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WHEN: Tuesday, February 22, 2011
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The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

RIN 3245–AG17

Small Business Jobs Act: 504 Loan Program Debt Refinancing

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule implements section 1122 of the Small Business Jobs Act of 2010 (Jobs Act), which authorizes projects approved for financing under Title V of the Small Business Investment Act to include the refinancing of qualified debt. This interim final rule revises the existing 504 Loan Program rules to make them consistent with section 1122 of the Jobs Act.

DATES: *Effective Date:* This rule is effective February 17, 2011.

Comment Date: Comments must be received on or before May 18, 2011.

ADDRESSES: You may submit comments, identified by RIN 3245–AG17, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Andrew B. McConnell Jr., Small Business Administration, Office of Financial Assistance, 409 Third Street, SW., 8th Floor, Washington, DC 20416.

Hand Delivery/Courier: Andrew B. McConnell Jr., Small Business Administration, Office of Financial Assistance, 409 Third Street, SW., 8th Floor, Washington, DC 20416.

SBA will post all comments on *http://www.regulations.gov.*

If you wish to submit confidential business information (CBI) as defined in the User Notice at *http://www.regulations.gov*, please submit the information to Andrew B. McConnell, Jr., 409 Third Street, SW., Washington, DC 20416, or send an e-mail to *jobsact504refi@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Andrew B. McConnell, Jr. at *Andrew.McConnell@sba.gov* or 202–205–7238.

SUPPLEMENTARY INFORMATION:

I. Background Information

The 504 Loan Program is a long-term financing tool for economic development that provides small businesses with long-term, fixed-rate financing to help acquire major fixed assets for expansion or modernization. A Certified Development Company (CDC) is typically a private, nonprofit corporation set up to contribute to the economic development of its community. CDCs work with SBA and private sector lenders to provide financing to small businesses under the 504 Loan Program. In general, a 504 project includes: A loan obtained from a private sector lender with a senior lien covering at least 50 percent of the project cost; a loan obtained from a CDC with a junior lien covering up to 40 percent of the total cost (backed by a 100 percent SBA-guaranteed debenture); and a contribution from the Borrower of at least 10 percent equity.

The Small Business Jobs Act of 2010 (Jobs Act), Public Law 111–240, 124 Stat. 2504, enacted on September 27, 2010, temporarily expands the ability of a small business to use the 504 Loan Program to refinance certain qualifying existing debt. The expanded authority is available for two years only. Prior to the Jobs Act, in a typical 504 project with a refinancing component, the borrower was required to use a significant portion of the loan proceeds for expansion of the business. *See* 13 CFR 120.882(e). The temporary Jobs Act program authorizes the use of the 504 Loan Program for the refinancing of debt where there is no expansion of the small business concern.

SBA is aware that there is a substantial amount of small business commercial first mortgage debt that was incurred 3–5 years ago that is maturing, typically through balloon mortgages, and in need of refinancing. In addition, credit availability for small businesses has decreased during the recent economic turmoil, and there may not be sufficient conventional lending capacity to handle this wave of refinancing. Further, real estate values have declined significantly in many parts of the country in recent years, which will make it more difficult for small businesses to refinance their maturing mortgages in the conventional market. By helping small businesses refinance current mortgages and lock in lower, long-term interest rates, this temporary Jobs Act program will help to provide the assistance needed by small businesses to avoid liquidation or foreclosure and improve their prospects for survival. It will also help to stabilize the commercial real estate market, as well as encourage lenders to increase lending by improving the health of their portfolios.

SBA has determined that this refinancing program will initially apply only to loans maturing on or before December 31, 2012 in order to assist those small businesses most in need with the limited resources available. SBA will publish a Notice in the **Federal Register** extending this date based on SBA's assessment of any change in available resources and market conditions. In addition, SBA will monitor the use of the program capacity of SBA and the CDC industry to handle the demand for this program and market conditions to determine whether SBA should also allow a debt to be refinanced if it is not maturing within the set timeframe but the refinancing would provide a "substantial benefit" to the Borrower. If SBA determines to allow such refinancing based on the "substantial benefit" criteria, SBA will announce such determination through a Notice published in the **Federal Register**, and will apply 13 CFR 120.882(e)(5) in implementing it.

The interim final rule also includes a provision requiring the Borrower to pay a supplemental annual guarantee fee, in addition to the existing annual guarantee fee, to cover the additional cost attributable to the refinancing program under the Jobs Act. SBA has determined that the total annual guarantee fee assessed for loans approved for refinancing during Fiscal Year 2011 will be 1.043% annually on

the unpaid principal balance of the debenture. If necessary, SBA will publish, at least sixty days before the beginning of the new Fiscal Year, a Notice in the **Federal Register** of any change in the fee for loans approved during Fiscal Year 2012. This fee will be assessed and collected in the same manner as the current annual SBA guarantee fee under 13 CFR 120.971(d)(2).

SBA has also determined that the loan structure for the Refinancing Project will be the same as in the 504 program generally, with the Third Party Lender contributing at least 50% of the fair market value of the fixed assets serving as collateral for the refinancing, the 504 loan contributing no more than 40% of such fair market value, and the Borrower contributing at least 10% of such fair market value. Consistent with current regulations, SBA will only require a 10% injection by the Borrower when the fixed asset serving as collateral is a limited or special purpose building because the higher contribution amounts (15% or 20% injection) apply only when these types of buildings are being acquired, constructed, expanded or converted. *See* 13 CFR 120.910(a)(2). In this case, the sole purpose of the loan is refinancing existing debt and, thus, no further contribution will be required of the Borrower.

SBA will permit the equity, if any, in the Eligible Fixed Asset securing the loan being refinanced to be counted toward the Borrower's 10% contribution, provided it is supported by the independent appraisal of the fair market value of that asset. In addition, if the fair market value of the Eligible Fixed Asset exceeds the existing debt but the Borrower does not have 10% equity in the asset, SBA will permit the equity in any other fixed assets that are acceptable to SBA to serve as collateral for the Refinancing Project and to be counted toward the Borrower's 10% contribution, provided that there is an independent appraisal of the fair market value of the additional asset(s). As discussed in the previous paragraph, the Third Party Loan and the 504 loan will not exceed 90% of the fair market value of all of the fixed assets serving as collateral for the Refinancing Project.

In the event that the outstanding principal balance on the existing loan is more than 90% of the current fair market value of the Eligible Fixed Assets securing the loan being refinanced, SBA will also permit the Borrower to contribute the equity in other fixed assets acceptable to SBA as collateral to increase the amount of the Refinancing Project, provided that there is an independent appraisal of the fair market value of the additional asset(s). Again, the Third Party Loan and the 504 loan will not exceed 90% of the fair market value of all of the fixed assets serving as collateral for the Refinancing Project.

In addition, the Jobs Act defines "qualified debt" to mean indebtedness "the proceeds of which were used to acquire an eligible fixed asset". SBA believes that it is consistent with this definition to allow a debt to be refinanced where substantially all of the proceeds of that debt were used to acquire an eligible fixed asset. By "substantially all", SBA means "almost all" or "nearly all" of the proceeds, and a Borrower will satisfy this standard where it used at least 85% of the proceeds of the existing debt to acquire an Eligible Fixed Asset. The remaining 15% of the proceeds must also have been incurred for the benefit of the small business. In implementing these requirements, SBA will require the Borrower to certify that the existing debt satisfies these requirements, and will require the Third Party Lender to certify that it has no reason to believe that the existing debt does not satisfy these requirements. In addition, SBA may require, on a random basis, for a borrower and/or lender to submit additional documentation supporting the substantially all assertion. SBA is also amending 13 CFR 120.882(e)(1) to incorporate this criteria, and to make the existing debt refinancing program involving expansions consistent with this new debt refinancing program.

The Jobs Act also authorizes the Agency to provide financing under this debt refinancing program "to be used solely for the payment of business expenses." The statute requires that the application for the financing of business expenses include a specific description of the expenses for which the additional financing is requested and an itemization of the amount of each expense. The statute expressly prohibits the borrower from using any part of the financing under this clause for non-business purposes. SBA will need time to implement this provision for the financing of business expenses. New controls will need to be developed to ensure that these funds are used in accordance with the statute, without requiring a burdensome level of detailed justification of expenditures. As the procedures for this portion of the legislation will be new to the CDCs and require the development of additional procedures for SBA staff, SBA is requesting input from interested parties regarding the level of detail that SBA should require to meet the statutory mandate that all proceeds be used for business purposes. The aim is a balance between excessive controls and ensuring that a business owner does not knowingly or unknowingly use the loan proceeds for personal purposes. With the immediate need for refinancing, the Agency is proceeding with this interim final rule to implement the refinancing component while continuing to consider the most efficient and effective manner in which to implement the business expense component of this new program. The Agency invites comments from interested parties on how best to and whether to implement this provision.

In addition, the Jobs Act includes a provision that states that "if the appraised value of the eligible fixed assets serving as collateral for the financing is less than the amount equal to 125 percent of the amount of the financing, the borrower may provide additional cash or other collateral to eliminate any deficiency". The Agency is continuing to review the scope of this provision and how it should be implemented, and invites comments from interested parties on this provision.

Further, SBA has determined that, with the limited resources available for this refinancing program, it will not at this time refinance Third Party Loans that are already part of an existing 504 Project. These Third Party Lenders have already benefitted from having access to subordinated debt provided by the Federal government, and also have other tools to assist borrowers that are experiencing financial difficulties, such as deferments in loan payments and workout plans. SBA will continue to consider the option of allowing the refinancing of existing Third Party Loans, and invites comments from interested parties on this issue.

This debt refinancing program is available for the refinancing of same institution debt which, similar to the definition for debt refinancing involving expansions in 13 CFR 120.882(e)(8), is defined as any debt of the CDC or the Third Party Lender that are providing funds for the refinancing, or the debt of affiliates of either. To protect the program from incurring unnecessary losses in the refinancing of same institution debt, and in accordance with 13 CFR 120.884(b), a CDC may not use 504 loan proceeds to pay any creditor in a position to sustain a loss causing a shift to SBA of all or part of a potential loss from an existing debt. SBA will require the CDC and the Third Party Lender to make certifications with respect to this standard for same institution debt. Whether there is a shift

to SBA of a potential loss should be determined by assessing the potential loss to SBA associated with the Refinancing Project (*e.g.,* the business is experiencing a significant threat to its viability or existence although the business is current on its outstanding debt). In addition, SBA will require a refinancing involving same institution debt to supply a full transcript of the loan payment history instead of only one year. The Jobs Act also provides that this refinancing program is not available to any loan that is subject to a guarantee by a Federal agency, which includes 7(a) loans. SBA also reminds lenders and CDCs that the refinancing of the existing debt must meet the "credit elsewhere" criteria currently applicable to the 504 Program. *See* 13 CFR 120.101. SBA will require the Third Party Lender to certify that it would not refinance the qualified debt without the assistance made available under this rule. In addition, to avoid a conflict of interest, or the appearance of a conflict of interest, in connection with the refinancing of debts owed to investment companies, SBA is amending 13 CFR 120.130(b) to prohibit the use of loan proceeds for the refinancing of a debt owed to a New Markets Venture Capital Company.

Finally, the authority provided by the Jobs Act is available for loan applications received by SBA on or after the effective date of this rulemaking and approved by SBA through September 27, 2012.

II. Section-by-Section Analysis

Section 120.130(b). To avoid conflicts of interest, or the appearance of conflicts of interest, in connection with the refinancing of debts owed to investment companies, SBA is amending this provision to prohibit the use of loan proceeds for the refinancing of a debt owed to a New Markets Venture Capital Company.

Section 120.882(e)(1). SBA is amending this provision to make the existing debt refinancing program involving expansions consistent with the new paragraph (g). As amended, this provision will allow debt refinancing involving expansions where substantially all (85% or more) of the proceeds of the indebtedness had been used to acquire Eligible Fixed Assets, and the remaining 15% of the proceeds had been incurred for the benefit of the small business concern.

Section 120.882(g). Under current regulations, SBA may only provide refinancing under the 504 Loan Program when the refinancing is provided in conjunction with an expansion by the small business. The Jobs Act temporarily authorizes refinancing without an expansion. SBA is adding a new paragraph (g) to § 120.882 to implement this new authority for refinancing existing eligible debt under the 504 loan program. This new paragraph sets forth the terms and conditions under which non-expansion refinancing will be permitted in the 504 program. For example, it:

(1) Provides that the financing provided by the Third Party Loan and the 504 loan may be no more than 90% of the fair market value of the fixed assets that will serve as collateral for the Refinancing Project, as established by an independent appraisal, but in no event may exceed the outstanding principal balance of the qualified debt;

(2) Provides that the Borrower pays an annual guarantee fee to cover the full cost attributable to the refinancing program. SBA has determined that the amount of this guarantee fee for loans approved during Fiscal Year 2011 is 1.043% annually on the unpaid principal balance of the debenture. If SBA determines that the fee must be changed to cover the costs for loans approved during Fiscal Year 2012, SBA will publish a Notice of the change in the **Federal Register**;

(3) Incorporates the definition of "qualified debt" set forth in the Jobs Act and includes several new defined terms, including "Refinancing Project";

(4) Incorporates the alternate job retention goal set forth in the Jobs Act for Borrowers that do not meet the job creation and retention goals under §§ 501(d) and (e) of the Small Business Investment Act. Under this alternate job retention goal, the Agency may provide a 504 loan in an amount that is not more than the product obtained by multiplying the number of employees of the borrower by $65,000. An example of how this alternate job retention goal is calculated is included in the rule;

(5) Provides that, in accordance with the Jobs Act, the authority to approve the refinancing is not delegated to the PCLP CDCs;

(6) Provides that refinancing will be initially available only for those loans that mature on or before December 31, 2012, unless SBA publishes a Notice in the **Federal Register** to extend the timeframe. In addition, depending on the program capacity of SBA and the CDC industry to handle the demand for this program and market conditions, SBA may in the future also permit a debt to be refinanced if it would provide a substantial benefit to the Borrower, as defined and in accordance with 13 CFR 120.882(e)(5). In such case, SBA will publish a Notice of this change in the **Federal Register**;

(7) Provides that the loan must be disbursed within 6 months after loan approval, unless the Director for Financial Assistance or his designee determines, upon request, that a longer disbursement period is appropriate for good cause. SBA expects disbursement extensions to be rare, and includes this time limitation on disbursements to ensure that funds not used in a timely manner may be made available to other small businesses during this limited two-year program;

(8) Provides that, consistent with 504 Loan Program requirements, the funding for the Refinancing Project must come from three sources based on the current fair market value of the fixed assets serving as collateral for the Refinancing Project, including not less than 50% from the Third Party Lender, not less than 10% from the Borrower, and not more than 40% from the 504 loan;

(9) Prohibits same institution debt refinanced under this program from being sold in the secondary market as part of a pool guaranteed under subpart J of part 120 of 13 CFR; and

(10) Identifies eligible project costs which may be paid with the proceeds of the refinancing.

Section 120.884. SBA amends § 120.884(a) to include this new authority as an additional exception to the general prohibition against using proceeds of the 504 loan for debt refinancing.

III. Justification for Publication as Interim Final Rule

In general, before issuing a final rule, SBA publishes the rule for public comment in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 553. The APA provides an exception to this standard rulemaking process where the agency finds good cause to adopt a rule without prior public participation. 5 U.S.C. 553(c)(3)(B). The good cause requirement is satisfied when prior public participation can be shown to be impracticable, unnecessary, or contrary to the public interest. Under such circumstances, an agency may publish an interim final rule without soliciting public comment.

In enacting the good cause exception to standard rulemaking procedures, Congress recognized that emergency situations arise where an agency must issue a rule without public participation. The current turmoil in the financial markets is having a negative impact on the availability of financing for small businesses. SBA finds that good cause exists to publish this rule as an interim final rule in light of the urgent need to help small businesses

sustain and survive during this economic downturn and the short-term nature of this new authority. This new refinancing authority will offer a significant opportunity for businesses, allowing them to restructure existing debt into new 504 financings that will help secure the financial stability of their businesses which will, in turn, help them to survive and save jobs. It also has the potential to quickly free up critical capital for small business owners across the country, allowing them to continue to operate and potentially expand and add jobs. This new authority is only available until September 27, 2012 and would have less impact if delayed until notice and comment rulemaking could be completed. Advance solicitation of comments for this rulemaking would be contrary to the public interest because it would harm those small businesses that need immediate access to capital. However, SBA did hold a public forum in Boston, Massachusetts on November 17, 2010, in which more than 120 persons participated in person or by phone offering their suggestions on how the Agency should implement section 1122 of the Jobs Act.

Although this rule is being published as an interim final rule, comments are solicited from interested members of the public. These comments must be submitted on or before the deadline for comments stated in this rule. The SBA will consider these comments and the need for making any amendments as a result of these comments.

IV. Justification for Immediate Effective Date

The APA requires that "publication or service of a substantive rule shall be made not less than 30 days before its effective date, except * * * as otherwise provided by the agency for good cause found and published with the rule." 5 U.S.C. 553(d)(3). The purpose of this provision is to provide interested and affected members of the public sufficient time to adjust their behavior before the rule takes effect. As this rule is implementing new authority that expands the 504 Program's current authority to refinance debt and does not restrict current behavior, there is no need for the public to adjust its behavior before the rule takes effect. Furthermore, any delay in the effective date would deny small businesses immediate access to credit, and an immediate effective date will maximize the rule's value to small businesses and its effect on the economy. SBA therefore finds that there is good cause for making this rule effective immediately instead of observing the 30-day period between publication and effective date.

Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612).

Executive Order 12866

The Office of Management and Budget has determined that this rule constitutes a "significant regulatory action" under Executive Order 12866 thus requiring Regulatory Impact Analysis as set forth below.

A. Regulatory Objective of the Interim Final Rule

The objective of the debt refinance program authorized by the Jobs Act interim final rule is to expand the 504 loan program to include a refinancing component that does not involve small business expansion. This is a two-year program that is authorized through September 27, 2012. The interim final rule will promote better understanding of Agency requirements by CDCs, lenders, and small business borrowers.

B. Baseline Costs

As this is an addition to the existing 504 program, there is no historical cost data for this new program component for comparison or projections. Similar costs may be assumed based on the historical costs for the 504 loan program, as the application for the Jobs Act 504 refinance program is expected to be almost identical to the existing application and eligibility checklist for the existing 504 loan program. The costs to CDCs will vary between ASM (Abridged Submission Method) CDCs and non-ASM (non Abridged Submission method) CDCs, as loan packages from ASM CDCs have an abridged list of required documents to submit. Based on historical ASM and non-ASM submissions, SBA anticipates that 68% of 504 debt refinance loan volume will be ASM loan packages and 32% will be non-ASM loan packages.

SBA anticipates that 21,300 refinance loans will be processed, of which 14,484, or 68%, are estimated to be submitted by ASM CDCs and 6,816, or 32%, are estimated to be submitted by non-ASM CDCs.

Based on the length of time SBA takes to review and process 504 applications, SBA is estimated to take an average of 8.4 hours to review and respond to ASM applications and 8.7 hours to review and respond to non-ASM applications.

C. Potential Benefits and Costs of the Interim Final Rule

(a) Potential Benefits and Costs to Lenders

The interim final rule would improve access to capital for businesses with the need to refinance but that will not be expanding their business. The cost differential between an application for the regular 504 program and the Jobs Act 504 debt refinance program application and checklist are negligible.

The ability to refinance debt will improve the small businesses cash flow, improve their financial ability to operate, improve the long-term viability of the small business, and facilitate job retention. Another potential benefit is the reduction in the number of loan servicing actions due to deferments or catch-up plans and reducing the likelihood that the business might be overcome by its indebtedness burden which could result in liquidation. Fewer servicing actions would potentially reduce the cost to CDCs and reduce the number of delinquent, deferments, default and liquidation cases. These changes would reduce the costs of loan servicing and liquidation processes for lenders as well.

SBA does not know of any specific additional costs that would be imposed on CDCs or lenders as a result of this interim final rule. SBA is requesting comments from the public on any monetized, quantitative or qualitative costs of CDC and Lender compliance with this rule. Please send comments to the SBA official referenced in the Addresses section of the preamble.

(b) Potential Benefits and Costs to CDCs and Borrowers

As provided by the Jobs Act, the interim final rule contains a provision that temporarily expands the ability of a small business to use the Section 504 Certified Development Company Loan program to refinance certain qualifying existing debt. To implement this new program, CDCs will package 504 debt refinance loan applications and service these loans for small business borrowers. For Borrowers, the cost benefit of lower interest rates and improved financial terms would significantly outweigh the costs of preparing the Jobs Act 504 debt refinance application and checklist in order to apply for the assistance provided by the program.

CDCs would benefit from increased loan volume due to the Jobs Act 504 debt refinance project. This new program will meet a new market demand for 504 debt refinancing for projects that do not involve expansion.

This will increase CDC income from packaging, processing, servicing and closing income as a result of the program, which would far outweigh any burdens associated with the preparation and submission to SBA of 504 debt refinance loan applications. As CDCs are delivering the 504 program, the increased cost to provide the SBA 504 debt refinance program will be negligible when compared to the substantial increase in CDC revenue.

SBA expects that CDCs and Borrowers would incur some additional costs as a result of this interim final rule. Due to the increased risk of 504 debt refinance applications as compared to the current 504 program, and in accordance with the Jobs Act, a supplemental subsidy fee of 29.4 basis points, or .294%, will be imposed on Borrowers to cover the additional cost attributable to the refinancing of qualified debt.

The costs to CDCs will vary between ASM (Abridged Submission Method) CDCs and non-ASM (non Abridged Submission method) CDCs, as loan packages from ASM CDCs have an abridged list of required documents to submit. Based on historical ASM and non-ASM submissions, SBA anticipates that 68% of 504 debt refinance loan volume will be ASM loan packages and 32% will be non-ASM loan packages.

SBA anticipates that CDCs would likely submit to the Agency for approval an estimated 21,300 504 debt refinance applications over the two-year period of the program. This is a significant increase of the SBA program current 8,500 annual 504 loan application volume.

For ASM CDCs, SBA estimates that the average time for completion of each application would consist of 8.4 hours at an average cost of $45 per hour. Therefore, the annual costs of submitting 504 debt refinance applications under the interim final rule would be 14,484 loan applications × 8.4 hours for an estimated cost of $45/hour for a two-year total of $5,474,952.

For Non-ASM CDCs, SBA estimates that the average time for completion of each application would consist of 8.7 hours at an average cost of $35 per hour. Therefore, the annual costs of submitting 504 debt refinance applications under the interim final rule would be 6,816 loan applications × 8.7 hours for an estimated cost of $45/hour for a two-year for non-ASM debt refinance applications of $2,668,464. The total estimated annual costs for ASM and non-ASM applications combined would be $8,143,416 for the two-year period of the Jobs Act.

For the CDCs, there are duplication and shipping costs associated with loan submission. Based on historical cost information for the 504 program, the copying and shipping costs using ASM ranges from $15–$50 per loan package and for non-ASM $25–$60 per loan package. This variance in costs depends on the complexity of the loan application and whether the application is submitted through the ASM or non-ASM Method.

SBA is requesting comments from the public on any monetized, quantitative or qualitative costs of CDCs compliance with this rule. Please send comments to the SBA official referenced in the **ADDRESSES** section of the preamble.

(c) Potential Benefits and Costs for SBA and the Federal Government

The interim final rule would benefit SBA because it would enable the Agency to increase access to capital to small business borrowers to refinance debt without expansion during the temporary period of this debt refinancing program. This would result in the submission of an estimated 21,300 504 debt refinance applications.

In order to carry out this new program, SBA will hire 50 additional staff for the Sacramento Loan Processing Center at an average cost of $92,000 per staff member per year, or an annual estimated salary total of $4,600,000 or a 2 year total of $9,200,000.

As indicated above, SBA anticipates that 21,300 refinance loans will be processed, of which 14,484, or 68%, are estimated to be submitted by ASM CDCs and 6,816, or 32%, are estimated to be submitted by non-ASM CDCs.

Based on the length of time SBA takes to review and process 504 applications, SBA is estimated to take an average of 8.4 hours to review and respond to ASM applications and 8.7 hours to review and respond to non-ASM applications. For ASM applications, this equates to 8.4 hours at $45 hour × 14,484 applications for an estimated cost of $5,474,952 for ASM refinance loan application for the two-year program period. For non-ASM applications, this equates to 8.7 hours at $45 hour for an estimated cost × 6,816 for a total annual estimated cost of $2,668,464 for non-ASM refinance loan application. SBA estimates the combined cost of reviewing ASM and non-ASM applications to be $8,143,416 for the two year period of the Jobs Act.

Furthermore, the Agency must hire two full-time staff for lender oversight at an average cost of $135,000 per year or a total of $540,000 for the two-year period of the Jobs Act. In addition, contract dollars of $105,000 per year, or $210,000 for the two-year period of the Jobs Act, will be utilized to assist with analysis and oversight. The total estimate cost of oversight of the 504 debt refinance program for the two-year period of the Jobs Act is estimated at $750,000.

D. Alternatives to Interim Final Rule

This interim final rule is SBA's best available means for achieving its regulatory objective of implementing the Jobs Act debt refinance program authorized by Public Law 111–240, 124 Stat. 2504, enacted on September 27, 2010. SBA is requesting comments from the public on any potentially effective and reasonably feasible alternative to this rule as it applies to CDCs and Lenders and the costs and benefits of those alternatives. Please send comments to the SBA official in the **ADDRESSES** section of the preamble.

SBA has not identified any reasonable alternative to this interim final rule to implement this new debt refinancing authority.

Executive Order 12988

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have preemptive effect or retroactive effect.

Executive Order 13132

This rule does not have federalism implications as defined in Executive Order 13132. 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 the Executive Order. As such it does not warrant the preparation of a Federalism Assessment.

Executive Order 13563

To the extent practicable given the need to make this temporary, 2-year refinance program operational expeditiously in order to assist as many small businesses as possible, this rule was developed in keeping with the intent of this Executive Order. SBA solicited suggestions and comments on how best to implement the Jobs Act from the affected stakeholders and the public as a whole. SBA provided notice of a public forum in the **Federal Register**, which was held in Boston, Massachusetts on November 17, 2010. More than 100 persons attended in person or by phone and 23 individuals provided testimony. In addition, SBA announced a Web site and solicited comments for a 30 day period. The final

structure of the program was significantly shaped by those comments, especially the decision to keep the same basic 504 financing structure for same institution debt refinancing as for a new institution refinancing another lender's debt.

By adhering as closely as possible to the procedures and conditions of SBA's existing permanent 504 refinancing program, any burden that this rule may have imposed on the affected stakeholders is lessened. In addition, SBA adopted a new procedure with this rule that specifically addresses concerns that were raised in public comments regarding the burden that has been imposed in the permanent 504 refinancing program by requiring lenders and borrowers to document that all of the proceeds of the debt being refinanced was used for eligible collateral. As indicated by the stakeholders, this requirement is especially difficult if a property has been refinanced more than once or if the initial lender had been acquired by another lender. In practice, the process was costly and time consuming for the borrower, lender and SBA personnel and, upon review, it rarely led to significant amounts being excluded from the refinancing. In this rule, SBA has adopted a more practical, less costly approach that relies on borrower and lender certifications, subject to random sampling to verify the amounts being refinanced. In addition, the rule allows the refinancing if substantially all of the proceeds of the debt being refinanced was used for eligible collateral. This rule will make that change to the permanent refinance program as well as this temporary one.

Paperwork Reduction Act

The SBA has determined that this rule imposes no additional reporting and recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

Regulatory Flexibility Act

Because this rule is an interim final rule, there is no requirement for SBA to prepare a Regulatory Flexibility Act (RFA) analysis. The RFA requires administrative agencies to consider the effect of their actions on small entities, including small non-profit businesses, and small local governments. Pursuant to the RFA, when an agency issues a rule, the agency must prepare an analysis that describes whether the impact of the rule will have a significant economic impact on a substantial number of these small entities. However, the RFA requires such analysis only where notice and comment rulemaking is required. As discussed above, SBA has determined that there is good cause to publish this rule without soliciting public comment. This rule is, therefore, exempt from the RFA requirements.

List of Subjects in 13 CFR Part 120

Loan programs—business, Small businesses.

For the reasons stated in the preamble, SBA amends 13 CFR part 120 as follows:

PART 120—BUSINESS LOANS

■ 1. The authority for 13 CFR part 120 is revised to read as follows:

Authority: 15 U.S.C. 634(b)(6), (b)(7), (b)(14), (h), and note, 636(a), (h) and (m), 650, 687(f), 696(3), and 697(a) and (e); Public Law 111–5, 123 Stat. 115, Public Law 111–240, 124 Stat. 2504.

■ 2. Amend § 120.130 by revising paragraph (b) to read as follows:

§ 120.130 Restrictions on uses of proceeds.

* * * * *

(b) Refinancing a debt owed to a Small Business Investment Company ("SBIC") or a New Markets Venture Capital Company ("NMVCC");

* * * * *

■ 3. Amend § 120.882 by revising paragraph (e)(1) and adding new paragraph (g) to read as follows:

§ 120.882 Eligible Project costs for 504 loans.

* * * * *

(e) * * *

(1) Substantially all (85% or more) of the proceeds of the indebtedness were used to acquire land, including a building situated thereon, to construct a building thereon, or to purchase equipment. The assets acquired must be eligible for financing under the 504 loan program;

* * * * *

(g) For applications received on or after February 17, 2011 and approved by SBA no later than September 27, 2012, SBA may approve a Refinancing Project of a qualified debt subject to the following conditions and requirements:

(1) The Refinancing Project does not involve the expansion of a small business;

(2) The applicant for the refinancing available under this paragraph (g) has been in operation for all of the 2 year period ending on the date of application;

(3) The qualified debt will mature on or before December 31, 2012, unless such date is extended by SBA, based on its assessment of available resources and market conditions, in a Notice published in the **Federal Register**. Based on available resources and market conditions, SBA may allow other debt to be refinanced if the refinancing would provide a substantial benefit to the Borrower in accordance with § 120.882(e)(5). If SBA determines to allow such refinancing based on the substantial benefit criteria, SBA will publish a Notice in the **Federal Register** of this determination;

(4) In addition to the annual guarantee fee assessed under § 120.971(d)(2), Borrower must pay SBA a supplemental annual guarantee fee to cover the additional cost attributable to the refinancing. For loans approved during Fiscal Year 2011, this supplemental annual guarantee fee will be 0.294%. For loans approved during Fiscal Year 2011, the annual guarantee fee assessed under § 120.971(d)(2) and the supplemental annual guarantee fee will total 1.043% on the unpaid principal balance of the debenture. If the total amount of the guarantee fee changes for loans approved during Fiscal Year 2012, SBA will publish a Notice of the change in the **Federal Register**;

(5) The funding for the Refinancing Project must come from three sources based on the current fair market value of the fixed assets serving as collateral for the Refinancing Project, including not less than 50% from the Third Party Lender, not less than 10% from the Borrower (excluding administrative costs), and not more than 40% from the 504 loan. In addition to a cash contribution, the Borrower's 10% contribution may be satisfied as set forth in § 120.910 or by the equity in any other fixed assets that are acceptable to SBA as collateral for the Refinancing Project, provided that there is an independent appraisal of the fair market value of the asset;

(6) The portion of the Refinancing Project provided by the 504 loan and the Third Party Loan may be no more than 90% of the fair market value of the fixed assets that will serve as collateral, but in no event may it exceed the outstanding principal balance of the qualified debt;

(7) If the qualified debt is not fully satisfied by the funding provided by the Refinancing Project, the lender of the qualified debt must take one of the following actions, or some combination thereof, to address the deficiency:

(i) Forgiveness of all or part of the deficiency;

(ii) Acceptance of payment by the Borrower, or

(iii) Acceptance of a Note executed by the Borrower for the balance, or any portion of the balance. Such Note must

be subordinate to the 504 loan if the Note and the 504 loan are secured by any of the same collateral. The Note is subject to any other restrictions that SBA may establish to protect its creditor position, including standby requirements;

(8) The Third Party Lender must have a first lien position, and the 504 loan must have a second lien position, on all Eligible Fixed Assets securing the Refinancing Project. Any other lien must be junior in priority to these lien positions. For other fixed assets serving as collateral for the Refinancing Project, the lien positions of the Third Party Lender and the 504 loan may be junior to any existing liens acceptable to SBA;

(9) Eligible Project costs which may be paid with the proceeds of the 504 loan are the amount used to refinance the qualified debt and other costs under § 120.882(c) and (d) and eligible administrative costs under § 120.883;

(10) Notwithstanding § 120.860, a debt may be refinanced under this paragraph (g) if it does not meet the job creation or other economic development objectives set forth in § 120.861 or § 120.862. In such case, the 504 loan may not exceed the product obtained by multiplying the number of employees of the Borrower by $65,000. The number of employees of the Borrower is equal to the sum of:

(i) The number of full-time employees of Borrower on the date of application, and

(ii) The product obtained by multiplying:

(A) The number of part-time employees of the Borrower on the date of application; by

(B) The quotient obtained by dividing the average number of hours each part time employee of the Borrower works each week by 40.

Example: 30 full-time employees and 35 part-time employees working 20 hours per week is calculated as follows: 30 + (35 × (20/40)) = 47.5. The maximum amount of the 504 loan would be 47.5 multiplied by $65,000, or $3,087,500.

(11) The authority to approve the refinancing under this paragraph (g) is not delegated to PCLP CDCs;

(12) The 504 loans approved under this paragraph (g) must be disbursed within 6 months after loan approval. The Director, Office of Financial Assistance, or his or her designee may approve any request for extension of the disbursement period for good cause;

(13) The Third Party Loan may not be sold on the secondary market as a part of a pool guaranteed under subpart J of this part 120 when the debt being refinanced is same institution debt;

(14) The Third Party Lender must certify that it would not refinance the qualified debt except for the assistance provided under this paragraph (g);

(15) *Definitions.* For the purposes of this paragraph (g), the terms below are defined as follows:

Date of application refers to the date the 504 loan application is received by SBA.

Eligible Fixed Assets are one or more long-term fixed assets, such as land, buildings, machinery, and equipment, acquired, constructed or improved by a small business for use in its business operations.

Fair market value refers to the current appraised value of an asset that is established by an independent appraiser in accordance with the standards established by SBA in its SOPs.

Qualified debt is a commercial loan:

(i) That was incurred not less than 2 years before the date of the application for the refinancing available under this paragraph (g);

(ii) That is not subject to a guarantee by a Federal agency or department;

(iii) Substantially all (85% or more) of which was for the acquisition of Eligible Fixed Assets;

(iv) That was for the benefit of the small business concern;

(v) That is collateralized by Eligible Fixed Assets;

(vi) That is not a Third Party Loan that is part of an existing 504 Project; and

(vii) For which the applicant for the refinancing available under this paragraph (g) has been current on all payments due for not less than 1 year preceding the date of application. For the purposes of this subparagraph (vi), "current on all payments due" means that no payment scheduled to be made during the one year period was either deferred or more than 30 days past due. Any delinquency in payment of the loan to be refinanced after approval and before debenture funding must be reported to SBA as an adverse change.

Refinancing Project means the fair market value of the Eligible Fixed Asset(s) securing the qualified debt and any other fixed assets acceptable to SBA.

Same institution debt means any debt of the Third Party Lender that is providing funds for the refinancing, or of its affiliates.

■ 4. Amend § 120.884 by revising paragraph (a) to read as follows:

§ 120.884 Ineligible costs for 504 loans.

* * * * *

(a) Debt refinancing (other than interim financing), except as provided in § 120.882(e) and (g).

* * * * *

Dated: February 10, 2011.

Karen G. Mills,

Administrator.

[FR Doc. 2011–3470 Filed 2–16–11; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–1032; Airspace Docket No. 10–AGL–20]

Amendment of Class E Airspace; Muncie, IN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace at Muncie, IN, to accommodate new Area Navigation (RNAV) Standard Instrument Approach Procedures (SIAP) at Ball Memorial Hospital Heliport, Muncie, IN. The FAA is taking this action to enhance the safety and management of Instrument Flight Rule (IFR) operations at the heliport.

DATES: Effective date: 0901 UTC, May 5, 2011. 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 November 8, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace for Muncie, IN, creating controlled airspace at Ball Memorial Hospital Heliport (75 FR 68552) Docket No. FAA–2010–1032. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Subsequent to publication, an error was found in the regulatory text noting the wrong airport name. This rule will make the correction.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9U dated August 18, 2010, and effective September 15, 2010, 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 creating Class E airspace extending upward from 700 feet above the surface to accommodate the new COPTER RNAV (POINT–IN–SPACE) standard instrument approach procedures at Ball Memorial Hospital Heliport, Muncie, IN. This action is necessary for the safety and management of IFR operations at the heliport. This action also corrects the airport name listed in the regulatory text for Muncie, IN, from "Purdue University Airport" to "Delaware County Regional Airport". With the exception of editorial changes and the changes described above, this action is the same as that proposed in the NPRM.

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 creates controlled airspace at Ball Memorial Hospital Heliport, Muncie, IN.

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 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010, is amended as follows:

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

* * * * *

AGL IN E5 Muncie, IN [Amended]

Muncie, Delaware County Regional Airport, IN
(Lat. 40°14′33″ N., long. 85°23′45″ W.)
Muncie, Ball Memorial Hospital Heliport, IN Point In Space
(Lat. 40°11′50″ N., long. 85°25′52″ W.)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Delaware County Regional Airport, and within a 6-mile radius of the Ball Memorial Hospital Heliport point in space coordinates at lat. 40°11′50″ N., long. 85°25′52″ W.

Issued in Fort Worth, Texas, on February 8, 2011.

Richard J. Kervin, Jr.

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

[FR Doc. 2011–3549 Filed 2–16–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–1031; Airspace Docket No. 10–AGL–19]

Establishment of Class E Airspace; Martinsville, IN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace at Martinsville, IN, to accommodate new Area Navigation (RNAV) Standard Instrument Approach Procedures (SIAP) at Morgan Hospital Heliport, Martinsville, IN. The FAA is taking this action to enhance the safety and management of Instrument Flight Rule (IFR) operations at the heliport.

DATES: *Effective date:* 0901 UTC, May 5, 2011. 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 November 8, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to establish Class E airspace for Martinsville, IN, creating additional controlled airspace at Morgan Hospital Heliport (75 FR 68557) Docket No. FAA–2010–1031. 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 7400.9U dated August 18, 2010, and effective September 15, 2010, 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 the new COPTER RNAV (POINT-IN-SPACE) standard instrument approach procedures at Morgan Hospital Heliport, Martinsville, IN. This action is necessary for the safety and management of IFR operations at the heliport.

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 Morgan Hospital Heliport, Martinsville, IN.

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 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010, is amended as follows:

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

* * * * *

AGL IN E5 Martinsville, IN [New]

Martinsville, Morgan Hospital Heliport, IN
Point in Space
(Lat. 39°25′00″ N., long. 86°24′49″ W.)

That airspace extending upward from 700 feet above the surface within a 6-mile radius of the Morgan Hospital Heliport point in space at lat. 39°25′00″ N., long. 86°24′49″ W.

Issued in Fort Worth, Texas, on February 8, 2011.

Richard J. Kervin, Jr.,

Acting Manager Operations Support Group, ATO Central Service Center.

[FR Doc. 2011–3550 Filed 2–16–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2011–0039]

RIN 1625–AA08

Special Local Regulations; Patriot Challenge Kayak Race, Ashley River, Charleston, SC

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing special local regulations for the Patriot Challenge Kayak Race in Charleston, SC. The race will take place on April 10, 2011 on the Ashley River. These special local regulations are necessary to insure the safety of life on navigable waters during the race. These special local regulations will temporarily restrict vessel traffic in a portion of the Ashley River, preventing non-participant vessels from entering the regulated areas.

DATES: This rule is effective from 1 p.m. until 3 p.m. on April 10, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0039 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0039 in the "Keyword" box, and then clicking "Search." They are 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 Lieutenant Julie E. Blanchfield, Sector Charleston Waterways Management Division, Coast Guard; telephone 843–740–3184, e-mail *Julie.E.Blanchfield@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

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the Coast Guard did not receive notice of the Patriot Challenge Kayak Race with sufficient time to publish an NPRM in advance of the effective date of this rule. Any delay in the effective date of this rule would be contrary to the public interest because immediate action is needed to minimize potential danger to the race participants as well as the general public.

Background and Purpose

On April 10, 2011, the Patriot Challenge Kayak Race is scheduled to take place on the Ashley River in Charleston, SC. The race will consist of approximately 100 vessels, including race kayaks. The race will commence at Brittlebank Park, transit the Ashley River, head north between Shutes Folly Island and the Charleston peninsula, and then turn around in Tidewater Reach. The race will then return to Brittlebank Park by the same route. These special local regulations are necessary to protect race participants, spectators, and other persons and vessels from the hazards associated with the race.

Discussion of Rule

The special local regulations consist of a series of buffer zones around race participant vessels. These buffer zones are as follows: (1) All waters within 75 yards in front of the lead safety vessel; (2) all waters within 75 yards behind the last safety vessel; and (3) all waters within 100 yards on either side of each participating vessel, including race kayaks. Information regarding the identity of the lead safety vessel and the last safety vessel will be provided prior to the race via broadcast notice to mariners and marine safety information bulletins. Persons and vessels are prohibited from entering, transiting

through, anchoring, or remaining within the buffer zones unless specifically authorized by the Captain of the Port Charleston or a designated representative. These special local regulations will be effective from 1 p.m. until 3 p.m. on April 10, 2011.

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.

We expect the economic impact of this rule to be so minimal that a full regulatory evaluation is unnecessary. This rule may have some impact on the public, but these potential impacts will be minimal for the following reasons: (1) The rule will be in effect for only two hours; (2) although persons and vessels will not be able to enter, transit through, anchor in, or remain within the buffer zones without authorization from the Captain of the Port Charleston or a designated representative, they may operate in the surrounding area during the effective period; (3) persons and vessels may still enter, transit through, anchor in, or remain within the buffer zones if authorized by the Captain of the Port Charleston or a designated representative; and (4) advance notification will be made to the local maritime community via broadcast notice to mariners.

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 may affect the following entities, some of which may be small entities: the owners or operators of vessels intending to enter, transit through, anchor in, or remain within that portion of the Ashley River encompassed within the buffer zones from 1 p.m. until 3 p.m. on April 10, 2011. For the reasons discussed in the Regulatory Planning and Review section above, this rule will not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process. Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of $100,000,000 or more (adjusted for inflation) 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 which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction. This rule involves special local regulations issued in conjunction with a regatta or marine parade. Under figure 2–1, paragraph (34)(h), 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 100

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. Add § 100.T07–0039 to read as follows:

§ 100.T07–0039 Special Local Regulations; Patriot Challenge Kayak Race, Ashley River, Charleston, SC.

(a) *Regulated Areas.* The following buffer zones are regulated areas during the Patriot Challenge Kayak Race: all waters within 75 yards in front of the lead safety vessel; all waters within 75 yards behind the last safety vessel; and all waters within 100 yards on either side of each participating vessel, including race kayaks. Information regarding the identity of the lead safety vessel and the last safety vessel will be provided prior to the race via broadcast notice to mariners and marine safety information bulletins. The race will commence at Brittlebank Park, transit the Ashley River, head north between Shutes Folly Island and the Charleston peninsula, and then turn around in Tidewater Reach. The race will then return to Brittlebank Park by the same route.

(b) *Definition.* The term "designated representative" means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, State, and local officers designated by or assisting the Captain of the Port Charleston in the enforcement of the regulated areas.

(c) *Regulations.*

(1) All persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the regulated areas unless otherwise authorized by the Captain of the Port Charleston or a designated representative.

(2) Persons and vessels desiring to enter, transit through, anchor in, or remain within the regulated areas may contact the Captain of the Port Charleston by telephone at 843–740–7050, or a designated representative via VHF radio on channel 16 to seek authorization. If authorization to enter, transit through, anchor in, or remain within the regulated areas is granted by the Captain of the Port Charleston or a designated representative, all persons and vessels receiving such permission must comply with the instructions of the Captain of the Port Charleston or a designated representative.

(3) The Coast Guard will provide notice of the regulated areas through advanced notice via broadcast notice to mariners and by on-scene designated representatives.

(d) *Effective Date.* The rule is effective from 1 p.m. until 3 p.m. on April 10, 2011.

Dated: February 8, 2011.

Michael F. White, Jr.,

Captain, U.S. Coast Guard, Captain of the Port Charleston.

[FR Doc. 2011–3573 Filed 2–16–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket Number USCG–2011–0026]

Drawbridge Operation Regulation; Upper Mississippi River, Rock Island, IL

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eighth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Rock Island Railroad and Highway Drawbridge across the Upper Mississippi River, mile 482.9, at Rock Island, Illinois. The deviation is necessary to allow the Quad City Marathon to cross the bridge. This deviation allows the bridge to be maintained in the closed-to-navigation position for four hours.

DATES: This deviation is effective from 7:30 a.m. to 11:30 a.m. on September 25, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0026 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0026 in the "Keyword" box and then clicking "Search". They are 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 Eric A. Washburn, Bridge Administrator, Western Rivers, Coast Guard; telephone (314) 269–2378, e-mail *Eric.Washburn@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION: The U.S. Army Rock Island Arsenal requested a temporary deviation for the Rock Island Railroad and Highway Drawbridge, across the Upper Mississippi River, mile 482.9, at Rock Island, Illinois to remain in the closed-to-navigation position for a four hour period from 7:30 a.m. to 11:30 a.m., September 25, 2011, while a marathon is held between the cities of Davenport, IA and Rock Island, IL. The

Rock Island Railroad and Highway Drawbridge currently operates in accordance with 33 CFR 117.5, which states the general requirement that drawbridges shall open promptly and fully for the passage of vessels when a request to open is given in accordance with the subpart.

There are no alternate routes for vessels transiting this section of the Upper Mississippi River.

The Rock Island Railroad and Highway Drawbridge, in the closed-to-navigation position, provides a vertical clearance of 23.8 feet above normal pool. Navigation on the waterway consists primarily of commercial tows and recreational watercraft. This temporary deviation has been coordinated with waterway users. No objections were received.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: February 3, 2011.

Eric A. Washburn,

Bridge Administrator.

[FR Doc. 2011–3567 Filed 2–16–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket Number USCG–2011–0025]

Drawbridge Operation Regulation; Upper Mississippi River, Rock Island, IL

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Eighth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Rock Island Railroad and Highway Drawbridge across the Upper Mississippi River, mile 482.9, at Rock Island, Illinois. The deviation is necessary to allow the Quad Cities Heart Walk to cross the bridge. This deviation allows the bridge to be maintained in the closed-to-navigation position for two hours.

DATES: This deviation is effective from 9 a.m. to 11 a.m. on May 21, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0025 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0025 in the "Keyword" box and then clicking "Search". They are 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 Eric A. Washburn, Bridge Administrator, Western Rivers, Coast Guard; telephone (314) 269–2378, e-mail *Eric.Washburn@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION: The U.S. Army Rock Island Arsenal requested a temporary deviation for the Rock Island Railroad and Highway Drawbridge, across the Upper Mississippi River, mile 482.9, at Rock Island, Illinois to remain in the closed-to-navigation position for a two hour period from 9 a.m. to 11 a.m., May 21, 2011, while a walk is held between the cities of Davenport, IA and Rock Island, IL. The Rock Island Railroad and Highway Drawbridge currently operates in accordance with 33 CFR 117.5, which states the general requirement that drawbridges shall open promptly and fully for the passage of vessels when a request to open is given in accordance with the subpart.

There are no alternate routes for vessels transiting this section of the Upper Mississippi River.

The Rock Island Railroad and Highway Drawbridge, in the closed-to-navigation position, provides a vertical clearance of 23.8 feet above normal pool. Navigation on the waterway consists primarily of commercial tows and recreational watercraft. This temporary deviation has been coordinated with waterway users. No objections were received.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: February 3, 2011.

Eric A. Washburn,

Bridge Administrator.

[FR Doc. 2011–3569 Filed 2–16–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–0041]

Drawbridge Operation Regulations; Hackensack River, Jersey City, NJ

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Lower Hack Bridge across the Hackensack River, mile 3.4, at Jersey City, New Jersey. The deviation is necessary to repair structural steel members on the lift span. This deviation allows the bridge to remain in the closed position to facilitate the above repairs.

DATES: This deviation is effective from 7 a.m. on February 19, 2011 through 8 p.m. on February 26, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2011–0041 and are available online at *http://www.regulations.gov,* inserting USCG–2011–0041 in the "Keyword" and then clicking "Search". They are 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 Mr. Joe Arca, Project Officer, First Coast Guard District, *joe.m.arca@uscg.mil,* telephone (212) 668–7165. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Lower Hack Bridge, across the Hackensack River at mile 3.4, has a vertical clearance in the closed position of 40 feet at mean high water and 45 feet at mean low water. The existing drawbridge operation regulations are listed at 33 CFR 117.723(b).

The waterway has commercial vessels of various sizes.

The owner of the bridge, New Jersey Transit, requested a temporary deviation to facilitate necessary structural steel repairs at the bridge.

Under this temporary deviation the Lower Hack Bridge, across the Hackensack River at mile 3.4, may remain in the closed position from 7 a.m. through 8 p.m. on February 19, 2011, with a rain date of February 26, 2011. Vessels that can pass under the bridge without a bridge opening may do so at all times.

In accordance with 33 CFR 117.35(e), the bridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: February 4, 2011.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2011–3571 Filed 2–16–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2010–1103]

RIN 1625–AA09

Drawbridge Operation Regulation; Curtis Creek, Baltimore, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is temporarily changing the drawbridge operation regulations of the Pennington Avenue Bridge, across Curtis Creek, mile 0.9, at Baltimore, MD. This temporary change allows the bridge to operate on a restricted schedule to complete structural repairs and replacement of the grid deck, floor beams and stringers.

DATES: This temporary final rule is effective from 6 a.m. on February 17, 2011 to 11:59 p.m. on November 30, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket, are part of docket USCG–2010–1103 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–1103 in the "Keyword" box, and 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 Bill H. Brazier, Bridge Management Specialist, Fifth Coast Guard District; telephone 757–398–6422, e-mail *Bill.H.Brazier@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

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because after the current repair project began extensive additional repairs and replacements were identified. This additional work will require additional time to complete. The corresponding request to revise the operating schedule for this temporary final rule also required extensive coordination with the known affected marine facilities (*i.e.,* the Coast Guard Yard and the U S. Army Reserve Unit), the City of Baltimore, MD, and the contractor so that necessary repairs can continue to the Pennington Avenue Bridge. The timing of the discovery of the additional repairs and replacements combined with the length of time to coordinate with the affected parties makes it impractical to publish an NPRM and still continue the work as scheduled. Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective in less than 30 days after publication in the **Federal Register** for the same reasons stated in the preceding paragraph.

Basis and Purpose

The City of Baltimore, MD, who owns and operates this double-leaf bascule drawbridge, has requested a temporary change from the current general operating regulation set out in 33 CFR 117.5 that requires the bridge to open promptly and fully for the passage of vessels when a request to open is given, to complete structural repairs.

The Pennington Avenue Bridge has a vertical clearance in the closed position to vessels of 38 feet, above mean high water. Regular users of the waterway consist of Coast Guard vessels bound for the Coast Guard Yard at Curtis Bay, as well as a significant amount of commercial vessels that pass through the bridge.

On August 17, 2010, we published a notice of temporary deviation from regulation entitled "Drawbridge Operation Regulations; Curtis Creek, Baltimore, MD" in the **Federal Register** (74 FR 50707). The temporary deviation allowed the bridge to operate on a restricted schedule to facilitate structural repairs from August 5, 2010 to December 1, 2010.

During completion of structural repairs, the drawbridge with four lift spans will provide full and partial openings of the spans for vessels on several dates and times from February 17, 2011 to November 30, 2011. During the replacement of the grid deck, floor beams and stringers, the drawbridge will be maintained in closed position to vessels to include immobilizing half of the draw spans to single-leaf operation.

Discussion of Rule

The Coast Guard is temporarily amending 33 CFR 117.557 by inserting new paragraphs (a) and (b).

Paragraph (a) will contain the temporary rule for the Pennington Avenue Bridge at mile 0.9 in Baltimore, MD. The rule will allow the draw of the bridge to operate as follows: (1) Need not open from 6 a.m. on February 17, 2011 to 11:59 p.m. on January 20, 2011; except, vessel openings shall be provided on signal if at least two hours advance notice is given; (2) Single-leaf operation on the southeast side span from 11:59 p.m. on January 20, 2011 to 11:59 p.m. on February 12, 2011. The opposite connecting spans on the north side while not under repair shall continue to open on signal for vessels; (3) Need not open from 11:59 p.m. on February 12, 2011 to 11:59 p.m. on March 6, 2011; except, vessel openings shall be provided on signal if at least two hours advance notice is given; (4) Single-leaf operation on the southwest side span from 11:59 p.m. on March 6, 2011 to 11:59 p.m. on March 28, 2011. The opposite connecting spans on the north side while not under repair shall continue to open on signal for vessels; (5) Need not open from 11:59 p.m. on March 28, 2011 to 11:59 p.m. on November 30, 2011; except, vessel openings shall be provided on signal if at least two hours advance notice is given.

Paragraph (b) will contain the existing regulations for the I695 Bridge, mile 1.0, at Baltimore, MD.

The temporary regulation will not significantly disrupt vessel traffic since

mariners may still transit the bridge with full and partial openings of the draw spans for vessels on several dates and times.

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.

We expect the economic impact of this temporary rule to be so minimal that a full Regulatory Evaluation is unnecessary. We reached this conclusion based on the fact that the temporary changes have only a minimal impact on maritime traffic transiting the bridge. Mariners can still plan their trips in accordance with the scheduled bridge openings, and to minimize delays, vessels that can pass under the bridge without a bridge opening may do so at all times.

Small Entities

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

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

This rule will affect the following entities, some of which may be small entities: Commercial users and unexpected users of the waterway intending to transit the drawbridge on signal. This action will not have a significant economic impact on a substantial number of small entities for the following reasons. Mariners can plan their trips in accordance with the scheduled bridge openings, to minimize delays and vessels that can pass under the bridge without a bridge opening may do so at all times.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can 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 affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

This rule does not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would 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 M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (32)(e) of the Instruction. Under figure 2–1, paragraph (32)(e), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

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

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

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

■ 2. From February 17, 2011 to November 30, 2011, suspend § 117.557, and add § 117.558, to read as follows:

§ 117.558 Curtis Creek.

(a) The draw of the Pennington Avenue Bridge, mile 0.9 at Baltimore shall operate as follows:

(1) Need not open from 6 a.m. on February 17, 2011 to 11:59 p.m. on January 20, 2011; except, vessel openings shall be provided on signal if at least two hours advance notice is given;

(2) Single leaf operation on the southeast side span from 11:59 p.m. on January 20, 2011 to 11:59 p.m. on February 12, 2011. The opposite connecting spans on the north side while not under repair shall continue to open on signal for vessels;

(3) Need not open from 11:59 p.m. on February 12, 2011 to 11:59 p.m. on March 6, 2011; except, vessel openings shall be provided on signal if at least two hours advance notice is given;

(4) Single leaf operation on the southwest side span starting from 11:59 p.m. on March 6, 2011 to 11:59 p.m. on March 28, 2011. The opposite connecting spans on the north side while not under repair shall continue to open on signal for vessels;

(5) Need not open from 11:59 p.m. on March 29, 2011 to 11:59 p.m. on November 30, 2011; except, vessel openings will be provided on signal if at least two hours advance notice is given.

(b) The draw of the I695 Bridge, mile 1.0 at Baltimore, shall open on signal if at least a one-hour notice is given to the Maryland Transportation Authority in Baltimore.

Dated: January 14, 2011.

William D. Lee

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

[FR Doc. 2011–3572 Filed 2–16–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0018]

RIN 1625–AA00

Safety Zone; Havasu Landing Regatta, Colorado River, Lake Havasu Landing, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on Lake Havasu, California in support of the Havasu Landing Regatta. This temporary safety zone is necessary to provide for the safety of the participants, crew, spectators, participating vessels, and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

DATES: This rule is effective from 8 a.m. on February 19, 2011, to 4 p.m. on February 20, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0018 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0018 in the "Keyword" box, and then clicking "Search." They are 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 temporary rule, call or e-mail Petty Officer Shane Jackson, Waterways Management, U.S. Coast Guard Sector San Diego; Coast Guard; telephone 619–278–7267, e-mail *Shane.E.Jackson@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

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable. The logistical details of the race were neither finalized nor presented to the Coast Guard with enough forewarning to draft and publish an NPRM. As such, the event will occur before the rulemaking process could be completed.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date would be contrary to the public interest, since immediate action is needed to ensure public safety.

Background and Purpose

We are establishing this temporary safety zone in support of the Havasu Landing Regatta, a marine event that includes vessels racing along an established and marked course on Lake Havasu, CA. A temporary safety zone is necessary to provide for the safety of the crews, spectators, and participants of the race and is also necessary to protect other vessels and users of the waterway.

Discussion of Rule

The Coast Guard is establishing a safety zone that will be enforced from 8 a.m. to 4 p.m. on Saturday, February 19, and Sunday, February 20, 2011. The limits of this safety zone are as follows: From the California shoreline in

position 34°29.40′ N 114°24.12′ W to the northern corner 900 yards east in position 34°29.40′ N 114°23.39′ W to the southern corner 1400 yards south in position 34°29.0′ N 114°23.39′ W to the California shoreline in position 34°29.0′ N 114°24.12′ W.

This safety zone is necessary to ensure unauthorized personnel and vessels remain safe by keeping clear of the race course during the event. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

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 safety zone is of a limited duration, only eight hours per day for a period of two days, and is limited to a relatively small geographic 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.

The safety zone will affect the following entities some of which may be small entities: The owners and operators of pleasure craft engaged in recreational activities and sightseeing in the impacted portion of Lake Havasu on February 19 and 20, 2011. This safety zone will not have a significant economic impact on a substantial number of small entities for several reasons. Vessel traffic can pass safely around the area, vessels engaged in recreational activities have ample space outside of the safety zone to engage in these activities, and this safety zone is limited in scope and duration as it is only in effect for eight hours per day for a period of two days.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves the establishment of a safety zone.

An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T11–392 to read as follows:

§ 165.T11–392 Safety Zone; Havasu Landing Regatta, Colorado River, Lake Havasu Landing, CA.

(a) *Location.* The limits of the safety zone will be the navigable waters of Lake Havasu bounded by the following coordinates: from the California shoreline in position 34°29.40′ N 114°24.12′ W to the northern corner 900 yards east in position 34°29.40′ N 114°23.39′ W to the southern corner 1,400 yards south in position 34°29.0′ N 114°23.39′ W to the California shoreline in position 34°29.0′ N 114°24.12′ W.

(b) *Enforcement Period.* This section will be in effect from 8 a.m. on February 19th to 4 p.m. on February 20, 2011. It will be enforced from 8 a.m. to 4 p.m. each day (February 19, 2011 and February 20, 2011). If the event concludes prior to the scheduled termination time, the Captain of the Port will cease enforcement of this safety zone and will announce that fact via Broadcast Notice to Mariners.

(c) *Definitions.* The following definition applies to this section: *Designated representative,* means any commissioned, warrant, or petty officer of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, and local, state, and federal law enforcement vessels who have been authorized to act on the behalf of the Captain of the Port.

(d) *Regulations.* (1) Entry into, transit through or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port of San Diego or his designated representative.

(2) Mariners requesting permission to transit through the safety zone may request authorization to do so from the Patrol Commander (PATCOM). The PATCOM may be contacted on VHF–FM Channel 16.

(3) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or his designated representative.

(4) Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

(5) The Coast Guard may be assisted by other federal, state, or local agencies.

Dated: February 3, 2011.

T.H. Farris,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2011–3566 Filed 2–16–11; 8:45 am]

BILLING CODE 9110–04–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2009–4]

Administration of Copyright Office Deposit Accounts

AGENCY: Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Office is amending its regulations to set the minimum level of activity required to hold a deposit account at 12 transactions per year; require deposit account holders to maintain a minimum balance in that account; require the closure of a deposit account the second time it is overdrawn within any 12-month period; and offer deposit account holders the option of automatic replenishment of their account via their bank account or credit card.

DATES: *Effective Date:* May 1, 2011.

FOR FURTHER INFORMATION CONTACT: Tanya Sandros, Deputy General Counsel or Chris Weston, Attorney Advisor. Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024. Telephone: (202) 707–8380. Telefax: (202) 707–8366. All prior **Federal Register** notices and public comments in this docket are available at *http://www.copyright.gov/docs/deposit-acct/eservice/.*

SUPPLEMENTARY INFORMATION:

Deposit Account Background

The Copyright Office maintains a system of deposit accounts for those who frequently use its services. An individual or entity may establish a deposit account, make advance deposits into that account, and charge copyright fees against the balance instead of sending separate payments with applications and other requests for services. This process has proven to be more efficient and less expensive for both the Office and the applicant than sending separate payments to the Copyright Office for each application for registration or for other services.

The goal of this Final Rule is to solve the problems associated with the suspension of paper registration applications for lack of deposit account funds. As explained in the October 8, 2010 **Federal Register** Notice of Proposed Rulemaking (75 FR 62345), when the deposit account being used for payment has insufficient funds to process a paper application, the Copyright Office suspends processing of the application to notify the account holder that replenishment of the account is needed, and places the pending application and associated deposit copies in temporary storage. The suspended applications, which may number 3,000 or more at any one time, must be reviewed regularly by Office staff to locate those that are newly funded and reprocess them. Thus, insufficient deposit account funding effectively doubles—at a minimum—the time Office staff must spend processing an application, time that would otherwise be more profitably spent on processing properly filed claims.

On average, one to three percent of paper applications for registration are suspended each year due to lack of

sufficient deposit account funds. In fiscal 2010, between 6,000 and 7,000 applications were carried on hold monthly for insufficient deposit account funds. The Office has expended substantial resources managing these suspended applications and deposits. While the Office assesses service charges for deposit account overdrafts ($165) and dishonored deposit account replenishment checks ($85), *see* 37 CFR 201.3(d), these penalties do not recover all costs or solve the fundamental problems associated with the additional handling and the delay in processing underfunded applications for registration.

First Notice of Proposed Rulemaking and Public Comments

On July 14, 2009, the Copyright Office published a notice of proposd rulemaking (NPRM) in the **Federal Register**, 74 FR 33930, proposing that the problem of insufficient deposit account funds for paper applications should be solved by requiring all deposit account holders to file their applications via eService, the Office's electronic registration system. An application for registration made via eService cannot be completed until the method of payment is verified by, for example, ensuring that sufficient funds are present in the deposit account and payment has been made. This approach would have been much more efficient than filing paper applications, which must go through a number of processing steps before the validity of the proffered method of payment can be ascertained. In addition, the proposal noted that electronic registration benefits applicants in that it offers a lower fee than paper registrations ($35 instead of $65) and helps to establish an earlier effective date of registration.

The July 2009 NPRM garnered six public comments, three of which supported the electronic filing requirement and three of which opposed it. Most notably, the Motion Picture Association of America (MPAA) challenged the initial proposed rule as premature and suggested an alternative whereby each deposit account holder would be charged an up-front $100 fee that would be held as a kind of security deposit with which to dispose of underfunded registration applications. MPAA comment 2009 at 2. According to the MPAA proposal, if an applicant has insufficient funds in its deposit account to pay for a paper application, the Copyright Office should close the deposit account and use the security deposit to pay for returning the application to the applicant. The MPAA argued that rights-holders should not be denied the option of continuing to use paper applications because of the actions of "irresponsible" deposit account holders. *See* MPAA comment 2009 at 4.

The MPAA and two other commenters also expressed skepticism with the efficiency and security of the eService system. A full discussion of these issues appears in the Office's October 8, 2010 NPRM.

The Copyright Office carefully considered each of the comments submitted in response to the July 9, 2009 NRPM, and was persuaded that mandatory electronic application was not the most appropriate solution to its problem of underfunded paper applications. While the Office still felt strongly that electronic registration is more efficient than paper registration, and redounds to the benefit of applicants as much as to the benefit of the Office, it concluded that mandatory electronic registration was an overbroad solution to the specific problems described. *See* 75 FR 62345, 62347–8. The final rule requiring a minimum deposit account balance and optional automatic replenishment discussed herein is a more targeted response to the problems facing the Office.

Second Notice of Proposed Rulemaking; Comments; Final Rule

After considering the comments filed in response to the July 2009 NPRM, the Copyright Office explored other options for addressing its problems with underfunded deposit accounts and in October 2010 proposed a number of administrative requirements to solve the problem. The Office received two comments favorable to the proposal—from Author Services, Inc. and the MPAA—and has decided to adopt the proposed regulatory amendments with two alterations. Specifically, the Office is amending its regulations to (1) Set the minimum level of activity required to hold a deposit account at 12 transactions per year; (2) require deposit account holders to maintain a minimum balance in that account; (3) mandate the closure of a deposit account the second time it is overdrawn within any 12-month period; and (4) offer deposit account holders the option of automatic replenishment of their account via their bank account or credit card.

1. Mandatory Minimum Deposit Account Activity and Balance

The Deposit Account regulation—37 CFR 201.6(b)—currently reads, "Persons or firms having a considerable amount of business with the Copyright Office may, for their own convenience, prepay copyright expenses by establishing a Deposit Account."

The words "a considerable amount of business" will be replaced by "12 or more transactions a year" in order to more clearly delineate the intended users of the deposit account program. The program's goal is to better serve rights-holders who engage in regular, multiple registrations and other transactions with the Copyright Office every year, and the new language reflects this intent with specificity. The 12 transaction minimum is also consistent with prior Copyright Office policy and conforms to the typical minimum level of activity of current deposit account holders.

The Office is also instituting a requirement that every deposit account holder must establish, in consultation with the Copyright Office, a minimum balance for its deposit account. Ideally, this balance will be the lowest amount a deposit account holder can have in his or her account and still be able to pay for the regular number of copyright registration applications. This amount will be set collaboratively so that both the account holder and the office are comfortable that it will be sufficient for the account holder's expected activity. However, each account must have at least a minimum balance of $450.

In the event a deposit account goes below its minimum balance, the Copyright Office will automatically notify the account holder of this situation. The minimum balance requirement is intended to act primarily as an indicator to the account holder that the account may need replenishment; going below a minimum balance will not in itself expose the account holder to any adverse consequences.

2. Consequences of Overdrawing a Deposit Account

Upon the second occasion that a deposit account is overdrawn—meaning the second time there is not enough money in an account to pay the fee for a submitted registration—the account will be closed. The MPAA, in its comment on the October 2010 notice, inquired "whether it might be appropriate to specify some time period during which two overdrafts would result in the closure of a deposit account." MPAA comment 2010 at 2. The Copyright Office finds merit in this suggestion, and is adding a proviso that, in order to result in account closure, both overdrafts must occur within the span of 12 months. This addition will help ensure that the penalty for two overdrafts affects only habitual abusers. Additionally, the overdraft rule in

practice will only affect deposit account holders who use paper applications, because eService will not allow an application to be submitted without sufficient funds.

However, a deposit account holder whose account is closed because it has been overdrawn twice is not foreclosed from using a deposit account in the future. The deposit account holder may re-open the closed account on the condition that it is funded through the automatic replenishment option. This requirement is to protect the account holder from the risk of overdrawing again and to protect the Copyright Office from the expense of handling suspended applications in the future.

3. Voluntary Automatic Replenishment

The Copyright Office will offer a voluntary automatic replenishment program to all deposit account holders. Under this program, the deposit account holder may provide pre-authorization to the Copyright Office to replenish the account from the account holder's credit card or bank account. Replenishment will take place when the deposit account goes below its minimum balance, at which time the Office will immediately notify the account holder that the account has fallen below the minimal balance and that the account will be replenished in accordance with the automatic replenishment agreement. The account holder will determine the amount of replenishment at the time the account holder enters the program.

Comments Received in Response to Question Regarding the Continued Availability of Deposit Accounts

In its July 15th, 2009 NPRM, the Copyright Office sought public comment on whether it should cease offering deposit accounts altogether. It noted that, in an era when paper applications and payment via check were the norm, a separate, simplified deposit account system presented attractive efficiencies to frequent applicants and to the Office. It also pointed out that in an era of electronic registration and payment via corporate or other credit cards, the administrative costs of maintaining a separate deposit account system are no longer clearly offset by its advantages; hence, the reason for the Office's inquiry concerning abolition of the deposit account system.

Three of the four commenters who addressed this question argued that eliminating deposit accounts would be harmful. Thus, the Copyright Office acknowledged in its October 8, 2010 notice that deposit accounts remain a useful and efficient option for copyright owners who frequently use its services, including, but not limited to, registration, and announced that it will continue to offer deposit accounts for the foreseeable future, reserving its prerogative to revisit the question of their utility and cost to the Office at a later time.

At this time, the Office also notes that the change in policy for administering Deposit Accounts will increase the effectiveness and efficiency of the system for the Office and eliminate most of the problems that generated the initial questions. Hence, in light of the comments from the rights-holders and the new amendments announced today, the Office will continue to offer Deposit Accounts.

List of Subjects in 37 CFR Part 201

Copyright, General provisions.

Final Regulation

In consideration of the foregoing, the Copyright Office amends 37 CFR Ch. II as follows:

PART 201—GENERAL PROVISIONS

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702, 708(c).

■ 2. In § 201.6, revise paragraph (b) to read as follows:

§ 201.6 Payment and refund of Copyright Office fees.

* * * * *

(b) *Deposit accounts.* (1) Persons or firms having 12 or more transactions a year with the Copyright Office may prepay copyright expenses by establishing a Deposit Account. The Office and the Deposit Account holder will cooperatively determine an appropriate minimum balance for the Deposit Account which, in no case, can be less than $450, and the Office will automatically notify the Deposit Account holder when the account goes below that balance.

(2) The Copyright Office will close a Deposit Account the second time the Deposit Account holder overdraws his or her account within any 12-month period. An account closed for this reason can be re-opened only if the holder elects to fund it through automatic replenishment.

(3) In order to ensure that a Deposit Account's funds are sufficiently maintained, a Deposit Account holder may authorize the Copyright Office to automatically replenish the account from the holder's bank account or credit card. The amount by which a Deposit Account will be replenished will be determined by the deposit account holder. Automatic replenishment will be triggered when the Deposit Account goes below the minimum level of funding established pursuant to paragraph (b)(1) of this section, and Deposit Account holders will be automatically notified that their accounts will be replenished. Funding through automatic replenishment is required if a Deposit Account holder, who has had an account closed because it has been overdrawn twice within any 12 month period, wishes to re-open the account.

* * * * *

Dated: February 7, 2011.

Maria Pallante,

Acting Register of Copyrights.

Approved by

James H. Billington,

The Librarian of Congress.

[FR Doc. 2011–3598 Filed 2–16–11; 8:45 am]

BILLING CODE 1410–30–P

POSTAL SERVICE

39 CFR Part 111

New Customs Declarations Label Requirements

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is revising the *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) 608.2.4 to require all mailpieces containing goods that enter the Customs Territory of the United States (CTUS), from outside the CTUS, to bear a customs declaration label. Additionally, the Postal Service updates the standards for items weighing 16 ounces or more when sent to, from, or between, and in some circumstances, within certain U.S. territories, possessions, and Freely Associated States.

DATES: *Effective Date:* June 6, 2011.

FOR FURTHER INFORMATION CONTACT: Rick Klutts at 813–877–0372.

SUPPLEMENTARY INFORMATION: Consistent with the Code of Federal Regulations, Title 19, Part 145—U.S. Customs and Border Protection, Department of Homeland Security, the Postal Service will require that all mailpieces containing goods that enter the CTUS, from outside the CTUS, to bear a customs declaration label. In addition, to ensure compliance with safety and security requirements of the United States Postal Inspection Service®, we are updating our standards for items weighing 16 ounces or more (regardless

of contents) when sent to, from, between, and, in some circumstances, within American Samoa, Guam, Palau, the Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, the Marshall Islands, and the U.S. Virgin Islands.

Definitions and Requirements for Items Sent to the CTUS

As defined in 19 CFR 101.1 and General Note 2 of the Harmonized Tariff Schedule of the United States, the CTUS includes only the 50 states, the District of Columbia, and Puerto Rico.

U.S. territories, possessions, and Freely Associated States under DMM 608.2.4 are considered "domestic" insofar as United States mail is sent to, from, or between these destinations; nonetheless, these destinations are outside the CTUS. As such, and consistent with 19 CFR 145.11, a clear and complete customs declaration label that describes the contents and value for the enclosed merchandise (that is, goods, or contents other than documents) must be secured to the mailpiece for each shipment when sent from a foreign post office. For the purpose of these new standards, "foreign post offices" include those in the following locations:

- American Samoa
- Commonwealth of the Northern Mariana Islands
- Federated States of Micronesia
- Guam
- Palau
- Republic of the Marshall Islands
- U.S. Virgin Islands

These revisions ensure compliance with regulations of U.S. Customs and Border Protection.

Updated Standards for Items Weighing 16 Ounces or More

Current DMM standards require a customs declaration label for Priority Mail® items weighing 16 ounces or more when sent from the United States to American Samoa, Guam, Palau, the Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, and the Marshall Islands, and when such items are sent to the United States from those locations. We are updating these standards to encompass the Package Services and Periodicals mail classes and to extend this requirement when items are sent between, and in some circumstances, within certain U.S. territories, possessions, and Freely Associated States. This update also clarifies that the same customs declaration requirements are applicable for mail sent to these destinations from Puerto Rico and the U.S. Virgin Islands.

These revisions ensure compliance with safety and security requirements of the Postal Inspection Service and other federal agencies.

The Postal Service adopts the following changes to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), which is 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:

* * * * *

600 Basic Standards for All Mailing Services

* * * * *

608 Postal Information and Resources

* * * * *

2.0 Domestic Mail

* * * * *

2.4 Customs Forms Required

[Revise the title and text of 2.4.1 as follows:]

2.4.1 Items Weighing 16 Ounces or More

Except for items sent via Express Mail, or Priority Mail combined with Registered Mail service, any mailpiece (regardless of contents) weighing 16 ounces or more must bear a properly completed PS Form 2976, *Customs Declaration CN 22,* or, if the customer prefers, a PS Form 2976–A, *Customs Declaration and Dispatch Note*—CP 72, when the item is:

a. Sent from the United States, Puerto Rico, or the U.S. Virgin Islands to the ZIP Code destinations listed in the table below.

b. Sent from the ZIP Code destinations listed in the table below to the United States, Puerto Rico, or the U.S. Virgin Islands.

c. Sent between two different destinations listed in the "Territory, Possession, or Freely Associated States" column in the table below.

d. Sent within American Samoa, the Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, or the Republic of the Marshall Islands. This standard does not apply to items sent within Guam or Palau.

ZIP code	Two-letter state abbreviation	City	Territory, possession, or freely associated state
96799	AS	Pago Pago	American Samoa.
96910	GU	Hagatna	Guam.
96912	GU	Dededo	Guam.
96913	GU	Barrigada	Guam.
96915	GU	Santa Rita	Guam.
96916	GU	Merizo	Guam.
96917	GU	Inarajan	Guam.
96919	GU	Agana Heights	Guam.
96921	GU	Barrigada	Guam.
96923	GU	Mangilao	Guam.
96928	GU	Agat	Guam.
96929	GU	Yigo	Guam.
96931	GU	Tamuning	Guam.
96932	GU	Hagatna	Guam.
96939	PW	Palau	Palau.
96940			
96941	FM	Pohnpei	Federated States of Micronesia.

ZIP code	Two-letter state abbreviation	City	Territory, possession, or freely associated state
96942	FM	Chuuk	Federated States of Micronesia.
96943	FM	Yap	Federated States of Micronesia.
96944	FM	Kosrae	Federated States of Micronesia.
96950	MP	Saipan	Commonwealth of the Northern Mariana Islands.
96951	MP	Rota	Commonwealth of the Northern Mariana Islands.
96952	MP	Tinian	Commonwealth of the Northern Mariana Islands.
96960	MH	Majuro	Republic of the Marshall Islands.
96970	MH	Ebeye	Republic of the Marshall Islands.

[Renumber current items 2.4.2 through 2.4.4 as 2.4.5 through 2.4.7 and insert new 2.4.2 through 2.4.4 as follows:]

2.4.2 Items Containing Goods

Regardless of mail class or weight, items containing goods (*i.e.,* contents other than documents; *see* IMM 123.63 for "document" eligibility) must bear a properly completed PS Form 2976, *Customs Declaration CN 22,* or, if the customer prefers, a PS Form 2976–A, *Customs Declaration and Dispatch Note—CP 72,* when the items are sent to the United States or Puerto Rico from the ZIP Code destinations listed in the table in 2.4.1, or from the U.S. Virgin Islands..

2.4.3 Improperly Prepared Items

Mailpieces deposited without a properly completed customs form under 2.4.1 and 2.4.2 will be returned to the sender.

2.4.4 Overseas Military Mail

For determining customs declarations' required usage when mailing to or from APO, FPO, or DPO addresses, *see* 703.2.3.6 through 703.2.3.8.

* * * * *

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

Neva R. Watson,

Attorney, Legislative.

[FR Doc. 2011–3446 Filed 2–16–11; 8:45 am]

BILLING CODE 7710–12–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 457

[CMS–2291–F]

RIN 0938–AP53

Children's Health Insurance Program (CHIP); Allotment Methodology and States' Fiscal Years 2009 Through 2015 CHIP Allotments

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule describes the implementation of funding provisions under Title XXI of the Social Security Act (the Act), for the Children's Health Insurance Program (CHIP), as amended by the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), by the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA), by other related CHIP legislation, and most recently by the Patient Protection and Affordable Care Act of 2010 (the Affordable Care Act). Specifically, this final rule addresses methodologies and procedures for determining States' fiscal years 2009 through 2015 allotments and payments in accordance with sections 2104 and 2105 of the Act, as amended by CHIPRA and the Affordable Care Act.

DATES: *Effective Date:* These regulations are effective on April 18, 2011.

FOR FURTHER INFORMATION CONTACT: Richard Strauss, (410) 786–2019.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Children's Health Insurance Program

Title XXI of the Social Security Act (the Act) sets forth CHIP to enable States, the District of Columbia, and specified Commonwealths and Territories to initiate and expand health insurance coverage to uninsured, low-income children. The 50 States, the District of Columbia, and the Commonwealths and Territories may implement the CHIP through a separate child health program under title XXI of the Act, an expanded Medicaid program under title XIX of the Act, or a combination of both.

Federal funds appropriated for title XXI are limited, and the law specifies a formula and methodology to divide the total annual appropriation into individual allotments available for each State, the District of Columbia, and each U.S. Territory and Commonwealth with an approved child health plan.

B. Funding of CHIP Allotments Before the Enactment of CHIPRA

Section 4901 of the Balanced Budget Act of 1997 (Pub. L. 105–33, enacted on August 5, 1997) (BBA), which added Title XXI to the Social Security Act, appropriated funding for States' CHIPs for each fiscal year over a 10 fiscal year (FY) period from 1998 through 2007. The funding for each FY varied from $4.295 billion for FY 1998 up to $5.0 billion for FY 2007. Under section 2104(c)(4) of the Act, additional appropriations were provided for each of FYs 1999 through 2007 to provide additional allotment amounts particularly for the Commonwealths and Territories.

Public Law 110–92 (enacted on September 29, 2007), contained provisions to extend funding under the CHIP through November 16, 2007. In particular, section 136(a) of Public Law 110–92 appropriated $5 billion for the purposes of providing FY 2008 allotments to the 50 States, the District of Columbia, and the Commonwealths and Territories. In addition, $40 million was appropriated by this section to provide additional allotments to the Commonwealths and Territories in FY 2008.

Section 136(b) of Public Law 110–92 also provided that the FY 2008 allotments will be determined in accordance with the same methodology as previous CHIP fiscal year allotments were determined. In addition, section 136(c) of Public Law 110–92 amended the CHIP statute to add a new section 2104(i) of the Act to provide for the redistribution in FY 2008 of the unexpended FY 2005 allotments remaining at the end of FY 2007 to those 50 States or the District of Columbia that had estimated shortfalls in FY 2008. Finally, section 106 of Public Law 110–92 made the FY 2008 allotment funds available only for States' CHIP expenditures for assistance provided through November 16, 2007.

Subsequent to the enactment of Public Law 110–92; further continuing appropriation legislation was enacted which extended the dates which the FY 2008 allotment funds were available as provided in section 106 of Public Law 110–92; in particular, Public Law 110–116 (enacted on November 13, 2007), Public Law 110–137 (enacted on December 14, 2007), and Public Law 110–149 (enacted on December 21, 2007) extended the dates to December 14, 2007, December 21, 2007, and December 31, 2007, respectively.

Section 201 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (Pub. L. 110–173, enacted on December 29, 2007) (MMSEA) amended section 2104(a) of the CHIP statute to explicitly provide funding for CHIP allotments in the amount of $5 billion for each of FYs 2008 and 2009 for the 50 States and the District of Columbia and the Commonwealths and Territories, and for $40 million for the Commonwealths and Territories for each of FYs 2008 and 2009. These allotments will be determined in accordance with the existing methodology in CHIP statute for fiscal years before FY 2008. The funding provided for FY 2008 under the Continuing Appropriation legislation discussed above and enacted before MMSEA will no longer be available (and thus expenditures for FY 2008 will be paid from the allotments as provided under MMSEA). MMSEA provided that the FYs 2008 and 2009 allotment funds were only available for States' expenditures through March 31, 2009.

Section 201 of MMSEA amended the CHIP statute to add section 2104(j) of the Act which appropriated $1.6 billion for the purpose of providing additional allotments to eliminate States' CHIP shortfalls in FY 2008.

The provisions of MMSEA were implemented and described in a **Federal Register** notice dated May 23, 2008 (73 FR 30112).

C. Enactment of CHIPRA

Section 101 of the CHIPRA amended section 2104(a) of the Act to appropriate funding for each of FYs 2009 through 2012, and for two semi-annual periods in FY 2013, October 1, 2012 through March 31, 2013 and April 1, 2013 through September 30, 2013 respectively, for the purpose of providing allotments to States for each of those fiscal years or fiscal year periods. Furthermore, section 108 of CHIPRA provided additional funding for State allotments for the period October 1, 2012 through March 31, 2013 (the first half of FY 2013). Finally, section 3(c) of CHIPRA provides for the coordination of funding for CHIP in FY 2009 as previously provided under section 201 of MMSEA.

In particular, section 3(c) of CHIPRA requires the Federal government to rescind any previously appropriated amounts that were not allotted or obligated before April 1, 2009 for the following:

- Section 2104(a)(11) of the Act for purposes of providing State CHIP allotments for FY 2009 for States' expenditures through March 31, 2009.
- Section 2104(k) of the Act for purposes of the redistribution of unexpended FY 2006 allotments in FY 2009 to address States' funding shortfalls in FY 2009.
- Section 2104(l) of the Act for purposes of providing additional allotments for States' expenditures in FY 2009 to fund States' shortfalls for their expenditures through March 31, 2009.

Furthermore, any amounts provided for FY 2009 CHIP allotments in section 2104(a)(12) as appropriated through the amendments made by CHIPRA must be reduced by the amounts that were obligated before April 1, 2009 under sections 2104(a)(11), 2104(k), or 2104(l) of the Act, as amended by section 201 of MMSEA (which refer to States' FY 2009 CHIP allotments, amounts of unexpended FY 2006 allotments redistributed in FY 2009, and the amounts of additional FY 2009 allotments to address States' CHIP funding shortfalls through March 31, 2009, respectively). Funding for Territories and Commonwealths under Section 2104(c)(4) of the Act was not subject to coordination of funding under section 3(c) of CHIPRA.

The rescission of these unobligated amounts as well as the reduction in the FY 2009 allotment for the amounts that were obligated before April 1, 2009 ensure that States do not receive FY 2009 allotments as determined under CHIPRA in excess of the total amount provided under section 2104(a)(12) of the Act for FY 2009, as amended by CHIPRA, and 2104(c)(4).

D. The Patient Protection and Affordable Care Act

Section 10203(d)(1) of the Patient Protection and Affordable Care Act of 2010 ("Affordable Care Act"), Public Law 111–148, amended section 2104 of the CHIP statute to extend funding for CHIP to the end of FY 2015 and made other technical changes to the funding provisions under CHIP that do not affect the overall funding mechanism.

E. Authority for Qualifying States to Use Available CHIP Allotments for Medicaid Expenditures

Under section 2105(a)(1)(A) through (D) and (a)(2) of the Act, and before enactment of Extension of Availability of CHIP Allotment Act (Pub. L. 108–74, enacted on August 15, 2003), only Federal payments for the following Medicaid and CHIP expenditures were applied against States' available CHIP allotments to include:

- Medical assistance provided under title XIX (Medicaid) of the Act, to targeted low-income children in a CHIP-related Medicaid expansion, for which the CHIP enhanced Federal medical assistance percentage (CHIP EFMAP) rate is available.
- Medical assistance provided on behalf of a child during a period of presumptive eligibility under section 1920A of the Act (these funds are matched at the regular Medicaid Federal medical assistance percentage (FMAP) rate).
- Child health assistance to targeted low income children that meets minimum benefit requirements under CHIP.
- Other types of expenditures in CHIP that are subject to the 10-percent limit on non-primary expenditures (including other child health assistance for targeted low-income children, health services initiatives, outreach, and administrative costs).

Section 1(b) of the Extension of Availability of CHIP Allotment Act as amended by the Social Security Act, Technical corrections (Pub. L. 108–127, enacted November 17, 2003), added new section 2105(g) to the Act that certain "qualifying States" that met prescribed criteria could elect to use up to 20 percent of any of the States' available CHIP allotments for FYs 1998, 1999, 2000, or 2001 to increase the FMAP rate for certain regular Medicaid expenditures to the EFMAP rate available under CHIP. These

expenditures were for children under 19 years of age whose family income exceeds 150 percent of the Federal poverty line and who are eligible under the States' Medicaid program. As described in the **Federal Register** notice published on July 23, 2004 (69 FR 44013), if a qualified State submitted both 20 percent allowance expenditures and other "regular" CHIP expenditures at the same time in a quarter, the 20 percent allowance expenditures would be applied first against the available fiscal year reallotments. However, the 20 percent allowance expenditures could be applied only against the specified fiscal year allotment funds (upon which the 20 percent allowances were based) and which would remain available. Under section 2104(g)(1)(B)(iii) of the Act, the amounts of States' FY 2001 reallotments would only be available through the end of FY 2005; therefore, the FY 2001 20 percent allowances for the qualifying States are only available through the end of FY 2005.

Section 6103 of the Deficit Reduction Act of 2005 (Pub. L. 109–171, enacted on February 8, 2006) amended section 2105(g) of the Act to provide for continued authority for qualifying States to use a portion of their available FYs 2004 and 2005 CHIP allotments for payments to supplement the Medicaid FMAP that result in total Federal participation at the EFMAP rate (as determined in section 2105(b) of the Act) for certain expenditures made in the Medicaid program.

Section 201(b) of the National Institutes of Health Reform Act of 2006 (Pub. L. 109–482, enacted on January 15, 2007) and section 201(b) of MMSEA, amended section 2105(g) of the Act to provide for continued authority of payments to qualifying States for FYs 2006 through 2009.

Finally, section 107 of CHIPRA amended title XXI of the Act to add a new paragraph (4) of section 2105(g) of the Act; under this new provision, qualifying states at their option may use up to their entire fiscal year allotments for each of FYs 2009 through 2015, to the extent such allotments remain available to the State under the Act, in an amount equal to the additional amount that would have been paid to the State if the EFMAP as determined by section 2104(b) of the Act was substituted for the FMAP defined in section 1905(b) of the Act. Section 10203(d)(2)(C) of the Affordable Care Act further amended section 2105(g)(4) of the Act to provide that qualifying states at their option may use up to their entire fiscal year allotments for each of FYs 2009 through 2015.

The CHIPRA amendments to the qualifying State provision provide that the indicated amounts of such allotments are available for certain expenditures of the qualifying States as described in section 2105(g)(4)(B) of the Act, as amended by CHIPRA. In particular, these are expenditures made by such States on or after February 5, 2009 for children whose family income equals or exceeds 133 percent of the Federal poverty line but does not exceed the Medicaid applicable income level. As indicated above in this preamble, this is a change from what was in effect previously; that is, before CHIPRA, the income level was 150 percent of the Federal poverty line.

II. Provisions of the Proposed Rule

We published on September 16, 2009 a proposed rule in the **Federal Register** (74 FR 47517), that set forth the methodologies and procedures to determine allotments of federal funds under title XXI of the Social Security Act (the Act), reflecting the statutory changes described above. We proposed new regulatory provisions that would be set forth in 42 CFR part 457 subpart F.

III. Analysis of and Responses to Public Comments

We received a total of 2 timely comments on the September 16, 2009 (74 FR 47517) proposed rule. Both comments either indicated agreement with the content of the proposed rule or were outside of the scope of the rule; neither of these comments suggested any changes to the content of the proposed rule.

IV. Provisions of the Final Regulations

After consideration of the comments reviewed and further analysis of specific issues, we are adopting the September 16, 2009 proposed rule as final with minor revisions discussed and identified below.

The provisions of this final rule that differ from those of the proposed rule relate to the amendments made by the Affordable Care Act, which extended funding for CHIP to the end of FY 2015; previously funding for CHIP extended only through the end of FY 2013. Therefore, we are implementing the new provisions of the Affordable Care Act discussed in this final regulation as final without the need for public comments.

In this final rule, we are retaining the provisions as published in the proposed rule, as follows:

- Set forth the methodology and procedures for determining the CHIP allotments for FYs 2009 through 2015 for the 50 States and the District of Columbia, and the U.S. Commonwealths and Territories as provided under section 2104(m) of the Act.
- Describe the methodology and process used to coordinate the funding provided previously to States under MMSEA, as described in the May 23, 2008 **Federal Register** notice (73 FR 30112), under the provisions of section 2104(a)(11) of the Act related to States' FY 2009 allotments provided to States before CHIPRA, section 2104(k) of the Act related to the redistribution of States' unexpended FY 2006 allotments to address States' shortfalls in FY 2009, and section 2104(l) of the Act related to funding States' shortfalls in FY 2009 for their expenditures through March 31, 2009.
- Set forth the FY 2009 allotments as determined in accordance with such methodologies and procedures.
- Set forth the FY 2010 allotments as determined in accordance with such methodologies and procedures.
- Describe the implementation of the continued authority under section 2105(g)(4) of the Act as amended by CHIPRA for "qualifying States" to elect to receive their available CHIP allotments for FYs 2009 through 2015 CHIP as increased Federal matching funds for certain expenditures in their Medicaid programs.
- Describe the retrospective adjustment for the FY 2008 shortfall funding as provided under section 2104(j) of the Act.

To incorporate the policies and implement the statutory provisions as described above, we applied the following revisions:

- In § 457.600(a), we removed the date "2007" and added in its place "2015".
- In § 457.608, we revised the heading "Process and calculation of State allotments for a fiscal year" to read "Process and calculation of State allotments prior to FY 2009".
- In part 457 subpart F, we added § 457.609, "Process and calculation of State allotments for a fiscal year after FY 2008", which implements the funding amounts available for States' CHIP allotments for FYs 2009 through 2015 of this regulation.
- In § 457.610, we revised the heading "Period of availability for State allotments for a fiscal year" to read "Period of availability for State allotments prior to FY 2009". In the first line of the paragraph for this section, we removed the words "for a fiscal year" and add in its place "prior to FY 2009".
- In part 457 subpart F, we add § 457.611, "Period of availability for State allotments for a fiscal year after FY 2008", which reflects the 3 fiscal year and 2 fiscal year periods of availability,

as applicable to fiscal years before 2009 and effective for FY 2009 and subsequent fiscal years, respectively.

A. Methodology and Procedures for Determining the CHIP Allotments for FY 2009 Through FY 2015 for the 50 States and the District of Columbia, and the U.S. Commonwealths and Territories

1. Reauthorization Funding for the CHIP

Section 2104(a)(1) through (18) of the Act, as amended by section 101 of CHIPRA, and as further amended by section 10203(d) of the Affordable Care Act, provides funding for providing States' allotments for FYs 2009 through 2015. In particular, section 101 of CHIPRA amended section 2104(a) of the Act to revise paragraph (11) for FY 2008, and adds new paragraphs (12) through (16) to provide appropriations for FY 2009 through FY 2013, respectively. The Affordable Care Act further amended section 2104(a) of the Act to add new paragraphs (17) and (18), which provide appropriations for CHIP in FYs 2014 and 2015. In particular, under the amendments made by CHIPRA and the Affordable Care Act, the appropriated amounts available for allotments for FYs 2009 through 2015, respectively are: $10,562,000,000 for FY 2009 (before CHIPRA the amount for FY 2009 was $5,000,000,000); 12,520,000,000 for FY 2010; $13,459,000,000 for FY 2011; $14,982,000,000 for FY 2012; $17,406,000,000 for FY 2013, $19,147,000,000 for FY 2014, and $2,850,000,000 for each of the first and second half of FY 2015. Also, section 108 of CHIPRA, as amended by 10203(d) of the Affordable Care Act, provides for a one-time appropriation of $15,361,000,000 for allotments for the first half of FY 2015. Therefore, the total appropriation for providing allotments during FY 2015 is $21,061,000,000 (determined as the sum of $2,850,000,000, $15,361,000,000, and $2,850,000,000).

2. Methodology for Determining State's Fiscal Year Allotments

a. CHIPRA and Affordable Care Act Provisions

Section 2104(m) of the Act, as amended by section 102 of CHIPRA and section 10203(d) of the Affordable Care Act sets forth the methodology for determining States' CHIP allotments for each of FYs 2009 through 2015. In general, the States' fiscal year allotments are provided from the appropriation for the respective fiscal year allotment, subject to a proration adjustment, described in section II.A.2.i. of this final rule.

b. FY 2009 Allotments

The FY 2009 allotments for the 50 States and the District of Columbia, and the Commonwealths and Territories, are provided from the FY 2009 appropriation of $10,562,000,000, and the $40,000,000 available at section 2104(c)(4) and are subject to a proration adjustment described in II.A.2.i. of this final rule, if necessary. The FY 2009 CHIP allotments for the 50 States and the District of Columbia are determined under a different methodology than is used for the determining the FY 2009 allotments for the Commonwealths and Territories.

The FY 2009 allotment for the 50 States and the District of Columbia is determined as 110 percent of the highest of the following 3 amounts:

- The total Federal payments to the State from the States' available CHIP allotments in FY 2008 as reported by the State and certified to the Secretary through the November 2008 submission of the quarterly expenditure reports, Forms CMS–21 (OMB# 0938–0731 with an expiration date of August 31, 2011) and CMS–64 (OMB# 0938–0067 with an expiration date of August 31, 2011), multiplied by the allotment increase factor described in section II.A.2.j. of this final rule.
- The amount allotted to the State for FY 2008, multiplied by the allotment increase factor described in section II.A.2.j. of this final rule.
- The projected total Federal payments to the State under title XXI of the Act for FY 2009, determined based on the February submission of projections of expenditures as certified by the State to CMS no later than March 31, 2009. These projections may include certain amounts of Medicaid expenditures for certain "qualifying States" described in section 2105(g) of the Act.

With respect to the last item related to projected total Federal payments for FY 2009 under title XXI, section 107 of CHIPRA added a new paragraph section 2105(g)(4) of the Act to allow States to use up to 100 percent of their FY 2009 allotments for these expenditures. This provision is further described in section II.E. of this final rule.

The FY 2009 allotment for the Commonwealths and Territories is determined as the highest amount of the Federal payments made to the Commonwealth or Territory under title XXI of the Act in any of the fiscal years for the period of FYs 1999 through 2008, multiplied by the allotment increase factor described in section II.A.2.j. of this final rule, plus an additional amount. The additional amount is equal to $40,000,000, as appropriated under section 2104(c)(4)(B) of the Act, multiplied by the following percentage provided under section 2104(c)(2) of the Act for the indicated jurisdiction: 91.6 percent for Puerto Rico; 3.5 percent for Guam; 2.6 percent for the Virgin Islands; 1.2 percent for American Samoa; and 1.1 percent for the Northern Mariana Islands.

c. FY 2010 Allotments

The FY 2010 allotments for the 50 States and the District of Columbia, and the Commonwealths and Territories, are provided from the FY 2010 appropriation of $12,520,000,000, and are subject to a proration adjustment if necessary, described in section II.A.2.i. of this final rule. Under the CHIPRA, the FY 2010 allotment for each State is determined by multiplying the allotment increase factor for FY 2010 for the State, by the sum of: The State's FY 2009 allotment; the amount of the final FY 2006 redistributed allotments paid to the State as determined under section 2104(k) of the Act, and subject to any final retrospective adjustment to such amount determined by section 2104(k)(5) of the Act; the amount of the final additional FY 2009 allotments paid to the State as determined by section 2104(l) of the Act, and subject to any final retrospective adjustment to such amount determined by section 2104(l)(5) of the Act; and the amount of any contingency fund payment made to the State for FY 2010, as determined by section 2104(n) of the Act.

For the 50 States and the District of Columbia, section 2104(m)(6) of the Act, the FY 2010 allotment may include additional amounts in situations where such States have submitted an expansion allotment adjustment request before August 31, 2009.

For the Commonwealths and Territories, in accounting for the amounts of the FY 2009 allotments for purposes of determining the FY 2010 allotments, the component of the FY 2009 allotment for such jurisdictions relating to the additional $40 million referenced in section 2104(c)(4) of the Act, is not included. Section 2104(m)(2)(A)(i)(I) of the Act, as amended by CHIPRA, references the FY 2009 allotment as determined in section 2104(m)(1) of the Act; that section, in turn, provides for determining the FY 2009 allotments from the amounts appropriated in section 2104(a)(12) of the Act. That is, such section 2104(m)(1) of the Act does not include the additional $40 million which is separately appropriated and available only for the jurisdictions in determining their FY 2009 allotments. Therefore, the

component of the jurisdictions' FY 2009 allotment related to the additional $40 million would not be included in determining the amount of the jurisdictions' FY 2010 allotments.

d. FY 2011 Allotments

The FY 2011 allotments for the 50 States and the District of Columbia, and the Commonwealths and Territories, are provided from the FY 2011 appropriation ($13,459,000,000). The amounts of these allotments are subject to a proration adjustment described in section II.A.2.i of this final rule, if necessary. Section 2104(m)(2)(A)(ii) of the Act, as amended by CHIPRA requires a "rebasing" process be used for determining the FY 2011 allotments; under the rebasing methodology, States' payments rather than their allotments for FY 2010 must be considered in calculating the FY 2011 allotments. In particular, the FY 2011 allotments are determined by multiplying the allotment increase factor for FY 2011 for the State by the sum of: Any Federal payments made from the States' available allotments in FY 2010; any amounts provided as redistributed allotments in FY 2010 to the State; and any Federal payments attributable to any contingency fund payments made to the State for FY 2010 determined under Section 2104(n) of the Act.

e. FY 2012 Allotments

The FY 2012 allotments for the 50 States and the District of Columbia, and the Commonwealths and Territories, are provided from the FY 2012 appropriation ($14,982,000,000), and are subject to a proration adjustment described in section II.A.2.i. of this final rule, if necessary. Under the CHIPRA, the FY 2012 allotment for each State will be determined by multiplying the allotment increase factor for FY 2012 for the State, by the sum of: The State's FY 2011 allotment and any contingency fund payment made to the State for FY 2011, as determined under section 2104(n) of the Act.

For the 50 States and the District of Columbia, in section 2104(m)(6) of the Act, the FY 2012 allotment may include additional amounts in situations where such States have submitted an expansion allotment adjustment request before August 31, 2011.

f. FY 2013 Allotments

The FY 2013 allotments for the 50 States and the District of Columbia, and the Commonwealths and Territories, are provided from the FY 2013 appropriation ($17,406,000,000). The amounts of these allotments are subject to a proration adjustment described in section II.A.i. of this final rule, if necessary. Section 2104(m)(2)(B)(i) of the of the Act, as amended by the Affordable Care Act requires a "rebasing" process be used for determining the FY 2013 allotments; the rebasing methodology means the States' payments rather than their allotments for FY 2012 must be considered in calculating the FY 2013 allotments. In particular, the FY 2013 allotments are determined by multiplying the allotment increase factor for FY 2013 for the State by the sum of: Any Federal payments made from the States' available allotments in FY 2012; any amounts provided as redistributed allotments in FY 2012 to the State; and any Federal payments attributable to any contingency fund payments made to the State for FY 2012 determined under Section 2104(n) of the Act.

g. FY 2014 Allotments

The FY 2014 allotments for the 50 States and the District of Columbia, and the Commonwealths and Territories, are provided from the FY 2014 appropriation of $19,147,000,000, and are subject to a proration adjustment described in II.A.2.i. of this final rule, if necessary. Under section 2104(m), as amended by the Affordable Care Act, the FY 2014 allotment for each State is determined by multiplying the allotment increase factor for FY 2014 for the State, by the sum of: The State's FY 2013 allotment and any contingency fund payment made to the State for FY 2013, as determined in section 2104(n) of the Act.

For the 50 States and the District of Columbia, under section 2104(m)(6) of the Act, the FY 2014 allotment may include additional amounts in situations where such States have submitted an expansion allotment adjustment request before August 31, 2013.

h. FY 2015 Allotments

The FY 2015 allotments for the 50 States and the District of Columbia, and the Commonwealths and Territories, are comprised of two components related to the first half of FY 2015 (that is, the period of October 1, 2014 through March 31, 2015) and second half of FY 2015 (that is, April 1, 2015 through September 30, 2015). The FY 2015 allotments for the first and second half of FY 2015 are subject to a proration adjustment described in section II.A.2.i. of this final rule, as necessary.

The allotments for the first half of FY 2015 are provided from a total available appropriation of $18,211,000,000, comprised of $2,850,000,000 appropriated under section 2104(a)(18)(A) of the Act, and $15,361,000,000 appropriated by section 108 of CHIPRA, as amended by the Affordable Care Act. The allotments for the first half of FY 2015 are equal to the "first half ratio" multiplied by the allotment increase factor for FY 2015 multiplied by the sum of any Federal payments made from the States' available allotments in FY 2014; any amounts provided as redistributed allotments in FY 2014 to the State; and any Federal payments attributable to any contingency fund payments made to the State for FY 2014 as determined under Section 2104(n) of the Act. Therefore, the first half ratio is the percentage determined by dividing $18,211,000,000 (calculated as the sum of $2,850,000,000 (the appropriation for the first half of FY 2015) and 15,361,000,000 (the one-time appropriation for the first half of the FY 2015)) by $21,061,000,000 (calculated as $2,850,000,000, the appropriation for the second half of FY 2015) plus the $18,211,000,000 amount).

The States' CHIP allotments for the second half of FY 2015 are provided from a total available appropriation of $2,850,000,000, appropriated under section 2104(a)(18)(B) of the Act. The allotments for the second half of FY 2015 are equal to $2,850,000,000 multiplied by a percentage equal to the amount of the allotment for the State for the first half of FY 2015 divided by the sum of all such first half of FY 2015 allotments for all States.

i. Proration Rule

Under section 2104(m)(4) of the Act, as amended by CHIPRA, if the amount of States' allotments for a fiscal year (in accordance with the provisions described in this final rule, or in the case of FY 2015, the amount of an allotment for each half of the fiscal year) exceeds the total appropriations available for such periods, the total allotments for each of these periods will be reduced on a proportional basis. The total amount available nationally for the period is multiplied by a proration percentage determined by dividing the amount determined for the period by the sum of such amounts.

j. The Allotment Increase Factor for a Fiscal Year

Under Section 2104(m)(5) of the Act, the allotment increase factor for a fiscal year is equal to the product of two amounts for the fiscal year: The per capita health care growth factor and the child population growth factor.

The per capita health care growth factor for a fiscal year is equal to 1 plus the percentage increase in the projected

per capita amount of the National Health Expenditures from the calendar year in which the previous fiscal year ends to the calendar year in which the fiscal year involved ends, as most recently published by CMS before the beginning of the fiscal year involved.

In general, for the 50 States and the District of Columbia, the Child Population Growth Factor (CPGF) for a fiscal year is equal to 1 plus the percentage increase (if any) in the population of children in the State from July 1 in the previous fiscal year to July 1 in the fiscal year involved, as determined by CMS based on the most recent published estimates of the Census Bureau available before the beginning of the fiscal year involved plus 1 percentage point. In the determination of the CPGF, section 2104(m)(5)(B) refers to "the percentage increase (if any)" of the population of children in the State. In this regard, CPGF refers only to increases in the population of children. Thus, if there was a decrease in the population of children over the indicated period, the CPGF for such State would be 0.0 percent plus one percentage point; that is, negative growth in the children population would not result in the growth factor being less than 101 percent.

Because of concerns about availability of data to determine the CGPF for the Commonwealths and the Territories, section 2104(m)(1)(B) of the Act explicitly required that the term "United States" be substituted for the term "the State". For fiscal years after FY 2009, that exception does not apply, and CMS will determine the CPGF for the Commonwealths and the Territories, based on the most recent published estimates of the Census Bureau. In accordance with section 602(b) of the CHIPRA, which added a new section 2109(b)(2)(B) of the Act, we will be working with the Secretary of the Commerce Department on appropriate adjustments to improve the Current Population Survey (CPS), or develop other data, to determine the CPGF.

k. CHIP Fiscal Year Allotment Process

As described above, the determination of the allotments for each fiscal year potentially involves the collection of relevant data, such as related to the allotment increase factor, or the consideration of additional information later or after the end of the fiscal year; for example, the determination of the FYs 2010, 2012, and 2014 allotments allows States to receive increases in their CHIP allotments to reflect the submission of certain expansions to their CHIP programs. In that regard, we are incorporating into the CHIP regulation a process, which the Secretary may elect to publish preliminary fiscal year allotments. Consequently, this process at the time the updated allotment amounts became available the Secretary would publish a final notice. For example, the CHIPRA legislation as amended by the Affordable Care Act, in the determination of the FYs 2010, 2012, and 2014 allotments, States can amend their CHIP programs to provide for certain expansions; the increase in expenditures for such expansions will serve to increase the amount of the State fiscal year allotments associated with the year of such expansions. As determined by the Secretary, the CHIP allotments for a fiscal year may need to be published first as "Preliminary Allotments" and then later as "Final Allotments" in the **Federal Register**. The proposed rule provided for the potential for a preliminary and final allotment to be determined.

B. Coordination of CHIP Funding for FY 2009

Before the enactment of CHIPRA, section 2104(a)(11) of the Act, as amended by MMSEA, appropriated $5 billion for purposes of providing FY 2009 allotments for States. The CHIP statute as amended by MMSEA and before the enactment of CHIPRA, funds were potentially available for allotment and obligation to States for their CHIP related expenditures in FY 2009 through March 31, 2009. Furthermore, section 2104(k) of the Act and section 2104(l) of the Act, as amended by MMSEA, provided for redistribution of the unexpended FY 2006 allotments in FY 2009, and for additional FY 2009 shortfall allotments in FY 2009, respectively. However, section 3(c)(1) of CHIPRA provides for a rescission of amounts of these funds that were not obligated before April 1, 2009. Also, section 3(c)(2) of CHIPRA requires that the FY 2009 allotments, as determined under section 2104(m)(1) of the Act as amended by CHIPRA, be reduced by the following amounts that were appropriated and obligated before April 1, 2009. Amounts appropriated and obligated before April 1, 2009 include the amounts of the FY 2009 allotments appropriated by section 2104(a)(11) of the Act, as amended by MMSEA and before the enactment of CHIPRA; amounts of FY 2006 redistributed allotments, provided in section 2104(k) of the Act; and, the amounts of the FY 2009 shortfall allotments, provided in section 2104(l) of the Act. Funding for Territories and Commonwealths under section 2104(c)(4) is not part of this coordination of funding. This coordination ensures that States' FY 2009 CHIP funding does not exceed the final FY 2009 CHIP allotments as determined under the CHIPRA.

C. FY 2009 Allotments Determined in Accordance With Such Methodologies and Procedures

We calculated the FY 2009 allotments for the States in accordance with the methodology described in section II.A. of the September 16, 2009 (74 FR 47517) proposed rule relating to the calculation of the fiscal year CHIP allotments, and in section II.B. of the same proposed rule. That calculation was contained in three tables described as Table 1 provided the calculation of the allotment increase factor for FY 2009, Table 2 provided the calculation of the FY 2009 allotment, and Table 3 provided the coordination of funds in FY 2009.

D. FY 2010 Allotments Determined in Accordance With Such Methodologies and Procedures

In accordance with the methodology described in section II.A.2.c. of this final rule, relating to the calculation of the FY 2010 CHIP allotments, and the availability of additional allotments, we calculated the FY 2010 allotments for the States. That calculation is contained in two tables described in section III of this final rule; Table 1 provides the calculation of the allotment increase factor for FY 2010, and Table 2 provides the calculation of the FY 2010 allotment.

E. FY 2011 Allotments Determined in Accordance With Such Methodologies and Procedures

In accordance with the methodology described in section II.A.2.d. of this final rule relating to the calculation of the fiscal year CHIP allotments, we calculated the FY 2011 allotments for the States. That calculation is contained in two tables described in section III of this final rule; Table 3 provides the calculation of the allotment increase factor for FY 2011, and Table 4 provides the calculation of the FY 2011 allotment, determined under the "rebasing" methodology.

F. Period of Availability for CHIP Allotments

Section 105 of CHIPRA amended section 2104(e) of the Act to revise the period of availability for expenditure by States of their CHIP fiscal year allotments. Before the enactment of CHIPRA, States' CHIP fiscal year allotments were available for expenditure by the State for three fiscal

years, the fiscal year in which they were initially allotted and the subsequent two fiscal years. Section 2104(e) of the Act, as amended by CHIPRA, now provides that each of the States' fiscal year allotments for *FYs 1998 through 2008* are available for expenditure by the State for *three fiscal years* and allotments for *FY 2009 and each succeeding fiscal year* are available for expenditure by the States for *two fiscal years;* the fiscal year in which they were initially allotted and the immediately subsequent fiscal year. In this final rule, we have amended the CHIP regulations at § 457.610 and added § 457.611 to reflect the three fiscal year and two fiscal year periods of availability, as applicable to fiscal years before FY 2009 and effective for FY 2009 and subsequent fiscal years, respectively.

G. Continuing Authority for Qualifying States to Use FY 2009 Through FY 2015 Allotments for Certain Medicaid Expenditures

Section 107 of CHIPRA amended the CHIP statute to add a new section 2105(g)(4) of the Act to allow certain "qualifying States" described in section 2105(g) of the Act to elect to use up to 100 percent of their available CHIP fiscal year allotments for FY 2009 and following fiscal years (through FY 2015, as amended by section 10203(d)(2) of the Affordable Care Act) for certain expenditures in Medicaid. Before the enactment of CHIPRA, States were only able to use up to 20 percent of their available fiscal year CHIP allotments for the applicable Medicaid expenditures. With the enactment of CHIPRA, beginning with the FY 2009 allotment, States can use up to 100 percent of their FY 2009 and following fiscal year allotments for the States' qualifying expenditures. In that case, only the Federal share portion of the expenditures which is above the amount that the State would have received under Medicaid will be applied against the CHIP allotment.

Under section 5001 of the American Recovery and Reinvestment Act of 2009 (ARRA, Pub. L. 111–5, enacted on February 17, 2009), and as further amended by the Public Law 111–226 (enacted on August 10, 2010), the FMAP has been increased during the 11-quarter period, October 1, 2009 through June 30, 2011 under the Medicaid program. Therefore, the amount of the Federal share funds that will be applied against the CHIP qualifying States' FY 2009 (and following) allotments will be reduced. For example, a qualifying State's regular Medicaid FMAP rate in FY 2009 is 50 percent, its increased FMAP under ARRA in Medicaid is 60.00 percent, and its CHIP EFMAP is 65.00 percent. The qualifying State will be able to claim the "qualifying" expenditures in FY 2009 at the 65.00 percent EFMAP rate in CHIP, and only 5 percent of such expenditures will apply against the State's FY 2009 allotment, calculated as 65.00 percent (CHIP EFMAP) minus 60.00 percent (increased FMAP under ARRA) claimable under the Medicaid program. In the same example (and assuming the same FMAP for Medicaid and EFMAP in CHIP), after June 30, 2011, 15.00 percent of the qualifying expenditure in FY 2011 will apply against the State's FY 2011 CHIP allotment, calculated as 65.00 percent (CHIP EFMAP) minus 50.00 percent (regular FMAP) claimable under the Medicaid program. We have amended the CHIP regulations to reflect this provision in this final rule.

H. Retrospective Adjustment of FY 2008 Shortfall Allotments

Section 2104(j)(5) of the Act, as amended by MMSEA provides for a potential retrospective adjustment with respect to the amounts of States' FY 2008 shortfall allotments provided to them in FY 2008 and based on expenditure reports for FY 2008 submitted and certified by States to CMS no later than November 30, 2008.

Under section 2104(j)(2) and (3)(A) of the Act, additional FY 2008 shortfall allotments were made available only to those 50 States and the District of Columbia that were initially determined to have a shortfall in CHIP funding in FY 2008 based on their FY 2008 expenditure projections as submitted and certified by the States by November 30, 2007. For those States, section 2104(j)(5) of the Act, the retrospective adjustment to the amounts of their additional FY 2008 shortfall allotments is based on the FY 2008 expenditure projections submitted and certified by such States by November 30, 2008.

Through the end of FY 2008 and based on States' estimated FY 2008 CHIP expenditures, we had provided approximately $1,201 million in total additional FY 2008 shortfall allotments to States to address their projected shortfalls in FY 2008. However, based on the States' actual FY 2008 expenditures, as submitted through November 30, 2008, the final States' shortfalls in FY 2008 were only approximately $995 million. That is, of those States who overestimated their projected shortfalls, final shortfalls for FY 2008 were about $232 million less than were previously estimated, and for States that underestimated their shortfalls, their actual shortfalls were about $26 million higher. Thus, the final net shortfall for States was about $995 million ($1,201 million minus $232 million plus $26 million). Table 4 of the proposed rule published in the **Federal Register** on September 16, 2009 (74 FR 47517) contained the final FY 2008 shortfall allotments after applying the retrospective adjustment under section 2104(j)(5) of the Act.

I. Retrospective Adjustment of FY 2009 Shortfall Allotments

Section 2104(l)(5) of the Act, as amended by MMSEA provides for a potential retrospective adjustment with respect to the amounts of States' FY 2009 shortfall allotments provided to them in FY 2009 prior to April 1, 2009 based on expenditure reports for the first two quarters of FY 2009 as submitted and certified by States to CMS no later than May 31, 2009.

Under section 2104(l)(2) and (3)(A) of the Act, additional FY 2009 shortfall allotments were made available to those States that were initially determined to have a shortfall in CHIP funding in FY 2009 based on their expenditure projections for the first two quarters of FY 2009 as submitted and certified by the States by November 30, 2008. For those States, section 2104(l)(5) of the Act, provided the retrospective adjustment to the amounts of their additional FY 2009 shortfall allotments is based on the FY 2009 expenditures for the first two quarters of FY 2009 as submitted and certified by such States by May 31, 2009.

Before April 1, 2009, and based on States' estimated FY 2009 CHIP expenditures through the end of the second quarter of FY 2009, we had provided approximately $267 million in total additional FY 2009 shortfall allotments to States to address their projected shortfalls in FY 2009 through the end of the second quarter FY 2009 in that amount. However, based on the States' actual FY 2009 expenditures for the first two quarters of FY 2009, as submitted through May 31, 2009, the final States' shortfalls in FY 2009 through the second quarter of FY 2009 for the shortfall States were only approximately $210 million. That is, for the shortfall States initially receiving the additional FY 2009 shortfall allotments, based on their actual FY 2009 reported expenditures for the first two quarters of FY 2009, their final shortfalls for the first two quarters of FY 2009 were about $58 million less than was previously estimated. Table 5 of the proposed rule published in the September 16, 2009 **Federal Register** (74 FR 47517) contained the final FY 2009 shortfall allotments after applying the

retrospective adjustment under section 2104(l)(5) of the Act.

III. Tables

Following are the keys and associated tables for the CHIP funding provisions as discussed in previous sections:

Table 1—Allotment Increase Factor for 2010

Table 2—FY 2010 Children's Health Insurance Program Allotments Under the Children's Health Insurance Program Reauthorization Act Of 2010

Table 3—Allotment Increase Factor for 2011

Table 4—FY 2011 Children's Health Insurance Program Allotments Under the Children's Health Insurance Program Reauthorization Act Of 2011.

A. Table 1—Allotment Increase Factor for 2010

Key to Table 1 Column/Description

Column A = *State*. Column A contains the name of the State, District of Columbia, U.S. Commonwealth or Territory.

Column B = *PCNHE 2009, PCNHE 2010, PCHCG Factor*. Column B contains the calculation of the Per Capita Health Care Growth (PCHCG) Factor for FY 2010, determined as 1 plus the percentage increase in the Per Capital National Health Expenditures (PCNHE) from calendar year 2009 to calendar year 2010.

Columns C through F = *Calculation of the Child Population Growth Factor (CPGF) for FY 2010:*

Column C = *July 1, 2009 Child Population*. Column C contains the population of children in each State or the United States as of July 1, 2009, as provided by the most recent published data of the Census Bureau before the beginning of FY 2010.

Column D = *July 1, 2010 Child Population*. Column D contains the population of children in each State or the United States as of July 1, 2010, as provided by the most recent published data of the Census Bureau before the beginning of FY 2010.

Column E = *Percent Increase 2009–2010*. Column E contains the percentage increase, if any, of the population of children in each State, or the United States, from July 1, 2009 to July 1, 2010, calculated as the difference between the number in Column D minus the number in Column C divided by the number in Column C.

Column F = *FY 2010 Child Population Growth Factor*. Column F contains the Child Population Growth Factor (CPGF) for each State, determined as 1.01 plus the percent in Column E for the State.

Column G = *FY 2010 Allotment Increase Factor*. Column G contains the FY 2010 Allotment Increase Factor, calculated as the PCHCG factor in Column B multiplied by the CPGF percent in Column F.

B. Table 2—FY 2010 Children's Health Insurance Program Allotments Under the Children's Health Insurance Program Reauthorization Act of 2009

Key to Table 2 Column/Description

Column A = *State*. Column A contains the name of the State, District of Columbia, U.S. Commonwealth or Territory.

Column B = *FY 2009 CHIP Allotments*. Column B contains, for the 50 States and the District of Columbia only, the States' FY 2009 CHIP allotments, as were published in the September 16, 2009 **Federal Register** (74 FR 47617).

Column C = *FY 2006 Redistributed Allotment Payments.* Column C contains for the 50 States and the District of Columbia only, the amounts of redistributed FY 2006 allotments provided in FY 2009 as determined under section 2104(k) of the Act.

Column D = *FY 2009 Additional Allotment Payments.* Column D contains the any additional allotment payments provided to the State in FY 2009 under the provisions of section 2104(l) of the Act, including the retrospective adjustments made under section 2104(l)(5) of the Act.

Column E = *FY 2009 Contingency Fund Payments.* Column E contains any contingency fund payments made to a State for FY 2009, if any, under the provisions of section 2104(n) of the Act.

Column F = *Total.* Column F contains the total of the amounts in Columns B, C, D, E, and F.

Column G = *FY 2010 Allotment Increase Factor.* Column G contains the Allotment Increase Factor for each State as contained in Column G of Table 1.

Column H = *FY 2010 Total × Increase Factor.* Column H contains the product of the total amount in Column F and the amount of the FY 2010 Allotment Increase Factor in Column G. This amount represents the FY 2010 CHIP allotment without the inclusion of any additional amounts available for the FY 2010 allotment indicated in Column I.

Column I = *Additional Amount Available for FY 2010 Allotment.* Column I contains, for the 50 States and the District of Columbia only, the amount of additional amounts available to increase the FY 2010 allotment, if any, as determined under the provisions of section 2014(m)(6) or (7) of the Act.

Column J = *Total FY 2010 Allotment.* Column J contains the total FY 2010 CHIP allotment, determined as the sum of the amounts in Column H and Column I, if any.

C. Table 3—Allotment Increase Factor for 2011

Key to Table 1 Column/Description

Column A = *State*. Column A contains the name of the State, District of Columbia, U.S. Commonwealth or Territory.

Column B = *PCNHE 2010, PCNHE 2011, PCHCG Factor*. Column B contains the calculation of the Per Capita Health Care Growth (PCHCG) Factor for FY 2011, determined as 1 plus the percentage increase in the Per Capital National Health Expenditures (PCNHE) from calendar year 2010 to calendar year 2011.

Columns C through F = *Calculation of the Child Population Growth Factor (CPGF) for FY 2011:*

Column C = *July 1, 2010 Child Population*. Column C contains the population of children in each State or the United States as of July 1, 2010, as provided by the most recent published data of the Census Bureau before the beginning of FY 2011.

Column D = *July 1, 2011 Child Population*. Column D contains the population of children in each State or the United States as of July 1, 2010, as provided by the most recent published data of the Census Bureau before the beginning of FY 2011.

Column E = *Percent Increase 2010–2011*. Column E contains the percentage increase, if any, of the population of children in each State, or the United States, from July 1, 2010 to July 1, 2011, calculated as the difference between the numbers in Column D minus the number in Column C divided by the number in Column C.

Column F = FY 2011 *Child Population Growth Factor.* Column F contains the Child Population Growth Factor (CPGF) determined as 1.01 plus the percent in Column E for the State.

Column G = *FY 2011 Allotment Increase Factor.* Column G contains the FY 2011 Allotment Increase Factor, calculated as the PCHCG factor in Column B multiplied by the CPGF percent in Column F.

D. Table 4—FY 2011 Children's Health Insurance Program Allotments Under the Children's Health Insurance Program Reauthorization Act of 2009

Key to Table 4

Column/Description

Column A = *State*. Column A contains the name of the State, District of Columbia, U.S. Commonwealth or Territory.

Column B = *FY 2010 FS Exp. Applied Against Allotments.* Column B contains the amounts of the Federal share expenditures that were applied against the State's available allotments in FY 2010.

Column C = *Contingency Fund Payments in FY 2010.* Column C contains the amounts of contingency fund payments made to the State in FY 2010, if any.

Column D = *Redistributed Allotments in FY 2010.* Column D contains the amounts of redistributed allotments provided to the State in FY 2010, if any.

Column E = *Total FY 2010 FS Expenditures.* Column E contains the sum of the total amounts of Federal Share expenditures applied against the States available allotments in FY 2010, Contingency Fund payments made in FY 2010, if any, and amounts of Redistributed Allotments in FY 2010, if any, calculated as the sum of the amounts in Columns B, C, and D.

Column F = *FY 2011 Allotment Increase Factor.* Column F contains the Allotment Increase Factor for each State as contained in Column G of Table 3.

Column G = *FY 2011 CHIP Allotment.* Column G contains the FY 2011 CHIP Allotment, calculated as the product of the total amount in Column E and the amount of the FY 2011 Allotment Increase Factor in Column F.

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Table 1 - FY 2010 Allotment Increase Factor

STATE	PCNHE* 2009 $8,160 PCNHE* 2010 $8,458 PCHCG Factor* 1.0365	Child Population Growth Factor (CPGF) for FY 2010				FY 2010 ALLOTMENT INCREASE FACTOR
		July 1, 2009 Population	July 1, 2010 Population	Percent Increase 2009 - 2010	FY 2010 CPGF Col E + 1.01	
				(D-C)/C		Col B x F
A	B	C	D	E	F	G
Alabama	1.0365	1,190,359	1,192,646	0.19%	101.19%	1.0489
Alaska	1.0365	188,599	187,685	0.00%	101.00%	1.0469
Arizona	1.0365	1,829,502	1,864,930	1.94%	102.94%	1.0670
Arkansas	1.0365	745,519	749,562	0.54%	101.54%	1.0525
California	1.0365	9,955,866	9,976,736	0.21%	101.21%	1.0491
Colorado	1.0365	1,290,075	1,310,373	1.57%	102.57%	1.0632
Connecticut	1.0365	857,987	852,532	0.00%	101.00%	1.0469
Delaware	1.0365	221,057	222,256	0.54%	101.54%	1.0525
District of Columbia	1.0365	121,080	120,782	0.00%	101.00%	1.0469
Florida	1.0365	4,226,239	4,219,170	0.00%	101.00%	1.0469
Georgia	1.0365	2,716,139	2,749,158	1.22%	102.22%	1.0595
Hawaii	1.0365	302,462	303,308	0.28%	101.28%	1.0498
Idaho	1.0365	441,426	447,326	1.34%	102.34%	1.0607
Illinois	1.0365	3,372,603	3,371,164	0.00%	101.00%	1.0469
Indiana	1.0365	1,673,220	1,674,982	0.11%	101.11%	1.0480
Iowa	1.0365	756,782	758,769	0.26%	101.26%	1.0496
Kansas	1.0365	743,988	749,557	0.75%	101.75%	1.0546
Kentucky	1.0365	1,065,154	1,067,039	0.18%	101.18%	1.0487
Louisiana	1.0365	1,184,061	1,192,675	0.73%	101.73%	1.0544
Maine	1.0365	288,217	284,503	0.00%	101.00%	1.0469
Maryland	1.0365	1,415,272	1,404,743	0.00%	101.00%	1.0469
Massachusetts	1.0365	1,517,725	1,511,312	0.00%	101.00%	1.0469
Michigan	1.0365	2,493,026	2,449,939	0.00%	101.00%	1.0469
Minnesota	1.0365	1,324,305	1,324,244	0.00%	101.00%	1.0469
Mississippi	1.0365	812,769	815,191	0.30%	101.30%	1.0500
Missouri	1.0365	1,499,003	1,497,080	0.00%	101.00%	1.0469
Montana	1.0365	233,985	235,048	0.45%	101.45%	1.0516
Nebraska	1.0365	474,674	477,489	0.59%	101.59%	1.0530
Nevada	1.0365	708,850	718,418	1.35%	102.35%	1.0609
New Hampshire	1.0365	307,340	303,136	0.00%	101.00%	1.0469
New Jersey	1.0365	2,156,056	2,147,558	0.00%	101.00%	1.0469
New Mexico	1.0365	534,017	536,718	0.51%	101.51%	1.0521
New York	1.0365	4,673,968	4,643,873	0.00%	101.00%	1.0469
North Carolina	1.0365	2,414,875	2,457,086	1.75%	102.75%	1.0650
North Dakota	1.0365	152,902	153,203	0.20%	101.20%	1.0489
Ohio	1.0365	2,865,334	2,843,969	0.00%	101.00%	1.0469
Oklahoma	1.0365	961,557	968,976	0.77%	101.77%	1.0549
Oregon	1.0365	923,294	930,398	0.77%	101.77%	1.0549
Pennsylvania	1.0365	2,925,260	2,904,746	0.00%	101.00%	1.0469
Rhode Island	1.0365	243,636	241,052	0.00%	101.00%	1.0469
South Carolina	1.0365	1,143,523	1,153,988	0.92%	101.92%	1.0564
South Dakota	1.0365	210,465	211,842	0.65%	101.65%	1.0537
Tennessee	1.0365	1,567,030	1,574,325	0.47%	101.47%	1.0517
Texas	1.0365	7,204,032	7,340,397	1.89%	102.89%	1.0665
Utah	1.0365	916,065	937,758	2.37%	103.37%	1.0714
Vermont	1.0365	136,222	134,265	0.00%	101.00%	1.0469
Virginia	1.0365	1,938,873	1,942,588	0.19%	101.19%	1.0489
Washington	1.0365	1,638,877	1,651,161	0.75%	101.75%	1.0547
West Virginia	1.0365	408,840	408,055	0.00%	101.00%	1.0469
Wisconsin	1.0365	1,387,170	1,383,049	0.00%	101.00%	1.0469
Wyoming	1.0365	138,140	140,560	1.75%	102.75%	1.0650
Total States	1.0365	78,497,420	78,737,320	0.30%	101.30%	1.0500
American Samoa	1.0365	28,110	27,929	0.00%	101.00%	1.0469
Guam	1.0365	62,331	62,461	0.21%	101.21%	1.0490
N. Mariana Islands	1.0365	17,108	15,897	0.00%	101.00%	1.0469
Puerto Rico	1.0365	1,026,441	1,009,250	0.00%	101.00%	1.0469
Virgin Islands	1.0365	29,175	28,373	0.00%	101.00%	1.0469
Total Territories	1.0365	1,163,165	1,143,910	0.00%	101.00%	1.0469
Total States/Territories	1.0365	79,660,585	79,881,230	0.28%	101.28%	1.0497

Footnotes:
*"PCNHE" is Per Capita National Health Expenditures
"PCHCG FACTOR" is "Per Capita Health Care Growth Factor", Calculated as:
1 + ($8,458 - $8,160)/$8,160; $8,160 is PCNHE for 2009 and $8,458 is PCNHE for 2010

TABLE 2 - CHILDREN'S HEALTH INSURANCE PROGRAM ALLOTMENTS FOR FY:									2010
STATE	FY 2009 CHIP Allotments /1	FY 2006 Redistributed Allotment Payments /2	FY 2009 Additional Allotment Payments /3	FY 2009 Contingency Fund Payments	Total Col B + C + D + E	FY 2010 Allotment Increase Factor	FY 2010 Tot. Fed. Pmts x Incr. Factor Col F x G	Additional Amount Available for FY 2010 Allotment /5	Total FY 2010 Allotment Col H + I
A	B	C	D	E	F	G	H	I	J
Alabama	$140,300,600	$0	$0	$0	$140,300,600	1.0489	$147,157,965	$0	$147,157,965
Alaska	$24,565,200	$0	$0	$0	$24,565,200	1.0469	$25,716,935	$0	$25,716,935
Arizona	$171,133,218	$0	$0	$0	$171,133,218	1.0670	$182,591,756	$0	$182,591,756
Arkansas	$133,752,696	$0	$0	$0	$133,752,696	1.0525	$140,775,504	$0	$140,775,504
California	$1,552,909,600	$0	$0	$0	$1,552,909,600	1.0491	$1,629,091,633	$0	$1,629,091,633
Colorado	$100,696,200	$0	$0	$0	$100,696,200	1.0632	$107,059,532	$15,792,228	$122,851,760
Connecticut	$45,644,506	$0	$0	$0	$45,644,506	1.0469	$47,784,540	$0	$47,784,540
Delaware	$15,096,397	$0	$0	$0	$15,096,397	1.0525	$15,889,061	$0	$15,889,061
District of Columbia	$14,180,255	$0	$0	$0	$14,180,255	1.0469	$14,845,093	$0	$14,845,093
Florida	$356,095,478	$0	$0	$0	$356,095,478	1.0469	$372,790,945	$0	$372,790,945
Georgia	$302,054,500	$0	$0	$0	$302,054,500	1.0595	$320,022,318	$0	$320,022,318
Hawaii	$20,888,564	$0	$0	$0	$20,888,564	1.0498	$21,928,480	$0	$21,928,480
Idaho	$44,514,800	$0	$0	$0	$44,514,800	1.0607	$47,218,571	$0	$47,218,571
Illinois	$344,561,804	$0	$0	$0	$344,561,804	1.0469	$360,716,517	$0	$360,716,517
Indiana	$137,584,700	$0	$0	$0	$137,584,700	1.0480	$144,185,508	$0	$144,185,508
Iowa	$65,255,300	$0	$0	$0	$65,255,300	1.0496	$68,492,373	$0	$68,492,373
Kansas	$57,163,700	$0	$0	$0	$57,163,700	1.0546	$60,287,325	$0	$60,287,325
Kentucky	$126,013,800	$0	$0	$0	$126,013,800	1.0487	$132,153,083	$0	$132,153,083
Louisiana	$207,402,800	$0	$9,861,967	$0	$217,264,767	1.0544	$229,089,499	$0	$229,089,499
Maine	$39,271,706	$0	$1,102,937	$0	$40,374,643	1.0469	$42,267,600	$0	$42,267,600
Maryland	$194,773,700	$0	$11,630,784	$0	$206,404,484	1.0469	$216,081,718	$0	$216,081,718
Massachusetts	$321,658,700	$11,182,289	$52,237,721	$0	$385,078,710	1.0469	$403,133,050	$0	$403,133,050
Michigan	$221,124,200	$0	$0	$0	$221,124,200	1.0469	$231,491,565	$0	$231,491,565
Minnesota	$83,960,234	$0	$0	$0	$83,960,234	1.0469	$87,896,693	$0	$87,896,693
Mississippi	$192,938,900	$0	$11,001,844	$0	$203,940,744	1.0500	$214,132,390	$0	$214,132,390
Missouri	$158,829,000	$0	$0	$0	$158,829,000	1.0469	$166,275,667	$0	$166,275,667
Montana	$32,989,000	$0	$0	$0	$32,989,000	1.0516	$34,691,026	$61,690,640	$96,381,666
Nebraska	$41,955,100	$0	$0	$0	$41,955,100	1.0530	$44,180,053	$8,798,433	$52,978,486
Nevada	$61,397,036	$0	$0	$0	$61,397,036	1.0609	$65,134,621	$0	$65,134,621
New Hampshire	$14,844,500	$0	$0	$0	$14,844,500	1.0469	$15,540,481	$0	$15,540,481
New Jersey	$505,395,000	$20,993,064	$79,929,758	$0	$606,317,822	1.0469	$634,744,914	$0	$634,744,914
New Mexico	$280,720,000	$3,591,754	$43,893,031	$0	$328,204,785	1.0521	$345,313,250	$0	$345,313,250
New York	$433,472,600	$0	$0	$0	$433,472,600	1.0469	$453,795,878	$0	$453,795,878
North Carolina	$241,660,100	$0	$0	$0	$241,660,100	1.0650	$257,368,666	$93,787,005	$351,155,671
North Dakota	$15,821,554	$0	$0	$0	$15,821,554	1.0489	$16,595,628	$0	$16,595,628
Ohio	$285,275,100	$0	$0	$0	$285,275,100	1.0469	$298,650,167	$0	$298,650,167
Oklahoma	$151,399,600	$0	$0	$0	$151,399,600	1.0549	$159,708,741	$0	$159,708,741
Oregon	$100,197,900	$0	$0	$0	$100,197,900	1.0549	$105,694,755	$175,363,884	$281,058,639
Pennsylvania	$310,308,900	$0	$0	$0	$310,308,900	1.0469	$324,857,672	$0	$324,857,672
Rhode Island	$69,525,150	$2,532,441	$0	$0	$72,057,591	1.0469	$75,435,997	$0	$75,435,997
South Carolina	$106,862,800	$0	$0	$0	$106,862,800	1.0564	$112,886,716	$0	$112,886,716
South Dakota	$20,655,800	$0	$0	$0	$20,655,800	1.0537	$21,764,322	$0	$21,764,322
Tennessee	$156,629,000	$0	$0	$0	$156,629,000	1.0517	$164,728,304	$0	$164,728,304
Texas	$867,350,000	$0	$0	$0	$867,350,000	1.0665	$925,033,169	$0	$925,033,169
Utah	$65,264,100	$0	$0	$0	$65,264,100	1.0714	$69,925,931	$0	$69,925,931
Vermont	$9,489,700	$0	$0	$0	$9,489,700	1.0469	$9,934,623	$0	$9,934,623
Virginia	$175,860,300	$0	$0	$0	$175,860,300	1.0489	$184,454,740	$0	$184,454,740
Washington	$94,285,111	$0	$0	$0	$94,285,111	1.0547	$99,438,161	$0	$99,438,161
West Virginia	$43,263,469	$0	$0	$0	$43,263,469	1.0469	$45,291,868	$0	$45,291,868
Wisconsin	$204,275,500	$0	$0	$0	$204,275,500	1.0469	$213,852,917	$0	$213,852,917
Wyoming	$11,326,700	$0	$0	$0	$11,326,700	1.0650	$12,063,423	$0	$12,063,423
States/DC Total	$9,372,594,578	$38,299,548	$209,658,042	$0	$9,620,552,168		$10,120,161,344	$355,432,190	$10,475,593,534
Commonwealths and Territories /4									
American Samoa	$852,152	$0	$0	$0	$852,152	1.0469	$892,105	$0	$892,105
Guam	$3,777,242	$0	$0	$0	$3,777,242	1.0490	$3,962,503	$0	$3,962,503
N. Mariana Islands	$781,139	$0	$0	$0	$781,139	1.0469	$817,763	$0	$817,763
Puerto Rico	$112,002,755	$0	$0	$0	$112,002,755	1.0469	$117,253,982	$0	$117,253,982
Virgin Islands	$2,289,167	$0	$0	$0	$2,289,167	1.0469	$2,396,494	$0	$2,396,494
Total	$119,702,455	$0	$0	$0	$119,702,455		$125,322,847	$0	$125,322,847
NATIONAL TOTAL	$9,492,297,033	$38,299,548	$209,658,042	$0	$9,740,254,623		$10,245,484,191	$355,432,190	$10,600,916,381

Footnotes:

/1 Final FY 2009 Allotments determined in accordance with section 1902(m)(4) of the Social Security Act(the Act)

/2 FY 2006 redistributed allotments in FY 2009 determined under section 2104(k) of the Act

/3 FY 2009 additional allotments determined under section 2104(l) of the Act, including retrospective adjustment under section 2104(l)(5) of the Act

/4 The total amount alloted to the Territories for FY 2009 included a total of $40,000,000 provided under section 2104(c)(4)(B) of the Act; such amount was in addition to the amount of the FY 2009 allotments determined and available under section 2104(m)(1)(B) of the Act. The FY 2010 allotments for the Territories, as provided under section 2104(m)(2)(A) of the Act, is determined based only on the amount of the Territories' FY 2009 allotments determined under section 2104(m)(1)(B) of the Act, a total of $119,702,455; such amount was not based on the $40,000,000 amount available only through FY 2009. There is no additional $40,000,000 available for allotment to the Territories for FY 2010 under section 2104(c)(4)(B) of the Act.

/5 Additional amount for FY 2010 allotment: For Colorado, Montana, Nebraska and Oregon determined under section 2104(m)(6) of the Act; for North Carolina, determined under section 2104(m)(7) of the Act

Table 3 - FY 2011 Allotment Increase Factor

STATE	PCNHE 2010 $8,290 PCNHE 2011 $8,643 PCHCG Factor* 1.0426	Child Population Growth Factor (CPGF) for FY 2011				FY 2011 ALLOTMENT INCREASE FACTOR
		July 1, 2010 Population	July 1, 2011 Population	Percent Increase 2009 - 2010 (D-C)/C	FY 2011 CPGF Col E + 1.01	Col B x F
A	B	C	D	E	F	G
Alabama	1.0426	1,195,649	1,197,428	0.15%	101.15%	1.0546
Alaska	1.0426	195,481	197,114	0.84%	101.84%	1.0617
Arizona	1.0426	1,836,192	1,853,452	0.94%	101.94%	1.0628
Arkansas	1.0426	753,695	757,899	0.56%	101.56%	1.0588
California	1.0426	10,016,933	10,059,217	0.42%	101.42%	1.0574
Colorado	1.0426	1,313,119	1,332,393	1.47%	102.47%	1.0683
Connecticut	1.0426	854,734	850,233	0.00%	101.00%	1.0530
Delaware	1.0426	220,278	220,860	0.26%	101.26%	1.0558
District of Columbia	1.0426	125,030	126,109	0.86%	101.86%	1.0620
Florida	1.0426	4,282,351	4,279,319	0.00%	101.00%	1.0530
Georgia	1.0426	2,746,697	2,770,529	0.87%	101.87%	1.0621
Hawaii	1.0426	307,375	309,159	0.58%	101.58%	1.0591
Idaho	1.0426	446,346	450,097	0.84%	101.84%	1.0618
Illinois	1.0426	3,362,106	3,362,523	0.01%	101.01%	1.0531
Indiana	1.0426	1,679,271	1,678,815	0.00%	101.00%	1.0530
Iowa	1.0426	757,430	758,969	0.20%	101.20%	1.0551
Kansas	1.0426	748,452	752,898	0.59%	101.59%	1.0592
Kentucky	1.0426	1,072,878	1,074,033	0.11%	101.11%	1.0541
Louisiana	1.0426	1,195,354	1,201,825	0.54%	101.54%	1.0587
Maine	1.0426	284,448	280,037	0.00%	101.00%	1.0530
Maryland	1.0426	1,432,364	1,430,806	0.00%	101.00%	1.0530
Massachusetts	1.0426	1,528,515	1,526,838	0.00%	101.00%	1.0530
Michigan	1.0426	2,457,188	2,420,923	0.00%	101.00%	1.0530
Minnesota	1.0426	1,332,649	1,333,441	0.06%	101.06%	1.0536
Mississippi	1.0426	811,592	812,248	0.08%	101.08%	1.0538
Missouri	1.0426	1,511,476	1,509,752	0.00%	101.00%	1.0530
Montana	1.0426	232,744	232,484	0.00%	101.00%	1.0530
Nebraska	1.0426	480,843	484,315	0.72%	101.72%	1.0605
Nevada	1.0426	718,215	722,709	0.63%	101.63%	1.0595
New Hampshire	1.0426	303,883	299,803	0.00%	101.00%	1.0530
New Jersey	1.0426	2,154,517	2,151,634	0.00%	101.00%	1.0530
New Mexico	1.0426	544,483	550,463	1.10%	102.10%	1.0645
New York	1.0426	4,685,203	4,668,942	0.00%	101.00%	1.0530
North Carolina	1.0426	2,434,939	2,461,231	1.08%	102.08%	1.0643
North Dakota	1.0426	154,871	155,853	0.63%	101.63%	1.0596
Ohio	1.0426	2,854,307	2,835,537	0.00%	101.00%	1.0530
Oklahoma	1.0426	981,469	993,045	1.18%	102.18%	1.0653
Oregon	1.0426	927,049	931,391	0.47%	101.47%	1.0579
Pennsylvania	1.0426	2,941,287	2,925,214	0.00%	101.00%	1.0530
Rhode Island	1.0426	241,646	239,370	0.00%	101.00%	1.0530
South Carolina	1.0426	1,154,490	1,161,575	0.61%	101.61%	1.0594
South Dakota	1.0426	212,193	213,522	0.63%	101.63%	1.0595
Tennessee	1.0426	1,581,977	1,587,767	0.37%	101.37%	1.0568
Texas	1.0426	7,387,811	7,526,972	1.88%	102.88%	1.0726
Utah	1.0426	932,060	950,855	2.02%	103.02%	1.0740
Vermont	1.0426	133,972	132,151	0.00%	101.00%	1.0530
Virginia	1.0426	1,970,352	1,982,054	0.59%	101.59%	1.0592
Washington	1.0426	1,671,093	1,685,645	0.87%	101.87%	1.0621
West Virginia	1.0426	409,792	409,173	0.00%	101.00%	1.0530
Wisconsin	1.0426	1,386,200	1,382,964	0.00%	101.00%	1.0530
Wyoming	1.0426	142,978	146,372	2.37%	103.37%	1.0778
Total States	1.0426	79,105,977	79,377,958	0.34%	101.34%	1.0566
American Samoa	1.0426	27,929	27,669	0.00%	101.00%	1.0530
Guam	1.0426	62,461	62,538	0.12%	101.12%	1.0543
N. Mariana Islands	1.0426	15,897	14,968	0.00%	101.00%	1.0530
Puerto Rico	1.0426	1,004,491	986,362	0.00%	101.00%	1.0530
Virgin Islands	1.0426	28,346	27,563	0.00%	101.00%	1.0530
Total Territories	1.0426	1,139,124	1,119,100	0.00%	101.00%	1.0530
Total States/Territories	1.0426	80,245,101	80,497,058	0.31%	101.31%	1.0563

Footnotes:
*"PCNHE" is Per Capita National Health Expenditures
"PCHCG FACTOR" is "Per Capita Health Care Growth Factor", Calculated as:
1 + ($8,643 - $8,290)/$8,290; $8,290 is PCNHE 2010 and $8,643 is PCNHE 2011

Table 4 - CHILDREN'S HEALTH INSURANCE PROGRAM ALLOTMENT FOR FY:						2011
STATE	FY 2010 FS Expenditures Applied Against Allotments*	Contingency Fund Payments in FY 2010	Redistributed Allotments in FY 2010	Total FY 2010 FS Expenditures Col B + C + D	FY 2011 Allotment Increase Factor	FY 2011 CHIP Allotment Col E x F
A	B	C	D	E	F	G
Alabama	$128,440,865	$0	$0	$128,440,865	1.0546	$135,448,405
Alaska	$18,677,459	$0	$0	$18,677,459	1.0617	$19,830,170
Arizona	$57,830,078	$0	$0	$57,830,078	1.0628	$61,462,234
Arkansas	$85,805,399	$0	$0	$85,805,399	1.0588	$90,852,696
California	$1,186,764,601	$0	$0	$1,186,764,601	1.0574	$1,254,894,664
Colorado	$115,601,855	$0	$0	$115,601,855	1.0683	$123,498,650
Connecticut	$29,743,148	$0	$0	$29,743,148	1.0530	$31,319,750
Delaware	$12,853,306	$0	$0	$12,853,306	1.0558	$13,570,030
District of Columbia	$11,289,463	$0	$0	$11,289,463	1.0620	$11,989,462
Florida	$308,517,594	$0	$0	$308,517,594	1.0530	$324,871,259
Georgia	$225,383,296	$0	$0	$225,383,296	1.0621	$239,369,074
Hawaii	$31,402,114	$0	$0	$31,402,114	1.0591	$33,256,672
Idaho	$34,099,448	$0	$0	$34,099,448	1.0618	$36,205,733
Illinois	$259,426,431	$0	$0	$259,426,431	1.0531	$273,211,456
Indiana	$89,780,481	$0	$0	$89,780,481	1.0530	$94,539,496
Iowa	$71,553,044	$0	$0	$71,553,044	1.0551	$75,497,451
Kansas	$52,741,906	$0	$0	$52,741,906	1.0592	$55,864,250
Kentucky	$122,945,604	$0	$0	$122,945,604	1.0541	$129,600,603
Louisiana	$175,713,531	$0	$0	$175,713,531	1.0587	$186,019,342
Maine	$33,703,224	$0	$0	$33,703,224	1.0530	$35,489,739
Maryland	$160,281,925	$0	$0	$160,281,925	1.0530	$168,778,027
Massachusetts	$300,999,705	$0	$0	$300,999,705	1.0530	$316,954,868
Michigan	$114,880,311	$0	$0	$114,880,311	1.0530	$120,969,799
Minnesota	$19,454,808	$0	$0	$19,454,808	1.0536	$20,498,108
Mississippi	$152,439,816	$0	$0	$152,439,816	1.0538	$160,648,691
Missouri	$107,037,283	$0	$0	$107,037,283	1.0530	$112,711,034
Montana	$36,529,632	$0	$0	$36,529,632	1.0530	$38,465,967
Nebraska	$36,719,692	$0	$0	$36,719,692	1.0605	$38,942,532
Nevada	$22,725,505	$0	$0	$22,725,505	1.0595	$24,078,374
New Hampshire	$12,175,306	$0	$0	$12,175,306	1.0530	$12,820,685
New Jersey	$562,377,795	$0	$0	$562,377,795	1.0530	$592,187,888
New Mexico	$230,626,135	$0	$0	$230,626,135	1.0645	$245,491,788
New York	$499,365,983	$0	$0	$499,365,983	1.0530	$525,835,994
North Carolina	$359,249,180	$0	$0	$359,249,180	1.0643	$382,336,267
North Dakota	$14,399,213	$0	$0	$14,399,213	1.0596	$15,257,665
Ohio	$263,972,238	$0	$0	$263,972,238	1.0530	$277,964,677
Oklahoma	$113,009,015	$0	$0	$113,009,015	1.0653	$120,388,959
Oregon	$86,116,203	$0	$0	$86,116,203	1.0579	$91,101,501
Pennsylvania	$305,645,638	$0	$0	$305,645,638	1.0530	$321,847,069
Rhode Island	$28,817,047	$0	$0	$28,817,047	1.0530	$30,344,559
South Carolina	$92,529,778	$0	$0	$92,529,778	1.0594	$98,026,552
South Dakota	$18,939,715	$0	$0	$18,939,715	1.0595	$20,067,331
Tennessee	$127,008,451	$0	$0	$127,008,451	1.0568	$134,225,460
Texas	$776,318,012	$0	$0	$776,318,012	1.0726	$832,714,327
Utah	$59,510,267	$0	$0	$59,510,267	1.0740	$63,915,866
Vermont	$5,502,112	$0	$0	$5,502,112	1.0530	$5,793,764
Virginia	$165,440,327	$0	$0	$165,440,327	1.0592	$175,234,257
Washington	$42,713,979	$0	$0	$42,713,979	1.0621	$45,365,924
West Virginia	$39,190,968	$0	$0	$39,190,968	1.0530	$41,268,373
Wisconsin	$97,561,547	$0	$0	$97,561,547	1.0530	$102,733,015
Wyoming	$9,267,890	$0	$0	$9,267,890	1.0778	$9,988,524
States/DC Total	$7,913,078,323	$0	$0	$7,913,078,323		$8,373,748,981
Commonwealths and Territories						
American Samoa	$892,105	$0	$0	$892,105	1.0530	$939,393
Guam	$3,962,503	$0	$0	$3,962,503	1.0543	$4,177,637
N. Mariana Islands	$817,763	$0	$0	$817,763	1.0530	$861,110
Puerto Rico	$94,554,476	$0	$0	$94,554,476	1.0530	$99,566,548
Virgin Islands	$0	$0	$0	$0	1.0530	$0
Total	$100,226,847	$0	$0	$100,226,847		$105,544,688
NATIONAL TOTAL	$8,013,305,170	$0	$0	$8,013,305,170		$8,479,293,669

Footnotes:

* FY 2010 expenditures based on the expenditures reported for the 4 quarters of FY 2010 and the associated Federal payments attributable and countable towards States' allotments available in FY 2010

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V. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment on the proposed rule. This procedure can be waived, however, if an agency finds good cause that a notice-and-comment procedure is impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued.

As discussed above, on September 16, 2009, we issued a proposed rule that set forth the methodologies and procedures to determine CHIP allotments in accordance with applicable federal laws on that date. Since that date, the Affordable Care Act was enacted into law. The Affordable Care Act made technical changes to the CHIP funding provisions and extended CHIP funding through the end of federal fiscal year 2015. The Affordable Care Act did not make any fundamental changes to the overall funding mechanism. Because there was no fundamental change to the funding mechanism, we believe it is unnecessary to reopen for public comment the methodologies and procedures to determine CHIP allotments set out in the proposed rule and made final in this rule. The changes made in the Affordable Care Act to extend the period of funding do not open up any new issues or concerns as to the calculation methodology or procedures.

Therefore, we find good cause to waive the notice of proposed rulemaking and to issue this final rule.

VI. Collection of Information Requirements

This document does not impose any information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 35).

VII. Regulatory Impact Analysis

A. Overall

We have examined the impacts of this final rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), the Regulatory Flexibility Act (RFA) (September 19, 1980, Public Law 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). We have determined that this final rule is economically significant, since it provides the methodologies under which State allotments for FYs 2009 through 2015 are calculated. In particular, this final rule implements the CHIP statute as amended by CHIPRA and the Affordable Care Act, under which approximately up to $74 billion in additional Federal funds may be made available for FYs 2009 through 2016 in addition to the amount of funds previously appropriated for States' CHIPs in accordance with the methodology established in the CHIP statute. This final rule also includes the actual State fiscal year CHIP allotments for FYs 2010 and 2011 determined in accordance with the methodology set out in this final rule. The methodologies for determining the States' CHIP allotments was established in accordance with the methodologies specified in statute and does not put forward any discretionary administrative policies for determining such allotments. Therefore, we have determined that there are no policy options that require an analysis beyond that which is presented in section II of this final rule.

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, we estimate that most hospitals and most other providers and suppliers are small entities as that term is used in the RFA nonprofit organizations. The great majority of hospitals and most other health care providers and suppliers are small entities, either by being nonprofit organizations or by meeting the SBA definition of a small business having revenues of less than $7.0 million to $34.5 million in any 1 year. Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined that this final rule will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. We are not preparing an analysis for section 1102(b) of the Act because we have determined that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2011, that threshold is approximately $136 million. This final rule will not create an unfunded mandate on States, tribal, or local governments in the aggregate, or by the private sector in the amount of $136 million in any one year.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have determined that this final rule will not significantly affect States' rights, roles, and responsibilities.

Low-income children will benefit from payments under this program through increased opportunities for health insurance coverage. We believe this final rule will have an overall positive impact by informing States, the District of Columbia, and Commonwealths and Territories of the extent to which they are permitted to expend funds under their child health plans using the additional funds provided by the FY 2009 allotment amounts.

B. Anticipated Effects

1. Effects on the CHIP program. This final rule provides the methodologies established in accordance with the CHIP statute, for determining the amounts of States' CHIP FY allotments through FY 2015. In accordance with such methodologies, CMS will determine and issue CHIP allotments to States each FY. States will be able to administer their CHIP programs with the appropriate levels of funding made available determined in accordance with the methodologies provided in this rule.

2. Effects on other entities. This final rule will have no effects on other entities; it is only promulgating the methodologies for determining the amounts of States' CHIP allotments.

C. Anticipated Effects

1. Effects on the CHIP program. This final rule provides the methodologies established in accordance with the CHIP statute, for determining the amounts of States' CHIP FY 2009 allotments through FY 2015. In accordance with such methodologies, CMS will determine and issue CHIP allotments to States each FY. States will be able to administer their CHIP programs with the appropriate levels of funding made available determined in accordance with the methodologies provided in this rule.

2. Effects on other entities. This final rule will have no effects on other entities; it is only promulgating the methodologies for determining the amounts of States' CHIP allotments.

D. Alternatives Considered

The methodologies for determining the States' fiscal year CHIP allotments, as reflected in the previously published proposed rule, and in final rule, were established in accordance with the methodologies and formula for determining States' allotments as specified in statute. As indicated above, the only comments we received with respect to proposed rule either agreed with the substance of the proposed rule or were outside the scope of the rule. This final rule does not put forward any further discretionary administrative policies for determining such allotments. The main difference from the notice of proposed rule published in the Federal Register on September 16, 2009, is that this final rule reflects the extension of funding for the CHIP and associated conforming changes in the CHIP statute for determining States' FY allotments, as amended by the Affordable Care Act.

E. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), in Table 6, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this rule. This table provides our best impact estimate of the rule, as it implements the CHIP statute as amended by CHIPRA, under which approximately up to $74 billion in additional Federal funds may be made available for fiscal years 2009 through 2015, in addition to the amount of funds previously appropriated for States' CHIPs. All expenditures are classified as transfers from the Federal Government to States.

TABLE 6—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM FY 2009 TO FY 2015

[In $millions]

Category	Transfers			
	Year dollar	Units discount rate		Period covered
		7%	3%	
Annualized Monetized Transfers	2009	$13,348.90	$13,381.15	FYs 2009–2015.
From Whom To Whom?	Federal Government to States			

In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 457

Administrative practice and procedure, Grant programs—health, Health insurance, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 457—ALLOTMENTS AND GRANTS TO STATES

■ 1. The authority citation for part 457 continues to read as follows:

Authority: Section 1102 of the Social Security Act (42 U.S.C. 1302).

Subpart F—Payments to States

§ 457.600 [Amended]

■ 2. Amend § 457.600(a) by removing the date "2007" and adding in its place "2015".

§ 457.608 [Amended]

■ 3. Amend the section heading in § 457.608 by removing the phrase "for a fiscal year" and adding in its place "prior to FY 2009".

■ 4. Section 457.609 is added to subpart F to read as follows:

§ 457.609 Process and calculation of State allotments for a fiscal year after FY 2008.

(a) *General.* For each of the 50 States and the District of Columbia and for each Commonwealth and Territory with an approved State child health plan, the State allotments for FY 2009 through FY 2015 are determined by CMS as described in paragraphs (b) through (g) of this section. Unless otherwise indicated in this section, the reference to "State" refers to the 50 States and the District of Columbia and the Commonwealths and Territories (American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands).

(b) *Amounts available for allotment.* The total amounts available for allotment for each fiscal year are as follows:

(1) FY 2009: $10,562,000,000.

(2) FY 2010: $12,520,000,000.

(3) FY 2011: $13,459,000,000.

(4) FY 2012: $14,982,000,000.

(5) FY 2013: $17,406,000,000.

(6) FY 2014: $19,147,000,000.

(7) FY 2015, for the period beginning October 1, 2014 and ending March 31, 2015, the following amounts are available for allotment:

(i) $2,850,000,000.

(ii) 15,361,000,000.

(8) FY 2015, for the period beginning April 1, 2013 and ending on September 30, 2013, $2,850,000,000.

(c) *Determination of a State allotment for FY 2009.*

(1) *For the 50 States and the District of Columbia.* From the amount in paragraph (b)(1) of this section as appropriated for the fiscal year under section 2104(a) of the Act, subject to paragraph (e) related to proration, and paragraph (c)(3) of this section relating to coordination of funding, the allotment for FY 2009 is equal to 110 percent of the highest of the following amounts for each State and the District of Columbia:

(i) The total Federal payments to the State under title XXI of the Act for FY 2008 as reported by the State and

certified to the Secretary through the November 2008 submission of the quarterly expenditure reports, Forms CMS–21 (OMB # 0938–0731) and CMS–64 (OMB # 0938–0067), multiplied by the allotment increase factor determined under paragraph (f) of this section.

(ii) The amount allotted to the State for FY 2008, multiplied by the allotment increase factor determined under paragraph (f) of this section;

(iii) The projected total Federal payments to the State under title XXI of the Act for FY 2009, subject to paragraph (c)(1)(iv) of this section, as determined based on the February 2009 projections certified by the State to CMS by no later than March 31, 2009.

(iv) In the case of a State described in section 2105(g) of the Act and electing the option under paragraph (4) of such section, for purposes of the projections described in paragraph (c)(1)(iii) of this section, such projections would include an amount equal to the difference between the following amounts:

(A) the amount of Federal payments for the expenditures described in section 2105(g)(4)(B) of the Act made after February 4, 2009 that would have been paid to the State if claimed at the enhanced Federal medical assistance percentage determined under section 2105(b) of the Act.

(B) the amount of Federal payments for the expenditures described in section 2105(g)(4)(B) of the Act made after February 4, 2009 that would have been paid to the State if claimed at the Federal medical assistance percentage defined in section 1905(b) of the Act; during the recession adjustment period described in section 5001(h) of the American Recovery and Reinvestment Act of 2009 (ARRA), as amended the Federal medical assistance percentage is as determined for the State under section 5001 of ARRA.

(2) *For the Commonwealths or Territories.*

(i) From the amount in paragraph (b)(1) of this section, as appropriated for the FY 2009 under section 2104(a) of the Act, subject to paragraph (e) of this section related to proration, and paragraph (c)(3) of this section relating to coordination of funding, an amount equal to the highest amount of Federal payments made to the Commonwealth or Territory under title XXI of the Social Security Act for any fiscal year occurring during the period for FY 1999 through FY 2008, multiplied by the allotment increase factor determined under paragraph (f) of this section, plus the additional amount for the fiscal year specified in paragraph (c)(2)(ii) of this section.

(ii) *Additional Amounts for FY 2009.* From the amount appropriated for the fiscal year under section 2104(c)(4)(B) of the Act, the additional amount for each Commonwealth or Territory is equal to $40,000,000 multiplied by the following percentage as specified in section 2104(c)(2) of the Act:

(A) For Puerto Rico, 91.6 percent.

(B) For Guam, 3.5 percent.

(C) For the Virgin Islands, 2.6 percent.

(D) For American Samoa, 1.2 percent.

(E) For the Northern Mariana Islands, 1.1 percent.

(3) *Coordination of CHIP Funding for FY 2009.* The amount of the CHIP allotment for FY 2009 available for payment for a States' expenditures may be reduced by the amounts appropriated and obligated before April 1, 2009 for States' FY 2009 allotments, FY 2006 allotments redistributed to the State in FY 2009 determined under section 2104(k) of the Act, and the amounts of additional FY 2009 shortfall allotments determined under section 2104(l) of the Act.

(d) *Determination of a State allotment for FY 2010 through FY 2015.*

(1) *General.* Subject to the provisions of paragraph (e) of this section relating to proration and paragraph (g) of the section relating to increases in a fiscal year allotment for approved program expansions, the State allotments for FY 2010 through FY 2015 are determined as follows.

(2) *Determination of a State Allotment for FY 2010.* (i) For the 50 States and the District of Columbia, and for the Commonwealths and Territories subject to paragraph (d)(2)(ii) of this section, the State allotment for FY 2010 is equal to the product of the following:

(A) The sum of:

(*1*) The State Allotment for FY 2009, as determined under paragraph (c) of the section.

(*2*) The amount of any Federal payments made as redistributions of unexpended FY 2006 allotments under section 2104(k) of the Act.

(*3*) The amount of any Federal payments made as additional FY 2009 allotments under section 2104(l) of the Act.

(*4*) The amount of any Federal payments made as contingency fund payments for FY 2009 under section 2104(n) of the Act.

(B) The State allotment increase factor for FY 2010 as determined under paragraph (f) of the section.

(ii) In determining the amount of the FY 2010 allotment for each Commonwealth and Territory, for purposes of determining the amount of the FY 2009 allotment under paragraph (d)(2)(i)(A)(1) of this section, the amount of such FY 2009 allotment will not include the additional amount determined under paragraph (c)(2)(ii).

(3) *Determination of a State Allotment for FY 2011.* For the 50 States and the District of Columbia, and the Commonwealths and Territories, the State allotment for FY 2011 is equal to the product of:

(i) The amount of Federal payments attributable and countable toward the available State allotments in FY 2010, including:

(A) Any amount redistributed to the State in FY 2010, and

(B) Any Federal payments made as contingency fund payments for FY 2010 under section 2104(n) of the Act.

(ii) The State allotment increase factor for FY 2011 as determined under paragraph (f) of the section.

(4) *Determination of a State Allotment for FY 2012.* For the 50 States and the District of Columbia, and the Commonwealths and Territories, the State allotment for FY 2012 is equal to the product of:

(i) The sum of:

(A) The State Allotment for FY 2011, as determined under paragraph (d)(3) of this section.

(B) The amount of any Federal payments made as contingency fund payments for FY 2011 under section 2104(n) of the Act.

(ii) The State allotment increase factor for FY 2012 as determined under paragraph (f) of this section.

(5) *Determination of a State Allotment for FY 2013.* For the 50 States and the District of Columbia, and the Commonwealths and Territories, the State allotment for FY 2013 is equal to the product of:

(i) The amount of Federal payments attributable and countable toward the available State allotments in FY 2012, including:

(A) Any amount redistributed to the State in FY 2012, and

(B) Any Federal payments made as contingency fund payments for FY 2012 under section 2104(n) of the Act.

(ii) The State allotment increase factor for FY 2013 as determined under paragraph (f) of the section.

(6) *Determination of a State Allotment for FY 2014.* For the 50 States and the District of Columbia, and the Commonwealths and Territories, the State allotment for FY 2014 is equal to the product of:

(i) The sum of:

(A) The State Allotment for FY 2013, as determined under paragraph (d)(5) of this section.

(B) The amount of any Federal payments made as contingency fund payments for FY 2013 under section 2104(n) of the Act.

(ii) The State allotment increase factor for FY 2014 as determined under paragraph (f) of this section.

(7) *Determination of a State Allotment for FY 2015.*

(i) *General.* There are two State allotments for FY 2015; one for the period beginning October 1, 2014 and ending March 31, 2015 and the second beginning April 1, 2015 and ending September 30, 2015. These State allotments are determined for each of the 50 States and the District of Columbia, and the Commonwealths and Territories.

(ii) The State allotment for FY 2015 for the period October 1, 2014 and ending March 31, 2015 is determined as the product of the following:

(A) The first half ratio determined as the amount in paragraph (d)(7)(ii)(A)(*1*) of this section divided by the amount in paragraph (d)(7)(ii)(A)(*2*) of this section as follows:

(*1*) $18,211,000,000 (calculated as the sum of the amount in paragraph (b)(7)(i) of this section, $2,850,000,000 (appropriated in section 2104(a)(18)(A) of the Act) and the amount in paragraph (b)(7)(ii) of this section, $15,361,000,000 (appropriated in section 108 of Pub. L. 111–3, as amended by section 10203 of Pub. L. 111–148)).

(*2*) $21,061,000,000, determined as the sum of the amount determined in paragraph (*1*) of this section, $18,211,000,000, and $2,850,000,000, the amount in paragraph (b)(8) of this section, as appropriated in section 2104(a)(18)(B) of the Act, as amended by section 10203 Of Public Law 111–148.

(B) The product of:

(*1*) The amount of Federal payments attributable and countable toward the total amount of available State allotments in FY 2014, to include:

(*i*) Any amount redistributed to the State in FY 2014; and

(*ii*) Any Federal payments made as contingency fund payments for FY 2014 under section 2104(n) of the Act.

(*2*) The State allotment increase factor for FY 2015 as determined under paragraph (f) of this section.

(iii) The State allotment for FY 2015 for the period April 1, 2015 and ending September 30, 2015 is determined as the product of the following:

(A) $2,850,000,000 the amount in paragraph (b)(8) of this section, as appropriated in section 2104(a)(18)(B) of the Act; and

(B) The ratio determined as the amount in paragraph (d)(7)(iii)(B)(*1*) of this section divided by the amount in paragraph (d)(7)(iii)(B)(*2*) of this section:

(*1*) The amount of the State allotment determined in paragraph (d)(7)(ii) of this section.

(*2*) The total of all the State allotments determined in paragraph (d)(7)(ii) of this section.

(e) *Proration.*

(1) If for a fiscal year the sum of the State allotments for the 50 States and the District of Columbia, and the State allotments for the Commonwealths and Territories (not including the additional amount for FY 2009 determined under paragraph (c)(2)(ii) of this section), exceeds the total amount available for allotment for the fiscal year in paragraph (b) of this section, the amount of the allotment for each of the 50 States and the District of Columbia, and for each of the Commonwealths and Territories (not including the additional amount for FY 2009 determined under paragraph (c)(2)(ii) of this section) will be reduced on a proportional basis as indicated in paragraph (e)(2) of this section.

(2) The amount of the allotment for each of the 50 States and the District of Columbia, and for each of the Commonwealths and Territories (not including the additional amount for FY 2009 determined in paragraph (c)(2)(ii) of this section) is equal to the product of:

(i) The percentage determined by dividing the amount in paragraph (e)(2)(i)(A) by the amount in paragraph (e)(2)(i)(B) of this section.

(A) The amount of the State allotment for each of the 50 States and the District of Columbia, and for each of the Commonwealths and Territories (not including the additional amount for FY 2009 determined under paragraph (c)(2)(ii) of this section).

(B) The sum of the amounts for each of the 50 States and the District of Columbia, and the Commonwealths and Territories in paragraph (e)(2)(i) of this section.

(ii) The total amount available for allotment for the fiscal year under paragraph (b) of this section.

(f) *Allotment increase factor.* The allotment increase factor for a fiscal year is equal to the product of the following:

(1) Per capita health care growth factor. The per capita health care growth factor for a fiscal year is equal to 1 plus the percentage increase in the projected per capita amount of the National Health Expenditures from the calendar year in which the previous fiscal year ends to the calendar year in which the fiscal year involved ends, as most recently published by CMS before the beginning of the fiscal year involved.

(2) *Child Population Growth Factor* (CPGF). The CPGF for a fiscal year is equal to 1 plus the percentage increase (if any) in the population of children in the State from July 1 in the previous fiscal year to July 1 in the fiscal year involved, as determined by CMS based on the most recent published estimates of the Census Bureau available before the beginning of the fiscal year involved plus 1 percentage point. For purposes of determining the CPGF for FY 2009 for the Commonwealths and Territories only, in applying the previous sentence, "United States" is substituted for "the State".

(g) *Increase in State allotment for the 50 States and the District of Columbia for FY 2010 through FY 2015 to account for approved program expansions.* In the case of the 50 States and the District of Columbia, the State allotment for FY 2010 through FY 2015, as determined in accordance with the provisions of this section, may be increased under the following conditions and amounts:

(1) The State has submitted to the Secretary, and has approved by the Secretary a State plan amendment or waiver request relating to an expansion of eligibility for children or benefits under title XXI of the Act that becomes effective for a fiscal year (beginning with FY 2010 and ending with FY 2015).

(2) The State has submitted to the Secretary, before the August 31 preceding the beginning of the fiscal year, a request for an expansion allotment adjustment under this paragraph for such fiscal year that specifies.

(i) The additional expenditures that are attributable to the eligibility or benefit expansion provided under the amendment or waiver described in paragraph (g)(1) of this section, as certified by the State and submitted to the Secretary by not later than August 31 preceding the beginning of the fiscal year.

(ii) The extent to which such additional expenditures are projected to exceed the allotment of the State or District for the year.

(3) Subject to paragraph (e) of this section relating to proration, the amount of the allotment of the State or District under this section for such fiscal year shall be increased by the excess amount described in paragraph (g)(2)(i)of this section. A State or District may only obtain an increase under paragraph (g)(2)(ii) of this section for an allotment for FY 2010, FY 2012, or FY 2014.

(h) *CHIP Fiscal Year Allotment Process.* As determined by the Secretary, the CHIP allotments for a fiscal year may be published as Preliminary Allotments or Final Allotments in the **Federal Register**.

§ 457.610 [Amended]

■ 5. Amend the section heading for § 457.610 by—

■ A. Amending the section heading by removing the phrase "for a fiscal year" and adding in its place "prior to FY 2009".

■ B. Removing the phrase "for a fiscal year" and add in its place "prior to FY 2009"in the first line of the paragraph.

■ 6. Section 457.611 is added to subpart F to read as follows:

§ 457.611 Period of availability for State allotments for a fiscal year after FY 2008.

The amount of a final allotment for a fiscal year after FY 2008, as determined under § 457.609 and reduced to reflect certain Medicaid expenditures in accordance with § 457.616, remains available until expended for Federal payments based on expenditures claimed during a 2-year period of availability, beginning with the fiscal year of the final allotment and ending with the end of the succeeding fiscal year following the fiscal year.

Authority: (Section 1102 of the Social Security Act (42 U.S.C. 1302).

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

(Catalog of Federal Domestic Assistance Program No. 93.767, State Children's Health Insurance Program)

Dated: November 3, 2010.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

Approved: November 30, 2010.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2011–3639 Filed 2–14–11; 4:15 pm]

BILLING CODE 4120–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[FCC 11–8; MB Docket No. 05–162; RM–11227, RM–11284]

Radio Broadcasting Services; Enfield, NH; Hartford, VT; Keeseville and Morrisonville, NY; White River Junction, VT

AGENCY: Federal Communications Commission.

ACTION: Final rule; application for review.

SUMMARY: This document grants the Application for Review filed by Hall Communications, Inc. of the *Report and Order* in this proceeding to the extent of rescinding the staff action reallotting FM Channel 231A to Morrisonville, New York, and reinstating the allotment of Channel 231A at Keeseville, New York, because an interest had been expressed in retaining the allotment at Keeseville. The document also affirms the Report and Order in all other respects. Finally, the document modifies the FM allotment processing policies so that, on a going forward basis, the Commission will no longer accept proposals involving the reallotment, class down-grade, or deletion of a vacant FM allotment. *See* **SUPPLEMENTARY INFORMATION,** *supra.*

DATES: Effective March 30, 2011.

FOR FURTHER INFORMATION CONTACT: Andrew J. Rhodes, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Memorandum Opinion and Order,* MB Docket No. 05–162, adopted January 25, 2011, and released January 26, 2011. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.*

The *Memorandum Opinion and Order* agreed that the *Report and Order*'s deletion of Channel 231A at Keeseville was inconsistent with existing Commission case law, which states that the Commission will not remove a vacant FM allotment form a community if a potential applicant has expressed an interest in applying to build a station on that channel, absent a compelling reason to do so. *See* 71 FR 30827, May 31, 2006. Because an interest had been expressed in retaining the channel at Keeseville, the channel should not have been deleted and reallotted to Morrisonville, New York. The reference coordinates for Channel 231A at Keeseville are 44–31–45 NL and 73–32–00 WL.

The *Memorandum Opinion and Order* also affirmed the *Report and Order* insofar as it (1) Allotted Channel 282A to Enfield, New Hampshire as its first local aural transmission service; (2) reallotted Channel 282C3, Station WWOD(FM), from Hartford, Vermont, to Keeseville, New York, and modified the license of FM Station WWOD(FM) accordingly; and (3) reallotted Channel 237A, Station WXLF(FM), from White River Junction, Vermont, to Hartford, Vermont and modified the license of FM Station WXLF(FM) accordingly.

Next, prompted by the circumstances that gave rise to Hall's Application for Review, the Commission concluded to discontinue the practice of considering rulemaking requests for the reallotment, class down-grade or deletion of a vacant FM allotment. The Commission determined that this practice is disruptive to the orderly auctioning of vacant FM spectrum, wastes limited staff resources, and undermines the finality of the actions adopting the initial allotment. However, the Commission will permit parties to propose same-class channel substitutions for vacant FM allotments in order to accommodate proposals in technically related FM allotment and/or application filings because same-class channel substitutions do not disturb final section 307(b) determinations on which the allotments were based.

Finally, we note that, although the *Report and Order* in this proceeding removed Channel 231A at Keeseville, New York, § 73.202(b), the Table of FM Allotments, inadvertently did not reflect this change, and the channel continues to appear in the Table. Accordingly, there is no need for a further revision to the Table of FM Allotments with respect to Keeseville, New York.

The Commission will send a copy of this *Memorandum Opinion and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under New York, is amended by removing Morrisonville, Channel 231A.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2011–3640 Filed 2–16–11; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 218

RIN 0648–AX86

Taking of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Training Operations Conducted Within the Gulf of Mexico Range Complex

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

ACTION: Final rule.

SUMMARY: NMFS, upon application from the U.S. Navy (Navy), is issuing regulations to govern the unintentional taking of marine mammals incidental to activities conducted by the Navy's Atlantic Fleet within the Gulf of Mexico (GOMEX) Range Complex for the period of April 2010 through April 2015. The Navy's activities are considered military readiness activities pursuant to the Marine Mammal Protection Act (MMPA), as amended by the National Defense Authorization Act for Fiscal Year 2004 (NDAA). These regulations, which allow for the issuance of "Letters of Authorization" (LOAs) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

DATES: Effective February 17, 2011 through February 17, 2016.

ADDRESSES: A copy of the Navy's application (which contains a list of the references used in this document), NMFS' Record of Decision (ROD), and other documents cited herein may be obtained by writing to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225 or by telephone via the contact listed here (*see* **FOR FURTHER INFORMATION CONTACT**). Additionally, the Navy's LOA application may be obtained by visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 713–2289, ext. 137.

SUPPLEMENTARY INFORMATION:

Availability

Extensive **SUPPLEMENTARY INFORMATION** was provided in the proposed rule for this activity, which was published in the **Federal Register** on Tuesday, July 14, 2009 (74 FR 33960). This information will not be reprinted here in its entirety; rather, all sections from the proposed rule will be represented herein and will contain either a summary of the material presented in the proposed rule or a note referencing the page(s) in the proposed rule where the information may be found. Any information that has changed since the proposed rule was published will be addressed herein. Additionally, this final rule contains a section that responds to the comments received during the public comment period.

Background

Sections 101(a)(5)(A) and (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) if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings may 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."

With respect to military readiness activities, the MMPA defines "harassment" as "(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment]."

Summary of Request

On October 2, 2008, NMFS received an application from the Navy requesting an authorization for the take of marine mammal species/stocks incidental to the proposed training operations within the GOMEX Range Complex over the course of 5 years. On April 24, 2009, NMFS received additional information and clarification on the Navy's proposed GOMEX Range Complex training activities. These training activities are classified as military readiness activities. The Navy states that these training activities may cause various impacts to marine mammal species in the proposed GOMEX Range Complex Study Area. The Navy requests an authorization to take 17 species of cetaceans annually by Level B harassment, and 1 individual each of pantropical spotted dolphin and spinner dolphin by Level A harassment (injury). However, due to the implementation of the proposed mitigation and monitoring measures, NMFS believes that the actual take would be less than estimated by the Navy.

Description of the Specified Activities

The proposed rule contains a complete description of the Navy's specified activities that are covered by these final regulations, and for which the associated incidental take of marine mammals will be authorized in the related LOAs. The proposed rule describes the nature and number of the training activities. These training activities consist of surface warfare [(Bombing Exercise (Air-to-Surface) or BOMBEX (A–S), and Small Arms Training (explosive hand grenades)] and vessel movement to, from and within the GOMEX Range Complex Study Area. The narrative description of the action contained in the proposed rule (74 FR 33960; July 14, 2009; pages 33961–33962) has not changed, except that the event duration for Small Arms Training was corrected to "1–2 hours" from "1 hour" in Table 1 of the proposed rule (74 FR 33960; July 14, 2009; page 33962). This change was to correct a typographical error in the proposed rule. Table 1 summarizes the nature and levels of these planned activities.

TABLE 1—LEVEL OF SURFACE WARFARE TRAINING ACTIVITIES PLANNED IN THE GOMEX RANGE COMPLEX PER YEAR

Operation	Platform	System/ordnance	Number of events	Training area	Potential time of day	Event duration
Bombing Exercise (BOMBEX) (Air-to-Surface, At-Sea).	F/A–18	MK–83 [1,000-lb High Explosive (HE) bomb] 415.8 lbs NEW.	1 event (4 bombs in succession).	BOMBEX Hotbox	Daytime only	1 hour.
Small Arms Training	Maritime Expeditionary Support Group (Various Small Boats).	MK3A2 anti-swimmer grenades (8-oz HE grenade) 0.5 lb NEW.	6 events* (20 live grenades).	UNDET Area E3	Day or night	1–2 hours.

*An individual event can include detonation of up to 10 live grenades, but no more than 20 live grenades will be used per year.

Description of Marine Mammals in the Area of the Specified Activities

Twenty-nine marine mammal species have confirmed or potential occurrence in the GOMEX Study Area. These include 28 cetacean species and 1 sirenian species (DoN, 2007a), which can be found in Table 2. Although it is possible that any of the 29 species of marine mammals may occur in the Study Area, only 21 of those species are expected to occur regularly in the region. Most cetacean species are in the Study Area year-round (*e.g.,* sperm whales and bottlenose dolphins), while a few (*e.g.,* fin whales and killer whales) have accidental or transient occurrence in the area. The Description of Marine Mammals in the Area of the Specified Activities section has not changed from what was in the proposed rule (74 FR 33960; July 14, 2009; pages 33962–33964).

TABLE 2—MARINE MAMMAL SPECIES FOUND IN THE GOMEX RANGE COMPLEX

Family and scientific name	Common name	Federal status
Order Cetacea		
Suborder Mysticeti (baleen whales)		
Eubalaena glacialis	North Atlantic right whale	Endangered.
Megaptera novaeangliae	Humpback whale	Endangered.
Balaenoptera acutorostrata	Minke whale.	
B. brydei	Bryde's whale.	
B. borealis	Sei whale	Endangered.
B. physalus	Fin whale	Endangered.
B. musculus	Blue whale	Endangered.
Suborder Odontoceti (toothed whales)		
Physeter macrocephalus	Sperm whale	Endangered.
Kogia breviceps	Pygmy sperm whale.	
K. sima	Dwarf sperm whale.	
Ziphius cavirostris	Cuvier's beaked whale.	
M. europaeus	Gervais' beaked whale.	
M. bidens	Sowerby's beaked whale.	
M. densirostris	Blainville's beaked whale.	
Steno bredanensis	Rough-toothed dolphin.	
Tursiops truncatus	Bottlenose dolphin.	
Stenella attenuata	Pantropical spotted dolphin.	
S. frontalis	Atlantic spotted dolphin.	
S. longirostris	Spinner dolphin.	
S. clymene	Clymene dolphin.	
S. coeruleoalba	Striped dolphin.	
Lagenodephis hosei	Fraser's dolphin.	
Grampus griseus	Risso's dolphin.	
Peponocephala electra	Melon-headed whale.	
Feresa attenuata	Pygmy killer whale.	
Pseudorca crassidens	False killer whale.	
Orcinus orca	Killer whale.	
G. macrorhynchus	Short-finned pilot whale.	
Order Sirenia		
Trichechus manatus	West Indian manatee	Endangered.

Potential Impacts to Marine Mammal Species

With respect to the MMPA, NMFS' effects assessment on the consequences of the Navy's proposed activities on marine mammals and their habitat serves four primary purposes: (1) To prescribe the permissible methods of taking (*i.e.,* Level B Harassment (behavioral harassment), Level A Harassment (injury), or mortality, including an identification of the number and types of take that could occur by Level A or B harassment or mortality) and to prescribe other means of effecting the least practicable adverse impact on such species or stock and its habitat (*i.e.,* mitigation); (2) to determine whether the specified activity will have a negligible impact on the affected species or stocks of marine mammals (based on the likelihood that the activity will adversely affect the species or stock through effects on annual rates of recruitment or survival); (3) to determine whether the specified activity will have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (however, there are no subsistence communities in the GOMEX Range Complex Study Area); and (4) to prescribe requirements pertaining to monitoring and reporting.

In the Potential Impacts to Marine Mammal Species section of the proposed rule, NMFS included a qualitative discussion of the different ways that underwater explosive detonations from BOMBEX and Small Arms Training with explosive hand grenades may potentially affect marine mammals (some of which NMFS would not classify as harassment). *See* 74 FR 33960; July 14, 2009; pages 33964–33973. Marine mammals may experience direct physiological effects (such as threshold shift), acoustic masking, impaired communications, stress responses, and behavioral disturbance. The information contained in the Potential Impacts to Marine Mammal Species section regarding BOMBEX and Small Arms Training in the proposed rule has not changed.

On April 20, 2010, explosion and fire on the Mobile Offshore Drilling Unit Deepwater Horizon MC252 approximately 50 miles southeast of the Mississippi Delta led to the BP oil spill, which is the largest oil spill in U.S. history and potentially the second largest in world history. The oil wellhead leaked for 85 days and was capped on July 15, 2010. Impacts of this spill are far reaching, and include environmental, economic, and societal consequences. Wildlife and ecosystems are threatened primarily due to factors such as petroleum toxicity and oxygen depletion in the water. Marine species that live in the Gulf and in the marshlands surrounding the Gulf are at risk, including marine mammals. As of August 31, 2010, 88 dolphins and 1 whale have been found stranded, including 4 dolphins that were visibly oiled. However, the proposed Navy's GOMEX training exercises are not expected to further impact the physical marine ecosystem due to the nature of the activities.

Below, in the Estimated Take of Marine Mammals Section, NMFS quantifies the potential effects to marine mammals from underwater detonation of explosives. In addition, NMFS relates such effects to the MMPA definitions of Level A and Level B Harassment. NMFS has also considered the effects of mortality on these species, although mortality is neither expected, nor will it be authorized.

Mitigation

In order to issue an incidental take authorization (ITA) under Section 101(a)(5)(A) of the MMPA, NMFS must prescribe regulations setting forth the "permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance." The NDAA amended the MMPA as it relates to military readiness activities and the incidental take authorization process such that "least practicable adverse impact" shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the "military readiness activity." The GOMEX Range Complex training activities described in the proposed rule are considered military readiness activities.

NMFS reviewed the Navy's proposed GOMEX Range Complex training activities and the proposed GOMEX Range Complex mitigation measures presented in the Navy's application to determine whether the activities and mitigation measures were capable of achieving the least practicable adverse effect on marine mammals.

Any mitigation measure prescribed by NMFS should be known to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed below:

(1) Avoidance or minimization of injury or death of marine mammals wherever possible (goals (2), (3), and (4) may contribute to this goal).

(2) A reduction in the numbers of marine mammals (total number or number at a biologically important time or location) exposed to underwater detonations or other activities expected to result in the take of marine mammals (this goal may contribute to (1), above, or to reducing harassment takes only).

(3) A reduction in the number of times (total number or number at biologically important time or location) individuals would be exposed to underwater detonations or other activities expected to result in the take of marine mammals (this goal may contribute to (1), above, or to reducing harassment takes only).

(4) A reduction in the intensity of exposures (either total number or number at biologically important time or location) to underwater detonations or other activities expected to result in the take of marine mammals (this goal may contribute to (1), above, or to reducing the severity of harassment takes only).

(5) A reduction in adverse effects to marine mammal habitat, paying special attention to the food base, activities that block or limit passage to or from biologically important areas, permanent destruction of habitat, or temporary destruction/disturbance of habitat during a biologically important time.

(6) For monitoring directly related to mitigation—an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation (*e.g.*, a buffer zone of a 5,100-yard radius be established and no bombing exercises would be initiated marine mammals are detected within the buffer zone, etc.).

NMFS reviewed the Navy's proposed mitigation measures, which included a careful balancing of the likely benefit of any particular measure to the marine mammals with the likely effect of that measure on personnel safety, practicality of implementation, and impact on the effectiveness of the "military-readiness activity."

The Navy's proposed mitigation measures were described in detail in the proposed rule (74 FR 33960; July 14, 2009; pages 33973–33975). The Navy's measures address personnel training, lookout and watchstander responsibilities, operating procedures for training activities using underwater detonations of explosives (Bombing Exercises and Small Arms Training), and mitigation related to vessel traffic. No changes have been made to the mitigation measures described in the proposed rule.

Monitoring

In order to issue an ITA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth "requirements pertaining to the monitoring and reporting of such taking." The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for LOAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

Monitoring measures prescribed by NMFS should accomplish one or more of the following general goals:

(1) An increase in the probability of detecting marine mammals, both within the safety zone (thus allowing for more effective implementation of the mitigation) and in general to generate more data to contribute to the effects analyses such as whether marine mammals are adversely affected by the proposed Navy training exercises in the GOM Range Complex.

(2) An increase in our understanding of how many marine mammals are likely to be exposed to levels of underwater detonations or other stimuli that we associate with specific adverse effects, such as behavioral harassment, temporary threshold shift of hearing sensitivity (TTS), or permanent threshold shift of hearing sensitivity (PTS).

(3) An increase in our understanding of how marine mammals respond (behaviorally or physiologically) to underwater detonations or other stimuli expected to result in take and how anticipated adverse effects on individuals (in different ways and to varying degrees) may impact the population, species, or stock (specifically through effects on annual rates of recruitment or survival).

(4) An increased knowledge of the affected species.

(5) An increase in our understanding of the effectiveness of certain mitigation and monitoring measures.

(6) A better understanding and record of the manner in which the authorized entity complies with the incidental take authorization.

Monitoring Plan for the GOMEX Range Complex Study Area

The Navy has provided NMFS with a copy of the draft GOMEX Range Complex Monitoring Plan. Additionally, NMFS and the Navy have incorporated a suggestion from the public, which recommended the Navy hold a workshop in 2011 to discuss the Navy's Monitoring Plans for the multiple range complexes and training exercises in which the Navy would receive ITAs.

The Navy must notify NMFS immediately (or as soon as clearance procedures allow) if the specified activity is thought to have resulted in the mortality or injury of any marine mammals, or in any take of marine mammals not identified in this document.

The Navy must conduct all monitoring and/or research required under the Letter of Authorization, if issued.

With input from NMFS, a summary of the monitoring methods required for use during training events in the GOMEX Range Complex are described below. These methods include a combination of individual elements that are designed to allow a comprehensive assessment.

I. Vessel or Aerial Surveys

(A) The Navy shall visually survey a minimum of 1 explosive event per year. If possible, the event surveyed will be one involving multiple detonations. One of the vessel or aerial surveys should involve professionally trained marine mammal observers (MMOs).

(B) When operationally feasible, for specified training events, aerial or vessel surveys shall be used 1–2 days prior to, during (if reasonably safe), and 1–5 days post detonation.

(C) Surveys shall include any specified exclusion zone around a particular detonation point plus 2,000 yards beyond the border of the exclusion zone (*i.e.*, the circumference of the area from the border of the exclusion zone extending 2,000 yards outwards). For vessel-based surveys a passive acoustic system (hydrophone or towed array) could be used to determine if marine mammals are in the area before and/or after a detonation event.

(D) When conducting a particular survey, the survey team shall collect:

- Location of sighting;
- Species (if not possible, indicate whale, dolphin or pinniped);
- Number of individuals;
- Whether calves were observed;
- Initial detection sensor;
- Length of time observers maintained visual contact with marine mammal;
- Wave height;
- Visibility;
- Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after;
- Distance of marine mammal from actual detonations (or target spot if not yet detonated);
- Observed behavior—Watchstanders will report, in plain language and without trying to categorize in any way, the observed behavior of the animal(s) (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming etc.), including speed and direction;
- Resulting mitigation implementation—Indicate whether explosive detonations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long; and
- If observation occurs while explosives are detonating in the water, indicate munitions type in use at time of marine mammal detection (*e.g.*, were the 5-inch guns actually firing when the animals were sighted? Did animals enter an area 2 minutes after a huge explosion went off?).

II. Passive Acoustic Monitoring

The Navy is required to conduct passive acoustic monitoring when operationally feasible.

(A) Any time a towed hydrophone array is employed during shipboard surveys the towed array shall be deployed during daylight hours for each of the days the ship is at sea.

(B) The towed hydrophone array shall be used to supplement the ship-based systematic line-transect surveys for marine mammals (particularly for species such as beaked whales that are rarely seen).

III. Marine Mammal Observers on Navy Platforms

(A) MMOs selected for aerial or vessel surveys shall, to the extent practicable, be placed on a Navy platform during the exercises being monitored.

(B) The MMO must possess expertise in species identification of regional marine mammal species and experience collecting behavioral data.

(C) MMOs shall not be placed aboard Navy platforms for every Navy training event or major exercise. Instead, MMOs should be employed during specifically identified opportunities deemed appropriate for data collection efforts. The events selected for MMO participation shall take into account safety, logistics, and operational concerns.

(D) MMOs shall observe from the same height above water as the lookouts.

(E) The MMOs shall not be part of the Navy's formal reporting chain of command during their data collection efforts; Navy lookouts shall continue to serve as the primary reporting means within the Navy chain of command for marine mammal sightings. The only exception is that if an animal is observed within the shutdown zone that

has not been observed by the lookout, the MMO shall inform the lookout of the sighting, and the lookout shall take the appropriate action through the chain of command.

(F) The MMOs shall collect species identification, behavior, direction of travel relative to the Navy platform, and distance first observed. All MMO sightings shall be conducted according to a standard operating procedure. Information collected by MMOs should be the same as those collected by Navy lookout/watchstanders described above.

The Monitoring Plan for the GOMEX Range Complex has been designed as a collection of focused "studies" (described fully in the GOMEX Monitoring Plan) to gather data that will allow the Navy to address the following questions:

(A) What are the behavioral responses of marine mammals that are exposed to explosives?

(B) Is the Navy's suite of mitigation measures effective at avoiding injury and mortality of marine mammals?

Data gathered in these studies will be collected by qualified, professional marine mammal biologists or trained Navy lookouts/watchstanders that are experts in their field. This monitoring plan has been designed to gather data on all species of marine mammals that are observed in the GOMEX Range Complex study area.

Monitoring Workshop

During the public comment period on past proposed rules for Navy actions (such as the Hawaii Range Complex (HRC) and Southern California Range Complex (SOCAL) proposed rules), NMFS received a recommendation that a workshop or panel be convened to solicit input on the monitoring plan from researchers, experts, and other interested parties. The GOMEX Range Complex proposed rule included an adaptive management component and both NMFS and the Navy believe that a workshop would provide a means for the Navy and NMFS to consider input from participants in determining whether (and if so, how) to modify monitoring techniques to more effectively accomplish the goals of monitoring set forth earlier in the document. NMFS and the Navy believe that this workshop concept is valuable in relation to all of the Range Complexes and major training exercise rules and LOAs that NMFS is working on with the Navy at this time. Consequently, NMFS has determined that this single Monitoring Workshop will be included as a component of all of the rules and LOAs that NMFS will be processing for the Navy in the next year or so.

The Navy, with guidance and support from NMFS, will convene a Monitoring Workshop, including marine mammal and acoustic experts as well as other interested parties, in 2011. The Monitoring Workshop participants will review the monitoring results from the previous year of monitoring pursuant to the GOMEX Range Complex rule as well as monitoring results from other Navy rules and LOAs (*e.g.*, VACAPES, AFAST, SOCAL, HRC, and other rules). The Monitoring Workshop participants would provide their individual recommendations to the Navy and NMFS on the monitoring plan(s) after also considering the current science (including Navy research and development) and working within the framework of available resources and feasibility of implementation. NMFS and the Navy would then analyze the input from the Monitoring Workshop participants and determine the best way forward from a national perspective. Subsequent to the Monitoring Workshop, modifications would be applied to monitoring plans as appropriate.

Integrated Comprehensive Monitoring Program

In addition to the site-specific Monitoring Plan for the GOMEX Range Complex, the Navy completed the Integrated Comprehensive Monitoring Program (ICMP) Plan at the end of 2009. The ICMP was developed by the Navy, with the Chief of Naval Operations Environmental Readiness Division (CNO–N45) having the lead. The program does not duplicate the monitoring plans for individual areas (*e.g.*, AFAST, HRC, SOCAL, VACAPES); instead it is intended to provide the overarching coordination that will support compilation of data from both range-specific monitoring plans as well as Navy funded research and development (R&D) studies. The Navy, through its ICMP will coordinate the monitoring programs' progress towards meeting its goals and develop a data management plan. The ICMP will be evaluated annually to provide a matrix for progress and goals for the following year, and will make recommendations on adaptive management for refinement and analysis of the monitoring methods.

The primary objectives of the ICMP are to:

- Monitor and assess the effects of Navy activities on protected species;
- Ensure that data collected at multiple locations is collected in a manner that allows comparison between and among different geographic locations;
- Assess the efficacy and practicality of the monitoring and mitigation techniques;
- Add to the overall knowledge-base of marine species and the effects of Navy activities on marine species.

The ICMP will be used both as: (1) A planning tool to focus Navy monitoring priorities (pursuant to ESA/MMPA requirements) across Navy Range Complexes and Exercises; and (2) an adaptive management tool, through the consolidation and analysis of the Navy's monitoring and watchstander data, as well as new information from other Navy programs (e.g., R&D), and other peer-reviewed newly published information.

In combination with the 2011 Monitoring Workshop and the adaptive management component of the GOMEX Range Complex rule and the other Navy rules (*e.g.* VACAPES Range Complex, Jacksonville Range Complex, etc.), the ICMP provides a framework for restructuring the monitoring plans and allocating monitoring effort based on the value of particular specific monitoring proposals (in terms of the degree to which results would likely contribute to stated monitoring goals, as well as the likely technical success of the monitoring based on a review of past monitoring results) that have been developed through the ICMP framework, instead of allocating effort based on maintaining an equal (or commensurate to effects) distribution of monitoring effort across range complexes.

The ICMP identified:

- A means by which NMFS and the Navy would jointly consider prior years' monitoring results and advancing science to determine if modifications are needed in mitigation or monitoring measures to better effect the goals laid out in the Mitigation and Monitoring sections of the GOMEX Range Complex rule.
- Guidelines for prioritizing monitoring projects.

If, as a result of the workshop and similar to the example described in the paragraph above, the Navy and NMFS decide it is appropriate to restructure the monitoring plans for multiple ranges such that they are no longer evenly allocated (by rule), but rather focused on priority monitoring projects that are not necessarily tied to the geographic area addressed in the rule, the ICMP will be modified to include a very clear and unclassified record-keeping system that will allow NMFS and the public to see how each range complex/project is contributing to all of the ongoing monitoring programs (resources, effort, money, etc.).

Adaptive Management

NMFS has included an adaptive management component in the final regulations governing the take of marine mammals incidental to Navy training exercises in the GOMEX Range Complex. The use of adaptive management will give NMFS the ability to consider new data from different sources to determine (in coordination with the Navy) on an annual basis if mitigation or monitoring measures should be modified or added (or deleted) if new data suggests that such modifications are appropriate (or are not appropriate) for subsequent annual LOAs, if issued.

The following are some of the possible sources of applicable data:

- Results from the Navy's monitoring from the previous year (either from GOMEX Range Complex or other locations)
- Findings of the Workshop that the Navy will convene in 2011 to analyze monitoring results to date, review current science, and recommend modifications, as appropriate to the monitoring protocols to increase monitoring effectiveness
- Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the ICMP, which is discussed elsewhere in this document)
- Results from specific stranding investigations (either from GOMEX Range Complex or other locations)
- Results from general marine mammal and sound research (funded by the Navy or otherwise)
- Any verified information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization

Mitigation measures could be modified or added (or deleted) if new data suggests that such modifications would have (or do not have) a reasonable likelihood of accomplishing the goals of mitigation laid out in this proposed rule and if the measures are practicable. NMFS would also coordinate with the Navy to modify or add to (or delete) the existing monitoring requirements if the new data suggest that the addition of (or deletion of) a particular measure would more effectively accomplish the goals of monitoring laid out in this proposed rule. The reporting requirements associated with this rule are designed to provide NMFS with monitoring data from the previous year to allow NMFS to consider the data and issue annual LOAs. NMFS and the Navy will meet annually, prior to LOA issuance, to discuss the monitoring reports, Navy R&D developments, and current science and whether mitigation or monitoring modifications are appropriate.

Reporting Measures

In order to issue an ITA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth "requirements pertaining to the monitoring and reporting of such taking". Effective reporting is critical to ensure compliance with the terms and conditions of a LOA, and to provide NMFS and the Navy with data of the highest quality based on the required monitoring. Additional detail has been added to the reporting requirements since they were outlined in the proposed rule. The updated reporting requirements are all included below. A subset of the information provided in the monitoring reports may be classified and not releasable to the public.

NMFS will work with the Navy to develop tables that allow for efficient submission of the information required below.

General Notification of Injured or Dead Marine Mammals

Navy personnel will ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as operational security allows) if an injured or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing underwater explosive detonations or other activities. The Navy will provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

Annual GOMEX Range Complex Monitoring Plan Report

The Navy shall submit a report annually on March 1 describing the implementation and results (through January 1 of the same year) of the GOMEX Range Complex Monitoring Plan, described above. Data collection methods will be standardized across range complexes to allow for comparison in different geographic locations. Although additional information will also be gathered, the MMOs collecting marine mammal data pursuant to the GOMEX Range Complex Monitoring Plan shall, at a minimum, provide the same marine mammal observation data required in the major range complex training exercises section of the Annual GOMEX Range Complex Exercise Report referenced below.

The GOMEX Range Complex Monitoring Plan Report may be provided to NMFS within a larger report that includes the required Monitoring Plan Reports from multiple Range Complexes.

Annual GOMEX Range Complex Exercise Report

The Navy is in the process of improving the methods used to track explosives used to provide increased granularity. The Navy will provide the information described below for all of their explosive exercises. Until the Navy is able to report in full the information below, they will provide an annual update on the Navy's explosive tracking methods, including improvements from the previous year.

(i) Total annual number of each type of explosive exercise (of those identified as part of the "specified activity" in this final rule) conducted in the GOMEX Range Complex.

(ii) Total annual expended/detonated rounds (missiles, bombs, etc.) for each explosive type.

GOMEX Range Complex 5-yr Comprehensive Report

The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during the GOMEX Range Complex exercises for which annual reports are required (Annual GOMEX Range Complex Exercise Reports and GOMEX Range Complex Monitoring Plan Reports). This report will be submitted at the end of the fourth year of the rule (March 2014), covering activities that have occurred through September 1, 2013.

Comments and Responses

On July 14, 2009, NMFS published a proposed rule (74 FR 33960) in response to the Navy's request to take marine mammals incidental to military readiness training in the GOMEX Range Complex Study Area and requested comments, information and suggestions concerning the request. During the 30-day public comment period, NMFS received comments from 3 private citizens and from the Marine Mammal Commission (Commission). The comments are summarized and sorted into general topic areas and are addressed below. Full copies of the comment letters may be accessed at *http://www.regulations.gov.*

MMPA Concerns

Comment 1: The Commission recommended that NMFS require the

Navy to conduct an external peer review of its marine mammal density estimates, the data upon which those estimates are based, and the manner in which those data were used for that purpose.

Response: As discussed in detail in the proposed rule (74 FR 33960; July 14, 2009), marine mammal density estimates were based on the most recent data and information on the occurrence, distribution, and density of marine mammals. The updated density estimates presented in this assessment are derived from the Navy OPAREA Density Estimates (NODE) for the GOMEX Operation Area (OPAREA) (DoN, 2007).

Density estimates for cetaceans were either modeled using available line-transect survey data or derived using cetacean abundance estimates found in the 2006 NOAA stock assessment reports (SARs) (Waring *et al.,* 2007), which can be viewed at *http://www.nmfs.noaa.gov/pr/sars/species.htm.* The abundance estimates in the stock assessment reports are from Mullin and Fulling (2004).

For the model-based approach, density estimates were calculated for each species within areas containing survey effort. A relationship between these density estimates and the associated environmental parameters such as depth, slope, distance from the shelf break, sea surface temperature (SST), and chlorophyll *a* (chl *a*) concentration was formulated using generalized additive models (GAMs). This relationship was then used to generate a two-dimensional density surface for the region by predicting densities in areas where no survey data exist.

The analyses for cetaceans were based on sighting data collected through shipboard surveys conducted by NMFS Southeast Fisheries Science Center (SEFSC) between 1996 and 2004. Species-specific density estimates derived through spatial modeling were compared with abundance estimates found in the 2006 NOAA SARs to ensure consistency. All spatial models and density estimates were reviewed by and coordinated with NMFS Science Center technical staff and scientists with the University of St. Andrews, Scotland, Centre for Environmental and Ecological Modeling (CREEM). Subsequent revisions and draft reports were reviewed by these same parties. Therefore, NMFS considers that the density estimates, including the data upon which those estimates are based and the manner in which the data are collected and used, have already gone through an independent review process.

Mitigation Measures

Comment 2: The Commission recommends that NMFS require the Navy to develop and implement a plan to evaluate the effectiveness of monitoring and mitigation measures before beginning, or in conjunction with, the proposed military readiness training operations.

Response: NMFS has been working with the Navy throughout the rulemaking process to develop a series of mitigation, monitoring, and reporting protocols. These mitigation, monitoring and reporting measures include, but are not limited to: (1) The use of trained shipboard lookouts who will conduct marine mammal monitoring to avoid collisions with marine mammals; (2) the use of exclusion zones that avoid exposing marine mammals to levels of sound likely to result in injury or death of marine mammals; (3) several cautionary measures to minimize the likelihood of ship strikes of marine mammals; (4) the use of MMOs/lookouts to conduct aerial and vessel-based surveys; and (5) annual monitoring reports and comprehensive reports to provide insights of impacts to marine mammals.

NMFS has evaluated the effectiveness of the measures and has concluded they will result in the least practicable adverse impact on the affected marine mammal species or stocks and their habitat. For example, operations will be suspended if trained lookouts and/or MMOs detect marine mammals within the exercise's specified exclusion zone in order to prevent marine mammal injury or mortality. In addition, prior to conducting training activities involving underwater explosive detonation, the Navy will be required to monitor the safety zones to ensure the areas are clear of marine mammals. Such monitoring will also be required during the exercise when operationally feasible. These monitoring and mitigation measures are expected to reduce the number of marine mammals exposed to underwater explosions.

Over the course of the 5-year rule, NMFS will evaluate the Navy's training activities annually to validate the effectiveness of the measures. NMFS will, through the established adaptive management process, work with the Navy to determine whether additional mitigation and monitoring measures are necessary. In addition, with the implementation of the ICMP Plan, and the planned Monitoring Workshop in 2011, NMFS will work with the Navy to further improve its monitoring and mitigation plans for its future activities.

Comment 3. The Commission recommends that NMFS require the Navy to describe the protocol for stranding network personnel to communicate with the Navy in the event of a stranding that is possibly associated with Navy activities.

Response: As described in the proposed rule (74 FR 33960; July 14, 2009), the Navy personnel will ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as operational security allows) if an injured or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing underwater explosive detonations. The Navy will provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available). This stranding communication protocol is similar to the protocol the Navy has for its Atlantic Fleet Active Sonar Training (AFAST).

Comment 4: The Commission recommends that NMFS require the Navy to suspend an activity if a marine mammal is seriously injured or killed and the injury or death could be associated with the Navy's activity. The injury or death should be investigated to determine the cause, assess the full impact of the activity or activities potentially implicated (e.g., the total of animals involved), and determine how the activity should be modified to avoid future injuries or deaths.

Response: Though NMFS largely agrees with the principle espoused by the Commission, it should be noted that without detailed examination by an expert, it is usually not feasible to determine the cause of injury or mortality when an injured or dead marine mammal is sighted in the field. NMFS has included a requirement in the final rule that if there is clear evidence that a marine mammal is injured or killed as a result of the Navy's training activities (*e.g.,* instances in which it is clear that munitions' explosions caused the injury or death), the Navy shall suspend its activities immediately and report such incident to NMFS through the Navy's chain-of-command.

For any other sighting of injured or dead marine mammals in the vicinity of any Navy training activities utilizing underwater explosive detonations for which the cause of injury or mortality cannot be immediately determined, the Navy personnel will ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as

operational security allows). The Navy will provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

Miscellaneous Issues

Comment 5: Three private citizens expressed general opposition to Navy activities and NMFS' issuance of an MMPA authorization because of the danger of killing marine life.

Response: NMFS appreciates the commenters' concern for the marine mammals that live in the area of the proposed activities. However, the MMPA allows individuals to take marine mammals incidental to specified activities if NMFS can make the necessary findings required by law (*i.e.,* negligible impact, unmitigable adverse impact on subsistence users, etc.). As explained throughout this rulemaking, NMFS has made the necessary findings under 16 U.S.C. 1371(a)(5)(A) to support our issuance of the final rule.

Estimated Take of Marine Mammals

With respect to the MMPA, NMFS' effects assessment serves four primary purposes: (1) To prescribe the permissible methods of taking (*i.e.,* Level B Harassment (behavioral harassment), Level A harassment (injury), or mortality, including an identification of the number and types of take that could occur by Level A or B harassment or mortality) and to prescribe other means of affecting the least practicable adverse impact on such species or stock and its habitat (*i.e.,* mitigation); (2) to determine whether the specified activity will have a negligible impact on the affected species or stocks of marine mammals (based on the likelihood that the activity will adversely affect the species or stock through effects on annual rates of recruitment or survival); (3) to determine whether the specified activity will have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (however, there are no subsistence communities that would be affected in the GOMEX Range Complex Study Area, so this determination is inapplicable for this rulemaking); and (4) to prescribe requirements pertaining to monitoring and reporting.

In the Estimated Take of Marine Mammals section of the proposed rule, NMFS related the potential effects to marine mammals from underwater detonation of explosives to the MMPA regulatory definitions of Level A and Level B Harassment and assessed the effects to marine mammals that could result from the specific activities that the Navy intends to conduct. The subsections of this analysis are discussed in the proposed rule (74 FR 33960; July 14, 2009) and have not changed.

Acoustic Take Criteria

In the Acoustic Take Criteria section of the proposed rule, NMFS described the development and application of the acoustic criteria for explosive detonations (74 FR 33960; July 14, 2009). No changes have been made to the discussion contained in this section of the proposed rule.

Take Calculations

An overview of the Navy's modeling methods to determine the number of exposures of MMPA-protected species to sound likely to result in mortality, Level A harassment (injury), or Level B harassment is provided in the **Federal Register** notice for the proposed rule (74 FR 33960; pages 33978–33979). No changes have been made to the modeling methods in the section of that proposed rule.

As noticed in the proposed rule, the Navy's modeling revealed that only eight marine mammal species (very few individuals of each) would be taken by Level A and Level B harassment. However, the Navy stated in its addendum to the LOA application, because of the relatively high abundance of several species (Bryde's whales, Atlantic spotted dolphins, bottlenose dolphins, Clymene dolphins, false killer whales, Fraser's dolphins, killer whales, two species of *Kogia* sp., melon-headed whales, pygmy killer whales, Risso's dolphins, rough-toothed dolphins, short-finned pilot whales, striped dolphins, and several species of beaked whales) in the proposed action area (Waring *et al.,* 2007) and the fact that some of these species aggregate in relatively large groups, the Navy considers that additional takes of these species by Level B behavioral harassment are possible. After reviewing the Navy's request and consulting the most recent stock assessment reports of marine mammals in the proposed action area (Waring *et al.,* 2009), NMFS largely agrees with the Navy except that NMFS considers that the take of Bryde's and killer whales is unlikely due to their rarity in the Study Area. However, NMFS considers that the incidental take by Level B harassment of sperm whale is likely due to this species abundance in the Gulf of Mexico area. Therefore, NMFS has included additional species in our take estimates for the 5-year regulations. Revised estimates of potential takes from the proposed GOMEX Range Complex training activities are summarized in Table 3.

TABLE 3—SUMMARY OF POTENTIAL EXPOSURES FROM EXPLOSIVE ORDNANCE (PER YEAR) FOR MARINE MAMMALS IN THE GOMEX RANGE COMPLEX

Marine mammal species	Level B (non-injury)	Level A (slight lung injury)	Mortality
Sperm whale	5	0	0
Atlantic spotted dolphin	20	0	0
Beaked whales	20	0	0
Bottlenose dolphin	30	0	0
Clymene dolphin	20	0	0
False killer whale	10	0	0
Fraser's dolphin	20	0	0
Kogia sp.	20	0	0
Melon-headed whale	20	0	0
Pantropical spotted dolphin	26	1	0
Pygmy killer whale	10	0	0
Risso's dolphin	30	0	0
Rough-toothed dolphin	20	0	0
Short-finned pilot whale	20	0	0
Spinner dolphin	27	1	0

TABLE 3—SUMMARY OF POTENTIAL EXPOSURES FROM EXPLOSIVE ORDNANCE (PER YEAR) FOR MARINE MAMMALS IN THE GOMEX RANGE COMPLEX—Continued

Marine mammal species	Level B (non-injury)	Level A (slight lung injury)	Mortality
Striped dolphin	20	0	0

Effects on Marine Mammal Habitat

NMFS' GOMEX Range Complex proposed rule included a section that addressed the effects of the Navy's activities on Marine Mammal Habitat (74 FR 33960; July 14, 2009; page 33979). NMFS concluded that the Navy's activities would have minimal effects on marine mammal habitat. No changes have been made to the discussion contained in this section of the proposed rule.

Analysis and Negligible Impact Determination

Pursuant to NMFS' regulations implementing the MMPA, an applicant is required to estimate the number of animals that will be "taken" by the specified activities (*i.e.,* takes by harassment only, or takes by harassment, injury, and/or death). This estimate informs the analysis that NMFS must perform to determine whether the activity will have a "negligible impact" on the species or stock. Level B (behavioral) harassment occurs at the level of the individual(s) and does not assume any resulting population-level consequences, though there are known avenues through which behavioral disturbance of individuals can result in population-level effects. A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of Level B harassment takes alone, is not enough information on which to base an impact determination.

In addition to considering estimates of the number of marine mammals that might be "taken" through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), and the number and nature of estimated Level A takes, the number of estimated mortalities, and effects on habitat.

The Navy's specified activities have been described based on best estimates of the planned detonation events the Navy would conduct for the proposed GOMEX Range Complex training activities. Taking the above into account, considering the sections discussed below, and dependent upon the implementation of the proposed mitigation measures, NMFS has determined that Navy training exercises utilizing underwater explosives will have a negligible impact on the affected marine mammal species and stocks present in the GOMEX Range Complex Study Area.

NMFS' analysis of potential behavioral harassment, temporary threshold shifts, permanent threshold shifts, injury, and mortality to marine mammals as a result of the GOMEX Range Complex training activities was provided in the proposed rule (74 FR 33960; July 14, 2009; pages 33965–33972) and is described in more detail below.

Behavioral Harassment

The Navy plans a total of 1 BOMBEX (Air-to-Surface) training event (each lasting for 1 hour) and 6 Small Arms Training (explosive hand grenades) events (each lasting for 1–2 hours) annually. The total training exercises using high explosives proposed by the Navy in the GOMEX Range Complex amount to approximately 13 hours per year. These detonation events are widely dispersed throughout several of the designated sites within the GOMEX Range Complex Study Area. The probability that detonation events will overlap in time and space with marine mammals is low, particularly given the densities of marine mammals in the GOMEX Range Complex Study Area and the implementation of monitoring and mitigation measures. Moreover, NMFS does not expect animals to experience repeated exposures to the same sound source as animals will likely move away from the source after being exposed. In addition, these isolated exposures, when received at distances where the Level B behavioral harassment (i.e., 177 dB re 1 microPa^2-sec) threshold would propogate, are expected to cause brief startle reactions or short-term behavioral modification by the animals. These brief reactions and behavioral changes are expected to disappear when the exposures cease. Therefore, these levels of received impulse noise from detonation are not expected to affect annual rates of recruitment or survival.

TTS

NMFS and the Navy have estimated that individuals of some species of marine mammals may sustain some level of temporary threshold shift (TTS) from underwater detonations. TTS can last from a few minutes to days, be of varying degree, and occur across various frequency bandwidths. The TTS sustained by an animal is primarily classified by three characteristics:

- Frequency—Available data (of mid-frequency hearing specialists exposed to mid to high frequency sounds—Southall *et al.,* 2007) suggest that most TTS occurs in the frequency range of the source up to one octave higher than the source (with the maximum TTS at ½ octave above).
- Degree of the shift (*i.e.,* how many dB is the sensitivity of the hearing reduced by)—generally, both the degree of TTS and the duration of TTS will be greater if the marine mammal is exposed to a higher level of energy (which would occur when the peak dB level is higher or the duration is longer). Since the impulse from detonation is extremely brief, an animal would have to approach very close to the detonation site to increase the received sound exposure level (SEL). The threshold for the onset of TTS for detonations is a dual criteria: 182 dB re 1 microPa^2-sec or 23 psi, which might be received at distances from 345–2,863 m from the centers of detonation based on the types of net explosive weight (NEW) involved to receive the SEL that causes TTS compared to similar source level with longer durations (such as sonar signals).
- Duration of TTS (Recovery time)—Of all TTS laboratory studies, some using continuous exposures of almost an hour in duration or up to 217 SEL, almost all recovered within 1 day (or less, often in minutes), though in one study (Finneran *et al.,* 2007), recovery took 4 days.
- Although the degree of TTS depends on the received noise levels and exposure time, all studies show that TTS is reversible and the animal's sensitivity is expected to recover fully in minutes to hours. Therefore, NMFS expects that TTS would not affect annual rates of recruitment or survival.

Acoustic Masking or Communication Impairment

As discussed above, it is also possible that anthropogenic sound could result in masking of marine mammal communication and navigation signals. However, masking only occurs during the time of the signal (and potential secondary arrivals of indirect rays), versus TTS, which occurs continuously for its duration. Impulse sounds from underwater detonations are extremely brief and the majority of most animals' vocalizations would not be masked. Therefore, masking effects from underwater detonations are expected to be minimal and unlikely. If masking or communication impairment were to occur briefly, it would be in the frequency ranges below 100 Hz, which overlaps with some mysticete vocalizations; however, it would likely not mask the entirety of any particular vocalization or communication series because of the short impulse.

PTS, Injury, or Mortality

The Navy's model estimated that 1 pantropical spotted dolphin and 1 spinner dolphin could experience 50-percent tympanic membrane rupture or slight lung injury (Level A harassment) as a result of the training activities utilizing underwater detonation by BOMBEX in the GOMEX Range Complex Study Area. However, these estimates do not take into consideration the proposed mitigation and monitoring measures. For underwater detonations, the animals have to be within an area between certain injury zones of influence (ZOI) to experience Level A harassment. Such injury ZOI varies from 0.09 km^2 to 4.98 km^2 (or at distances between 169 m to 1,259 m from the center of detonation) depending on the types of munition used and the season of the action. Though it is possible that Navy observers could fail to detect an animal at a distance of more than 1 km (an injury ZOI during BOMBEX, which is planned to have 1 event annually), all injury ZOIs from small arms trainings are smaller than 0.1 km^2 (178 m in radius) and NMFS believes it is unlikely that any marine mammal will be missed by lookouts/watchstanders or MMOs. As discussed previously, the Navy plans to utilize aerial or vessel surveys to detect marine mammals for mitigation implementation and indicated that they are capable of effectively monitoring safety zones.

Based on these assessments, NMFS and the Navy determined that approximately 5 Sperm whales, 20 Atlantic spotted dolphins, 20 beaked whales, 30 bottlenose dolphins, 20 Clymene dolphins, 10 false killer whales, 20 Fraser's dolphins, 20 pygmy or dwarf sperm whales, 20 melon-headed whales, 26 pantropical spotted dolphins, 10 pygmy killer whales, 30 Risso's dolphins, 20 rough-toothed dolphins, 27 spinner dolphins, 20 short-finned pilot whales, and 20 striped dolphins could be affected by Level B harassment (TTS and sub-TTS) as a result of the proposed GOMEX Range Complex training activities. These numbers represent approximately 0.30%, 0.07%, 0.81%, 0.30%, 2.57%, 4.42%, 0.88%, 0.08%, 3.10%, 1.89%, 0.75%, 2.79%, 1.36%, and 0.60% of sperm whales, Atlantic spotted dolphins, bottlenose dolphins (Gulf of Mexico oceanic stock), Clymene dolphins, false killer whales, pygmy or dwarf sperm whales, melon-headed whales, pantropical spotted dolphins, pygmy killer whales, Risso's dolphins, rough-toothed dolphins, short-finned pilot whales, spinner dolphins, and striped dolphins, respectively in the vicinity of the proposed GOMEX Range Complex Study Area (calculation based on NMFS 2007 U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessment). Although the population estimates of beaked whales and Fraser's dolphins are unknown in the proposed action area, NMFS has concluded that the take of 20 individuals of beaked whales and Fraser's dolphins by Level B harassment would have a negligible impact because most of its population exists beyond the project area and because they are a widely distributed species in the North Atlantic (Jefferson *et al.,* 1993; Reeves *et al.,* 2002).

In addition, the Level A takes of 1 pantropical spotted dolphin and 1 spinner dolphin represent 0.0029% and 0.0503% of these species, respectively, in the vicinity of the proposed GOMEX Range Complex Study Area (calculation based on NMFS 2007 U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessment). Given these very small percentages, NMFS does not expect there to be any long-term adverse effect on the populations of the aforementioned dolphin species. No marine mammals are expected to be killed as a result of these activities.

Additionally, the aforementioned take estimates do not account for the implementation of mitigation measures. With the implementation of mitigation and monitoring measures, NMFS expects that the takes would be reduced further. Coupled with the fact that these impacts will likely not occur in areas and times critical to reproduction, NMFS has determined that the total taking over the 5-year period of the regulations and subsequent LOAs from the Navy's GOMEX Range Complex training activities will have a negligible impact on the marine mammal species and stocks present in the GOMEX Range Complex Study Area.

Subsistence Harvest of Marine Mammals

NMFS has determined that the issuance of 5-year regulations and subsequent LOAs (as warranted) for Navy training exercises in the GOMEX Range Complex would not have an unmitigable adverse impact on the availability of the affected species or stocks for subsistence use since there are no such uses in the specified area.

ESA

There are six ESA-listed marine mammal species that are listed as endangered under the ESA with confirmed or possible occurrence in the GOMEX Range Complex: humpback whale, North Atlantic right whale, fin whale, blue whale, sei whale, and sperm whale.

Pursuant to Section 7 of the ESA, the Navy has consulted with NMFS on this action. NMFS has also consulted internally on the issuance of regulations under section 101(a)(5)(A) of the MMPA for this activity. The Biological Opinion concludes that the proposed Navy activities are likely to adversely affect but are not likely to jeopardize the continued existence of these threatened and endangered species under NMFS jurisdiction.

NEPA

NMFS participated as a cooperating agency on the Navy's Final Environmental Impact Statement (FEIS) for the GOMEX EIS. NMFS subsequently adopted the Navy's EIS/OEIS for the purpose of complying with the MMPA.

Determination

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat and dependent upon the implementation of the mitigation measures, NMFS finds that the total taking from Navy training exercises utilizing underwater explosives in the GOMEX Range Complex will have a negligible impact on the affected marine mammal species or stocks and will not result in an unmitigable adverse impact on the availability of marine mammal species or stocks for taking for subsistence uses because no subsistence uses exist in the GOMEX Range Complex study area. NMFS has issued regulations for these exercises that prescribe the means of effecting the least

practicable adverse impact on marine mammals and their habitat and set forth requirements pertaining to the monitoring and reporting of that taking.

Classification

This action does not contain a collection of information requirement for purposes of the

Paperwork Reduction Act

The Office of Management and Budget has determined that this rule is not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified at the proposed rule stage that this action will not have a significant economic impact on a substantial number of small entities. The Navy is the sole entity that will be affected by this rulemaking. It is not a small governmental jurisdiction, small organization or small business, as defined by the RFA. This rulemaking authorizes the take of marine mammals incidental to a specified activity. The specified activity defined in the final rule includes the use of underwater detonations, which are only used by the U.S. military, during training activities that are only conducted by the U.S. Navy. Additionally, any requirements imposed by a Letter of Authorization issued pursuant to these regulations, and any monitoring or reporting requirements imposed by these regulations, will be applicable only to the Navy. Because this action, if adopted, would directly affect the Navy and not a small entity, NMFS concludes the action would not result in a significant economic impact on a substantial number of small entities.

List of Subjects in 50 CFR Part 218

Exports, Fish, Imports, Incidental take, Indians, Labeling, Marine mammals, Navy, Penalties, Reporting and recordkeeping requirements, Seafood, Sonar, Transportation.

Dated: February 10, 2011.

Samuel D. Rauch III,

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

For reasons set forth in the preamble, 50 CFR part 218 is amended as follows:

PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 218 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Subpart D is added to part 218 to read as follows:

Subpart D—Taking Marine Mammals Incidental to U.S. Navy Training in the Gulf of Mexico Range Complex

Sec.

218.30 Specified activity and specified geographical area and effective dates.
218.31 Permissible methods of taking.
218.32 Prohibitions.
218.33 Mitigation.
218.34 Requirements for monitoring and reporting.
218.35 Applications for Letters of Authorization.
218.36 Letters of Authorization.
218.37 Renewal of Letters of Authorization and adaptive management.
218.38 Modifications to Letters of Authorization.

Subpart D—Taking Marine Mammals Incidental to U.S. Navy Training in the Gulf of Mexico Range Complex

§ 218.30 Specified activity and specified geographical area and effective dates.

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy is only authorized if it occurs within the GOMEX Range Complex Operation Areas (OPAREAs), which is located along the Gulf of Mexico coast of the U.S. described in Figures 1 and 2 of the LOA application and consists of the BOMBEX Hotbox (surface and subsurface waters), located off the Alabama and Florida coast, south of NAS Pensacola, and underwater detonation (UNDET) Area E3 (surface and subsurface waters), located within the territorial waters off Padre Island, Texas, near Corpus Christi NAS.

(1) The northernmost boundary of the BOMBEX Hotbox is located 23 nm (42.6 km) from the coast of the Florida panhandle at latitude 30° N, the eastern boundary is approximately 200 nm (370.4 km) from the coast of the Florida peninsula at longitude 86°48' W.

(2) The UNDET Area E3 is a defined surface and subsurface area located in the waters south of Corpus Christi NAS and offshore of Padre Island, Texas. The westernmost boundary is located 7.5 nm (13.9 km) from the coast of Padre Island at 97°9′33″ W and 27°24′26″ N at the Westernmost corner. It lies entirely within the territorial waters (0 to 12 nm, or 0 to 22.2 km) of the U.S. and the majority of it lies within Texas state waters (0 to 9 nm, or 0 to 16.7 km). It is a very shallow water training area with depths ranging from 20 to 26 m.

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities within the designated amounts of use:

(1) The detonation of the underwater explosives identified in paragraph (c)(1)(i) of this section conducted as part of the training events identified in paragraph (c)(1)(ii) of this section:

(i) Underwater Explosives:

(A) MK–83 (1,000 lb High Explosive bomb);

(B) MK3A2 anti-swimmer concussion grenades (0.5 lbs NEW).

(ii) Training Events:

(A) BOMBEX (Air-to-Surface)—up to 5 events over the course of 5 years (an average of 1 event per year, with 4 bombs in succession for each event);

(B) Small Arms Training with MK3A2 anti-swimmer concussion grenades—up to 30 events over the course of 5 years (an average of 6 events per year, with up to 10 live grenades authorized per event, but no more than 20 live grenades will be used per year).

(2) [Reserved]

(d) Regulations are effective February 17, 2011 through February 17, 2016.

§ 218.31 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 of this chapter and 218.36, the Holder of the Letter of Authorization may incidentally take marine mammals within the area described in § 218.30(b), provided the activity is in compliance with all terms, conditions, and requirements of this subpart and the appropriate Letter of Authorization.

(b) The activities identified in § 218.30(c) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in § 218.30(c) is limited to the following species, by the indicated method of take and the indicated number of times:

(1) Level B Harassment:

(i) Sperm whale (*Physeter macrocephalus*)—25 (an average of 5 annually);

(ii) Beaked whales—100 (an average of 20 annually);

(iii) Bottlenose dolphin (*Tursiops truncatus*)—150 (an average of 30 annually);

(iv) Pantropical spotted dolphin (*Stenella attenuata)*—130 (an average of 26 annually);

(v) Clymene dolphin (*S. clymene*)—100 (an average of 20 annually);

(vi) Atlantic spotted dolphin (*S. frontalis*)—100 (an average of 20 annually);

(vii) Spinner dolphin (*S. longirostris*)—135 (an average of 27 annually);

(viii) Striped dolphin (*S. coeruleoalba*)—100 (an average of 20 annually);

(ix) Risso's dolphin (*Grampus griseus*)—150 (an average of 30 annually);

(x) Melon-headed whales (*Peponocephala electra*)—100 (an average of 20 annually);

(xi) False killer whale (*Pseudorca crassidens*)—50 (an average of 10 annually);

(xii) Fraser's dolphin (*Lagenodelphis hosei*)—100 (an average of 20 annually);

(xiii) Pygmy or dwarf sperm whales (*Kogia* sp.)—100 (an average of 20 annually);

(xiv) Pygmy killer whale (*Ferresa attenuatta*)—50 (an average of 10 annually);

(xv) Rough-toothed dolphin (*Steno bredanensis*)—100 (an average of 20 annually);

(xvi) Short-finned pilot whale (*Globicephala macrorhynchus*)—100 (an average of 20 annually).

(2) Level A Harassment (injury):

(i) Pantropical spotted dolphin—5 (an average of 1 annually);

(ii) Spinner dolphin—5 (an average of 1 annually);

§ 218.32 Prohibitions.

Notwithstanding takings contemplated in § 218.31 and authorized by a Letter of Authorization issued under § 216.106 of this chapter and § 218.36, no person in connection with the activities described in § 218.30 may:

(a) Take any marine mammal not specified in § 218.31(c);

(b) Take any marine mammal specified in § 218.31(c) other than by incidental take as specified in § 218.31(c)(1) and (2);

(c) Take a marine mammal specified in § 218.31(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this Subpart or a Letter of Authorization issued under § 216.106 of this chapter and § 218.36.

§ 218.33 Mitigation.

(a) When conducting training activities identified in § 218.30(c), the mitigation measures contained in the Letter of Authorization issued under § 216.106 of this chapter and § 218.36 must be implemented. These mitigation measures include, but are not limited to:

(1) General Maritime Measures:

(i) Personnel Training—Lookouts:

(A) All bridge personnel, Commanding Officers, Executive Officers, officers standing watch on the bridge, maritime patrol aircraft aircrews, and Mine Warfare (MIW) helicopter crews shall complete Marine Species Awareness Training (MSAT).

(B) Navy lookouts shall undertake extensive training to qualify as a watchstander in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(C) Lookout training shall include on-the-job instruction under the supervision of a qualified, experienced watchstander. Following successful completion of this supervised training period, lookouts shall complete the Personal Qualification Standard Program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects).

(D) Lookouts shall be trained in the most effective means to ensure quick and effective communication within the command structure to facilitate implementation of protective measures if marine species are spotted.

(E) Surface lookouts shall scan the water from the ship to the horizon and be responsible for all contacts in their sector. In searching the assigned sector, the lookout shall always start at the forward part of the sector and search aft (toward the back). To search and scan, the lookout shall hold the binoculars steady so the horizon is in the top third of the field of vision and direct the eyes just below the horizon. The lookout shall scan for approximately five seconds in as many small steps as possible across the field seen through the binoculars. They shall search the entire sector in approximately five-degree steps, pausing between steps for approximately five seconds to scan the field of view. At the end of the sector search, the glasses shall be lowered to allow the eyes to rest for a few seconds, and then the lookout shall search back across the sector with the naked eye.

(F) At night, lookouts shall scan the horizon in a series of movements that would allow their eyes to come to periodic rests as they scan the sector. When visually searching at night, they shall look a little to one side and out of the corners of their eyes, paying attention to the things on the outer edges of their field of vision. Lookouts shall also have night vision devices available for use.

(ii) Operating Procedures & Collision Avoidance:

(A) Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to the Operational Order shall be issued to further disseminate the personnel training requirement and general marine species mitigation measures.

(B) Commanding Officers shall make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the ship.

(C) While underway, surface vessels shall have at least two lookouts with binoculars; surfaced submarines shall have at least one lookout with binoculars. Lookouts already posted for safety of navigation and man-overboard precautions may be used to fill this requirement. As part of their regular duties, lookouts shall watch for and report to the OOD the presence of marine mammals.

(D) Personnel on lookout shall employ visual search procedures employing a scanning method in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(E) After sunset and prior to sunrise, lookouts shall employ Night Lookouts Techniques in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(F) While in transit, naval vessels shall be alert at all times, use extreme caution, and proceed at a "safe speed" (the minimum speed at which mission goals or safety will not be compromised) so that the vessel can take proper and effective action to avoid a collision with any marine animal and can be stopped within a distance appropriate to the prevailing circumstances and conditions.

(G) When marine mammals have been sighted in the area, Navy vessels shall increase vigilance and implement measures to avoid collisions with marine mammals and avoid activities that might result in close interaction of naval assets and marine mammals. Such measures shall include changing speed and/or course direction and would be dictated by environmental and other conditions (*e.g.,* safety or weather).

(H) Naval vessels shall maneuver to keep at least 500 yds (460 m) away from any observed whale and avoid approaching whales head-on. This requirement does not apply if a vessel's safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Vessels shall take reasonable steps to alert other vessels in the vicinity of the whale.

(I) Where feasible and consistent with mission and safety, vessels shall avoid closing to within 200-yd (183 m) of marine mammals other than whales (whales addressed above).

(J) Navy aircraft participating in exercises at sea shall conduct and maintain, when operationally feasible and safe, surveillance for marine species of concern as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties. Marine mammal detections shall be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate where it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

(K) All vessels shall maintain logs and records documenting training operations should they be required for event reconstruction purposes. Logs and records shall be kept for a period of 30 days following completion of a major training exercise.

(2) Coordination and Reporting Requirements:

(i) The Navy shall coordinate with the local NMFS Stranding Coordinator for any unusual marine mammal behavior and any stranding, beached live/dead, or floating marine mammals that may occur at any time during or within 24 hours after completion of training activities.

(ii) The Navy shall follow internal chain of command reporting procedures as promulgated through Navy instructions and orders.

(3) Mitigation Measures for Specific At-sea Training Events—If a marine mammal is injured or killed as a result of the proposed Navy training activities (e.g., instances in which it is clear that munitions explosions caused the death), the Navy shall suspend its activities immediately and report such incident to NMFS.

(i) Air-to-Surface At-Sea Bombing Exercises (1,000-lbs explosive bombs):

(A) This activity shall only occur in W–155A/B (hot box) area of the GOMEX Range Complex OPAREA.

(B) Aircraft shall visually survey the target and buffer zone for marine mammals prior to and during the exercise. The survey of the impact area shall be made by flying at 1,500 ft (457 m) altitude or lower, if safe to do so, and at the slowest safe speed. Release of ordnance through cloud cover is prohibited; aircraft must be able to actually see ordnance impact areas.

(C) A buffer zone of a 5,100-yard (4,663-m) radius shall be established around the intended target zone. The exercises shall be conducted only if the buffer zone is clear of marine mammals.

(D) At-sea BOMBEXs using live ordnance shall occur during daylight hours only.

(ii) Small Arms Training—Explosive hand grenades (such as the MK3A2 grenades):

(A) Lookouts shall visually survey for marine mammals prior to and during exercise.

(B) A 200-yd (182-m) radius buffer zone shall be established around the intended target. The exercises shall be conducted only if the buffer zone is clear of marine mammals.

(b) [Reserved]

§ 218.34 Requirements for monitoring and reporting.

(a) The Holder of the Letter of Authorization issued pursuant to § 216.106 of this chapter and § 218.36 for activities described in § 218.30(c) is required to cooperate with the NMFS when monitoring the impacts of the activity on marine mammals.

(b) The Holder of the Authorization must notify NMFS immediately (or as soon as clearance procedures allow) if the specified activity identified in § 218.30(c) is thought to have resulted in the mortality or serious injury of any marine mammals, or in any take of marine mammals not identified in § 218.31(c).

(c) The Navy must conduct all monitoring and required reporting under the Letter of Authorization, including abiding by the GOMEX Range Complex Monitoring Plan, which is incorporated herein by reference, and which requires the Navy to implement, at a minimum, the monitoring activities summarized below.

(1) Vessel or aerial surveys.

(i) The Holder of this Authorization shall visually survey a minimum of 1 explosive event per year. One of the vessel or aerial surveys should involve professional trained marine mammal observers (MMOs). If it is impossible to conduct the required surveys due to lack of training exercises, the missed annual survey requirement shall roll into the subsequent year to ensure that the appropriate number of surveys (*i.e.,* total of five) occurs over the 5-year period of effectiveness of this subject.

(ii) When operationally feasible, for specified training events, aerial or vessel surveys shall be used 1–2 days prior to, during (if reasonably safe), and 1–5 days post detonation.

(iii) Surveys shall include any specified exclusion zone around a particular detonation point plus 2,000 yards beyond the border of the exclusion zone (*i.e.,* the circumference of the area from the border of the exclusion zone extending 2,000 yards outwards). For vessel-based surveys a passive acoustic system (hydrophone or towed array) could be used to determine if marine mammals are in the area before and/or after a detonation event.

(iv) When conducting a particular survey, the survey team shall collect:

(A) Location of sighting;

(B) Species (if not possible, indicate whale, dolphin or pinniped);

(C) Number of individuals;

(D) Whether calves were observed;

(E) Initial detection sensor;

(F) Length of time observers maintained visual contact with marine mammal;

(G) Wave height;

(H) Visibility;

(I) Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after;

(J) Distance of marine mammal from actual detonations (or target spot if not yet detonated);

(K) Observed behavior—Watchstanders shall report, in plain language and without trying to categorize in any way, the observed behavior of the animal(s) (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming etc.), including speed and direction;

(L) Resulting mitigation implementation—Indicate whether explosive detonations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long; and

(M) If observation occurs while explosives are detonating in the water, indicate munitions type in use at time of marine mammal detection.

(2) Passive acoustic monitoring—the Navy shall conduct passive acoustic monitoring when operationally feasible.

(i) Any time a towed hydrophone array is employed during shipboard surveys the towed array shall be deployed during daylight hours for each of the days the ship is at sea.

(ii) The towed hydrophone array shall be used to supplement the ship-based systematic line-transect surveys (particularly for species such as beaked whales that are rarely seen).

(iii) The array should have the capability of detecting low frequency vocalizations (<1,000 Hz) for baleen whales and relatively high frequency (up to 30 kHz) for odontocetes. The use of two simultaneously deployed arrays can also allow more accurate localization and determination of diving patterns.

(3) Marine mammal observers on Navy platforms:

(i) As required in § 218.34(c)(1), MMOs who are selected for aerial or vessel surveys shall, to the extent practicable, be placed on a Navy platform during the exercises being monitored.

(ii) The MMO must possess expertise in species identification of regional marine mammal species and experience collecting behavioral data.

(iii) MMOs shall not be placed aboard Navy platforms for every Navy training event or major exercise. Instead, MMOs should be employed during specifically identified opportunities deemed appropriate for data collection efforts. The events selected for MMO participation shall take into account safety, logistics, and operational concerns.

(iv) MMOs shall observe from the same height above water as the lookouts.

(v) The MMOs shall not be part of the Navy's formal reporting chain of command during their data collection efforts; Navy lookouts shall continue to serve as the primary reporting means within the Navy chain of command for marine mammal sightings. The only exception is that if an animal is observed within the shutdown zone that has not been observed by the lookout, the MMO shall inform the lookout of the sighting and the lookout shall take the appropriate action through the chain of command.

(vi) The MMOs shall collect species identification, behavior, direction of travel relative to the Navy platform, and distance first observed. Information collected by MMOs should be the same as those collected by the survey team described in § 218.34(c)(1)(iv).

(d) General Notification of Injured or Dead Marine Mammals—Navy personnel shall ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as clearance procedures allow) if an injured or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing underwater explosive detonations. The Navy shall provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

(e) Annual GOMEX Range Complex Monitoring Plan Report—The Navy shall submit a report annually on March 1 describing the implementation and results (through January 1 of the same year) of the GOMEX Range Complex Monitoring Plan. Data collection methods shall be standardized across range complexes to allow for comparison in different geographic locations. Although additional information will also be gathered, the MMOs collecting marine mammal data pursuant to the GOMEX Range Complex Monitoring Plan shall, at a minimum, provide the same marine mammal observation data required in § 218.34(c)(1)(iv). The GOMEX Range Complex Monitoring Plan Report may be provided to NMFS within a larger report that includes the required Monitoring Plan Reports from GOMEX Range Complex and multiple range complexes.

(f) Annual GOMEX Range Complex Exercise Report—The Navy shall provide the information described below for all of their explosive exercises. Until the Navy is able to report in full the information below, they shall provide an annual update on the Navy's explosive tracking methods, including improvements from the previous year.

(1) Total annual number of each type of explosive exercise (of those identified as part of the "specified activity" in this final rule) conducted in the GOMEX Range Complex.

(2) Total annual expended/detonated rounds (missiles, bombs, etc.) for each explosive type.

(g) GOMEX Range Complex 5-yr Comprehensive Report—The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during the GOMEX Range Complex exercises for which annual reports are required (Annual GOMEX Range Complex Exercise Reports and GOMEX Range Complex Monitoring Plan Reports). This report shall be submitted at the end of the fourth year of the rule (February 2015), covering activities that have occurred through August 1, 2014.

(h) The Navy shall respond to NMFS comments and requests for additional information or clarification on the GOMEX Range Complex Comprehensive Report, the Annual GOMEX Range Complex Exercise Report, or the Annual GOMEX Range Complex Monitoring Plan Report (or the multi-Range Complex Annual Monitoring Plan Report, if that is how the Navy chooses to submit the information) if submitted within 3 months of receipt. These reports will be considered final after the Navy has addressed NMFS' comments or provided the requested information, or three months after the submittal of the draft if NMFS does not comment by then.

(i) In 2011, the Navy shall convene a Monitoring Workshop in which the Monitoring Workshop participants will be asked to review the Navy's Monitoring Plans and monitoring results and make individual recommendations (to the Navy and NMFS) of ways of improving the Monitoring Plans. The recommendations shall be reviewed by the Navy, in consultation with NMFS, and modifications to the Monitoring Plan shall be made, as appropriate.

§ 218.35 Applications for Letters of Authorization.

To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by § 216.103 of this chapter) conducting the activity identified in § 218.30(a) (the U.S. Navy) must apply for and obtain either an initial Letter of Authorization in accordance with § 218.36 or a renewal under § 218.37.

§ 218.36 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the period of validity of this subpart, but must be renewed annually subject to annual renewal conditions in § 218.37.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (i.e., mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

§ 218.37 Renewal of Letters of Authorization and adaptive management.

(a) A Letter of Authorization issued under §§ 216.106 and 218.36 of this chapter for the activity identified in § 218.30(c) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 218.35 shall be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) Timely receipt of the monitoring reports required under § 218.34; and

(3) A determination by the NMFS that the mitigation, monitoring and reporting measures required under § 218.33 and the Letter of Authorization issued under §§ 216.106 and 218.36 of this chapter, were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 218.37 of this chapter indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, the NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register.**

(d) NMFS, in response to new information and in consultation with the Navy, may modify the mitigation or monitoring measures in subsequent LOAs if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either from GOMEX Study Area or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011 (§ 218.34(j)).

(3) Results from specific stranding investigations (either from the GOMEX Range Complex Study Area or other locations).

(4) Results from general marine mammal and sound research (funded by the Navy (described below) or otherwise).

(5) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

§ 218.38 Modifications to Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §§ 216.106 and 218.36 of this chapter and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 218.37, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 218.30(b), a Letter of Authorization issued pursuant to §§ 216.106 and 218.36 of this chapter may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action.

[FR Doc. 2011–3629 Filed 2–16–11; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 76, No. 33
Thursday, February 17, 2011

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM446 Special Conditions No. 25–11–05–SC]

Special Conditions: Gulfstream Model GVI Airplane; Electronic Flight Control System: Control Surface Position Awareness

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Gulfstream GVI airplane. This airplane will have novel or unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. These design features include an electronic flight control system. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for these design features. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: We must receive your comments by April 4, 2011.

ADDRESSES: You must mail two copies of your comments to: Federal Aviation Administration, Transport Airplane Directorate, Attn: Rules Docket (ANM–113), Docket No. NM446, 1601 Lind Avenue, SW., Renton, Washington, 98057–3356. You may deliver two copies to the Transport Airplane Directorate at the above address. You must mark your comments: Docket No. NM446. You can inspect comments in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Joe Jacobsen, FAA, Airplane and Flightcrew Interface Branch, ANM–111, Transport Standards Staff, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington, 98057–3356; telephone (425) 227–2011; facsimile (425) 227–1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning these special conditions. You can inspect the docket before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

If you want us to acknowledge receipt of your comments on this proposal, include with your comments a self-addressed, stamped postcard on which you have written the docket number. We will stamp the date on the postcard and mail it back to you.

Background

On March 29, 2005, Gulfstream Aerospace Corporation (hereafter referred to as "Gulfstream") applied for an FAA type certificate for its new Gulfstream Model GVI passenger airplane. Gulfstream later applied for, and was granted, an extension of time for the type certificate, which changed the effective application date to September 28, 2006. The Gulfstream Model GVI airplane will be an all-new, two-engine jet transport airplane with an executive cabin interior. The maximum takeoff weight will be 99,600 pounds, with a maximum passenger count of 19 passengers.

Type Certification Basis

Under provisions of Title 14, Code of Federal Regulations (14 CFR) 21.17, Gulfstream must show that the Gulfstream Model GVI airplane (hereafter referred to as "the GVI") meets the applicable provisions of 14 CFR part 25, as amended by Amendments 25–1 through 25–119, 25–122, and 25–124. If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the GVI because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to complying with the applicable airworthiness regulations and special conditions, the GVI must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36. The FAA must also issue a finding of regulatory adequacy pursuant to section 611 of Public Law 92–574, the "Noise Control Act of 1972."

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type certification basis under § 21.17(a)(2).

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design features, the special conditions would also apply to the other model under provisions of § 21.101.

Novel or Unusual Design Features

The GVI has an electronic flight control system and no direct coupling from the cockpit controller to the control surface, so the pilot may not be aware of the actual surface position utilized to fulfill the requested command. Some unusual flight conditions, such as those arising from atmospheric conditions, aircraft malfunctions, or engine failures, may result in full or near-full control surface deflection. Unless the flightcrew is made aware of excessive deflection or impending control surface limiting, piloted or auto-flight system control of the airplane might be inadvertently continued to a point that could cause a loss of aircraft control or other unsafe

stability or performance characteristic. Because electronic flight control system technology has outpaced existing regulations, a special condition is proposed to ensure control surface position awareness by the flightcrew.

Discussion of Proposed Special Condition

This proposed special condition would require that suitable flight control position annunciation be provided to the flightcrew when a flight condition exists in which near-full surface authority (not crew-commanded) is being utilized. The suitability of such an annunciation must take into account that some pilot-demanded maneuvers, such as a rapid roll, are necessarily associated with intended full performance, and which may saturate the control surface. Simple alerting systems which would annunciate either intended or unexpected control-limiting situations must be properly balanced between providing necessary crew awareness and avoiding undesirable nuisance warnings.

This proposed special condition would establish a level of safety equivalent to that provided by a conventional flight control system and that contemplated in existing regulations.

Applicability

As discussed above, this proposed special condition is applicable to the GVI. Should Gulfstream apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design features, this proposed special condition would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features of the GVI. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

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

The Proposed Special Condition

Accordingly, the Federal Aviation Administration (FAA) proposes the following special condition as part of the type certification basis for the GVI airplanes.

In addition to compliance with §§ 25.143, 25.671, 25.672, and 25.1322, the following special condition applies:

When a flight condition exists where, without being commanded by the flightcrew, control surfaces are coming so close to their limits that return to the normal flight envelope and/or continuation of safe flight requires a specific flightcrew member action, a suitable flight control position annunciation must be provided to the flightcrew, unless other existing indications are found adequate or sufficient to prompt that action.

Note: The term "suitable" also indicates an appropriate balance between necessary operation and nuisance factors.

Issued in Renton, Washington, on February 8, 2011.

KC Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–3556 Filed 2–16–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–0023; Airspace Docket No. 11–ANM–2]

Proposed Amendment of Class D and Class E Airspace; Idaho Falls, ID

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend the Class D and Class E airspace areas at Idaho Falls, ID, by changing the name of the airport to Idaho Falls Regional Airport, and adjusting the geographic coordinates of the airport. This action also would add additional Class E airspace necessary to accommodate aircraft using new Area Navigation (RNAV) Required Navigation Performance (RNP) standard instrument approach procedures at the airport. This action would enhance the safety and management of aircraft operations at the airport.

DATES: Comments must be received on or before April 4, 2011.

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–2011–0023; Airspace Docket No. 11–ANM–2, 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 2011–0023 and Airspace Docket No. 11–ANM–2) 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–2011–0023 and Airspace Docket No. 11–ANM–2". 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 amending the Class D and Class E airspace areas to change the airport name from Fanning Field to Idaho Falls Regional Airport, and also would adjust the geographic coordinates of the airport to be in concert with the FAA's Aeronautical Products office. Also, existing Class E airspace area extending upward from 700 feet above the surface at Idaho Falls Regional Airport would be adjusted to accommodate aircraft using the new RNAV (RNP) standard instrument approach procedures, and would enhance the safety and management of aircraft operations at the airport.

Class D and Class E airspace designations are published in paragraph 5000, 6002, 6004 and 6005, respectively, of FAA Order 7400.9U, dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class D and Class E airspace designations 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 amends controlled airspace at Idaho Falls Regional Airport, Idaho Falls, ID.

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 71.1 of the Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010 is amended as follows:

Paragraph 5000 Class D airspace.

* * * * *

ANM ID D Idaho Falls, ID [Amended]

Idaho Falls Regional Airport, ID
(Lat. 43°30′52″ N., long. 112°04′13″ W.)

That airspace extending upward from the surface to and including 7,200 feet MSL within a 5.4-mile radius of Idaho Falls Regional Airport excluding that airspace below 5,300 feet MSL within a 1-mile radius of lat. 43°28′16″ N., long. 111°59′27″ W.; and excluding that airspace 1 mile either side of the 127° bearing from lat. 43°28′16″ N., long. 111°59′27″ W., to the 5.4-mile radius of Idaho Falls Regional Airport. This Class D 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.

Paragraph 6002 Class E airspace designated as surface areas.

* * * * *

ANM ID E2 Idaho Falls, ID [Amended]

Idaho Falls Regional Airport, ID
(Lat. 43°30′52″ N., long. 112°04′13″ W.)

Within a 5.4-mile radius of Idaho Falls Regional Airport. 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.

Paragraph 6004 Class E airspace designated as an Extension to a Class D surface area.

* * * * *

ANM ID E4 Idaho Falls, ID [Amended]

Idaho Falls Regional Airport, ID
(Lat. 43°30′52″ N., long. 112°04′13″ W.)
Idaho Falls VOR/DME
(Lat. 43°31′08″ N., long. 112°03′50″ W.)

That airspace extending upward from the surface within 3.1 miles each side of the Idaho Falls VOR/DME 223° radial extending from the 5.4-mile radius of Idaho Falls Regional Airport to 9.2 miles southwest of the VOR/DME, and within 3.5 miles each side of the Idaho Falls VOR/DME 030° radial extending from the 5.4-mile radius of the airport to 7 miles northeast of the VOR/DME.

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

* * * * *

ANM ID E5 Idaho Falls, ID [Modified]

Idaho Falls Regional Airport, ID
(Lat. 43°30′52″ N., long. 112°04′13″ W.)
Pocatello VORTAC
(Lat. 42°52′13″ N., long. 112°39′08″ W.)
Burley VOR/DME
(Lat. 42°34′49″ N., long. 113°51′57″ W.)
Idaho Falls VOR/DME
(Lat. 43°31′08″ N., long. 112°03′50″ W.)

That airspace extending upward from 700 feet above the surface within a 7.5-mile radius of Idaho Falls Regional Airport, and within 10.2 miles northwest and 4.3 miles southeast of the Idaho Falls VOR/DME 036° and 216° radials extending from 27.2 miles northeast to 16.1 miles southwest of the VOR/DME, and within 7.9 miles southeast and 5.3 miles northwest of the 029° radial of the Pocatello VORTAC extending from 20.1 to 40.9 miles northeast of the VORTAC; that airspace extending from 1,200 feet above the surface bounded by a line beginning at the intersection of long. 112°30′03″ W., and the south edge of V–298, extending east along V–298 to the intersection of the south edge of V–298 and long. 112°02′00″ W., north along long. 112°02′00″ W. to lat. 44°20′00″ N., east along lat. 44°20′00″ N. to long. 110°37′00″ W., south along long. 110°37′00″ W. to the intersection of long. 110°37′00″ W. and the

northwest edge of V–465, southwest on V–465 to the intersection of V–465 and long. 112°00′00″ W., south along long. 112°00′00″ W., to the north edge of V–4, west on V–4 to the 24.4 mile radius of the Burley VOR/DME, thence counterclockwise via the 24.4-mile radius to the south edge of V–269, thence east along the south edge of V–269 to the 25.3-mile radius of the Pocatello VORTAC, thence clockwise via the 25.3-mile radius to lat. 43°05′46″ N., long. 113°08′15″ W.; to lat. 43°20′30″ N., long. 112°45′33″ W.; to lat. 43°32′00″ N., long. 112°35′03″ W.; to lat. 43°50′20″ N., long. 112°30′03″ W., thence to the point of beginning; excluding that airspace within Federal airways, the Jackson Hole Airport, WY, the Rexburg/Madison County Airport, ID, and the West Yellowstone Airport, MT, Class E airspace areas.

Issued in Seattle, Washington, on February 9, 2011.

Christine Mellon,

Acting Manager, Operations Support Group, Western Service Center.

[FR Doc. 2011–3557 Filed 2–16–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506–AB11

Financial Crimes Enforcement Network; Imposition of Special Measure Against the Lebanese Canadian Bank SAL as a Financial Institution of Primary Money Laundering Concern

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

ACTION: Notice of proposed rulemaking.

SUMMARY: In a notice of finding published elsewhere in this issue of the **Federal Register**, the Secretary of the Treasury, through his delegate, the Director of FinCEN, found that reasonable grounds exist for concluding that the Lebanese Canadian Bank SAL ("LCB") is a financial institution of primary money laundering concern pursuant to 31 U.S.C. 5318A. FinCEN is issuing this notice of proposed rulemaking to impose a special measure against LCB.

DATES: Written comments on the notice of proposed rulemaking must be submitted on or before April 18, 2011.

ADDRESSES: You may submit comments, identified by RIN 1506–XXX by any of the following methods:

- *Federal e-rulemaking portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regcomments@fincen.treas.gov.* Include RIN 1506–XXX in the subject line of the message.
- *Mail:* The Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Include RIN 1506–XXX in the body of the text.

Instructions. It is preferable for comments to be submitted by electronic mail because paper mail in the Washington, DC area may be delayed. Please submit comments by one method only. All submissions received must include the agency name and the Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to *http://www.fincen.gov,* including any personal information provided. Comments may be inspected at FinCEN between 10 a.m. and 4 p.m., in the FinCEN reading room in Washington, DC. Persons wishing to inspect the comments submitted must request an appointment by telephoning (202) 354–6400 (not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Regulatory Policy and Programs Division, FinCEN, (800) 949–2732.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Provisions

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001 (the "USA PATRIOT Act"), Public Law 107–56. Title III of the USA PATRIOT Act amended the anti-money laundering provisions of the Bank Secrecy Act ("BSA"), codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314 and 5316–5332, to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism. Regulations implementing the BSA appear at 31 CFR part 103. The authority of the Secretary of the Treasury ("the Secretary") to administer the BSA and its implementing regulations has been delegated to the Director of FinCEN.[1]

Section 311 of the USA PATRIOT Act ("section 311") added section 5318A to the BSA, granting the Secretary the authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, institution, class of transaction, or type of account is of "primary money laundering concern," to require domestic financial institutions and financial agencies to take certain "special measures" against the primary money laundering concern. Section 311 identifies factors for the Secretary to consider and Federal agencies to consult before the Secretary may conclude that a jurisdiction, institution, class of transaction, or type of account is of primary money laundering concern. The statute also provides similar procedures, *i.e.,* factors and consultation requirements, for selecting the specific special measures to be imposed against the primary money laundering concern.

Taken as a whole, section 311 provides the Secretary with a range of options that can be adapted to target specific money laundering and terrorist financing concerns most effectively. These options give the Secretary the authority to bring additional pressure on those jurisdictions and institutions that pose money laundering threats. Through the imposition of various special measures, the Secretary can gain more information about the jurisdictions, institutions, transactions, or accounts of concern; can more effectively monitor the respective jurisdictions, institutions, transactions, or accounts; or can protect U.S. financial institutions from involvement with jurisdictions, institutions, transactions, or accounts that are of money laundering concern.

Before making a finding that reasonable grounds exist for concluding that a foreign financial institution is of primary money laundering concern, the Secretary is required to consult with both the Secretary of State and the Attorney General. The Secretary is also required by section 311 to consider "such information as the Secretary determines to be relevant, including the following potentially relevant factors:

- The extent to which such financial institution is used to facilitate or promote money laundering in or through the jurisdiction;
- The extent to which such financial institution is used for legitimate business purposes in the jurisdiction; and
- The extent to which the finding that the institution is of primary money laundering concern is sufficient to ensure, with respect to transactions involving the institution operating in the jurisdiction, that the purposes of the BSA continue to be fulfilled, and to guard against international money laundering and other financial crimes.

If the Secretary determines that reasonable grounds exist for concluding that a financial institution is of primary money laundering concern, the Secretary must determine the appropriate special measure(s) to address the specific money laundering risks. Section 311 provides a range of

[1] Therefore, references to the authority of the Secretary of the Treasury under section 311 of the USA PATRIOT Act apply equally to the Director of FinCEN.

special measures that can be imposed individually, jointly, in any combination, and in any sequence.[2] The Secretary's imposition of special measures requires additional consultations to be made and factors to be considered. The statute requires the Secretary to consult with appropriate Federal agencies and other interested parties [3] and to consider the following specific factors:

- Whether similar action has been or is being taken by other nations or multilateral groups;
- Whether the imposition of any particular special measures would create a significant competitive disadvantage, including any undue cost or burden associated with compliance, for financial institutions organized or licensed in the United States;
- The extent to which the action or the timing of the action would have a significant adverse systemic impact on the international payment, clearance, and settlement system, or on legitimate business activities involving the particular institution; and
- The effect of the action on the United States national security and foreign policy.[4]

B. The Lebanese Canadian Bank SAL

In this rulemaking, FinCEN proposes to impose the fifth special measure (31 U.S.C. 5318A(b)(5)) against LCB. The fifth special measure prohibits or conditions the opening or maintaining of correspondent or payable-through accounts for the designated institution by U.S. financial institutions. This special measure may be imposed only through the issuance of a regulation.

LCB is based in Beirut, Lebanon, and maintains a network of 35 branches in Lebanon and a representative office in Montreal, Canada.[5] The bank is considered among the top 10 banks in Lebanon in assets and has over 600 employees.[6] Originally established in 1960 as Banque des Activities Economiques SAL, it operated as a subsidiary of the Royal Bank of Canada Middle East (1968–1988) and is now a privately owned bank.[7] LCB offers a broad range of corporate, retail, and investment products, and it maintains extensive correspondent accounts with banks worldwide, including several U.S. financial institutions.[8] As of 2009, LCB's total assets were worth over $5 billion.[9]

LCB has a controlling financial interest in a number of subsidiaries, including LCB Investments SAL, LCB Finance SAL, LCB Estates SAL, LCB Insurance Brokerage House SAL, Dubai-based Tabadul for Shares and Bonds LLC, Prime Bank Limited ("Prime Bank") of Gambia.[10] Prime Bank is a private commercial bank located in Serrekunda, Gambia.[11] LCB owns 51% of Prime Bank, while the remaining shares are held by local and Lebanese partners.[12] LCB apparently serves as the sole correspondent bank for Prime Bank.[13] For purposes of this document and, unless expressly stated otherwise, references to LCB include the aforementioned subsidiaries.

II. Imposition of Special Measure Against the Lebanese Canadian Bank SAL as a Financial Institution of Primary Money Laundering Concern

As a result of the finding on February 17, 2011 by the Secretary, through his delegate, the Director of FinCEN, that reasonable grounds exist for concluding that LCB is a financial institution of primary money laundering concern (*see* the notice of this finding published elsewhere today in the **Federal Register**), and based upon the additional consultations and the consideration of all relevant factors discussed in the finding and in this notice of proposed rulemaking, the Secretary, through FinCEN, has determined that reasonable grounds exist for the imposition of the special measure authorized by section 5318A(b)(5).[14] That special measure authorizes the prohibition against the opening or maintaining of correspondent accounts [15] by any domestic financial institution or agency for or on behalf of a targeted financial institution. A discussion of the section 311 factors relevant to imposing this particular special measure follows.

1. Whether Similar Actions Have Been or Will Be Taken by Other Nations or Multilateral Groups Against LCB

Other countries or multilateral groups have not taken action similar to the one proposed in this rulemaking that would prohibit domestic financial institutions and agencies from opening or maintaining a correspondent account for or on behalf of LCB, and require those domestic financial institutions and agencies to screen their correspondents in a manner that is reasonably designed to guard against their indirect use by nested correspondent accounts held by LCB. FinCEN encourages other countries to take similar action based on the findings contained in this rulemaking.

2. Whether the Imposition of the Fifth Special Measure Would Create a Significant Competitive Disadvantage, Including Any Undue Cost or Burden Associated With Compliance, for Financial Institutions Organized or Licensed in the United States

The fifth special measure sought to be imposed by this rulemaking would prohibit covered financial institutions from opening and maintaining correspondent accounts for, or on behalf of, LCB. As a corollary to this measure, covered financial institutions also would be required to take reasonable steps to apply special due diligence, as set forth below, to all of their correspondent accounts to help ensure that no such account is being used indirectly to provide services to LCB. FinCEN does not expect the burden associated with these requirements to be significant, given its understanding that few U.S. financial institutions currently maintain a correspondent account for

[2] Available special measures include requiring: (1) Recordkeeping and reporting of certain financial transactions; (2) collection of information relating to beneficial ownership; (3) collection of information relating to certain payable-through accounts; (4) collection of information relating to certain correspondent accounts; and (5) prohibition or conditions on the opening or maintaining of correspondent or payable through accounts. 31 U.S.C. 5318A(b)(1)–(5). For a complete discussion of the range of possible countermeasures, *see* 68 FR 18917 (April 17, 2003) (proposing special measures against Nauru).

[3] Section 5318A(a)(4)(A) requires the Secretary to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Secretary of State, the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the National Credit Union Administration (NCUA), and, in the sole discretion of the Secretary, "such other agencies and interested parties as the Secretary may find to be appropriate." The consultation process must also include the Attorney General if the Secretary is considering prohibiting or imposing conditions on domestic financial institutions opening or maintaining correspondent account relationships with the designated jurisdiction.

[4] Classified information used in support of a section 311 finding and measure(s) may be submitted by Treasury to a reviewing court ex parte and in camera. *See* section 376 of the Intelligence Authorization Act for fiscal year 2004, Pub. L. 108–177 (amending 31 U.S.C. 5318A by adding new paragraph (f)).

[5] Bankers Almanac, Lebanese Canadian Bank SAL, June 22, 2010 (*http://www.bankersalmanac.com*).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Lebanese Canadian Bank, 2009 Annual Report.

[10] *Id.*

[11] *See http://primebankgambia.gm/index.*

[12] *Id.*

[13] *Id.*

[14] In connection with this action, FinCEN consulted with staff of the Federal functional regulators, the Department of Justice, and the Department of State.

[15] For purposes of the proposed rule, a correspondent account is defined as an account established to receive deposits from, or make payments or other disbursements on behalf of, a foreign bank, or handle other financial transactions related to the foreign bank.

LCB.[16] There is a minimal burden involved in transmitting a one-time notice to correspondent account holders concerning the prohibition on indirectly providing services to LCB. In addition, U.S. financial institutions generally apply some degree of due diligence in screening their transactions and accounts, often through the use of commercially available software such as that used for compliance with the economic sanctions programs administered by the Office of Foreign Assets Control (OFAC) of the Department of the Treasury. As explained in more detail in the section-by-section analysis below, financial institutions should, if necessary, be able to easily adapt their current screening procedures to comply with this special measure. Thus, the special due diligence that would be required by this rulemaking is not expected to impose a significant additional burden upon U.S. financial institutions.

3. The Extent To Which the Proposed Action or Timing of the Action Will Have a Significant Adverse Systemic Impact on the International Payment, Clearance, and Settlement System, or on Legitimate Business Activities of the Lebanese Canadian Bank SAL

This proposed rulemaking targets LCB specifically; it does not target a class of financial transactions (such as wire transfers) or a particular jurisdiction. LCB is not a major participant in the international payment system and is not relied upon by the international banking community for clearance or settlement services. Thus, the imposition of the fifth special measure against LCB would not have a significant adverse systemic impact on the international payment, clearance, and settlement system. In light of the reasons for imposing this special measure, FinCEN does not believe that it would impose an undue burden on legitimate business activities, and notes that the presence of several larger banks in Lebanon would alleviate the burden on legitimate business activities within that jurisdiction.

4. The Effect of the Proposed Action on United States National Security and Foreign Policy

The exclusion from the U.S. financial system of banks that serve as conduits for significant money laundering activity and other financial crimes enhances national security, making it more difficult for money launderers to access the substantial resources of the U.S. financial system. More generally, the imposition of the fifth special measure would complement the U.S. Government's worldwide efforts to expose and disrupt international money laundering.

Therefore, pursuant to the finding of the Secretary of the Treasury that LCB is an institution of primary money laundering concern, and after conducting the required consultations and weighing the relevant factors, FinCEN has determined that reasonable grounds exist for imposing the special measure.

III. Section-by-Section Analysis

The proposed rule would prohibit covered financial institutions from establishing, maintaining, or managing in the United States any correspondent account for or on behalf of LCB. As a corollary to this prohibition, covered financial institutions would be required to apply special due diligence to their correspondent accounts to guard against their indirect use by LCB. At a minimum, that special due diligence must include two elements. First, a covered financial institution must notify those correspondent account holders that the covered financial institution knows or has reason to know provide services to LCB that such correspondents may not provide LCB with access to the correspondent account maintained at the covered financial institution. Second, a covered financial institution must take reasonable steps to identify any indirect use of its correspondent accounts by LCB, to the extent that such indirect use can be determined from transactional records maintained by the covered financial institution in the normal course of business. A covered financial institution should take a risk-based approach when deciding what, if any, additional due diligence measures it should adopt to guard against the indirect use of its correspondent accounts by LCB, based on risk factors such as the type of services it offers and geographic locations of its correspondents.

A. 103.194(a)—Definitions

1. The Lebanese Canadian Bank SAL

Section 103.194(a)(1) of the proposed rule defines LCB to include all branches, offices, and subsidiaries of LCB operating in Lebanon or in any jurisdiction. These branches, offices, and subsidiaries include, but are not necessarily limited to, LCB Investments (Holding) SAL, LCB Finance SAL, LCB Estates SAL, LCB Insurance Brokerage House SAL, Dubai-based Tabadul for Shares and Bonds LLC, and Prime Bank Limited in Serrekunda, Gambia. FinCEN will provide updated information, as it is available; however, covered financial institutions should take commercially reasonable measures to determine whether a customer is a branch, office, or subsidiary of LCB.

2. Correspondent account

Section 103.194(a)(2) defines the term "correspondent account" by reference to the definition contained in 31 CFR 103.175(d)(1)(ii). Section 103.175(d)(1)(ii) defines a correspondent account to mean an account established to receive deposits from, or make payments or other disbursements on behalf of, a foreign bank, or handle other financial transactions related to the foreign bank.

In the case of a U.S. depository institution, this broad definition includes most types of banking relationships between a U.S. depository institution and a foreign bank that are established to provide regular services, dealings, and other financial transactions including a demand deposit, savings deposit, or other transaction or asset account, and a credit account or other extension of credit.

In the case of securities broker-dealers, futures commission merchants, introducing brokers in commodities, and investment companies that are open-end companies (mutual funds), we are using the same definition of "account" for purposes of this rule as was established in the final rule implementing section 312 of the USA PATRIOT Act.[17]

3. Covered Financial Institution

Section 103.194(a)(3) of the proposed rule defines "covered financial institution" with the same definition used in the final rule implementing section 312 of the USA PATRIOT Act,[18] which in general includes the following:

- An insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h));
- A commercial bank;
- An agency or branch of a foreign bank in the United States;
- A Federally insured credit union;
- A savings association;
- A corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611);
- A trust bank or trust company;
- A broker or dealer in securities;
- A futures commission merchant or an introducing broker; or

[16] Bankers Almanac, Lebanese Canadian Bank SAL, June 22, 2010 (*http://www.bankersalmanac.com*).

[17] *See* 31 CFR 103.175(d)(2)(ii) through (iv).

[18] *See* 31 CFR 103.175(f)(1).

- A mutual fund.

B. 03.194(b)—Requirements for Covered Financial Institutions

For purposes of complying with the proposed rule's prohibition on the opening or maintaining of correspondent accounts for, or on behalf of, LCB, FinCEN expects that a covered financial institution would take such steps that a reasonable and prudent financial institution would take to protect itself from loan fraud or other fraud or loss based on misidentification of a person's status.

1. Prohibition on Direct Use of Correspondent Accounts

Section 103.194(b)(1) of the proposed rule would prohibit all covered financial institutions from establishing, maintaining, administering, or managing a correspondent or payable-through account in the United States for, or on behalf of, LCB. The prohibition would require all covered financial institutions to review their account records to ensure that they maintain no accounts directly for, or on behalf of, LCB.

2. Special Due Diligence of Correspondent Accounts To Prohibit Indirect Use

As a corollary to the prohibition on maintaining correspondent accounts directly for LCB, section 103.194(b)(2) would require a covered financial institution to apply special due diligence to its correspondent accounts [19] that is reasonably designed to guard against their indirect use by LCB. At a minimum, that special due diligence must include notifying those correspondent account holders that the covered financial institution knows or has reason to know provide services to LCB, that such correspondents may not provide LCB with access to the correspondent account maintained at the covered financial institution. A covered financial institution would, for example, have knowledge that the correspondents provide access to LCB through transaction screening software. A covered financial institution may satisfy this requirement by transmitting the following notice to its correspondent account holders that it knows or has reason to know provide services to LCB:

Notice: Pursuant to U.S regulations issued under section 311 of the USA PATRIOT Act, 31 CFR 103.194, we are prohibited from establishing, maintaining, administering or managing a correspondent account for, or on behalf of, the Lebanese Canadian Bank SAL or any of its subsidiaries (including, but not limited to, LCB Investments (Holding) SAL, LCB Finance SAL, LCB Estates SAL, LCB Insurance Brokerage House SAL, Dubai-based Tabadul for Shares and Bonds LLC, and Prime Bank Limited of Gambia). The regulations also require us to notify you that you may not provide the Lebanese Canadian Bank SAL or any of its subsidiaries with access to the correspondent account you hold at our financial institution. If we become aware that the Lebanese Canadian Bank SAL or any of its subsidiaries is indirectly using the correspondent account you hold at our financial institution for transactions, we will be required to take appropriate steps to prevent such access, including terminating your account.

The purpose of the notice requirement is to help ensure cooperation from correspondent account holders in denying LCB access to the U.S. financial system. However, FinCEN does not require or expect a covered financial institution to obtain a certification from any of its correspondent account holders that indirect access will not be provided in order to comply with this notice requirement. Instead, methods of compliance with the notice requirement could include, for example, transmitting a one-time notice by mail, fax, or e-mail to certain of the covered financial institution's correspondent account customers, informing them that they may not provide LCB with access to the covered financial institution's correspondent account, or including such information in the next regularly occurring transmittal from the covered financial institution to those correspondent account holders. FinCEN specifically solicits comments on the form and scope of the notice that would be required under the rule.

A covered financial institution also would be required under this rulemaking to take reasonable steps to identify any indirect use of its correspondent accounts by LCB, to the extent that such indirect use can be determined from transactional records maintained by the covered financial institution in the normal course of business. For example, a covered financial institution would be expected to apply an appropriate screening mechanism to be able to identify a funds transfer order that on its face listed LCB as the originator's or beneficiary's financial institution, or otherwise referenced LCB in a manner detectable under the financial institution's normal screening processes. An appropriate screening mechanism could be the mechanism used by a covered financial institution to comply with various legal requirements, such as the commercially available software programs used to comply with the economic sanctions programs administered by OFAC. FinCEN specifically solicits comments on the requirement under the proposed rule that covered financial institutions take reasonable steps to screen their correspondent accounts in order to identify any indirect use of such accounts by LCB.

Notifying certain correspondent account holders and taking reasonable steps to identify any indirect use of its correspondent accounts by LCB in the manner discussed above would be the minimum due diligence requirements under the proposed rule. Beyond these minimum steps, a covered financial institution should adopt a risk-based approach for determining what, if any, additional due diligence measures it should implement to guard against the indirect use of its correspondent accounts by LCB, based on risk factors such as the type of services it offers and the geographic locations of its correspondent account holders.

A covered financial institution that obtains knowledge that a correspondent account is being used by a foreign bank to provide indirect access to LCB must take all appropriate steps to prevent such indirect access, including the notification of its correspondent account holder per section 103.194(b)(2)(i)(A) and, where necessary, terminating the correspondent account. A covered financial institution may afford the foreign bank a reasonable opportunity to take corrective action prior to terminating the correspondent account. Should the foreign bank refuse to comply, or if the covered financial institution cannot obtain adequate assurances that the account will no longer be available to LCB, the covered financial institution must terminate the account within a commercially reasonable time. This means that the covered financial institution should not permit the foreign bank to establish any new positions or execute any transactions through the account, other than those necessary to close the account. A covered financial institution may reestablish an account closed under the proposed rule if it determines that the account will not be used to provide banking services indirectly to LCB. FinCEN specifically solicits comments on the requirement under the proposed rule that covered financial institutions prevent indirect access to LCB, once such indirect access is identified.

3. Reporting Not Required

Section 103.194(b)(3) of the proposed rule clarifies that the rule would not

[19] Again, for purposes of the proposed rule, a correspondent account is defined as an account established to receive deposits from, or make payments or other disbursements on behalf of, a foreign bank, or handle other financial transactions related to the foreign bank.

impose any reporting requirement upon any covered financial institution that is not otherwise required by applicable law or regulation. A covered financial institution must, however, document its compliance with the requirement that it notify those correspondent account holders that the covered financial institution knows or has reason to know provide services to LCB, that such correspondents may not provide LCB with access to the correspondent account maintained at the covered financial institution.

IV. Request for Comments

FinCEN invites comments on all aspects of the proposal to prohibit the opening or maintaining of correspondent accounts for or on behalf of LCB, and specifically invites comments on the following matters:

1. The form and scope of the notice to certain correspondent account holders that would be required under the rule;
2. The appropriate scope of the proposed requirement for a covered financial institution to take reasonable steps to identify any indirect use of its correspondent accounts by LCB;
3. The appropriate steps a covered financial institution should take once it identifies an indirect use of one of its correspondent accounts by LCB; and
4. The impact of the proposed special measure upon legitimate transactions with LCB involving, in particular, U.S. persons and entities; foreign persons, entities, and governments; and multilateral organizations doing legitimate business with persons or entities operating in Lebanon.

V. Regulatory Flexibility Act

It is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. FinCEN understands that LCB currently maintains few correspondent accounts in the United States.[20] Thus, the prohibition on maintaining such accounts would not have a significant impact on a substantial number of small entities. In addition, all U.S. persons, including U.S. financial institutions, currently must exercise some degree of due diligence in order to comply with various legal requirements. The tools used for such purposes, including commercially available software used to comply with the economic sanctions programs administered by OFAC, can easily be modified to monitor for the use of correspondent accounts by LCB. Thus, the special due diligence that would be required by this rulemaking—*i.e.,* the one-time transmittal of notice to certain correspondent account holders and the screening of transactions to identify any indirect use of correspondent accounts, would not be expected to impose a significant additional economic burden upon small U.S. financial institutions. FinCEN invites comments about the impact on small entities.

VI. Paperwork Reduction Act

The collection of information contained in this proposed rule is being submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, DC 20503 (or by e-mail to *oira_submission@omb.eop.gov*) with a copy to FinCEN by mail or e-mail at the addresses previously specified. Comments should be submitted by one method only. Comments on the collection of information should be received by April 18, 2011. In accordance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), and its implementing regulations, 5 CFR part 1320, the following information concerning the collection of information as required by 31 CFR 103.194 is presented to assist those persons wishing to comment on the information collection.

The collection of information in this proposed rule is in 103.194(b)(2)(i) and 103.194(b)(3)(i). The notification requirement in 103.194(b)(2)(i) would be intended to ensure cooperation from correspondent account holders in denying LCB access to the U.S. financial system. The information required to be maintained by 103.194(b)(3)(i) would be used by Federal agencies and certain self-regulatory organizations to verify compliance by covered financial institutions with the provisions of 31 CFR 103.194. The class of financial institutions affected by the notification requirement would be identical to the class of financial institutions affected by the recordkeeping requirement. The collection of information is mandatory.

Description of Affected Financial Institutions: Banks, broker-dealers in securities, futures commission merchants and introducing brokers, and mutual funds maintaining correspondent accounts.

Estimated Number of Affected Financial Institutions: 5,000.

Estimated Average Annual Burden Hours per Affected Financial Institutions: The estimated average burden associated with the collection of information in this proposed rule is one hour per affected financial institution.

Estimated Total Annual Burden: 5,000 hours.

FinCEN specifically invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the mission of FinCEN, including whether the information shall have practical utility; (b) the accuracy of FinCEN's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information required to be maintained; (d) ways to minimize the burden of the required collection of information, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to maintain the information.

VII. Location in Chapter X

As discussed in the **Federal Register** rule published 75 FR 65806, October 26, 2010, FinCEN will be removing Part 103 of Chapter I of Title 31, Code of Federal Regulations, and adding Parts 1000 to 1099 ("Chapter X") effective March 1, 2011. As of this effective date, the changes in the present proposed rule, if finalized, would be reorganized according to Chapter X. The planned reorganization will have no substantive effect on the regulatory changes herein. The regulatory changes of this specific rulemaking would be renumbered according to Chapter X as follows:

Section 103.194 would be moved to § 1010.656.

VIII. Executive Order 12866

The proposed rule is not a significant regulatory action for purposes of Executive Order 12866, "Regulatory Planning and Review."

List of Subjects in 31 CFR Part 103

Administrative practice and procedure, Banks and banking, Brokers, Currency, Foreign banking, Foreign currencies, Gambling, Investigations, Penalties, Reporting and recordkeeping requirements, Securities, Terrorism.

Authority and Issuance

For the reasons set forth in the preamble, part 103 of title 31 of the

[20] Bankers Almanac, Lebanese Canadian Bank SAL, June 22, 2010 (*http://www.bankersalmanac.com*).

Code of Federal Regulations is proposed to be amended as follows:

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

1. The authority citation for part 103 is amended to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314, 5316–5332 Title III, secs. 311, 312, 313, 314, 319, 326, 352, Pub. L. 107–56, 115 Stat. 307.

2. Subpart I of part 103 is amended by adding § 103.194 under an undesignated center heading to read as follows:

Special Due Diligence for Correspondent Accounts and Private Banking Accounts

§ 103.194 Special measures against the Lebanese Canadian Bank SAL

(a) *Definitions.* For purposes of this section:

(1) *The Lebanese Canadian Bank SAL* means all branches, offices, and subsidiaries of the Lebanese Canadian Bank operating in any jurisdiction.

(2) *Correspondent account* has the same meaning as provided in § 103.175(d)(1)(ii).

(3) *Covered financial institution* has the same meaning as provided in § 103.175(f)(1).

(4) *Subsidiary* means a company of which more than 50 percent of the voting stock or analogous equity interest is owned by another company.

(b) *Requirements for covered financial institutions.* (1) *Prohibition on direct use of correspondent accounts.* A covered financial institution shall terminate any correspondent account that is established, maintained, administered, or managed in the United States for, or on behalf of, the Lebanese Canadian Bank SAL.

(2) *Special due diligence of correspondent accounts to prohibit indirect use.* (i) A covered financial institution shall apply special due diligence to its correspondent accounts that is reasonably designed to guard against their indirect use by the Lebanese Canadian Bank SAL. At a minimum, that special due diligence must include:

(A) Notifying those correspondent account holders that the covered financial institution knows or has reason to know provide services to the Lebanese Canadian Bank SAL, that such correspondents may not provide the Lebanese Canadian Bank SAL with access to the correspondent account maintained at the covered financial institution; and

(B) Taking reasonable steps to identify any indirect use of its correspondent accounts by the Lebanese Canadian Bank SAL, to the extent that such indirect use can be determined from transactional records maintained in the covered financial institution's normal course of business.

(ii) A covered financial institution shall take a risk-based approach when deciding what, if any, other due diligence measures it should adopt to guard against the indirect use of its correspondent accounts by the Lebanese Canadian Bank SAL.

(iii) A covered financial institution that obtains knowledge that a correspondent account is being used by the foreign bank to provide indirect access to the Lebanese Canadian Bank SAL, shall take all appropriate steps to prevent such indirect access, including the notification of its correspondent account holder under paragraph (b)(2)(i)(A) of this section and, where necessary, terminating the correspondent account.

(3) *Recordkeeping and reporting.* (i) A covered financial institution is required to document its compliance with the notice requirement set forth in paragraph (b)(2)(i)(A) of this section.

(ii) Nothing in this section shall require a covered financial institution to report any information not otherwise required to be reported by law or regulation.

Dated: February 9, 2011.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. 2011–3348 Filed 2–16–11; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2011–0046]

RIN 1625–AA08

Special Local Regulations for Marine Events; Severn River, Spa Creek and Annapolis Harbor, Annapolis, MD

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish special local regulations during the swim segment of the "TriRock Annapolis" triathlon, a marine event to be held on the waters of Spa Creek and Annapolis Harbor on May 14, 2011. These special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to temporarily restrict vessel traffic in a portion of the Potomac River during the event.

DATES: Comments and related material must be received by the Coast Guard on or before March 21, 2011. Requests for public meetings must be received by the Coast Guard on or before the end of the comment period.

See the **SUPPLEMENTARY INFORMATION** for discussion of the anticipated effective date.

ADDRESSES: You may submit comments identified by docket number USCG–2011–0046 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. *See* the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e-mail Mr. Ronald Houck, U.S. Coast Guard Sector Baltimore, MD; telephone 410–576–2674, e-mail *Ronald.L.Houck@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2011–0046), indicate the specific section of this document to which each comment

applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu select "Proposed Rule" and insert "USCG–2011–0046" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2011–0046" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one on or before the end of the comment period, using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Basis and Purpose

On Saturday, May 14, 2011, Competitor Group Inc. of San Diego, California, will sponsor the "TriRock Annapolis" triathlon in Annapolis, Maryland. The swim segment of the event will occur from 7 a.m. to 8:30 a.m. and will be located in Spa Creek and Annapolis Harbor. Up to 2,000 swimmers will operate on a 500-meter course located between the Annapolis City Dock and the confluence of the Spa Creek with the Severn River. The swimmers will be supported by sponsor-provided watercraft. The start and finish will be located at the Annapolis City Dock. A portion of the swim course will impede the Federal navigation channel. Due to the need for vessel control during the event, the Coast Guard would temporarily restrict vessel traffic in the event area to provide for the safety of participants, spectators and other transiting vessels.

Discussion of Proposed Rule

The Coast Guard proposes to establish temporary special local regulations on specified waters of Spa Creek and Annapolis Harbor. The regulations would be in effect from 6 a.m. to 9 a.m. on May 14, 2011. The regulated area, approximately 900 yards in length, would extend across the entire width of Spa Creek and Annapolis Harbor, within lines connecting the following positions: From position latitude 38°58′34″ N, longitude 076°29′05″ W, thence to position latitude 38°58′27″ N, longitude 076°28′55″ W, and from position latitude 38°58′53″ N, longitude 076°28′34″ W to position latitude 38°58′21″ N, longitude 076°28′26″ W. The effect of this proposed rule would be to restrict general navigation in the regulated area during the event. These regulations are needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting vessels.

Regulatory Analyses

We developed this proposed 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 proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Although this regulation will prevent traffic from transiting a portion of Spa Creek and Annapolis Harbor during the event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via the Local Notice to Mariners and marine information broadcasts, so mariners can adjust their plans accordingly.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed 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 proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in the effected portions of Spa Creek and Annapolis Harbor during the event.

Although this regulation prevents traffic from transiting a portion of the Spa Creek and Annapolis Harbor during the event, this proposed rule will not have a significant economic impact on a substantial number of small entities

for the following reasons: Though the regulated area extends across the entire width of the waterway, this proposed rule would be in effect for only a limited period; and before the enforcement period, we will issue maritime advisories so mariners can adjust their plans accordingly. All Coast Guard vessels enforcing this regulated area can be contacted on marine band radio VHF–FM channel 16 (156.8 MHz).

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Coast Guard Sector Baltimore, MD. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call 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 proposed 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 proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Indian Tribal Governments

This proposed rule does not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would 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 proposed 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 proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed 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 made a preliminary determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction. This proposed rule involves implementation of regulations within 33 CFR Part 100 applicable to organized marine events on the navigable waters of the United States that could negatively impact the safety of waterway users and shore side activities in the event area. The category of water activities includes but is not limited to sail boat regattas, boat parades, power boat racing, swimming events, crew racing, canoe and sail board racing. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

2. Add § 100.35–T05–0046 to read as follows:

§ 100.35–T05–0046 Special Local Regulations for Marine Events; Severn River, Spa Creek and Annapolis Harbor, Annapolis, MD.

(a) *Regulated area.* The following location is a regulated area: All waters of the Spa Creek and Annapolis Harbor, within lines connecting the following positions: From position latitude 38°58′34″ N, longitude 076°29′05″ W, thence to position latitude 38°58′27″ N, longitude 076°28′55″ W, and from position latitude 38°58′53″ N, longitude 076°28′34″ W to position latitude 38°58′21″ N, longitude 076°28′26″ W. All coordinates reference Datum NAD 1983.

(b) *Definitions:* (1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the U.S. Coast Guard who has been designated by the Commander, Coast Guard Sector Baltimore.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Sector Baltimore with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(c) *Special local regulations:* (1) The Coast Guard Patrol Commander may forbid and control the movement of all vessels and persons in the regulated area. When hailed or signaled by an official patrol vessel, a vessel or person in the regulated area shall immediately comply with the directions given. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(2) All Coast Guard vessels enforcing this regulated area can be contacted on marine band radio VHF–FM channel 16 (156.8 MHz).

(3) The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue a marine information broadcast on VHF–FM marine band radio announcing specific event date and times.

(d) *Enforcement period:* This section will be enforced from 6 a.m. until 9 a.m. on May 14, 2011.

Dated: February 3, 2011.

Brian W. Roche,

Commander, U.S. Coast Guard, Acting Captain of the Port Baltimore.

[FR Doc. 2011–3570 Filed 2–16–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 154 and 155

[Docket No. USCG–1998–4354 and USCG–1999–5705]

RIN 2115–AE87 and 2115–AE88

Tank Vessel and Marine Transportation-Related Facility Response Plans for Hazardous Substances

AGENCY: Coast Guard, DHS.

ACTION: Proposed rules; reopening of comment period.

SUMMARY: The Coast Guard is reopening the comment periods on two proposed rules before issuing final rules regarding Tank Vessel Response Plans for Hazardous Substances (USCG–1998–4354) and Marine Transportation-Related Facility Response Plans for Hazardous Substances (USCG–1999–5705). The Coast Guard previously published two notices of proposed rulemaking (NPRMs) proposing to require response plans for certain tank vessels operating on the navigable waters of the United States, as well as marine transportation-related facilities, that could reasonably be expected to cause substantial harm to the environment by discharging a hazardous substance. The proposed regulations were published to implement the requirements put into place by the Oil Pollution Act of 1990, but were never published as final rules. Because of the lapse in time since the NPRM publications, the Coast Guard is reopening the comment period to allow for any additional or updated comments from the public before publishing the final rules.

DATES: Comments and related material must either be submitted to the appropriate online docket via *http://www.regulations.gov* on or before May 18, 2011 or reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments identified by docket number USCG–1998–4354 and/or USCG–1999–5705 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. *See* the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments. Please submit comments to the appropriate docket; if your comments apply to both proposed rules, please submit them to both dockets.

Viewing incorporation by reference material: You may inspect the material proposed for incorporation by reference at room 2100, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593–0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–267–6716. Copies of the material are available as indicated in the "Incorporation by Reference" section of this preamble.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e-mail Raymond Martin, Coast Guard; telephone 202–372–1449, e-mail *Raymond.W.Martin@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

A. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–1998–4354 and/or USCG–1999–5705), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the "submit a comment" box, which will

then become highlighted in blue. In the "Document Type" drop down menu select "Proposed Rule" and insert "USCG–1998–4354" or "USCG–1999–5705" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments.

B. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–1998–4354" or "USCG–1999–5705" and click "Search." Click the "Open Docket Folder" in the "Actions" column. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

C. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

D. Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to either docket using one of the methods specified under **ADDRESSES**. In your request, explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

II. Background

The Clean Water Act (CWA), as amended by section 4202(a)(6) of the Oil Pollution Act of 1990 (OPA 90), requires owners or operators of tank vessels, offshore facilities, and onshore facilities to prepare response plans to mitigate spills of both oils and hazardous substances. Specifically, it requires the owners and operators of those vessels and facilities that could reasonably be expected to cause substantial or significant and substantial harm to the environment to prepare and submit response plans. These plans must address measures to respond, to the maximum extent practicable, to a worst-case discharge or a substantial threat of such a discharge, of oil or a hazardous substance into or on navigable waters, adjoining shorelines, or the exclusive economic zone of the United States. The primary purpose of requiring response plans is to minimize impact of a discharge of oil or hazardous substances into the navigable waters of the United States.

In response to the Congressional statute, the Coast Guard promulgated several rules regarding response plans for oil spills. The Final Rule for oil spill response plans for vessels was published on January 12, 1996 (61 FR 1052), and the rule for facilities followed on February 29, 1996 (61 FR 7890).

In addition to publication of oil spill response plan regulations, we published proposals regarding response plans for hazardous substances. On May 3, 1996, we published an ANRPM addressing vessel and facility response plans (61 FR 20084). The ANPRM discussed the background, statutory requirements, and possible regulatory approaches to developing plans for hazardous substance releases. It also posed 96 questions, and the Coast Guard Received 42 comment letters replying to the ANPRM.

The Coast Guard gathered additional information to formulate hazardous substance response plans from the public during public meetings and a response plan workshop. We conducted two public meetings on July 30, 1996, in Washington, DC, and August 5, 1996, in Houston, TX. The Coast Guard held a workshop and meeting in Houston, TX to engage various stakeholders in issues that had been identified as significant in response to the ANPRM. The workshop focused on four specific issues identified in advance: (1) The role and contents of first responders' guides; (2) the role and capabilities of decision support systems; (3) chemical removal technology; and (4) public responder versus private responder issues.

Finally, the Coast Guard received recommendations from advisory committees. Under the auspices of the Chemical Transportation Advisory Committee (CTAC), the Hazardous Substances Response Plan Subcommittee was formed to develop and recommend hazardous substance response plan criteria for the agency's consideration in developing requirements for response plans. The subcommittee formed working groups to address the various aspects of response planning: Fate and effects, response resources and methodology, and planning process. Based on the work done by these groups, the subcommittee delivered a report containing findings and recommendations, which was considered by the Coast Guard in developing its proposed regulations.

Based on the comments provided to the Coast Guard from the sources listed above, we published two separate NPRMs proposing to require hazardous substance response plans for tank vessels and marine transportation-related facilities on March 22, 1999 and March 31, 2000, respectively (64 FR 13734 and 65 FR 17416). The intent of the proposed regulations was to ensure access to the necessary information and equipment during a response to a spill of hazardous substances, as well as to ensure the availability of appropriate technical expertise as necessary. The proposed requirements allowed for flexibility in determining how to respond to a particular spill, given that the disparate nature of spills of hazardous substances do not lend themselves to standardized procedures, unlike the comparatively standardized procedures for oil spill responses.

The premise of the proposed regulations is that, through an analysis of the required information by area specialists, the most appropriate response strategies for dealing with a particular spill could be identified and performed. Furthermore, the proposed regulations were intended to accommodate the use of the National Response Team's Integrated Contingency Plan (ICP) Guidance, published in the **Federal Register** on June 5, 1996 (61 FR 28642). This guidance provided a mechanism for consolidating multiple plans into one functional emergency response plan, minimizing or eliminating duplication of information. In addition, the proposed regulations allowed plans to be structured in such a way that oil response plans for tank vessels and facilities could be amended or

augmented to meet the requirements for hazardous substances.

At this time, we believe that the proposed regulations provide a basis to develop strong, flexible plans to address spills of hazardous substances. The proposals also encourage plans that make use of industry best practices and comply with international standards. We encourage readers to refer to the published NPRMs and their supporting documents for a more complete discussion of the proposed regulations.

III. Discussion

In the Coast Guard Authorization Act of 2010 (Pub. L. 111–281), Congress mandated that the agency promulgate final rules pursuant to section 311 of the CWA within 18 months. Despite publishing proposals for hazardous substance response plans in 1999 and 2000, the Coast Guard has not yet issued final rules on this issue. However, in accordance with the legislative mandate, we are planning to publish final rules based on these proposals within the required timeframe. The final rules will consider all of the comments received in the course of this rulemaking action, both written and presented in public meetings.

In this notice, the Coast Guard is reopening the comment period for the NPRMs on hazardous substance response plans for tank vessels and marine transportation-related facilities. At this time, we are not yet responding to comments received in response to the NPRMs, nor are we changing the proposals in any way. Due to the length of time that has elapsed since the publication of the proposed rules, we are reopening the comment period to solicit additional or updated comments regarding the proposed hazardous substance response plan regulations. Such information may relate to changed market conditions, industry practices, improvements in technology, or any other matter addressed by the proposed regulations.

One issue on which we are specifically not requesting comments at this time is the expansion of the requirement for response plans to noxious liquid substances not covered by 40 CFR part 116. In Section 701 of the Coast Guard and Maritime Transportation Act of 2004 (Pub. L. 108–219), Congress amended the CWA by adding paragraph (B) to 33 U.S.C. 1321(j)(5), which authorized the Coast Guard to require response plans for noxious liquid substances not covered under other regulations. However, because the agency is required to publish a final rule by April of 2012, we will not be able to incorporate those chemicals into the current response plan proposals. The agency is closely studying the matter and intends to propose regulations in the future regarding those additional chemicals.

IV. Incorporation by Reference

Material proposed for incorporation by reference appears in § 155.3035 of the proposed text. You may inspect this material at U.S. Coast Guard Headquarters where indicated under **ADDRESSES**. Copies of the material are available from the sources listed in § 155.140.

Dated: February 11, 2011.

J.G. Lantz,

Director of Commercial Regulations and Standards, U.S. Coast Guard.

[FR Doc. 2011–3568 Filed 2–16–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0034]

RIN 1625–AA00

Safety Zone; Fourth Annual Offshore Challenge, Sunny Isles Beach, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone in the Atlantic Ocean east of Sunny Isles Beach, Florida for the Fourth Annual Offshore Challenge. The Fourth Annual Offshore Challenge will consist of a series of high-speed boat races. The boat races are scheduled to take place from Friday, June 17, 2011 through Sunday, June 19, 2011. The temporary safety zone is necessary for the safety of race participants, spectators, and the general public.

DATES: Comments and related material must be received by the Coast Guard on or before March 15, 2011. See the **SUPPLEMENTARY INFORMATION** for discussion of the anticipated effective date.

ADDRESSES: You may submit comments identified by docket number USCG–2011–0034 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. *See* the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e-mail Lieutenant Paul A. Steiner, Sector Miami Prevention Department, Coast Guard; telephone 305–535–8724, e-mail *Paul.A.Steiner@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2011–0034), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the "submit a comment" box, which will then become highlighted in blue. In the "Document Type" drop down menu select "Proposed Rule" and insert "USCG–2011–0034" in the "Keyword" box. Click "Search" then click on the balloon shape in the "Actions" column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2011–0034" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a public meeting on or before February 15, 2011 using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Basis and Purpose

The Fourth Annual Offshore Challenge, hosted by Offshore Events, LLC, will consist of a series of high-speed boat races. Since 2008, the Annual Offshore Challenge has been held in the Atlantic Ocean offshore of Sunny Isles Beach, Florida. Approximately 50 offshore power boats will be participating in the boat races. These vessels will be traveling at high speeds. Approximately 200 spectator vessels are expected to observe the races. The high speed of the participant vessels poses a safety hazard to race participants, spectators, and the general public. The safety zone is necessary to protect race participants, spectators, and the general public from the hazards associated with the high-speed boat races.

Discussion of Proposed Rule

The proposed rule would designate a temporary safety zone around a race area in the Atlantic Ocean offshore of Sunny Isles Beach, Florida. Persons and vessels will be prohibited from entering, transiting through, anchoring in, or remaining within the safety zone unless specifically authorized by the Captain of the Port Miami or a designated representative. Persons and vessels may request permission to enter, transit through, anchor in, or remain within the safety zone by contacting the Captain of the Port Miami via telephone at 305–535–4472 or a designated representative via VHF radio on channel 16. The temporary safety zone will be in effect from 8 a.m. on June 17, 2011 through 5 p.m. on June 19, 2011. The temporary safety zone will be enforced daily from 8 a.m. until 5 p.m. on June 17, 2011 through June 19, 2011.

Regulatory Analyses

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

We expect the economic impact of this proposed rule to be so minimal that a full regulatory evaluation is unnecessary. This proposed rule may have some impact on the public, but these potential impacts will be minimal for the following reasons: (1) The rule will be in effect for three days but will only be enforced for a total of nine hours each day; (2) although persons and vessels will not be able to enter, transit through, anchor in, or remain within the safety zone without authorization from the Captain of the Port Miami or a designated representative, they may operate in the surrounding area during the enforcement period; (3) persons and vessels may still enter, transit through, anchor in, or remain within the safety zone if authorized by the Captain of the Port Miami or a designated representative; and (4) advance notification of the safety zone will be made to the local maritime community via local notice to mariners, marine safety information bulletins, and broadcast notice to mariners.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed 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 proposed rule would not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities, some of which may be small entities: Owners and operators of vessels intending to enter, transit through, anchor in, or remain within waters of the Atlantic Ocean offshore of Sunny Isles Beach, Florida that are encompassed within the safety zone from 8 a.m. until 5 p.m. on June 17, 2011 through June 19, 2011.

For the reasons discussed in the Regulatory Planning and Review section above, this proposed rule will not have significant economic impact on a substantial number of small entities.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement

Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant Paul A. Steiner, Sector Miami Prevention Department, Coast Guard; telephone 305–535–8724, e-mail *Paul.A.Steiner@uscg.mil.* The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

This proposed rule would call 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 proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Indian Tribal Governments

This proposed rule does not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would 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 proposed 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 proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed 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 made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. A preliminary environmental analysis checklist supporting this determination is available in the docket where indicated under **ADDRESSES.** This proposed rule involves establishing a temporary safety zone, as described in paragraph 34(g) of the Instruction, east of Sunny Isles, Florida in the Atlantic Ocean. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed 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 proposes to amend 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, 6.04–1,6.04–6, 160.5; Pub L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add temporary § 165.T07–0034 to read as follows:

§ 165.T07–0034 Safety Zone; Fourth Annual Offshore Challenge, Sunny Isles Beach, FL.

(a) *Regulated Area.* The following regulated area is a safety zone. All waters of the Atlantic Ocean east of Sunny Isles Beach, FL encompassed within an imaginary line connecting the following points: starting at Point 1 in position 25°57′45″ N, 80°07′05″ W; thence east to Point 2 in position 25°57′43″ N, 80°05′59″ W; thence south to Point 3 in 25°54′03″ N, 80°05′59″ W; thence west to Point 4 in position 25°54′04″ N, 80°07′18″ W; thence north back to origin. All coordinates are North American Datum 1983.

(b) *Definition.* The term "designated representative" means Coast Guard Patrol Commanders, including Coast

Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, State, and local officers designated by or assisting the Captain of the Port Miami in the enforcement of the regulated area.

(c) *Regulations.* (1) All persons and vessels are prohibited from entering, transiting through, anchoring in, or remaining within the regulated area unless authorized by the Captain of the Port Miami or a designated representative.

(2) Persons and vessels desiring to enter, transit through, anchor in, or remain within the regulated area may contact the Captain of the Port Miami via telephone at 305–535–4472, or a designated representative via VHF radio on channel 16, to seek permission. If permission to enter, transit through, anchor in, or remain within the regulated area is granted by the Captain of the Port Miami or a designated representative, all persons and vessels receiving such permission must comply with the instructions of the Captain of the Port Miami or a designated representative.

(3) The Coast Guard will provide notice of the regulated area via local notice to mariners, marine safety information bulletins, broadcast notice to mariners, and by on-scene designated representatives.

(d) *Effective Date and Enforcement Periods.* The rule is effective from 8 a.m. on June 17, 2011 through 5 p.m. on June 19, 2011. The rule will be enforced daily from 8 a.m. until 5 p.m. on June 17, 2011 through June 19, 2011.

Dated: January 28, 2011.

G.J. Depinet,

Captain, U.S. Coast Guard, Acting Captain of the Port Miami.

[FR Doc. 2011–3564 Filed 2–16–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2010–0445; A–1–FRL–9267–9]

Approval and Promulgation of Air Quality Implementation Plans; Massachusetts; Revised Carbon Monoxide Maintenance Plan for Lowell

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Massachusetts. This SIP submittal contains revisions to the carbon monoxide (CO) maintenance plan for Lowell, Massachusetts. Specifically, Massachusetts has revised the contingency plan portion of the original maintenance plan. The intended effect of this action is to propose approval of this revision to the Lowell CO maintenance plan. This action is being taken in accordance with the Clean Air Act.

DATES: Written comments must be received on or before March 21, 2011.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R01–OAR–2010–0445 by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: arnold.anne@epa.gov.*
3. *Fax:* (617) 918–0047.
4. *Mail:* "Docket Identification Number EPA–R01–OAR–2010–0445", Anne Arnold, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square—Suite 100, (Mail code OEP05–2), Boston, MA 02109–3912.
5. *Hand Delivery or Courier.* Deliver your comments to: Anne Arnold, Manager, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square—Suite 100, (mail code OEP05–2), Boston, MA 02109–3912. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R01–OAR–2010–0445. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *http://www.regulations.gov,* or e-mail, information that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

In addition, copies of the State submittal and EPA's technical support document are also available for public inspection during normal business hours, by appointment at the State Air Agency; Division of Air Quality Control, Department of Environmental Protection, One Winter Street, 8th Floor, Boston, MA 02108.

FOR FURTHER INFORMATION CONTACT: Anne K. McWilliams, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, 5 Post Office Square—Suite 100, (mail code OEP05–2), Boston, MA 02109–3912, telephone number (617) 918–1697, fax number (617) 918–0697, e-mail *mcwilliams.anne@epa.gov.*

SUPPLEMENTARY INFORMATION:

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II. What action is EPA taking?
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I. Background and Purpose

On April 14, 2010, the Massachusetts Department of Environmental Protection (DEP) submitted a revision to its State Implementation Plan (SIP) for Massachusetts. The SIP revision consists of a minor modification to the carbon monoxide (CO) maintenance plan for Lowell, Massachusetts. (A redesignation request and a maintenance plan for the Lowell CO nonattainment area were approved by EPA on February 19, 2002 (67 FR 7272).) The modification changes the triggering mechanism which will be used by the State to determine if contingency measures need to be implemented in Lowell.

II. What action is EPA taking?

EPA is proposing to approve revisions to the Lowell carbon monoxide maintenance plan submitted by the State of Massachusetts on April 14, 2010. Specifically, EPA is proposing approval of the State's modification of the portion of the maintenance plan used to determine when contingency measures need to be triggered to reduce CO concentrations in Lowell. This proposed action, if finalized, would allow the discontinuation of CO monitoring in the Lowell maintenance area.

Massachusetts's SIP revision and EPA's evaluation of this SIP revision are discussed below. Additional details are also provided in a memorandum dated January 24, 2011, entitled "Technical Support Document for Revision to the Carbon Monoxide Maintenance Plan for Lowell, Massachusetts" (TSD). The TSD and Massachusetts's submittal are available in the docket supporting this action.

III. Summary of SIP Revision

On April 14, 2010, the Massachusetts Department of Environmental Protection submitted a SIP revision to EPA that contains a modification to its CO maintenance plan for the Lowell CO maintenance area. The modifications to the maintenance plan change the triggering mechanism by which contingency measures would be implemented and will allow the State to discontinue CO monitoring in the Lowell maintenance area. CO concentrations measured in Lowell have been below the National Ambient Air Quality Standard (NAAQS) for nearly 25 years, and in recent years, maximum measured concentrations have been less than 30% of the 9 parts per million (ppm) 8-hour CO standard.[1] In this SIP revision, the State of Massachusetts is establishing an alternative triggering mechanism, which will rely on CO data from a nearby CO monitor in Worcester, Massachusetts.

Under the current maintenance plan, contingency measures in Lowell are triggered when a violation of the CO NAAQS is measured in Lowell. Under the revised maintenance plan, Massachusetts will rely on data from the Worcester CO monitor to determine when and if monitoring will be reestablished in the Lowell maintenance area, and, in some circumstances, when contingency measures will be triggered in the Lowell maintenance area.

If this proposal is finalized, Massachusetts will discontinue CO monitoring in Lowell. Massachusetts DEP will continue to collect and review CO monitoring data from nearby Worcester, MA on an on-going basis. In the event the second highest CO concentration in any calendar year monitored in Worcester reaches 75 percent of the Federal 1-hour or 8-hour NAAQS for CO (35 and 9 ppm, respectively), Massachusetts will, within 9 months of recording such concentrations, re-establish a CO monitoring site in Lowell consistent with EPA siting criteria, and resume analyzing and reporting those data. Massachusetts will continue to commit to implement its contingency program in Lowell in the event that a CO violation (the "contingency trigger") is monitored at the re-established Lowell monitoring site at any time during the maintenance period and to consider one or more of the other EPA-approved measures listed in the 2001 Maintenance Plan if necessary to reduce CO levels.

If the Worcester CO monitor measures a violation of either the Federal 1-hour or 8-hour NAAQS for CO, the contingency measures in 2001 Maintenance Plan for Lowell will be implemented in Lowell, as well as triggering contingency measures in Worcester under the terms of the existing Maintenance Plan for Worcester, until a re-established Lowell CO monitor shows that the area is attainment of the CO standard.

When implementing contingency measures, Massachusetts will review and implement the measures necessary to remedy the violation, including transportation control measures (TCM) or other additional vehicle or fuel controls.

IV. EPA's Evaluation of the SIP Revision

EPA agrees that the mechanism described above represents an acceptable contingency triggering mechanism for the Lowell CO maintenance plan. If the proposed approval of this revised triggering mechanism is finalized, Massachusetts DEP will be allowed to discontinue monitoring in the Lowell area, which we believe is appropriate for this area which is currently measuring concentrations well below the 1-hour and 8-hour CO NAAQS. Under this plan, we believe air quality goals can be maintained, and State monitoring resources conserved.

On October 17, 2006, EPA published a final monitoring rule revising minimum monitoring requirements, which was codified in 40 CFR part 58. (*See* 71 FR 61236.) That rule explicitly recognized that, in some cases where measured levels of pollutants are low, shutting down certain CO monitors may be allowed without revising the SIP. (*See* 40 CFR 58.14(c)(1)–(6).) The rule, however, also explicitly provides that if a monitor is the only monitor in the area, and it serves as a trigger to implement a contingency measure in an EPA-approved maintenance plan, then the monitor may not be discontinued. (*See* 40 CFR 58.14(c)(1).) Rather, in this case the maintenance plan would need to be revised, and the trigger replaced. (*See* 71 FR 61250 and 71 FR 61301.)

As described above, this action is proposing to approve a change to the mechanism that Massachusetts will use to determine when contingency measures need to be triggered to reduce CO concentrations in Lowell. Previously, the State would implement a contingency measure based on concentrations of CO monitored in Lowell. In light of the fact that Lowell CO concentrations have been well below the standard for some time, the State is looking to conserve resources. Massachusetts DEP wants to use its CO monitor in Worcester, a nearby city, to aid in determining if Lowell has a CO problem. Lowell and Worcester are located 42 miles apart. Worcester (population 175,011)[2] is somewhat larger than Lowell (population

[1] On January 28, 2011, EPA proposed to retain the existing CO standard. In this action, EPA also proposed an increase in near-road CO monitoring. Due to the low CO concentrations recorded at the Lowell monitor and the applicable monitor siting criteria, this monitor would not meet the requirements for a near-road monitor.

[2] U.S. Census Bureau, 2008 Population Estimates.

103,615)[3], so its CO concentrations can be expected to be slightly higher due to greater motor vehicle emissions. CO concentrations in Lowell and Worcester have tracked very closely for many years. (The TSD provides a comparison of the data collected at the Lowell and Worcester CO monitors over the last twenty-five years.) Both cities were designated nonattainment in 1990 for CO "by operation of law," though both had design values below the standard at that time. In both cases, only the city itself was designated nonattainment since data did not support an expansion of the nonattainment area. Both cities were redesignated to attainment in 2000, and both have measured CO concentrations well below the standard since that time.

In order to conserve resources, the State is seeking to discontinue monitoring in Lowell since current air quality levels do not warrant the additional expense of running a CO monitor in this area. The State has committed to continue CO monitoring in Worcester, and will reestablish CO monitoring in Lowell if air quality in Worcester degrades significantly. In Massachusetts (as in many other places), CO is primarily emitted by on and off-road mobile sources. Starting in the early 1970s, EPA has set national standards that have considerably reduced emissions of CO and other pollutants from motor vehicles, including tailpipe emissions, new vehicle technologies, and clean fuels programs. Moreover, the Massachusetts SIP requires that new or modified large stationary sources demonstrate that their emissions will not cause an exceedance of any NAAQS. Finally, growth is not likely to result in increased CO levels because the CO reductions described above have occurred even as vehicle miles traveled (VMT) have increased. (*See* VMT data in TSD.) For this reason, EPA believes that it is unlikely that the Lowell or Worcester maintenance area will exceed the CO NAAQS again. Thus, we believe that the revisions that Massachusetts has made to the Lowell maintenance plan will continue to protect the citizens of Massachusetts from high CO concentrations, and also conserve resources.

EPA is proposing to approve the Massachusetts SIP revision for the Carbon Monoxide Maintenance Plan for Lowell, which was submitted on April 14, 2010. EPA is soliciting public comments on the issues discussed in this notice or on other relevant matters. These comments will be considered before taking final action. Interested parties may participate in the Federal rulemaking procedure by submitting written comments to the EPA New England Regional Office listed in the **ADDRESSES** section of this **Federal Register.**

[3] *Ibid.*

V. Proposed Action

EPA is proposing to approve the revisions to the Lowell CO maintenance plan submitted by the State of Massachusetts on April 14, 2010. Specifically, EPA is proposing approval of the State's request to modify the portion of the maintenance plan used to determine when contingency measures need to be implemented in Lowell. As described in more detail above, if this proposal is finalized, the State will shut down the Lowell CO monitor and rely on data from the CO monitor in Worcester to determine when and if monitoring will be reestablished in the Lowell maintenance area, and, in some circumstances, when contingency measures will be triggered in the Lowell maintenance area.

VI. Statutory and Executive Order Reviews

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Reporting and recordkeeping requirements.

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

Dated: February 8, 2011.

H. Curtis Spalding,

Regional Administrator, EPA New England.

[FR Doc. 2011–3613 Filed 2–16–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 434, 438, and 447

[CMS–2400–P]

RIN 0938–AQ34

Medicaid Program; Payment Adjustment for Provider-Preventable Conditions Including Health Care-Acquired Conditions

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement section 2702 of the Patient Protection and Affordable Care Act of 2010 which directs the Secretary of

Health and Human Services to issue Medicaid regulations effective as of July 1, 2011 prohibiting Federal payments to States under section 1903 of the Social Security Act for any amounts expended for providing medical assistance for health care-acquired conditions. It would also authorize States to identify other provider-preventable conditions for which Medicaid payment would be prohibited.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on March 18, 2011.

ADDRESSES: In commenting, please refer to file code CMS–2400–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions under the "More Search Options" tab.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–2400–P, P.O. Box 8016, Baltimore, MD 21244–1850.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, *Attention:* CMS–2400–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, *see* the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Venesa Day, (410) 786–8281, or Gary Jackson, (410) 786–1218.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

Acronyms

To assist the reader, the following is list of the acronyms used in this proposed rule:

AHRQ Agency for Healthcare Research and Quality
BPM Benefit Policy Manual
CABG Coronary artery bypass graft
CBO Congressional Budget Office
CDC Centers for Disease Control and Prevention
DVT Deep vein thrombosis
ESRD End-stage renal disease
DRA Deficit Reduction Act of 2005 (Pub. L. 109–171, enacted on February 8, 2006)
FFP Federal financial participation
FY Fiscal year
HAC Hospital-acquired condition
HCAC Health care-acquired condition
ICR Information collection requirement
IPPS Inpatient prospective payment system
MS–DRG Diagnosis-related group
NCA National coverage analysis
NDC National coverage determination
NQF National Quality Forum
OACT [CMS] Office of the Actuary
OIG Office of Inspector General
OMB Office of Management and Budget
OPPC Other provider-preventable condition
PE Pulmonary embolism
POA Present on admission
PPC Provider-preventable condition
PRA Paperwork Reduction Act
RFA Regulatory Flexibility Act (September 19, 1980, Pub. L. 96–354)
RIA Regulatory impact analysis
SMDL State Medicaid Director Letter
SPA State plan amendment
UMRA Unfunded Mandates Reform Act of 1995 (Pub. L. 104–04, enacted on March 22, 1995)
UTI Urinary tract infection

I. Background

Title XIX of the Social Security Act (the Act) authorizes Federal grants to the States for Medicaid programs to provide medical assistance to persons with limited income and resources. While Medicaid programs are administered by the States, they are jointly financed by the Federal and State governments. Each State establishes its own eligibility standards, benefits packages, payment rates, and program administration for Medicaid in accordance with Federal statutory and regulatory requirements. Operating within broad Federal parameters, States select eligibility groups, types, and range of services, payment levels for services, and administrative and operating procedures. Each State Medicaid program must be described and administered in accordance with a Federally-approved "State plan." This comprehensive document describes the nature and scope of the State's Medicaid program, and provides assurances that it will be administered in conformity with all Federal requirements.

The Federal government pays its share of medical assistance expenditures to the State on a quarterly basis according to a formula described in sections 1903 and 1905(b) of the Act. Specifically, section 1903 of the Act requires that the Secretary (except as otherwise provided) pay to each State which has a plan approved under this title, for each quarter, an amount equal to the Federal medical assistance percentage of the total amount expended during such quarter as medical assistance under the State plan.

Among the statutory requirements for Medicaid State plans, section 1902(a)(4) of the Act requires that State plans provide for methods of administration as are found to be necessary by the Secretary for the proper and efficient operation of the plan. Section 1902(a)(6) of the Act requires that a State plan for

medical assistance provide that the State agency will make such reports, in such form and containing such information, as the Secretary may from time-to-time require, and comply with such provisions as the Secretary may from time-to-time find necessary to assure the correctness and verification of such reports. In addition, section 1902(a)(19) of the Act requires that a State plan for medical assistance provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients.

A. The Medicare Program and Quality Improvements Made in the Deficit Reduction Act of 2005 (DRA) (Pub. L. 109–171)

Title XVIII of the Act provides authority for the Secretary to operate the Medicare program, which provides payment for certain medical expenses for persons 65 years of age or older, certain disabled individuals, and persons with end-stage renal disease (ESRD). Medicare benefits include inpatient care, a wide range of medical services, and outpatient prescription drugs.

The Medicare statute authorizes the Secretary, in the course of operating the Medicare program, to develop, implement, and monitor quality measures, as well as take other actions, to ensure the quality of the care and services received by Medicare beneficiaries.

Payment under the Medicare program for inpatient hospital benefits is generally based on the "inpatient prospective payment system" (IPPS) described in section 1886(d) of the Act. Hospitals receive a payment for each inpatient discharge based on diagnosis codes that identify a "diagnosis-related group" (MS–DRG). Assignment of an MS–DRG can take into account the presence of secondary diagnoses, and payment levels are also adjusted to account for a number of hospital-specific factors.

Section 5001(a) of the Deficit Reduction Act of 2005 (Pub. L. 109–171, enacted on February 8, 2006) (DRA) amended section 1886(b)(3)(B) of the Act to expand the set of hospital quality measures collected by Medicare. In particular, this provision directed the Secretary to start collecting baseline measures set forth by the Institute of Medicine in its November 2005 report in fiscal year (FY) 2007. These measures include 22 Hospital Quality Alliance measures and 3 process measures. In FY 2008 and subsequent years, the Secretary was required to add other measures that reflect consensus among affected parties. The provision also allowed the Secretary to replace and update existing quality measures. The statute mandates that the Secretary establish a process for hospitals to review data that will be made public and, after that process is complete, requires the Secretary to post measures on the Hospital Compare Internet Web site. The quality measures required under section 5001(a) of the DRA were integral to the direction under section 5001(b) of the DRA for the Secretary to develop a plan to implement value-based purchasing commencing FY 2009 for most Medicare hospital services. We are currently developing a hospital value-based purchasing system as required by the Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010) (Affordable Care Act).

Section 5001(c) of the DRA amended section 1886(d)(4) of the Act to prohibit payment to hospitals for certain preventable hospital-acquired conditions (HACs) identified by the Secretary. Specifically, under section 1886(d)(4)(D)(iv) of the Act, the Secretary is required to identify HACs for which no payment for hospital services would be made. These conditions are required to have the following characteristics: (a) High cost or high volume or both; (b) result in the assignment of a case to a MS–DRG that has a higher payment when present as a secondary diagnosis; and (c) could reasonably have been prevented through the application of evidence-based guidelines. Section 5001(c) of the DRA provides for revision of the list of conditions from time to time, as long as it contains at least two conditions.

B. Previously Specified Medicare HACs

As amended by section 5001(c) of the DRA, section 1886(d)(4) of the Act provides that the Secretary must ensure that additional payment under the IPPS is not made to hospitals for identified HACs including infections. By October 1, 2007, the Secretary was required under section 1886(d)(4)(D) of the Act to select, in consultation with the Centers for Disease Control and Prevention (CDC), diagnosis codes associated with at least two HACs that: (a) Are high cost, high volume, or both; (b) are assigned to a higher paying MS–DRG when present as a secondary diagnosis (that is, conditions under the MS–DRG system that are complications or co-morbidities or major complications or co-morbidities); and (c) could reasonably have been prevented through the application of evidence based guidelines. The list of conditions can be revised from time-to-time as long as the list contains at least two conditions.

Under the provisions of section 1886(d)(4)(D)(ii) of the Act, when an HAC is not present on admission (POA), but is reported as a secondary diagnosis associated with the hospitalization, the Medicare payment under IPPS to the hospital may be reduced to reflect that the condition was hospital-acquired. More specifically, the hospital discharge cannot be assigned to a higher paying MS–DRG if the secondary diagnosis associated with the HAC would otherwise have caused this assignment. If an HAC were POA, then the Medicare payment under IPPS to the hospital would not be reduced. Since October 1, 2007, hospitals subject to the IPPS have been required to submit information on Medicare claims specifying whether diagnoses were POA. The POA indicator reporting requirement and the HAC payment provision apply to IPPS hospitals only. This requirement does not apply to hospitals exempt from the IPPS.

The following is a list of the current Medicare HACs (75 FR 50084 through 50085):

- Foreign Object Retained After Surgery.
- Air Embolism.
- Blood Incompatibility.
- Stage III and IV Pressure Ulcers.
- Falls and Trauma.
  + Fractures.
  + Dislocations.
  + Intracranial Injuries.
  + Crushing Injuries.
  + Burns.
  + Electric Shock.
- Manifestations of Poor Glycemic Control.
  + Diabetic Ketoacidosis.
  + Nonketotic Hyperosmolar Coma.
  + Hypoglycemic Coma.
  + Secondary Diabetes with Ketoacidosis.
  + Secondary Diabetes with Hyperosmolarity.
- Catheter-Associated Urinary Tract Infection (UTI).
- Vascular Catheter-Associated Infection.
- Surgical Site Infection Following:
  + Coronary Artery Bypass Graft (CABG)—Mediastinitis.
  + Bariatric Surgery.
    - Laparoscopic Gastric Bypass.
    - Gastroenterostomy.
    - Laparoscopic Gastric Restrictive Surgery.
  + Orthopedic Procedures.
    - Spine.
    - Neck.
    - Shoulder.

- Elbow.
- Deep Vein Thrombosis (DVT)/ Pulmonary Embolism (PE).
  + Total Knee Replacement.
  + Hip Replacement.

The Secretary may revise this list upon review.

C. Previously Specified Medicare National Coverage Determinations (NCD)

In 2002, the National Quality Forum (NQF) published "Serious Reportable Events in Healthcare: A Consensus Report", which listed 27 adverse events that were "serious, largely preventable and of concern to both the public and health care providers." These events and subsequent revisions to the list became known as "never events." This concept and need for the proposed reporting led to NQF's "Consensus Standards Maintenance Committee on Serious Reportable Events," which maintains and updates the list which currently contains 28 items.

The Medicare program has addressed certain "never events" through national coverage determinations (NCDs). Similar to any other patient population, Medicare beneficiaries may experience serious injury and/or death if they undergo erroneous surgical or other invasive procedures and may require additional healthcare in order to correct adverse outcomes that may result from such errors. In order to address and reduce the occurrence of these surgeries, Medicare issued three NCDs. Under these NCDs, Medicare does not cover a particular surgical or other invasive procedure to treat a particular medical condition when the practitioner erroneously performs: (1) A different procedure altogether; (2) the correct procedure but on the wrong body part; or (3) the correct procedure but on the wrong patient. Medicare will also not cover hospitalizations and other services related to these non-covered procedures.

D. Prior Guidance on Medicaid HACs and NCDs in Response to Medicare's Policy

Section 5001(c) of the DRA addressed only the Medicare program and did not require that Medicaid implement nonpayment policies for HACs. However, in light of the Medicare requirements, we encouraged States to adopt payment prohibitions on provider claims for HACs to coordinate with the Medicare prohibitions under section 1886(d)(4)(D) of the Act. To accomplish this task, we issued State Medicaid Director Letter (SMDL) #08–004 on July 31, 2008. In the July 31, 2008 SMDL, we noted that there was variation in how State Medicaid programs had addressed such claims in the past. The letter noted that nearly 20 States already had, or were considering, eliminating payment for some or all of the 28 conditions on the NQF's list of Serious Reported Events. Other States had more limited efforts to deny payment for services related to such conditions because the services were "medically unnecessary" in light of the primary diagnosis.

Recognizing this variation and addressing the immediate concern of the States over Federal cost-shifting that could result from the Medicare HAC policy as applied to those who are dually-eligible for Medicare and Medicaid, we took a flexible position in the July 31, 2008 SMDL guidance on State Medicaid handling of the issue. The SMDL indicated that States seeking to implement HAC nonpayment policies could do so by amending their Medicaid State plans to specify the extent to which they would deny payment for an HAC. Those interested only in avoiding secondary liability for Federal Medicare denials of HACs and NCDs in the case of dual-eligibles could do so by amending their State Plan to indicate that payment would not be available for HACs and the procedures described in the 3 NCDs that are not paid by Medicare. States that wanted broader payment prohibitions could indicate that payment would not be available for conditions specified in the State plan amendment (SPA), or that meet criteria identified in the SPA.

E. Section 2702 of the Affordable Care Act

Section 2702 of the Affordable Care Act requires that the Secretary implement Medicaid payment adjustments for health care-acquired conditions (HCACs). Section 2702 of the Affordable Care Act did not grant the Secretary new authorities, indicating that existing statutory authorities are sufficient to fulfill the obligation. Section 2702(a) of the Affordable Care Act sets out a general framework for application of Medicare prohibitions on payment for HCACs to the Medicaid program. Section 2702(a) of the Affordable Care Act first directs the Secretary to identify current State practices that prohibit payment for HCACs and to incorporate the practices identified, or elements of such practices, which the Secretary determines appropriate for application to the Medicaid program in regulations. Section 2702(a) of the Affordable Care Act then requires that, effective as of July 1, 2011, the Secretary prohibit payments to States under section 1903 of the Act for any amounts expended for providing medical assistance for HCACs specified in regulations. Such regulations must ensure that the prohibition on payment for HCACs shall not result in a loss of access to care or services for Medicaid beneficiaries.

Section 2702(b) of the Affordable Care Act defines the term "health care-acquired condition" as "a medical condition for which an individual was diagnosed that could be identified by a secondary diagnostic code described in section 1886(d)(4)(D)(iv) of the Act."

Section 2702(c) of the Affordable Care Act specifically requires that the Secretary, in carrying out section 2702 of the Affordable Care Act, apply the regulations issued under section 1886(d)(4)(D) of the Act relating to the prohibition of payments based on the presence of a secondary diagnosis code specified by the Secretary in such regulations, as appropriate for the Medicaid program. The Secretary may exclude certain conditions identified under title XVIII of the Act for nonpayment under title XIX of the Act when the Secretary finds the inclusion of such conditions to be inapplicable to beneficiaries under title XIX.

F. Requirement To Review Existing State Practices Prohibiting Nonpayment Policies for HCACs

Section 2702 of the Affordable Care Act requires that the Secretary identify current State practices that prohibit payment for HCACs and incorporate those practices, as appropriate, into Medicaid regulations.

To fulfill the statutory direction, we reviewed existing SPAs originally submitted in response to the July 31, 2008 SMDL (#08–004). We also researched State HCAC-related nonpayment policies that had been implemented outside of Medicaid State plans. We reviewed State quality assurance programs, pay-for-performance programs, reporting requirements and procedures, and payment systems.

We reviewed various articles, reports, summaries, and data bases pertaining to States' existing practices concerning hospital and HCACs and infections including, but not limited to:

- *Nonpayment for Preventable Events and Conditions: Aligning State and Federal Policies to Drive Health System Improvement,* Jill Rosenthal and Carrie Hanlon, December 2009.
- "Estimating the Costs of Potentially Preventable Hospital Acquired Complications," Richard L. Fuller M.S., *et al, Health Care Financing Review,* Summer 2009, Volume 30, Number 4.
- "Identifying Potential Preventable Complications Using a Present on

Admission Indicator," John S. Hughes, M.D., *et al, Health Care Financing Review,* Spring 2006, Volume 27, Number 3.

- *State Government Tracking of Hospital-Acquired Conditions,* Nathan West, MPA *et al,* April 2010.
- "The Triple Aim: Care, Health, and Cost," Donald Berwick, *et al., Health Affairs,* Volume 27, Number 3 (2008).
- "Lessons from the Pioneers: Reporting Healthcare-Associated Infections," Anna Spencer, *et al.* National Conference of State Legislatures, July 2010.
- "OIG Report: Adverse Events in Hospitals: National Incidence Among Medicare Beneficiaries," OEI–06–09–00090, November 2010.
- "OIG Report: Adverse Events in Hospitals: Public Disclosure of Information About Events," OEI–06–09–00360, January 2010.
- "OIG Report: Adverse Events in Hospitals: State Reporting Systems," OEI–06–07–00471, December 2008.
- *To Err is Human: Building a Safer Health System, A report of the Committee on Quality of Health Care in America,* Institute of Medicine, National Academy Press, 2000, L.T. Kohn, J.M. Corrigan, and M.S. Donaldson, eds.

We discussed internally within CMS, as well as with interagency partners at the Agency for Healthcare Research and Quality (AHRQ) and the CDC to ensure that the proposed regulations are consistent with other regulations, policies, and procedures currently in existence surrounding this issue. We also met with them to gain information on areas where we could mirror existing processes to eliminate undue burdens on States or providers.

We issued a State survey to capture data from all related payment policies regardless of whether they were implemented as a result of the July 31, 2008 SMDL or whether such practices are currently detailed in the State plan. The survey is still undergoing the Paperwork Reduction Act (PRA) process and has not been made mandatory. However, we have received information from a few States through the survey and have reviewed other information that has been helpful in explaining current State processes for making payment adjustments for HCACs. Subsequent to the publication of the survey, we held all-State calls where we answered questions in response to the survey, had States with existing policies talk about their experiences, and listened to discussion regarding the implementation of the HCAC policy.

We met with nongovernmental partners including the NQF, the National Academy for State Health Policy, the National Association of Children's Hospitals, the Joint Commission, and State Medicaid Medical Directors. Most of these organizations are primarily focused on State program development and/or quality issues. We reached out to them to ensure that the proposed policies would be consistent with current industry understanding of both State payment and quality improvement goals. In our discussions with these organizations, we were able to discuss State experiences on a broad, national level that had been gained from working with States. During these meetings, we discussed a number of issues related to the proposed rule and State concerns in implementing this provision. For instance, it was clear from many of our discussions that States hoped to be able to look to this provision to provide additional definition regarding the types of conditions to identify for nonpayment, as well as to provide some support in working with provider communities to which these policies would be applied.

G. Current State Practices Prohibiting Payment for HACs, HCACs, and Other Similar Events

We found that 29 States do not have existing HCAC-related nonpayment policies. Most of the 21 States that currently have HCAC-related nonpayment policies identify at least Medicare's HACs for nonpayment in hospitals. However, it is important to note that at least half of the existing policies we reviewed exceeded Medicare's current HAC requirements and policies, either in the conditions identified, the systems used to indicate the conditions, or the settings to which the nonpayment policies applied. These policies vary tremendously from State to State in the authority used to enact the policies, the terminology used, the conditions identified, State's utilization of the current Medicare HAC list, the service settings to which nonpayment policies are applied, reporting requirements, and the claims processing of the nonpayment policies.

All of the States with HCAC-related nonpayment policies have implemented provisions that would protect the State from dual-eligible liability either by directly prohibiting payment for Medicare crossover claims or by relying on existing State plan authority to deny payment for claims previously denied by Medicare.

We found that 17 of the States implemented Medicaid specific policies that reduce payment for services provided to Medicaid beneficiaries. Most of the States implementing Medicaid specific policies identify at least Medicare's current list of HAC, and nearly half of those States defined a list that was different from Medicare's current list of HACs for nonpayment.

Similar variation exists in States' plan language identifying Medicare's NCD for nonpayment ranging from mirroring Medicare to completely breaking from Medicare. We do note, however, that the nature of the NQF serious reportable events, like surgery on the wrong body part, proper surgery wrong patient, and wrong surgery, is so severe that States were likely to have relied on State coverage provisions and appropriate care requirements to deny payment for these events.

We also found that States use different general terminology for HCAC-related nonpayment policies even though many of the conditions identified overlap, are from the same sources, and do not generally vary in medical definition from one list to the other. For example, 3 States identify "air embolism" as a condition for nonpayment under its plans with the condition understood to be consistently defined for medical purposes. However, one State includes air embolisms on its list of "HACs"; another includes the same condition as a "Serious Adverse Event"; and the third includes it on a list of "Medical Errors."

We also found that at least 7 of the States with HCAC-related nonpayment policies apply those policies to settings other than the inpatient hospital setting required by Medicare, including both physicians and ambulatory surgical centers.

Variation across States is not surprising given the States have been permitted broad flexibility in defining their HCAC policies and programs. However, we attribute some of the variety on this issue to the wealth of information and evidence-based guidelines available to States, either through their own experiences and resources or through industry researched and developed resources related to health system quality. Data gathered on the conditions identified, reporting strategies, and implementation guidelines indicate that States have relied heavily on existing health system quality improvement research to define requirements while tailoring policies appropriate to their own systems. In addition, our research indicates that States' HCAC-related nonpayment policies are mainly intended to drive broader health system agendas to promote quality outcomes. We believe the use of evidence-based measures and the push for health system quality are an appropriate foundation for the

proposed regulation. We propose to implement Medicaid HCAC regulations that would provide some consistency across health care payers (Medicare and Medicaid). At the same time, we also propose to accommodate State flexibility to design individual HCAC policies for nonpayment, quality-related programs suitable for their own Medicaid program and health marketplace to the extent such policies go beyond Federally-established minimum standards. We request comment on this issue.

The July 31, 2008 SMDL (#08–004) instructed States to submit SPAs to enact nonpayment provisions. Thirteen States complied with this requirement. Other States that implemented these policies through some other authority like State law or administrative procedures will be required to submit new SPAs for review and work with CMS to ensure their policies, effective July 1, 2011, are in line with the final provisions of this rule.

H. Provider Preventable Conditions

We are proposing to exercise our authority under sections 1902(a)(4), 1902(a)(19), and 1902(a)(30)(A) of the Act to provide for identification of Provider Preventable Conditions (PPCs) as an umbrella term for hospital and nonhospital conditions identified by the State for nonpayment to ensure the high quality of Medicaid services. These statutory provisions authorize requirements that States use methods and procedures determined by the Secretary to be necessary for the proper and efficient administration of the State plan, to provide care and services in the best interests of beneficiaries, and to provide for payment that is consistent with efficiency, economy, and quality of care.

With the introduction of this term, we propose to include two categories of PPCs—HCACs and OPPCs. HCACs would apply as required under the statute. OPPCs would be applicable to other conditions that States identify and have approved through their Medicaid State plans.

The inclusion of the new terms, PPCs and OPPCs, is consistent with the implementation of a broader application of this policy which allows us to appropriately incorporate existing State practices. The adoption of a new term is necessary because the term, "health care-acquired condition" is very narrowly defined in the Statute and does not provide for the inclusion of conditions other than those identified as HACs for Medicare, even excluding the 3 Medicare NCDs. Additionally, the statutory definition of HCACs only applies to the inpatient hospital service setting.

We considered a broader definition of the term, "health care-acquired conditions," attempting to isolate the idea of the actual condition from the setting in which it occurred, however after conferring with Medicare to clearly understand the statute at section 1886(d)(4)(D)(iv) of the Act, we came to understand that it applies specifically to conditions applicable to inpatient hospitals as defined in that section and reimbursed by diagnosis related groups. For example, section 1886 of the Act is titled, "Payment to Hospitals for Inpatient Hospital Services." Section 1886(d) of the Act applies specifically to "the amount of the payment with respect to the operating costs of inpatient hospital services." Section 1886(d)(4) of the Act requires that, "The Secretary shall establish a classification of inpatient hospital discharges* * *" Section 1886(d)(4)(D) of the Act is specific to the assignment of diagnosis-related groups which apply solely to Medicare payment for inpatient hospital services.

We did look to the Affordable Care Act in creating these terms. Section 3008(b) of the Affordable Care Act, "Study And Report On Expansion Of Healthcare Acquired Conditions Policy To Other Providers," requires that Medicare study the effects of expanding its existing policy to other providers. We adopted the "Other Providers" term to remain consistent with Medicare in the expansion of its policy.

In looking to expand the overall policy, we considered a number of other terms but determined that many of them like "adverse events" or "serious reportable events" would generate confusion because they had existing industry definitions that did not necessarily overlap with our policy aims. We adopted the term "Provider Preventable Condition" after discussion with Medicare because it appropriately identified the scope of the conditions and could act as a "catch-all." Also, the term had not been narrowly defined by use in Medicare, Medicaid, or in the industry at-large.

I. Reporting of Results

After researching State, industry, and Federal information related to the importance of reporting of quality data in driving improved health outcomes, we propose that a simplified level of reporting is essential to creating a successful nonpayment policy both from the payment and quality perspectives. We believe that any requirements for provider reporting should provide a consistent format for States to report State-specific measures; require that providers report conditions identified for nonpayment when they occur regardless of a provider's intention to bill; and not cause undue burden on States or providers.

Quality reporting across States is inconsistent. There are 27 States that require reporting of either hospital-acquired infections, conditions, or some combination of both. Some of those States require quality reporting but have not implemented associated HCAC-related nonpayment policies. Others have HCAC-related nonpayment policies, but have not implemented quality reporting requirements.

Existing national quality reporting formats do not support the collection of data on HCACs and OPPCs for Medicaid beneficiaries. Providers, mainly hospitals, are subject to reporting requirements in addition to those imposed by States. For instance, most hospitals report some quality measures to CMS, the Joint Commission, or the CDC. We considered requiring reporting to Hospital Compare and the National Health Safety Network, but decided against these formats because: We do not believe they currently have the capacity to allow State specific reporting of varied measures; their existing collections may not be consistent with what most States are currently requiring providers report; and the reporting formats may impose undue significant burden for providers—particularly those that do not have full-time quality staffs or resources.

Without direct reporting requirements, providers have no incentive to report conditions or adverse events for nonpayment or otherwise. HACs, HCACs, and related policies represent liabilities for providers beyond nonpayment provisions. In fact, Medicare and the industry-at-large, have experienced nonclaiming or nonbilling on the part of providers seeking to escape the liability that could come with any type of notification of a particular event or avoid negative health outcome indicators.

In consideration of our research, we propose a requirement that existing claims systems be used as a platform for provider self-reporting. We also propose to include reporting provisions that would require provider reporting in instances when there is no associated bill. For instance, States could employ the widely used POA system in combination with including edits in their Medicaid claims systems that would indicate an associated claim and flag it for medical review.

J. States' Use of Payment Systems other than MS–DRG

We also found that States' payment systems will dictate the manner in which States are able to operationalize PPCs related nonpayment policies. For instance, some States reimburse using MS–DRG or some other type of grouper software to price claims. As with Medicare, these States may use the POA indicator system to identify claims and reduce payments by programming the grouper to reduce payment through the grouper. We note that a considerable number of States do not use grouper systems to reimburse providers. These States may identify and reduce payment for HCACs using methods appropriate to the specific reimbursement system used within that State. For instance, at least one State has elected to carve out a portion of the total system reimbursements for redistribution based on its own historical quality measures. We believe that the proposed provision allows States this type of flexibility in designing methodologies that would isolate amounts for nonpayment and allow provider payment to be reduced based on a CMS-approved State plan methodology that is prospective in nature. We would welcome comment on this issue.

II. Provisions of the Proposed Regulations

A. General Discussion

We propose to codify provisions that would allow States flexibility in identifying PPCs that include, at a minimum, the HAC identified by Medicare, but may also include other State-identified conditions. This flexibility would extend to applying nonpayment provisions to service settings beyond the inpatient hospital setting. We believe that establishing Medicare as the minimum for the application of this policy is appropriate at this point. Many States that have implemented HCAC-related policies have adhered to Medicare because the conditions have been researched and are generally accepted by the provider community. In addition, provider familiarity with Medicare's HACs and identification processes limits the States' implementation burden.

We also recognize that Medicare's own policy is evolving. The Affordable Care Act requires that Medicare attach new payment incentives to its HAC provisions, as well as to study the implications of applying HCACs policy to providers other than inpatient hospital providers. We encourage States to consider the benefits and quality implications of expanding HCAC quality and nonpayment policies as more information becomes available from Medicare and State Medicaid programs. We invite comment on the topic of expanding HCAC-related policies in State Medicaid programs.

We propose that PPCs are defined under two categories: HCACs; and OPPCs. We are proposing to define the category of PPCs that would be referred to using the term "health care-acquired conditions" (HCACs) based on the definition of that term in section 2702(b) of the Affordable Care Act. That definition provides that an HCAC must be a condition that "could" be identified in the Medicare program by a secondary ICD–9–CM OR ICD–10–CM code as an HAC under section 1886(d)(4)(D)(iv) of the Act for Medicare purposes. Section 2702(c) of the Affordable Care Act specifically requires that the Secretary shall apply to State plans (or waivers) under title XIX of the Act the regulations issued under section 1886(d)(4)(D) of the Act relating to the prohibition of payments based on the presence of a secondary diagnosis code specified by the Secretary in such regulations, as appropriate for the Medicaid program. This means States must, at a minimum, identify conditions as HACs in accordance with section 1886(d)(4)(D) of the Act. Consistent with this identification, we propose that every State must, at a minimum, identify as an HCAC, those secondary diagnosis codes that have been identified as Medicare HACs when not present on hospital admission. We note that the Secretary has authority to update the Medicare HAC list as appropriate. As such, States are required to comply with subsequent updates or revisions in accordance with section 1886(d)(4)(D) of the Act.

States will be responsible for ensuring that the conditions identified under their Medicaid State plans are, at a minimum, consistent with those identified in Medicare's final annual hospital IPPS rule. Medicare is required to display its final IPPS rule 60 days prior to the beginning of the Federal fiscal year to which the update applies. If Medicare revises its HAC list, we believe States will have sufficient time to update their corresponding policies. Therefore, we propose that States' policies will be effective consistent with Medicare's revisions to its list of HACs. We are soliciting comments on this issue.

Because the definition does not require that HCACs must be limited to Medicare HAC, we propose a definition for an HCAC that would not be limited to those specifically identified for the Medicare program, but can include conditions identified by States for nonpayment under their State plans, as approved by CMS through the State plan review process, that the State has determined meet the statutory criteria outlined at section 1886(d)(4)(D)(iv) of the Act. We believe this is appropriate at this point in time, considering where many States are in development of their programs but we are seeking comment on this proposed policy. This proposed definition would establish Medicare as the floor, but allow further State innovation as determined by each State. However, even if a State chooses to go beyond Medicare, it will still have to be implemented through SPAs, and we will publish such policies on the CMS Web site on an annual basis to encourage States to learn from each other. With respect to those statutory criteria for identification of an HCAC, section 1886(d)(4)(D)(iv) of the Act sets forth the following criteria:

- Cases described by such code have a high cost or high volume, or both, under this title.
- The code results in the assignment of a case to a MS–DRG that has a higher payment when the code is present as a secondary diagnosis.
- The code describes such conditions that could reasonably have been prevented through the application of evidence-based guidelines.

In applying these criteria to identify HCACs, we propose that the term "code" would refer to ICD–9–CM OR ICD–10–CM codes assigned in the International Classification of Diseases coding system, 9th (or 10th) Revision, Clinical Modification or a State-specified alternative method of identifying conditions for purposes of payment.

In addition, we propose that when analyzing the payment impact of an inpatient hospital HCAC, the State may consider the nature of its particular payment methodology. For instance, when a State reimburses hospitals on a per diem basis and determines that there was an HCAC that was not POA, the State may need to isolate the increased cost of the services (possibly through a utilization review) and reduce the per diem reimbursement accordingly.

While we believe that the broad use of ICD–9–CM OR ICD–10–CM codes in inpatient hospital payment, as well as the POA indicator system currently used by Medicare to indicate conditions for nonpayment is the most consistent methodology for States in identifying HCACs, we are interested in hearing about other methods of identifying HCACs. We recognize that there is considerable variation among State hospital payment methodologies. In

addition, we recognize that there is considerable variation among States in the availability of data necessary to identify HCACs and related quality issues. We are proposing to require that States implement requirements for provider self-reporting of HCACs in the Medicaid claims payment process.

The rule proposes that States would identify an HCAC similar to the way Medicare identifies an HAC. However, as the OIG points out in its report evaluating the usefulness of selected methods for identifying events that harm hospitalized Medicare beneficiaries, *Adverse Events in Hospitals: Methods for Identifying Events (OEI–06–08–00221),* tools like the Institute for Healthcare Improvement's Global Trigger Tool that require standardized medical record reviews are considered much more effective in detection than the POA system. This is significant because one cannot prevent what one cannot detect. Accurate measurement is the necessary antecedent of quality improvement. We are soliciting comments on the efficiency of POA indicators for purposes of this provision.

We are also proposing to provide that States may identify similar OPPCs related to services furnished in settings other than inpatient hospitals, which would also be subject to a payment prohibition.

Preventable conditions that are caused or related to the provision of health care are not limited to inpatient hospital settings. These conditions can occur in outpatient hospital, nursing facility, and ambulatory care settings, and other healthcare settings.

We are proposing that the treatment of these OPPCs will be similar to the treatment of HCACs. State plans must provide for nonpayment for care and services related to these OPPCs, and Federal financial participation (FFP) will not be available in State expenditures for such care and services related to OPPCs.

To establish a base of an OPPC, we propose to define OPPC to include, at a minimum, wrong surgical or other invasive procedure performed on a patient; a surgical or other invasive procedure performed on the wrong body part; and a surgical or other invasive procedure performed on the wrong patient.

These three conditions were addressed by Medicare in three national coverage analyses (NCAs) to establish NCDs.

Effective January 15, 2009, Medicare does not cover a particular surgical or other invasive procedure to treat a particular medical condition when the practitioner erroneously performs: (1) A different procedure altogether; (2) the correct procedure but on the wrong body part; or (3) the correct procedure but on the wrong patient. Medicare will also not cover hospitalizations and other services related to these non-covered procedures as defined in the Medicare Pub. 100–02, Benefit Policy Manual (BPM), chapter 1, sections 10 and 120 and chapter 16, section 180. We propose to adopt these 3 for purposes of this regulation.

In addition to these Federally-identified OPPCs, we propose to authorize States to identify other OPPCs and apply payment prohibitions the same as those applied to HCACs. The criteria that we are proposing for such other OPPCs would be similar to the criteria for HCACs. We propose the following criteria for States to use in identifying additional OPPCs:

- A condition or event identified by a State for inclusion under this provision must be a discrete, auditable, quantifiable, and clearly defined occurrence.
- A condition or event must be clearly adverse, resulting in a negative consequence of care that results in unintended injury or illness.
- A condition or event identified must be reasonably preventable, meaning an event that could have been anticipated and prepared for, but that occurs because of an error or other system failure.

In designating additional OPPCs, we recommend that States consider the 2002 NQF report entitled "Serious Reportable Events in Healthcare: A Consensus Report." In that report, NQF listed 27 events that were "serious, largely preventable and of concern to both the public and health care providers." NQF's "Consensus Standards Maintenance Committee on Serious Reportable Events" maintains and updates the list which currently contains 28 items.

In order to implement the requirements of this new payment prohibition, we recognize that States may need additional information to properly process claims and determine the availability of FFP. We propose requiring States to establish provider self-reporting procedures for PPCs related to claims for Medicaid payment or courses of treatment that otherwise would be payable under Medicaid. We solicit comments on this issue.

We will continue to gather information from States to further inform our policies and facilitate information sharing across States. We note that the Secretary may update this regulation over time to require additional nonpayment by States as we learn more from State practices.

B. Access to Care

Section 2702(a) of the Affordable Care Act requires that the Secretary ensure that adjustments to payment rates under this section do not result in a loss of access to care for beneficiaries. To this end, we propose that any reduction in payment would be limited to the amounts directly identifiable as related to the PPC and the resulting treatment. We are proposing this method of protecting access because it limits States' ability to unduly reduce provider rates. For instance, if a patient develops mediastinitis after a CABG, the State would be allowed to deny payment for the treatment of the mediastinitis, but not the CABG.

Additionally, we do not believe that beneficiaries would be best served by this policy if the focus was shifted from quality to system cost containment. We note further that nothing in this rule prevents a State from reinvesting any savings it may achieve from nonpayment of PPCs into rate improvements aimed at achieving improved access to care, as appropriate. We solicit comments on this issue.

C. Effective Date of the Proposed Provisions

Consistent with the provisions of section 2702(a) of the Affordable Care Act, we would make these requirements effective July 1, 2011. We will be requesting that States submit conforming SPAs to implement these provisions prior to that date. To be in compliance with the July 1, 2011 proposed effective date, under 42 CFR 430.20, the last date an SPA may be submitted would be September 30, 2011, which is the last day of the quarter in which the amendment would be effective.

D. Specific Revisions to Regulations Text

The provisions of this rule would deny FFP for Medicaid expenditures made for PPCs, including HCACs and OPPCs identified in the State plan; and ensure that related payment adjustments do not limit beneficiary access to care. These provisions would apply to payments as specified under States' approved Medicaid State plans, effective no later than July 1, 2011. We are proposing to modify the regulations at 42 CFR parts 434, 438, and 447 following general provider payment rules and preceding other provisions concerning reductions in provider payments. In addition, to ensure that these provisions apply to contracts that

States use to provide Medicaid benefits using a managed care delivery system, we are also proposing to modify the regulations at 42 CFR part 438. Because the basic rule is set forth in part 447, we discuss that proposed modification first.

Currently the general rules regarding Medicaid State plan payments for Medicaid are provided at part 447 subpart A. We propose to add a new § 447.26 to indicate that FFP will not be available for expenditures made for PPCs. We have included in § 447.26(a) a statement of the basis and purpose for the regulation, and in § 447.26(b), the definitions for the umbrella term PPCs, and the included terms HCACs, and other PPCs. These proposed provisions will establish Medicare as the floor that all States must adopt, but allow flexibility for States to move beyond the Medicare definitions and settings. As States' programs evolve and they make additional requirements, we would require that necessary SPAs be submitted for implementation purposes.

In § 447.26(c), we are proposing to set forth the general rule that State plans must preclude payment to providers for PPCs, and that FFP is not available for State expenditures for PPCs. To ensure beneficiary access to care, we specify that any reductions may be limited to the added cost resulting from the PPC.

In § 447.26(d), we have included a provision that would require States to require provider reporting of PPCs associated with Medicaid claims, or with courses of treatment for Medicaid beneficiaries that would otherwise be payable under Medicaid.

In addition to these changes in part 447, we are proposing to include a requirement in § 434.6(a)(12) for contracts for medical or administrative services that contractors do not make payment for PPCs, and require that providers comply with the reporting requirements in § 447.26(d) as a condition of receiving payment. Likewise, to ensure that these provisions are included as required elements in Medicaid managed care contracts, we are proposing to include a requirement in § 438.6(f)(2) that contracts must comply with both § 434.6(a)(12) and § 447.26.

We have proposed these particular provisions because the information gathered in preparation for issuing these proposed rules indicate the need for a consistent authority under which States can implement PPC nonpayment policies; a consistent approach to identifying conditions for nonpayment; a streamlined terminology to indicate Medicaid HCAC payment policies; State flexibility to implement provisions suitable to their own systems; and a consistent provider reporting platform.

III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs):

Effective July 1, 2011, proposed § 447.26 would require States to submit SPAs for CMS approval that would reduce payments to providers by amounts related to PPCs. The burden associated with this proposed requirement would be the time and effort necessary for a State to submit its SPA and the associated pre-print. We estimate that 50 States would be required to comply with this requirement. We further estimate that it will take each State 7 hours to submit the aforementioned documentation to CMS. The total estimated burden associated with this requirement would be 350 hours at a cost of $20.67 per hour per State.

We estimate that it will take each State 7 hours because we intend to issue a template to States to simplify the process of making the related amendment to the Medicaid State plan.

Proposed § 447.26 would also require States to implement provider reporting requirements to ensure that PPCs are identified in claims for Medicaid payment. The burden associated with this requirement is the time and effort necessary to develop and implement provider reporting requirements that are effective with the provisions of this regulation. We estimate that 50 States would be required to comply with this requirement. Similarly, we estimate that it will take 24 hours for each State to develop and implement the provider reporting requirements as specified above. The total estimated burden associated with this requirement would be 1,200 hours at a cost of $20.67 per hour per State. We believe that this estimate is reasonable because we are requiring that States have providers use their existing claims processes to report identified events.

Proposed § 438.6(f)(2) would also require States which provide medical assistance using a managed care delivery system to modify their managed care contracts to reflect the PPCs payment adjustment policies as applied through these regulations. The burden associated with this requirement is the time and effort necessary for a State to amend its managed care contracts to reflect these policies. We estimate that 48 States would be required to comply with this requirement. We also estimate that it would take 8 hours for each State to revise its contracts to comply with this requirement and submit the amended contract to CMS for review and approval. The total estimated annual burden associated with this requirement is 384 hours at a cost of $20.67 per hour per State.

The total estimated burden associated with this requirement is 1,934 hours at a cost of $806.13 per State.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attention:* CMS Desk Officer, [CMS–2400–P]; *Fax:* (202) 395–6974; or *E-mail: OIRA_submission@omb.eop.gov.*

IV. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

V. Regulatory Impact Statement

A. Statement of Need

This proposed rule implements section 2702 of the Affordable Care Act

of 2010 which directs the Secretary to issue Medicaid regulations effective as of July 2011, prohibiting Federal payments to States (under section 1903 of the Act) for any amounts expended for providing medical assistance for HCACs. It would also authorize States to identify other PPCs for which Medicaid payment would be prohibited. We view this regulation as one step of a larger approach to address the problem of HCACs.

B. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (February 2, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This rule does not reach the economic threshold and thus is not considered a major rule under the Congressional Review Act. We request comments on our economic analysis.

It is difficult to estimate the amount which will be withheld from providers under this regulation, as not all of these events will be billed. However, it is instructive to note that the total dollar amount of Medicare claims denied under its HAC policy is approximately $20 million per year (*see* 75 FR 23895, May 4, 2010). The original regulation creating the Medicare HACs was published in the August 19, 2008 **Federal Register** (73 FR 48433). In addition, estimates were conducted by the Congressional Budget Office (CBO) and the CMS Office of the Actuary (OACT) on the impact of section 2702 of the Affordable Care Act. The CBO estimate concluded there would be no impact associated with section 2702 of the Act (CBO and JCT, 2010 Estimate). The CMS OACT estimate (Estimated Financial Effects of the "Patient Protection and Affordable Care Act," as Amended, 2010) projected an impact from section 2702 on the Medicaid program of cost savings of $2 million for FY 2011 ($1 million for the Federal share and $1 million for the State share), with an aggregate cost savings of $35 million ($20 million for the Federal share and $15 million for the State share) for FYs 2011 through 2015. The Federal and State share cost savings, as result of denied payments, are represented by the reduction in transfers from Medicaid to hospitals.

TABLE 1—MEDICAID IMPACTS FOR FYS 2011 THROUGH 2015

Medicaid impacts	FY impact ($ millions)					
	2011	2012	2013	2014	2015	Total
Federal Share	−1	−4	−5	−5	−5	−20
State Share	−1	−3	−3	−4	−4	−15
Total	−2	−7	−8	−9	−9	−35

There are administrative cost impacts on States to modify their systems to meet reporting requirements, but we believe these are not significant. As noted above, the reporting system in this proposed regulation relies on an existing billing system currently in place. Both States and providers already have billing, claiming, and payment systems in place to act upon the information obtained. The costs reported in section III. of this proposed rule, Collection of Information Requirements, amount to an additional $39,976 dollars aggregate across all States.

Hospitals may incur additional costs to reduce HCACs. Such costs include hiring additional nurses to ensure enforcement of the infection prevention policies. In turn, preventing or reducing HCACs will lead to a reduction in direct health spending, which is a benefit realized by Medicaid, hospitals and other payers.

The Joint Commission requires hospitals to have established programs for Quality Improvement, Risk Management, Safety, and Infection Control. As a result, a majority of hospitals already have in place programs to avert Medicare HACs and thus would not incur new costs to implement parallel programs to avert Medicaid HACs. Furthermore, we anticipate a public benefit to all providers and payers since programs that hospitals develop to avoid Medicaid HCACs will likely benefit all patients and reduce health care costs. Patient benefits resulting from a reduction in HCAC may include an increase in healthy years of life. However, this public benefit will derive from possible responses by hospitals and not from this regulation itself.

We realize that the overall problem of HCACs cannot be completely addressed in this regulation, as this proposed regulation is one step of an overall approach. Consequently, the estimated economic impacts from all HHS initiatives to address HCACs may result in much higher savings impact than presented in this analysis. However, such economic savings, for example, will not derive from this regulation alone, but will in part come from the knowledge that State and Federal governments gain from the reporting requirements created by this regulation. That knowledge will in turn inform future HHS initiatives to reduce excess morbidity and mortality attributable to HCACs.

The RFA requires agencies to analyze options for regulatory relief for small entities, if a rule has a significant impact on a substantial number of small entities. Most hospitals, other providers, and suppliers are small entities, either by nonprofit status or by having revenues of $7.0 million to $34.5 million in any 1 year. Individuals and States are not included in the definition of a small entity. Guidance issued by the Department of Health and Human Services interpreting the RFA considers effects to be economically significant if they reach a threshold of 3 to 5 percent or more of total revenue or total costs. As illustrated in Table 1, any decrease in payments, as a result of this regulation, to small entities should be significantly less than this threshold.

Therefore, we are not preparing an analysis for the RFA because the Secretary has determined that this proposed rule will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a RIA if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because the Secretary has determined that this proposed rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2011, that threshold is approximately $136 million. This rule will have no consequential effect on State, local, or tribal governments in the aggregate or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. While this regulation does not impose substantial costs on State or local governments, it does preempt some State laws. The requirements of Executive Order 13132 are applicable.

Executive Order 13132 sets forth a process to be followed by the Federal government whenever Federal regulatory processes may affect or preempt State regulations or laws. We are aware that many States do have regulations for Medicaid nonpayment in the event that specified adverse events occur during provider care. This proposed rule is intended to create a Federal legal minimum for such State regulations. States could continue to enact more stringent laws or regulations upon approval of a Medicaid SPA by CMS to assure that there is no adverse impact on Medicaid beneficiary access to care.

This proposed rule derives from section 2702 of the Affordable Care Act and other CMS regulatory authority. Like the Affordable Care Act, it is derived from Federal authority under the Commerce Clause of the U.S. Constitution. Under the requirements of Executive Order 13132 and the requirements of section 2702 of the Affordable Care Act, we have consulted with the States before issuing this proposed rule. Major portions of the regulation are, in fact, derived from comparable State regulations. Significant regulatory authority in this area would remain with the States should the proposed regulation become final. As stated, the proposed rule does not completely preempt State law, but merely sets a Federal minimum standard.

Moreover, we solicit comments from States as part of this proposed rule and will consider such State comments in drafting the final rule. While there will be some additional administrative costs to States to administer this regulation, it is expected that State Medicaid savings will largely offset such costs.

The requirements of Executive Order 13132 will be met in the final rule to be issued 30 days prior to the effective date of July 1, 2011, set forth in the Affordable Care Act.

C. Anticipated Effects

1. Effects on State Medicaid Programs

The effects on State Medicaid programs as a result of this provision will depend on various factors. For instance, as we state in the preamble, there are 21 States that have already implemented similar policies. While we have reviewed existing State policies and incorporated those policies that we believe would best apply on a national level, these States will have to make changes to comply with the minimums set in this proposed rule. In addition, States will have to work through the SPA review process to ensure that their existing policies do not serve to limit beneficiaries' access to health care.

The States that have used State plan authority to implement their nonpayment policies will need to review their policies and ensure that they comply with any finally implemented provisions of these rules. These States will likely have to submit revisions to their State plans. In addition, the States that implemented these policies through some other authority like State law or administrative procedures will have to submit new SPAs for review and work with CMS to ensure that their policies effective July 1, 2011, are in line with the final provisions of these rules. States that have elected not to implement Medicaid specific policies or that do not have related policies at all will need to submit new SPAs. Further, States which use a managed care delivery system to provide Medicaid benefits to beneficiaries will have to amend and submit for CMS review and approval managed care contracts that reflect these new requirements. While this regulation is effective on July 1, 2011, most States will already have their managed care contracts for the fiscal year in place by that time and there may be some delay in incorporating new language in their managed care contracts. We will issue subregulatory guidance to States requiring that appropriate changes be made to managed care contracts to comply with the regulation.

All States will need to incorporate the reporting requirements into their claims systems. In addition, States will need to evaluate the best ways in which to identify and reduce payment for PPCs under their respective Medicaid plans.

We anticipate that this provision will prompt programmatic changes for States regarding quality improvement considerations within health care systems. This provision, while it is a payment provision, is primarily targeted at preventing medical errors.

2. Effects on Other Providers

We anticipate that these provisions will prompt health care providers to adopt quality programs that would limit the risk of providing services or using resources, in error, that will not be reimbursed.

We anticipate that the reporting requirements will ultimately be a catalyst for providers in developing quality practices to reduce the risks associated with receiving care at their facilities and promote overall quality improvements.

3. Effects on the Medicaid Program

Medicare's and States' experience has demonstrated that related policies often do not produce substantial short-term financial savings within health care systems. Medicare estimated that the policy will reduce its spending by an aggregate amount of about $80,000,000 from FY 2009 through FY 2013, or by less than 0.01 percent of total annual spending on inpatient hospital services (75 FR 50661). States report similar short-term savings. However, there are more significant gains to be realized when considering the broader impact of increased quality on the health system overall, or more exactly the savings created when preventable conditions and related treatment are measured.

The anticipated public benefit to all providers and payers from programs

that hospitals develop to avoid Medicaid HCACs will likely benefit all patients and reduce health care costs. This includes, for example, Medicaid beneficiaries realizing an increase in healthy years of life as a result of the reduction in HCACs. However, this public benefit will derive from possible responses by hospitals and not from this regulation itself.

D. Alternatives Considered: Conditions Identified as Provider-Preventable Conditions

The Statute requires that Medicaid, at a minimum, recognize Medicare's current list of HACs. We considered proposing regulatory action that included only the conditions listed as Medicare HACs. However, when considering current State practices our research concluded that many States' policies included conditions not identified by Medicare as HACs. We concluded that such limited action would not serve the program purposes of ensuring high quality care and would potentially limit State flexibility to protect beneficiaries and program integrity. Similarly, we considered proposing regulatory action that included only the inpatient hospital setting. Again, after assessing current State practices, as well as industry-based research, there is clear indication that data is available to States that will allow them to employ evidence based policy practices beyond the inpatient hospital setting. In order to provide States full flexibility to protect beneficiaries and the program, we elected the more comprehensive approach proposed. We are seeking comment on both issues.

We considered defining OPPC as, "a condition occurring in any health care setting that could have reasonably been prevented through the ordinary provision of high quality care during the course of treatment * * *" We believed that this terminology would limit additional requirements on States to produce evidence of preventability. However, after discussing the terminology and scientific parameters that exist in relation to this issue, we propose that the term be defined as, "a condition that could have reasonably been prevented through the application of evidence based guidelines." We are seeking comment on the use of both definitions.

E. Conclusion

For the reasons outlined in the RIA, we are not preparing an analysis for either the RFA or section 1102(b) of the Act because we have determined that this proposed rule would not have a direct significant economic impact on a substantial number of small entities or a direct significant impact on the operations of a substantial number of small rural hospitals.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects

42 CFR Part 434

Grant programs—health, Health maintenance organizations (HMO), Medicaid, Reporting and recordkeeping requirements.

42 CFR Part 438

Grant programs—health, Medicaid, Reporting and recordkeeping requirements.

42 CFR Part 447

Grant programs—health, Medicaid.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR parts 434, 438, and 447, as set forth below:

PART 434—CONTRACTS

1. The authority citation for part 434 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

Subpart A—General Provisions

2. Section 434.6 is amended by—

A. Revising the introductory text of paragraph (a).

B. Removing the semicolons from the end of paragraphs (a)(1) through (a)(9), and the semicolon and the word "and" from the end of paragraph (a)(10), and adding in their place a period.

C. Adding a new paragraph (a)(12).

The revision and addition read as follows:

§ 434.6 General requirements for all contracts and subcontracts.

(a) *Contracts.* All contracts under this part must include all of the following:

* * * * *

(12) Specify the following:

(i) No payment will be made by the contractor to a provider for provider-preventable conditions, as identified in the State plan.

(ii) The contractor will require that all providers agree to comply with the reporting requirements in § 447.26(d) of this subchapter as a condition of payment from the contractor.

(iii) The contractor will comply with such reporting requirements to the extent the contractor directly furnishes services.

* * * * *

PART 438—MANAGED CARE

3. The authority citation for part 438 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

Subpart A—General Provisions

4. Section 438.6 is amended by revising paragraph (f) to read as follows:

§ 438.6 Contract requirements.

* * * * *

(f) *Compliance with contracting rules.* All contracts must meet the following provisions:

(1) Comply with all applicable Federal and State laws and regulations including title VI of the Civil Rights Act of 1964; title IX of the Education Amendments of 1972 (regarding education programs and activities); the Age Discrimination Act of 1975; the Rehabilitation Act of 1973; and the Americans with Disabilities Act of 1990 as amended.

(2) Provide for compliance with the requirements prohibiting payment for provider-preventable conditions as set forth in § 434.6(a)(12) and § 447.26 of this subchapter.

(3) Meet all the requirements of this section.

* * * * *

PART 447—PAYMENTS FOR SERVICES

5. The authority citation for part 447 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

Subpart A—Payments: General Provisions

6. Section 447.26 is added to read as follows:

§ 447.26 Prohibition on payment for provider-preventable conditions.

(a) *Basis and purpose.* The purpose of this section is to protect Medicaid beneficiaries and the Medicaid program by prohibiting payments by States for services related to provider-preventable conditions.

(1) Section 2702 of the Patient Protection Act and Affordable Care Act of 2010, Public Law 111–148 requires that the Secretary exercise authority to prohibit Federal payment for certain provider preventable conditions (PPCs) and health care-acquired conditions (HCACs).

(2) Section 1902(a)(19) of the Act requires that States provide care and services consistent with the best interests of the recipients.

(3) Section 1902(a)(30) of the Social Security Act requires that State payment methods must be consistent with efficiency, economy, and quality of care.

(b) *Definitions.* As used in this section—

Health care-acquired condition means a condition identified as a HAC by the Secretary under section 1886(d)(4)(D)(iv) of the Act for purposes of the Medicare program and other HACs identified in the State plan that the State determines meet the requirements described in section 1886(d)(4)(D)(ii) and (iv) of the Act.

Other provider-preventable condition means a condition occurring in any health care setting that meets the following criteria:

(i) Could have reasonably been prevented through the application of evidence based guidelines.

(ii) Has a negative consequence for the beneficiary.

(iii) Is identified in the State plan.

(iv) Is auditable.

(v) Includes, at a minimum, wrong surgical or other invasive procedure performed on a patient; surgical or other invasive procedure performed on the wrong body part; surgical or other invasive procedure performed on the wrong patient.

Provider-preventable condition means a condition that meets the definition of a "health care-acquired condition" or an "other provider-preventable condition" as defined in this section.

(c) *General rules.*

(1) A State plan must provide that no medical assistance will be paid for "provider-preventable conditions" as defined in this section.

(2) Reductions in provider payment may be limited to the extent that the following apply:

(i) The identified provider-preventable conditions would otherwise result in an increase in payment.

(ii) The State can reasonably isolate for nonpayment the portion of the payment directly related to treatment for, and related to, the provider-preventable conditions.

(3) FFP will not be available for any State expenditure for provider-preventable conditions.

(4) A State plan must ensure that payment for services is sufficient to assure access to services for Medicaid beneficiaries in accordance with section 1902(a)(30)(A) of the Act.

(d) *Reporting.* State plans must require that providers identify provider-preventable conditions that are associated with claims for Medicaid payment or with courses of treatment furnished to Medicaid patients for which Medicaid payment would otherwise be available.

Authority: Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program.

Dated: November 17, 2010.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

Approved: December 13, 2011.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2011–3548 Filed 2–16–11; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 5b

RIN 0906–AA91

Privacy Act; Exempt Record System

AGENCY: Health Resources and Services Administration (HRSA), HHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule would exempt the system of records (09–15–0054, the National Practitioner Data Bank for Adverse Information on Physicians and Other Health Care Practitioners, HHS/HRSA/BHPr) for the National Practitioner Data Bank (NPDB) from certain provisions of the Privacy Act. The exemption is necessary due to the recent expansion of the NPDB under section 1921 of the Social Security Act to include the investigative materials compiled for law enforcement purposes reported to the Healthcare Integrity and Protection Data Bank (HIPDB). The system of records for the HIPDB has an exemption from certain provisions of the Privacy Act. In order to maintain the exemption for the HIPDB investigative materials, which are now also available through the NPDB, it is necessary to expand the same privacy act exemptions for the HIPDB to the NPDB. This rule specifically seeks public comments on the proposed exemption.

DATES: To assure consideration, public comments must be delivered to the address provided below by no later than 5 p.m. on April 18, 2011.

ADDRESSES: You may submit comments in one of the three ways listed below. The first is the preferred method. Please submit your comments in only one of these ways, so that no duplicates are received.

- *Federal eRulemaking Portal.* You may submit comments electronically to *http://www.regulations.gov.* Click on the link "Submit electronic comments on HRSA regulations with an open comment period." Submit your actual comments as an attachment to your message or cover letter. (Attachments should be in Microsoft Word or WordPerfect; however, we prefer Microsoft Word.)
- *By regular, express or overnight mail.* You may mail written comments to the following address only: Health Resources and Services Administration, Department of Health and Human Services, Attention: HRSA Regulations Officer, Parklawn Building Rm. 14A–11, 5600 Fishers Lane, Rockville, MD 20857. Please allow sufficient time for mailed comments to be received before the close of the comment period.
- *Delivery by hand (in person or by courier*). If you prefer, you may deliver your written comments before the close of the comment period to the same address: Parklawn Building Room 14A–11, 5600 Fishers Lane, Rockville, MD 20857. Please call in advance to schedule your arrival with one of our HRSA Regulations Office staff members at telephone number (301) 443–1785.

Because of staffing and resource limitations, and to ensure that no comments are misplaced, we cannot accept comments by facsimile (FAX) transmission.

In commenting, please refer to RIN 0906–AA91. Comments are available for public viewing on the Federal eRulemaking portal at *http://www.regulations.gov.* Comments received on a timely basis will be available for public inspection as they are received in Room 14A–11 of the Health Resources and Services Administration's offices at 5600 Fishers Lane, Rockville, MD, Monday through Friday of each week (Federal holidays excepted) from 8:30 a.m. to 5 p.m. (phone: 301–443–1785).

FOR FURTHER INFORMATION CONTACT: Director, Division of Practitioner Data Banks, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, 5600 Fishers Lane, Room 8–103, Rockville, MD 20857; telephone number: (301) 443–2300.

SUPPLEMENTARY INFORMATION: On January 28, 2010, the Health Resources and Services Administration published a final rule in the **Federal Register** (75 FR 4656) designed to implement section 1921 of the Social Security Act (herein referred to as section 1921). Section 1921 expands the scope of the NPDB. Section 1921 requires each state to

adopt a system of reporting to the Secretary certain adverse licensure actions taken against health care practitioners and health care entities by any authority of the state responsible for the licensing of such practitioners or entities. It also requires each state to report any negative action or finding that a state licensing authority, a peer review organization, or a private accreditation entity has finalized against a health care practitioner or entity. Practically speaking, Section 1921 resulted in, among other consequences, the transfer of the vast majority of information contained in the HIPDB to the NPDB.

The HIPDB was created by the Health Insurance Portability and Accountability Act (HIPAA) of 1996, Public Law (Pub. L. 104–191), which required the Secretary, acting through the Office of Inspector General (OIG) and the United States Attorney General, to establish a new health care fraud and abuse control program to combat health care fraud and abuse.

Groups that have access to this information include all organizations eligible to query the NPDB under the Health Care Quality Improvement Act of 1986 (hospitals, other health care entities that conduct peer review and provide health care services, state medical or dental boards and other health care practitioner state boards), other state licensing authorities, agencies administering federal health care programs, including private entities administering such programs under contract, state agencies administering or supervising the administration of state health care programs, State Medicaid Fraud Control Units, and certain law enforcement agencies, and utilization and quality control peer review organizations (referred to as QIOs) as defined in Part B of title XI of the Social Security Act and appropriate entities with contracts under section 1154(a)(4)(C) of the Social Security Act. Individual health care practitioners and entities can self-query.

One of the primary purposes of these data will be use of this information by a federal or state government agency charged with the responsibility of investigating or prosecuting a case where there is an indication of a violation or potential violation of law, whether civil, criminal, or regulatory in nature. The information in this system may also be used in the preparation for a trial or hearing for such violation. Specifically, this proposed rule would exempt this data bank from certain provisions of the Privacy Act.[1] This exemption is intended to protect, from release to the record subject, information on law enforcement queries to the data bank. It would also exempt the data bank from Privacy Act access and amendment procedures in order to establish access and amendment procedures in the NPDB regulations.

While subjects will have access to information on all other queries to the data bank, disclosure of law enforcement queries could compromise ongoing investigation activities. The premature disclosure of the existence of a law enforcement activity to an outside party (who may also be the subject of the investigation) could lead to, among other things, the destruction or alteration of evidence and the tampering with witnesses.

Record subjects are guaranteed access to, and correction rights for, substantive information reported to the NPDB. The procedures, appearing in 45 CFR part 60, use the Privacy Act access and correction procedures as a basic framework while, at the same time, providing significant additional rights (such as automatic notification to the record subject of any report filed with the data bank). Data bank subjects also have broader rights on NPDB correction procedures, including the right to file a statement of disagreement as soon as a report is filed with the data bank.

Economic and Regulatory Impact

The Office of Management and Budget has reviewed this proposed rule in accordance with the provisions of Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by Executive Orders 13258 and 13422, and has determined that it will have no major effect on the economy or federal expenditures. Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when rulemaking is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health, safety distributive and equity effects.

The Secretary has determined that this proposed rule is not a "major rule" within the meaning of the statute providing for Congressional Review of Agency Rulemaking, 5 U.S.C. 801, and has determined that it does not meet the criteria for a significant regulatory action. In addition, under the Small Business Enforcement Act (SBEA) of 1996, if a rule has a significant economic effect on a substantial number of small businesses, the Secretary must specifically consider the economic effect of a rule on small business entities and analyze regulatory options that could lessen the impact of the rule. The Secretary has reviewed this proposed exemption in accordance with the provisions of the SBEA and certifies that this proposed exemption will not have a significant impact on a substantial number of small entities. Specifically, as indicated above, while the reports of adverse actions to the NPDB will be known to the subjects of the records in the data bank, the access and use of such information by law enforcement agencies would not be known to the subjects of the records. As a result, we believe that disclosure of this information could compromise ongoing law enforcement activities.

Similarly, it will not have effects on state, local, and tribal governments and on the private sector such as to require consultation under the Unfunded Mandates Reform Act of 1995.

The Secretary has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have "federalism implications." This rule would not "have substantial direct effects on the states, or on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government."

The proposals made in this notice of proposed rulemaking, if implemented, would not adversely affect the following family elements: family safety, family stability, marital commitment; parental rights in the education, nurture and supervision of their children; family functioning, disposable income, or poverty; or the behavior and personal responsibility of youth, as determined under section 654(c) of the Treasury and General Government Appropriations Act of 1999.

Paperwork Reduction Act

This proposed rule does not have any information collection requirements.

Dated: December 22, 2010.

Mary Wakefield,

Administrator, Health Resources and Services Administration.

Approved: January 19, 2011.

Kathleen Sebelius,

Secretary.

List of Subjects in 45 CFR Part 5b

Privacy.

[1] Subsections (c)(3), (d)(1)–(4), and (e)(4)(G) and (H) of the Privacy Act, in accordance with 5 U.S.C. 552a(k)(2) and proposed 45 CFR 5b.11(b)(2)(ii)(L).

Accordingly, 45 CFR part 5b is proposed to be amended as set forth below:

PART 5b—PRIVACY ACT REGULATIONS

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

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

2. In § 5b.11, add paragraph (b)(2)(ii)(L) to read as follows:

§ 5b.11 Exempt systems.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(L) Investigative materials compiled for law enforcement purposes for the National Practitioner Data Bank (NPDB). (*See* § 60.16 of this title for access and correction rights under the NPDB by subjects of the Data Bank.)

* * * * *

[FR Doc. 2011–3513 Filed 2–16–11; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2009–0014; 92210–1117–0000–B4]

RIN 1018–AW50

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for Roswell Springsnail, Koster's Springsnail, Noel's Amphipod, and Pecos Assiminea

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; revision and reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce reopening of the public comment period on the June 22, 2010, proposal to revise designated critical habitat for the Pecos assiminea (*Assiminea pecos*), and to newly designate critical habitat for the Roswell springsnail (*Pyrgulopsis roswellensis*), Koster's springsnail (*Juturnia kosteri*), and Noel's amphipod (*Gammarus desperatus*), under the Endangered Species Act of 1973, as amended (Act). We also announce revisions to the proposed critical habitat, as it was described in the proposed rule published in the **Federal Register** on June 22, 2010 (75 FR 35375). In total, we are proposing to designate as critical habitat 520.8 acres (210.8 hectares) for the four species. In this proposal we include as critical habitat for Noel's amphipod an additional 5.8 acres (2.3 hectares) for Chaves County, New Mexico, as a population of amphipods was recently confirmed to be Noel's amphipod at this location. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the revised proposed rule, the associated economic analysis, environmental assessment, and the amended required determinations.

DATES: We will consider comments received on or before March 21, 2011. Comments must be received by 11:59 p.m. Eastern Time on the closing date. Any comments that we receive after the closing date may not be fully 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.* Search for docket number FWS–R2–ES–2009–0014 and then follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No. FWS–R2–ES–2009–0014; 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: Wally "J" Murphy, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna Rd., NE., Albuquerque, NM 87113; telephone 505–761–4781; facsimile 505–246–2542. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed designation of the proposed revisions to critical habitat for the Pecos assiminea (*Assiminea pecos*), and the proposed critical habitat for the Roswell springsnail (*Pyrgulopsis roswellensis*), Koster's springsnail (*Juturnia kosteri*), and Noel's amphipod (*Gammarus desperatus*) (four invertebrates) that was published in the **Federal Register** on June 22, 2010, (75 FR 35375), and the additional area proposed in this notice. As a result of information sent to us in response to our June 22, 2010, proposal and request for comments, we became aware that a population of amphipods was confirmed to be Noel's amphipod along the Rio Hondo, on the South Tract of Bitter Lake National Wildlife Refuge. We are particularly interested in information on our proposed inclusion of this new habitat in our final critical habitat designation, including comments on the economic analysis and environmental assessment of the proposed designation related to this new area. We particularly seek comments concerning:

(1) The reasons why we should or should not designate habitat as "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 the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

(a) The amount and distribution of habitat for the Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assiminea;

(b) What areas occupied at the time of listing and that contain features essential to the conservation of the species we should include in the designation and why. We are particularly interested in information on the additional habitat containing the recently discovered Noel's amphipod population on the South Tract of Bitter Lake National Wildlife Refuge;

(c) Special management considerations or protections for areas that contain the features essential to the conservation of the Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assiminea that have been identified in this proposal, including management for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential for the conservation of the species and why.

(3) Land use management and current or planned activities in the subject areas and their possible impacts on proposed critical habitat, particularly in the area occupied by the recently discovered Noel's amphipod population on the South Tract of Bitter Lake National Wildlife Refuge.

(4) Any foreseeable economic, national security, or other relevant impacts of designating any area that may be included in the final designation. We are particularly

interested in any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(5) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

(6) Information on the extent to which the description of economic impacts in the economic analysis is complete and accurate, and information on potential economic impacts that may occur should we designate the area occupied by the recently discovered Noel's amphipod population on the South Tract of Bitter Lake National Wildlife Refuge.

(7) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the economic analysis and environmental assessment, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

If you submitted comments or information on the proposed rule (75 FR 35375) during the initial comment period from June 22, 2010, to August 23, 2010, please do not resubmit them. We have incorporated them into the public record as part of that comment period, and we will fully consider them in the preparation of our final determination. Our final determination concerning revised critical habitat 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 proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning the proposed rule, economic analysis, or environmental assessment by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. We will post all hardcopy comments on *http://www.regulations.gov* as well. If you submit a hardcopy comment 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.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, economic analysis, and environmental assessment will be available for public inspection on *http://www.regulations.gov* at Docket No. FWS–R2–ES–2009–0014, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office (*see* **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rule, economic analysis, and environmental assessment on the Internet at *http://www.regulations.gov* at Docket Number FWS–R2–ES–2009–0014, or by mail from the New Mexico Ecological Services Field Office (*see* **FOR FURTHER INFORMATION CONTACT** section).

Background

It is our intent to discuss in this notice only those topics relevant to the designation of one additional critical habitat unit for Noel's amphipod (*Gammarus desperatus*) in this proposed rule. For more information on the Roswell springsnail (*Pyrgulopsis roswellensis*), Koster's springsnail (*Juturnia kosteri*), Noel's amphipod, and Pecos assiminea (*Assiminea pecos*), refer to the final listing rule published in the **Federal Register** on August 9, 2005 (70 FR 46304), and to the proposed rule revising critical habitat for Pecos assiminea and proposing new critical habitat for Roswell springsnail, Koster's springsnail, and Noel's amphipod that published in the **Federal Register** on June 22, 2010 (75 FR 35375).

Noel's amphipod is a small, freshwater shrimp in the family Gammaridae that inhabits shallow, cool, well-oxygenated waters of streams, ponds, ditches, sloughs, and springs in southeast New Mexico (Holsinger 1976, p. 28; Pennak 1989, p. 478). Since publication of the June 22, 2010, proposed rule (75 FR 35375), a new population of amphipods found in spring vents along the Rio Hondo on the South Tract of Bitter Lake National Wildlife Refuge (Refuge) was confirmed genetically and morphologically to be Noel's amphipod (Berg 2010, p. 1; Lang 2010, pp. 2–3).

Previous Federal Actions

On August 9, 2005, we listed Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assiminea as endangered under the Act (70 FR 46304). In that rule, we also designated critical habitat for Pecos assiminea at Diamond Y Springs Complex in Pecos County, Texas, and at East Sandia Springs in Reeves County, Texas. We excluded the Refuge from the critical habitat designation because special management for the four invertebrates was already occurring there.

On March 12, 2009, in response to a complaint filed by Forest Guardians (now WildEarth Guardians) challenging the exclusion of the Refuge from the final critical habitat designation for the four species, we reopened the comment period on the proposed designation of lands of the Bitter Lake National Wildlife Refuge as critical habitat for the four invertebrates (74 FR 10701).

On June 22, 2010, we published a proposed rule revising critical habitat for the Pecos assiminea and proposing new critical habitat for Roswell springsnail, Koster's springsnail, and Noel's amphipod (75 FR 35375). The comment period was open for 60 days and closed on August 23, 2010. Information we received during that comment period led to our consideration of a new area for critical habitat for the Noel's amphipod and, therefore, to publishing this additional notice to accept public comment on the proposed designation of the additional area.

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) essential to the conservation of the species and

(b) which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition

and maintenance, propagation, live trapping, transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies insure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner seeks or requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time it was listed must contain the physical and biological features essential to the conservation of the species and be included only if those features may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life-cycle needs of the species (areas on which are found the physical and biological features laid out in the appropriate quantity and spatial arrangement for the conservation of the species).

Under the Act, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species. When the best available scientific data do not demonstrate that the conservation needs of the species require such additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species. An area currently occupied by the species but that was not occupied at the time of listing may, however, be essential to the conservation of the species and may be included in the critical habitat designation.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be required for recovery of the species. Areas that are important to the conservation of the species, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act. Areas that support populations are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied at the time of listing to designate as critical habitat, we consider the physical and biological features essential to the conservation of the species that may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historic, geographical, and ecological distributions of a species.

We consider the physical or biological features essential to the conservation of the species to be the primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement for the conservation of the species. We derived the specific PCEs from studies of the habitat, ecology, and life history of the Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assiminea. The description of the PCEs for all four invertebrates and a full description of the essential environment as it relates to the specific PCEs are described in the June 22, 2010, published proposed designation of critical habitat for the four invertebrates (75 FR 35375). We are restating the PCEs for Noel's amphipod here, as the additional proposed critical habitat area contains only that species.

Noel's Amphipod

Based on the species' needs and our current knowledge of the life history, biology, and ecology of Noel's

amphipod and the habitat requirements for sustaining its essential life-history functions, we have determined that the primary constituent element essential to the conservation of Noel's amphipod is springs and spring-fed wetland systems that:

(1) Have permanent, flowing, unpolluted water;

(2) Have slow to moderate water velocities;

(3) Have substrates including limestone cobble and aquatic vegetation;

(4) Have stable water levels with natural diurnal (daily) and seasonal variations;

(5) Consist of fresh to moderately saline water;

(6) Have minimal sedimentation;

(7) Vary in temperature between 10–20 °C (50–68 °F) with natural seasonal and diurnal variations slightly above and below that range; and

(8) Provide abundant food, consisting of:

(a) Submergent vegetation and decaying organic matter;

(b) A surface film of algae, diatoms, bacteria, and fungi; and

(c) Microbial foods, such as algae and bacteria, associated with aquatic plants, algae, bacteria, and decaying organic material.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and that may require special management considerations or protection. As stated in the final listing rule (70 FR 46304, August 9, 2005), threats to the four invertebrates include reducing or eliminating water in suitable or occupied habitat through drought or pumping; introducing pollutants to levels unsuitable for the species from urban areas, agriculture, release of chemicals, and oil and gas operations; fires that reduce or eliminate available habitat; and introducing nonnative species into the invertebrates' inhabited spring systems such that suitable habitat is reduced or eliminated. Each of these threats is discussed in detail in the June 22, 2010, proposed designation of critical habitat for the four invertebrates (75 FR 35375); only those threats relevant to the newly found population and not discussed in the previous proposed rule are discussed here. Other threats (water quantity, contamination from oil and gas operations, fire, and introduced species) are also threats to this population.

Water Contamination

Water contamination is a significant threat for Noel's amphipod in the small spring vents along the Rio Hondo on the South Tract of the Refuge. One possible source of water contamination is runoff of agricultural fertilizers and pesticides that are applied to the croplands on the South Tract of the Refuge. This tract encompasses approximately 1,400 acres (ac) (566 hectares (ha)) that are closed to public access. About 330 ac (133.5 ha) are used as agricultural cropland (Service 1998, p. 7) to provide food, habitat, and feeding areas for wintering migratory bird populations (Service 1998, p. 7). Alfalfa, corn, hegari, barley, winter wheat, sorghum, and other small grains are cultivated on this tract (Service 2010, p. 14). Although crop rotation minimizes the need for chemical fertilizers, both fertilizers and pesticides are used on this tract, and these chemicals have the potential to enter the springs inhabited by Noel's amphipod. Chemicals used on the South Tract in the past 10 years include Accent (Nicosulfuron), Banvel (Dicamba), Pounce (Permethrin), Roundup and Equivalents (Glyphosate), Pursuit DG (Imazathapyr), Rhonox (2-ethylhexyl ester of 2-methyl-4-chlorophenoxyacetic acid), Steadfast (Nicosulfuron/Rimsulfuron), Malathion 57 (Malathion), and Impact (Topramezone) (Service 2010, p. 43–44). To protect aquatic life in the Rio Hondo, the Refuge implements chemical-specific buffers within which the chemicals cannot be used. Additionally, restrictions are in place prohibiting use of chemicals on Refuges that dissolve and travel in groundwater. These restrictions and buffers serve to minimize exposure of Noel's amphipod to these chemicals. Nevertheless, there remains a potential for contamination and negative effects to Noel's amphipod and its habitat.

The Refuge is in the process of reviewing the farming program on the South Tract. A draft environmental analysis (Service 2010, pp. 1–55) evaluates the effects of several levels of farming on this tract. The current preferred alternative is to eliminate farming on the South Tract; if the draft environmental analysis is adopted, no future chemical application of fertilizers or pesticides would occur in the vicinity of Noel's amphipod populations, and this source of potential water contamination would be eliminated.

Another potential source of water contamination in Noel's amphipod habitats on the South Tract is from periodic inundation by water from the Rio Hondo. The Rio Hondo is a perennial stream from Roswell to its confluence with the Pecos River, and its watershed extends eastward to the Sacramento Mountains. The majority of the lower Rio Hondo valley is used for extensive agricultural purposes, including ranching, commercial livestock feeding, and crop production, as well as residential land use (USACE 1974, p. 8). Stormwater runoff from areas with these land uses is one way contaminants can be transported into the Rio Hondo and into Noel's amphipod habitats. In addition, stormwater runoff from urban areas (such as from the City of Roswell) has been identified as potentially containing many materials such as solids, plastics, sediment, nutrients, metals, pathogens, salts, oils, fuels, and various chemicals, including antifreeze, detergents, pesticides, and other pollutants that can be toxic to aquatic life (Burton and Pitt 2002, pp. 6–7; Selbig 2009, p. 1).

Another way the Rio Hondo receives contaminants is by wastewater effluent discharge (USACE 1974, p. 9; Smith 2000, p. 65). At the present time, the average return flow from City of Roswell Wastewater Treatment Facility is approximately 6.2 cubic feet per second (cfs) (0.18 cubic meters per second (cms)). Effluent from the Roswell Wastewater Treatment Facility is largely used for crop irrigation from February through November or is discharged to the North Spring River, which flows 5 miles (mi) (8 kilometers (km)) before entering the Rio Hondo (Smith 2000, p. 65; USEPA 2006, p. 2), upstream of the Noel's amphipod population. In 2010, the Roswell Wastewater Treatment Facility was modified to provide a higher level of water purification that should improve the quality of the effluent discharge (J. Anderson, City of Roswell, pers. comm. December 9, 2010; USEPA 2007, p. 5). However, some nutrients, bacteria, metals, pesticides, oxygen-demanding substances, organic chemicals, surfactants, flame retardants, personal care products, steroids, hormones, and pharmaceuticals are expected to remain in the Rio Hondo (USEPA 2009, pp. 26–39).

Past analysis of water quality in the Rio Hondo has indicated some concerns. For example, sampling in the past yielded that total dissolved solids in Rio Hondo water averaged 935 mg/L, sulfates averaged 722 mg/L, and chlorides averaged 40 mg/L (USACE 1974, p. V–4) (both sulfates and chlorides are components of salt). However, more recent sampling by the New Mexico Environment Department (NMED) (2006a, p. 13) found higher total dissolved solids (average 7,321 mg/L), including more chloride (average

2,640 mg/L) and slightly more sulfate (average 776 mg/L) than reported by the USACE (1974, p. V–4). In addition, the NMED (2006b, p. 32) identified water quality parameters of nutrients, bacteria, salinity, and temperature as a concern in the upper Rio Hondo watershed. Potential sources of nutrients or bacteria are municipal wastewater treatment facility effluents, onsite waste treatment systems (septic tanks), residential areas, landscape maintenance, livestock feeding operations, rangeland grazing, atmospheric deposition, stream modification or destabilization, and urban areas and construction sites (NMED 2006b, p. 32).

Riverine conditions in the Rio Hondo are not suitable for Noel's amphipod; the amphipod is found only in the nearby springs. However, Noel's amphipod could be affected by river water entering the spring runs during periods of high flow by either flushing the amphipods downstream or by river water mixing with spring water and introducing contaminants or altered water chemistry to the spring habitats. The Rio Hondo has a base flow between 2 and 6 cfs (0.06 to 0.17 cms) but exceeds 10 cfs (.03 cms; a flow high enough to inundate the springs) approximately 5 to 10 times per year for short durations (USGS 2010, p. 1). Under base flow conditions, the spring runs that harbor Noel's amphipod are found along the riverbank at elevations higher than the stream, and, therefore, the water from the river does not mix with the spring outflow water. However, when Rio Hondo flows are elevated, these springs become inundated with water from the river and the amphipods may be exposed to contaminants from the Rio Hondo.

Groundwater that supplies the outflow to the springs where the amphipod occurs is an additional potential source of spring water contamination. This water is clearly distinct from the water of the nearby Rio Hondo based on very different temperatures and low dissolved oxygen measurements (Lusk 2010, p. 1). Low dissolved oxygen is typical of spring water conditions, as oxygen enters the water mainly through the atmosphere (White *et al.* 1990, p. 584), and spring water temperatures remain much more constant throughout the year due to the insulating effect of soil and rock on groundwater (Constantz 1998, p. 1610). The South Tract of the Refuge lies within the same groundwater source area as the Middle Tract, where the other Noel's amphipod populations are found and is, therefore, subject to the same threat of contamination from oil and gas activities as was discussed in the proposed designation of critical habitat for the four invertebrates (75 FR 35375, June 22, 2010).

There has been no research on the specific effects on Noel's amphipod of contaminants such as metals, pesticides, fertilizers, nutrients, or bacteria. However, there is some evidence that freshwater amphipods in the family Gammaridae (in particular, *Gammarus*) may require higher oxygen levels and less polluted water than some other amphipods such as *Crangonyx* (*e.g.,* MacNeil *et al.* 1997, pp. 350, 356; MacNeil *et al.* 2000, p. 2). Gammarid amphipods (such as Noel's amphipod) may be considered an indicator of relatively unpolluted waters (MacNeil *et al.* 1997, p. 356; MacNeil *et al.* 2000, p. 6). Additionally, bacteria in high levels can affect amphipods directly through infections, or indirectly by depleting the dissolved oxygen in the water column through respiration or decomposition (Boylen and Brock 1973, p. 631).

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available to determine critical habitat. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. For our June 22, 2010 proposed designation of critical habitat (75 FR 35375), we evaluated areas within the geographical area occupied at the time of listing that contain the features essential to the conservation of Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assiminea. We considered an area to be currently occupied if Roswell springsnail, Koster's springsnail, Pecos assiminea, or Noel's amphipod were found to be present by species experts within the last 5 years and no major habitat modification has occurred that would preclude its presence. We also considered areas outside of the geographical area occupied at the time of the listing rule to designate critical habitat for the four invertebrates (75 FR 35375), and recommendations contained in State wildlife resource reports (Cole 1985, pp. 93–104; Jones and Balleau 1996, pp. 1–16; Boghici 1997, pp. 1–120; Balleau *et al.* 1999, pp. 1–42; NMDGF 1999, pp. A1–B46; NMDGF 2006, pp. 1–16; NMDGF 2007, pp. 1–20; and NMDGF 2008, pp. 1–28) and the State recovery plan (NMDGF 2005, pp. 1–80) in making this determination. We also reviewed the available literature pertaining to habitat requirements, historic localities, and current localities for these species. This includes data submitted during section 7 consultations and regional geographic information system (GIS) coverages.

Since the June 22, 2010, proposal we identified an additional site along the Rio Hondo on the South Tract of the Refuge that is currently occupied by Noel's amphipod, but not by the other three species. We believe this site was occupied by Noel's amphipod at the time of listing because amphipods were first found at this site in 2006, one year after listing (Warrick 2006, p. 1). However, they were not taxonomically confirmed to be Noel's amphipod until 2010 (Berg 2010, p. 1; Lang 2010, p. 1). Since this spring area is isolated from other occupied areas and no reintroduction efforts have taken place, it has likely been occupied for a very long time, but appropriate surveys had not been previously conducted to verify it. We reasonably assume, therefore, that the site was occupied at the time of listing in 2005 and not discovered until 2006.

Essential Areas

In our June 22, 2010 proposed designation of additional critical habitat for the four invertebrates, we selected areas based on the best scientific data available that possess those PCEs essential to the conservation of the species that may require special management considerations or protection. We are now modifying that proposed critical habitat to add the additional site along the Rio Hondo on the South Tract of the Refuge that is currently occupied only by Noel's amphipod. By inclusion of the additional site along the Rio Hondo, we are again proposing to designate as critical habitat all sites currently occupied by at least one of the four invertebrates.

Our reason for proposing to designate all known occupied habitat for these species is that the four invertebrates are not migratory, nor is there frequent gene exchange between populations or critical habitat units. Further, the proposed critical habitat units in New Mexico and west Texas are sufficiently distant (40 to 100 mi (64 to 161 km)) from one another to rule out Pecos assiminea gene exchange. Therefore, due to the lack of frequent gene exchange, we have determined that all of the currently occupied sites of these populations are essential to the conservation of the species because they provide for the maintenance of the genetic diversity of the four invertebrates, and contain all of the

known remaining genetic diversity within each species. All of the proposed critical habitat units also have the defined PCEs and the kind, amount, and quality of habitat associated with those occurrences. The units contain the appropriate quantity and distribution of PCEs to support the life cycle stages we have determined are essential to the conservation of the species.

When determining critical habitat boundaries within this proposed rule, including the newly proposed Unit 5, we made every effort to avoid including structures such as culverts and roads, because areas with such structures lack PCEs for the four invertebrates. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such areas. Any such structures inadvertently left inside critical habitat boundaries shown on the map of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat were finalized as proposed, a Federal action involving these areas would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the PCEs in the adjacent critical habitat.

In summary, this proposed critical habitat designation includes populations of the four invertebrates and habitats that possess the physical and biological features essential to the conservation of the species. We believe the populations included in this designation, if secured, would provide for the conservation of Roswell springsnail, Koster's springsnail, Pecos assiminea, and Noel's amphipod by:

(1) Maintaining the physical and biological features essential to the conservation of the species in areas where populations of the four invertebrates are known to occur, and

(2) Maintaining the current distribution of these populations, and thus preserving genetic variation throughout the ranges of the four invertebrates and minimizing the potential effects of local extinction.

Summary of Changes From Previously Proposed and Designated Critical Habitat

The area identified in this proposed rule constitutes an addition to the proposed revision of the areas we proposed for designation as critical habitat for the four invertebrates on June 22, 2010 (75 FR 35375). All areas proposed on June 22, 2010, remain proposed for designation as critical habitat. In this proposed rule, we are proposing an additional area on the South Tract of the Refuge along the Rio Hondo in which amphipod populations were recently confirmed to be Noel's amphipod (Berg 2010, p. 1). Therefore, we are proposing as critical habitat all occupied sites for Noel's amphipod, as all of these sites are essential to the conservation of the species.

Proposed Critical Habitat Designation

We are proposing an additional unit as critical habitat for Noel's amphipod in New Mexico. For a full description of Units 1 through 4, please see the June 22, 2010, proposed rule (75 FR 35375). The new Unit 5 we propose as additional critical habitat for Noel's amphipod, and its approximate area, is displayed in Table 3. This location is currently occupied by Noel's amphipod. In total, we are proposing to designate as critical habitat 520.8 acres (210.8 hectares) for the four species.

TABLE 1—PROPOSED CRITICAL HABITAT UNITS FOR ROSWELL SPRINGSNAIL AND KOSTER'S SPRINGSNAIL

[Area estimates reflect all land within critical habitat unit boundaries.] These units were proposed and discussed in the previous proposal to designate critical habitat for the four invertebrates on June 22, 2010 (75 FR 35375).

Critical habitat unit	Land ownership by type	Size of unit in acres (hectares)
1. Sago/Bitter Creek Complex	Service	31.9 (12.9)
2. Impoundment Complex	Service	35.9 (14.5)
	City of Roswell	2.8 (1.1)
Total		70.6 (28.6)

Note: Area sizes may not sum due to rounding.

TABLE 2—PROPOSED REVISED CRITICAL HABITAT UNITS FOR PECOS ASSIMINEA

[Area estimates reflect all land within critical habitat unit boundaries.] These units were proposed and discussed in the previous proposal to designate critical habitat for the four invertebrates on June 22, 2010 (75 FR 35375).

Critical habitat unit	Land ownership by type	Size of unit in acres (hectares)
1. Sago/Bitter Creek Complex	Service	31.9 (12.9)
2. Impoundment Complex	Service	35.9 (14.5)
	City of Roswell	2.8 (1.1)
3. Diamond Y Springs Complex	The Nature Conservancy	441.4 (178.6)
4. East Sandia Spring	The Nature Conservancy	3.0 (1.2)
Total		515.0 (208.4)

Note: Area sizes may not sum due to rounding.

TABLE 3—PROPOSED CRITICAL HABITAT UNITS FOR NOEL'S AMPHIPOD

[Area estimates reflect all land within critical habitat unit boundaries.] Units 1 and 2 were proposed and discussed in the previous proposal to designate critical habitat for the four invertebrates on June 22, 2010 (75 FR 35375).

Critical habitat unit	Land ownership by type	Size of unit in acres (hectares)
1. Sago/Bitter Creek Complex	Service	31.9 (12.9)
2. Impoundment Complex	Service	35.9 (14.5)
	City of Roswell	2.8 (1.1)
5. Rio Hondo	Service	5.8 (2.3)
Total		76.4 (30.9)

Note: Area sizes may not sum due to rounding.

We present a brief description of the new unit and reasons why the proposed critical habitat unit meets the definition of critical habitat for Noel's amphipod below.

Unit 5: Rio Hondo

Unit 5 consists of 5.8 ac (2.3 ha) of habitat that is currently occupied by Noel's amphipod (Berg 2010, p. 1; Lang 2010, p. 1). We propose to designate this unit as critical habitat for Noel's amphipod only. It contains all of the features essential to the conservation of this species. We consider this site to be occupied by Noel's amphipod at the time of listing. Although the amphipods were first found at this site in 2006, one year after listing (Warrick 2006, p. 1), they were taxonomically confirmed to be Noel's amphipod in 2010 (Berg 2010, p. 1; Lang 2010, p. 1). Unit 5 is located on the South Tract of Bitter Lake National Wildlife Refuge, Chaves County, New Mexico. The complex of springs and seeps along the banks of approximately 0.4 mi (0.64 km) of the Rio Hondo comprises the population center of this proposed critical habitat unit. The proposed designation includes all springs and seeps along the Rio Hondo in this reach. Habitat in this unit is threatened by subsurface drilling or similar activities that contaminate surface drainage or aquifer water; nonnative fish, crayfish, snails, and vegetation; chemical fertilizers and pesticides applied to adjacent farmland; contaminants in the Rio Hondo from upstream of the amphipod populations; fire; and unauthorized activities, including dumping of pollutants or fill material into occupied sites. Therefore, the PCEs in this unit may require special management considerations or protection to minimize impacts resulting from these threats. The entire unit is owned by the Service.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

There are no Department of Defense lands within the areas we are proposing to designate as critical habitat for the four invertebrates; therefore, we are not exempting any areas from designation.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If, based on this analysis, we make this determination, then we can exclude the area only if such exclusion would not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus; the educational benefits of mapping essential habitat for recovery of the listed species; and any benefits that may result from a designation due to State or Federal laws than may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; implementation of a management plan that provides equal to or more conservation that a critical habitat designation would provide; or some combination of these.

After evaluating the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to determine whether the benefits of

exclusion outweigh those of inclusion. If we determine that they do, we then determine whether exclusion would result in extinction. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we are preparing an analysis of the economic impacts of the proposed critical habitat designation and related factors.

A draft analysis of the economic effects of the proposed critical habitat designation was prepared and with this proposed rule is made available for public review. The economic analysis considers the economic impacts of conservation measures taken prior to and subsequent to the final listing and designation of critical habitat for the four invertebrates. Baseline impacts are typically defined as all management efforts that have occurred since the time of listing. We listed the four invertebrates in August 2005 (70 FR 46304). Incremental costs are those that are attributable to critical habitat designation alone. Total baseline costs associated with this proposed critical habitat designation are estimated to be $1,150,000 to $1,560,000 over the next 30 years, and incremental costs are estimated to be $6,420 to $68,000.

Copies of the economic analysis are available for downloading from the Internet at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2009–0014 or by contacting the New Mexico Ecological Services Field Office (*see* **FOR FURTHER INFORMATION CONTACT**).

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense (DOD) where a national security impact might exist. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the four invertebrates are not owned or managed by the DOD. We are aware that there are DOD lands in the vicinity of the Refuge, but our proposed designation does not include these lands, and we anticipate no impact to national security. Therefore, we have not proposed any areas for exclusion based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether the landowners have developed any habitat conservation plans (HCPs) or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this proposal, we have determined that there are currently no HCPs for the four invertebrates, and the proposed designation does not include any tribal lands or trust resources. We anticipate no impact to tribal lands, partnerships, or HCPs from this proposed critical habitat designation. There are no areas proposed for exclusion from this proposed designation based on other relevant impacts.

The Refuge has developed and completed a Comprehensive Conservation Plan that provides the framework for protection and management of all trust resources, including federally listed species and sensitive natural habitats. These lands are protected areas for wildlife and are currently managed for the conservation of wildlife, including endangered and threatened species, and specifically the four invertebrates, including Noel's amphipod. A description of the management being provided by the Refuge for the conservation of the four invertebrates within areas proposed for designation as critical habitat is provided in the previous proposed rule to designate critical habitat for the four invertebrates (75 FR 35375, June 22, 2010).

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we sought the expert opinions of three appropriate and independent specialists to review the proposed critical habitat during the public comment period for the previous proposed rule to designate critical habitat for the four invertebrates (75 FR 35375). The purpose of peer review was to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. One substantial comment received from peer reviewers was to add the additional area as critical habitat for Noel's amphipod, which led to this proposal of an additional critical habitat unit for the species.

Required Determinations

Regulatory Planning and Review—Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this proposed rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(1) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(2) Whether the rule will create inconsistencies with other Federal agencies' actions.

(3) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(4) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

In the draft economic analysis of the proposed revised critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of the Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assiminea (baseline costs), and the additional potential economic effects resulting from the proposed

designation of their critical habitat (incremental costs). This analysis estimated prospective economic impacts due to the implementation of conservation efforts for the four invertebrates in five categories: (a) Modifications to oil and gas activities; (b) habitat management; (c) conservation of agricultural groundwater withdrawals; (d) control of residential septic systems; and (e) controls on confined animal feeding operations. We determined from our analysis that there will be minimal additional economic impacts to small entities resulting from the proposed designation of critical habitat, because almost all of the project modification and conservation costs identified in the economic analysis represent baseline costs that would be realized in the absence of critical habitat. There are several factors that eliminate the potential for incremental costs among small entities, including:

- Conservation measures implemented by New Mexico's oil and gas firms comply with BLM's Bitter Lake Habitat Restoration Zone requirements. Likewise, modifications pursued by oil and gas developers on private land near The Nature Conservancy units are already implemented for the benefit of various listed species in the immediate area.
- All of the proposed critical habitat is occupied. Therefore, ongoing project modifications and conservation measures requested through consultation with the Service under Section 7 of the Act are expected to be similar to those already required to satisfy the jeopardy standard.
- Most of the proposed critical habitat is already managed for conservation purposes. The small portion of proposed critical habitat owned by the City of Roswell has already been designated as critical habitat for the Pecos sunflower (*Helianthus paradoxus*) and, as a wetland, it is unsuitable for development.
- Habitat management costs are attributable to existing conservation agreements and are, therefore, classified as baseline costs.
- Most consultations under section 7 of the Act would be pursued in the absence of critical habitat. To the extent that incremental costs are introduced, they are borne by public agencies rather than private entities.

The draft economic analysis estimates the annual incremental costs associated with the designation of critical habitat for the invertebrates to be very modest, at approximately $6,420. All of these costs would derive from the added effort associated with considering adverse modification in the context of section 7 consultations.

We will consider the information in our final economic analysis, and in any public comments we receive, in determining whether this designation would result in a significant economic effect on a substantial number of small entities, and announce our determination in our final rule. Based on the above reasoning and currently available information, it appears that this rule may not result in a significant economic impact on a substantial number of small entities. If we determine that is the case, then we will certify that the designation of critical habitat for the four invertebrates will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis will not be required.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) 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. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and 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. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments. The public lands we are proposing to designate as critical habitat are owned by the City of Roswell and the Service. Small governments, such as the City of Roswell, will be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that their actions will not adversely affect the critical habitat. As discussed above, the areas owned by the City of Roswell which are being proposed for designation as critical habitat for the four invertebrates have already been designated as critical habitat for the Pecos sunflower and are unsuitable for development. Therefore, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we complete our final economic analysis, and review and revise this assessment as appropriate.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assiminea 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 allow actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this designation of critical habitat for the four invertebrates does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in New Mexico and Texas. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical and biological features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We propose designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the physical and biological features within the designated areas to assist the public in understanding the habitat needs of the Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assiminea.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)). However, when the range of the species includes States within the Tenth Circuit, such as that of the Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assiminea, under the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), we will undertake an analysis for critical habitat designation and notify the public of the availability of the environmental assessment for this proposal when it is finished. A draft environmental assessment is now available for public review along with the publication of this proposal. You may obtain a copy of the environmental assessment online at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2009–0014, by mail from the New Mexico Ecological Services Field Office (*see* **FOR FURTHER INFORMATION CONTACT**).

Clarity of the Rule

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

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act", we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

We have determined that there are no tribal lands occupied at the time of listing that contain the features essential for the conservation of, and no tribal lands that are essential for the conservation of, the Roswell springsnail, Koster's springsnail, Pecos assiminea, and Noel's amphipod. Therefore, we have not proposed designation of critical habitat for the four invertebrates on tribal lands.

Energy Supply, Distribution, or Use

E.O. 13211 requires agencies to prepare Statements of Energy Effects

when undertaking certain actions. We do not expect this rule to significantly affect energy supplies, distribution, or use due to the small amount of habitat we are proposing for designation and the fact that the habitat is primarily on a National Wildlife Refuge. Therefore, we have made a preliminary determination that this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we complete our final economic analysis, and review and revise this assessment as appropriate.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R2–ES–2009–0014 and upon request from the New Mexico Ecological Services Field Office (*see* **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this package are the staff members of the New Mexico Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended at 75 FR 35375 (June 22, 2010), as follows:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.95, Critical habitat for "Noel's amphipod (*Gammarus desperatus*)", which was proposed to be added to paragraph (h) on June 22, 2010, at 75 FR 35375, is further amended by adding a paragraph (7) to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(h) *Crustaceans.*

* * * * *

Noel's amphipod (*Gammarus desperatus*).

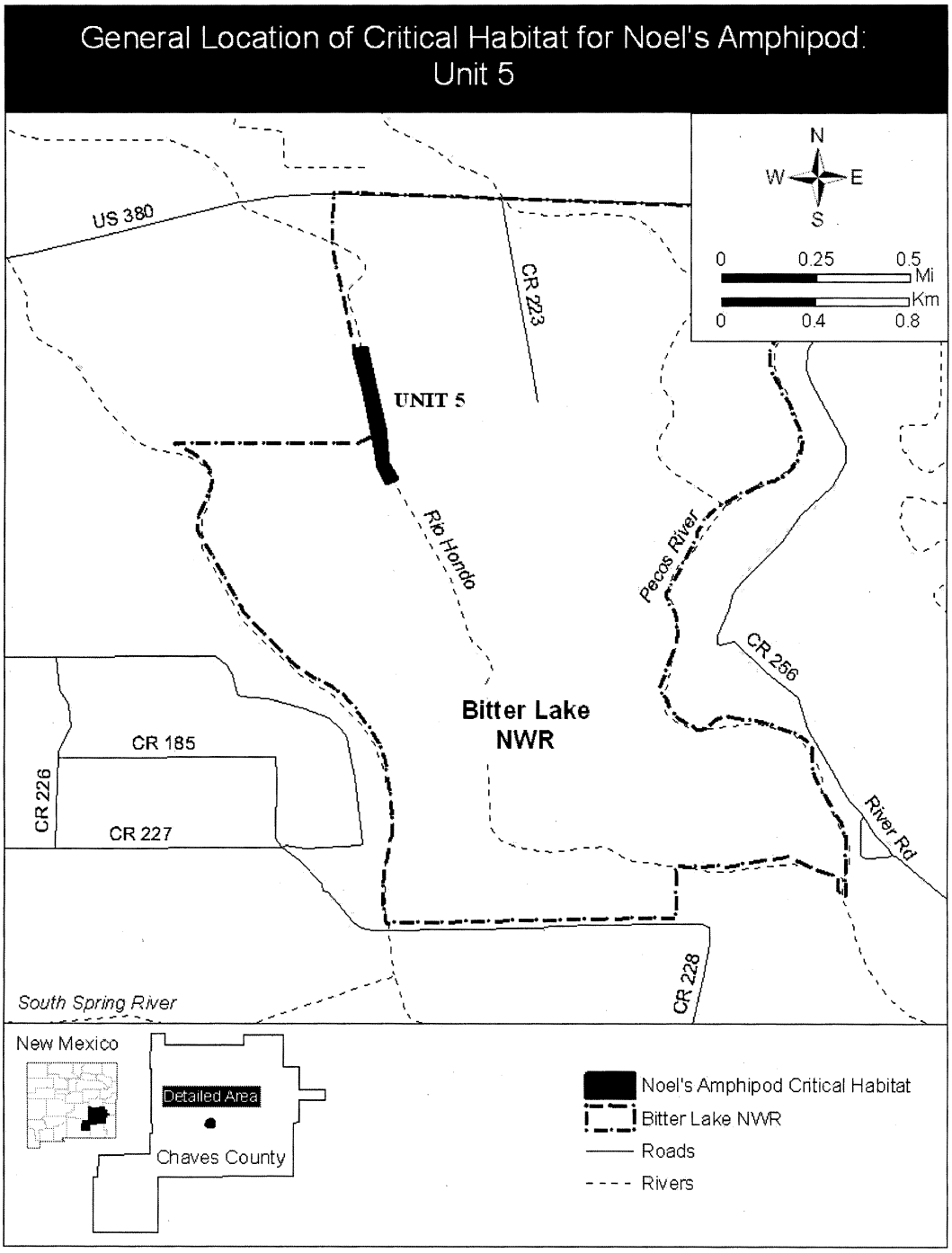
* * * * *

(7) Unit 5: Rio Hondo, Chaves County, New Mexico.

(i) [Reserved for textual description of unit.]

(ii) Map of Unit 5 for Noel's amphipod follows:

BILLING CODE 4310–55–P


General Location of Critical Habitat for Noel's Amphipod: Unit 5
N
W
E
S
0
0.25
0.5
Mi
Km
0
0.4
0.8
US 380
CR 223
UNIT 5
Rio Hondo
Pecos River
CR 256
Bitter Lake NWR
CR 185
CR 226
CR 227
River Rd
CR 228
South Spring River
New Mexico
Detailed Area
Chaves County
Noel's Amphipod Critical Habitat
Bitter Lake NWR
Roads
Rivers

* * * * *

Dated: February 10, 2011.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2011–3673 Filed 2–16–11; 8:45 am]

BILLING CODE 4310–55–C

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R1–ES–2010–0096; MO 92210–0–0008]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Sand Verbena Moth as Endangered or Threatened

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 the sand verbena moth, *Copablepharon fuscum,* as endangered or threatened under the Endangered Species Act of 1973, as amended. Based on our review, we find the petition presents substantial information indicating that listing the sand verbena moth 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 sand verbena moth as endangered or threatened 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 April 18, 2011. 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 Time on this date. After April 18, 2011, you must submit information directly to the Washington Fish and Wildlife 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.

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–R1–ES–2010–0096. 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 document before submitting your comment.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R1–ES–2010–0096; 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 we receive 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: Ken S. Berg, Manager, Washington Fish and Wildlife Office, 510 Desmond Drive, Lacey, WA 98503; by telephone (360) 753–9440; or by facsimile (360) 534–9331. 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 sand verbena moth 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, its habitat, or both.

(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 yellow sand verbena (*Abronia latifolia*), the host plant for the sand verbena moth, such as patch size and distribution, including distribution of known or potential sand verbena moth habitats; information on ongoing or future activities in potential sand verbena moth habitat; information on yellow sand verbena population trends; and information on other native or nonnative plant distributions, particularly nonnative beachgrass (*Ammophila* spp.), in the range of the yellow sand verbena, especially where the sand verbena moth occurs.

If, after the status review, we determine that listing the sand verbena moth 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 sand verbena moth, we request data and information on:

(1) What may constitute "physical or biological features essential to the conservation of the species";

(2) Where such physical or biological 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 whether there are any specific areas outside the geographical area occupied by the species that may be considered 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 explain 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. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section of this document. If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. 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, Washington Fish and Wildlife Office (*see* **FOR FURTHER INFORMATION CONTACT**).

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1533(b)(3)(A)) 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 readily 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 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 species status review, which we subsequently summarize in our 12-month finding.

Petition History

On February 17, 2010, we received a petition, dated February 4, 2010, from WildEarth Guardians and the Xerces Society for Invertebrate Conservation requesting that the sand verbena moth be listed as endangered or threatened throughout its entire range and that critical habitat be designated under the Act (WildEarth Guardians and the Xerces Society for Invertebrate Conservation 2010, hereafter cited as "Petition"). The petition clearly identified itself as such and included the requisite identification information for the petitioner(s), as required by 50 CFR 424.14(a). In a March 22, 2010, letter to the petitioners, we responded that we 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 due to court orders and judicially approved settlement agreements for other listing and critical habitat determinations under the Act that required nearly all of our listing and critical habitat funding for fiscal year 2010, we would not be able to further address the petition at that time but would complete the action when workload and funding allowed. On May 26, 2010, we received a notice of violation with intent to file suit, dated May 20, 2010, from WildEarth Guardians and the Xerces Society requesting that we make a 90-day finding on the listing petition within the next 60 days. On July 14, 2010, we notified the petitioners that funding became available and we were currently reviewing the petition. This finding addresses the petition.

Species Information

The sand verbena moth was first described and collected in 1995 (Troubridge and Crabo 1995, pp. 87–90), and is the only species of the genus *Copablepharon* known to occur west of the Cascade Mountains (Troubridge and Crabo 1995, p. 89; Committee on the Status of Endangered Wildlife in Canada (COSEWIC) 2003, p. 4). The adults of the sand verbena moth can be easily identified by their distinctive physical characteristics. The sand verbena moth is dark in color with yellow and black forewing lines and is the only species within the genus with a predominantly gray underside to its forewing and hindwing (Troubridge and Crabo 1995, p. 89). Total wingspan varies from 35 to 40 millimeters (mm) (1.38 to 1.47 inches (in)) in length (COSEWIC 2003, p. 5).

There is very little information on the biology and habitat requirements of the sand verbena moth (British Columbia Invertebrates Recovery Team (BCIRT) 2008, pp. 3, 5) and data on its distribution are known to be incomplete (NatureServe 2010 [online]). Virtually all of the available information is based on the original description of the species (Troubridge and Crabo 1995, pp. 87–90) and observations of the four metapopulations located in British Columbia (*see* "Distribution and Status" below). The adult sand verbena moth has a lifespan of 5 to 14 days (Species At Risk Act (SARA) Registry 2009, p. 4) and one flight period that occurs from mid-May to late July (Troubridge and Crabo 1995, p. 89; COSEWIC 2003, p. 16). Adults have been observed at dusk and early evening (COSEWIC 2003, p. 16) and lay eggs singly or in groups on leaves or flowers of its only host plant, the yellow sand verbena. Larvae feed exclusively at night on the leaves and flowers of the plant (COSEWIC 2003, pp. 5, 16) and burrow in the sand during the day (Troubridge and Crabo 1995, p. 89). Larvae are green in color in early instars (developmental stages) and turn brown with pale longitudinal stripes in late instars. Mature larvae are found in the sand below the host plant and are dormant during the winter (SARA Registry 2009, p. 4). Pupation occurs between late April and late May. Pupae measure approximately 20 mm (0.8 in) in length, are brown in color, and are protected by a thin layer of sand particles. Pupae have a distinct external compartment in which the proboscis develops (COSEWIC 2003, pp. 5, 16).

Distribution and Status

The sand verbena moth was first described by Troubridge and Crabo (1995, pp. 87–90) after its discovery in Deception Pass State Park, Washington, and Saanichton, British Columbia. Troubridge and Crabo (1995, p. 89) state, "where it occurs, *C. fuscum* can be relatively abundant," and "it was the most common noctuid at Deception Pass State Park, Washington." Currently, the sand verbena moth has been collected only in the Georgia Basin-Puget Sound Region in British Columbia and Washington, but this area has not been thoroughly surveyed for the species, and roughly 90 percent of the range of its host plant, yellow sand verbena, has not been surveyed for the sand verbena moth. Because the range of the sand verbena moth's host plant extends along the coast from British Columbia southward into California, additional

sampling in Washington, Oregon, and California is needed to evaluate the full extent of the range of the sand verbena moth.

Exactly how many populations of the sand verbena moth are currently known is unclear. Although the petitioners at times state that 10 populations are known, 4 in British Columbia and 6 in Washington (*e.g.,* Petition, pp. 1, 6, 8), they also point out that not all of these sites may be separate occurrences, and at one point list a total of 9 populations, 4 in British Columbia and 5 in Washington (Petition, p. 9). We are aware of nine populations of the sand verbena moth, distributed over a total of approximately 4,850 square kilometers (km^2) (1,873 square miles (mi^2)). In Canada, surveys conducted between 2001 and 2007 confirmed the presence of the sand verbena moth on Goose Spit, Sandy Island, Cordova Spit/Island View Beach, and James Island. All but one of these locations occur on public, military, and indigenous lands. The James Island population, discovered in 2007, occurs entirely on private land. The BCIRT considers each location to be a metapopulation that is defined by a combination of many subpopulations (BCIRT 2008, p. 2). In Washington in the United States, five populations have been confirmed. Although according to the COSEWIC (2003, p. 15) all known U.S. locations occur primarily on public or military lands, we only know the specific locations for sites on Dungeness National Wildlife Refuge in Sequim, Deception Pass State Park on Whidbey Island, and San Juan Island National Historical Park (San Juan Island NHP) on San Juan Island. Two other populations are located in Port Townsend and Whidbey Island; however, we have no information regarding their exact locations (COSEWIC 2003).

There is also conflicting information as to whether the known populations are isolated from one another. Although the petitioners state, "all populations are isolated from each other," citing COSEWIC 2003 and BCIRT 2008 (Petition, p. 7), the petitioners also cite NatureServe (2009) as indicating that not all of the known sites may be separate occurrences.

The COSEWIC (2003, p. 8) describes the methodology for surveys conducted in British Columbia and Washington between 2001 and 2002. In most cases, a single light trap was set from dusk to dawn next to patches of yellow sand verbena during the sand verbena moth's flight season. Occasionally, two traps were set, and some hand-netting occurred. In British Columbia, 19 locations were surveyed for the sand verbena moth over a period of 19 days between May 20 and August 14, 2001. A total of nine sand verbena moths were collected at two of these locations (COSEWIC 2003, pp. 32–36). In 2002, seven locations were surveyed in British Columbia between May 30 and June 15. During this period, one sand verbena moth was collected at a single location in the Comcox area over a period of 6 days (COSEWIC 2003, pp. 36–39). In the Puget Sound Region in Washington, surveys were conducted between June 6 and June 12, 2002. A total of 36 sand verbena moths were collected at 5 of the 9 locations surveyed over a period of 4 days (COSEWIC 2003, pp. 36–38). According to the COSEWIC (2003, p. 9), one survey was conducted in Oregon in 2002. Light-trapping was not possible, and the sand verbena moth was not detected by hand-searching flowering patches of yellow sand verbena. The COSEWIC (2003, p. 9) did not present any additional information or citation regarding this survey, and concluded that additional sampling is needed to determine if the sand verbena moth is present in Oregon and California in areas where its host plant is found.

According to the COSEWIC (2003, p. 18), the use of data collected from light traps is an inappropriate method for estimating population sizes or characterizing population densities of the sand verbena moth. Thus, there are no reliable population estimates for British Columbia populations (BCIRT 2008, p. 2) or populations in the United States (NatureServe 2009 [online]). Because of the recent discovery of the sand verbena moth, there is no historical information on population sizes, nor is there any evidence of any decline. The petitioners acknowledge, "because this species was only recently described, information on historical population abundance that would inform whether or not this species has declined over time is unavailable" (Petition, p. 7).

The sand verbena moth is listed as endangered under the Species At Risk Act in British Columbia (SARA Registry 2009, p. 1) and is a candidate species in the State of Washington (Washington Department of Fish and Wildlife (WDFW) 2010 [online]). NatureServe (2009 [online]) ranks the species as critically imperiled to imperiled (G1G2). NatureServe notes this global rank, "is explicitly based on the conclusion by COSEWIC and others that the purported range is essentially correct and that the moth is not nearly as widespread as its foodplant" (NatureServe 2009 [online]).

Although the petitioners contend the moth is facing an "accelerating decline," they offer no support for this statement (Petition, p. 2). Furthermore, the petitioners cite NatureServe (2009) as describing global long-term declines of 75 to 90 percent for the sand verbena moth. Although NatureServe does classify the global long-term trend for the species as "large decline (75–90%)," it is unclear how NatureServe may have arrived at this conclusion, as the moth was only discovered in 1995, and there are no reliable quantitative data regarding sand verbena moth population sizes or trends. The projected decline is apparently an inferred consequence of presumed habitat loss due to dune stabilization and exotic plants, but no documentation is provided to support this inference (NatureServe 2010 [online]). The petitioners further suggest that possible declines in the host plant, yellow sand verbena, may have resulted in declines in the sand verbena moth (Petition, p. 7). They cite COSEWIC (2003) as stating that yellow sand verbena populations in many sites have likely declined substantially over the past 50 years because of vegetation changes. However, we note that NatureServe (2010 [online]) ranks the yellow sand verbena as "globally secure."

Habitat

The yellow sand verbena occurs in spits, dunes, and sandy coastal habitat that lack dense plant cover (COSEWIC 2003, p. 11). This species is distributed from the Queen Charlotte Islands, British Columbia, to Santa Barbara County, California (Hickman 1993, p. 769). NatureServe (2010 [online]) ranks the yellow sand verbena as globally secure (G5). This plant is considered to be vulnerable in Oregon and British Columbia, but its conservation status has not been assessed in Washington or California (NatureServe 2010, [online]). Yellow sand verbena is not listed by the Washington Department of Natural Resources, Natural Heritage Program (COSEWIC 2003, pp. v-vi), nor is it considered a sensitive species by the National Park Service or Forest Service (Thomas 2010, pers. comm.).

The patch size, structure, and configuration of yellow sand verbena necessary to sustain populations of sand verbena moth are poorly understood (BCIRT 2008, pp. 3, 5). To date, there is no quantitative or qualitative measure of habitat at known sand verbena moth locations in Washington. At known locations in British Columbia, the sand verbena moth occurs in small satellite patches within 200 m (656 ft), or so, of larger populations of yellow sand verbena. Isolated small, sparse, or non-

flowering populations of the plants do not appear to support the sand verbena moth (NatureServe 2009 [online]). In addition, the sand verbena moth has not been collected in yellow sand verbena patches less than 500 square meters (m^2) (5,382 square feet (ft^2)) (BCIRT 2008, pp. 3, 5); however, the BCIRT cautions, "this statement is only quantitative and neither indicates this area as a minimum patch size nor suggests that patches should be managed to this size."

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 particular factor to evaluate whether the species may respond to that 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 we attempt to determine how significant a threat it is. The threat may be significant if it drives, or contributes to, the risk of extinction of the species such that the species may warrant listing as endangered or threatened as those terms are defined by the Act. The identification of factors that could impact a species negatively may not be sufficient to compel a finding that substantial information has been presented suggesting that listing may be warranted. The information should contain evidence or the reasonable extrapolation that any factor(s) may be an operative threat that acts on the species to the point that the species may meet the definition of endangered or threatened under the Act.

In making this 90-day finding, we evaluated whether information regarding threats to the sand verbena moth, based on information 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 Its Habitat or Range

Dune Stabilization

Information Provided in the Petition

According to the petitioners, yellow sand verbena requires chronic disturbance to maintain long-term populations of the sand verbena moth (Petition, p. 10, citing COSEWIC 2003, p. 19). The petitioners state stabilization of dunes by both native and introduced species, such as the nonnative European beachgrass, *Ammophila arenaria,* degrades habitat for yellow sand verbena and consequently the sand verbena moth as well (Petition, p. 10). The petitioners further state that nonnative beachgrass displaces yellow sand verbena, although no supporting documentation is provided for this claim (Petition, p. 10). The petitioners maintain (Petition, p. 10, citing BCIRT 2008, p. 19) this threat is severe at all locations in British Columbia and most locations in Washington. Troubridge and Crabo (cited as 1995, p. 99, in Petition, p. 10) note European beachgrass has stabilized most of the dune habitat on the Pacific Coast, replacing native vegetation. In addition, the petitioners cite nonnative beachgrass as dominating most Washington dunes (Petition, p. 10, citing Washington State Department of Ecology pp. 1–2, [online]).

Evaluation of Information Provided in the Petition and Available in Service Files

We reviewed the information presented in the petition and information in our files and found no information indicating that dune stabilization (referred to as "vegetation stabilization" by the petitioners) is a significant threat at sand verbena moth locations in Washington. Only one reference, L. Crabo (2010, pers. comm.), was presented in the petition regarding the threat of beachgrass at known sand verbena moth locations in the Puget Sound Region of Washington (Petition, p. 10). According to the petitioners, L. Crabo noted that the dunes at Deception Pass State Park have been less affected by European beachgrass and Scotch broom (*Cytisus scoparius*) than some of the other sites (Petition, p. 10). The petitioners did not document this communication (S. Jepsen, Xerces Society, 2010, pers. comm.); thus we are unable to verify and assess this claim or any other information that was referenced as "L. Crabo 2010, pers. comm." in the petition. According to the Washington State Department of Ecology (pp. 1–2, [online]), both American beachgrass (*Ammophila breviligulata*) and European beachgrass have changed sediment transport, plant communities, and habitat along the southwest coast of Washington. Currently, American beachgrass dominates most foredunes, from the mouth of the Columbia River to the mouth of the Copalis River (Washington State Department of Ecology p. 2, [online]). The current distribution of European beachgrass was not discussed, nor was information provided regarding beachgrass in the Puget Sound Region of Washington (Washington State Department of Ecology pp. 1–2, [online]).

We acknowledge that beachgrass may outcompete native dune species, including yellow sand verbena. Wiedemann and Pickart (1996, p. 287) state that beachgrass has outcompeted native plant species and drastically reduced their habitat. However, displacement has so far been demonstrated indirectly by correlation studies between beachgrass and species diversity (cited as Barbour *et al.* 1976, in Wiedmann and Pickart 1996, p. 295), and responses to beachgrass differ among foredune species (cited as Boyd 1992, in Wiedmann and Pickart 1996, p. 295).

At occupied sand verbena moth locations in Washington, the total area of beachgrass and yellow sand verbena available to the sand verbena moth has not been quantified. Limited information is available for other nearby sites that support both yellow sand verbena and beachgrass. At Graveyard Spit in Dungeness National Wildlife Refuge (NWR), yellow sand verbena is distributed throughout the refuge, but does not appear to be outcompeted by either native or nonnative grasses. This spit is located in a designated research natural area and supports a relatively intact native beach strand community (Thomas 2010, pers. comm.). On Protection Island NWR, approximately 42 acres on Violet Spit support beachgrass. Yellow sand verbena has also been noted on Protection Island, and beachgrass is reported to be dense at this location; however, comprehensive surveys of either yellow sand verbena or beachgrass have not been completed, as the area is avoided during flowering due to its overlap in timing with the Salish Sea's largest nesting colonies of glaucous-winged

gulls (*Larus glaucescens*). The refuge is planning native strand restoration at this site. On San Juan Island NWR, beachgrass has been noted on Smith Island, and no vegetation occurs on Minor Spit. The density of beachgrass and yellow sand verbena available to the sand verbena moth has not been quantified at these locations (Thomas 2010, pers. comm.).

Although not currently a known location for sand verbena moth, we received a yellow sand verbena inventory report from Willapa NWR, located in southwest Washington. In 2006, all sandy beaches from the Columbia River North Jetty to Leadbetter Point were surveyed. A total of 1,003 mature plants and 2,447 immature plants were documented over the course of the survey (Lewis 2006, unnumbered p. 2). Lewis noted the shape of a few large plants was altered by encroaching beachgrass. The beachgrass appeared to shade out yellow sand verbena and reduce its vigor, and thus may outcompete it. Yellow sand verbena plants were not documented in areas or zones established by beachgrass (Lewis 2006, unnumbered p. 3).

In British Columbia, dune stabilization has been identified as the primary threat to yellow sand verbena and, therefore, to the sand verbena moth (COSEWIC 2003, p. 19; NatureServe 2009, [online]). According to COSEWIC (2003, p. 14), the introduction of invasive nonnative plants, such as Scotch broom and exotic grasses, has accelerated dune stabilization at sand verbena moth locations in British Columbia.

In summary, we have little information to suggest that dune stabilization may pose a significant threat to the sand verbena moth within its known range in the State of Washington, and whether the sand verbena moth may occur elsewhere on the Pacific Coast of the United States where its host plant is found is uncertain. However, we acknowledge that the Committee on the Status of Endangered Wildlife in Canada, which we consider to be a reliable source of scientific information, considers dune stabilization to be a significant threat to the species within its range in British Columbia. Therefore, based on this information, we find that the petition presents substantial scientific or commercial information indicating that dune stabilization may pose a threat to the sand verbena moth such that the petitioned action may be warranted.

Habitat Conversion

Information Provided in the Petition

The petitioners state that at least four sand verbena moth locations, three in British Columbia and one in Washington, have experienced habitat reduction due to park infrastructure, and additionally they claim that military buildings and marine development may result in reduced moth habitat as well (Petition, p. 10). According to the petition (2010, p. 10), L. Crabo (2010, pers. comm.) stated, "a parking lot has already converted sand dune habitat in the Deception Pass State Park location, and a housing development occurs nearby; only about 300 yards of beach dune habitat remain at the type locality for the sand verbena moth, making this species vulnerable to extirpation at this location." We were unable to verify and assess the petitioners' reference, as no documentation of this personal communication exists (Jepsen 2010, pers. comm.).

Evaluation of Information Provided in the Petition and Available in Service Files

Sand verbena moth and yellow sand verbena populations that occur in U.S. National Park lands and National Wildlife Refuges are generally protected from development; thus habitat conversion due to park infrastructure would not affect habitat at two known sand verbena moth locations in Washington. The petitioners did not provide information, nor do we have any in our files, that supports the claim that military buildings and other infrastructure or marine development have reduced sand verbena moth habitat in Washington. As the total habitat occupied by sand verbena moth populations in Washington has never been documented, any putative reduction in sand verbena moth habitat cannot be determined.

In British Columbia, the COSEWIC (2003, p. 19) considers habitat conversion to be a secondary threat to the sand verbena moth and notes it may have substantial local impacts. According to the BCIRT (2008, p. 16), all of the sites located in Canada have been impacted by habitat conversion, including destruction of sand dunes for park use, development of military training facilities, expansion of beach areas, and marine development.

In summary, we have little information to suggest that habitat conversion may pose a significant threat to the sand verbena moth within its known range in the State of Washington, and whether the sand verbena moth may occur elsewhere on the Pacific Coast of the United States where its host plant is found is uncertain. However, we acknowledge that the Committee on the Status of Endangered Wildlife in Canada, which we consider to be a reliable source of scientific information, considers habitat conversion to be an important threat to the species within its range in British Columbia. Therefore, based on this information, we find that the petition presents substantial scientific or commercial information indicating that dune stabilization may pose a threat to the sand verbena moth such that the petitioned action may be warranted.

Recreation

Information Provided in the Petition

The petitioners state that recreational foot traffic on beach dunes presents a threat to the sand verbena moth and its habitat, and claim the threat is likely to increase due to population growth (Petition, p. 10). According to the petitioners (Petition, p. 10), L. Crabo (2010, pers. comm.) noted the sand verbena moth population at Deception Pass State Park is threatened by high levels of human recreation.

Evaluation of Information Provided in the Petition and Available in Service Files

We were unable to verify or assess the petitioners' reference cited as a personal communication in regard to recreation at Deception Pass State Park, Washington, as no documentation of this communication exists (Jepsen 2010, pers. comm.). At Dungeness NWR, yellow sand verbena is distributed within a research natural area that is closed to the public (Thomas 2010, pers. comm.); thus recreation is not likely to pose a threat to the sand verbena moth or its habitat now or in the foreseeable future at this location. We have no additional information regarding recreational use at other sand verbena moth locations in Washington.

In British Columbia, the COSEWIC (2003, p. 19) considers recreation a secondary threat to the sand verbena moth; however, actions have been taken to reduce this threat at several locations (BCIRT 2008, pp. 8–9). At Goose Spit, preliminary guidelines for activities near sand verbena moth populations have been developed and signs posted near the site at the dune entrance (BCIRT 2008, p. 8). This population was temporarily fenced to prevent disturbance from military training activities (BCIRT 2008, p. 9). At Island View Regional Park, a split rail fence was constructed to reduce access to the

sand verbena moth population. In addition, an educational program was implemented to encourage visitors to stay on established walkways (BCIRT 2008, p. 9).

Based on the above evaluation, we find that the information provided in the petition, as well as other information readily available in our files, fails to meet our standard for substantial scientific or commercial information indicating that recreation may pose a threat to the yellow sand verbena moth such that the petitioned action may be warranted.

Coastal Erosion

Information Provided in the Petition

The petitioners state that all sand verbena moth habitat occurs within 25 to 100 m (82 to 328 ft) of the shoreline, and therefore it is vulnerable to coastal erosion caused by severe winter storms, wildfire, and heavy winds during the moth's flight season (Petition, p. 10). Furthermore, they point out that in British Columbia, storms over the winter of 2005–2006 eroded 2 to 10 m (6.6 to 32.8 ft) of dunes along Goose Spit (Petition, p. 11). According to the petitioners, the population on San Juan Island is threatened by erosion because it is located on an eroded dune and the roots of yellow sand verbena are visible (Petition, p. 10).

Although they have identified coastal erosion as a threat to the sand verbena moth, the petitioners also make the converse argument that yellow sand verbena and, therefore, the sand verbena moth are adversely affected by the construction of artificial barriers, such as bulkheading and hard protection techniques, constructed to reduce coastal erosion (Petition, p. 15).

Evaluation of Information Provided in the Petition and Available in Service Files

According to the COSEWIC (2003, p. 19) the primary threat to the sand verbena moth is habitat loss and degradation as a result of dune stabilization. Natural disturbance of yellow sand verbena populations in open sand areas or new sand deposition, in which colonization may occur, is required to maintain populations of the sand verbena moth (COSEWIC 2003, p. 19). Erosion, winter storms, wildfire, and heavy winds are all natural processes that occur in coastal habitat that likely have maintained suitable dune habitat for yellow sand verbena over time. The BCIRT (2008, p. 5) states, "yellow sand-verbena locations typically lack dense herbaceous or bryophyte plant cover, likely a result of periodic disturbance by natural environmental processes (*e.g.,* storms, wave-washed logs, and wind). Such weather processes prevent dune stabilization which would otherwise occur through natural succession and plant encroachment." COSEWIC (2003, p. 20) states, "accelerated coastal disturbance and sediment transport associated with increased storm frequency may result in increased development of open sand habitats, which would have a positive effect" on the sand verbena moth.

In 2005–2006, 2 to 10 m (6.6 to 32.8 ft) of coastal erosion of dune front occurred at Goose Spit, British Columbia, for a length of 200 m (656 ft) along the beach (cited as Allan, pers. comm., 2007 in BCIRT 2008, p. 7). This resulted in a loss of yellow sand verbena plants that are used by the sand verbena moth. In 2007, the dunes were stabilized with abutments to minimize further erosion in this area (BCIRT 2008, p. 9). Erosion barriers have likely impacted sediment transport within the dune ecosystem and may lead to dune and vegetation stabilization (BCIRT 2008, p. 7).

According to a document cited by the petitioners, the shoreline of the Puget Sound region "consists of a diverse suite of coastal landforms ranging from rocky cliffs to beaches and broad river deltas" (cited as Shipman 2008 in Shipman 2009, unnumbered p. 2). This diversity results in complex relationships among and between landforms (Shipman 2009, unnumbered p. 3); each landform responds differently to coastal erosion (Shipman 2009, unnumbered p. 3). For example, erosion from coastal bluffs may provide sediment to beaches and spits, thus providing new area for yellow sand verbena to colonize.

According to the BCIRT (2007, p. 6), in British Columbia sand verbena moth habitat occurs within 100 m (328 ft) of shoreline (BCIRT 2008, p. 6). The petitioners did not present any information, nor could we find any readily available in our files, regarding habitat at known sand verbena moth locations in Washington. Information lacking thus includes the distance from shoreline in which suitable habitat occurs, habitat structure and configuration, and total area of yellow sand verbena needed to support the sand verbena moth. Thomas (2010, pers. comm.) noted that erosion is occurring in dune habitat at San Juan Island NHP; however, new sand deposition occurs simultaneously with the erosion process, which may provide new areas for yellow sand verbena to colonize. Lewis (2006, p. 3) found that taproots of the plant grow deep in the sand. A seedling with four leaves was found to have taproots growing to a depth of more than 25 cm (10 in). Taproots can easily reach 1 m (3.28 ft) or greater in depth (Thomas 2010, pers. comm.). In addition, roots of yellow sand verbena are tough, leathery, and well-designed to resist desiccation from exposure.

The petitioners did not provide any information, nor do we have information in our files, directly relating to the claim that wildfire, heavy winds, or severe winter storms may be factors threatening the continued existence of sand verbena moth or its habitat. The frequency or existence of coastal zone wildfires is poorly understood. However, very little fuel is available in coastal habitats; therefore any fires would be short in duration and likely infrequent.

The petitioners did not present any information, nor do we have any in our files, that indicate bulkheads and other 'hard protection' techniques may be a factor threatening the continued existence of sand verbena moth throughout its range. At San Juan Island NHP and Dungeness NWR, no bulkheads or other types of hard structures exist, and natural processes dominate. In British Columbia, erosion barriers have decreased sand transport to Goose Spit; however, dunes were stabilized at this location and yellow sand verbena populations have been augmented by transplants (BCIRT 2008, p. 9).

Based on the above evaluation, we find that the information provided in the petition, as well as other information readily available in our files, fails to meet our standard for substantial scientific or commercial information indicating that coastal erosion may be a threat to the sand verbena moth such that the petitioned action may be warranted.

Climate Change

Information Provided in the Petition

The petitioners state that rising sea levels and increasingly severe coastal storms and summer droughts as a result of climate change threaten the sand verbena moth (Petition, p. 13, citing BCIRT 2008, p. 8). Sand verbena moth populations in Canada are located less than 5 m (16.4 ft) above sea level, and most habitat occurs within 25 m (82 ft) of the shoreline (BCIRT 2008, pp. 6, 8). According to the petitioners (Petition, p. 13), the Puget Sound region is projected to experience sea level rises estimated at 22 in (55 cm) by 2050 and 50 in (128 cm) by 2100 (Mote *et al.* 2008, p. 10).

Evaluation of Information Provided in the Petition and Available in Service Files

The BCIRT (2008, p. 8) considers climate change to be a potential, but poorly understood, threat to sand verbena moth habitat. Although we acknowledge that climate change may lead to sea level rise (IPCC 2007, p. 30; Mote *et al.* 2008, p. 3; Karl *et al.* 2009, p. 84), it is important to note that "the present shoreline of the Salish Sea has formed and is maintained under a regime of gradually rising sea levels" (Shipman 2009, unnumbered p. 2). Projections of future sea levels are highly uncertain, vary across regions, and are unpredictable (Mote *et al.* 2008, pp. 3, 9; Shipman 2009, unnumbered p. 1). Mote *et al.* (2008, p. 9) stress that these "estimates have not formally quantified the probabilities, sea level rise cannot be estimated accurately at specific locations, and the estimates are for advisory purposes only." Mote *et al.* (2008, p. 10) present sea level rise estimates in three categories: very low, medium, and very high. The sea level rise estimates presented in the petition are those categorized as very high for the Puget Sound region. Mote *et al.* (2008, p. 10) consider the very low and very high sea level rise estimates to be low probability scenarios; a formal framework to quantify the probabilities of the very high or very low sea level rise estimates has not been developed.

According to Mote *et al.* (2008, p. 10), the medium sea level rise estimate for Puget Sound is 6 in (15 cm) by 2050. Assuming that sand verbena moth populations and yellow sand verbena habitat in Washington are located similarly to those in Canada with respect to distance from shoreline and location above sea level, this level of projected sea level rise would not inundate yellow sand verbena and thus sand verbena moth populations in Washington. Mote *et al.* (2008, p. 10) also provide medium sea level rise estimates along the entire coast of Washington. Because uplifting occurs in the Northwest Olympic Peninsula, they estimated no sea level rise by 2050. Along the central and southern coast of Washington, sea level rise was estimated to be 5 in (12.5 cm) by 2050. The petition did not present, nor do we have in our files, sea level rise estimates along the coasts of British Columbia, Oregon, or California.

According to the COSEWIC (2003, p. 20), the potential effects of climate change on the sand verbena moth are complex, and they state, "climate change may be associated with sea level rise which could threaten coastal dune habitats directly. However, accelerated coastal disturbance and sediment transport associated with increased storm frequency may result in increased development of open sand habitats, which would have a positive effect."

The petitioners also state that climate change may cause an increase in summer drought, which may result in early senescence (aging) of yellow sand verbena. The petitioners assert that this will detrimentally affect the sand verbena moth, larvae of which feed on leaves and shoots throughout the summer in preparation for winter diapause (a state of dormancy) (Petition, p. 14).

The petitioners did not provide any evidence, nor could we find any in our files, documenting any increase in summer drought conditions resulting from climate change as causing a loss of leaves, early dormancy, or early senescence of yellow sand verbena. According to BCIRT (2008, p. 8), climate change is a potential, but poorly understood, threat to the sand verbena moth, but they do acknowledge that during drought conditions the plant may lose leaves and enter dormancy early, thus reducing forage for the larvae of the sand verbena moth.

Yellow sand verbena has unique adaptations including deep taproots with high water storage capacity, prostrate growth, and succulent leaves with a thick epidermis (COSEWIC 2003, p. 12) that would enable it to withstand drought conditions. Because changes in precipitation in Puget Sound have been highly variable over recent decades, no particular trend has been observed. Mote *et al.* (2005, p. 7) state that in Puget Sound, "there is little indication that annual and interannual variation in precipitation in the 21st century will be vastly different from those in the 20th century. Secondly, properties or characteristics of the living and non-living environment that respond to precipitation have probably already experienced the range that they will experience in the next century." We could not locate any information in our files, nor was any provided in the petition, concerning evidence of increases in drought over the range of yellow sand verbena.

Based on the above evaluation, we find that the information provided in the petition, as well as other information readily available in our files, fails to meet our standard for substantial scientific or commercial information indicating that climate change may be a threat to the yellow sand verbena moth such that the petitioned action may be warranted.

Summary of Factor A

Given the uncertainties regarding the potential significance of the threat of dune stabilization and habitat conversion on the sand verbena moth throughout all or a significant portion of its range, as well as the determination by the Committee on the Status of Endangered Wildlife in Canada that these factors pose a significant threat to the sand verbena moth within its range in that country, we find that the questions raised by information presented in the petition are sufficient to meet the "substantial information" standard for a positive 90-day finding, according to our regulations (50 CFR 424.14(b)). In cases where we have no information in our files that would contradict the opinion of a credible expert on the species, we defer to that expert's opinion for purposes of a 90-day finding. Therefore, we find that the information presented in the petition, as well as other information in our files, presents substantial scientific or commercial information to indicate that dune stabilization and habitat conversion may be threats potentially resulting in the present or threatened destruction, modification, or curtailment of the habitat or range of the sand verbena moth such that the petitioned action may be warranted.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Information Provided in the Petition

The petitioners state that collection is not known to threaten the sand verbena moth, but the rarity of the species may make it attractive to collectors (Petition, p. 11). According to the petitioners, small populations are especially vulnerable to overcollection (2010, p. 11). The petitioners did not offer any supporting documentation for their statements.

Evaluation of Information Provided in the Petition and Available in Service Files

According to COSEWIC (2003, p. 20), collection of the sand verbena moth is considered to have a very minor effect on population size. Direct human-caused mortality is low (NatureServe 2009, [online]). Under Federal regulations, the collection of living or dead wildlife, fish, or plants, or the parts or products thereof, is prohibited on lands under National Park Service and NWR jurisdiction without a permit (36 CFR 2.1(a)(1)(i) and (a)(1)(ii)). Similar regulations exist on Washington State lands (Washington Administrative Code (WAC) section 232–12–064). The

sand verbena moth is thus protected from collection within its known range in the United States and apparently is only minimally impacted by collection within its range in Canada.

Summary of Factor B

The petitioners did not provide any information, nor did we have any available in our files, to indicate that overutilization may have a significant negative impact on sand verbena moth populations. Therefore, we find the petition does not present substantial scientific or commercial information to indicate that overutilization for commercial, recreational, scientific, or educational purposes may present a threat to the yellow sand verbena moth such that the petitioned action may be warranted.

C. Disease or Predation

Information Provided in the Petition

The petitioners state the sand verbena moth is likely subject to predation by bats, birds, and small mammals (Petition, p. 11, citing BCIRT 2008, p. 7). The petitioners also assert that alien parasitic tachinid flies, if introduced to control gypsy moths, may harm the sand verbena moth (Petition, p. 11). According to the petitioners (Petition, p. 11), herbivory of yellow sand verbena is considered a minor threat at all sand verbena moth locations (BCIRT 2008, p. 7).

Evaluation of Information Provided in the Petition and Available in Service Files

All species are subjected to endemic levels of disease and predation under natural conditions. Gypsy moths attack conifers and broadleaf trees (Boersma *et al.* 2006, p. 126), habitat the sand verbena moth is not known to occupy. Between 1974 and 2007, only 14 gypsy moths have been collected in the three Washington counties where sand verbena moth is known to occur (Washington State Department of Agriculture (WSDA), 2008, [online]). Between 2007 and 2009, only one moth was collected in these counties (WSDA, 2009, [online]). Alien tachinid flies have not been introduced to the western United States and Canada (BCIRT 2008, p. 7), nor do we have any evidence that such an introduction is planned or likely to occur. While we agree that introducing the fly, should it ever occur, may have a negative effect on the moth, at this time we have no evidence, and the petitioners have offered none, that supports the claim that these threats may rise to the level of acting as a significant limiting factor to the sand verbena moth throughout its range.

Summary of Factor C

We reviewed our files and the information provided by the petitioners, and did not find substantial information to indicate that disease or predation may be outside the natural range of variation such that it could be considered a threat to the sand verbena moth. Therefore, we find the petition does not present substantial scientific or commercial information to indicate that disease or predation may present a threat to the yellow sand verbena moth such that the petitioned action may be warranted.

D. The Inadequacy of Existing Regulatory Mechanisms

Information Provided in the Petition

The petitioners state that Federal or State laws or policies do not adequately protect the sand verbena moth from endangerment or extinction (Petition, p. 12). In Canada, the sand verbena moth is listed as Endangered under the Species At Risk Act. According to the petitioners (Petition, p. 12), actions that provide protection and recovery of the species are well underway for populations in Canada (BCIRT 2008, pp. 8–9, 12). The petitioners (Petition p. 12) claim the designation of the sand verbena moth as a candidate species by the State of Washington does not provide protection for the sand verbena moth. The petitioners further state (Petition, p. 12) that the sand verbena moth is included in the State of Washington's Priority Habitat and Species (PHS) List (WDFW 2008, p. 30). According to the petitioners (Petition, p. 12), the habitats and species included on the PHS List are considered to be priorities for conservation and management, and the PHS List is used to aid in developing management strategies and mapping purposes (WDFW 2008, pp. 1–2).

Evaluation of Information Provided in the Petition and Available in Service Files

The petitioners further provide a discussion of the Global, National, and State or Provincial rankings of the sand verbena moth on NatureServe (Petition, p. 12). However, we note the NatureServe rankings are not regulatory in nature and thus are not relevant to Factor D under the Act.

Information provided by the petitioners suggests existing regulatory mechanisms in Canada are adequate for the conservation of the species (Petition, p. 12). Within its range in the United States, the sand verbena moth populations in Washington occur primarily on public lands. Under Federal regulations, the collection of living or dead wildlife, fish, or plants, or the parts or products thereof, is prohibited on lands under National Park Service and National Wildlife Refuge jurisdiction without a permit (36 CFR 2.1(a)(1)(i) and (a)(1)(ii)). Similar regulations exist on Washington State lands (WAC section 232–12–064). Additional protection is provided to sand verbena moth habitat and therefore the sand verbena moth at Dungeness NWR. Yellow sand verbena is distributed in a research natural area there that is closed to the public (Thomas 2010, pers. comm.).

The petitioners do not identify any threats presumably impacting the sand verbena moth that are inadequately controlled by existing regulatory mechanisms within its range in the United States. The petitioners have not provided any information, nor do we find any available in our files, to suggest that existing regulatory mechanisms in Washington are inadequate to protect the sand verbena moth from any specific factors that may threaten its continued existence.

Summary of Factor D

Within the framework of a 90-day finding we are not required to conduct a far-reaching assessment of the adequacy of existing regulatory mechanisms for the sand verbena moth, and neither the information presented in the petition nor in our files supports this factor as a threat to the sand verbena moth. We find the petition did not present, nor could we locate in our files, substantial scientific or commercial information to indicate that the lack of regulatory mechanisms may be a factor threatening the continued existence of the sand verbena moth throughout its range such that the petitioned action may be warranted.

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

Insecticides

Information Provided in the Petition

According to the petitioners, the use of insecticides such as *Bacillus thuringiensis* var. *kurstaki* (Btk) near sand verbena moth locations can harm the sand verbena moth (Petition, p. 14, citing BCIRT 2008, p. 7). Btk is typically applied from early April to early May to control gypsy moths, *Lymantria dispar.* The petitioners state that spraying would overlap with the larval feeding period of sand verbena moth and would

result in high mortalities (Petition, p. 14).

Evaluation of Information Provided in the Petition and Available in Service Files

Gypsy moths attack conifers and broadleaf trees (Boersma *et al.* 2006, p. 126), habitat the sand verbena moth is not known to occupy. In fact, between 1974 and 2009, only 15 gypsy moths have been collected in the three Washington counties where the sand verbena moth is currently known to occur (Washington Department of Agriculture 2009, [online]). To date, Btk has never been sprayed near sand verbena moth populations, but is named as a potential threat by BCIRT (2008, p. 7).

While we agree that use of insecticides such as Btk near sand verbena moth populations would potentially have a negative effect on the species, at this time we have no evidence that such usage is likely to occur, since Btk is utilized in forested environments and the sand verbena moth inhabits coastal dunes. We have no information available in our files, and the petitioners have offered none, that supports the claim that the threat of insecticides may rise to the level of acting as a significant limiting factor to the sand verbena moth throughout its range.

Based on the above evaluation, we find the petition did not present, nor could we locate in our files, substantial scientific or commercial information to indicate that insecticides may be a threat to the sand verbena moth such that the petitioned action may be warranted.

Herbicides

Information Provided in the Petition

According to the petitioners (Petition, p. 14), chemical control of European beachgrass is the most cost-effective method for, and may be the most common approach to, its eradication (Pickart 1997, p. 6). The petitioners (Petition, p. 14) suggest the Service consider whether mechanical, chemical, or manual means used to control European beachgrass may have an adverse effect on yellow sand verbena and therefore the sand verbena moth. However, they offer no supporting evidence in support of the argument that these control methods may impact yellow sand verbena.

Evaluation of Information Provided in the Petition and Available in Service Files

Neither COSEWIC (2003), nor BCIRT (2008), nor NatureServe (2009, [online]; 2010, [online]) identify herbicides as being a threat to yellow sand verbena and therefore the sand verbena moth. The petitioners did not provide any information, nor could we locate any in our files, that documents specific methods in which beachgrass is controlled at any of the known sand verbena moth locations. Yellow sand verbena, distributed throughout Graveyard Spit in Dungeness National Wildlife Refuge, is located in a research natural area and supports a relatively intact native strand community (Thomas 2010, pers. comm.); efforts to control beachgrass at this sand verbena moth location using herbicides are not planned. Although not a current sand verbena moth location, efforts to restore dune habitat at Willapa NWR involve a variety of mechanical, manual, and chemical means (Ritchie 2009, p. 2). As a result of these actions, a self-sustaining pink sand verbena (*Abronia umbellata*) population now exists on the refuge (Ritchie 2009, p. 4). Since yellow sand verbena may be outcompeted by beachgrass and may not occur in established beachgrass zones (Lewis 2006, unnumbered p. 3), the long-term positive effects of habitat restoration through control of beachgrass, regardless of means, is likely to significantly outweigh any short-term impacts that may occur to yellow sand verbena, and therefore the sand verbena moth.

Based on the above evaluation, we find the petition did not present, nor could we locate in our files, substantial scientific or commercial information to indicate that herbicides may be a threat to the sand verbena moth such that the petitioned action may be warranted.

Biological Vulnerability

Information Provided in the Petition

The petitioners state the sand verbena moth's dependence on yellow sand verbena is a biologically limiting factor (BCIRT 2008, pp. 5–6) that may compound any threats to the species (Petition, p. 14). According to the petitioners, the sand verbena moth's small population size, restricted range, and vulnerability to weather events may increase the likelihood of its extinction. The petitioners go on to say that the sand verbena moth's narrow range should be considered a threat to the species (Petition, p. 15).

Evaluation of Information Provided in the Petition and Available in Service Files

We acknowledge that small population size and restricted range increases the vulnerability of a species to extinction and that complete dependence on one host plant is a potentially limiting factor for the sand verbena moth. However, not all species with limited ranges and small population sizes warrant listing under the Act (*see* our 12-month finding on a petition to list the island marble butterfly (*Euchloe ausonides insulanus*) as threatened or endangered at 71 FR 66292; November 14, 2006), and to date, the global population size, distribution, and status of the sand verbena moth is uncertain. According to NatureServe (2009, [online]), "distribution data for U.S. states and Canadian provinces is known to be incomplete or has not been reviewed for this taxon." In addition, Troubridge and Crabo note the sand verbena moth may have a limited distribution, "* * * although it could also be an artifact of lack of collecting in suitable habitats" (Troubridge and Crabo 1995, p. 89). We have evidence of only two surveys that were completed outside of the Puget Sound region. One survey, which was unsuccessful in capturing the sand verbena moth, was conducted by hand-searching patches of yellow sand verbena in Oregon (COSEWIC 2003, p. 9). According to COSEWIC (2003, p. 9), additional sampling in Oregon and California is needed to determine the presence or absence of the sand verbena moth. The petitioners state that surveys conducted on the Long Beach peninsula in Washington were not successful in locating the species (cited as L. Crabo, 2010, pers. comm. in the Petition, p. 7). However, we could not verify or access this information because the petitioners do not have a record of this conversation (Jepsen 2010, pers. comm.).

Based on the available information, the surveys conducted to date are not sufficient to constitute substantial information indicating that the sand verbena moth is distributed over a narrow range. Yellow sand verbena is distributed over approximately 1,500 miles (mi) (2,414 kilometers (km)) of shoreline. To date, 90 percent of the range of the yellow sand verbena has not been surveyed for the sand verbena moth. In 2006, all sandy beaches from the North Jetty of the Columbia River to the tip of Leadbetter Point, approximately 28 mi (45 km), were surveyed for yellow sand verbena (Lewis 2006, unnumbered p. 2). This survey documented the existence of a metapopulation and recruitment of yellow sand verbena (Lewis 2006, unnumbered p. 3). Yellow sand verbena also occurs along the Oregon and California coast, indicating both suitable

habitat and that the sand verbena moth may be present in additional locations as yet unsearched in Washington, Oregon, and California. However, for the purposes of this finding based on the assessments of NatureServe (2009, [online]) and COSEWIC (2003), we defer to their expert opinion that the sand verbena moth currently has a narrow known range.

BCIRT (2008, p. 8) identifies small and isolated populations as biological limiting factors for the sand verbena moth. In addition, BCIRT states that the sand verbena moth's dependence on a single host plant may increase its risk of extinction. However, both of these factors are not specifically identified as threats to the species. Many species have limited distributions or small population sizes, but these two factors alone (i.e., rarity), without additional information regarding threats, do not meet the substantial information threshold indicating that the species may warrant listing. Information indicating whether the range or abundance of a species has been significantly curtailed helps us assess whether the species has always been rare, or if it was once more widespread and has been reduced in response to threats.

Based on the above evaluation, we find the petition did not present, nor could we locate in our files, substantial scientific or commercial information to indicate that inherent biological vulnerability may be a threat to the sand verbena moth such that the petitioned action may be warranted.

Human Population Growth

Information Provided in the Petition

The petitioners (Petition, p. 14) state that human population growth in the Puget Sound region has been more than twice that of the U.S. national average for the past 50 years (Mote *et al.* 2005, p. 3). According to the petitioners, the population growth has caused degradation to the Puget Sound Region that includes conversion of natural habitat, armoring of the shoreline with riprap and concrete, spread of nonnative plants, and an increase in recreational use of coastal dune habitats (Petition, p. 14).

These factors relating to habitat and recreational use have been addressed under Factor A, The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range, as they relate to the sand verbena moth and its host plant, yellow sand verbena.

Summary for Factor E

Based on our evaluation of the information submitted by the petitioners and available in our files, we did not find evidence suggesting that insecticides, herbicides, or inherent biological vulnerability may pose a significant threat to the sand verbena moth. With regard to inherent biological vulnerability, in particular, we note that many species have limited distributions or small population sizes, but we do not consider these two factors alone (*i.e.,* rarity) to meet the substantial information threshold indicating that the species may warrant listing without additional information regarding threats. In the absence of information identifying threats to the species, and linking those threats to the rarity of the species, we do not consider rarity itself to be a threat. Therefore, we find the petition does not present substantial scientific or commercial information indicating that other natural or manmade factors may affect the continued existence of the sand verbena moth such that the petitioned action may by warranted.

Cumulative Threats Under All Factors

Information Provided in the Petition

According to the petitioners (Petition, p. 15), the Service should consider whether the aforementioned threats intersect and act synergistically to increase the likelihood of extinction or endangerment of the sand verbena moth.

Evaluation of Information Provided in the Petition and Available in Service Files

We have no information in our files, nor was any presented in the petition, that suggests these threats, acting synergistically or collectively, are likely to threaten the continued existence of the sand verbena moth. However, as noted under our Summary of Factor A, we find the questions raised by the petitioners regarding the possible impacts of dune stabilization and habitat conversion are sufficient to meet our "substantial information" standard for a positive 90-day finding under our implementing regulations (50 CFR 424.14(b)).

Finding

On the basis of our evaluation of the information presented under section 4(b)(3)(A) of the Act, we find that the petition presents substantial scientific or commercial information indicating that listing the sand verbena moth may be warranted based on potential threats posed under Factor A, The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range. Specifically, we find that dune stabilization and habitat conversion may pose a threat to the sand verbena moth throughout all or a significant portion of its range such that the petitioned action may be warranted. Because we find the petition presents substantial information indicating that listing the sand verbena moth throughout its range may be warranted, we are initiating a status review to determine whether listing the sand verbena moth under the Act is 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 the 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**).

Authors

The primary authors of this notice are the staff members of the Washington 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.*).

Rowan W. Gould,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2011–3546 Filed 2–16–11; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 76, No. 33

Thursday, February 17, 2011

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

Animal and Plant Health Inspection Service

[Docket No. APHIS–2011–0010]

Notice of Request for Reinstatement of an Information Collection; National Animal Health Monitoring System; Feedlot 2011 Study

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Reinstatement of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a reinstatement of an information collection to support the National Animal Health Monitoring Feedlot 2011 Study.

DATES: We will consider all comments that we receive on or before April 18, 2011.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2011–0010* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send one copy of your comment to Docket No. APHIS–2011–0010, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2011–0010.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: For information on the Feedlot 2011 Study, contact Mr. Chris Quatrano, Industry Analyst, Centers for Epidemiology and Animal Health, VS, APHIS, 2150 Centre Avenue, Building B MS 2E7, Fort Collins, CO 80526; 970–494–7207. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: National Animal Health Monitoring System; Feedlot 2011 Study.

OMB Number: 0579–0079.

Type of Request: Reinstatement of an information collection.

Abstract: Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) is authorized, among other things, to protect the health of our Nation's livestock and poultry populations by preventing the introduction and interstate spread of serious diseases and pests of livestock and for eradicating such diseases from the United States when feasible.

In connection with this mission, APHIS would like to reinstate the 2011 Feedlot Study, which will be used to collect information to:

- Describe changes in management practices and animal health in feedlots;
- Describe the management practices in feedlots that impact product quality;
- Identify factors associated with shedding of potential foodborne pathogens or commensal organisms by feedlot cattle;
- Describe antimicrobial usage in feedlots; and
- Describe biosecurity practices and capabilities in feedlots.

The Feedlot 2011 study will consist of several on-farm questionnaires that will be administered by APHIS-designated data collectors. The information collected through the Feedlot 2011 study will be analyzed and used to:

- Direct producer education;
- Identify research gaps;
- Facilitate education of future producers and veterinarians;
- Assess quality assurance programs; and
- Help with policy formation.

We are asking the Office of Management and Budget (OMB) to approve our use of this information collection activity for 2 years.

The purpose of this notice is to solicit comments from the public (as well as agencies) concerning our information collection. These comments will help us:

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

(2) Evaluate the accuracy of our estimate of the burden of the information collection, 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 information collection on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies, e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.5938775 hours per response.

Respondents: Feedlot managers, feedlot owners, feedlot operators.

Estimated annual number of respondents: 4,900.

Estimated annual number of responses per respondent: 1.

Estimated annual number of response hours: 4,900.

Estimated total annual burden on respondents: 2,910 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 14th day of February 2011.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–3610 Filed 2–16–11; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF COMMERCE

Office of the Secretary

Request for Comments on the Strategy for American Innovation

AGENCY: Office of the Secretary, Department of Commerce.

ACTION: Notice and Request for Information; Correction.

SUMMARY: On February 4, 2011, the Department of Commerce published a Request for Information (FRI) seeking input on a range of policy matters that can affect our innovativeness and competitiveness but particularly the Administration's Innovation Strategy (*see http://www.Commerce.gov/competes* for a link to the report). Due to an inadvertent error, that RFI contained an incorrect e-mail address where the public may submit comments and an incorrect phone number for the public contact. This notice provides the correct e-mail address and contact phone number. The public may submit e-mail comments to *competitiveness@doc.gov* and may contact Sabrina L. Montes at 202–482–6495 for any questions on the notice.

DATES: Comments must be postmarked or submitted by no later than April 1, 2011.

ADDRESSES: You may submit comments, identified by "Innovation Strategy RFI" by any of the following methods:

E-mail: competitiveness@doc.gov. Mail: Office of the Chief Economist, U.S. Department of Commerce, 1401 Constitution Avenue, NW., HCHB Room 4852, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Sabrina L. Montes: e-mail *SMontes@doc.gov*; telephone 202–482–6495.

Dated: February 9, 2011.

John Connor,

Office of the Secretary of Commerce.

[FR Doc. 2011–3560 Filed 2–16–11; 8:45 am]

BILLING CODE 3510–EA–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 10–2011]

Foreign-Trade Zone 274—Butte-Silver Bow, MT; Application for Manufacturing Authority REC Silicon (Polysilicon and Silane Gas) Butte, MT

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the City and County of Butte-Silver Bow, grantee of FTZ 274, requesting manufacturing authority on behalf of REC Silicon, located in Butte, Montana. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on February 11, 2011.

The REC Silicon facility (300 employees, 3,450 metric ton capacity) is located within Site 1 of FTZ 274. The facility is used for the manufacturing of polysilicon and silane gas for the photovoltaic industry using domestic and imported silicon metal (duty rate 5.3–5.5%). Materials sourced from abroad represent 8% of the value of the finished polysilicon and 5% of the value of the finished silane gas. REC Silicon has indicated that they will not admit foreign status silicon metal subject to antidumping or countervailing duty orders into the facility and would accept a restriction on such admissions.

FTZ procedures could exempt REC Silicon from customs duty payments on the foreign components used in export production. The company anticipates that some 95% of the plant's shipments will be exported. On its domestic sales, REC Silicon would be able to choose the duty rates during customs entry procedures that apply to polysilicon and silane gas (duty rate ranges from duty-free to 3.7%) for the imported silicon metal noted above. FTZ designation would further allow REC Silicon to realize logistical benefits through the use of weekly customs entry procedures. Customs duties also could possibly be deferred or reduced on foreign status production equipment. The request indicates that the savings from FTZ procedures would help improve the plant's international competitiveness.

In accordance with the Board's regulations, Elizabeth Whiteman of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is April 18, 2011. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to May 3, 2011.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230–0002, and in the "Reading Room" section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz.*

For further information, contact Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov* or (202) 482–0473.

Dated: February 11, 2011.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2011–3641 Filed 2–16–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 100603239–0275–02]

RIN 0648–XW85

Endangered and Threatened Wildlife; 90-Day Finding on a Petition To List Alabama Shad as Threatened or Endangered Under the Endangered Species Act (ESA)

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

ACTION: Notice of 90-day petition finding.

SUMMARY: We (NMFS) announce a 90-day finding on a petition to list Alabama shad (*Alosa alabamae*) as threatened or endangered and designate critical habitat under the ESA. We find that the petition does not present substantial scientific or commercial information indicating that the petitioned actions may be warranted.

ADDRESSES: Copies of the petition and related materials are available upon request from the Assistant Regional Administrator, Protected Resources Division, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701, or on the NMFS Southeast Region's Web site at *http://*

sero.nmfs.noaa.gov/pr/AlabamaShad.htm.

FOR FURTHER INFORMATION CONTACT: Kelly Shotts, NMFS, Southeast Region, (727) 824–5312; or Marta Nammack, NMFS, Office of Protected Resources, (301) 713–1401.

SUPPLEMENTARY INFORMATION:

Background

In 1997, we added Alabama shad to our Candidate Species List (62 FR 37562; July 14, 1997). At that time, a candidate species was defined as any species being considered by the Secretary of Commerce (Secretary) for listing as an endangered or a threatened species, but not yet the subject of a proposed rule (49 FR 38900; October 1, 1984). In 2004, we created the Species of Concern list (69 FR 19975; April 15, 2004) to encompass species for which we have some concerns regarding their status and threats, but for which insufficient information is available to indicate a need to list the species under the ESA. Twenty-five candidate species, including the Alabama shad, were transferred to the Species of Concern list at that time because they were not being considered for ESA listing and were better suited for Species of Concern status due to some concerns and uncertainty regarding their biological status and threats. The Species of Concern status does not carry any procedural or substantive protections under the ESA.

On April 20, 2010, the Center for Biological Diversity, Alabama Rivers Alliance, Clinch Coalition, Dogwood Alliance, Gulf Restoration Network, Tennessee Forests Council, and the West Virginia Highlands Conservancy (petitioners) submitted a petition to the Secretaries of Interior and Commerce, as well as to the Regional Director of the Southeast Region of the U.S. Fish and Wildlife Service (USFWS), to list 404 aquatic, riparian, and wetland species from the Southeastern United States as threatened or endangered under the ESA. The petitioners also requested that critical habitat be designated under the ESA for all petitioned species. NMFS' Southeast Region notified the USFWS' Southeast Region by letter dated May 3, 2010, that we believe the Alabama shad, one of the 404 petitioned species, falls under NMFS' jurisdiction based on the August 1974 Memorandum of Understanding regarding jurisdictional responsibilities and listing procedures between the two agencies. We proposed to evaluate the petition, for the Alabama shad only, for the purpose of the 90-day finding and any required subsequent listing action. On May 14, 2010, we sent the petitioners confirmation that we would be evaluating the petition for Alabama shad.

ESA Statutory Provisions and Policy Considerations

ESA Statutory and Regulatory Provisions and Evaluation Framework

Section 4(b)(3)(A) of the ESA of 1973, as amended (U.S.C. 1531 *et seq.*), requires, to the maximum extent practicable, that within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the **Federal Register** (16 U.S.C. 1533(b)(3)(A)). When it is found that substantial scientific or commercial information in a petition indicates the petitioned action may be warranted (a "positive 90-day finding"), we are required to promptly commence a review of the status of the species concerned during which we will conduct a comprehensive review of the best available scientific and commercial information. In such cases, within 12 months of receipt of the petition, we shall conclude the review with a finding as to whether, in fact, the petitioned action is warranted. Because the finding at the 12-month stage is based on a more thorough review of the available information, as compared to the narrow scope of review at the 90-day stage, a "may be warranted" finding does not prejudge the outcome of the status review.

Under the ESA, a listing determination may address a "species," which is defined to also include subspecies and, for any vertebrate species, any distinct population segment (DPS) that interbreeds when mature (16 U.S.C. 1532(16)). A joint NOAA-U.S. Fish and Wildlife Service (USFWS) policy clarifies the agencies' interpretation of the phrase "distinct population segment" for the purposes of listing, delisting, and reclassifying a species under the ESA (61 FR 4722; February 7, 1996). A species, subspecies, or DPS is "endangered" if it is in danger of extinction throughout all or a significant portion of its range, and "threatened" if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether species are threatened or endangered because of any one or a combination of the following five section 4(a)(1) factors: (1) The present or threatened destruction, modification, or curtailment of habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) any other natural or manmade factors affecting the species' existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

ESA-implementing regulations issued jointly by NMFS and the U.S. Fish and Wildlife Service (USFWS; 50 CFR 424.14(b)) define "substantial information" in the context of reviewing a petition to list, delist, or reclassify a species as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. In evaluating whether substantial information is contained in a petition, the Secretary must consider whether the petition: (1) Clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved; (2) contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (3) provides information regarding the status of the species over all or a significant portion of its range; and (4) is accompanied by the appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps (50 CFR 424.14(b)(2)).

Court decisions have clarified the appropriate scope and limitations of the Services' review of petitions at the 90-day finding stage, in making a determination that a petitioned action "may be" warranted. As a general matter, these decisions hold that a petition need not establish a "strong likelihood" or a "high probability" that a species is either threatened or endangered to support a positive 90-day finding.

We evaluate the petitioner's request based upon the information in the petition including its references, and the information readily available in our files. We do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the petitioner's sources and characterizations of the information presented, if they appear to be based on accepted scientific principles, unless we have specific information in our files that indicates

the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be dismissed at the 90-day finding stage, so long as it is reliable and a reasonable person would conclude it supports the petitioner's assertions. In other words, conclusive information indicating the species may meet the ESA's requirements for listing is not required to make a positive 90-day finding. We will not conclude that a lack of specific information alone negates a positive 90-day finding, if a reasonable person would conclude that the unknown information itself suggests an extinction risk of concern for the species at issue.

To make a 90-day finding on a petition to list a species, we evaluate whether the petition presents substantial scientific or commercial information indicating the subject species may be either threatened or endangered, as defined by the ESA. First, we evaluate whether the information presented in the petition, along with the information readily available in our files, indicates that the petitioned entity constitutes a "species" eligible for listing under the ESA. Next, we evaluate whether the information indicates that the species at issue faces extinction risk that is cause for concern; this may be indicated in information expressly discussing the species' status and trends, or in information describing impacts and threats to the species. We evaluate any information on specific demographic factors pertinent to evaluating extinction risk for the species at issue (*e.g.,* population abundance and trends, productivity, spatial structure, age structure, sex ratio, diversity, current and historical range, habitat integrity or fragmentation), and the potential contribution of identified demographic risks to extinction risk for the species. We then evaluate the potential links between these demographic risks and the causative impacts and threats identified in section 4(a)(1).

Information presented on impacts or threats should be specific to the species and should reasonably suggest that one or more of these factors may be operative threats that act or have acted on the species to the point that it may warrant protection under the ESA. Broad statements about generalized threats to the species, or identification of factors that could negatively impact a species, do not constitute substantial information that listing may be warranted. We look for information indicating that not only is the particular species exposed to a factor, but that the species may be responding in a negative fashion; then we assess the potential significance of that negative response.

Many petitions identify risk classifications made by other organizations or agencies, as evidence of extinction risk for a species. Risk classifications of the petitioned species by other organizations or made under other Federal or State statutes may be informative, but the classification alone may not provide the rationale for a positive 90-day finding under the ESA. Thus, when a petition cites such classifications, we will evaluate the source information that the classification is based upon, in light of the standards on extinction risk and impacts or threats discussed above.

Distribution and Life History of Alabama Shad

The Alabama shad is a euryhaline, anadromous species that spawns in medium to large flowing rivers from the Mississippi River drainage to the Suwannee River, Florida. They once reached into freshwater systems as far inland as eastern Oklahoma, Iowa, and West Virginia. Present distributions extend up the Mississippi River drainage into eastern Arkansas and central Missouri. They are found in some Gulf coast drainages, but are thought to be extirpated from those drainages west of the Pascagoula drainage in Mississippi (Adams *et al.,* 2000; Mettee and O'Neil, 2003; Boschung and Mayden, 2004). Although once abundant enough to support commercial fisheries in Alabama, Arkansas, Kentucky, Indiana, and Iowa, Alabama shad are rarely collected throughout much of their former range (Ross, 2001; Adams *et al.,* 2000). Gunning and Suttkus (1990) report on collections between 1963 and 1988 in the Pearl River, Louisiana and Mississippi, in which the majority of individuals (384) were collected before 1965, with only 34 collected since then. None have been taken from the Pearl River since 1981 (Gunning and Suttkus, 1990; Ross, 2001). Barkuloo *et al.* (1993) report large declines in the Mobile River basin occurred shortly after new dams were built on the Alabama and lower Tombigbee rivers in the 1960s. Five adults have been captured in the basin in the past 25 years, and then only in years with very high river flows (Mettee and O'Neil, 2003), suggesting that no spawning population remains. The largest remaining population probably occurs in the Apalachicola River, Florida, downstream of the Jim Woodruff Lock and Dam (Barkuloo *et al.,* 1993). Outside of Florida, spawning populations are thought to persist in the Choctawhatchee and Conecuh Rivers, Alabama; the Pascagoula River, Mississippi; the Ouachita River, Arkansas; and, the Missouri, Gasconade, Osage and Meramec Rivers, Missouri.

Alabama shad belong to the family Clupeidae and are closely related to, as well as similar in appearance and life history to, the American shad (*A. sapidissima*). They also resemble the skipjack herring (*A. chrysochloris*), which occurs in the same areas. Defining characteristics of the Alabama shad are their upper jaw with a distinct median notch, and the number of gill rakers (41 to 48) on the lower limb of the anterior gill arch. Alabama shad differ from other members of their family in the same area in that the lower jaw does not protrude beyond the upper jaw, black spots are present along the length of the lower jaw, and the dorsal fin lacks an elongate filament.

Alabama shad are a schooling species. Research in the Pascagoula River system indicates that Alabama shad shift between riverine habitats during their first year (age 0). In early summer (June to mid-July) in the Pascagoula River system, small juveniles use sandbar habitats, then switch to open channel and steep bank habitats containing large woody debris in late summer and fall (Mickle, 2006). Within habitat types, they tend to select cooler water temperatures (Mickle, 2006). While little is known of the Alabama shad's thermal tolerance, alosids in general are notoriously sensitive to thermal stress (Beitinger *et al.,* 2000; McCauley and Binkowski, 1982). Little is known of the species' behavior and habitat use in marine environments. Juveniles remain in fresh water for the first 6 to 8 months of their lives, feeding on small fishes and invertebrates (Ross, 2001). Adults broadcast spawn in the spring or early summer over coarse sand and gravel sediments swept by moderate currents when river temperatures are between 18 and 23 degrees Celsius. Males appear to enter the river at earlier dates and lower water temperatures than females (Laurence and Yerger, 1966). Male and female spawning site arrival also varies by age (Mettee and O'Neil, 2003). Adults likely do not feed during the spawning run; otherwise, they are thought to forage on small fish. Females become larger than males, reaching 18 inches (457 mm), while males reach 16.5 inches (419 mm). Age-2 adults are the most prevalent age class of spawning adults. Repeat spawning is common, but the percentage of returning spawners is highly variable among years. Annual fecundity ranges from 40,000 to 360,000

eggs per female. Juvenile growth rate is about 1.2 inches (30 mm) per month from July to September and then 0.4 inches (10 mm) per month until December. Juveniles enter the seawater in late summer/early autumn when they are about 2 to 5 inches (50 to 130 mm). Some natal homing tendency is evidenced by genetic differences among drainage basins (Bowen, 2005). The Alabama shad is relatively short lived (up to 6 years).

Analysis of the Petition

First, we evaluated whether the petition presented the information indicated in 50 CFR 424.14(b)(2). The petition clearly indicates the administrative measure recommended and gives the scientific and common name of the taxonomically valid species involved; contains a narrative justification for the recommended measure, describing the distribution of the species, as well as the threats faced by the species; and is accompanied by supporting documentation in the form of bibliographic references. However, the petition does not include information required under 50 CFR 424.14(b)(2)(ii–iii) on the past and present numbers of the species, or information regarding the status of the species over all or a significant portion of its range, other than conclusions and opinions. We have additional information in our files, acquired since our last evaluation of Alabama shad in 2004 and its designation as a Species of Concern, on the abundance and age structure of the Apalachicola population of Alabama shad, which we discuss in more detail below.

The petition states that Alabama shad have likely experienced dramatic long-term population declines, as well as short-term population declines of as much as 30 percent, and attributes these trends to habitat loss and degradation caused by impoundments, pollution, dredging, and other factors. The petition also states that commercial fishing in the Ohio River was a threat historically, and even though there is no longer a commercial fishery, intentional eradication or indirect impacts of fishing may be contributing to the species' declining status. The petition states that it is unknown whether any occurrences of Alabama shad are "appropriately protected," noting the lack of fish passage at locks and dams as a primary management concern, and cites lack of regulatory protections associated with status classifications assigned Alabama shad by NatureServe, NMFS, and the States of Mississippi, Alabama, and Georgia. Other factors, such as pollution, sedimentation, and drought, are cited in the petition as contributing to declines in shad populations. Thus, the petition states that four of the five causal factors in section 4(a)(1) of the ESA are adversely affecting the continued existence of Alabama shad: Habitat modification and degradation due to dams, dredging, and pollution; overutilization in historical commercial fisheries and continued indirect effects from fishing and eradication programs; inadequacy of existing regulatory mechanisms associated with current status classifications; and other natural or manmade factors, such as pollution, sedimentation, and drought.

Information on Species Status

The petition states that Alabama shad has undergone a major geographic contraction of its historical range, which originally spanned the Gulf Coast from the Suwannee River, Florida, to the Mississippi River, and westward in the Ouachita River system (Arkansas and Louisiana) to eastern Oklahoma. The species' current range is stated to include the Apalachicola River system below Jim Woodruff Lock and Dam in Florida; the Pascagoula River drainage in Mississippi; and, the Conecuh, Choctawhatchee, and Mobile Rivers in Alabama. The petition describes Alabama shad populations as small and states that the species is considered very rare in large portions of its historical range. The petition cites a NatureServe (2008) estimate that only 6 to 20 populations of Alabama shad remain. The petition also includes an observation by Mettee *et al.* (1996) that there are only two known remaining spawning runs in the Mississippi River System, with other spawning runs occurring in the Florida Panhandle and southern Alabama, and the conclusions by Mettee and O'Neil (2003) that spawning populations of shad are "relatively small." Though the petition describes Alabama shad populations as "small" and the species as "rare throughout its historic range" and concludes that spawning populations are "relatively small," it does not present estimates for historical or current abundance of Alabama shad for comparison and evaluation. While the petition states that 6 to 20 populations of Alabama shad exist today, it does not state the location of those populations, the size of the populations, or the number, locations, and size of historical Alabama shad populations for comparison.

The petition cites various status classifications made by the International Union for Conservation of Nature (IUCN), the American Fisheries Society (AFS), NatureServe, and NMFS to support its assertion that Alabama shad should be listed as threatened or endangered under the ESA. We do not give any particular weight to classifications established by other scientific and conservation organizations, which may or may not be based on criteria that directly correspond to the listing standards of the ESA. However, we have reviewed and evaluated the underlying information used to develop the various classifications given to Alabama shad by entities listed in the petition.

The petition cites the IUCN's classification of Alabama shad as "endangered," which the IUCN defines as "a very high risk of extinction in the wild." The IUCN bases its species classifications on evidence indicating that the species meets any of the five general criteria (A through E) that relate to population size (A), rate of population decline (B), reductions in geographic range (C), specific population sizes relative to rates of decline (D), and quantification of extinction risk (E). Based on its 1996 assessment, the IUCN classified Alabama shad as endangered because it believed the species met one of the five criteria (B). Specifically, the IUCN assigned Alabama shad a generic criterion of "B1+2e," which indicates (B) the extent of occurrence is estimated to be less than 5,000 km^2 or the area of occupancy is estimated to be less than 500 km^2, with (1) either severely fragmented populations or the species is known to exist at no more than five locations, and (2) continuing inferred, observed, or projected decline in (e) the number of mature individuals. However, this generic criterion does not describe how the 5,000 km^2 area of occurrence or the 500 km^2 area of occupancy were determined to be the thresholds below which a species is facing "a very high risk of extinction" and does not provide information on how the current areal extent of Alabama shad was determined. While the IUCN criterion indicates that the number of mature individuals is declining, no abundance estimates were provided to quantify that decline. In fact, the IUCN recently updated its classification of Alabama shad (version 2010.4), relying on a more current 2007 assessment of the species (citing NatureServe as the "assessor"), and reclassified it from "endangered" to "data deficient." While the IUCN notes declines in the population and geographic range of the species, it states in its justification of the current classification that "there has been no quantification of the rate of

range or population decline" of the Alabama shad (IUCN, 2010).

NatureServe (2008) gave the species a rank of "G3" or "vulnerable" and attributed the rank to the species' limited distribution in Gulf of Mexico tributaries, reduction in population due to the effects of dams in blocking spawning migration, and degradation of habitat by siltation and pollutants. The petition cites NatureServe (2008) in its assertion that Alabama shad have experienced as much as a 30 percent population decline in the short term, with dramatic long-term declines. NatureServe (2008) defines short-term trends for species as the observed, estimated, inferred, suspected, or projected short-term trend over a period spanning the past 10 years or 3 generations (whichever is longer, up to a maximum of 100 years). The full description of the short-term trends for Alabama shad in the NatureServe (2008) source is "declining to stable, with +/− 10 percent fluctuation to 30 percent decline" and notes that while Alabama shad are "probably" declining, the "rate of decline is unknown." NatureServe (2008) also describes range-wide trends over the "long-term" (covering an approximately 200-year period) in very broad terms: "substantial decline to relatively stable (25 percent change to 75 percent decline)." The range that the percentage of population change/decline represents is very large and demonstrates a great deal of uncertainty in the actual rate of change in Alabama shad populations, making reliable quantification of long-term population trends difficult at best. The ability to interpret NatureServe's (2008) quantification of long-term trends is further confounded because there is no description of how these percentages were determined. While NatureServe (2008) is cited in the petition as the major source presenting the declines in Alabama shad, the actual descriptions of the short- and long-term trends by NatureServe actually allow for stability and even some increases in Alabama shad populations.

Alabama shad were designated as "threatened" (in imminent danger of becoming endangered throughout all or a significant portion of its range) by AFS in 2008 based on (1) present or threatened destruction, modification, or reduction of habitat or range, and (2) over-exploitation for commercial, recreational, scientific, or educational purposes. The AFS designation does not provide any information on historical or current numbers, populations, or rates of decline, and also refers to NatureServe's (2008) ranking of "G3/vulnerable" (discussed in the previous section of this finding).

As previously noted, NMFS transferred Alabama shad to the Species of Concern list from the Candidate Species list in 2004. The entirety of the scientific and commercial information presented in the petition on the apparent population decline of Alabama shad and the threats that contributed to the apparent decline were considered by NMFS in its last evaluation of Alabama shad in 2004 and resulted in its designation as a Species of Concern. Further, much of the information on the status and threats presented in the petition is included in the NMFS Species of Concern fact sheet for Alabama shad, which is publicly available on the Internet (*http://www.nmfs.noaa.gov/pr/pdfs/species/alabamashad_detailed.pdf*). The fact sheet describes the rationale for the Species of Concern designation, citing Alabama shad's rarity throughout much of its former range and on-going threats that may have contributed to its decline, such as dams, poor water quality, siltation, habitat alteration, dredging, bycatch, and thermal stress. By definition, a Species of Concern is one for which we have some concerns regarding status and threats, but for which insufficient information is available to indicate a need to list the species under the ESA. We believe that no new substantial information (information not already considered by NMFS in designating Alabama shad as a Species of Concern) is presented in the petition.

In addition to these classifications by national and international organizations, Alabama shad has received several State classifications/designations. Mississippi lists the Alabama shad as a "Tier 1" "species of greatest conservation need," defined as "species that are in need of immediate conservation action and/or research because of extreme rarity, restricted distribution, unknown or decreasing population trends, specialized habitat needs, and/or habitat vulnerability. Some species may be considered critically imperiled and at risk of extinction/extirpation." Alabama also lists Alabama shad as a "species of greatest conservation need" with a priority of "2." A priority of "2" is considered by Alabama to be a "high conservation concern" and is given to species that meet three of the following factors: Rarity; very limited, disjunct, or peripheral distribution; decreasing population trend/population viability problems; and/or, specialized habitat needs/habitat vulnerability due to natural/human-caused factors. This designation notes that timely research and/or conservation action is needed. Neither Mississippi nor Alabama indicate which of the multiple factors resulted in the "Tier 1" and "Priority 2" classifications, and no population abundance estimates were provided by either State. The shad is also listed as a "species of special concern" by the State of Georgia and is given a State ranking of "S1," defined as "critically imperiled in the State because of extreme rarity (5 or fewer occurrences)." Georgia lists the State status of Alabama shad as "threatened," defined as "a species which is likely to become an endangered species in the foreseeable future throughout all or parts of its range." While Georgia's "S1" ranking indicates that there are "5 or fewer occurrences" in the State, it is unclear what constitutes an "occurrence," and it does not provide information on population abundance.

The classification of Alabama shad as "data deficient," "vulnerable," "threatened," and a "Species of Concern" by national and international organizations, as well as their designations as "Tier 1" and "Priority 2" "species of greatest conservation need" by Mississippi and Alabama, respectively, and an "S1" "threatened" "species of special concern" by Georgia, demonstrate that there is general concern about the status of Alabama shad. However, it also demonstrates that there is no consensus on the severity of the decline and magnitude of the threats faced by Alabama shad. We reviewed the underlying information for these classifications and found that none of the sources cited in the petition provide current population sizes of Alabama shad or historical population sizes for comparison and insight into any rate of decline of the species that may be occurring.

In addition to the information presented in the petition, we evaluated information in our own files, particularly new information obtained since our last review of Alabama shad in 2004 that resulted in its designation as a Species of Concern. Most of these sources contained in our files are also publicly available on the Internet.

The first population abundances of Alabama shad, estimated for the Apalachicola River population, were published by Ely *et al.* (2008). The population sizes varied greatly during the 2005 to 2007 study period (approximately 2,000 to 26,000 Alabama shad), and were described by Ely *et al.* (2008) as lower than expected based on a comparison with American shad in the Savannah and Altamaha Rivers (between 100,000 and 200,000

American shad). Given the similarities in life history characteristics of Alabama and American shad and the similarities in discharge, drainage area, and latitude between the Apalachicola River and the other Atlantic Coast rivers, the authors expected the populations of adult Alabama shad and American shad to be similar. Ingram (2007) compared growth and age class structure of Alabama shad in the Apalachicola River in 2005 and 2006 with studies conducted in 1967 and 1972 and indicated that the current structure, with fewer age classes and an earlier age at maturity, was indicative of a declining population and asserted that "concern over the long-term sustainability of Alabama shad populations appears to be justified." Ingram (2007) also noted that populations comprised of few year classes tend to rebound quickly when environmental conditions change (Rutherford *et al.,* 1992), but also tend to be less stable than populations comprised of more year classes and may be extirpated under prolonged periods of degraded environment (Everhart and Youngs, 1981). Additionally, Ely *et al.* (2008) noted that fluctuations in abundance of American shad are well documented (Hattala *et al.,* 1996; Atlantic States Marine Fisheries Commission, 1998; Moring, 2005) and variations in year-class strength typically observed in this genus suggest that populations of Alabama shad are capable of recovering quickly to historical levels under favorable conditions.

The resilience of Alabama shad and the species' ability to respond positively to conservation efforts is evident in the Apalachicola-Chattahoochee-Flint (ACF) River System. Beginning in 2005, a cooperative study supported by multiple local, academic, State, and Federal conservation partners, including NMFS, started tracking Alabama shad and other fish species in the Apalachicola River (USFWS, 2008; TNC, 2010; Ely *et al.,* 2008). The study also evaluated the feasibility of passing fish upriver of the Jim Woodruff Lock and Dam (JWLD), located at the confluence of the Chattahoochee and Flint Rivers, which presents the first major impediment on the Apalachicola River to the upstream migration of Alabama shad to their historical spawning grounds. The results of this collaborative study showed that the existing lock could be used to pass fish upriver where they could potentially reproduce in great numbers. Based on these findings, in 2008, the U.S. Army Corps of Engineers (USACE) began operating the lock at JWLD to allow fish passage. The locks are operated twice a day to correspond with the natural movement patterns of migrating fish during spawning seasons—February through May each year. Alabama shad have been found to pass upstream of the lock with 45 percent efficiency (Young, 2010) and, as a result, can access over 150 miles of historical habitat and spawning areas in the ACF River System for the first time in more than 50 years (TNC, 2010). The current 2010 population estimate for the ACF River System of 98,469 Alabama shad obtained as a result of this study (Young, 2010) is almost four times larger than the previous high estimate of 25,935 obtained in 2005 (Ely *et al.,* 2008). Since age-2 adults are the most prevalent age class of spawning adults, the large increase in the Alabama shad population in the Apalachicola in 2010 is likely a direct result of JWLD being operated for fish passage beginning in 2008.

The information presented in the petition on the status and trends of Alabama shad populations does not present new substantial information indicating that listing as threatened or endangered under the ESA may be warranted. While the petition notes that Alabama shad populations are small and there has been an overall reduction in its geographic range, none of the sources cited provide current population sizes of Alabama shad or historical population sizes for comparison and insight into any rate of decline of the species that may be occurring. Further, the majority of the information contained in the petition was already considered in NMFS' 2004 evaluation of Alabama shad that resulted in its retention on the Species of Concern list. In addition to the petition, we also reviewed information in our own files. Since our evaluation in 2004, the first abundance estimates for Alabama shad were obtained in the Apalachicola River. The current 2010 estimate for that river is four times higher than the previous high estimate, likely evidence of the success of conservation efforts that resulted in fish passage at JWLD beginning in 2008. While we only have population estimates from the Apalachicola River, information on the status of the species contained in the petition and our files does not indicate that the listing of Alabama shad as threatened or endangered under the ESA may be warranted. We will next consider how threats facing Alabama shad may be contributing to their extinction risk.

Information on Threats to the Species

We evaluated whether the information in the petition and contained in our files concerning the extent and severity of one or more of the ESA section 4(a)(1) factors suggests these impacts and threats may be posing a risk of extinction for Alabama shad that is cause for concern. The bulk of the information in the petition on threats is an overview of many of the past and ongoing categories of threats that are believed to have contributed to the decline of 404 aquatic, riparian, and wetland species in the Southeast. The majority of this information on threats is either general for all species in the Southeast, specifically linked to species other than Alabama shad, or characterized in areas where shad are not known to occur. The following discussion on threats focuses on the information presented in the section of the petition on Alabama shad.

Habitat Modification and Destruction

The petition states that Alabama shad have experienced widespread declines because of loss of habitat to dams, rapid urbanization, pollution, and other factors (Mettee and O'Neil, 2003; Mirarchi *et al.,* 2004; NMFS, 2008). The petition states that shad have been cut off from many historical spawning areas by dams and locks (Robison and Buchanan, 1988; Etnier, 1997; Mirarchi *et al.,* 2004) and provides the example of dams built on the lower Tombigbee and Alabama Rivers in the 1960s resulting in "steep declines in shad populations" in the Mobile River Basin (Barkuloo *et al.,* 1993; Mettee and O'Neil, 2003; NMFS, 2008; NatureServe, 2008). The petition also states that agricultural operations, dredging, and possible reservoir construction for water supply on major tributaries are major threats to remaining populations in Alabama (Mettee, 2004) and that these threats likely apply throughout the species' range. NMFS listed dredging as a factor for the Alabama shad's decline in its rationale for the 2004 Species of Concern designation. Dredging can remove necessary spawning substrate, increase siltation, and reduce water quality. However, neither the petition nor our files contain specific information on the nature or the degree of threat to Alabama shad from dredging. We also noted the presence of locks and dams as factors in the decline of Alabama shad in our Species of Concern designation, including the specific example cited in the petition of reduction in shad populations in the Mobile River Basin resulting from dam construction on the Tombigbee and

Alabama Rivers. We further noted in our evaluation of the impacts of dams on Alabama shad that the population in the Pascagoula River is small, even though that river lacks dams and other barriers to migration. While dredging and dams represent generalized threats to the species, as stated in the petition and by us in our rationale for designating Alabama shad as a Species of Concern, the petition does not provide substantial information detailing how the significance of these threats to the species indicates that listing may be warranted. The petition cites reservoir construction as a threat to the species, with recent information that new reservoirs are currently proposed on Murder Creek, the Little Choctawhatchee, and on smaller tributaries "that further threaten the shad" (SFC and CBD, 2010). However, the petition does not state whether Alabama shad are present in these locations and does not describe, either quantitatively or qualitatively, the anticipated effects (*e.g.,* blockage of spawning migrations or modifications of downstream habitat) to Alabama shad from the proposed reservoirs. Further, the petition asserts that habitat loss due to rapid urbanization and pollution has contributed to the widespread declines in Alabama shad populations, but provides no explanation or examples describing how or where this has occurred. Therefore, we find that the petition does not present new substantial information on the threat to Alabama shad from habitat destruction and modification indicating that listing may be warranted.

Overutilization

The petition states that commercial fishing in the Ohio River was a threat historically, but with the decline in fish numbers, there is no longer a commercial fishery (NatureServe, 2008). The petition cites AFS (Jelks *et al.,* 2008), which classified this species as threatened in part because of over-exploitation for commercial, recreational, scientific, or educational purposes, including intentional eradication or indirect impacts of fishing. As part of the rationale for the Alabama shad's 2004 Species of Concern designation, we noted that early commercial harvest of Alabama shad may have contributed to its decline, but that the catches were small and the fishery was short lived. NMFS (2004) also noted that threats to Alabama shad may include bycatch (*i.e.,* indirect impacts of fishing, as stated by the petition), but neither the petition nor our files provide additional details on the nature or degree of the threat of bycatch to Alabama shad. There is no information in our files, nor does the petition provide sources or citations, for the historical or current existence of a recreational fishery of Alabama shad, scientific or educational activities that could threaten shad, or the nature or location of programs intended to eradicate the species. Therefore, we find the petition does not present new substantial information on the threat to Alabama shad from overutilization indicating that listing may be warranted.

Inadequacy of Existing Regulatory Mechanisms

The petition states that it is not known whether any occurrences of Alabama shad are appropriately protected and cites NatureServe (2008) that a "primary management need is the creation of fishways so that shad can migrate through or around locks and dams." Dams are documented to block anadromous species, such as Alabama shad, from accessing habitat upstream, while also degrading habitat downstream. Hydropower dams are regulated by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA). The FPA provides for cooperation between FERC and other Federal and State agencies, including resource agencies, in licensing and relicensing power projects, including the authority to issue mandatory fishway prescriptions. However, the timing of project relicensing (once every 30 to 50 years per facility) and the existence of dams, such as those operated by the Army Corps of Engineers, to which the FPA does not apply, can hinder the efficacy of the FPA. Even where fish passage currently exists, passage efficiency varies and is often less than 100 percent. The petition does not quantify the amount of historical Alabama shad habitat that is blocked by dams or the reductions in abundance of shad resulting from the lack of passage at dams. However, the presence of dams and the lack of passage is recognized by NMFS as a general threat to Alabama shad and was documented as part of the rationale for its 2004 Species of Concern designation. As part of the proactive conservation initiative under the Species of Concern program, we are a partner in the multi-agency collaborative project at JWLD that resulted in the USACE operating the lock for purposes of fish passage during spawning season. This project appears to have been highly successful at enhancing the Alabama shad population in the ACF River System.

As previously discussed, the petition notes classifications of the Alabama shad by various States within its range. Mississippi lists the shad as a Tier 1 "species of greatest conservation need." This designation provides no regulatory protection for the shad. Alabama also lists the species as a "species of greatest conservation need" with a priority of "2." Although the State of Alabama has developed a "comprehensive wildlife strategy," this strategy is entirely voluntary and provides no regulatory protection for the shad. The petition also states that there is no evidence that adherence to the strategy will ensure the survival and recovery of the shad. The shad is also listed as a species of special concern by the State of Georgia and NMFS, though these designations, like the others, do not provide any regulatory protection. Other than fish passage at dams discussed in the previous section, the petition does not indicate what threats require adequate regulation by these States or NMFS. Therefore, we have determined that information in the petition and contained in our files does not constitute substantial information indicating existing regulatory mechanisms are inadequate to prevent, or are contributing to, the extinction risk for Alabama shad to the extent that listing as threatened or endangered under the ESA may be warranted.

Other Natural or Manmade Factors

The petition lists pollution "from a variety of sources" and drought as additional threats to Alabama shad. As stated in the discussion of habitat modification and destruction, the petition cites Mettee (2004), which lists increased sedimentation, pesticide runoff from agricultural operations, and prolonged drought as major threats to populations in Alabama, and Metee and O'Neil (2003), which lists siltation and water pollution as causes of decreasing shad populations. Siltation and poor water quality are already documented as part of the rationale for the Alabama shad's 2004 Species of Concern designation by NMFS, and the petition does not provide additional information indicating the significance of these generalized threats to Alabama shad. Therefore, there is no new substantial information indicating listing may be warranted as a result of these threats. Prolonged drought is recognized as a potential threat to riverine and anadromous species, as it can decrease water depths and velocity, increase thermal stress, and exacerbate existing water quality issues. However, the petition does not present information that indicates the extent to which Alabama shad have been affected by drought or evaluate how their current

extinction risk would be increased to an unacceptable level by the onset of future droughts. Therefore, we find that the petition does not present new substantial information on the threat to Alabama shad from other natural and manmade factors, such as water pollution, siltation and drought, indicating listing as threatened or endangered under the ESA may be warranted.

Petition Finding

We have reviewed the petition, the literature cited in the petition, and other literature and information contained in our files. We find that the petition does not present substantial scientific or commercial information indicating that the requested listing actions may be warranted. Alabama shad is currently designated as a NMFS Species of Concern. We periodically review the species on the Species of Concern list to evaluate whether they should be retained or removed from the list or proposed for listing under the ESA. For the Alabama shad, NMFS is currently scheduled to release a Species of Concern review in 2011.

References Cited

A complete list of all references is available upon request from the Protected Resources Division of the NMFS Southeast Regional Office (*see* **ADDRESSES**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: February 11, 2011.

Eric C. Schwaab,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 2011–3628 Filed 2–16–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA222

Gulf Spill Restoration Planning; Notice of Intent To Begin Restoration Scoping and Prepare a Programmatic Environmental Impact Statement

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

ACTION: Notice of intent to begin restoration scoping and prepare a Programmatic Environmental Impact Statement (PEIS).

SUMMARY: The purpose of the Gulf Spill Restoration Planning PEIS is to identify restoration types and establish a programmatic framework and procedures that will enable the Trustees to expedite the selection and implementation of restoration projects to compensate the public and the environment for loss of natural resources and services from the Deepwater Horizon Oil Spill that began on April 20, 2010, Mississippi Canyon Block 252 ("the Oil Spill"). The Trustees will prepare a PEIS that will evaluate a range of restoration types that could be used to compensate the public for the environmental and human use damages caused by the Oil Spill. The Trustees seek public involvement in the scoping process and development of the PEIS. This notice explains the scoping process the Trustees will use to gather input from the public. Comments on what the Trustees should consider in the PEIS may be submitted in written form or verbally at any of the public scoping meetings; or may be submitted in written or electronic form at any other time during the scoping process.

DATES: Public comments must be received by May 18, 2011. Preliminary public scoping meeting locations are being scheduled for:

- Pensacola, FL
- Belle Chasse, LA
- Grand Isle, LA
- Port Arthur, TX
- Galveston, TX
- Houma, LA
- Morgan City, LA
- Gulfport, MS
- Spanish Fort, AL
- Panama City, FL
- Washington, DC

The specific dates and times for each are to be determined and will be announced in the **Federal Register**, on the Web site, and in local newspapers no later than two weeks prior to each meeting.

ADDRESSES: Written scoping comments on suggested restoration types should be sent to NOAA Restoration Center, Attn: DWH PEIS Comments, 263 13th Avenue South, Suite 166, St. Petersburg, FL 33701. Electronic comments are strongly encouraged, and can also be submitted to *http://www.gulfspillrestoration.noaa.gov.* All written scoping comments must be received by the close of the scoping process to be considered during the scoping process. The exact dates and venues of scoping meetings, as well as the closing date for scoping comments, will be announced in a public notice to be released two weeks prior to the first public scoping meetings to be held pursuant to this notice.

FOR FURTHER INFORMATION CONTACT: NOAA—Brian Hostetter at 888.547.0174 or by e-mail at *gulfspillcomments@noaa.gov*;

DOI—Robin Renn by e-mail at *Robin_Renn@fws.gov*;

AL— Will Gunter by e-mail at *William.Gunter@dcnr.alabama.gov*;

FL—Lee Edminston or Gil McRae by e-mail at *Lee.Edmiston@dep.state.fl.us* or *Gil.McRae@myfwc.com*;

LA—Karolien Debusschere by e-mail at *karolien.debusschere@la.gov*;

MS—Richard Harrell by e-mail at *Richard_Harrell@deq.state.ms.us*;

TX—Don Pitts by e-mail at *Don.Pitts@tpwd.state.tx.us*.

To be added to the Oil Spill PEIS mailing list, please visit: *http://www.gulfspillrestoration.noaa.gov.*

SUPPLEMENTARY INFORMATION: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce is the lead agency for the preparation of the PEIS on behalf of United States Department of the Interior (on behalf of the Fish and Wildlife Service, the National Park Service, the Bureau of Land Management and the Bureau of Indian Affairs) ("DOI"); the Louisiana Coastal Protection and Restoration Authority, the Louisiana Oil Spill Coordinator's Office, the Louisiana Department of Environmental Quality, the Louisiana Department of Wildlife and Fisheries, and the Louisiana Department of Natural Resources, for the State of Louisiana; the Mississippi Department of Environmental Quality, for the State of Mississippi; the Alabama Department of Conservation and Natural Resources and the Geological Survey of Alabama, for the State of Alabama; the Florida Department of Environmental Protection and the Florida Fish and Wildlife Conservation Commission for the State of Florida; and the Texas Parks and Wildlife Department, Texas General Land Office, and the Texas Commission on Environmental Quality, for the State of Texas.

Under the Oil Pollution Act (OPA), 33 U.S.C. 2701 *et seq.* Responsible Parties incur liability for the costs of cleaning up the oil and for the restoration of injured natural resources and their services. Liability for natural resource injuries caused by the Oil Spill can also flow from the Park System Resource Protection Act (PSRPA) (16 U.S.C. 19jj), the National Marine Sanctuaries Act (16 U.S.C. 1431 *et seq.*), and other federal

and state laws. The Trustee agencies, including NOAA, are leading efforts to assess and restore affected resources. These resources include ecologically, recreationally, and commercially important species and their habitats in the Gulf of Mexico and along the coastal areas of Louisiana, Mississippi, Alabama, Texas, and Florida, as well as human uses of these resources.

Natural Resource Damage Assessment (NRDA) is the process established under OPA to evaluate the impacts to natural resources and lost human uses of those resources. Information continues to be collected on pre-oiled and oiled areas to assess potential impacts to natural resources, including: fish, shellfish, marine mammals, turtles, birds, and other sensitive resources and their habitats, including; wetlands, beaches, mudflats, bottom sediments, corals, and the water column. Losses of commercial and recreational human uses such as fishing, hunting, boating, and beach enjoyment are also being assessed.

OPA authorizes certain federal and state agencies and Indian tribes to be designated as Trustees for affected natural resources. Under OPA, these agencies and tribes are authorized to assess natural resource injuries and to seek compensation from RPs, including the costs of performing the damage assessment. The Trustees are required to use recovered damages only to restore, replace or acquire the equivalent of injured or lost resources and the human use of those resources. Toward that end, the PEIS will identify types of restoration that could be used to compensate the public for lost resources and their services, as well as a framework and procedures for the selection and implementation of restoration projects that will compensate the public for the natural resource damages caused by the Oil Spill.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* and the Council on Environmental Quality regulations implementing NEPA under 40 CFR Chapter V apply to restoration actions by federal trustees. The federal and state Trustees will be developing a PEIS to help guide restoration actions associated with the NRDA for the Oil Spill. The PEIS will assess the environmental, social, and economic attributes of the affected environment and the potential consequences of alternative actions to restore, rehabilitate, replace, or acquire the equivalent of natural resources and services potentially injured by the spill. A PEIS may be prepared to evaluate actions that encompass a large geographic scale. Tiered analyses considering particular restoration actions may be required in the future as specific plans for implementing particular alternatives are established.

The purpose of the scoping process is to identify the concerns of the affected public and federal agencies, states, and Indian tribes, involve the public early in the decision making process, facilitate an efficient PEIS preparation process, define the issues and alternatives that will be examined in detail, and save time by ensuring that draft documents adequately address relevant issues. The scoping process reduces paperwork and delay by ensuring that important issues are addressed early. Following the scoping process, the Trustees will prepare a draft PEIS, at which time the public will be encouraged to comment on the document. Similar to the scoping process, public comment meetings will be held at that time to gather oral and written public input on the draft PEIS.

In compliance with 15 CFR 990.45, the Trustees will prepare an Administrative Record (Record). The Record will include documents that the Trustees relied on during the development of the PEIS. After preparation, the Record will be on file at the NOAA Restoration Center in Silver Spring, MD, and duplicate copies will be maintained at the following Web site: *http://www.darrp.noaa.gov/*. The specific web page will be provided in the next public notice.

The draft PEIS document is intended to be released for public comment by Fall/Winter, 2011. Specific dates and times for future events will be publicized when scheduled.

Dated: February 11, 2011.

Patricia A. Montanio,

Director, Office of Habitat Conservation, National Marine Fisheries Service.

[FR Doc. 2011–3634 Filed 2–16–11; 8:45 am]

BILLING CODE 3510–22–P

COMMISSION OF FINE ARTS

Notice of Meeting

The next meeting of the U.S. Commission of Fine Arts is scheduled for 17 February 2011, at 10 a.m. in the Commission offices at the National Building Museum, Suite 312, Judiciary Square, 401 F Street, NW., Washington, DC 20001–2728. Items of discussion may include buildings, parks and memorials.

Draft agendas and additional information regarding the Commission are available on our Web site: *http://www.cfa.gov.* Inquiries regarding the agenda and requests to submit written or oral statements should be addressed to Thomas Luebke, Secretary, U.S. Commission of Fine Arts, at the above address; by e-mailing *staff@cfa.gov;* or by calling 202–504–2200. Individuals requiring sign language interpretation for the hearing impaired should contact the Secretary at least 10 days before the meeting date.

Dated February 8, 2011 in Washington, DC.

Thomas Luebke,

Secretary.

[FR Doc. 2011–3563 Filed 2–16–11; 8:45 am]

BILLING CODE 6330–01–M

CONSUMER PRODUCT SAFETY COMMISSION

Public Availability of Consumer Product Safety Commission FY 2010 Service Contract Inventory

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The Consumer Product Safety Commission ("CPSC" or "we"), in accordance with section 743(c) of Division C of the Consolidated Appropriations Act, 2010 (Pub. L. 111–117, 123 Stat. 3034, 3216), is announcing the availability of its service contract inventory for fiscal year ("FY") 2010. This inventory provides information on service contract actions over $25,000 that we made in FY 2010.

FOR FURTHER INFORMATION CONTACT: Donna Hutton, Director, Division of Procurement Services, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814. *Telephone:* 301–504–7009; e-mail *dhutton@cpsc.gov.*

SUPPLEMENTARY INFORMATION: On December 16, 2009, the Consolidated Appropriations Act, 2010 "Consolidated Appropriations Act"), Public Law 111–117, became law. Section 743(a) of the Consolidated Appropriations Act, titled "Service Contract Inventory Requirement," requires agencies to submit to the Office of Management and Budget ("OMB") an annual inventory of service contracts awarded or extended through the exercise of an option on or after April 1, 2010 and describes the contents of the inventory. The contents of the inventory include:

(A) A description of the services purchased by the executive agency and the role the services played in achieving agency objectives, regardless of whether such a purchase was made through a contract or task order;

(B) The organizational component of the executive agency administering the

contract, and the organizational component of the agency whose requirements are being met through contractor performance of the service;

(C) The total dollar amount obligated for services under the contract and the funding source for the contract;

(D) The total dollar amount invoiced for services under the contract;

(E) The contract type and date of award;

(F) The name of the contractor and place of performance;

(G) The number and work location of contractor and subcontractor employees, expressed as full-time equivalents for direct labor, compensated under the contract;

(H) Whether the contract is a personal services contract; and

(I) Whether the contract was awarded on a noncompetitive basis, regardless of date of award.

Section 743(a)(3)(A) through (I) of the Consolidated Appropriations Act. Section 743(c) of the Consolidated Appropriations Act requires agencies to "publish in the **Federal Register** a notice that the inventory is available to the public."

Consequently, through this notice, we are announcing that the CPSC's service contract inventory for FY 2010 is available to the public. The inventory provides information on service contract actions over $25,000 that we made in FY 2010. The information is organized by function to show how contracted resources are distributed throughout the CPSC. We developed the inventory in accordance with guidance issued on November 5, 2010 by the OMB. (The OMB guidance is available at *http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf.*) The CPSC's Division of Procurement Services has posted its inventory, and a summary of the inventory can be found at our homepage at the following link: *http://www.cpsc.gov/cpscpub/pubs/reports/2010inventories.pdf.*

Dated: February 14, 2011.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2011–3609 Filed 2–16–11; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Efficiency Initiative Effort To Reduce Non-Value-Added Costs Imposed on Industry by Department of Defense Acquisition Practices

AGENCY: Department of Defense (DoD).

ACTION: Request for public comments.

SUMMARY: The Department of Defense understands that some of its mandates, reporting requirements, and other acquisition practices encourage industry to adopt processes and make investments that increase costs, especially overhead costs, but do not contribute to value added in systems and services delivered to the Department. To implement the memorandum from Under Secretary of Defense (Acquisition, Technology, and Logistics) Dr. Ashton Carter, dated September 14, 2010, Memorandum to Acquisition Professionals, DoD is requesting information from the industrial base to identify the sources of these costs, backed by specific, credible, convincing data. DoD's goal is to develop a fact-based program to reform cost-inflating practices.

DATES: Submit written comments to the address shown below on or before March 31, 2011.

ADDRESSES: Submit comments to: Deputy Assistant Secretary of Defense for Industrial Policy, 3330 Defense Pentagon, Washington, DC 20301; or e-mail to *efficiency.ip@osd.mil.*

FOR FURTHER INFORMATION CONTACT: Dr. Eugene Gholz, telephone 571–256–2974, or e-mail *Eugene.Gholz@osd.mil.*

SUPPLEMENTARY INFORMATION: During the summer of 2010, industry voluntarily furnished nearly 500 suggestions to the Department of Defense as part of the first stage of Undersecretary Carter's Better Buying Power Initiative. Many of these suggestions were incorporated into the September 14, 2010, memorandum; others involved changes that can only be made over the longer term or require additional follow-up data before they are ready for possible action. DoD hopes that the current request for comments will yield the additional data that it needs along with information about some additional areas of non-value-added cost.

Submissions should specifically identify policies and practices that increase industry's non-value-added costs. They should draw on a reasonable definition of "non-value-added," understanding that statutes and defense policies reflect persistent American values, including but not limited to, a clear focus on warfighting performance. It is not reasonable to count all costs associated with core laws governing defense acquisition as non-value added, but data on the costs of technical and administrative decisions within the statutory framework and on particular aspects of the laws would help the Efficiency Initiative move forward. As an example, earlier industry comments on the potential effects of adjusting thresholds in the Truth in Negotiations Act (TINA) for inflation seem to be at an appropriate level of analysis.

The supporting data should give a clear indication of the magnitude of the cost, so that DoD can evaluate and prioritize the information. Submissions should also explain how the data were collected and the relevant costs were counted or estimated. DoD is looking for the sort of data used in the 1994 Defense Science Board study, The DoD Regulatory Cost Premium: A Quantitative Assessment. DoD is particularly interested in data that would allow it to follow up on earlier industry submissions about the effects of particular TINA provisions, particular audit practices, and particular barriers to right-sizing industry capacity for current and projected future levels of demand.

DoD will use these submissions as part of its internal deliberations on the Better Buying Power Initiative. We expect to seek further industry comment at a public meeting where we hope that industry experts in contract management and finance will offer comments on the topic areas raised through this request for comments, ensuring that the results of this submission process are not idiosyncratic or overly influenced by particular companies' cost structures. Any information from this request shared at that future meeting will be entirely sanitized.

Submissions are likely to rely on business confidential data. Any business confidential data should be clearly labeled. The information will only be used by individuals in the Department of Defense who need it for purposes of policy development as part of Undersecretary Carter's Efficiency Initiative. Trade secrets and commercial or financial information considered by the submitter to be privileged or confidential, and marked accordingly by the submitter, will be treated as exempt from public disclosure as provided for by 5 U.S.C. 522(b)(4) (Freedom of Information Act rules).

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2011–3600 Filed 2–16–11; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment request.

SUMMARY: The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before April 18, 2011.

ADDRESSES: Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: February 14, 2011.

Darrin A. King,

Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Office of Special Education and Rehabilitative Services

Type of Review: Extension.

Title of Collection: Client Assistance Program.

OMB Control Number: 1820–0528.

Agency Form Number(s): Form RSA–227.

Frequency of Responses: Annually.

Affected Public: Businesses or other for-profit; Not-for-profit institutions State, Local, or Tribal Government, State Educational Agencies or Local Educational Agencies.

Total Estimated Number of Annual Responses: 56.

Total Estimated Number of Annual Burden Hours: 896.

Abstract: Form RSA–227 is used to meet specific data collection requirements contained in Section 112 of the Rehabilitation Act of 1973, as amended, and its implementing Federal Regulations at 34 CFR Part 370. Data from the form have been used to evaluate individual programs. These data also have been used to indicate trends in the provision of services from year to year. In addition, Form RSA–227 will be used to analyze and evaluate the effectiveness of individual Client Assistance Program (CAP) Program grantees. These agencies provide services to individuals seeking or receiving services from programs and projects authorized by the Rehabilitation Act of 1973, as amended. Form RSA–227 has enabled RSA to furnish the President and Congress with data on the provision of advocacy services and has helped to establish a sound basis for future funding requests.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4520. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–3642 Filed 2–16–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment Request.

SUMMARY: The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before April 18, 2011.

ADDRESSES: Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be

processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: February 14, 2011.

Darrin A. King,

Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Office of Postsecondary Education

Type of Review: Extension.

Title of Collection: Financial Status and Program Performance Final Report for State and Partnership for the Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP).

OMB Control Number: 1840–0782.

Agency Form Number(s): N/A.

Frequency of Responses: Once.

Affected Public: Not-for-profit institutions; State, Local, or Tribal Government, State Educational Agencies or Local Educational Agencies.

Total Estimated Number of Annual Responses: 209.

Total Estimated Number of Annual Burden Hours: 8,360.

Abstract: The purpose of this information collection is to determine whether recipients of the Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP) have made substantial progress towards meeting the objectives of their respective projects, as outlined in their grant applications and/or subsequent work plans. In addition, the final report will enable the Department to evaluate each grant project's fiscal operations for the entire grant performance period, and compare total expenditures relative to federal funds awarded, and actual cost-share/matching relative to the total amount in the approved grant application. This report is a means for grantees to share the overall experience of their projects and document achievements and concerns, and describe effects of their projects on participants being served; project barriers and major accomplishments; and evidence of sustainability. The report will be GEAR UP's primary method to collect/analyze data on students' high school graduation and immediate college enrollment rates.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4518. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2011–3637 Filed 2–16–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Professional Development for Arts Educators Program; Office of Innovation and Improvement; Overview Information; Professional Development for Arts Educators (PDAE) Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2011

Catalog of Federal Domestic Assistance (CFDA) Number: 84.351C.

DATES: *Applications Available:* February 17, 2011.

Deadline for Notice of Intent to Apply: March 21, 2011.

Deadline for Transmittal of Applications: April 8, 2011.

Deadline for Intergovernmental Review: June 7, 2011.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: This program supports the implementation of high-quality model professional development programs in elementary and secondary education for music, dance, drama, media arts, or visual arts, including folk arts, for educators and other arts instructional staff of kindergarten through grade 12 (K–12) students in high-poverty schools. The purpose of this program is to strengthen standards-based arts education programs and to help ensure that all students meet challenging State academic content standards and challenging State student academic achievement standards in the arts.

Priorities: This competition includes one absolute priority, two competitive preference priorities, and one invitational priority. The absolute priority is from the notice of final priority, requirements, and definitions for this program (2005 NFP), published in the **Federal Register** on March 30, 2005 (70 FR 16242). The two competitive preference priorities and the invitational priority are from the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486).

Absolute Priority: For FY 2011 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

This priority supports professional development programs for K–12 arts educators and other instructional staff that use innovative instructional methods and current knowledge from education research and focus on—

(1) The development, enhancement, or expansion of standards-based arts education programs; or

(2) The integration of standards-based arts instruction with other core academic area content.

In order to meet this priority, an applicant must demonstrate that the project for which it seeks funding is linked to State and national standards intended to enable all students to meet challenging expectations, and to improving student and school performance.

Note: *National standards* refers to the arts standards developed by the Consortium of National Arts Education Associations. The standards outline what students should know and be able to do in the arts. These are not Department standards.

Competitive Preference Priorities: For FY 2011 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i) we award up to an additional 10 points per competitive preference priority to an application, depending on how well the application meets the priorities.

These priorities are:

1. Enabling More Data-Based Decision-Making

Projects that are designed to collect (or obtain), analyze, and use high-quality and timely data, including data on program participant outcomes, in accordance with privacy requirements (as defined in this notice), in the following priority area: Improving instructional practices, policies, and student outcomes in elementary or secondary schools.

2. Supporting Programs, Practices, or Strategies for Which There Is Strong or Moderate Evidence of Effectiveness

Projects that are supported by strong or moderate evidence (as defined in this notice). A project that is supported by strong evidence (as defined in this notice) will receive more points than a project that is supported by moderate evidence (as defined in this notice).

Invitational Priority: For FY 2011 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is an invitational priority. Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Improving Achievement and High School Graduation Rates

Projects that are designed to address one or more of the following priority areas:

(a) Accelerating learning and helping to improve high school graduation rates and college enrollment rates for students in rural local educational agencies.

(b) Accelerating learning and helping to improve high school graduation rates and college enrollment rates for high-need students.

Application Requirement: The following requirement is from the 2005 NFP (*see* 70 FR 16242–16243).

To be eligible for PDAE Program funds, applicants must propose to carry out professional development programs for arts educators and other instructional staff of K–12 low-income children and youth by implementing projects in schools in which 50 percent or more of the children enrolled are from low-income families (based on the poverty criteria in Title I, section 1113(a)(5) of the Elementary and Secondary Education Act of 1965, as amended.

Note: Applicants will be required to provide evidence that they are serving such schools.

Definitions: The definitions for the terms *art, art educators,* and *integrate* are from the 2005 NFP (*see* 70 FR 16242, 16244). The definition for the term *local educational agency (LEA)* is from 34 CFR 77.1. The definition for the phrase *sustained and intensive* is for the purpose of the program's Government Performance and Results Act [GPRA] measure only. The remaining definitions are from the notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486), and are applicable to the competitive preference and invitational priorities in this notice.

Arts includes music, dance, theater, media arts, or visual arts, including folk arts.

Arts educator means a teacher who works in music, dance, theater, media arts, or visual arts, including folk arts.

Carefully matched comparison group design means a type of quasi-experimental study (as defined in this notice) that attempts to approximate an experimental study (as defined in this notice. More specifically, it is a design in which project participants are matched with non-participants based on key characteristics that are thought to be related to the outcome. These characteristics include, but are not limited to:

(1) Prior test scores and other measures of academic achievement (preferably, the same measures that the study will use to evaluate outcomes for the two groups);

(2) Demographic characteristics, such as age, disability, gender, English proficiency, ethnicity, poverty level, parents' educational attainment, and single- or two-parent family background;

(3) The time period in which the two groups are studied (*e.g.,* the two groups are children entering kindergarten in the same year as opposed to sequential years); and

(4) Methods used to collect outcome data (*e.g.,* the same test of reading skills administered in the same way to both groups).

Experimental study means a study that employs random assignment of, for example, students, teachers, classrooms, schools, or districts to participate in a project being evaluated (treatment group) or not to participate in the project (control group). The effect of the project is the average difference in outcomes between the treatment and control groups.

Integrate means to strengthen (i) the use of high-quality arts instruction within other academic content areas, and (ii) the place of the arts as a core academic subject in the school curriculum.

Interrupted time series design means a type of quasi-experimental study (as defined in this notice) in which the outcome of interest is measured multiple times before and after the treatment for program participants only. If the program had an impact, the outcomes after treatment will have a different slope or level from those before treatment. That is, the series should show an "interruption" of the prior situation at the time when the program was implemented. Adding a comparison group time series, such as schools not participating in the program or schools participating in the program in a different geographic area, substantially increases the reliability of the findings.[1]

Local educational agency (LEA) means—

(a) A public board of education or other public authority legally constituted within a State for either administrative control of or direction of, or to perform service functions for, public elementary or secondary schools in—

(1) A city, county, township, school district, or other political subdivision of a State; or

(2) Such combination of school districts or counties a State recognizes as an administrative agency for its public elementary or secondary schools; or

(b) Any other public institution or agency that has administrative control and direction of a public elementary or secondary school.

(c) As used in 34 CFR parts 400, 408, 525, 526 and 527 (vocational education programs), the term also includes any other public institution or agency that has administrative control and direction of a vocational education program.

Moderate evidence means evidence from previous studies whose designs can support causal conclusions (*i.e.,* studies with high internal validity) but have limited generalizability (*i.e.,* moderate external validity), or studies with high external validity but moderate internal validity. The following would constitute moderate evidence:

(1) At least one well-designed and well-implemented (as defined in this notice) experimental or quasi-experimental study (as defined in this notice) supporting the effectiveness of the practice, strategy, or program, with small sample sizes or other conditions

[1] A single subject or single case design is an adaptation of an interrupted time series design that relies on the comparison of treatment effects on a single subject or group of single subjects. There is little confidence that findings based on this design would be the same for other members of the population. In some single subject designs, treatment reversal or multiple baseline designs are used to increase internal validity. In a treatment reversal design, after a pretreatment or baseline outcome measurement is compared with a post treatment measure, the treatment would then be stopped for a period of time; a second baseline measure of the outcome would be taken, followed by a second application of the treatment or a different treatment. A multiple baseline design addresses concerns about the effects of normal development, timing of the treatment, and amount of the treatment with treatment-reversal designs by using a varying time schedule for introduction of the treatment and/or treatments of different lengths or intensity.

of implementation or analysis that limit generalizability;

(2) At least one well-designed and well-implemented (as defined in this notice) experimental or quasi-experimental study (as defined in this notice) that does not demonstrate equivalence between the intervention and comparison groups at program entry but that has no other major flaws related to internal validity; or

(3) Correlational research with strong statistical controls for selection bias and for discerning the influence of internal factors.

Privacy requirements means the requirements of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and its implementing regulations in 34 CFR part 99, the Privacy Act, 5 U.S.C. 552a, as well as all applicable Federal, State and local requirements regarding privacy.

Quasi-experimental study means an evaluation design that attempts to approximate an experimental study (as defined in this notice) and can support causal conclusions (*i.e.,* minimizes threats to internal validity, such as selection bias, or allows them to be modeled). Well-designed and well-implemented (as defined in this notice) quasi-experimental studies (as defined in this notice) include carefully matched comparison group designs (as defined in this notice), interrupted time series designs (as defined in this notice), or regression discontinuity designs (as defined in this notice).

Regression discontinuity design study means, in part, a quasi-experimental study (as defined in this notice) design that closely approximates an experimental study (as defined in this notice). In a regression discontinuity design, participants are assigned to a treatment or comparison group based on a numerical rating or score of a variable unrelated to the treatment such as the rating of an application for funding. Another example would be assignment of eligible students, teachers, classrooms, or schools above a certain score ("cut score") to the treatment group and assignment of those below the score to the comparison group.

Strong evidence means evidence from previous studies whose designs can support causal conclusions (*i.e.,* studies with high internal validity), and studies that in total include enough of the range of participants and settings to support scaling up to the State, regional, or national level (*i.e.,* studies with high external validity). The following are examples of strong evidence:

(1) More than one well-designed and well-implemented (as defined in this notice) experimental study (as defined in this notice) or well-designed and well-implemented (as defined in this notice) quasi-experimental study (as defined in this notice) that supports the effectiveness of the practice, strategy, or program; or

(2) One large, well-designed and well-implemented (as defined in this notice) randomized controlled, multisite trial that supports the effectiveness of the practice, strategy, or program.

Sustained and Intensive, as used in the GPRA measure set forth in the Performance Measures section of this notice, means to complete 40 hours of professional development and 75% of the total number of professional development hours offered over a period of 6 or more months.

Well-designed and well-implemented means, with respect to an experimental or quasi-experimental study (as defined in this notice) that the study meets the What Works Clearinghouse evidence standards, with or without reservations (*see http://ies.ed.gov/ncee/wwc/references/idocviewer/doc.aspx?docid=19&tocid=1* and in particular the description of "Reasons for Not Meeting Standards" at *http://ies.ed.gov/ncee/wwc/references/idocviewer/Doc.aspx?docId=19&tocId=4#reasons*).

Program Authority: 20 U.S.C. 7271.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98 and 99. (b) The notice of final priority, requirements, and definitions for this program, published in the **Federal Register** on March 30, 2005 (70 FR 16242). (c) The notice of final supplemental priorities and definitions for discretionary grant programs, published in the **Federal Register** on December 15, 2010 (75 FR 78486).

Note: The regulations in 34 CFR part 79 apply to all applicants except Federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: The Administration's budget request for FY 2011 does not include funds for this program. In place of this and several other, sometimes narrowly targeted, programs focused on student achievement in specific subject areas, the Administration has proposed to create, through the ESEA reauthorization, a broader program, Effective Teaching and Learning for a Well-Rounded Education, that would support activities to improve student achievement and teacher effectiveness in arts and other subject areas. However, we are inviting applications to allow enough time to complete the grant process before the end of the current fiscal year, if Congress appropriates funds for this program.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2012 from the list of unfunded applicants from this competition.

Estimated Range of Awards: $150,000–$350,000 for the first year of the project. Funding for the second and third years is subject to the availability of funds and the approval of continuation awards (*see* 34 CFR 75.253).

Estimated Average Size of Awards: $252,000.

Estimated Number of Awards: 28.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

III. Eligibility Information

1. *Eligible Applicants:* An LEA, which may be a charter school that is considered an LEA under State law and regulations, that is acting on behalf of an individual school or schools that meets the poverty criterion with respect to children from low-income families that is specified in the Application Requirement section elsewhere in this notice, and that must work in partnership with one or more of the following—

- A State or local non-profit or governmental arts organization;
- A State educational agency (SEA) or regional educational service agency;
- An institution of higher education; or
- A public or private agency, institution, or organization, including a museum, an arts education association, a library, a theater, or a community- or faith-based organization.

2.a. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

b. *Supplement-Not-Supplant:* This program involves supplement-not-supplant funding requirements. Under section 5551(f)(2) of the ESEA, the Secretary requires that assistance provided under this program be used only to supplement, and not to supplant, any other assistance or funds made available from non-Federal sources for the activities assisted under the program. This restriction also has the effect of allowing projects to recover

indirect costs only on the basis of a restricted indirect cost rate, according to the requirements in 34 CFR 75.563 and 34 CFR 76.564 through 76.569. As soon as they decide to apply, applicants are urged to contact the ED Indirect Cost Group at (202) 377–3833 for guidance about obtaining a restricted indirect cost rate to use on the Budget Information form (ED Form 524) included with the application package.

3. *Coordination Requirement:* Under section 5551(f)(1) of the ESEA, the Secretary requires that each entity funded under this program coordinate, to the extent practicable, each project or program carried out through its grant with appropriate activities of public or private cultural agencies, institutions, and organizations, including museums, arts education associations, libraries, and theaters.

IV. Application and Submission Information

1. *Address to Request Application Package:* ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.EDPubs.gov* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.351C.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Notice of Intent to Apply: The Department will be able to develop a more efficient process for reviewing grant applications if it has a better understanding of the number of entities that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant to notify the Department by sending a short e-mail message indicating the applicant's intent to submit an application for funding. The e-mail need not include information regarding the content of the proposed application, only the applicant's intent to submit it. The e-mail notification should be sent to the program e-mail address: *pdae@ed.gov.*

Applicants that fail to provide this e-mail notification may still apply for funding.

Page Limit: The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. Applicants are strongly encouraged to limit the application (Part III) to the equivalent of no more than 25 pages, using the following standards:

- A "page" is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the page limit does apply to all of the application narrative section (Part III).

3. *Submission Dates and Times:*

Applications Available: February 17, 2011.

Deadline for Notice of Intent to Apply: March 21, 2011.

Deadline for Transmittal of Applications: April 8, 2011.

Applications for grants under this program must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV.7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: June 7, 2011.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, and Central Contractor Registry:* To do business with the Department of Education, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined in the Grants.gov 3–Step Registration Guide (*see http://*

www.grants.gov/section910/Grants.govRegistrationBrochure.pdf).

7. *Other Submission Requirements:*

Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the PDAE Program, CFDA Number 84.351C, must be submitted electronically using the Governmentwide Grants.gov Apply site at *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the PDAE Program at *http://www.Grants.gov.* You must search for the downloadable application package for this program [competition] by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.351, not 84.351C).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.
- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this program to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *http://www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must attach any narrative sections of your application as files in a .PDF (Portable Document) format only. If you upload a file type other than a .PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; *and*
- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day

before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Isadora Binder, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W246A, Washington, DC 20202–5950. FAX: (202) 205–5630.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.351C), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.351C), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from 34 CFR 75.210. The maximum score for all the selection criteria is 100 points. The maximum score for each criterion is indicated in parentheses. Each criterion also includes the factors that the reviewers will consider in determining how well an application meets the criterion. A note following a selection criterion is guidance to help applicants in preparing their applications, and is not required by statute or regulations. The criteria are as follows:

(1) *Significance* (10 points). The Secretary considers the significance of the proposed project. In determining the significance of the proposed project, the Secretary considers the following factors:

(a) The extent to which the proposed project is likely to build local capacity to provide, improve, or expand services that address the needs of the target population.

(b) The extent to which the results of the proposed project are to be disseminated in ways that will enable others to use the information or strategies.

(2) *Quality of the project design* (10 points). The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the extent to which the proposed project is designed to build capacity and yield results that will extend beyond the period of Federal financial assistance.

(3) *Quality of project services* (20 points). The Secretary considers the quality of the services to be provided by the proposed project. In determining the quality of the services to be provided by the proposed project, the Secretary considers the following factors:

(a) The quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(b) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services.

(c) The likelihood that the services to be provided by the proposed project will lead to improvements in the achievement of students as measured against rigorous academic standards.

(4) *Quality of project personnel* (10 points). The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel, the Secretary considers the following factors:

(a) The extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(b) The qualifications, including relevant training and experience, of key project personnel.

(c) The qualifications, including relevant training and experience, of project consultants or subcontractors.

(5) *Quality of the management plan* (20 points). The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities,

timelines, and milestones for accomplishing project tasks.

(6) *Quality of the project evaluation* (30 points). The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the following factors:

(a) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(b) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

Note: A strong evaluation plan should be included in the application narrative and should be used, as appropriate, to shape the development of the project from the beginning of the grant period. The evaluation plan should include benchmarks to monitor progress toward specific project objectives and also outcome measures to assess the impact on teaching and learning, or other important outcomes for project participants. More specifically, the plan should identify the individual or organization that has agreed to serve as evaluator for the project and describe the qualifications of that evaluator. The plan should describe the evaluation design, indicating: (1) What types of data will be collected; (2) when various types of data will be collected; (3) what methods will be used; (4) what instruments will be developed and when these instruments will be developed; (5) how data will be analyzed; (6) when reports of results and outcomes will be available; and (7) how the applicant will use the information collected through the evaluation to monitor progress of the funded project and to provide accountability information both about success at the initial site and about effective strategies for replication in other settings. Applicants are encouraged to devote an appropriate level of resources to project evaluation.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* We have established two GPRA performance measures for the PDAE Program. The first GPRA measure is: The percentage of teachers participating in the PDAE Program who receive professional development that is sustained and intensive. In implementing this measure, the Department will collect from grantees data on the extent to which they provide professional development that is sustained and intensive in accordance with the definition for the phrase *sustained and intensive* provided elsewhere in this notice. The second GPRA measure is: The percentage of PDAE projects whose teachers show a statistically significant increase in content knowledge in the arts. In implementing this measure, grantees will be expected to administer a pre-test and a post-test of teacher content knowledge in the arts. The pre-test and post-test should be the same test or an equivalent version of the test. Successful applicants will be expected to include professional development data in their annual performance reports to the Department.

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made "substantial progress toward meeting the objectives in its approved application." This consideration includes the review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT:

Isadora Binder, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W246A, Washington, DC 20202 or by e-mail: *pdae@ed.gov.* If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact persons listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

Note: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: February 11, 2011.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2011–3638 Filed 2–16–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

List of Correspondence

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: List of Correspondence from July 1, 2010 through September 30, 2010.

SUMMARY: The Secretary is publishing the following list pursuant to section 607(f) of the Individuals with Disabilities Education Act (IDEA). Under section 607(f) of the IDEA, the Secretary is required, on a quarterly basis, to publish in the **Federal Register** a list of correspondence from the U.S. Department of Education (Department) received by individuals during the previous quarter that describes the interpretations of the Department of the IDEA or the regulations that implement the IDEA.

FOR FURTHER INFORMATION CONTACT: Laura Duos or Mary Louise Dirrigl. *Telephone:* (202) 245–7468.

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

Individuals with disabilities can obtain a copy of this notice in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the contact persons listed under **FOR FURTHER INFORMATION CONTACT.**

SUPPLEMENTARY INFORMATION: The following list identifies correspondence from the Department issued from July 1, 2010 through September 30, 2010. Included on the list are those letters that contain interpretations of the requirements of the IDEA and its implementing regulations, as well as letters and other documents that the Department believes will assist the public in understanding the requirements of the law and its regulations. The date of and topic addressed by each letter are identified, and summary information is also provided, as appropriate. To protect the privacy interests of the individual or individuals involved, personally identifiable information has been redacted, as appropriate.

Part B—Assistance for Education of All Children With Disabilities

SECTION 612—State Eligibility

Topic Addressed: Least Restrictive Environment

○ Letter dated August 23, 2010 to Conference of Educational Administrators of Schools and Programs for the Deaf, Inc. President Edward H. Bosso, Jr., regarding factors to be considered in determining placement for students who are deaf.

SECTION 614—Evaluations, Eligibility Determinations, Individualized Education Programs, and Educational Placements

Topic Addressed: Revocation of Consent

○ Letter dated August 31, 2010 to Kansas State Department of Education Attorney Mark Ward, reiterating that a local educational agency (LEA) must accept either parent's revocation of consent for the child's continued receipt of special education and related services, provided that the parent has legal authority to make educational decisions on behalf of the child.

Topic Addressed: Individualized Education Programs (IEPs)

○ Letter dated August 5, 2010 to Little Cypress-Mauriceville Director of Special Programs Dr. Robert H. Finch, regarding individualized education program (IEP) goals for transfer students with disabilities during the time period when the new public agency is required to provide services comparable to those described in the child's IEP from the previous public agency.

Section 615—Procedural Safeguards

Topic Addressed: Independent Educational Evaluations

○ Letter dated August 13, 2010 to individuals (personally identifiable information redacted), regarding public agency criteria for independent educational evaluations, particularly the qualifications of examiners conducting psychological evaluations.

Topic Addressed: Prior Written Notice

○ Letter dated August 5, 2010 to Missouri Division of Special Education Assistant Commissioner Heidi Atkins-Lieberman, regarding whether a public agency is required to include a child's specific category of eligibility in a prior written notice provided under Part B of the IDEA.

Topic Addressed: Mediation And Resolution Agreements

○ Letter dated July 13, 2010 to Texas Education Agency General Counsel David Anderson, regarding the effect of a settlement agreement resulting from a mediation or resolution meeting on claims raised in subsequent State complaints.

Section 616—Monitoring, Technical Assistance, and Enforcement and Section 642—Federal Administration

Topic Addressed: State Performance Plans

○ Letter dated September 16, 2010 to Florida Infants and Young Children Executive Director Pat Grosz, regarding requirements for States to establish targets of 100 percent for all compliance indicators in State Performance Plans and Annual Performance Reports under Part C of the IDEA.

Electronic Access to This Document

You can view this document, as well as all other Department of Education documents published in the **Federal Register,** in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister/index.html.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

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.*

(Catalog of Federal Domestic Assistance Number 84.027, Assistance to States for Education of Children with Disabilities)

Dated: February 11, 2011.

Alexa Posny,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2011–3635 Filed 2–16–11; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

State Energy Advisory Board (STEAB); Meeting

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a Board meeting of the State Energy Advisory Board (STEAB). The Federal Advisory Committee Act (Pub. L. 92–463; 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: February 22 and 23, 2011, 8 a.m.–5 p.m.

February 24, 2011, 8 a.m.–12 p.m.

ADDRESSES: Doubletree Berkeley Marina, 200 Marina Blvd., Berkeley, CA 94710.

FOR FURTHER INFORMATION CONTACT: Gary Burch, STEAB Designated Federal Officer, Senior Management Technical Advisor, Intergovernmental Projects, Golden Field Office, U.S. Department of Energy, 1617 Cole Boulevard, Golden, CO 80401, Telephone (303) 275–4801.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: To make recommendations to the Assistant Secretary for the Office of Energy Efficiency and Renewable Energy regarding goals and objectives, programmatic and administrative policies, and to otherwise carry out the Board's responsibilities as designated in the State Energy Efficiency Programs Improvement Act of 1990 (Pub. L. 101–440).

Tentative Agenda: Discuss ways the State Energy Advisory Board can continue to support the Department of Energy's (DOE) commercialization and deployment efforts, find ways to encourage energy efficiency market transformation, meet with scientists and senior staff at Lawrence Berkeley National Laboratory (LBNL) in order to receive updates on new and emerging technologies as well as current projects, consider potential collaborative activities with LBNL in order to facilitate renewable energy advancement and deployment, and update members of the STEAB on routine business matters affecting the Board.

Public Participation: The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Gary Burch at the address or telephone number listed above. Requests to make oral comments must be received as soon as possible prior to the meeting; reasonable provision will be made to include requested topic(s) on the agenda. The Chair of the Board is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

This notice is being published less than 15 days prior to the meeting date due to programmatic issues, logistical circumstances, and members' availability. Public notice of the meeting has been on the STEAB's website since January 2011.

Minutes: The minutes of the meeting will be available for public review and copying within 60 days on the STEAB Web site: *www.steab.org.*

Issued at Washington, DC on February 14, 2010.

Carol A. Matthews,

Committee Management Officer.

[FR Doc. 2011–3739 Filed 2–16–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Biomass Research and Development Technical Advisory Committee

AGENCY: Department of Energy, Office of Energy Efficiency and Renewable Energy.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces an open meeting of the Biomass Research and Development Technical Advisory Committee under Section 9008(d) of the Food, Conservation, and Energy Act of 2008. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that agencies publish these notices in the **Federal Register** to allow for public participation. This notice is being published less than 15 days prior to the meeting date due to programmatic issues, logistical circumstances, and members' availability.

DATES: March 2, 2010 8 a.m.–5 p.m.
March 3, 2011 8 a.m.–1:30 p.m.

ADDRESSES: Omni Shoreham Hotel, 2500 Calvert Street, NW., Washington, DC 20008.

FOR FURTHER INFORMATION CONTACT: Laura McCann, Designated Federal Officer, Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585; (202) 586–7766; *E-mail: laura.mccann@ee.doe.gov* or Roy Tiley at (410) 997–7778 ext. 220; *E-mail: rtiley@bcs-hq.com.*

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To provide advice and guidance that promotes research and development leading to the production of biobased fuels and biobased products.

Tentative Agenda: Agenda will include the following:

- Update on USDA Biomass R&D Activities.
- Update on DOE Biomass R&D Activities.
- Overview of the DOE Biomass Program.
- Presentation on Feedstock Logistics.

Public Participation: In keeping with procedures, members of the public are welcome to observe the business of the Biomass Research and Development Technical Advisory Committee. To attend the meeting and/or to make oral statements regarding any of the items on the agenda, you must contact Laura McCann at (202) 586–7766; *E-mail: laura.mccann@ee.doe.gov* or Roy Tiley at (410) 997–7778 ext. 220; *E-mail: rtiley@bcs-hq.com* at least 5 business days prior to the meeting. Members of the public will be heard in the order in which they sign up at the beginning of the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chair of the Committee will make every effort to hear the views of all interested parties. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. The Chair will conduct the meeting to facilitate the orderly conduct of business.

Minutes: The minutes of the meeting will be available for public review and copying at *http://biomassboard.gov/committee/meetings.html.*

Issued at Washington, DC on February 14, 2011.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2011–3599 Filed 2–16–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14085–000]

Village of Swanton, VT; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On February 4, 2011, the Village of Swanton, Vermont (Swanton) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal

Power Act (FPA), proposing to study the feasibility of the Swanton Dam Hydroelectric Project to be located on the Missisquoi River in the Village of Swanton, Franklin County, Vermont. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of: (1) The existing 12-foot-high, 335-foot-long Swanton dam equipped with a 331-foot-long spillway; (2) the existing 170-acre reservoir with a normal water surface elevation of 108 feet NGVD; (3) an existing headgate structure equipped with trashracks; (4) a new powerhouse containing two turbine generating units with a total installed capacity of 825 kilowatts; (5) a new 45-foot-wide, 45-foot-long tailrace; and (6) a new 210-foot-long, 12.47-kilovolt transmission line. The project would produce an estimated average annual generation of about 3,580 megawatt-hours.

Applicant Contact: Paul Nolan, 5515 North 17th Street, Arlington, VA 22205, phone: (703) 534–5509.

FERC Contact: Tom Dean (202) 502–6041.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 Days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–14085) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: February 10, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–3625 Filed 2–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13995–000]

Mill Town Power Project; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On January 4, 2011, Mill Town Power Project filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Chagrin Spillway Hydroelectric Project (Chagrin Spillway Project or project) to be located on the Upper Main Branch of the Chagrin River, in the town of Chagrin Falls, in Cuyahoga County, Ohio. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) An impoundment with a surface area of 0.2 acres at a maximum pool elevation of 940 feet mean sea level; (2) a 9.45-foot-high, 162-foot-long earthen stone and reinforced concrete dam including a 91-foot-long spillway; (3) a new 10-foot-wide intake structure constructed directly upstream of the left side of the dam; (4) a new 75-foot-long, 48-inch-diameter steel penstock leading from the intake structure to the turbine assembly; (5) a new 20-foot-long, 20-foot-wide powerhouse located downstream of the dam containing one S-Type tubular Kaplan turbine-generator unit with a capacity of 110 kilowatts; (6) a new 6-foot-wide, 10-foot-long tailrace; (7) a new 480-volt, 800-foot-long transmission line connecting the powerhouse with a net metering station; and (8) appurtenant facilities. The estimated annual generation of the Chagrin Spillway Project would be 700 megawatt-hours at a head range of 14–17 feet.

Applicant Contact: Mr. Anthony J. Marra III, General Manager, 11365 Normandy Lane, Chagrin Falls, Ohio 44023; *phone:* (440) 804–6627.

FERC Contact: Sergiu Serban; *phone:* (202) 502–6211.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13995–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: February 10, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–3624 Filed 2–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1494–391]

Grand River Dam Authority; Notice of Application Accepted for Filing, Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Types of Application:* Non-Project Use and Occupancy of Project Lands.

b. *Project No.:* 1494–391.

c. *Date Filed:* January 7, 2011.

d. *Applicant:* Grand River Dam Authority (GRDA).

e. *Name of Project:* Pensacola Project.

f. *Location:* Grand (Neosho) River in Craig, Delaware, Mayes, and Ottawa Counties, Oklahoma.

g. *Filed Pursuant to:* Federal Power Act, 16 USC 791a–825r.

h. *Applicant Contact:* Tamara E. Jahnke, Assistant General Counsel, Grand River Dam Authority, P.O. Box 409, Vinita, OK 74301; 918–256–5545; *tjahnke@gdra.com.*

i. *FERC Contact:* Dr. Mark Ivy, (202) 502–6156, Mark.Ivy@*ferc.gov*.

j. Deadline for filing comments, motions to intervene, and protests, is 30 days from the issuance date of this notice. All documents may be filed electronically via the Internet. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp*. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and seven copies should be mailed to: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments.

Please include the project number (P–1494–391) on any comments, motions, or recommendations filed.

k. *Description of Request:* Grand River Dam Authority, licensee for the Pensacola Project, proposes to permit Colonial Center, LP to add a dock with 14 boat slips to an existing marina located in Ketchum Cove on Grand Lake 0' the Cherokees, Mayes County. The additional slips require waivers of GRDA's 125 foot rule and parallel slip rule.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208- 3676 or e-mail *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. Comments, Protests, or Motions to Intervene: Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Responsive Documents: Any filing must (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, motions to intervene, or protests should relate to project works which are the subject of the license surrender. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: February 10, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–3623 Filed 2–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP11–68–000; PF10–19–000]

Equitrans, L.P.; Notice of Application

Take notice that on January 27, 2011, Equitrans, L.P. ("Equitrans"), having its principal place of business at 625 Liberty Avenue, Suite 1700, Pittsburgh, Pennsylvania 15222, filed an application in Docket No. CP11–68–000 pursuant to Section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's Regulations, for a certificate of public convenience and necessity to construct and operate its Sunrise Project. Equitrans' Sunrise Project is designed to provide additional firm capacity of up to 313,560 Dekatherms per day on its system at an incremental rate and will address infrastructure constraints associated with the rapid development of natural gas from the Marcellus Shale formation in the central Appalachian Basin. Specifically, Equitrans proposes to: (1) Construct and operate approximately 41.5 miles of 24-inch diameter pipeline, 0.21-mile of 20-inch pipeline and 2.7 miles of 16-inch pipeline parallel to existing Equitrans transmission and gathering pipelines; (2) replace a 2.6-mile section of inactive 16-inch pipeline with new 20-inch pipeline; (3) retest and uprate 4.8 miles of 20-inch pipeline with appropriate overpressure protection facilities; (4) install one new compressor station consisting of three reciprocating units providing approximately 14,205 horsepower (hp); and (5) perform additional activities for aboveground sites for interconnections,

mainline block valves, launchers and receivers, control systems, and other facilities, all as more fully set forth in the application, which is on file with the Commission and open to public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions regarding this application should be directed to Paul W. Diehl, Senior Counsel-Midstream, EQT Corporation, 625 Liberty Avenue, Suite 1700, Pittsburgh, PA 15222 by calling (412) 395–5540; by faxing (412) 553–7781; or by e-mailing *pdiehl@egt.com.*

On May 28, 2010, the Commission staff granted Equitrans' request to use the pre-filing process and assigned Docket No. PF10–19–000 to staff activities involving the Sunrise Project. Now, as of the filing of this application on January 27, 2011, the NEPA Pre-Filing Process for this project has ended. From this time forward, this proceeding will be conducted in Docket No. CP11–68–000, as noted in the caption of this Notice.

Pursuant to section 157.9 of the Commission's regulations, 18 CFR 157.9, within 90 days of this Notice, the Commission's staff will either complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission's staff issuance of the EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to reach a final decision on a request for federal authorization within 90 days of the date of issuance of the Commission staff's EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. *See,* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link.

Comment Date: March 3, 2011.

Dated: February 10, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–3620 Filed 2–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG11–57–000.
Applicants: Rinehart Solar Farm LLC.
Description: Self-Certification of EG or FC of Blue Chip Energy, LLC.
Filed Date: 02/10/2011.
Accession Number: 20110210–5145.
Comment Date: 5 p.m. Eastern Time on Thursday, March 03, 2011.

Docket Numbers: EG11–58–000.
Applicants: Sorrento Solar Farm LLC.
Description: Self-Certification of EG of Blue Chip Energy, LLC.
Filed Date: 02/10/2011.
Accession Number: 20110210–5144.
Comment Date: 5 p.m. Eastern Time on Thursday, March 03, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER03–721–015.
Applicants: New Harquahala Generating Company, LLC.
Description: Supplemental Information of New Harquahala Generating Company, LLC.
Filed Date: 01/27/2011.
Accession Number: 20110127–5190.
Comment Date: 5 p.m. Eastern Time on Thursday, February 17, 2011.

Docket Numbers: ER07–1195–001.
Applicants: Mittal Steel USA, Inc.
Description: Notice of Non-Material Changes in Status Form of ArcelorMittal USA LLC.
Filed Date: 02/09/2011.
Accession Number: 20110209–5209.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER10–1924–001.
Applicants: Wisconsin Public Service Corporation.
Description: Wisconsin Public Service Corporation submits tariff filing per 35: Notification of Effective Date of WPSC and Marshfield's 2010 Agreement to be effective 2/1/2011.
Filed Date: 02/10/2011.
Accession Number: 20110210–5091.

Comment Date: 5 p.m. Eastern Time on Thursday, March 03, 2011.

Docket Numbers: ER10–2006–001.
Applicants: Hawkeye Power Partners, LLC.
Description: Hawkeye Power Partners, LLC submits tariff filing per 35: Hawkeye Compliance Filing to be effective 7/28/2010.
Filed Date: 02/10/2011.
Accession Number: 20110210–5000.
Comment Date: 5 p.m. Eastern Time on Thursday, March 03, 2011.

Docket Numbers: ER10–3214–002.
Applicants: PH Glatfelter Company.
Description: PH Glatfelter Company submits tariff filing per 35: P.H. Glatfelter Company Filing to be effective 2/8/2011.
Filed Date: 02/09/2011.
Accession Number: 20110209–5170.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER11–2598–002.
Applicants: Gateway Energy Services Corporation.
Description: Gateway Energy Services Corporation submits tariff filing per 35: Supplement to Tariff Revision Regarding Seller Category to be effective 3/4/2011.
Filed Date: 02/10/2011.
Accession Number: 20110210–5139.
Comment Date: 5 p.m. Eastern Time on Thursday, March 03, 2011.

Docket Numbers: ER11–2612–002.
Applicants: MXenergy Electric Inc.
Description: MXenergy Electric Inc. submits tariff filing per 35.17(b): MXenergy Substitute First Revised MBR Tariff to be effective 3/4/2011.
Filed Date: 02/10/2011.
Accession Number: 20110210–5090.
Comment Date: 5 p.m. Eastern Time on Thursday, March 03, 2011.

Docket Numbers: ER11–2730–001.
Applicants: Energy Exchange International, LLC.
Description: Energy Exchange International, LLC submits tariff filing per 35.17(b): Energy Exchange International, LLC Electric Tariff Original Volune No 1, to be effective 3/1/2011.
Filed Date: 02/10/2011.
Accession Number: 20110210–5001.
Comment Date: 5 p.m. Eastern Time on Thursday, March 03, 2011.

Docket Numbers: ER11–2866–000.
Applicants: Cleco Power LLC.
Description: Cleco Power LLC submits tariff filing per 35.13(a)(2)(iii): RS36 Cleco Power/Entergy JOA to be effective 3/31/2011.
Filed Date: 02/10/2011.
Accession Number: 20110210–5034.
Comment Date: 5 p.m. Eastern Time on Thursday, March 03, 2011.

Docket Numbers: ER11–2867–000.
Applicants: Cleco Power LLC.
Description: Cleco Power LLC submits tariff filing per 35.13(a)(2)(iii): Correction for RS10 to be effective 12/31/2011.
Filed Date: 02/10/2011.
Accession Number: 20110210–5062.
Comment Date: 5 p.m. Eastern Time on Thursday, March 03, 2011.

Docket Numbers: ER11–2868–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii): WMPA No. 2721, Queue No. V4–070, Flemington Solar, LLC and JCP&L to be effective 1/13/2011.
Filed Date: 02/10/2011.
Accession Number: 20110210–5101.
Comment Date: 5 p.m. Eastern Time on Thursday, March 03, 2011.

Docket Numbers: ER11–2869–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii): ISA 2775, Queue No. V4–019, PSEG Fossil, L.L.C. and PSE&G to be effective 1/11/2011.
Filed Date: 02/10/2011.
Accession Number: 20110210–5102.
Comment Date: 5 p.m. Eastern Time on Thursday, March 03, 2011.

Docket Numbers: ER11–2870–000.
Applicants: Allegheny Energy Supply Company, LLC.
Description: Allegheny Energy Supply Company, LLC submits tariff filing per 35: Allegheny Energy Supply ER11–2203 Compliance Filing to be effective 1/1/2011.
Filed Date: 02/10/2011.
Accession Number: 20110210–5130.
Comment Date: 5 p.m. Eastern Time on Thursday, March 03, 2011.

Docket Numbers: ER11–2871–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits tariff filing per 35.15: Notice of Cancellation of Letter Agreement for the Manzana Wind Project SA 87 to be effective 1/10/2011.
Filed Date: 02/10/2011.
Accession Number: 20110210–5141.
Comment Date: 5 p.m. Eastern Time on Thursday, March 03, 2011.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES11–15–000.
Applicants: Michigan Electric Transmission Co., LLC.
Description: Updated Exhibits of Michigan Electric Transmission Company, LLC.
Filed Date: 02/09/2011.
Accession Number: 20110209–5207.
Comment Date: 5 p.m. Eastern Time on Friday, February 18, 2011.

Docket Numbers: ES11–16–000.
Applicants: International Transmission Company.
Description: International Transmission Company Updated Exhibits to Application.
Filed Date: 02/09/2011.
Accession Number: 20110209–5206.
Comment Date: 5 p.m. Eastern Time on Friday, February 18, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern Time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online

service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 10, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–3577 Filed 2–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC11–42–000.
Applicants: Millennium Power Partners, L.P., New Harquahala Generating Company, LLC, MACH Gen, LLC, New Athens Generating Company, LLC, SOLA LTD, Solus Alternative Asset Management LP.
Description: Application of MACH Gen, LLC *et al.* for Order Authorizing Disposition of Jurisdictional Facilities under Section 203 of the Federal Power and Request for Waivers and Expedited Action.
Filed Date: 02/09/2011.
Accession Number: 20110209–5082.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG11–56–000.
Applicants: Coyote Canyon Energy LLC.
Description: Self-Certification of EG of Coyote Canyon Energy LLC.
Filed Date: 02/09/2011.
Accession Number: 20110209–5109.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1988–001.
Applicants: Sagebrush, a California partnership.
Description: Sagebrush, a California Partnership submits tariff filing per 35: Sagebrush Compliance Filing to the OATT FINAL to be effective 12/31/2011.
Filed Date: 11/15/2010.
Accession Number: 20101115–5158.
Comment Date: 5 p.m. Eastern Time on Wednesday, February 16, 2011.

Docket Numbers: ER10–2801–002.
Applicants: Dunkirk Power LLC.
Description: Dunkirk Power LLC submits tariff filing per 35: Dunkirk—Amendment to MBR Tariff 01272011 to be effective 10/8/2010.
Filed Date: 01/27/2011.
Accession Number: 20110127–5137.
Comment Date: 5 p.m. Eastern Time on Thursday, February 17, 2011.

Docket Numbers: ER10–3298–001.
Applicants: Powerex Corporation.
Description: Powerex Corporation submits tariff filing per 35: Amendment to Powerex Rate Schedule No. 5 to be effective 9/30/2010.
Filed Date: 02/09/2011.
Accession Number: 20110209–5081.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER10–1518–001; ER10–2765–002; ER10–2766–002; ER10–2767–002; ER10–2768–002; ER10–2769–002; ER10–2770–002.
Applicants: Milford Power Company, LLC, MASSPOWER, Lake Road Generating Company, L.P., Empire Generating Co, LLC, ECP Energy I, LLC, EquiPower Resources Management, LLC, Dighton Power, LLC.
Description: Notification of Change in Status of Dighton Power, LLC, *et al.*
Filed Date: 02/09/2011.
Accession Number: 20110209–5100.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER11–2424–001.
Applicants: Pinetree Power-Tamworth, Inc.
Description: Pinetree Power-Tamworth, Inc. submits tariff filing per 35.17(b): Pinetree Power—Tamworth, Inc.—Supplement to Filing of Initial Tariff to be effective 1/1/2011.
Filed Date: 02/09/2011.
Accession Number: 20110209–5135.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER11–2693–001.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.17(b): 02–09–2011 to J102 to be effective 1/19/2011.
Filed Date: 02/09/2011.
Accession Number: 20110209–5147.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER11–2854–000.
Applicants: Mirant Potomac River, LLC.
Description: Mirant Potomac River, LLC submits tariff filing per 35.13(a)(2)(iii): Notice of Succession to be effective 1/20/2011.
Filed Date: 02/08/2011.
Accession Number: 20110208–5164.
Comment Date: 5 p.m. Eastern Time on Tuesday, March 01, 2011.

Docket Numbers: ER11–2855–000.
Applicants: Avenal Park LLC.
Description: Avenal Park LLC submits tariff filing per 35.12: Application for Market-Based Rate Authority to be effective 3/7/2011.
Filed Date: 02/09/2011.
Accession Number: 20110209–5000.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER11–2856–000.
Applicants: Sand Drag LLC.
Description: Sand Drag LLC submits tariff filing per 35.12: Application for Market-Based Rate Authority to be effective 3/7/2011.
Filed Date: 02/09/2011.
Accession Number: 20110209–5001.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER11–2857–000.
Applicants: Sun City Project LLC.
Description: Sun City Project LLC submits tariff filing per 35.12: Application for Market-Based Rates to be effective 3/7/2011.
Filed Date: 02/09/2011.
Accession Number: 20110209–5002.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER11–2858–000.
Applicants: Public Service Company of New Mexico.
Description: Public Service Company of New Mexico submits tariff filing per 35.12: OATT Service Agreement No. 368 to be effective 1/12/2011.
Filed Date: 02/09/2011.
Accession Number: 20110209–5004.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER11–2859–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company Cancellation of Ltr Agreement with City of Pasadena for CB Replacement.
Filed Date: 02/09/2011.
Accession Number: 20110209–5091.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER11–2860–000.
Applicants: Coyote Canyon Energy LLC.
Description: Coyote Canyon Energy LLC submits tariff filing per 35.12: FERC Electric Tariff Volume No.1 to be effective 4/11/2011.
Filed Date: 02/09/2011.
Accession Number: 20110209–5092.
Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER11–2861–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits tariff filing per

35.13(a)(2)(iii): Revision to Attachment AD to Temporarily Extend Tariff Administration Agreement to be effective 2/1/2011.

Filed Date: 02/09/2011.

Accession Number: 20110209–5132.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER11–2862–000.

Applicants: Entergy Arkansas, Inc.

Description: Entergy Arkansas, Inc. submits tariff filing per 35.13(a)(2)(iii): Plum Point Amended IOA to be effective 4/10/2011.

Filed Date: 02/09/2011.

Accession Number: 20110209–5166.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER11–2863–000.

Applicants: Mirant Mid-Atlantic, LLC.

Description: Mirant Mid-Atlantic, LLC submits tariff filing per 35.13(a)(2)(iii): Notice of Succession to be effective 1/20/2011.

Filed Date: 02/09/2011.

Accession Number: 20110209–5167.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER11–2864–000.

Applicants: GenOn Chalk Point, LLC.

Description: GenOn Chalk Point, LLC submits tariff filing per 35.13(a)(2)(iii): Notice of Succession to be effective 1/20/2011.

Filed Date: 02/09/2011.

Accession Number: 20110209–5183.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Docket Numbers: ER11–2865–000.

Applicants: AEP Texas Central Company.

Description: AEP Texas Central Company submits tariff filing per 35.13(a)(2)(iii): 20110209 TCC–ETT IA Amend 1 to be effective 1/21/2011.

Filed Date: 02/09/2011.

Accession Number: 20110209–5184.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 02, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern Time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 9, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–3578 Filed 2–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IN07–26–004]

Brian Hunter; Third Supplemental Notice of Designation of Commission Staff

On February 1, 2008, the Commission issued an order that, *inter alia,* designated the staff of the Office of Enforcement as non-decisional in deliberations by the Commission in this proceeding, with the exception of the Director of the Office of Enforcement and the Directors of the Divisions of Investigations, Energy Market Oversight, Audits, and Financial Regulation. On May 6, 2008, in a Supplemental Notice of Designation of Commission Staff, Shauna Coleman, an attorney in the Office of Enforcement was designated as an additional exception to the designation of the Office of Enforcement as non-decisional.

On August 20, 2009, the Commission issued the Second Supplemental Notice of Designation of Commission Staff designating Larry Gasteiger, Deputy Direction of the Office of Enforcement, and Max Minzner, Senior Counsel to the Director of the Office of Enforcement, as additional exceptions to the designation of the Office of Enforcement as non-decisional. Mr. Minzner is no longer employed by the Commission.

In this notice, the Commission designates James Meade, Attorney Advisor, as an additional exception to the designation of the Office of Enforcement as non-decisional. Mr. Meade joined the Office of Enforcement after the previous notices were issued and did not participate in the investigation at issue in this proceeding.

Dated: February 10, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–3622 Filed 2–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 12615–001; 13528–000]

Soule Hydro, LLC; Notice of Draft License Application and Preliminary Draft Environmental Assessment (PDEA) and Request for Preliminary Terms and Conditions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Major Unconstructed Project.

b. *Project No.:* 12615–001; 13528–000.

c. *Date Filed:* February 3, 2011.

d. *Applicant:* Soule Hydro, LLC.

e. *Name of Project:* Soule River Hydroelectric Project.

f. *Location:* On the Soule River, approximately nine miles southwest of the community of Hyder, Alaska. The project would occupy 1,257 acres of federal lands within the Tongass National Forest, administered by the U.S. Forest Service.

g. *Filed Pursuant to:* Federal Power Act 16 USC 791(a)—825(r).

h. *Applicant Contact:* Glen D. Martin, C/O Alaska Power & Telephone Company, P.O. Box 3222, Port Townsend, WA 98368, (360) 385–1733 x 122.

i. *FERC Contact:* Matt Cutlip, (503) 552–2762, *matt.cutlip@ferc.gov.*

j. *Status of Project:* With this notice the Commission is soliciting (1) preliminary terms, conditions, and recommendations on the Preliminary Draft Environmental Assessment (DEA), and (2) comments on the Draft License Application.

k. *Deadline for filing:* May 2, 2011.

All comments on the Preliminary DEA and Draft License Application should be sent to the addresses noted above in Item (h), and filed with FERC. Comments may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

All comments must include the project name and number and bear the heading Preliminary Comments, Preliminary Recommendations, Preliminary Terms and Conditions, or Preliminary Prescriptions.

l. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Soule Hydro, LLC has mailed a copy of the Preliminary DEA and Draft License Application to interested entities and parties. Copies of these documents are available for review at AP&T Wireless, Inc., 4033 Tongass Avenue, Suite 100, Ketchikan, Alaska 99901, or by calling (360) 385–1733 x 122 or by e-mailing *glen.m@aptalaska.com.*

m. With this notice, we are initiating consultation with the Alaska State Historic Preservation Officer as required by Section 106, National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36 CFR 800.4.

Dated: February 10, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–3619 Filed 2–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR11–86–000]

Arkansas Oklahoma Gas Corporation; Notice of Filing

Take notice that on January 14, 2011, Arkansas Oklahoma Gas Corporation (AOG) filed to request a case-specific waiver of section 284.126(b)(1)(iv) of the Commission's regulations which was promulgated in Order No. 735.[1] Order No. 735 requires all section 311 and Hinshaw pipelines to file quarterly reports containing transportation transaction information including receipt points for each transaction. AOG requests waiver so that it can identify "production pool" as the receipt point for its transactions instead of a specific receipt point as more fully described in the filing.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern time on Friday, February 18, 2011.

Dated: February 10, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–3626 Filed 2–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2857–000]

Sun City Project LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Sun City Project LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is March 2, 2011.

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[1] Contract Reporting Requirements of Intrastate Natural Gas Companies, Order No. 735, 131 FERC ¶ 61,150 (May 20, 2010).

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 10, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–3574 Filed 2–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2844–000]

Adagio Energy LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Adagio Energy LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is March 2, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 10, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–3575 Filed 2–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2860–000]

Coyote Canyon Energy LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Coyote Canyon Energy LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is March 2, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 10, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–3579 Filed 2–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2856–000]

Sand Drag LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Sand Drag LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is March 2, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 10, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–3580 Filed 2–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2855–000]

Avenal Park LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

February 10, 2011.

This is a supplemental notice in the above-referenced proceeding of Avenal Park LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is March 2, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: February 10, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–3576 Filed 2–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL11–19–000]

Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas & Electric Company; Notice of Petition

Take notice that on January 31, 2011, pursuant to section 210(h)(2) of the Public Utility Regulatory Policies Act of 1978 (PURPA),[1] Southern California Edison Company (SCE), Pacific Gas and Electric Company (PG&E), and San Diego Gas & Electric Company (SDG&E) filed a petition requesting that the Federal Energy Regulatory Commission (Commission) enforce the requirements of PURPA against the Public Utilities Commission of the State of California (CPUC), and find that the CPUC's AB 1613 Decisions[2] violate PURPA and the Commission's Regulations implementing PURPA.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the

[1] 16 U.S.C. 824a–3(h)(2) (2006).

[2] The AB 1613 Decisions consist of the following CPUC decisions issued in rulemaking docket R.08–06–024: (1) Decision Adopting Policies and Procedures for Purchase of Excess Electricity Under Assembly Bill 1613, D.09–12–042 (Dec. 21, 2009), (2) Order Dismissing Motion for Stay of Decision (D.) 09–12–042, Modifying D.09–12–042, and Denying Rehearing of D.09–12–042, as Modified, D.10–04–055 (Apr. 26, 2010), and (3) Decision Granting, in Part, and Denying in Part, Joint Petition of Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company for Modification of Decision 09–12–042, D.10–12–055 (Dec.17, 2010), *rehearing pending.* Page citations to CPUC Decisions are to the .pdf versions posted on the CPUC Web site.

Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on February 22, 2011.

Dated: February 10, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–3621 Filed 2–16–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Southeastern Power Administration

Jim Woodruff Project

AGENCY: Southeastern Power Administration, DOE.

ACTION: Notice of Proposed Rate Adjustment.

SUMMARY: Southeastern proposes a new rate schedule JW–1–J to replace Wholesale Power Rate Schedules JW–1–I for a five-year period from September 20, 2011, to September 19, 2016. Rate schedule JW–1–J would be applicable to Southeastern power sold to existing preference customers in the Florida Power Corporation service (Progress Energy) area. In addition, Southeastern proposes to extend Rate schedule JW–2–F, applicable to Florida Power Corporation, to September 19, 2016.

DATES: Written comments are due on or before May 18, 2011. A public information and public comment forum will be held at Courtyard by Marriott, in Tallahassee, Florida, at 10 a.m. on March 29, 2011. Persons desiring to speak at the forum are requested to notify Southeastern at least seven (7) days before the forum is scheduled so that a list of forum participants can be prepared. Others present may speak if time permits. Persons desiring to attend the forum should also notify Southeastern at least seven (7) days before the forum is scheduled. If Southeastern has not been notified by close of business on March 22, 2011, that at least one person intends to be present at the forum, the forum will be canceled with no further notice.

ADDRESSES: Written comments should be submitted to: Kenneth E. Legg, Administrator, Southeastern Power Administration, Department of Energy, 1166 Athens Tech Road, Elberton, Georgia 30635–6711. The public comment Forum will meet at the Courtyard by Marriott, 1018 Apalachee Parkway, Tallahassee, Florida, 32301 *Phone:* (850) 222–8822.

FOR FURTHER INFORMATION CONTACT: J. W. Smith, Southeastern Power Administration, Department of Energy, 1166 Athens Tech Road, Elberton, Georgia 30635–6711, (706) 213–3800.

SUPPLEMENTARY INFORMATION: Existing rate schedules are supported by a July 2009 Repayment Study and other supporting data contained in FERC Docket No. EF09–3031–000. A repayment study prepared in January 2011 shows that the existing rates are adequate to meet repayment criteria. However, the Jim Woodruff preference customers have asked Southeastern to revise the rates to include a pass-through of purchased power expenses. The capacity and energy charges to preference customers can be reduced because purchased power expenses will be recovered in a separate, pass-through charge to the affected customers.

In the proposed rate schedule JW–1–J, which is available to preference customers, the capacity charge would be reduced from $13.06 per kilowatt per month to $10.29 per kilowatt per month. The energy charge would be reduced from 32.07 mills per kilowatt-hour to 26.51 mills per kilowatt-hour. Rate schedule JW–2–F, available to Florida Power Corporation (FPC), would continue the rate of 100 percent of FPC's fuel cost.

In addition to the capacity and energy charges, each preference customer would be charged for power purchased by Southeastern on behalf of the preference customer. This pass-through would be computed as follows:

On or about the 20th of each month, Progress Energy would provide Southeastern with the meter readings for preference customers' delivery points that have an allocation of capacity from Southeastern. Subsequently, Progress Energy would provide Southeastern with reports of purchased power and support capacity requirements around the 10th of the succeeding month. Southeastern would compute its purchased power obligation for each delivery point monthly. Southeastern would compute any revenue from sales to Progress Energy for each delivery point monthly. Southeastern would sum the purchased power obligation and any revenue from sales to Progress Energy for each preference customer monthly. The purchased power obligation minus any revenue from sales to Progress Energy for each customer would be called the Net Purchased Power Cost. Southeastern would charge each customer its respective monthly Net Purchased Power Cost in equal portions over the next eleven (11) billing months. This computation of the pass-through would begin twelve (12) months before the pass-through is implemented. The first bill prepared using this method would include the computations for the previous twelve (12) months.

The proposed rate schedules are available for examination at 1166 Athens Tech Road, Elberton, Georgia, 30635–6711, as is the January 2011 repayment study.

Dated: February 9, 2011.

Kenneth E. Legg,

Administrator.

[FR Doc. 2011–3596 Filed 2–16–11; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9267–7]

Auclair Superfund Site; Notice of Proposed Administrative Settlement Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with section 122(i) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative settlement (Region 9 Docket No. 2011–02), pursuant to Section 122(h) of CERCLA, concerning the Auclair Superfund Site (the "Site"), located on the Torres Martinez Desert

Cahuilla Indian Reservation, Riverside County, California. The settling party is Belmont Produce Sales, Inc. ("Settling Party"). In the Agreement, the Settling Party will reimburse the United States $25,000 for response costs incurred at the Site. For thirty (30) days following the date of publication of this Notice, the Agency will receive written comments relating to the proposed settlement. The Agency's response to any comments received will be available for public inspection at EPA's Region IX offices, located at 75 Hawthorne Street, San Francisco, California 94105. The EPA will consider all comments it receives during this period, and may modify or withdraw its consent to the settlement if any comments disclose facts or considerations indicating that the settlement is inappropriate, improper, or inadequate.

DATES: EPA will receive written comments relating to the settlement until March 21, 2011.

ADDRESSES: The proposed settlement agreement may be obtained from the U.S. EPA Superfund Records Center, telephone (415) 536–2000. Written comments regarding the proposed settlement should be addressed to Letitia Moore, Office of Regional Counsel, at the U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street (mail code ORC–3), San Francisco, California 94105–3901, and should reference the Auclair Superfund Site and Region IX Docket No. 2011–02.

FOR FURTHER INFORMATION CONTACT: Letitia Moore, Office of Regional Counsel, (415) 972–3928, U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street (mail code ORC–3), San Francisco, California 94105–3901.

Dated: February 8, 2011.

Dan Meer,

Assistant Director, Emergency Response, Preparedness & Prevention Branch, Superfund Division, Region IX.

[FR Doc. 2011–3614 Filed 2–16–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than March 4, 2011.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *John D. Connolly,* Danvers, Minnesota; to acquire and retain voting shares of West 12 Bancorporation, Inc., and thereby indirectly acquire and retain control of State Bank of Danvers, both in Danvers, Minnesota.

B. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Randal S. Shannon,* Drexel, Missouri; to acquire shares of Amsterdam Bancshares, Inc., and thereby indirectly acquire shares of Citizens Bank, both in Amsterdam, Missouri.

Board of Governors of the Federal Reserve System, February 14, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–3606 Filed 2–16–11; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Patient Safety Organizations: Voluntary Delisting From Rocky Mountain Patient Safety Organization

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Notice of Delisting.

SUMMARY: Rocky Mountain Patient Safety Organization: AHRQ has accepted a notification of voluntary relinquishment from Rocky Mountain Patient Safety Organization, a component entity of Colorado Hospital Association, of its status as a Patient Safety Organization (PSO). The Patient Safety and Quality Improvement Act of 2005 (Patient Safety Act), Public Law 109–41, 42 U.S.C. 299b–21–b–26, provides for the formation of PSOs, which collect, aggregate, and analyze confidential information regarding the quality and safety of health care delivery. The Patient Safety and Quality Improvement Final Rule (Patient Safety Rule), 42 CFR Part 3, authorizes AHRQ, on behalf of the Secretary of HHS, to list as a PSO an entity that attests that it meets the statutory and regulatory requirements for listing. A PSO can be "delisted" by the Secretary if it is found to no longer meet the requirements of the Patient Safety Act and Patient Safety Rule, including when a PSO chooses to voluntarily relinquish its status as a PSO for any reason.

DATES: The directories for both listed and delisted PSOs are ongoing and reviewed weekly by AHRQ. The delisting was effective at 12 Midnight ET (2400) on January 19, 2011.

ADDRESSES: Both directories can be accessed electronically at the following HHS Web site: *http://www.pso.AHRQ.gov/index.html.*

FOR FURTHER INFORMATION CONTACT: Diane Cousins, RPh., Center for Quality Improvement and Patient Safety, AHRQ, 540 Gaither Road, Rockville, MD 20850; Telephone (toll free): (866) 403–3697; Telephone (local): (301) 427–1111; ITY (toll free): (866) 438–7231; TTY (local): (301) 427–1130; E-mail: *pso@AHRQ.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Patient Safety Act authorizes the listing of PSOs, which are entities or component organizations whose mission and primary activity is to conduct activities to improve patient safety and the quality of health care delivery.

HHS issued the Patient Safety Rule to implement the Patient Safety Act. AHRQ administers the provisions of the Patient Safety Act and Patient Safety Rule (PDF file, 450 KB. PDF Help) relating to the listing and operation of PSOs. Section 3.108(d) of the Patient Safety Rule requires AHRQ to provide public notice when it removes an organization from the list of federally approved PSOs.

AHRQ has accepted a notification from the Rocky Mountain Patient Safety Organization, a component entity of Colorado Hospital Association, PSO number P0040, to voluntarily relinquish its status as a P50. Accordingly, the Rocky Mountain Patient Safety Organization, a component entity of Colorado Hospital Association, was delisted effective at 12 Midnight ET (2400) on January 19, 2011. More information on PSOs can be obtained through AHRQ's P50 Web site at *http://www.pso.AHRQ.gov/index.html.*

Dated: February 4, 2011.

Carolyn M. Clancy,

Director.

[FR Doc. 2011–3390 Filed 2–16–11; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Patient Safety Organizations: Voluntary Delisting From West Virginia Center for Patient Safety

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Notice of Delisting.

SUMMARY West Virginia Center for Patient Safety: AHRQ has accepted a notification of voluntary relinquishment from West Virginia Center for Patient Safety, a component entity of West Virginia Hospital Association, West Virginia Medical Institute (WVMI), and West Virginia State Medical. Association (WVSMA), of its status as a Patient Safety Organization (PSO). The Patient Safety and Quality Improvement Act of 2005 (Patient Safety Act), Public Law 109–41, 42 U.S.C. 299b-21–b-26, provides for the formation of PSOs, which collect, aggregate, and analyze confidential information regarding the quality and safety of health care delivery. The Patient Safety and Quality Improvement Final Rule (Patient Safety Rule), 42 CFR Part 3, authorizes AHRQ, on behalf of the Secretary of HHS, to list as a P50 an entity that attests that it meets the statutory and regulatory requirements for listing. A P50 can be "delisted" by the Secretary if it is found to no longer meet the requirements of the Patient Safety Act and Patient Safety Rule, including when a PSO chooses to voluntarily relinquish its status as a PSO for any reason.

DATES: The directories for both listed and delisted PSOs are ongoing and reviewed weekly by AHRQ. The delisting was effective at 12 Midnight ET (2400) on January 20, 2011.

ADDRESSES: Both directories can be accessed electronically at the following HHS *Web site*: *http://www.pso.AHRQ.gov/index.html.*

FOR FURTHER INFORMATION CONTACT: Diane Cousins, RPh., Center for Quality Improvement and Patient Safety, AHRQ, 540 Gaither Road, Rockville, MD 20850; Telephone (toll free): (866) 403–3697; Telephone (local): (301) 427–1111; TTY (toll free): (866) 438–7231; TTY (local): (301) 427–1130; *E-mail: pso@AHRQ.hhs.Qov.*

SUPPLEMENTARY INFORMATION:

Background

The Patient Safety Act authorizes the listing of PSOs, which are entities or component organizations whose mission and primary activity is to conduct activities to improve patient safety and the quality of health care delivery. HHS issued the Patient Safety Rule to implement the Patient Safety Act. AHRQ administers the provisions of the Patient Safety Act and Patient Safety Rule (PDF file, 450 KB. PDF Help) relating to the listing and operation of PSOs. Section 3.108(d) of the Patient Safety Rule requires AHRQ to provide public notice when it removes an organization from the list of federally approved PSOs.

AHRQ has accepted a notification from the West Virginia Center for Patient Safety, a component entity of West Virginia Hospital Association, West Virginia Medical Institute (WVMI), and West Virginia State Medical Association (WVSMA), PSO number P0044, to voluntarily relinquish its status as a PSO. Accordingly, the West Virginia Center for Patient Safety, a component entity of West Virginia Hospital Association, West Virginia Medical Institute (WVMI), and West Virginia State Medical Association (WVSMA), was delisted effective at 12 Midnight ET (2400) on January 20, 2011. More information on PSOs can be obtained through AHRQ's PSO Web site at *http://www.pso.AHRQ.gov/index.html.*

Dated: February 4, 2011.

Carolyn M. Clancy,

Director.

[FR Doc. 2011–3376 Filed 2–16–11; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: ACF Grantee Survey of the Low Income Home Energy Assistance Program (LIHEAP).

OMB No.: 0970–0076.

Description: The LIHEAP Grantee Survey is an annual data collection activity, which is sent to grantees of the 50 states and the District of Columbia administering the Low Income Home Energy Assistance Program (LIHEAP). The survey is mandatory in order that national estimates of the sources and uses of LIHEAP funds can be calculated in a timely manner; a range can be calculated of State average LIHEAP benefits; and maximum income cutoffs for four-person households can be obtained for estimating the number of low-income households that are income eligible for LIHEAP under the State income standards. The need for the above information is to provide the Administration and Congress with fiscal estimates in time for hearings about LIHEAP appropriations and program performance. The information also is included in the Departments annual LIHEAP Report to Congress. Survey information also will be posted on the Office of Community Services LIHEAP Web site for access by grantees and other interested parties.

Respondents:

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
LIHEAP Grantee Survey	51	1	3.50	178.50

Estimated Total Annual Burden Hours 178.50.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, *Attn:* ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. *E-mail address: infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this

document in the **Federal Register.** Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, *Fax:* 202–395–7285, *E-mail: OIRA_SUBMISSION@OMB.EOP.GOV.*

Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2011–3636 Filed 2–16–11; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Title: Analysis of Engagement in Additional Work Activities and Expenditures on other Benefits and Services within the Temporary Assistance for Needy Families Program.

OMB No.: New collection.

Description: The Administration for Children and Families (ACE) is proposing an information collection activity as part of the Analysis of Engagement in Additional Work Activities and Expenditures on other Benefits and Services within the Temporary Assistance for Needy Families Program (TANF) project. The proposed information collection consists of semi-structured interviews with key state TANF respondents on questions of engagement in additional work activities and expenditures of other benefits and services.

Through this information collection, ACF seeks to elucidate the data presented in reports submitted by states to the ACF Office of Family Assistance (OFA) as required by the Claims Resolution Act of 2010. This collection is separate from the state reports to OFA required by the Act.

Respondents: State administrators responsible for the TANF Program.

ANNUAL BURDEN ESTIMATES

Instrument	Annual number of respondents	Number of responses per respondent	Average burden hours per response	Total annual burden hours
Discussion Guide for Use with State TANF officials	40	2	8	640

Estimated Total Annual Burden Hours: 640.

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade, SW., Washington, DC 20447, *Attn:* OPRE Reports Clearance Officer. *E-mail address: OPREinfocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: February 8, 2011.

Steven M. Hanmer,

Reports Clearance Officer.

[FR Doc. 2011–3277 Filed 2–16–11; 8:45 am]

BILLING CODE 4184–09–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Notice of Meeting; National Commission on Children and Disasters

AGENCY: Administration for Children and Families, Department of Health and Human Services.

ACTION: Notice of Meeting.

DATES: The meeting will be held on Monday, March 14, 2011, from 9:30 a.m. to 3:30 p.m.

ADDRESSES: The meeting will be held at the Administration for Children and Families, 901 D Street, SW., Washington, DC 20024. To attend either in person or via teleconference, please register by 5 p.m., Eastern Time, March 10, 2011. To register, please e-mail *Jacqueline.Officer@acf.hhs.gov* with "Meeting Registration" in the subject line, or call (202) 205–9560. Registration must include your name, affiliation, and phone number. If you require a sign language interpreter or other special assistance, please call Jacqueline Officer at (202) 205–9560 or e-mail *Jacqueline.Officer@acf.hhs.gov* as soon as possible and no later than 5 p.m. Eastern Time, March 1, 2011.

Agenda: The Commission will: (1) Hear testimony from federal and non-federal officials on the status of recommendations from its 2010 Report to the President and Congress.

Written comments may be submitted electronically to *Juliana.Sadovich@acf.hhs.gov* with "Public Comment" in the subject line. The Commission recommends that you include your name, mailing address and an email address or other contact information in the body of your comment. This ensures that you can be identified as the submitter of the comment, and it allows the Commission to contact you if further information on the substance of the comment is needed or if your comment cannot be read due to technical difficulties. The Commission's policy is that the Commission will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment placed in the official record.

The Commission will provide an opportunity for public comments during the public meeting on March 14, 2011. Those wishing to speak will be limited to three minutes each; speakers are encouraged to submit their remarks in writing in advance to ensure their comment is received in case there is

inadequate time for all comments to be heard on March 14, 2011.

Additional Information: Contact CAPT Juliana Sadovich, RN, PhD, Director, Office of Human Services Emergency Preparedness and Response, e-mail *Juliana.Sadovich@acf.hhs.gov* or call (202) 401–9306.

SUPPLEMENTARY INFORMATION: The National Commission on Children and Disasters is an independent Commission directed to conduct a comprehensive study to examine and assess the needs of children as they relate to preparation for, response to, and recovery from all hazards, building upon the evaluations of other entities and avoiding unnecessary duplication by reviewing the findings, conclusions, and recommendations of these entities. The Commission submitted reports to the President and the Congress on the Commission's independent and specific findings, conclusions, and recommendations to address the needs of children as they relate to preparation for, response to, and recovery from all hazards, including major disasters and emergencies.

Dated: February 10, 2011.

David A. Hansell,

Acting Assistant Secretary for Children and Families.

[FR Doc. 2011–3603 Filed 2–16–11; 8:45 am]

BILLING CODE 4184–06–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Statement of Delegation of Authority

Notice is hereby given that I have delegated to the Administrator, Health Resources and Services Administration (HRSA), the authorities vested in the Secretary under Section 4101(a) of the Patient Protection and Affordable Care Act (Pub. L. 111–148) (42 U.S.C. 280h–4), as amended hereafter, and Section 4101(b) of the Patient Protection and Affordable Care Act (Pub. L. 111–148) amending Section 399Z–1 of the Public Health Service Act (42 U.S.C. 280h–5), as amended hereafter. These authorities may be redelegated.

This delegation excludes the authority to issue regulations, to establish advisory committees and councils, and appoint their members, and to submit reports to Congress, and shall be exercised in accordance with the Department's applicable policies, procedures, and guidelines.

I herby affirm and ratify any actions taken by the Administrator, HRSA, or other HRSA officials, which involved the exercise of these authorities prior to the effective date of this delegation.

This delegation is effective upon date of signature.

Dated: February 10, 2011.

Kathleen Sebelius,

Secretary.

[FR Doc. 2011–3587 Filed 2–16–11; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Statement of Delegation of Authority

Notice is hereby given that I have delegated to the Administrator, Health Resources and Services Administration (HRSA), the authority vested in the Secretary under Section 10502 of the Patient Protection and Affordable Care Act, as amended hereafter, as it pertains to the functions assigned to HRSA. This authority may be redelegated.

This delegation excludes the authority to issue regulations, to establish advisory committees and councils, and appoint their members, and to submit reports to Congress, and shall be exercised in accordance with the Department's applicable policies, procedures, and guidelines.

I hereby affirm and ratify any actions taken by the Administrator, HRSA, or other HRSA officials, which involved the exercise of this authority prior to the effective date of this delegation.

This delegation is effective upon date of signature.

Dated: February 10, 2011.

Kathleen Sebelius,

Secretary.

[FR Doc. 2011–3586 Filed 2–16–11; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or 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 grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Quantitative Imaging for Evaluation of Responses to Cancer Therapies.

Date: March 2, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Gerald G. Lovinger, PhD, Scientific Review Administrator, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Blvd., Room 8101, Bethesda, MD 20892–8329, 301/496–7987, *lovingeg@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; The Role of Microbial Metabolites in Cancer Prevention and Etiology.

Date: March 7, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Legacy Hotel and Meeting Center, 1775 Rockville Pike, Rockville, MD 20852.

Contact Person: Gerald G. Lovinger, PhD, Scientific Review Administrator, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Blvd., Room 8101, Bethesda, MD 20892–8329, 301/496–7987, *lovingeg@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Quantitative Imaging for Tumor Microenvironment.

Date: March 9, 2011.

Time: 8 a.m. to 10 a.m.

Agenda: To review and evaluate contract proposals.

Place: Legacy Hotel and Meeting Center, 1775 Rockville Pike, Rockville, MD 20852.

Contact Person: Zhiqiang Zou, MD, PhD, Scientific Review Officer, National Cancer Institute, National Institutes of Health, 6116 Executive Blvd., Room 8055A, Bethesda, MD 20852, *zouzhiq@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Development of Image Processing and Analysis Software for Oncology.

Date: March 9, 2011.

Time: 10 a.m. to 6 p.m.

Agenda: To review and evaluate contract proposals.

Place: Legacy Hotel and Meeting Center, 1775 Rockville Pike, Rockville, MD 20852.

Contact Person: Zhiqiang Zou, MD, PhD, Scientific Review Officer, National Cancer Institute, National Institutes of Health, 6116 Executive Blvd., Room 8055A, Bethesda, MD 20852, *zouzhiq@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Collaborative Practices in Palliative and Hospice Care.
Date: March 14, 2011.
Time: 3 p.m. to 5 p.m.
Agenda: To review and evaluate contract proposals.
Place: National Institutes of Health, 6116 Executive Boulevard, Room 8055B, Rockville, MD 20852 (Telephone Conference Call).
Contact Person: Ellen K Schwartz, PhD, Scientific Review Officer, Special Review & Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 8055B, Bethesda, MD 20892–8329, 301–594–1215, *schwarel@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Molecular Pharmacodynamic Assays.
Date: March 15, 2011.
Time: 8 a.m. to 12 p.m.
Agenda: To review and evaluate contract proposals.
Place: Legacy Hotel and Meeting Center, 1775 Rockville Pike, Rockville, MD 20852.
Contact Person: Adriana Stoica, PhD, Scientific Review Officer, Special Review & Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd., Ste 703, Rm 7072, Bethesda, MD 20892–8329, 301–594–1408, *Stoicaa2@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Companion Diagnostics.
Date: March 15–16, 2011.
Time: 12 p.m. to 6 p.m.
Agenda: To review and evaluate contract proposals.
Place: Legacy Hotel and Meeting Center, 1775 Rockville Pike, Rockville, MD 20852.
Contact Person: Adriana Stoica, PhD, Scientific Review Officer, Special Review & Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd., Ste 703, Rm 7072, Bethesda, MD 20892–8329, 301–594–1408, *Stoicaa2@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Prostate Imaging Meeting.
Date: March 22, 2011.
Time: 1 p.m. to 4 p.m.
Agenda: To review and evaluate contract proposals.
Place: National Institutes of Health, 6116 Executive Boulevard, Room 8103, Rockville, MD 20852 (Telephone Conference Call).
Contact Person: Timothy C. Meeker, M.D., PhD, Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 8103, Bethesda, MD 20892, (301) 594–1279, *meekert@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Biomarker Resources.
Date: March 23, 2011.
Time: 1:30 p.m. to 3 p.m.
Agenda: To review and evaluate contract proposals.
Place: National Institutes of Health, 6116 Executive Boulevard, Room 707, Rockville, MD 20852 (Telephone Conference Call).
Contact Person: Zhiqiang Zou, M.D., PhD, Scientific Review Officer, National Cancer Institute, National Institutes of Health, 6116 Executive Blvd., Room 8055A, Bethesda, MD 20852, *zouzhiq@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Exceptional, Unconventional, Research Enabling Knowledge Acceleration (EUREKA).
Date: March 28–29, 2011.
Time: 8 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: Bethesda North Marriott & Conference Ctr, 5701 Marinelli Road, Bethesda, MD 20852.
Contact Person: Clifford W. Schweinfest, PhD, Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Blvd., Room 8050a, Bethesda, MD 20892–8329, 301–402–9415, *schweinfestcw@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Manufacturing Therapeutic Biologics Meeting.
Date: March 28, 2011.
Time: 12 p.m. to 4 p.m.
Agenda: To review and evaluate contract proposals.
Place: National Institutes of Health, 6116 Executive Boulevard, Room 8103, Rockville, MD 20852 (Telephone Conference Call).
Contact Person: Timothy C. Meeker, M.D., PhD, Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 8103, Bethesda, MD 20892, (301) 594–1279, *meekert@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Small Grant for Behavioral Research in Cancer Control (R03).
Date: March 31–April 1, 2011.
Time: 8:30 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.
Contact Person: Ellen K. Schwartz, PhD, Scientific Review Officer, Special Review & Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 8055B, Bethesda, MD 20892–8329, 301–594–1215, *schwarel@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: February 10, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–3631 Filed 2–16–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: Translational Research in Pediatric and Obstetric Pharmacology.
Date: March 9, 2011.
Time: 12 p.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.
Contact Person: Nancy Sheard, SCD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6046–E, MSC 7892, Bethesda, MD 20892, 301–408–9901, *sheardn@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowship: Cell Biology and Development.
Date: March 10–11, 2011.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Courtyard by Marriott, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.
Contact Person: Ross D Shonat, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6172, MSC 7892, Bethesda, MD 20892, 301–435–2786, *ross.shonat@nih.hhs.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Endocrinology, Metabolism and Reproduction.
Date: March 10–11, 2011.
Time: 11 a.m. to 2 p.m.
Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Sooja K Kim, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6182, MSC 7892, Bethesda, MD 20892, (301) 435–1780, *kims@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Neuropharmacology and Neuroplasticity.

Date: March 10, 2011.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Carole L Jelsema, PhD, Chief and Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4176, MSC 7850, Bethesda, MD 20892, (301) 435–1248, *jelsemac@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflicts: Gastrointestinal Pathophysiology.

Date: March 14, 2011.

Time: 4 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Patricia Greenwel, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2178, MSC 7818, Bethesda, MD 20892, 301–435–1169, *greenwep@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR09–129: MLPCN High Throughput Screening Assays for Drug Discovery.

Date: March 15, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Ping Fan, MD, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5154, MSC 7840, Bethesda, MD 20892, 301–408–9971, *fanp@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–10–180: CounterAct U 01.

Date: March 15, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency, 300 Light Street, Baltimore, MD 21202.

Contact Person: Jonathan K Ivins, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040A, MSC 7806, Bethesda, MD 20892, (301) 594–1245, *ivinsj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cancer Biology and Therapy.

Date: March 15–16, 2011.

Time: 11 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Eun Ah Cho, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6202, MSC 7804, Bethesda, MD 20892, (301) 451–4467, *choe@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–10–276: Research Using Agriculturally Important Domestic Species.

Date: March 21, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Michael Knecht, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6176, MSC 7892, Bethesda, MD 20892, (301) 435–1046, *knechtm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowship: Biophysical and Biochemical Sciences.

Date: March 28–29, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Alexander Gubin, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4196, MSC 7812, Bethesda, MD 20892, 301–435–2902, *gubina@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RM10–015: Economics of Prevention.

Date: March 29, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Kathy Salaita, SCD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3172, MSC 7770, Bethesda, MD 20892, 301–806–8250, *salaitak@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Devices and Detection Systems.

Date: March 29–30, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Georgetown Suites, 1000 29th Street, NW., Washington, DC 20007.

Contact Person: Ross D. Shonat, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6172, MSC 7892, Bethesda, MD 20892, 301–435–2786, *ross.shonat@nih.hhs.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RM10–016: Efficient Delivery of Effective Health Care.

Date: March 30, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Kathy Salaita, SCD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3172, MSC 7770, Bethesda, MD 20892, 301–806–8250, *salaitak@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Topics in Microbiology.

Date: March 30, 2011.

Time: 1:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Fouad A. El-Zaatari, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3206, MSC 7808, Bethesda, MD 20814–9692, (301) 435–1149, *elzaataf@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: February 11, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–3633 Filed 2–16–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, March 7, 2011, 8 a.m. to March 8, 2011, 8 p.m., National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 which was published in the **Federal Register** on February 4, 2011, 76 FR 6486–6487.

The meeting will be held March 1, 2011 to March 2, 2011. The meeting time and location remain the same. The meeting is closed to the public.

Dated: February 11, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–3632 Filed 2–16–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2) notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The purpose of this meeting is to evaluate requests for preclinical development resources, biologics, clinical assays and other developmental programs for potential new therapeutics for the treatment of cancer. The outcome of the evaluation will provide information to internal NCI committees that will decide whether NCI should support requests and make available contract resources for development of the potential therapeutic to improve the treatment of various forms of cancer. The research proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the proposed research projects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel, Clinical Assay Development Program (CADP).

Date: March 4, 2011.

Time: 9 a.m.–4 p.m.

Agenda: To review grant applications for the CADP.

Place: Bethesda Marriott North Hotel, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Dr. Barbara Conley, Executive Secretary, Clinical Assay Development Program (CADP), National Cancer Institute, NIH, 6130 Executive Boulevard, Room 6035A, Bethesda, MD 20892. 301–496–8639. *conleyba@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: February 10, 2011.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–3630 Filed 2–16–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Intent To Request Approval From OMB of One New Public Collection of Information: Baseline Assessment for Security Enhancement (BASE) Program

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-day notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on a new Information Collection Request (ICR) abstracted below that we will submit to the Office of Management and Budget (OMB) for approval in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. This voluntary collection allows TSA to conduct transportation security-related assessments during site visits with security and operating officials of transit agencies.

DATES: Send your comments by April 18, 2011.

ADDRESSES: Comments may be emailed to *TSAPRA@dhs.gov* or delivered to the TSA PRA Officer, Office of Information Technology (OIT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011.

FOR FURTHER INFORMATION CONTACT: Joanna Johnson at the above address, or by telephone (571) 227–3651.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation is available at *http://www.reginfo.gov.* Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

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

(2) Evaluate the accuracy of the agency's estimate of the burden;

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

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

Purpose of Data Collection

Approximately 6,000 transit service providers, commuter railroads, and long distance passenger railroad providers operate in the United States.[1] Mass transit and passenger rail systems provide transportation services through buses, rail transit, long-distance rail, and other, less common types of service (cable cars, inclined planes, funiculars, and automated guideway systems). These systems can also include "demand response services" for seniors and persons with disabilities, as well as vanpool/rideshare programs and taxi services operated under contract with a public transportation agency.

TSA is required to "assess the security of each surface transportation mode and evaluate the effectiveness and efficiency of current Federal Government surface transportation security initiatives." EO 13416, section 3(a) (Dec. 5, 2006). While many transit systems have security and emergency response plans or protocols in place, no single database exists, nor is there a consistent approach to evaluating the extent to which security programs are in place across mass transit systems.

TSA developed the Baseline Assessment for Security Enhancement (BASE) to evaluate the status of security and emergency response programs on transit systems throughout the nation. In particular, a BASE review assesses the security measures of mass transit and passenger rail systems and gathers data used by TSA to address its responsibilities, such as evaluating "effectiveness and efficiency of current Federal Government surface transportation security initiatives" and developing modal specific annexes to the Transportation Systems Sector Specific Plan that include "an identification of existing security

[1] TSA, "Transportation Sector-Specific Plan Mass Transit Modal Annex," page 4 (May 2007).

guidelines and requirements and any security gaps * * *." EO 13416, Sec. 3(c)(i). Reflecting its risk-based prioritization, TSA primarily conducts BASE reviews on the top 100 transit systems in the country, as identified by the Federal Transit Administration (FTA).[2]

Description of Data Collection

TSA's Surface Transportation Security Inspectors (STSIs) conduct BASE reviews during site visits with security and operating officials of transit systems. The STSIs capture and document relevant information using a standardized electronic checklist. Advance coordination and planning ensures the efficiency of the assessment process. As part of this, transit systems may also obtain a checklist in advance from TSA and conduct self-assessments of their security readiness. All BASE reviews are done on a voluntary basis.

The BASE checklist guides the collection of information and encompasses review of security plans, programs, and procedures employed by transit agencies in implementing the recommended Action Items. During a review, STSIs collect information from the review of transit system's documents, plans, and procedures; interviews with appropriate transit agency personnel, to gain process insight; and system observations prompted by questions raised during the document review and interview stages. TSA subject matter experts can then analyze this information. If information in completed assessments meets the requirements of 49 CFR parts 15 and 1520 in that disclosure would be detrimental to the security of transportation, TSA designates and marks the data as "Sensitive Security Information," as appropriate, and protects it in accordance with the requirements set forth in those regulations.

Use of Results

A BASE review evaluates a transit agency's security program components using a two-phased approach: (1) Field collection of information, and (2) analysis/evaluation of collected information. The information collected by TSA through BASE reviews strengthens the security of transit systems by supporting security program development (including grant programs) and the analysis/evaluation provides a consistent road map for mass transit systems to address security and emergency program vulnerabilities. In addition, each transit system that undergoes a BASE assessment is provided with a report of results that is used in security enhancement activities.

Specifically, the information collected will be used as follows:

1. To develop a baseline understanding of a transit agency's security and emergency management processes, procedures, policies, programs, and activities against security requirements and recommended security practices published by TSA and FTA.

2. To enhance a transit agency's overall security posture through collaborative review and discussion of existing security activities, identification of areas of potential weakness or vulnerability, and development of remedial recommendations and courses of action.

3. To identify programs and protocols implemented by a transit agency that represent an "effective" or "smart" security practice warranting sharing with the transit community as a whole to foster general enhancement of security in the mass transit mode.

4. To inform TSA's development of security strategies, priorities, and programs for the most effective application of available resources, including funds distributed under the Transit Security Grant Program, to enhance security in the Nation's mass transit system.

While TSA has not set a limit on the number of BASE reviews to conduct, TSA estimates it will conduct approximately 100 BASE reviews on an annual basis and does not intend to conduct more than one BASE review per transit system in a single year. The total hour burden dedicated to the assessment and collection of security-related documents for review varies depending upon the size of the system and scope of its security program and activities. The hours estimated represent a sampling of BASE reviews completed in 2010. The sampling was derived from 15 transit agencies varying in size from small to large. Actual inspection hours were utilized in the sampling. TSA estimates that the hour burden per transit agency to engage their security and/or operating officials with inspectors in the interactive BASE review process is approximately 18 hours for a small transit agency, approximately 144 hours for a large transit agency, or an average of 46 hours for a moderately-sized agency. Thus, the total annual hour burden for the BASE review (140 agencies identified) is estimated on the low end of 2520 hours ($140 \times 18 = 2520$) annually and the high end of 6440 hours ($140 \times 46 = 6440$) annually. This number will most likely increase as transit agencies volunteer to participate.

Issued in Arlington, Virginia, on February 11, 2011.

Joanna Johnson,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2011–3602 Filed 2–16–11; 8:45 am]

BILLING CODE 9110–05–P

[2] A current list of the top 100 transit systems can be viewed on the National Transit Database Web site at *http://www.ntdprogram.gov/ntdprogram/.*

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket No. TSA–2009–0024]

Enforcement Actions Summary

AGENCY: Transportation Security Administration, DHS.

ACTION: Notice of Availability.

SUMMARY: The Transportation Security Administration (TSA) is providing notice that it has issued an annual summary of all enforcement actions taken by TSA under the authority granted in the Implementing Recommendations of the 9/11 Commission Act of 2007.

FOR FURTHER INFORMATION CONTACT: Emily Su, Acting Assistant Chief Counsel, Civil Enforcement, Office of the Chief Counsel, TSA–2, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6002; telephone (571) 227–2305; facsimile (571) 227–1378; e-mail *emily.su@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

On August 3, 2007, section 1302(a) of the Implementing Recommendations of the 9/11 Commission Act of 2007 (the 9/11 Act), Public Law 110–53, 121 Stat. 392, gave TSA new authority to assess civil penalties for violations of any surface transportation requirements under title 49 of the U.S. Code (U.S.C.) and for any violations of chapter 701 of title 46 of the U.S. Code, which governs transportation worker identification credentials.

Section 1302(a) of the 9/11 Act, codified at 49 U.S.C. 114(v), authorizes the Secretary of the Department of Homeland Security (DHS) to impose civil penalties of up to $10,000 per violation of any surface transportation requirement under 49 U.S.C. or any requirement related to transportation worker identification credentials (TWIC) under 46 U.S.C. chapter 701. TSA

exercises this function under delegated authority from the Secretary. *See* DHS Delegation No. 7060–2.

Under 49 U.S.C. 114(v)(7)(A), TSA is required to provide the public with an annual summary of all enforcement actions taken by TSA under this subsection; and include in each such summary the identifying information of each enforcement action, the type of alleged violation, the penalty or penalties proposed, and the final assessment amount of each penalty. This summary is for calendar year 2010. TSA will publish a summary of all enforcement actions taken under the statute in January to cover the previous calendar year.

Document Availability

You can get an electronic copy of both this notice and the enforcement actions summary on the Internet by searching the electronic Federal Docket Management System (FDMS) web page at *http://www.regulations.gov,* Docket No. TSA–2009–0024;

You can get an electronic copy of only this notice on the Internet by—

(1) Accessing the Government Printing Office's web page at *http://www.gpoaccess.gov/fr/index.html;* or

(2) Visiting TSA's Security Regulations web page at *http://www.tsa.gov* and accessing the link for "Research Center" at the top of the page.

In addition, copies are available by writing or calling the individual in the **FOR FURTHER INFORMATION CONTACT** section. Make sure to identify the docket number of this rulemaking.

Issued in Arlington, Virginia, February 8, 2011.

Margot F. Bester,

Principal Deputy Chief Counsel.

[FR Doc. 2011–3601 Filed 2–16–11; 8:45 am]

BILLING CODE 4910–05–P

DEPARTMENT OF THE INTERIOR

Geological Survey

Notice of an Open Meeting of the Advisory Committee on Water Information (ACWI)

AGENCY: United States Geological Survey, Department of the Interior.

ACTION: Notice of an open meeting.

SUMMARY: Notice is hereby given of a meeting of the ACWI, to be held March 1, 2011, via teleconference and web-based presentations. This ACWI meeting will serve a dual purpose:

(1) During the morning, the Federal water agencies will have an opportunity to brief ACWI about the proposed 2012 budget. Each organization will have no more than five minutes to report, so we can ensure adequate time for discussion and for feedback from the non-Federal ACWI member organizations.

(2) During the afternoon, some or all of the seven USGS science strategic planning teams (SSPTs) will present information about their activities and solicit ACWI feedback. The USGS SSPTs are part of a new science planning effort that Dr. Marcia McNutt, Director of the USGS, started within the bureau. The USGS 10-year strategic science plan (*http://pubs.usgs.gov/circ/2007/1309/*), which was released in 2007, identified six thematic areas upon which the USGS would concentrate. USGS has received much positive feedback on this plan and the efforts to move it forward. Director McNutt has commissioned seven SSPTs, one for each of the areas identified in the 2007 plan plus one additional team for Core Science Systems. These teams will work from the present through October 2011 to develop a more targeted 10-year science plan for each of their respective areas:

- Core Science Systems
- Ecosystems
- Energy and Minerals
- Environmental Health
- Global Change
- Natural Hazards
- Water

These teams will work over the next 10 months to develop a strategic plan for each area and to carefully examine how efforts need to be integrated across all seven areas. It is also of the utmost importance to everyone at the USGS to have your input into this process, and that process will begin at the ACWI WebEx meeting on March 1.

The ACWI was established under the authority of the Office of Management and Budget Memorandum M–92–01 and the Federal Advisory Committee Act. The purpose of the ACWI is to provide a forum for water information users and professionals to advise the Federal Government on activities and plans that may improve the effectiveness of meeting the Nation's water information needs. Member organizations help to foster communications between the Federal and non-Federal sectors on sharing water information.

Membership, limited to 35 organizations, represents a wide range of water resources interests and functions. Representation on the ACWI includes all levels of government, academia, private industry, and professional and technical societies. For more information on the ACWI, its membership, subgroups, meetings and activities, *please see* the Web site at: *http://ACWI.gov.*

DATES: The formal meeting will convene at 10 a.m. and adjourn at 5 p.m. on March 1, 2011.

ADDRESSES: The meeting will be a WebEx, accessible by telephone and by logging on to the meeting Web site to view the presentations online. Telephone and log-in information will be available the week prior to the meeting on the ACWI Web site (*http://ACWI.gov*) and can also be obtained by calling Wendy Norton at 703–648–6910. Those who wish to attend the meeting in person can do so at U.S. Geological Survey Headquarters, located at 12201 Sunrise Valley Drive, Reston, VA, Room 5A217.

FOR FURTHER INFORMATION CONTACT: Ms. Wendy E. Norton, ACWI Executive Secretary and Chief, Water Information Coordination Program, U.S. Geological Survey, 12201 Sunrise Valley Drive, MS 417, Reston, VA 20192. *Telephone:* 703–648–6810; *Fax:* 703–648–5644; *e-mail: wenorton@usgs.gov.*

SUPPLEMENTARY INFORMATION: This meeting is open to the public. There will not be a public comment period, due to time constraints for this particular meeting, but any member of the public may submit written information and (or) comments to Ms. Norton for distribution at the ACWI meeting or immediately following the meeting.

Dated: February 11, 2011.

Katherine Lins,

Chief, Office of Water Information.

[FR Doc. 2011–3605 Filed 2–16–11; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MTM 067221]

Notice of Proposed Withdrawal Extension and Opportunity for Public Meeting; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The United States Department of Agriculture (USDA), Forest Service, has filed an application with the Bureau of Land Management (BLM) that proposes to extend the duration of Public Land Order (PLO) No. 6881 for an additional 20-year term. PLO No. 6881 withdrew approximately 95 acres of National Forest System lands from location and entry under the United

States mining laws to protect recreational values and the investment of Federal funds at the Howard Lake, Ross Creek, and Yaak Falls Recreation Areas. The withdrawal created by PLO No. 6881 will expire on September 18, 2011, unless extended. This notice also gives the public an opportunity to comment on the proposed action and to request a public meeting.

DATES: Comments and requests for a public meeting must be received by May 18, 2011.

ADDRESSES: Comments and meeting requests should be sent to the Regional Forester, U.S. Forest Service, Region 1, P.O. Box 7669, Missoula, Montana 59807, or the Montana State Director, Bureau of Land Management, 5001 Southgate Drive, Billings, Montana 59101–4669.

FOR FURTHER INFORMATION CONTACT: Scott Bixler, U.S. Forest Service, Region 1, P.O. Box 7669, Missoula, Montana 59807, 406–329–3655, or Sandra Ward, Bureau of Land Management, 5001 Southgate Drive, Billings, Montana 59101–4669, 406–896–5052.

SUPPLEMENTARY INFORMATION: The USDA Forest Service filed an application requesting that the Department of the Interior's Assistant Secretary for Land and Minerals Management extend PLO No. 6881 (56 FR 47414 (1991)), which withdrew approximately 95 acres of National Forest System lands located in Lincoln County, Montana, from location and entry under the United States mining laws (30 U.S.C. ch. 2) for an additional 20-year term. PLO No. 6881 is incorporated herein by reference.

The purpose of the proposed withdrawal extension is to continue to protect recreational values and the investment of Federal funds at the Howard Lake, Ross Creek and Yaak Falls Recreation Areas.

The use of a right-of-way, interagency agreement, cooperative agreement, or surface management under 43 CFR part 3809 regulations would not provide adequate protection.

There are no suitable alternative sites available. There are no other Federal lands in the area containing these unique recreational opportunities and improvements.

No additional water rights will be needed to fulfill the purpose of the requested withdrawal extension.

On or before May 18, 2011, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal extension may present their views in writing to the Regional Forester, U.S. Forest Service, Region 1, P.O. Box 7669, Missoula, Montana 59807.

Comments, including names and street addresses of respondents, will be available for public review at the U.S. Forest Service, Region 1, 200 East Broadway, Missoula, Montana, and the Bureau of Land Management, Montana State Office, 5001 Southgate Drive, Billings, Montana, during regular business hours.

Individual respondents may request confidentiality. Before including your address, phone number, e-mail address, or other personal identifying information in your comments, be advised that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal extension. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the Regional Forester, U.S. Forest Service, Region 1, P.O. Box 7669, Missoula, Montana 59807 by May 18, 2011. Upon determination by the authorized officer that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** and at least one local newspaper not less than 30 days before the scheduled date of the meeting.

This application will be processed in accordance with the applicable regulations set forth in 43 CFR 2310.4.

Authority: 43 CFR 2310.3–1.

Cynthia Staszak,

Chief, Branch of Land Resources.

[FR Doc. 2011–3617 Filed 2–16–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[IDI–35965]

Notice of Proposed Withdrawal and Opportunity for Public Meeting; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The U.S. Forest Service (USFS) has filed an application with the Bureau of Land Management (BLM) requesting the Assistant Secretary of the Interior for Land and Minerals Management withdraw 183.47 acres of National Forest System land in the Idaho Panhandle National Forest from mining to protect the Settler's Grove of Ancient Cedars Recreation Area near Wallace, Idaho. This notice segregates the lands for up to 2 years from location and entry under the United States mining laws while the withdrawal application is being processed. The land will remain open to mineral leasing and to all activities currently consistent with applicable Forest plans and those related to the exercise of valid existing rights.

DATES: Comments and request for a public meeting must be received by May 18, 2011.

ADDRESSES: Comments and meeting requests should be sent to the Forest Supervisor, Idaho Panhandle National Forest, 3815 Schreiber Way, Coeur d'Alene, Idaho 83815.

FOR FURTHER INFORMATION CONTACT: Laura Bingham, BLM Idaho State Office (208) 373–3866 or Scott Bixler, Forest Service, (406) 329–3655.

SUPPLEMENTARY INFORMATION: The USFS has filed an application to withdraw the following described National Forest lands from location and entry under the United States mining laws, subject to valid existing rights. This parcel of land has been withdrawn for USFS use since 1987 for protection of the Settler's Grove of Ancient Cedars Roadless Recreation Area. This proposed withdrawal covers the same land withdrawn for USFS use under Public Land Order (PLO) No. 6658 (52 FR 36577 (1987)). Due to an administrative oversight on the part of the USFS, PLO 6658 expired before an extension of the withdrawal could be processed. Therefore, the USFS is requesting a new 20-year withdrawal covering the same area:

Boise Meridian

Idaho Panhandle National Forest

T. 50 N., R. 5 E.,
Sec. 4, NW¼NE¼ of lot 1, NW¼ of lot 1, SW¼SW¼ of lot 1, N½SW¼ of lot 1, SE¼NE¼ of lot 2, SE¼ of lot 2, NE¼SW¼NE¼, NW¼SE¼SW¼NE¼, E½NW¼SW¼NE¼, SW¼NW¼SW¼NE¼, SW¼SW¼NE¼, E½SE¼SE¼NW¼, SW¼SE¼;SE¼NW¼, SE¼SW¼SE¼NW¼, NW¼NE¼SW¼, NE¼NE¼SW¼, S½NE¼NW¼SW¼, SE¼NW¼NW¼SW¼, NE¼SW¼NW¼SW¼, N½SE¼NW¼SW¼, and W½NW¼NW¼SE¼.

T. 51 N., R. 5 E.,
Sec. 33, S½SE¼NE¼SE¼, SE¼SW¼NE¼SE¼, NE¼SE¼SE¼, E½NW¼SE¼SE¼, W½SE¼SE¼SE¼, SW¼SE¼SE¼, and NE¼SE¼SE¼SE¼.

T. 51 N., R. 5 E.,

Sec. 34, SW¼NW¼SW¼, NW¼SW¼SW¼, S½NW¼NW¼SW¼.

The area described contains 183.47 acres in Shoshone County.

For a period of 2 years from February 17, 2011, subject to valid existing rights the land will be segregated from location and entry under the United States mining laws unless the application is denied or canceled or the withdrawal is approved prior to that date. The temporary land uses which may be permitted during this segregative period include activities currently consistent with applicable plans and those related to the exercise of valid existing rights, including public recreation and other activities compatible with preservation of the character of the area.

The application will be processed in accordance with the regulations set forth in 43 CFR 2300.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the Forest Supervisor, Idaho Panhandle National Forest, at the address indicated above.

The use of a right-of-way, interagency agreement, cooperative agreement or surface management under 43 CFR part 3809 would not adequately constrain nondiscretionary uses that could irrevocably affect the use of the lands for mining purposes.

No water rights would be needed to fulfill the purpose of the requested withdrawal.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the Forest Supervisor at the address indicated above by May 18, 2011. Upon determination by the authorized officer that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** and a newspaper having a general circulation in the vicinity of the land at least 30 days before the scheduled date of the meeting.

Records relating to the application may be examined by interested parties at the address of the Idaho Panhandle National Forest Office stated above.

Comments, including names and street addresses for respondents, will be available for public review at the Idaho Panhandle National Forest Office during regular business hours, 7:30 a.m. to 4 p.m., Monday through Friday, except holidays. Before including your 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 the public review, we cannot guarantee that we will be able to do so.

Authority: 43 U.S.C. 1714 and 43 CFR 2310.3–1.

Jeffery L. Foss,

Deputy State Director, Resource Services.

[FR Doc. 2011–3616 Filed 2–16–11; 8:45 am]

BILLING CODE 4310–11–P

DEPARTMENT OF THE INTERIOR

National Park Service

Kalaupapa National Historical Park Advisory Commission Meeting

AGENCY: National Park Service, Interior.

ACTION: Notice of meeting.

SUMMARY: This notice announces the date for the March 15, 2011, Meeting of the Kalaupapa National Historical Park Advisory Commission.

DATES: The public meeting of the Commission will be held on Tuesday, March 15, 2011, at 9 a.m. (Hawaiian Standard Time).

ADDRESSES: The meeting will be held at McVeigh Social Hall, Kalaupapa National Historical Park, Kalaupapa, Hawaii 96742.

FOR FURTHER INFORMATION CONTACT: Steve Prokop, Superintendent, Kalaupapa National Historical Park, P.O. Box 2222, Kalaupapa, Hawaii 96742, telephone (808) 567–6802, or electronically at the following Internet address: *Steve_Prokop@nps.gov.*

SUPPLEMENTARY INFORMATION:

Agenda

The March 15, 2011, Commission meeting will consist of the following:

1. Report from the Superintendent.
2. Bridge Replacement and Trail.
3. Memorial Project Updates.
4. Air Transportation Service.
5. General Management Plan Update.
6. Public Comments.

The meeting is open to the public, and time will be reserved for public comment. 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. Oral comments will be summarized for the record. If persons wish to have their comments recorded verbatim, they must submit them in writing. 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: January 13, 2011.

Stephen Prokop,

Superintendent, Kalaupapa National Historical Park.

[FR Doc. 2011–3391 Filed 2–16–11; 8:45 am]

BILLING CODE 4312–GJ–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–733]

In the Matter of Certain Flat Panel Digital Televisions and Components Thereof; Notice of a Commission Determination Not To Review an Initial Determination Terminating the Investigation; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination ("ID") (Order No. 10) of the presiding administrative law judge ("ALJ") terminating the above-captioned investigation based on a settlement agreement.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–2310. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's

electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on August 19, 2010, based on a complaint filed by Vizio, Inc. of Irvine, California. 75 FR 51285–86 (August 19, 2010). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain flat panel digital televisions and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 5,703,887 ("the '887 patent"); 5,233,629 ("the '629 patent"); 5,511,096; 5,621,761; 5,745,522; 5,511,082; and 5,396,518. The complaint further alleges the existence of a domestic industry. The Commission's notice of investigation named the following respondents: LG Electronics, Inc. of South Korea and LG Electronics, Inc. of Englewood Cliffs, New Jersey.

On November 24, 2010, the Commission issued notice of its determination not to review the ALJ's ID terminating the investigation as to claims 15–21 of the '887 patent, and all asserted claims of the '629 patent, based on withdrawal of these '887 patent claims and the '629 patent.

On January 18, 2011, complainant and respondents jointly moved to terminate the investigation on the basis of a settlement agreement. The Commission investigative attorney filed a response in support of the motion.

The ALJ issued the subject ID on January 26, 2011, granting the motion for termination. He found that the motion for termination satisfies Commission rule 210.21(b). He further found, pursuant to Commission rule 210.50(b)(2), that termination of this investigation by settlement agreement is in the public interest. No party petitioned for review of the ID. The Commission has determined not to review the ID, and the investigation is terminated.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in sections 210.21 and 210.42(h) of the Commission's Rules of Practice and Procedure, 19 CFR 210.21, 210.42(h).

By order of the Commission.

Issued: February 11, 2011.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. 2011–3538 Filed 2–16–11; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Public Availability of Department of Justice FY 2010 Service Contract Inventory

AGENCY: Justice Management Division, Department of Justice.

ACTION: Notice of Public Availability of FY 2010 Service Contract Inventories.

SUMMARY: In accordance with Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117), the Department of Justice is publishing this notice to advise the public of the availability of the FY 2010 Service Contract inventory. This inventory provides information on service contract actions over $25,000 that were made in FY 2010. The information is organized by function to show how contracted resources are distributed throughout the agency. The inventory has been developed in accordance with guidance issued on November 5, 2010 by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). OFPP's guidance is available at *http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf.* The Department of Justice has posted its inventory and a summary of the inventory on the Department of Justice Senior Procurement Executive homepage at the following link: *http://www.justice.gov/jmd/pe/service-contract-inventory.html.*

FOR FURTHER INFORMATION CONTACT: Questions regarding the service contract inventory should be directed to Dennis R. McCraw in the Justice Management Division, Management and Planning Staff, Procurement Policy and Review Group at (202) 616–3754 or *dennis.mccraw@usdoj.gov.*

Michael H. Allen,

Deputy Assistant Attorney General, Policy Management and Planning, U.S. Department of Justice, Justice Management Division.

[FR Doc. 2011–3561 Filed 2–16–11; 8:45 am]

BILLING CODE 4410–DB–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Exemptions From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following: D–11591, Citigroup Inc. and its affiliates (Citigroup), the Citigroup 401(k) Plan, the Citibuilder 401(k) Plan for Puerto Rico (the Citibuilder Plan and collectively with the Citigroup 401(k) Plan, the Participant Directed Plans), the Citigroup Pension Plan (and collectively with the Participant Directed Plans, the Plans) (the Applicants), PTE 2011–04; and D–11592, TD Ameritrade, Inc. (TD Ameritrade), 2011–05.

SUPPLEMENTARY INFORMATION: A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

Citigroup Inc. and Its Affiliates (Citigroup), the Citigroup 401(k) Plan, the Citibuilder 401(k) Plan for Puerto Rico (the Citibuilder Plan and Collectively With the Citigroup 401(k) Plan, the Participant Directed Plans), the Citigroup Pension Plan (and Collectively With the Participant Directed Plans, the Plans) (the Applicants), Located in Greenwich, CT

[Prohibited Transaction Exemption 2011–04; Exemption Application No. D–11591]

Exemption

Section I: Transactions

(a) The restrictions of sections 406(a), 406(b)(1), 406(b)(2), and 407(a) of the Act [1] shall not apply, effective June 22, 2009 (the Record Date) and until June 10, 2012, to:

(1) The acquisition of stock rights (the Rights) by certain plans, described below in Section I(a)(1)(A) through (C) of this exemption, in connection with holding shares of common stock of Citigroup Inc. (Citigroup Stock) on the Record Date established pursuant to an offering of such Rights (the Offering) in accordance with the Tax Benefits Preservation Plan (the Rights Plan) by Citigroup Inc. (Citigroup), a party in interest with respect to the following plans, and/or the acquisition of Citigroup Stock and the attached Rights by the plans in the future pursuant to the Offering:

(A) The Citigroup 401(k) Plan (the Citigroup 401(k) Plan);

(B) The Citibuilder 401(k) Plan for Puerto Rico (the Citibuilder Plan and collectively with the Citigroup 401(k) Plan, the Participant Directed Plans); and

(C) The Citigroup Pension Plan (the Citigroup Pension Plan and collectively with the Participant Directed Plans, the Plans);

(2) The holding of the Rights by the Plans until the date the Plans exercise or otherwise dispose of the Rights or the expiration of such Rights in accordance with the terms and conditions of the Rights Plan, whichever is earlier; and

(3) The exercise or other disposition of the Rights by the Plans; provided that the conditions in Section II of this exemption, as set forth below, are satisfied.[2]

(b) The sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1)(A) through (E) shall not apply, effective June 22, 2009, to the acquisition of the Rights by the Plans, described above in Section I(a)(1)(A), and Section I(a)(1)(C) of this exemption; [3] provided that the conditions in Section II of this exemption, as set forth below, are satisfied.

Section II: Conditions

The relief provided in this exemption is conditioned upon adherence to the material facts and representations described herein and as set forth in the application file and upon compliance with the conditions, as set forth in this exemption.

(a) The acquisition by each of the Plans of the Rights occurred or will occur in connection with the June 22, 2009 Offering made available by Citigroup on the same terms to all shareholders of the common stock of Citigroup (the Citigroup Stock), including the acquisition of the Rights at no cost to the Plans;

(b) The acquisition of the Rights by the Participant Directed Plans on the Record Date resulted from an independent act of Citigroup as a corporate entity. The acquisition of the Citigroup Stock and the attached Rights by the Plans in the future will occur either at the direction of individual participants (in the case of the Participant Directed Plans), at the direction of an Independent Fiduciary (in the case of the Citigroup Pension Plan), or in connection with in-kind contributions to the Citigroup Pension Plan by Citigroup of Citigroup Stock and the attached Rights (a Stock/Right Contribution), in each case incidental to, and as a direct consequence of, the purchase or other acquisition of Citigroup Stock. All holders of Citigroup Stock, which include the Rights (other than an Acquiring Person, as defined in the Rights Plan), including the Plans, were, and will continue to be, treated in the same manner with respect to the acquisition of the Rights;

(c) All shareholders of Citigroup Stock, including the Plans acquired, or will acquire, the same proportionate number of Rights based on the number of shares of Citigroup Stock held by such shareholders, including the Plans;

(d) The acquisition of the Rights by the Participant Directed Plans was made, or will be made, pursuant to provisions of each such plan for individually-directed investment of participant accounts;

(e) All decisions regarding the Rights that will be made by the Participant Directed Plans will be made in accordance with the provisions of such Participant Directed Plans for individually-directed investment of participant accounts by the individual participants whose accounts in each such Participant Directed Plan acquired the Rights in connection with the Offering, and if no instructions are received, the Rights will expire in accordance with the terms and conditions of the Rights Plan;

(f) All decisions regarding the Citigroup Stock and the attached Rights will be made on behalf of the Citigroup Pension Plan by an Independent Fiduciary acting as an investment manager. Such Independent Fiduciary will have sole discretionary responsibility relating to the acquisition, holding, ongoing management and disposition of the Citigroup Stock and the attached Rights. The Independent Fiduciary will determine, before taking any action regarding the Citigroup Stock and the attached Rights, that each such action is in the interest of the Citigroup Pension Plan.

(g) To the extent the Citigroup board of directors exercises its rights under the Offering to redeem the Rights at the redemption price set forth in the Offering, all shareholders of Citigroup

[1] For purposes of this exemption, references to provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

[2] The Department's determination to grant relief for these transactions should not be viewed as an endorsement of the Rights Plan, nor is it offering any views as to whether such transactions satisfy any other requirements of ERISA, the Code or other relevant statutory provisions. Rather, this exemption is designed to place the Plans and their participants and beneficiaries in the same position as other holders of Citigroup Stock with respect to the acquisition of the Rights and to prevent the possible dilution of the Plans' investment in the Citigroup Stock.

[3] The Applicants represent that, because the fiduciaries for the Citibuilder 401(k) Plan for Puerto Rico have not made an election under section 1022(i)(2) of the Act, whereby such plan would be treated as a trust created and organized in the United States for purposes of tax qualification under section 401(a) of the U.S. Code, jurisdiction under Title II of the Act does not apply. Accordingly, the Applicant is not seeking any relief for the prohibitions, as set forth in Title II of the Act, for the acquisition of the Rights by the Citibuilder Plan.

Stock will be treated the same, including the Plans; and

(h) The acquisition of the Rights as a result of a Stock/Right Contribution by Citigroup to the Citigroup Pension Plan shall result from a determination by Citigroup as a corporate entity.

(i) Neither the Participant Directed Plan participants nor the Citigroup Pension Plan will pay any fees or commissions in connection with the exercise of the Rights other than the aggregate Purchase Price with respect to the Rights then being exercised and an amount equal to any applicable transfer tax or other governmental charge.

Section III: Definition

The term "Independent Fiduciary" means an investment manager, as described in section 3(38) of the Act, that is:

(a) Independent of, and unrelated to, Citigroup Inc. and its affiliates (Citigroup), and

(b) Appointed to act on behalf of the Citigroup Pension Plan for the purposes described in Section II.(f) above.

For purposes of this exemption, a fiduciary will not be deemed to be independent of, and unrelated to, Citigroup if: (i) Such fiduciary directly or indirectly, controls, is controlled by, or is under common control with Citigroup; (ii) such fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this exemption, except that it may receive compensation for acting as an independent fiduciary from Citigroup in connection with the transactions described herein, if the amount or payment of such compensation is not contingent upon, or in any way affected by such fiduciary's decision; and (iii) more than 5 percent of such fiduciary's annual gross revenue in its prior tax year will be paid by Citigroup in the fiduciary's current tax year.

DATES: *Effective Date:* This exemption is effective as of June 22, 2009, the date of the announcement of the Offering and will expire on June 10, 2012.

Written Comments

The Notice of Proposed Exemption, published in the October 6, 2010 issue of the **Federal Register** (75 FR 61947), invited all interested persons to submit comments on the Proposed Exemption and/or to request that a public hearing be held. In response to the solicitation of comments from interested persons, the Department received a December 6, 2010 comment letter on behalf of Citigroup (the Citigroup Comment) and comments from several other interested persons. None of the comments requested that a public hearing be held on the Proposed Exemption. The Citigroup Comment responded to the comments received from the other interested persons, provided further information on the exemption transactions and requested modification of the definition of Independent Fiduciary in the Proposed Exemption.

The Citigroup Comment notes that several participants in the Plans provided comments to the Department and that two of these participants simply voiced a general objection to the Proposed Exemption, one without providing any rationale and the other appearing to question Citigroup's treatment of its employees generally. The Applicants stated that these comments are not relevant to whether the proposed exemption is in the interests of the Plans and their participants and beneficiaries and whether it should be granted. The Applicants believe that granting the proposed exemption is in the interests of the Plans and their participants and beneficiaries. The Applicants note that another participant objected on the basis that the participant believed that the Proposed Exemption was unclear as to its scope and purpose and that Citigroup Stock was an inappropriate investment for a pension fund. Two participants shared the sentiment that granting the exemption would represent a further loosening of regulatory restrictions. The last participant objected on the grounds that the Proposed Exemption would permit Citigroup to make future contributions to the Citigroup Pension Plan in Citigroup Stock rather than cash and believed that the Independent Fiduciaries should have the right to sell the shares of Citigroup Stock.

The Applicants assert that the Proposed Exemption permits the Plans to acquire the Rights as opposed to the underlying Citigroup Stock and that the purpose of the Proposed Exemption is not to determine whether acquisition of Citigroup Stock (including an acquisition as a result of a contribution in-kind to one or more of the Plans by Citigroup) is in the interests of the Plans, nor is the purpose to authorize or approve any such acquisition of Citigroup Stock. The Applicants, in the Citigroup Comment state:

> While the Plans would not be permitted to acquire, hold or dispose of Citigroup Stock if the requested exemption were not granted, this is merely because the Rights, while they technically may be a separate 'security' under Section 3(20) of ERISA, are not severable from Citigroup Stock until they become exercisable. The analysis as to whether the acquisition, holding or disposition of Citigroup Stock, as opposed to the Rights, is appropriate in any given circumstance would necessarily involve a separate analysis under ERISA and is not the subject of the proposed exemption. Rather, the purpose of the proposed exemption is to allow the Plans to acquire, hold and, if applicable, dispose of the Rights that are attached to the Citigroup Stock once the decision has already been made to acquire Citigroup Stock.

The Department notes that, to the extent that the Citigroup Stock is not a qualifying employer security as defined in section 407(d)(5) of ERISA, an administrative exemption would be necessary for the acquisition and holding of such stock. Accordingly, the final exemption has been clarified to provide that the Independent Fiduciary of the Citigroup Pension Plan will have sole discretionary responsibility to determine whether the Citigroup Pension Plan should acquire Citigroup Stock and the attached Rights whether by purchase or contribution by Citigroup. As a result, the Department believes that the condition requiring the appointment of an independent fiduciary to represent the interests of the Citigroup Pension Plan with respect to the acquisition, holding and the exercise or other disposition of the Rights that are the subject of the exemption request should be clarified.

The Department, however, is not making a determination as to whether the Citigroup Stock combined with the attached Rights is a qualifying employer security, as defined in section 407(d)(5) of ERISA. Since the Citigroup Stock, without the attached Rights, would be a qualifying employer security, the percentage limitations for qualifying employer securities, as set forth in sections 407(a) and 407(f) of ERISA (the Percentage Limitations), may still be applicable. In light of this uncertainty, the Applicants have agreed to abide by the Percentage Limitations.

The Citigroup Comment asserts that the Proposed Exemption is in the interests of the Plans and their participants and beneficiaries because allowing the Plans to acquire the Rights will place the Plans and their participants and beneficiaries in the same position as other holders of Citigroup Stock with respect to the acquisition of the Rights and to prevent the possible dilution of the Plans' investments in Citigroup Stock. The Applicants note that Citigroup Stock itself is a qualifying employer security and that the acquisition, holding and disposition of Citigroup Stock in appropriate instances is contemplated by the statutory scheme of ERISA. The requirement to dispose of the Citigroup Stock on a retroactive basis would conflict with participants' rights under

the terms of the Participant Directed Plans during this period to hold Citigroup Stock. Additionally, if the Plans held Citigroup Stock but were not able to exercise the Rights in the event they became exercisable, the value of their shares would be diluted significantly, resulting in harm to the Plans.

With respect to the participant's statement that the scope and purpose of the Proposed Exemption was unclear, the Applicants note that the Proposed Exemption relates to a complicated tax preservation vehicle and a technical provision of ERISA. The Applicants, however, believe that the Proposed Exemption published by the Department, as well as the Citigroup Comment, provide a clear explanation of why the Proposed Exemption is in the interests of the Plans and their participants and beneficiaries.

The Citigroup Comment notes that, under the definition of an "Independent Fiduciary" in the Proposed Exemption, the Independent Fiduciary's compensation cannot be affected in any way by any decision it makes in connection with the Rights. The Applicants state that typically an Independent Fiduciary's compensation is a fixed percentage (or otherwise a function) of the value of the Citigroup Pension Plan's assets under its management. In the unlikely event that the Rights Plan is triggered and the Rights become exercisable, the Applicants believe that the Independent Fiduciary's compensation would be affected by the Independent Fiduciary's decision in connection with the exercise of the Rights. By way of example, if the Independent Fiduciary decided not to exercise the Rights and other stockholders (as would be expected to avoid dilution of their own stock) did, the value of the Citigroup Stock that the Citigroup Pension Plan holds would be significantly diluted and, thus, the value of the assets managed by the Independent Fiduciary would decrease, resulting in a lower management fee than if it elected to exercise the Rights.

Although the Independent Fiduciary's compensation would be affected by its decision regarding the Rights, the Applicants note that the Independent Fiduciary's discretion is quite limited in these circumstances. First, any trigger of the Rights Plan would be a result of the actions of a party unrelated to the Independent Fiduciary. Second, given that any holder of Citigroup Stock that does not exercise the Rights would suffer significant dilution, it is difficult for the Applicant to imagine a situation in which an Independent Fiduciary, which is bound by fiduciary obligations to the Citigroup Pension Plan, would elect not to exercise the Rights and allow the Citigroup Pension Plan to suffer harm in the form of significant dilution of its interest in Citigroup Stock and, therefore, a significant reduction in the value of that interest. Thus, the Applicants believe that the fact that the Independent Fiduciary's compensation may be affected by its decision to exercise the Rights does not create a conflict of interest and is fully consistent with the interests of the Citigroup Pension Plan and its participants and beneficiaries. The Independent Fiduciary's options would be extremely limited and, in any case, its interests would be fully aligned with those of the Citigroup Pension Plan. The Applicants request the Department to modify the definition of Independent Fiduciary accordingly.

The Department does not believe that any modification to this definition is necessary since the language of the definition does not preclude an Independent Fiduciary from receiving compensation that is a fixed percentage (or otherwise a function) of the value of the Citigroup Pension Plan's assets under its management. The language in section III that concerns compensation of the Independent Fiduciary was designed to preclude third party contingency payments to the Independent Fiduciary that are dependent on the Independent Fiduciary's decisions during the management of the plan assets. The language does not preclude the Independent Fiduciary from receiving ongoing management fees which are determined as a percentage of the value of the Citigroup Pension Plan's assets under its management. Rather, the provision expresses the Department's concern with additional payments that could influence or have an impact on the decisions of the Independent Fiduciary. Accordingly, the Department has not made the Applicant's requested change to the definition of Independent Fiduciary contained in section III of the Notice.

The Department has given full consideration to the entire record, including the comments received in response to the Proposed Exemption, and has determined to grant the exemption.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption that was published on October 6, 2010 in the **Federal Register** at 75 FR 61947.

For Further Information Contact: Brian Shiker of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

TD Ameritrade, Inc. (TD Ameritrade), Located in Omaha, NE

[Prohibited Transaction Exemption 2011–05; Exemption Application No. D–11592]

Exemption

Section I. Sales of Auction Rate Securities From Plans to TD Ameritrade: Unrelated to a Settlement Agreement

The restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D), and (E) of the Code, shall not apply, effective July 20, 2009, to the sale by a Plan (as defined in Section V(e)) of an Auction Rate Security (as defined in Section V(c)) to TD Ameritrade, where such sale (an Unrelated Sale) is unrelated to, and not made in connection with, a Settlement Agreement (as defined in Section V(f)), provided that the conditions set forth in Section II have been met.[4]

Section II. Conditions Applicable to Transactions Described in Section I

(a) The Plan acquired the Auction Rate Security in connection with brokerage services provided by TD Ameritrade to the Plan;

(b) The last auction for the Auction Rate Security was unsuccessful;

(c) The Unrelated Sale is made pursuant to a written offer by TD Ameritrade (the Unrelated Offer) containing all of the material terms of the Unrelated Sale, including, but not limited to: (1) The identity and par value of the Auction Rate Security; (2) the interest or dividend amounts that are due with respect to the Auction Rate Security; and (3) the most recent information for the Auction Rate Security (if reliable information is available).

(d) The Unrelated Sale is for no consideration other than cash payment against prompt delivery of the Auction Rate Security;

(e) The sales price for the Auction Rate Security is equal to the par value of the Auction Rate Security, plus any accrued but unpaid interest or dividends;

(f) The Plan does not waive any rights or claims in connection with the Unrelated Sale;

[4] For purposes of this exemption, references to section 406 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

(g) The decision to accept the Unrelated Offer or retain the Auction Rate Security is made by a Plan fiduciary or Plan participant or IRA owner who is independent (as defined in Section V(d)) of TD Ameritrade.[5]

(h) Neither TD Ameritrade nor any affiliate exercises investment discretion or renders investment advice within the meaning of 29 CFR 2510.3–21(c) with respect to the decision to accept the Unrelated Offer or retain the Auction Rate Security;

(i) The Plan does not pay any commissions or transaction costs with respect to the Unrelated Sale;

(j) The Unrelated Sale is not part of an arrangement, agreement or understanding designed to benefit a party in interest to the Plan;

(k) TD Ameritrade and its affiliates, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of the Unrelated Sale, such records as are necessary to enable the persons described below in paragraph (l)(1), to determine whether the conditions of this exemption, if granted, have been met, except that:

(1) No party in interest with respect to a Plan which engages in an Unrelated Sale, other than TD Ameritrade and its affiliates, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by paragraph (l)(1); and

(2) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of TD Ameritrade or its affiliates, as applicable, such records are lost or destroyed prior to the end of the six-year period;

(l)(1) Except as provided below in paragraph (l)(2), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to above in paragraph (k) are unconditionally available at their customary location for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the U.S. Securities and Exchange Commission;

(B) Any fiduciary of any Plan, including any IRA owner, that engages in an Unrelated Sale, or any duly authorized employee or representative of such fiduciary; or

(C) Any employer of participants and beneficiaries and any employee organization whose members are covered by a Plan that engages in the Unrelated Sale, or any authorized employee or representative of these entities;

(2) None of the persons described above in paragraphs (l)(1)(B)–(C) shall be authorized to examine trade secrets of TD Ameritrade, or commercial or financial information which is privileged or confidential; and

(3) Should TD Ameritrade refuse to disclose information on the basis that such information is exempt from disclosure, TD Ameritrade shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Section III. Sales of Auction Rate Securities From Plans to TD Ameritrade: Related to a Settlement Agreement

The restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D), and (E) of the Code shall not apply, effective July 20, 2009, to the sale by a Plan of an Auction Rate Security to TD Ameritrade, where such sale (a Settlement Sale) is related to, and made in connection with, a Settlement Agreement, provided that the conditions set forth in Section IV have been met.

Section IV. Conditions Applicable to Transactions Described in Section III

(a) The terms and delivery of the offer (the Purchase Offer) are consistent with the requirements set forth in the Settlement Agreement;

(b) The Purchase Offer or other documents available to the Plan specifically describe, among other things:

(1) How a Plan may determine: the Auction Rate Securities held by the Plan with TD Ameritrade; the number of shares and par value of the Auction Rate Securities; the interest or dividend amounts that are due with respect to the Auction Rate Securities; purchase dates for the Auction Rate Securities; and (if reliable information is available) the most recent rate information for the Auction Rate Securities;

(2) The background of the Purchase Offer;

(3) That neither the tender of Auction Rate Securities nor the purchase of any Auction Rate Securities pursuant to the Purchase Offer will constitute a waiver of any claim of the tendering Plan;

(4) The methods and timing by which Plans may accept the Purchase Offer;

(5) The purchase dates, or the manner of determining the purchase dates, for Auction Rate Securities tendered pursuant to the Purchase Offer;

(6) The timing for acceptance by TD Ameritrade of tendered Auction Rate Securities;

(7) The timing of payment for Auction Rate Securities accepted by TD Ameritrade for payment;

(8) The methods and timing by which a Plan may elect to withdraw tendered Auction Rate Securities from the Purchase Offer;

(9) The expiration date of the Purchase Offer;

(10) The fact that TD Ameritrade may make purchases of Auction Rate Securities outside of the Purchase Offer following the termination or expiration of the Purchase Offer and may otherwise buy, sell, hold or seek to restructure, redeem or otherwise dispose of the Auction Rate Securities;

(11) A description of the risk factors relating to the Purchase Offer as TD Ameritrade deems appropriate;

(12) How to obtain additional information concerning the Purchase Offer; and

(13) The manner in which information concerning material amendments or changes to the Purchase Offer will be communicated to the Plan.

(c) The terms of the Settlement Sale are consistent with the requirements set forth in the Settlement Agreement; and

(d) All the conditions of Section II have been met.

Section V. Definitions

For purposes of this proposed exemption:

(a) The term "affiliate" means any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(b) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(c) The term "Auction Rate Security" means a security: (1) That is either a debt instrument (generally with a long-term nominal maturity) or preferred

[5] The Department notes that the Act's general standards of fiduciary conduct also would apply to the transactions described herein. In this regard, section 404 of the Act requires, among other things, that a fiduciary discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent manner. Accordingly, a plan fiduciary must act prudently with respect to, among other things, the decision to sell the Auction Rate Security to TD Ameritrade for the par value of the Auction Rate Security, plus unpaid interest and dividends. The Department further emphasizes that it expects Plan fiduciaries, prior to entering into any of the proposed transactions, to fully understand the risks associated with this type of transaction following disclosure by TD Ameritrade of all relevant information.

stock; and (2) with an interest rate or dividend that is reset at specific intervals through a Dutch Auction process;

(d) A person is "independent" of TD Ameritrade if the person is (1) not TD Ameritrade or an affiliate; and

(2) not a relative (as defined in section 3(15) of the Act) of the party engaging in the transaction;

(e) The term "Plan" means an individual retirement account or similar account described in section 4975(e)(1)(B) through (F) of the Code (an IRA); an employee benefit plan as defined in section 3(3) of the Act; or an entity holding plan assets within the meaning of 29 CFR 2510.3–101, as modified by section 3(42) of the Act; and

(f) The term "Settlement Agreement" means a legal settlement involving TD Ameritrade and a U.S. state or federal authority that provides for the purchase of an Auction Rate Security by TD Ameritrade from a Plan.

Effective Date: This exemption is effective as of July 20, 2009.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on December 16, 2009 at 75 FR 78768.

For Further Information Contact: Ms. Anna Mpras Vaughan of the Department, telephone (202) 693–8565. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 14th day of February, 2011.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2011–3589 Filed 2–16–11; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Proposed Exemptions From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following proposed exemptions: D–11528, Wachovia Corporation and Its Current and Future Affiliates or Successors (collectively, Wachovia or the Applicant; and D–11635, The Parvin Nahvi, M.D., Inc. 401(k) Profit Sharing Trust (the Plan); *et al.*]

DATES: All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice.

ADDRESSES: Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N–5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. *Attention:* Application No._____, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: *moffitt.betty@dol.gov,* or by FAX to (202) 219–0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

Warning: If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

SUPPLEMENTARY INFORMATION:

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and rrepresentations.

Wachovia Corporation and Its Current and Future Affiliates or Successors (Collectively, Wachovia or the Applicant)

Located in San Francisco, California

[Application No. D–11528]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).[1]

Section I. Sales of Auction Rate Securities From Plans to Wachovia: Unrelated to a Settlement Agreement

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D), and (E) of the Code, shall not apply, effective February 1, 2008, to the sale by a Plan (as defined in Section V(e)) of an Auction Rate Security (as defined in Section V(c)) to Wachovia, where such sale (an Unrelated Sale) is unrelated to, and not made in connection with, a Settlement Agreement (as defined in Section V(f)), provided that the conditions set forth in Section II have been met.

Section II. Conditions Applicable to Transactions Described in Section I

(a) The Plan acquired the Auction Rate Security in connection with brokerage or advisory services provided by Wachovia to the Plan;

(b) The last auction for the Auction Rate Security was unsuccessful;

(c) Except in the case of a Plan sponsored by Wachovia for its own employees (a Wachovia Plan), the Unrelated Sale is made pursuant to a written offer by Wachovia (the Offer) containing all of the material terms of the Unrelated Sale, including, but not limited to: (1) The identity and par value of the Auction Rate Security; (2) the interest or dividend amounts that are due and unpaid with respect to the Auction Rate Security; and (3) the most recent rate information for the Auction Rate Security (if reliable information is available). Notwithstanding the foregoing, in the case of a pooled fund maintained or advised by Wachovia, this condition shall be deemed met to the extent each Plan invested in the pooled fund (other than a Wachovia Plan) receives advance written notice regarding the Unrelated Sale, where such notice contains all of the material terms of the Unrelated Sale, including, but not limited to, the material terms described in the preceding sentence;

(d) The Unrelated Sale is for no consideration other than cash payment against prompt delivery of the Auction Rate Security;

(e) The sales price for the Auction Rate Security is equal to the par value of the Auction Rate Security, plus any accrued but unpaid interest or dividends;

(f) The Plan does not waive any rights or claims in connection with the Unrelated Sale;

(g) The decision to accept the Offer or retain the Auction Rate Security is made by a Plan fiduciary or Plan participant or an individual retirement account (an IRA (as defined in Section V(e)) owner who is independent (as defined in Section V(d)) of Wachovia. Notwithstanding the foregoing: (1) In the case of an IRA which is beneficially owned by an employee, officer, director or partner of Wachovia, the decision to accept the Offer or retain the Auction Rate Security may be made by such employee, officer, director or partner; or (2) in the case of a Wachovia Plan or a pooled fund maintained or advised by Wachovia, the decision to accept the Offer may be made by Wachovia after Wachovia has determined that such purchase is in the best interest of the Wachovia Plan or pooled fund;[2]

(h) Except in the case of a Wachovia Plan or a pooled fund maintained or advised by Wachovia, neither Wachovia nor any affiliate exercises investment discretion or renders investment advice within the meaning of 29 CFR 2510.3–21(c) with respect to the decision to accept the Offer or retain the Auction Rate Security;

(i) The Plan does not pay any commissions or transaction costs with respect to the Unrelated Sale;

(j) The Unrelated Sale is not part of an arrangement, agreement or understanding designed to benefit a party in interest to the Plan;

(k) Wachovia and its affiliates, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of the Unrelated Sale, such records as are necessary to enable the persons described below in paragraph (l)(1), to determine whether the conditions of this exemption, if granted, have been met, except that:

(1) No party in interest with respect to a Plan which engages in an Unrelated Sale, other than Wachovia and its affiliates, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by paragraph (l)(1); and

(2) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of Wachovia or its affiliates, as applicable, such records are lost or destroyed prior to the end of the six-year period;

(l)(1) Except as provided below in paragraph (l)(2), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to above in paragraph (k) are unconditionally available at their customary location for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the U.S. Securities and Exchange Commission;

(B) Any fiduciary of any Plan, including any IRA owner, that engages in a Sale, or any duly authorized employee or representative of such fiduciary; or

(C) Any employer of participants and beneficiaries and any employee organization whose members are covered by a Plan that engages in the Unrelated Sale, or any authorized employee or representative of these entities;

(2) None of the persons described above in paragraphs (l)(1)(B)–(C) shall be authorized to examine trade secrets of Wachovia, or commercial or financial information which is privileged or confidential; and

(3) Should Wachovia refuse to disclose information on the basis that

[1] For purposes of this proposed exemption, references to section 406 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[2] The Department notes that the Act's general standards of fiduciary conduct also would apply to the transactions described herein. In this regard, section 404 of the Act requires, among other things, that a fiduciary discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent manner. Accordingly, a plan fiduciary must act prudently with respect to, among other things, the decision to sell the Auction Rate Security to Wachovia for the par value of the Auction Rate Security, plus unpaid interest and dividends. The Department further emphasizes that it expects Plan fiduciaries, prior to entering into any of the proposed transactions, to fully understand the risks associated with this type of transaction following disclosure by Wachovia of all relevant information.

such information is exempt from disclosure, Wachovia shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Section III. Sales of Auction Rate Securities From Plans to Wachovia: Related to a Settlement Agreement

If the proposed exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D), and (E) of the Code, shall not apply, effective February 1, 2008, to the sale by a Plan of an Auction Rate Security to Wachovia, where such sale (a Settlement Sale) is related to, and made in connection with, a Settlement Agreement, provided that the conditions set forth in Section IV have been met.

Section IV. Conditions Applicable to Transactions Described in Section III

(a) The terms and delivery of the Offer are consistent with the requirements set forth in the Settlement Agreement and acceptance of the Offer does not constitute a waiver of any claim of the tendering Plan;

(b) The Offer or other documents available to the Plan specifically describe, among other things:

(1) The securities available for purchase under the Offer;

(2) The background of the Offer;

(3) The methods and timing by which Plans may accept the Offer;

(4) The purchase dates, or the manner of determining the purchase dates, for Auction Rate Securities tendered pursuant to the Offer, if the Offer had any limitation on such dates;

(5) The timing for acceptance by Wachovia of tendered Auction Rate Securities, if there were any limitations on such timing;

(6) The timing of payment for Auction Rate Securities accepted by Wachovia for payment, if payment was materially delayed beyond the acceptance of the Offer;

(7) The expiration date of the Offer; and

(8) How to obtain additional information concerning the Offer;

(c) The terms of the Settlement Sale are consistent with the requirements set forth in the Settlement Agreement; and

(d) All of the conditions in Section II have been met.

Section V. Definitions

For purposes of this proposed exemption:

(a) The term "affiliate" means any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(b) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(c) The term "Auction Rate Security" or "ARS" means a security: (1) That is either a debt instrument (generally with a long-term nominal maturity) or preferred stock; and (2) with an interest rate or dividend that is reset at specific intervals through a Dutch auction process;

(d) A person is "independent" of Wachovia if the person is: (1) Not Wachovia or an affiliate; and (2) not a relative (as defined in section 3(15) of the Act) of the party engaging in the transaction;

(e) The term "Plan" means an individual retirement account or similar account described in section 4975(e)(1)(B) through (F) of the Code (an IRA); an employee benefit plan as defined in section 3(3) of the Act; or an entity holding plan assets within the meaning of 29 CFR 2510.3–101, as modified by section 3(42) of the Act; and

(f) The term "Settlement Agreement" means a legal settlement involving Wachovia and a U.S. state or federal authority that provides for the purchase of an ARS by Wachovia from a Plan.

DATES: *Effective Date:* If granted, this proposed exemption will be effective as of February 1, 2008.

Summary of Facts and Representations

1. The Applicant, Wachovia, is a global financial services firm headquartered in North Carolina. Among other things, Wachovia includes banks, registered investment advisers subject to the Investment Advisers Act of 1940 and broker-dealers registered with the U.S. Securities and Exchange Commission. In this last regard, Wachovia acts as a broker and dealer with respect to the purchase and sale of securities, including Auction Rate Securities. Wachovia is one of the largest diversified financial services companies in the United States. Wachovia provides a broad range of retail banking and brokerage, asset and wealth management, and corporate and investment banking products and services to customers through 3,330 retail financial centers in 21 states from Connecticut to Florida and west to Texas and California, and nationwide retail brokerage, mortgage lending and auto finance businesses. On December 31, 2008, Wachovia was acquired by Wells Fargo & Company (WF). WF is a nationwide, diversified community-based financial services company with total assets of $1.2 trillion and market capitalization of $140 billion as of December 31, 2009.

2. The Applicant describes Auction Rate Securities and the arrangement by which ARS are bought and sold as follows. Auction Rate Securities are securities (issued as debt or preferred stock) with an interest rate or dividend that is reset at periodic intervals pursuant to a process called a Dutch Auction. Investors submit orders to buy, hold, or sell a specific ARS to a broker-dealer selected by the entity that issued the ARS. The broker-dealers, in turn, submit all of these orders to an auction agent. The auction agent's functions include collecting orders from all participating broker-dealers by the auction deadline, determining the amount of securities available for sale, and organizing the bids to determine the winning bid. If there are any buy orders placed into the auction at a specific rate, the auction agent accepts bids with the lowest rate above any applicable minimum rate and then successively higher rates up to the maximum applicable rate, until all sell orders and orders that are treated as sell orders are filled. Bids below any applicable minimum rate or above the applicable maximum rate are rejected. After determining the clearing rate for all of the securities at auction, the auction agent allocates the ARS available for sale to the participating broker-dealers based on the orders they submitted. If there are multiple bids at the clearing rate, the auction agent will allocate securities among the bidders at such rate on a pro-rata basis.

3. The Applicant states that, under a typical Dutch Auction process, Wachovia is permitted, but not obligated, to submit orders in auctions for its own account either as a bidder or a seller and routinely does so in the auction rate securities market in its sole discretion. Wachovia may place one or more bids in an auction for its own account to acquire ARS for its inventory, to prevent: (a) A failed auction (i.e., an event where there are insufficient clearing bids which would result in the auction rate being set at a specified rate, resulting in no ARS being sold through the auction process); or (b) an auction from clearing at a rate that Wachovia believes does not reflect the market for the particular ARS being auctioned.

4. The Applicant states that for many ARS, Wachovia has been appointed by the issuer of the securities to serve as a

dealer in the auction and is paid by the issuer for its services. Wachovia is typically appointed to serve as a dealer in the auctions pursuant to an agreement between the issuer and Wachovia. That agreement provides that Wachovia will receive from the issuer auction dealer fees based on the principal amount of the securities placed through Wachovia.

5. The Applicant states further that Wachovia may share a portion of the auction rate dealer fees it receives from the issuer with other broker-dealers that submit orders through Wachovia, for those orders that Wachovia successfully places in the auctions. Similarly, with respect to ARS for which broker-dealers other than Wachovia act as dealer, such other broker-dealers may share auction dealer fees with Wachovia for orders submitted by Wachovia.

6. According to the Applicant, since February 2008, only a minority of auctions have cleared, particularly involving municipalities. As a result, Plans holding ARS may not have sufficient liquidity to make benefit payments, mandatory payments and withdrawals and expense payments when due.[3]

7. The Applicant represents that, in certain instances, Wachovia may have previously advised or otherwise caused a Plan to acquire and hold an Auction Rate Security.[4] In connection with Wachovia's role in the acquisition and holding of ARS by various Wachovia clients, including the Plans, Wachovia entered into Settlement Agreements with certain U.S. states and federal authorities. Pursuant to these Settlement Agreements, among other things, Wachovia was required to send a written offer to certain Plans that held ARS in connection with the advice and/or brokerage services provided by Wachovia. As described in further detail below, eligible Plans that accepted the Offer were permitted to sell the ARS to Wachovia for cash equal to the par value of such securities, plus any accrued but unpaid interest and/or dividends. The Applicant states that, prospectively, additional shares of ARS may be tendered by Plans to Wachovia pursuant to a Settlement Agreement. Accordingly, the Applicant is requesting retroactive and prospective relief for the Settlement Sales. The Applicant is also requesting retroactive relief (and prospective relief) for Unrelated Sales in the event that a sale of Auction Rate Securities by a Plan to Wachovia has occurred outside the Settlement process. If granted, this proposed exemption will be effective as of February 1, 2008.

8. Specifically, the Applicant is requesting exemptive relief for the sale of Auction Rate Securities under two different circumstances: (a) Where Wachovia initiates the sale by sending to a Plan a written Offer to acquire the ARS (i.e., an Unrelated Sale), notwithstanding that such Offer is not required under a Settlement Agreement; and (b) where Wachovia is required under a Settlement Agreement to send to Plans a written Offer to acquire the ARS (i.e., a Settlement Sale). The Applicant states that the Unrelated Sales and Settlement Sales (also referred to as a Covered Sale) are in the interests of Plans. In this regard, the Applicant states that the Covered Sales would permit Plans to normalize Plan investments. The Applicant represents that each Covered Sale will be for no consideration other than cash payment against prompt delivery of the ARS, and such cash will equal the par value of the ARS, plus any accrued but unpaid interest or dividends. The Applicant represents further that Plans will not pay any commissions or transaction costs with respect to any Covered Sale.

9. The Applicant represents that the proposed exemption is protective of the Plans. The Applicant states that, with the exception of sales of ARS involving Wachovia Plans and pooled funds maintained or advised by Wachovia: (a) Each Covered Sale will be made pursuant to a written Offer; and (b) the decision to accept the Offer or retain the ARS will be made by a Plan fiduciary or Plan participant or IRA owner who is independent of Wachovia.[5] Additionally, each Offer will be delivered in a manner designed to alert a Plan fiduciary that Wachovia intends to purchase ARS from the Plan. Offers made in connection with an Unrelated Sale will contain all of the material terms of the Unrelated Sale, including: (a) The identity and par value of the Auction Rate Security; (b) the interest or dividend amounts that are due with respect to the Auction Rate Security; and (c) the most recent rate information for the Auction Rate Security (if reliable information is available). Offers made in connection with a Settlement Agreement will specifically include, among other things: (a) The background of the Offer; (b) the method and timing by which a Plan may accept the Offer; (c) the expiration date of the Offer; (d) a description of certain risk factors relating to the Offer; (e) how to obtain additional information concerning the Offer; and (f) the manner in which information concerning material amendments or changes to the Offer will be communicated. The Applicant states that, with very narrowly tailored exceptions (involving Wachovia Plans and pooled funds maintained or advised by Wachovia), neither Wachovia nor any affiliate will exercise investment discretion or render investment advice with respect to a Plan's decision to accept the Offer or retain the ARS.[6] In the case of a Wachovia Plan or a pooled fund maintained or advised by Wachovia, the decision to engage in a Covered Sale may be made by Wachovia after Wachovia has determined that such purchase is in the best interest of the Wachovia Plan or pooled fund. The Applicant represents further that Plans will not waive any rights or claims in connection with any Covered Sale.

10. The Applicant represents that the proposed exemption, if granted, would be administratively feasible. In this regard, the Applicant notes that each Covered Sale will occur at the par value of the affected ARS (plus accrued but unpaid interest and dividends, to the extent applicable), and such value is readily ascertainable. The Applicant represents further that Wachovia will maintain the records necessary to enable the Department and Plan fiduciaries, among others, to determine whether the conditions of this exemption, if granted, have been met.

11. In summary, the Applicant represents that the transactions described herein satisfy the statutory criteria of section 408(a) of the Act because, among other things:

(a) With only very narrow exceptions (involving Wachovia Plans and pooled funds maintained or advised by Wachovia), each Covered Sale shall be made pursuant to a written Offer;

(b) Each Covered Sale shall be for no consideration other than cash payment against prompt delivery of the ARS;

(c) The amount of each Covered Sale shall equal the par value of the ARS,

[3] The Department notes that Prohibited Transaction Exemption 80–26 (45 FR 28545 (April 29, 1980), as amended at 71 FR 17917 (April 7, 2006)) permits interest-free loans or other extensions of credit from a party in interest to a plan if, among other things, the proceeds of the loan or extension of credit are used only: (1) For the payment of ordinary operating expenses of the plan, including the payment of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract, or (2) for a purpose incidental to the ordinary operation of the plan.

[4] The relief contained in this proposed exemption does not extend to the fiduciary provisions of section 404 of the Act.

[5] However, in the case of an IRA beneficially owned by an employee, officer, director or partner of Wachovia, the decision to accept the Offer or retain the ARS may be made by such employee, officer, director or partner of Wachovia.

[6] The Applicant states that while there may be communication between a Plan and Wachovia subsequent to an Offer, such communication will not involve advice regarding whether the Plan should accept the Offer.

plus any accrued but unpaid interest or dividends;

(d) Plans will not waive any rights or claims in connection with any Covered Sale;

(e) With only very narrow exceptions (involving Wachovia Plans and pooled funds maintained or advised by Wachovia): (1) The decision to accept an Offer or retain the ARS shall be made by a Plan fiduciary or Plan participant or IRA owner who is independent of Wachovia (unless the IRA owner is an employee, officer, director or partner of Wachovia); and (2) neither Wachovia nor any affiliate shall exercise investment discretion or render investment advice within the meaning of 29 CFR 2510.3–21(c) with respect to the decision to accept the Offer or retain the ARS;

(f) Plans shall not pay any commissions or transaction costs with respect to any Covered Sale;

(g) A Covered Sale shall not be part of an arrangement, agreement or understanding designed to benefit a party in interest to the affected Plan;

(h) With respect to any Settlement Sale, the terms and delivery of the Offer, and the terms of Settlement Sale, shall be consistent with the requirements set forth in the Settlement Agreement;

(i) Wachovia shall make available in connection with an Unrelated Sale the material terms of the Unrelated Sale, including: (1) The identity and par value of the Auction Rate Security; (2) the interest or dividend amounts that are due but unpaid with respect to the Auction Rate Security; and (3) the most recent rate information for the Auction Rate Security (if reliable information is available); and

(j) Each Offer made in connection with a Settlement Agreement shall describe the material terms of the Settlement Sale, including the following (and shall not constitute a waiver of any claim of the tendering Plan): (1) The background of the Offer; (2) the methods and timing by which the Plan may accept the Offer; (3) the purchase dates, or the manner of determining the purchase dates, for ARS pursuant to the Offer and the timing for acceptance by Wachovia of tendered ARS for payment; (4) the expiration date of the Offer; and (5) how to obtain additional information concerning the Offer.

Notice to Interested Persons

The Applicant represents that the potentially interested participants and beneficiaries cannot all be identified, and, therefore, the only practical means of notifying such participants and beneficiaries of this proposed exemption is by the publication of this notice in the **Federal Register**. Comments and requests for a hearing must be received by the Department not later than 30 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

For Further Information Contact: Gary Lefkowitz of the Department, telephone (202) 693–8546. (This is not a toll-free number.)

The Parvin Nahvi, M.D., Inc. 401(k) Profit Sharing Trust (the Plan), Located in Templeton, CA

Application No. D–11635

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, in connection with the cash sale by the Plan (the Sale) of a parcel of improved real property (the Property), to Dr. Parvin Nahvi and Dr. Javad Sani (the Applicants), the 100% owners of the Plan sponsor, Parvin Nahvi, M.D., Inc. (the Employer), and parties in interest with respect to the Plan; provided that:

(a) All terms and conditions of the Sale are at least as favorable to the Plan as those that the Plan could obtain in an arm's length transaction with an unrelated party;

(b) The Plan's obligations with respect to the remaining principal balance of a loan (the Loan) on the Property that is secured by a first deed of trust (the Deed of Trust) with Santa Lucia Bank, an unrelated lender, are:

(1) Satisfied in full out of the proceeds of the Sale, or

(2) assumed in full by the Applicants, who indemnify and hold the Plan harmless for any further payment on, or any claims arising in connection with, the Loan;

(c) The Plan receives an amount in cash, equal to the greater of:

(1) The original purchase price paid by the Plan for the Property, plus additional contributions or expenses paid by the Plan relating to the holding of the Property, less any income generated by the Property and paid to the Plan, less the Loan principal assumed by the Applicants pursuant to Section (b)(2), or

(2) The Property's appraised value of $1,825,000, which represents the fair market value of the Property, less the Loan principal assumed by the Applicants pursuant to Section (b)(2);

(d) The fair market value of the Property has been determined by a qualified independent appraiser (the Appraiser) and is updated by such appraiser on the date the Sale is consummated;

(e) The Sale is a one-time transaction for cash;

(f) The Plan incurs no real estate fees, or commissions, in connection with the Sale; and

(g) The Plan fiduciaries (1) determine whether it is in the interest of the Plan to proceed with the Sale, (2) review and approve the methodology used in the appraisal that is being relied upon, and (3) ensure that such methodology is applied by the Appraiser in determining the fair market value of the Property on the date of the Sale.

Summary of Facts and Representations

Background

1. The Employer, a California professional medical corporation, is the sponsor of the Plan. The Applicants are participants in the Plan and the sole shareholders of the Employer. The Applicants are related through marriage and are both fiduciaries and trustees (the Trustees) of the Plan. The remaining employees covered under the Plan are the Applicants' three children. The Employer is located in Templeton, California.

2. The Plan is a profit sharing plan qualified under section 401(a) of the Code and an individual account plan as described in section 3(34) of the Act, having an original effective date of January 1, 2002. Under the Plan, each Plan participant may direct the Trustees to invest any portion of his or her individual account in any asset which is administratively feasible for the Plan to hold, provided the acquisition of which would not result in disqualification of the Plan under the Code. The Plan provides separate individual accounting so that each participant bears the sole risk of loss attributable to his or her investment decision.

3. According to the Plan's 2009 Annual Return/Report of Employee Benefit Plan (the 2009 Annual Report), as of December 31, 2009, the Plan had five participants holding combined net assets of $1,459,184.[7] According to the Applicants, as of December 31, 2009, the Plan's five participants, together with their percentage holdings of total Plan's assets, consist of Dr. Javad N. Sani, owning 57.69%, Dr. Parvin Nahvi,

[7] This figure takes into account the Plan's Loan liability of $500,946 as of December 31, 2009.

owning 32.28%, and the Applicants' children, Farhad Sani, Roya Sani, and Sara Sani, owning 4.13%, 3.28%, and 2.62%, respectively.

4. As Trustees, the Applicants caused the Plan, on August 5, 2004, to purchase, on behalf of the participants, the Garden Street Inn, a 13-room bed and breakfast located at 1212 Garden Street, San Luis Obispo, California, from Dan and Kathy Smith, unrelated third parties. The Property, originally constructed in 1898, is a rectangular shaped, two-story building containing approximately 5,998 square feet on the first and second level combined and an additional 754 square foot finished basement that is currently used as a manager's unit. The Applicants represent that the purpose of the investment was to obtain an income producing piece of real estate.

5. The total purchase price for the Property, inclusive of any closing costs and $85,890 allocated to furniture and fixtures, was $2,213,348.[8] Of the total purchase price, the Plan paid $1,463,348 in cash and financed the remainder through a first deed of trust with Santa Lucia Bank, of Atascadero, California, an unrelated party, in the original principal amount of $750,000. According to the Applicants, there are no other deeds of trust or encumbrances on the Property. The Applicants state that the Loan underlying the Deed of Trust has a maturity date of August 4, 2014 and it carries a 6.5% fixed interest rate for 5 years, after which it is subject to an adjustable rate of interest. Subject to any payment changes, the Loan is payable in 119 monthly installments. According to the Plan's 2009 Annual Report, the outstanding balance of the Loan as of December 31, 2009 was $500,946. In addition, the Applicants state that, as of August 31, 2010, the outstanding principal balance of the Loan had been paid down to $479,876.43.[9]

6. The Applicants note that the Plan does not own any property aside from the subject Property. In addition, the Applicants represent that no parties in interest with respect to the Plan own or lease any property adjacent to the Property. The Applicants further represent that the Property has not been leased to, or used by, any party in interest with respect to the Plan since the date of acquisition.

7. According to the Applicants, aside from the Property's acquisition price (including real estate taxes), the aggregate cost of holding the Property by the Plan has been paid out of the income generated by the Property. According to the Applicants, in respect of the years 2004 through 2008, the Property yielded net income to the Plan in the amounts of: $9,175, $30,433, $30,492, $64,639, and $14,125, respectively. However, the Applicants state that, in 2009, the Property suffered a loss of $21,035.[10]

8. Furthermore, during the five month period ending on May 31, 2010, the Property suffered an additional loss of approximately $3,017, for a total loss of $24,052. The Applicants explain that, prior to June 1, 2010, the Property was managed by an unrelated third party, the Hotel Management Group (HMG), which had been charging the Plan $3,000 per month in maintenance fees. Due to the inability of the Plan to continue paying such fees, the management contract with HMG was terminated as of June 1, 2010, and since then, the Applicants have managed the Property themselves without receiving any compensation for their services. As a result, from June 1, 2010 through August 31, 2010, the Plan received approximately $16,836 in net income from the Property.

Financial data provided by the Applicants, summarized below, reveals that for the period beginning in 2004 and continuing through August 31, 2010, the Plan received total income of $2,503,275 and incurred total expenses of $2,361,627, related to its holding of the Property, yielding aggregate net income of $141,648. As a result, through August 31, 2010, the Plan's aggregate net acquisition and holding costs with respect to the Property were $2,071,700 (the original purchase price of $2,213,348, less aggregate net income of $141,648).

Item of Income/Expense	2004—8/31/2010 ($)
Revenue:	
Rooms Department [11]	2,490,046.00
Other Income	13,229.00
Total Income	2,503,275.00
Departmental Expenses:	
Rooms Department	955,938.00
Cost of Other Income	4,312.00
Fixed Expenses:	
Real Estate Taxes	69,467.00
Insurance	40,084.00
Mortgage Interest Expense	256,813.00
UBIT on Property	0.00
Other	10,327.00
Undistributed Expenses:	
Operating Expenses	96,152.00
Marketing Expenses	77,765.00
Energy Costs	97,138.00
Administrative & General	[12] 753,631.00
Total Expenses	2,361,627.00
Net Income	141,648.00

The Appraisal Report

9. ThePropertywas originally appraised on June 9, 2009, by Keith Spierling, of Spierling Appraisal and Consulting Services, Arroyo Grande, California. Based on the appraisal report dated June 9, 2009 (the Appraisal Report), the Appraiser is an Associate Member of the Appraisal Institute and has been actively engaged in the appraisal profession for over 25 years, 20 of which with respect to the appraisal of commercial properties. The Appraiser is also certified by the State of California as a State Certified General Appraiser. The Appraiser affirms that he is independent of the Applicants, the Employer, and any other parties in interest. In addition, the Appraiser states that he derives less than 1% of his income from these parties.

10. Pursuant to a letter addressed to the Applicants dated May 14, 2010, the Appraiser stated that the Appraisal Report was completed for Santa Lucia Bank, who was the primary client and the intended user of the Report. He further represented that he was engaged by Santa Lucia Bank so that the Applicants could obtain financing in order to purchase the Property from the Plan as well as seek exemptive relief from the Department for such purchase. Although the Appraisal Report was completed for Santa Lucia Bank as its intended user, the Applicants represent that the Appraisal Report was paid for by Dr. Sani. In this regard, the Applicants state that, in anticipation of applying for the exemption, they approached Santa Lucia Bank about assuming the Loan and also the

[8] The Department expresses no opinion herein as to whether the acquisition and holding of the Property by the Plan violated any of the provisions of Part 4 of Title I of the Act.

[9] The Applicants state that, as trustees of the Plan, they have applied the income derived from the Property's operation since its purchase to paying down the principal balance of the Loan.

[10] According to data provided by the Applicants, this loss was mainly attributable to a $76,829 drop in revenue received from room rents compared with the previous year and a corresponding drop in expenses of only $41,000.

[11] Typically, the "rooms department" may include reservations, the front office, housekeeping, telephone, maintenance, and engineering. A "department" is a management convention used in the hotel and lodging industry to ensure efficient coordination and control of activities undertaken to effectively manage a facility. In a very small lodging business, such as a bed-and-breakfast, the owner can supervise each department.

[12] Includes approximately $184,400 paid to Sterling Hotels Corporation and HMG, unrelated property management companies.

possibility of taking out a second loan. Accordingly, the Applicants explain, the bank required an appraisal of the Property in order to determine whether or not the Applicants could assume the Loan and qualify for the second loan. The Applicants explain further that the policy of the bank is to initiate an appraisal with the client paying the fee. Consequently, Santa Lucia Bank retained Mr. Spierling for an appraisal of the Property and forwarded his bill for services to the Applicants, who paid the amount due in turn.

11. The Appraiser acknowledged, in his letter of May 14, 2010, that the Appraisal Report would be used for purposes of obtaining an administrative exemption from the Department for the Sale. Furthermore, the Appraiser stated that, barring any unforeseen circumstances, he would be able to update the Appraisal Report as of the date of purchase of the Property by the Applicants. According to the Appraiser, such an update would be necessary due to the length of time elapsed between the original Appraisal Report and the contemplated date of purchase of the Property. The Applicants have stated that they would pay the costs associated with updating the Appraisal Report.

12. In the Appraisal Report, the Appraiser valued the Property in fee simple using the Sales Comparison Approach and Income Approach to valuation. The Appraiser indicated that he considered using the Cost Approach in addition to the Sales Comparison Approach and Income Approach, but ultimately decided that the Cost Approach was not appropriate, because the age of the building, the architectural details of the structure, and the lack of similar land sales prevent the Cost Approach from providing a meaningful indicator or adding any credibility to the overall analysis.

The Appraisal Report indicates that the Sales Comparison Approach and Income Approach yielded $1,875,000 and $1,850,000 for the Property, respectively. According to the Appraiser, the Sales Comparison Approach was considered the most pertinent to the analysis because of the recent sales of similar properties that were available for a comparative analysis, in spite of the fact that the available comparable sales of properties in the area were somewhat dated. Consequently, the Appraiser determined that the Sales Comparison Approach should be given consideration in the final analysis. Additionally, the Appraiser determined that the Income Approach was the most pertinent in the analysis of income producing properties. In valuing the Property using this approach, the Appraiser reviewed historical income and expense data and compared such data to similar competitive properties. In conclusion, the Appraiser accorded relatively equal consideration to both approaches to value and determined that the fair market value of the Property as of June 9, 2009 was $1,860,000, using an exposure of three to sixteen months.

The Appraisal Update

13. Because the Appraisal Report was dated more than one year before this proposed exemption was published, the Department required an additional appraisal of the Property to take place, as an update to the original appraisal. In this regard, on November 3, 2010, the Appraiser provided an update to the Appraisal Report (the Appraisal Update), which incorporates the Appraisal Report of June 9, 2009.[13]

14. In the Appraisal Update, the Appraiser valued the Property in fee simple as of October 28, 2010 based upon the same methods of valuation used in the Appraisal Report, the Income Approach and Sales Comparison Approach. The Appraiser states that, upon his most recent inspection, the interior and exterior of the Property revealed no changes since the prior appraisal. However, the Appraisal Update notes that, while there continues to be overall softness in the real estate market in the past year since the date of the Appraisal Report, there is insufficient data to develop any definitive trends in current market price, as no additional sales of smaller, good quality hotels or bed and breakfast facilities since June of 2009 have occurred.

15. The Appraisal Update indicates that the Sales Comparison Approach and the Income Approach yielded $1,850,000 and $1,800,000, respectively. Regarding the Sales Comparison Approach, while there were no recent comparable sales data since June of 2009, as noted above, there were several open listings which supported and correlated well with the sales data in the Appraisal Report. In this regard, the Appraisal Update states that the slight decline in the value of the Property based on the Sales Comparison Approach was primarily due to the persistent soft market conditions. Regarding the Income Approach, an updated rental survey was completed which generally revealed that room rates have remained relatively stable since the date of the Appraisal Report. In addition, the Appraisal Update notes that no sales data was revealed which would contradict the overall capitalization rates used in the prior appraisal.

The Appraisal Update notes that the two approaches are considered pertinent and should be considered in the final analysis. Thus, giving equal weight to each valuation approach, the Appraisal Update states that the fair market value of the Property as of October 28, 2010 was $1,825,000 assuming an exposure period of 4 to 18 months. Accordingly, the value of the Property constitutes approximately 93.11% of the Plan's total asset value of $1,960,130.43.

Terms of the Sale

16. The Applicants have requested an exemption from the Department to purchase the Property from the Plan. The Applicants represent that, although they do not currently possess enough cash to purchase the Property, they have the ability to sell for cash certain other properties that they currently own in their individual capacities. Furthermore, the Applicants represent that there is a chance that they may not be able to liquidate other real property holdings in order to pay cash for the full purchase price of the Property. In such event, they state that they will assume the remaining principal balance of the Loan from the Plan and pay cash to the Plan for the remainder.[14] In either event, the Applicants state that the Plan's obligations with respect to the Loan will be satisfied in full. Furthermore, the Applicants state that the Plan will not pay any commissions, costs, or other expenses in connection with the Sale, and the Appraisal Report will again be updated by the Appraiser on the date of the Sale.[15]

17. Therefore, in exchange for the Property the Applicants will make a one-time cash payment to the Plan equal to the greater of: (a) The original purchase price paid by the Plan for the Property, plus any expenses paid by the Plan relating to the holding of the Property, less any income generated by the Property and paid to the Plan, and less the Loan principal assumed by the Applicants, or (b) the appraised value of

[13] In the same manner that Santa Lucia Bank ordered the Appraisal Report, at the Applicants' behest, Santa Lucia Bank also retained Mr. Spierling to complete the Appraisal Update and forwarded his bill for services to the Applicants, who paid the amount due in turn.

[14] The Applicants represent that Santa Lucia Bank has authorized the assumption of the existing Loan by the Applicants in the event that the Sale takes place after approval by the Department of the exemption.

[15] For this purpose, the updated appraisal must take into account any new data on recent sales of similar property in the local real estate market, which may affect the valuation conclusion.

$1,825,000, which represents the fair market value of the Property, less the Loan principal assumed by the Applicants. In the event that the Applicants assume the remainder of the Loan, they will indemnify and hold the Plan harmless for any further payment on such Loan.

Rationale for the Sale

18. The Applicants represent that the proposed transaction is in the interest of the Plan because it will divest the Plan of an asset that has been difficult to manage within the Plan as a result of adverse economic conditions. According to the Applicants, the hospitality industry has undergone a downturn as a result of the recent unfavorable economic conditions. As illustrated above, the net income generated by the Property since 2007 has declined precipitously. The Applicants point out that this lack of strong cash flow makes it difficult for the Plan to pay expenses related to the management and maintenance of the Property. In this regard, the Applicants represent that the Property has had several maintenance and safety issues that have gone unaddressed because the Plan cannot afford to make them.

19. Moreover, the Applicants suggest that the Sale is in the interest of the Plan because the Applicants would pay more to the Plan than unrelated third parties would pay to purchase the Property. According to the Applicants, in a sale on the open market the Plan would receive no more than its fair market value, whereas in the proposed transaction, the Applicants would make the Plan whole for any loss in the value of the Property since its acquisition, including any expenses paid by the Plan in holding the Property (net of any income paid to the Plan). As the Property's current fair market value is well below its original acquisition cost, a sale on the open market would cause the Plan to sustain a significant monetary loss. Furthermore, the Applicants note that, in a sale on the open market, the Plan would be forced to pay a real estate commission of approximately 7% on the sale price of the Property. In the proposed transaction, the Plan will not incur any expenses in connection with the Sale, including real estate commissions.

20. Finally, the Applicants, in their capacities as Plan fiduciaries, will (a) Determine whether it is in the interest of the Plan to proceed with the Sale of the Property, (b) review and approve the methodology used in the Appraisal Report that is being relied upon, and (c) ensure that such methodology is applied by the Appraiser in determining the fair market value of the Property on the date of the Sale.

Summary

21. In summary, the Applicants represent that the proposed transaction will satisfy the statutory criteria contained in section 408(a) of the Act and section 4975(c)(2) of the Code for the following reasons:

(a) All terms and conditions of the Sale will be at least as favorable to the Plan as those that the Plan could obtain in an arm's length transaction with an unrelated party;

(b) The Plan's obligations with respect to the Loan will be:

(1) Satisfied in full out of the proceeds of the sale, or

(2) Assumed in full by the Applicants, who shall indemnify and hold the Plan harmless for any further payment on, or any claims arising in connection with, the Loan;

(c) The Plan will receive an amount in cash, equal to the greater of:

(1) The original purchase price paid by the Plan for the Property, plus expenses paid by the Plan relating to the holding of the Property, less any income generated by the Property and paid to the Plan, less the Loan principal assumed by the Applicants pursuant to Section (b)(2), or

(2) The appraised value of $1,825,000, which represents the fair market value of the Property, less the Loan principal assumed by the Applicants pursuant to Section (b)(2);

(d) The fair market value of the Property has been determined by the Appraiser, who will update the Appraisal Report on the date the Sale is consummated;

(e) The Sale will be a one-time transaction for cash;

(f) The Plan will incur no real estate fees, or commissions, in connection with the Sale; and

(g) The Plan fiduciaries will (1) determine whether it is in the interest of the Plan to proceed with the Sale, (2) review and approve the methodology used in the appraisal that is being relied upon, and (3) ensure that such methodology is applied by the Appraiser in determining the fair market value of the Property on the date of the Sale.

For Further Information Contact: Warren Blinder of the Department, telephone (202) 693–8553. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, 14th day of February 2011.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2011–3590 Filed 2–16–11; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0116]

Proposed Extension of Existing Information Collection; Examinations and Testing of Electrical Equipment, Including High Voltage Longwalls

AGENCY: Mine Safety and Health Administration, Department of Labor.

ACTION: Notice of request for public comments.

SUMMARY: The Department of Labor, 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 continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps to assure 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 requirements on respondents can be properly assessed. Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection for 30 CFR 75.351 *Atmospheric monitoring systems;* 75.512 *Electric equipment; examination, testing and maintenance;* 75.703 *Grounding offtrack direct-current machines and enclosures of related detached components;* 75.800–4 Testing, examination and maintenance of circuit breakers; record; 75.820 *Electrical work; troubleshooting and testing;* 75.821 Testing, examination and maintenance; 75.900–4 *Testing, examination and maintenance of circuit breakers; record;* 75.1001–1 *Devices for overcurrent protection; testing and calibration requirements; records;* 77.502 *Electric equipment; examination, testing, and maintenance;* 77.800–2 *Testing, examination and maintenance of circuit breakers; record;* and 77.900–2 *Testing, examination, and maintenance of circuit breakers; record.*

DATES: All comments must be received or postmarked by midnight Eastern Standard Time on April 18, 2011.

ADDRESSES: Comments must be identified clearly with the rule title and may be submitted to MSHA by any of the following methods:

(1) *Electronic mail: zzMSHA-Comments@dol.gov.*

(2) *Facsimile:* 202–693–9441.

(3) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Mario Distasio, Chief of the Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *distasio.mario@dol.gov* (e-mail), 202–693–9445 (voicemail), 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

The respondents for the paperwork provisions of the subject regulations are coal mine operators. The records of tests and examinations are reviewed by coal miners, coal mine officials, and MSHA and State inspectors. The records are intended to verify that examinations and tests were conducted and give insight into the hazardous conditions that have been encountered and those that may be encountered. These records greatly assist those who use them in making decisions during accident investigations to establish root causes and to prevent similar occurrences. These decisions will ultimately affect the safety and health of miners.

Miners examine the records to determine if electric equipment is safe to operate and to determine if reported safety defects have been corrected. Mine officials examine the records to evaluate the effectiveness of their electrical maintenance programs, to determine that the required tests and examinations have been conducted, and to determine if reported safety defects have been corrected. MSHA and State inspectors review the records to determine if the required tests and examinations have been conducted and to identify units of electric equipment that may pose a potential safety hazard, and to evaluate the effectiveness of the coal mine operator's electrical maintenance programs. By comparing the records with the actual condition of electric equipment, MSHA inspectors may, in some cases, be able to identify weaknesses in the coal mine operator's electrical maintenance programs and require that these weaknesses be corrected.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- 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 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.

A copy of the information collection request can be obtained by contacting the person listed in the **FOR FURTHER INFORMATION** section of this notice, or viewed on the Internet by selecting "FedReg.Docs" under the "Rules & Regs" section on the right of the homepage. On the next screen, select "Paperwork Reduction Act Supporting Statement" to view documents supporting the **Federal Register** notice.

III. Current Actions

This notice contains the request for an extension of the existing collection of information in 30 CFR 75.351 *Atmospheric monitoring systems;* 75.512 *Electric equipment; examination, testing and maintenance;* 75.703 *Grounding offtrack direct-current machines and enclosures of related detached components;* 75.800–4 *Testing, examination and maintenance of circuit breakers; record;* 75.820 *Electrical work; troubleshooting and testing;* 75.821 *Testing, examination and maintenance;* 75.900–4 *Testing, examination and maintenance of circuit breakers; record;* 75.1001–1 *Devices for overcurrent protection; testing and calibration requirements; records;* 77.502 *Electric equipment; examination, testing, and maintenance;* 77.800–2 *Testing, examination and maintenance of circuit breakers; record;* and 77.900–2 *Testing, examination, and maintenance of circuit breakers; record.* MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0116.

Frequency: Daily, weekly, monthly, semi-annually, and on occasion.

Affected Public: Business or other for-profit.

Cost to Federal Government: There is minimal cost to the Government as the records are reviewed during the course of inspections.

Total Burden Respondents: 1,547 per year.

Total Number of Responses: 706,296 per year.

Total Burden Hours: 128,101 hours.

Total Hour Burden Cost (operating/maintaining): $9,703,964 per year.

Comments submitted in response to this notice will be summarized and 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: February 11, 2011.

Roslyn B. Fontaine,

Acting Director, Office of Standards, Regulations and Variances, Certifying Officer.

[FR Doc. 2011–3591 Filed 2–16–11; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0142]

Proposed Extension of Existing Information Collection; Sealing of Abandoned Areas

AGENCY: Mine Safety and Health Administration.

ACTION: Notice of request for public comments.

SUMMARY: The Department of Labor, 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 continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps to assure 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 requirements on respondents can be properly assessed. Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection for 30 CFR 75.335 Seal strengths, design applications, and installation; 75.336 Sampling and monitoring requirements; 75.337 Construction and repair of seals; and 75.338 Training.

DATES: All comments must be received or postmarked by midnight Eastern Standard Time on April 18, 2011.

ADDRESSES: Comments must clearly be identified with the rule title and may be submitted to MSHA by any of the following methods:

(1) *Electronic mail: zzMSHA-Comments@dol.gov.*

(2) *Facsimile:* 202–693–9441.

(3) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Mario Distasio, Chief of the Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *distasio.mario@dol.gov* (e-mail), 202–693–9445 (voice mail), or 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Adequate seal design and construction and monitoring of the atmosphere behind seals are crucial requirements to prevent potentially explosive or toxic gases from migrating into the active working areas of underground coal mines. Seals must be designed to withstand elevated pressures from explosions, and the atmosphere behind the seal must be monitored to prevent methane from reaching the explosive range. Miners rely on seals to protect them from the hazardous and explosive atmosphere within the sealed area. Records collected under these standards help assure that the construction and maintenance of seals are done correctly; certified persons conducting sampling in sealed areas are adequately trained; and the sampling results are recorded. The respondents for the paperwork provisions of these standards are coal mine operators.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- 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 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.

A copy of the information collection request can be obtained by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet at *http://www.msha.gov* and by selecting *FedReg. Docs* under *Rules & Regs* on the right side of the screen. On the next screen, select *Information Collection Requests* to view documents supporting this **Federal Register** notice.

III. Current Actions

This notice contains the request for an extension of the existing collection of information in 30 CFR 75.335 Seal strengths, design applications, and installation; 75.336 Sampling and monitoring requirements; 75.337 Construction and repair of seals; and 75.338 Training. MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Type of Review: Three-year update.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0142.

Frequency: As necessary.

Affected Public: Business or other for-profit.

Cost to Federal Government: Minimal cost because records are reviewed during the course of inspections.

Total Burden Respondents: 361 per year.

Total Number of Responses: 90,360 per year.

Total Burden Hours: 9,057 hours.

Total Hour Burden Cost (operating/maintaining): $750,730 per year.

Comments submitted in response to this notice will be summarized and 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: February 11, 2011.

Roslyn B. Fontaine,

Acting Director, Office of Standards, Regulations and Variances, Certifying Officer.

[FR Doc. 2011–3594 Filed 2–16–11; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0015]

Proposed Extension of Existing Information Collection; Refuse Piles and Impoundment Structures, Recordkeeping and Reporting Requirements

AGENCY: Mine Safety and Health Administration, Department of Labor.

ACTION: Notice of request for public comments.

SUMMARY: The Department of Labor, 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 continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps to assure 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 requirements on respondents can be properly assessed. Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection for 30 CFR 77.215(j), 77.215–2, 77.215–3, 77.215–4, 77.216–2, 77.216–3, 77.216–4, and 77.216–5.

DATES: All comments must be received or postmarked by midnight Eastern Standard Time on April 18, 2011.

ADDRESSES: Comments must be identified clearly with the rule title and may be submitted to MSHA by any of the following methods:

(1) *Electronic mail: zzMSHA-Comments@dol.gov.*

(2) *Facsimile:* 202–693–9441

(3) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Mario Distasio, Chief of the Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *distasio.mario@dol.gov* (e-mail), 202–693–9445 (voice mail), 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

30 CFR part 77, subpart C, sets forth standards for surface installations. More specifically, these sections address refuse piles (30 CFR 77.215), and impoundments (30 CFR 77.216). Impoundments are structures that can retain water, sediment, or slurry or any combination of materials; and refuse piles are deposits of coal mine waste (other than overburden or spoil) that are removed during mining operations or separated from mined coal and deposited on the surface. The failure of these structures can have a devastating affect on a community. To avoid or minimize such disasters, standards have been promulgated for the design, construction, and maintenance of these structures; for annual certifications; for certification for hazardous refuse piles; for the frequency of inspections; and the methods of abandonment for impoundments and impounding structures.

Section 103(e) of the Mine Act directs the Secretary of Labor not to impose an unreasonable burden on small businesses when obtaining any information under the Mine Act. This information collection does not have a significant impact on a substantial number of small entities.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- 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 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.

A copy of the information collection request can be obtained by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet by selecting "Rules & Regs", and then selecting "FedReg.Docs". On the next screen, select "Paperwork Reduction Act Supporting Statement" to view documents supporting the **Federal Register** notice.

III. Current Actions

This notice contains the request for an extension of the existing collection of information in 30 CFR 77.215(j), 77.215–2, 77.215–3, 77.215–4, 77.216–2, 77.216–3, 77.216–4, and 77.216–5. MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0015.

Frequency: Variable.

Affected Public: Business or other for-profit.

Cost to Federal Government: $535,953.

Total Burden Respondents: 642.

Total Number of Responses: 10,422.

Total Burden Hours: 30,579 hours.

Total Hour Burden Cost (operating/maintaining): $7,782,240.

Comments submitted in response to this notice will be summarized and 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: February 11, 2011.

Roslyn B. Fontaine,

Acting Director, Office of Standards, Regulations and Variances, Certifying Officer.

[FR Doc. 2011–3593 Filed 2–16–11; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0127]

Proposed Extension of Existing Information Collection on Qualification/Certification Program and Man Hoist Operators Physical Fitness

AGENCY: Mine Safety and Health Administration, Department of Labor.

ACTION: Notice of request for public comments.

SUMMARY: The Department of Labor, 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 continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps to assure 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 requirements on respondents can be properly assessed. Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection for 30 CFR 75.100, 75.155, 75.159, 75.160, 75.161, 77.100, 77.105, 77.106, 77.107, and 77.107–1 on Qualification/Certification Program and Man Hoist Operators Physical Fitness.

DATES: All comments must be received by midnight Eastern Standard Time on April 18, 2011.

ADDRESSES: Comments must be identified clearly with the rule title and may be submitted to MSHA by any of the following methods:

(1) *Electronic mail: zzMSHA-Comments@dol.gov.*

(2) *Facsimile:* 202–693–9441

(3) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Mario Distasio, Chief of the Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *distasio.mario@dol.gov* (e-mail), 202–693–9445 (voicemail), 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Section 101(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act) requires that the Secretary must develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines. Under section 103(a)(2), authorized representatives of the Secretary of Labor or Secretary of Health and Human Services must make frequent inspections and investigations in coal or other mines each year for the purpose of gathering information with respect to mandatory health or safety standards.

Sections 75.159 and 77.106 require coal mine operators to maintain a list of persons who are certified and those who are qualified to perform duties under Parts 75 and 77, such as conduct examinations for hazardous conditions, conduct tests for methane and oxygen deficiency, conduct tests of air flow, perform electrical work, repair energized surface high-voltage lines, and perform duties of hoisting engineer. The recorded information is necessary to ensure that only persons who are properly trained and have the required number of years of experience are permitted to perform these duties. MSHA does not specify a format for the recordkeeping; however, it normally consists of the names of the certified and qualified persons listed in two columns on a sheet of paper. One column is for certified persons and the other is for qualified persons.

Sections 75.100 and 77.100 pertain to the certification of certain persons to perform specific examinations and tests. Sections 75.155 and 77.105 outline the requirements necessary to be qualified as a hoisting engineer or hoist man. Also, under §§ 75.160, 75.161, 77.107 and 77.107–1, the mine operator must have an approved training plan developed to train and retrain the qualified and certified people to effectively do their tasks.

These regulations recognize State certification and qualification programs. However, where State programs are not available, MSHA may certify and qualify persons.

The MSHA program will continue to qualify or certify individuals as long as these individuals meet the requirements for certification or qualification, fulfill any applicable retraining requirements, and remain employed at the same mine or by the same independent contractor.

Applications for Secretarial qualification or certification are submitted to the MSHA Qualification and Certification Unit in Denver, Colorado. MSHA Form 5000–41 provides the coal mining industry with a standardized reporting format that expedites the certification and qualification process while ensuring compliance with the regulations. MSHA uses the form's information to determine if applicants satisfy the requirements to obtain the certification or qualification sought. Persons must meet certain minimum experience requirements depending on the type of certification or qualification.

Section 103(e) of the Mine Act directs the Secretary of Labor not to impose an unreasonable burden on small businesses when obtaining any information under the Mine Act. This information collection does not have a significant impact on a substantial number of small entities.

II. Desired Focus of Comments

MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- 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 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.

A copy of the information collection request can be obtained by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet by selecting "Rules & Regs", and then selecting "FedReg.Docs". On the next screen, select "Paperwork Reduction Act Supporting Statement" to view documents supporting the **Federal Register** notice.

III. Current Actions

This notice contains the request for an extension of the existing collection of information in 30 CFR 75.100, 75.155, 75.159, 75.160, 75.161, 77.100, 77.105, 77.106, 77.107, and 77.107–1. MSHA does not intend to publish the results from this information collection. MSHA is seeking approval to display the expiration date for the OMB approval of this information collection on MSHA Form 5000–41.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Type of Review: Three year update.

Agency: Mine Safety and Health Administration.

OMB Number: 1219–0127.

Frequency: Annually.

Affected Public: Business or other for-profit.

Cost to Federal Government: none.
Total Burden Respondents: $1,547.
Total Number of Responses: 6,966.
Total Burden Hours: 679 hours.
Total Hour Burden Cost (operating/maintaining): $125.

Comments submitted in response to this notice will be summarized and 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: February 11, 2011.

Roslyn B. Fontaine,

Acting Director, Office of Standards, Regulations and Variances, Certifying Officer.

[FR Doc. 2011–3592 Filed 2–16–11; 8:45 am]

BILLING CODE 4510–43–P

THE NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meeting of National Council on the Humanities

AGENCY: The National Endowment for the Humanities.

ACTION: Notice of meeting.

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended) notice is hereby given the National Council on the Humanities will meet in Washington, DC on March 3–4, 2011.

The purpose of the meeting is to advise the Chairman of the National Endowment for the Humanities with respect to policies, programs, and procedures for carrying out his functions, and to review applications for financial support from and gifts offered to the Endowment and to make recommendations thereon to the Chairman.

The meeting will be held in the Old Post Office Building, 1100 Pennsylvania Avenue, NW., Washington, DC. A portion of the morning and afternoon sessions on March 3–4, 2011, will not be open to the public pursuant to subsections (c)(4), (c)(6) and (c)(9)(B) of section 552b of Title 5, United States Code because the Council will consider information that may disclose: Trade secrets and commercial or financial information obtained from a person and privileged or confidential; information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and information the premature disclosure of which would be likely to significantly frustrate implementation of proposed agency action. I have made this determination under the authority granted me by the Chairman's Delegation of Authority dated July 19, 1993.

The agenda for the sessions on March 3, 2011 will be as follows:

Committee Meetings

(Open to the Public)

Policy Discussion

9–10:30 a.m.
Digital Humanities—Room 402
Education Programs—Room M–07
Federal/State Partnership and Preservation and Access—Room 415
Public Programs—Room 421
Research Programs—Room 315

(Closed to the Public)

Discussion of Specific Grant Applications and Programs Before the Council

10:30 a.m. until Adjourned
Digital Humanities—Room 402
Education Programs—Room M–07
Federal/State Partnership and Preservation and Access—Room 415
Public Programs—Room 421
Research Programs—Room 315

The morning session of the meeting on March 4, 2011 will convene at 9 a.m., in the first floor Council Room M–09, and will be open to the public, as set out below. The agenda for the morning session will be as follows:

A. Minutes of the Previous Meeting
B. Reports
1. Introductory Remarks
2. Film Presentation
3. Staff Report
4. Congressional Report
5. Budget Report
6. Reports on Policy and General Matters
a. Digital Humanities
b. Education Programs
c. Federal/State Partnership
d. Preservation and Access
e. Public Programs
f. Research Programs

The remainder of the proposed meeting will be given to the consideration of specific applications and will be closed to the public for the reasons stated above.

Further information about this meeting can be obtained from Michael P. McDonald, Advisory Committee Management Officer, National Endowment for the Humanities, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, or by calling (202) 606–8322, TDD (202) 606–8282. Advance notice of any special needs or accommodations is appreciated.

Michael P. McDonald,

Advisory Committee Management Officer.

[FR Doc. 2011–3618 Filed 2–16–11; 8:45 am]

BILLING CODE 7536–01–P

THE NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: The National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given that the following meetings of Humanities Panels will be held at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Michael P. McDonald, Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on (202) 606–8282.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by the grant applicants. Because the proposed meetings will consider information that is likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential and/or information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated July 19, 1993, I have determined that these meetings will be closed to the public pursuant to subsections (c)(4), and (6) of section 552b of Title 5, United States Code.

1. *Date:* March 1, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for Archaeology II in Collaborative Research, submitted to the

Division of Research Programs at the October 28, 2010 deadline.

2. *Date:* March 7, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for Latin American Studies in Collaborative Research, submitted to the Division of Research Programs at the October 28, 2010 deadline.

3. *Date:* March 7, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 421.
Program: This meeting will review applications for Europe in Bridging Cultures through Film Grants Program, submitted to the Division of Public Programs at the January 5, 2011 deadline.

4. *Date:* March 8, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 421.
Program: This meeting will review applications for Africa and the Middle East in Bridging Cultures through Film Grants Program, submitted to the Division of Public Programs at the January 5, 2011 deadline.

5. *Date:* March 8, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for Literature and the Arts in Collaborative Research, submitted to the Division of Research Programs at the October 28, 2010 deadline.

6. *Date:* March 9, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for Philosophy, Religion, and History of Science in Collaborative Research, submitted to the Division of Research Programs at the October 28, 2010 deadline.

7. *Date:* March 10, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for American Studies in Collaborative Research, submitted to the Division of Research Programs at the October 28, 2010 deadline.

8. *Date:* March 10, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 421.
Program: This meeting will review applications for Asia in Bridging Cultures through Film Grants Program, submitted to the Division of Public Programs at the January 5, 2011 deadline.

9. *Date:* March 11, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 421.
Program: This meeting will review applications for the Americas in Bridging Cultures through Film Grants Program, submitted to the Division of Public Programs at the January 5, 2011 deadline.

10. *Date:* March 14, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for Philosophy and Religion in Scholarly Editions, submitted to the Division of Research Programs at the October 28, 2010 deadline.

11. *Date:* March 15, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for Sustaining Cultural Heritage Collections I in Sustaining Cultural Heritage Collections, submitted to the Division of Preservation and Access at the December 1, 2010 deadline.

12. *Date:* March 15, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for Archaeology I in Collaborative Research, submitted to the Division of Research Programs at the October 28, 2010 deadline.

13. *Date:* March 16, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for Anthropology, Sociology, and History in Collaborative Research, submitted to the Division of Research Programs at the October 28, 2010 deadline.

14. *Date:* March 17, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for American and European History in Scholarly Editions, submitted to the Division of Research Programs at the October 28, 2010 deadline.

15. *Date:* March 22, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for Sustaining Cultural Heritage Collections II in Sustaining Cultural Heritage Collections, submitted to the Division of Preservation and Access at the December 1, 2010 deadline.

16. *Date:* March 24, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for Sustaining Cultural Heritage Collections III in Sustaining Cultural Heritage Collections, submitted to the Division of Preservation and Access at the December 1, 2010 deadline.

17. *Date:* March 28, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 421.
Program: This meeting will review applications for United States History in America's Media Makers Grants Program, submitted to the Division of Public Programs at the January 12, 2011 deadline.

18. *Date:* March 29, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 421.
Program: This meeting will review applications for Anthropology and the West in America's Historical and Cultural Organizations Grants Program, submitted to the Division of Public Programs at the January 12, 2011 deadline.

19. *Date:* March 29–30, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for DFG/NEH FY 11 Joint Sitting Panel in DFG/NEH Bilateral Digital Humanities Program, submitted to the Office of Digital Humanities at the November 16, 2010 deadline.

20. *Date:* March 31, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for Sustaining Cultural Heritage Collections IV in Sustaining Cultural Heritage Collections, submitted to the Division of Preservation and Access at the December 1, 2010 deadline.

21. *Date:* March 31, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 421.
Program: This meeting will review applications for World Cultures in America's Media Makers Grants Program, submitted to the Division of Public Programs at the January 12, 2011 deadline.

Michael P. McDonald,
Advisory Committee Management Officer.

[FR Doc. 2011–3627 Filed 2–16–11; 8:45 am]
BILLING CODE 7536–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–373 and 50–374; NRC–2010–0254]

Exelon Generation Company, LLC; Lasalle County Station, Units 1 and 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an amendment for Facility Operating License Nos. NPF–11 and NPF–18, issued to Exelon Generation Company, LLC (Exelon, the licensee) for operation of the LaSalle County Station, Units 1 and 2 (LSCS), located in

Marseilles, Illinois. In accordance with Title 10 to the Code of Federal Regulations (10 CFR) Section 51.21, the NRC prepared an environmental assessment documenting its finding. The NRC concluded that the proposed actions will have no significant environmental impact.

Environmental Assessment

Identification of the Proposed Action

The proposed action would revise the Facility Operating Licenses for LSCS to possess, but not separate, byproduct material, specifically Class B and Class C low-level radioactive waste (LLRW), from the following Exelon owned nuclear power stations: Braidwood Station, Units 1 and 2 (Braidwood), Byron Station, Units 1 and 2 (Byron), and Clinton Power Station, Unit 1 (Clinton). The LLRW will be stored in LSCS's interim radwaste storage facility (IRSF).

The proposed action is in accordance with the licensee's application dated January 6, 2010, as supplemented by letters dated August 20, October 14, and December 2, 2010.

The Need for the Proposed Action

The proposed action is needed to provide the licensee with adequate interim storage capacity for Class B and Class C LLRW, since it does not currently have access to a licensed disposal facility for this LLRW. This is due to the State of South Carolina's licensed LLRW disposal facility, located in Barnwell, which has limited access for radioactive waste generators located in states that are not part of the Atlantic Low-Level Waste Compact. Illinois is not a member of the Atlantic Low-Level Waste Compact. Therefore, Exelon facilities located in Illinois do not have access to the Barnwell disposal facility for their Class B and Class C LLRW. LSCS has a LLRW storage facility capable of safely storing a large amount of LLRW, on an interim basis. The other Exelon facilities in Illinois do not have the capability to store all of the LLRW they generate. The building at LSCS is designed to comply with NRC regulatory guidance, primarily Generic Letter 81–38, "Storage of Low-Level Radioactive Wastes at Power Reactor Sites" and to meet the radiation protection standards in 10 CFR Part 20, "Standards for Protection Against Radiation," and 40 CFR Part 190, "Environmental Radiation Protection Standards for Nuclear Power Operations."

Environmental Impacts of the Proposed Action

The proposed action involves the transportation of LLRW from Exelon's Braidwood, Byron, and Clinton nuclear power plants for interim storage at LSCS. The LLRW will be transported by truck in accordance with U.S. Department of Transportation and NRC regulations. The distance between the plant sites is less than the distance that was previously traveled to the Barnwell disposal facility in South Carolina. The licensee anticipates that there will be approximately five to eight shipments a year of LLRW to LSCS from the combination of the Braidwood, Byron, and Clinton stations. The projected number of shipments is consistent with the past annual average number of shipments to the Barnwell facility. The proposed action will reduce the total annual number of miles driven for the transport of LLRW. With less miles traveled, it is expected that there will be no change or possibly a corresponding reduction in the impacts associated with transportation such as lower radiation exposure to the truck driver and members of the public along the transportation route. The proposed action would not result in an increased risk of accidents and radiological hazards beyond those associated with the transport to the Barnwell facility. There will be no change to radioactive effluents from the power plants and the LLRW containers that affect radiation exposure to plant workers and members of the public. The interim storage building is designed to comply with NRC regulatory guidance, primarily Generic Letter 81–38, "Storage of Low-Level Radioactive Wastes at Power Reactor Sites" and to meet the radiation protection standards in 10 CFR part 20, "Standards for Protection Against Radiation," and 40 CFR part 190, "Environmental Radiation Protection Standards for Nuclear Power Operations." The cumulative dose from handling the LLRW from LSCS and from the additional LLRW from Braidwood, Byron, and Clinton will be controlled by station procedures to ensure compliance with the radiation dose standards to workers and members of the public. Based on this information, the staff concludes that the radiological impacts associated with the transportation, handling, and storage of LLRW at LSCS will not result in a significant impact to plant workers and members of the public.

The proposed action does not involve a change to plant buildings or land areas on the LSCS site. The proposed action does not result in changes to land use or water use, or result in changes to the quality or quantity of non-radiological effluents. With less miles traveled, it is expected that there will be no change or possibly a corresponding reduction in the impacts associated with transportation such as reduced use of fossil fuel and reduced air emissions that would affect air quality. No changes to the National Pollutant Discharge Elimination System permit are needed. No effects on the aquatic or terrestrial habitat in the vicinity of the plant, or to threatened, endangered, or protected species under the Endangered Species Act, or impacts to essential fish habitat covered by the Magnuson-Stevens Act are expected. There are no impacts to historical and cultural resources. There would be no impact to socioeconomic resources. Therefore, no changes to or different types of non-radiological environmental impacts are expected as a result of the proposed exemption.

Accordingly, the NRC staff concludes that there are no significant environmental impacts associated with the proposed action.

The NRC staff's safety evaluation will be provided in the license amendment, if approved by the NRC, which will be issued as part of the letter to the licensee approving the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed actions, the NRC staff considered denial of the proposed actions (*i.e.,* the "no-action" alternative). Denial of the exemption request would result in no change in current environmental impacts. The environmental impacts of the proposed exemption and the "no action" alternative are similar.

Alternative Use of Resources

The action does not involve the use of any different resources than those considered in the NUREG–0486, "Final Environmental Statement related to the Operation of the LaSalle County Station, Units 1 and 2 dated November 1978".

Agencies and Persons Consulted

In accordance with its stated policy, on December 15, 2010, the NRC staff consulted with the Illinois State official, Paul Smith, Nuclear System Analysis Section Chief, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the

human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated January 6, 2010, as supplemented by letters dated August 20, October 14, and December 2, 2010. These documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O–1F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site: *http://www.nrc.gov/reading-rm/adams.html.*

Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or send an e-mail to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 10th day of February 2011.

For the Nuclear Regulatory Commission.

Eva A. Brown,

Senior Project Manager, Plant Licensing Branch III–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2011–3607 Filed 2–16–11; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0268]

Notice of Availability of Interim Staff Guidance Documents for Spent Fuel Storage Casks

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

FOR FURTHER INFORMATION CONTACT: Matthew Gordon, Structural Mechanics and Materials Branch, Division of Spent Fuel Storage and Transportation Division, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20005–0001; *telephone:* 301–492–3331; *fax:* 301–492–3342; *e-mail: matthew.gordon@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) has prepared an Interim Staff Guidance (ISG) No. 23 document, entitled "Application of ASTM Standard Practice C1671–07 when performing technical reviews of spent fuel storage and transportation packaging licensing actions." This ISG document would provide guidance to the NRC staff when reviewing licensee integrated safety analyses, license or Certificate of Compliance applications or amendment requests, or other related activities for dry cask storage systems under Title 10 of the Code of Federal Regulations (10 CFR) part 71 and 10 CFR part 72.

II. Further Information

Documents related to this action are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice are provided in the following table. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

ADAMS document	ADAMS accession No.
Interim Staff Guidance-23.	ML103130171

These documents may also be viewed electronically on the public computers located at the NRC's PDR, O–1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. The PDR reproduction contractor will copy documents for a fee. Comments and questions on ISG–23 should be directed to Matthew Gordon, Structural Mechanics and Materials Branch, Division of Spent Fuel Storage and Transportation, Office of Nuclear Materials Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20005–0001. Comments can also be submitted by telephone, fax, or e-mail to the following: *Telephone:* 301–492–3331; *fax number:* 301–492–3331; *e-mail: matthew.gordon@nrc.gov.*

Dated at Rockville, Maryland, this 18th day of January, 2011.

For the U.S. Nuclear Regulatory Commission.

Michele Sampson,

Acting Chief, Structural Mechanics and Materials Branch, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2011–3608 Filed 2–16–11; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2009–31; Order No. 670]

Change in Contractual Priority Mail Postal Prices

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request concerning changes in certain contractual Priority Mail prices. This document provides public notice of the changes and addresses related procedural steps.

DATES: *Comments are due:* February 18, 2011.

ADDRESSES: Submit comments electronically by accessing the "Filing Online" link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commission's Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their views electronically should contact the person identified in **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION:

I. Introduction

On February 9, 2011, the Postal Service filed notice of a change in prices pursuant to an amendment to Priority Mail Contract 7.[1] The Notice includes three attachments: Attachment A, a redacted version of the amendment to Priority Mail Contract 7; Attachment B, a certified statement of compliance with 39 U.S.C. 3633(a); and Attachment C, an application for non-public treatment and a redacted version of the supporting financial documentation. In addition, the Postal Service filed the unredacted

[1] Notice of United States Postal Service of Change in Prices Pursuant to Amendment to Priority Mail Contract 7, February 9, 2011 (Notice).

amendment to the contract and supporting financial documentation under seal. *Id.* at 1.

Substantively, the Notice seeks approval of an amendment to the prices for Priority Mail Contract 7 while keeping the contract's existing duration. *Id.,* Attachment A.[2] The Postal Service states that the price amendment will become effective the day the Commission completes its review of the Notice. Notice at 1.

II. Notice of Filings

The Commission reopens Docket No. CP2009–31 for consideration of the issues raised by the Notice. Interested persons may submit comments on whether these recent Postal Service's filings in this docket are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642 and 39 CFR part 3015. Comments are due no later than February 18, 2011. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Diane K. Monaco to serve as Public Representative in this proceeding.

III. Ordering Paragraphs

It is ordered:

1. The Commission reopens Docket No. CP2009–31 for consideration of the matters raised by the amendment to Priority Mail Contract 7.
2. Pursuant to 39 U.S.C. 505, Diane K. Monaco is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public for this aspect of this docket.
3. Comments by interested persons in these proceedings are due no later than February 18, 2011.
4. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2011–3552 Filed 2–16–11; 8:45 am]

BILLING CODE 7710–FW–P

[2] Priority Mail Contract 7 was originally approved, along with Priority Mail Contracts 6, and 8 through 10 in this docket by Order No. 226, Order Concerning Priority Mail Contracts 6 through 10, June 19, 2009.

POSTAL REGULATORY COMMISSION

[Docket No. CP2009–38; Order No. 671]

Changes in Contractual Priority Mail Prices

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service notice concerning an amendment to a Priority Mail contract. This document provides public notice of the proposed change and addresses related procedural steps.

DATES: *Comments are due:* February 18, 2011.

ADDRESSES: Submit comments electronically by accessing the "Filing Online" link in the banner at the top of the Commission's Web site (*http://www.prc.gov*) or by directly accessing the Commissions' Filing Online system at *https://www.prc.gov/prc-pages/filing-online/login.aspx.* Commenters who cannot submit their view electronically should contact the person identified in **FOR FURTHER INFORMATION CONTACT** section as the source for case-related information for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820 (case-related information) or *DocketAdmins@prc.gov* (electronic filing assistance).

SUPPLEMENTARY INFORMATION:

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I. Introduction
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I. Introduction

On February 9, 2011, the Postal Service filed notice of a change in prices pursuant to an amendment to Priority Mail Contract 12.[1] The Notice includes three attachments: Attachment A—a redacted version of the amendment to Priority Mail Contract 12; Attachment B—a certified statement of compliance with 39 U.S.C. 3633(a); and Attachment C—an application for non-public treatment and a redacted version of the supporting financial documentation. In addition, the Postal Service filed the unredacted amendment to the contract and supporting financial documentation under seal. *Id.* at 1.

Substantively, the Notice seeks approval of an amendment to the prices for Priority Mail Contract 12 while keeping the contract's existing duration. *Id.,* Attachment A.[2] The Postal Service states that the price amendment will become effective the day the Commission completes its review of the Notice. Notice at 1.

[1] Notice of United States Postal Service of Change in Prices Pursuant to Amendment to Priority Mail Contract 12, February 9, 2011 (Notice).

[2] Priority Mail Contract 12 was originally approved in this docket by Order No. 232, Order Concerning Priority Mail Contract 12 Negotiated Service Agreement, July 1, 2009.

II. Notice of Filings

The Commission reopens Docket No. CP2009–38 for consideration of the issues raised by the Notice. Interested persons may submit comments on whether these recent Postal Service filings in this docket are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642 and 39 CFR part 3015. Comments are due no later than February 18, 2011. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Diane K. Monaco to serve as Public Representative in this proceeding.

III. Ordering Paragraphs

It is ordered:

1. The Commission reopens Docket No. CP2009–38 for consideration of the matters raised by the amendment to Priority Mail Contract 12.
2. Pursuant to 39 U.S.C. 505, Diane K. Monaco is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public for this aspect of this docket.
3. Comments by interested persons in these proceedings are due no later than February 18, 2011.
4. The Secretary shall arrange for publication of this notice and order in the **Federal Register**.

By the Commission.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2011–3553 Filed 2–16–11; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release no. 34–63899]

Public Availability of the Securities and Exchange Commission FY 2010 Service Contract Inventory

AGENCY: Securities and Exchange Commission.

ACTION: Notice of public availability of FY 2010 Service Contract Inventory.

SUMMARY: The Securities and Exchange Commission is publishing this notice to advise the public of the availability of the FY 2010 Service Contract Inventory as required by Section 743 of Division C of the Consolidated Appropriations Act of 2010 (Pub. L. 111–117). This inventory provides information on service contract actions over $25,000 that were made in FY 2010. The information is organized by function to show how contracted resources are distributed throughout the agency. The

inventory has been developed in accordance with guidance issued on November 5, 2010 by the Office of Management and Budget's Office of Federal Procurement Policy (OFPP). OFPP's guidance is available at *http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf.* The Securities and Exchange Commission has posted its inventory and a summary of the inventory on the Securities and Exchange Commission's Open Government homepage at the following link *http://sec.gov/about/offices/oacq/secfy2010servicecontract inventories.pdf.*

FOR FURTHER INFORMATION CONTACT: Questions regarding the service contract inventory should be directed to Judith Blake, Chief, Policy, Oversight, and Acquisition Programs Branch at 202–551–8071 or *blakej@sec.gov.*

February 14, 2011.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–3644 Filed 2–16–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63887; File No. SR–CBOE–2011–015]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the CFLEX Surcharge Fee Cap

February 10, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on February 1, 2011, Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") proposes to amend its Fees Schedule to extend the CFLEX Surcharge Fee cap to all orders. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On November 15, 2007, the Commission approved Exchange rules that provide for the trading of Flexible Exchange ("FLEX") options on the Exchange's new FLEX Hybrid Trading System ("CFLEX").[3] CFLEX is a trading platform that incorporates both open outcry and electronic trading functionality. On November 20, 2007, the Exchange filed an amendment to the Exchange Fees Schedule to establish a $.10 per contract surcharge fee on all orders (i.e., applicable to all origin codes) executed electronically on the CFLEX system ("CFLEX Surcharge Fee").[4] Pursuant to that filing, the CFLEX Surcharge Fee is currently charged up to the first 2,500 contracts per trade for public customers.[5]

The proposed amendment to the Fees Schedule would extend the cap on the CFLEX Surcharge Fee to all orders. The CFLEX Surcharge Fee would be charged up to the first 2,500 contracts per trade, regardless of the order type. The purpose of the proposed fee change is to encourage more use of the CFLEX system.

The proposed change is scheduled to take effect on February 1, 2011.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 ("Act"),[6] in general, and furthers the objectives of Section 6(b)(4) [7] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE Trading Permit Holders and other persons using its facilities. The proposed rule change, by extending the cap on the CFLEX Surcharge Fee to all order types, would provide for lower fees for all market participants trading on the CFLEX system.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [8] and subparagraph (f)(2) of Rule 19b–4 [9] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 56792 (November 15, 2007), 72 FR 65776 (SR–CBOE–2006–99).

[4] *See* Securities Exchange Act Release No. 56852 (November 28, 2007), 72 FR 68226 (December 4, 2007) (SR–CBOE–2007–139).

[5] *See* CBOE Fees Schedule, Footnote 5 [sic].

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

• Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2011–015 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2011–015. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2011–015 and should be submitted on or before March 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–3554 Filed 2–16–11; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63891; File No. SR–NASDAQ–2011–022]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Enhance the Investor Support Program

February 11, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on February 2, 2011, The NASDAQ Stock Market LLC ("NASDAQ") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes changes to the fee provisions of Rule 7014 (Investor Support Program) to increase the rebate for adding targeted liquidity within the Investor Support Program. NASDAQ has designated this fee change proposal effective and operative upon filing.

The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com,* at NASDAQ's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing changes to the fee provisions of Rule 7014 to increase the rebate for adding targeted liquidity within the Investor Support Program.

The Exchange established an Investor Support Program ("ISP") that enables NASDAQ members to earn a monthly fee credit for providing additional liquidity to NASDAQ and increasing the NASDAQ-traded volume of what are generally considered to be retail and institutional investor orders in exchange-traded securities ("targeted liquidity").[3] The goal of the ISP is to incentivize members to provide such targeted liquidity to the NASDAQ Market Center.[4] The Exchange noted in the ISP Filing that maintaining and increasing the proportion of orders in exchange-listed securities executed on a registered exchange (rather than relying on any of the available off-exchange execution methods) would help raise investors' confidence in the fairness of their transactions and would benefit all investors by deepening NASDAQ's liquidity pool, supporting the quality of price discovery, promoting market

[3] For a detailed description of the Investor Support Program, *see* Securities Exchange Act Release No. 63270 (November 8, 2010), 75 FR 69489 (November 12, 2010)(NASDAQ–2010–141) (notice of filing and immediate effectiveness)(the "ISP Filing"). *See also* Securities Exchange Act Release Nos. 63414 (December 2, 2010), 75 FR 76505 (December 8, 2010)(NASDAQ–2010–153) (notice of filing and immediate effectiveness); and 63628 (January 3, 2011), 76 FR 1201 (January 7, 2011)(NASDAQ–2010–154) (notice of filing and immediate effectiveness).

[4] The Commission has recently expressed its concern that a significant percentage of the orders of individual investors are executed at over the counter ("OTC") markets, that is, at off-exchange markets; and that a significant percentage of the orders of institutional investors are executed in dark pools. Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (Concept Release on Equity Market Structure, "Concept Release"). In the Concept Release, the Commission has recognized the strong policy preference under the Act in favor of price transparency and displayed markets. The Commission published the Concept Release to invite public comment on a wide range of market structure issues, including high frequency trading and un-displayed, or "dark," liquidity. *See also* Mary L. Schapiro, *Strengthening Our Equity Market Structure* (Speech at the Economic Club of New York, Sept. 7, 2010) ("Schapiro Speech," available on the Commission Web site) (comments of Commission Chairman on what she viewed as a troubling trend of reduced participation in the equity markets by individual investors, and that nearly 30 percent of volume in U.S.-listed equities is executed in venues that do not display their liquidity or make it generally available to the public).

transparency and improving investor protection.

The Exchange now proposes an adjustment to the Investor Support Program, in the form of an increase in the rebate for the ISP. The primary objective in making this adjustment is to further incentivize members to provide targeted liquidity to the Exchange by increasing the rebate for those that bring the largest amounts to NASDAQ.

The ISP generally compares a member's Participation Ratio for the current month to the same member's Participation Ratio in August 2010 (known as the "Baseline Participation Ratio").[5] This ratio is determined by measuring the number of shares in liquidity-providing orders entered by the member (through any NASDAQ port) and executed on NASDAQ and dividing this number by the consolidated (across all trading venues) share volume of System Securities[6] traded in the given month.[7] To determine the amount of the ISP credit pursuant to the program, pursuant to sub-section (b), NASDAQ would multiply $0.0003 by the lower of: the number of shares of displayed liquidity provided in orders entered by the member through its ISP-designated ports and executed in the NASDAQ Market Center during the given month; or the amount of Added Liquidity[8] for the given month, which is compared to the member's Baseline Participation Ratio. The Exchange proposes to increase the rebate to a rate of $0.0004 for members that bring a greater amount of targeted liquidity.

Specifically, the Exchange clarifies subsection (b) to state that, subject to the conditions set forth in section (c) the rebate rate may be $0.0003 or $0.0004.[9] The Exchange adds proposed sub-section (c)(2) to indicate that the $.00004 rebate rate is available to those members that bring in an even greater amount of liquidity by exceeding the Baseline Participation Ration by at least 0.43%.[10] The Exchange believes that the increased rebate should encourage members to strive to bring even more retail and institutional orders in exchange-traded securities to the Exchange.

The ISP is designed to operate on a monthly cycle, both from the perspective of targeted flow brought to the Exchange and ISP rebates to members that brought such flow. Since its inception,[11] the ISP fee program has been, and continues to be, non-discriminatory, reasonable, and effective in attracting targeted liquidity to the NASDAQ Market Center. The primary objective in making the proposed adjustment is to encourage members to bring larger amounts of targeted liquidity to the Exchange by increasing the rebate for such liquidity. The Exchange believes that its proposal is decidedly non-discriminatory because it does not favor or distinguish any group of ISP participants while promoting the clear goal of the ISP.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[12] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[13] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls, and it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.

The Investor Support Program encourages members to add targeted liquidity that is executed in the NASDAQ Market Center. The primary objective in making this enhancement to the Investor Support Program is to add an even greater amount of targeted liquidity to the Exchange. The rule change proposal, like the ISP, is "not designed to permit unfair discrimination"[14] but, rather, is intended to promote submission of liquidity-providing orders to NASDAQ, which would benefit all NASDAQ members and all investors. Likewise, the proposal, like the ISP, is consistent with the Act's requirement "for the equitable allocation of reasonable dues, fees, and other charges."[15] As explained in the immediately preceding paragraphs, the proposal enhances the goal of the ISP. Members who choose to significantly increase the volume of ISP-eligible liquidity-providing orders that they submit to NASDAQ would be benefitting all investors, and therefore an additional credit, as contemplated in the proposed enhanced program, is equitable. Finally, NASDAQ notes that the intense competition among several national securities exchanges and numerous OTC venues effectively guarantees that fees and credits for the execution of trades in NMS securities remain equitable and are not unfairly discriminatory.[16]

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section

[5] The term "Participation Ratio" is defined as: for a given member in a given month, the ratio of (i) the number of shares of liquidity provided in orders entered by the member through any of its Nasdaq ports and executed in the Nasdaq Market Center during such month to (ii) the Consolidated Volume. Rule 7014 (d)(4).

The term "Consolidated Volume" is defined as: for a given member in a given month, the consolidated volume of shares of System Securities in executed orders reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during such month. Rule 7014(d)(6).

[6] The term "System Securities" is defined as: all securities listed on NASDAQ and all securities subject to the Consolidated Tape Association Plan and the Consolidated Quotation Plan. Rule 4751(b).

[7] *See* Rule 7014(d)(2) and (d)(4).

[8] The term "Added Liquidity" is defined as: for a given member in a given month, the number of shares calculated by (i) subtracting from such member's Participation Ratio for that month the member's Baseline Participation Ratio, and then (ii) multiplying the resulting difference by the average daily consolidated volume of shares of System Securities in executed orders reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during such month; provided that if the result is a negative number, the Added Liquidity amount shall be deemed zero. Rule 7014(d)(1).

[9] Subsection (c)(1) (which simply consolidates current subsections (c)(1) and (c)(2)) states that a member shall not be entitled to receive any ISP credit pursuant to (b) for a given month if any of the following applies: (A) the member's ISP Execution Ratio for the month in question is 10 or above; or (B) the average daily number of shares of liquidity provided in orders entered by the member through its ISP-designated ports and executed in the Nasdaq Market Center during the month is below 10 million, provided that in calculating such average, Nasdaq will exclude days when it is open for less than the entire regular trading day.

[10] 0.43% is the equivalent of approximately 35 million shares of added liquidity per day (based on January 2011 consolidated market activity).

[11] *See* Securities Exchange Act Release No. 63270 (November 8, 2010), 75 FR 69489 (November 12, 2010)(NASDAQ–2010–141)(notice of filing and immediate effectiveness).

[12] 15 U.S.C. 78f.

[13] 15 U.S.C. 78f(b)(4) and (5).

[14] *See* Section 6(b)(5) of the Act, 15 U.S.C. 78f(b)(5).

[15] *See* Section 6(b)(4) of the Act, 15 U.S.C. 78f(b)(4).

[16] *See, e.g.,* Concept Release (discusses the various venues where trades are executed).

19(b)(3)(A)(ii) of the Act.[17] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2011–022 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2011–022. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2011–022 and should be submitted on or before March 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–3582 Filed 2–16–11; 8:45 am]

BILLING CODE 8011–01–P

[17] 15 U.S.C. 78s(b)(3)(a)(ii).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63895; File No. SR–FINRA–2009–090]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 to a Proposed Rule Change and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Adopt FINRA Rule 5320 (Prohibition Against Trading Ahead of Customer Orders) in the Consolidated FINRA Rulebook

February 11, 2011.

I. Introduction

On December 12, 2009, the Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt FINRA Rule 5320 in FINRA's new consolidated rulebook ("Consolidated FINRA Rulebook"). The proposed rule change was published for comment in the **Federal Register** on December 22, 2009.[3] The Commission received four comment letters on the proposed rule change [4] and a letter from FINRA responding to the comment letters.[5] On January 24, 2011, FINRA filed Amendment No. 1 to the proposed rule change.[6] This order approves the proposed rule change, as amended by Amendment No. 1.

II. Description of Proposed Rule Change and Summary of Comments

As part of the process of developing the Consolidated FINRA Rulebook,[7] FINRA proposes to adopt NASD IM–2110–2 (Trading Ahead of Customer Limit Order) and NASD Rule 2111 (Trading Ahead of Customer Market Orders) with significant changes as new FINRA Rule 5320 (Prohibition Against Trading Ahead of Customer Orders). NASD IM–2110–2 generally prohibits a member from trading for its own account in an NMS stock, as defined in Rule 600(b)(47) of Regulation NMS,[8] or

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 61168 (December 15, 2009); 74 FR 68084 ("Notice").

[4] *See* Letter to Elizabeth Murphy, Secretary, Commission, from Patrick Chi, Chief Compliance Officer, ITG, Inc., dated January 12, 2010 ("ITG Letter"); Letter to Elizabeth M. Murphy, Secretary, Commission, from R. Cromwell Coulson, Chief Executive Officer, Pink OTC Markets Inc., dated January 18, 2010 ("Pink OTC Letter"); Letter to Elizabeth M. Murphy, Secretary, Commission, from Ann Vlcek, Managing Director and Associate General Counsel, SIFMA, dated January 28, 2010 ("SIFMA Letter"); and Letter to Elizabeth M. Murphy, Secretary, Commission, from Leonard J. Amoruso, General Counsel, Knight Capital Group, Inc. and Michael T. Corrao, Chief Compliance Officer, Knight Equity Markets, L.P., dated February 22, 2010 ("Knight Letter").

[5] *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Racquel Russell, Assistant General Counsel, Regulatory Policy and Oversight, FINRA, dated August 31, 2010 ("FINRA Letter").

[6] Amendment No. 1 modifies the proposal to remove the requirement that a member assign and use a unique market participant identifier (MPID) for its market-making desks where the member structures its order handling practices in NMS stocks to permit its market-making desks to trade at prices that would satisfy customer orders held at a separate unit. The amendment also addresses the applicability of interpretive guidance previously issued in connection with NASD IM–2110–2 and NASD Rule 2111 to new FINRA Rule 5320. FINRA stated that, consistent with its existing policy, where a provision of FINRA Rule 5320 is not substantively different from NASD IM–2110–2 or NASD Rule 2111, previously issued interpretations generally will continue to apply (unless rescinded or updated by FINRA). The Commission expects FINRA to update, as soon as practicable, its interpretive guidance to reflect new FINRA Rule 5320 and to rescind any previous interpretive guidance that is no longer applicable. The amendment also clarifies that, in the case of extended hours trading in foreign securities where currency fluctuations are possible, the price at which the proprietary transaction is executed, not the price of the proprietary order, is relevant in determining whether the customer order protection requirement has been triggered. Finally, Amendment No. 1 makes several non-substantive, technical changes to the rule text.

[7] The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("Incorporated NYSE Rules"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE. The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[8] Under Rule 600 of Regulation NMS, an NMS stock means any NMS security other than an

an OTC equity security, at a price that is equal to or better than an unexecuted customer limit order in that security, unless the member immediately, in the event it trades ahead, executes the customer limit order at the price at which it traded for its own account or better. Similarly, NASD Rule 2111 generally prohibits a member that accepts and holds a customer market order in a Nasdaq or exchange-listed security from trading for its own account at prices that would satisfy a customer market order, unless the firm immediately thereafter executes the customer market order up to the size and at the same price at which it traded for its own account or better. At present, NASD Rule 2111 does not apply to OTC equity securities.

While there is no Incorporated NYSE Rule counterpart to NASD IM–2110–2 and NASD Rule 2111 (collectively, "customer order protection rules"), NYSE Rule 92 imposes similar requirements on NYSE members in NYSE-listed securities. NYSE Rule 92 generally prohibits members or member organizations from knowingly entering proprietary orders ahead of, or along with, customer orders that are executable at the same price as the proprietary order.

As discussed below, FINRA proposes several changes to the requirements set forth in NASD IM–2110–2 and NASD Rule 2111 to create a standard that incorporates elements from existing FINRA and NYSE Rules. Commenters generally favored FINRA's effort to integrate the limit order protection rule and the market order protection rule into a single rule. However, as discussed below, some commenters raised concerns regarding the scope of the proposed rule and supported certain additional modifications.

A. Integration of NASD IM–2110–2 and NASD Rule 2111

FINRA proposes to integrate NASD IM–2110–2 and NASD Rule 2111 into a single rule, proposed FINRA Rule 5320, to govern members' treatment of customer orders and apply the new FINRA Rule to all equity securities uniformly, other than with respect to the no-knowledge interpretation as detailed below.[9] In addition, FINRA proposes to extend the application of NASD Rule 2111 to OTC equity securities.[10] As noted above, NASD Rule 2111 currently applies only to Nasdaq or exchange-listed securities, while NASD IM–2110–2 applies to both NMS stocks and OTC equity securities.

Some commenters sought clarification about the application of the proposed rule to "not held" orders.[11] Generally, a "not held" order is an un-priced, discretionary order voluntarily categorized as such by the customer.[12] One commenter stated that it is not appropriate to apply the proposed rule to "not held" orders because they are neither a market nor a limit order and, by definition, provide a broker-dealer with flexibility through a grant of price and time discretion to exercise its professional judgment in handling the order.[13]

The Commission notes that FINRA stated, in its response, that because the customer has given the member price and time discretion, the proposed rule would not be applicable to the order, given that there is not a specific price parameter limitation to apply to the member's proprietary trading.[14] FINRA noted that it previously has provided clarification regarding the application of the customer order protection rules to "not held" orders.[15] FINRA stated that a broker-dealer with such an order must use its judgment as a broker in the execution of the order and, if such judgment is properly exercised, the broker is relieved of its normal responsibilities with respect to the time of execution and the price or prices of execution of such an order.[16] FINRA noted, however, that a member must clearly document its customer authorization to "work the order" and must disclose to customers that members may trade at the same price or better than that received by the discretionary order.[17] FINRA further remarked that, because the customer has granted the member the discretion to "work the order," the member has a clear responsibility to endeavor to obtain the best fill for the customer, considering all of the terms agreed to with the customer and the market conditions surrounding the order.[18]

B. Large Orders and Institutional Accounts

Currently, NASD IM–2110–2 and NASD Rule 2111 provide an exception to the customer order protection rules to permit members to negotiate terms and conditions on the acceptance of certain large-sized orders (orders of 10,000 shares or more and greater than $100,000 in value) and orders from institutional accounts as defined in NASD Rule 3110(c) (collectively referred to as "Institutional/Large-Sized Orders"). Such terms and conditions permit a member to continue to trade along side or ahead of such customer orders if the customer agrees.

FINRA proposes to modify the steps necessary for a member to avail itself of the exception for Institutional/Large-Sized Orders. Specifically, under FINRA Rule 5320, a member would be permitted to trade a security on the same side of the market for its own account at a price that would satisfy a customer order, provided that the member provides clear and comprehensive written disclosure to each customer at account opening and annually thereafter that: (a) The member may trade proprietarily at prices that would satisfy the customer order, and (b) provides the customer with a meaningful opportunity to opt in to the protections of FINRA Rule 5320 with respect to all or any portion of its order(s).[19] If a customer does not opt in

option. An NMS security means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options. 17 CFR 242.600.

[9] The Commission understands that prior interpretive guidance, such as Notices to Members, relating to FINRA's customer order protection rules would still apply to the extent that such interpretive guidance does not conflict with new FINRA Rule 5320.

[10] The Commission notes that, since the filing of the proposed rule change, FINRA's definition of "OTC Equity Security" was revised to mean any equity security that is not an "NMS stock" as that term is defined in Rule 600(b)(47) of Regulation NMS; provided, however, that the term "OTC Equity Security" shall not include any Restricted Equity Security. *See* FINRA Rule 6420. This definitional change was intended to clarify members' trade reporting requirements for OTC equity securities and would not affect the applicability of FINRA Rule 5320. For information on this definitional change, *see* Securities Exchange Act Release No. 61979 (April 23, 2010), 75 FR 23316 (May 3, 2010) (SR–FINRA–2010–003).

[11] *See* ITG Letter and SIFMA Letter. SIFMA also sought clarification that FINRA Rule 5320 would not apply to securities that would not qualify as exchange-listed or OTC equity securities. FINRA, in response, clarified that FINRA Rule 5320 would apply to securities that meet the definition of "OTC Equity Security" as defined in FINRA Rule 6420, as well as securities that meet the definition of "NMS stock" as defined in Rule 600 of Regulation NMS. *See* FINRA Letter.

[12] *See* FINRA Letter.

[13] *See* SIFMA Letter.

[14] *See* FINRA Letter.

[15] *Id.*

[16] *See* FINRA Letter. *See also Notice to Members* 97–57 (September 1997) and *Notice to Members* 95–43 (June 1995).

[17] *See* FINRA Letter. *See also Notice to Members* 97–57 (September 1997).

[18] *See* FINRA Letter.

[19] FINRA represents that, even when a customer has not opted in to the protections under FINRA Rule 5320, a member's conduct must continue to be consistent with the guidance provided in the *Notice to Members* 05–51 (August 2005). In *Notice to Members* 05–51, FINRA, among other things, reminded members that adherence to just and equitable principles of trade as mandated by NASD Rule 2010 "requires that members handle and execute any order received from a customer in a

Continued

with respect to all or any portion of its order(s), the member may reasonably conclude that such customer has consented to the member trading a security on the same side of the market for its own account at a price that would satisfy the customer's order.[20]

In lieu of a member providing written disclosure to customers at account opening and annually thereafter, FINRA Rule 5320 would permit the member to provide clear and comprehensive oral disclosure to, and obtain consent from, a customer on an order-by-order basis, provided that the member documents who provided such consent and that such consent evidences the customer's understanding of the terms and conditions of the order. In addition, where a customer has opted in to the protections of FINRA Rule 5320, a member may still obtain consent on an order-by-order basis to trade ahead of or along with an order from that customer, provided that the member documents who provided such consent and that such consent evidences the customer's understanding of the terms and conditions of the order.[21]

The Commission believes that the change to the exception for Institutional/Large-Sized Orders is appropriate. Specifically, the requirement that members provide comprehensive written disclosure to each customer at account opening and annually, or, alternatively, provide clear and comprehensive oral disclosure to, and get consent from, customers on an order-by-order basis, will help ensure that customers are sufficiently informed with respect to their rights to opt in to the protections of FINRA Rule 5320.

C. No-Knowledge Exception

NASD IM–2110–2 and NASD Rule 2111 provide another exception to the customer order protection rules. Specifically, if a firm implements and utilizes an effective system of internal controls, such as appropriate information barriers, that operate to prevent a non-market-making proprietary desk from obtaining knowledge of customer orders held at the firm's market-making desk, those "walled off" non-market-making proprietary desks are permitted to trade at prices that would satisfy the customer orders held by the market-making desk without any requirement that such proprietary executions trigger an obligation to fill pending customer orders at the same price.[22] NYSE Rule 92 has a similar, but not identical, "no-knowledge" exception. NYSE Rule 92, by its terms, is limited to those circumstances where the firm knowingly trades ahead of its customer.[23]

FINRA Rule 5320 would expand the current no-knowledge interpretation to include market-making desks, but not with respect to OTC equity securities.[24] To use the amended exception, a firm must structure its order handling practices in NMS stocks to wall off customer order flow from its market-making desks and disclose that fact to customers in writing. Such disclosure must include a description of the manner in which customer orders are handled and the circumstances under which the firm may trade proprietarily at its market-making desk at prices that would satisfy a customer order. Further, the disclosure is required at account opening and on an annual basis thereafter.

Three commenters argued that the proposed rule should extend the no-knowledge exception to market-making desks that trade OTC equity securities.[25] Two of these commenters stated that the adoption of different standards for exchange-listed and OTC equity securities is inconsistent with the stated intention to harmonize FINRA and NYSE rules.[26] Moreover, one commenter argued that having two sets of approaches to the no-knowledge exception would introduce unnecessary complexity, as well as compliance and programming inefficiencies.[27] This commenter further argued that the OTC equity markets have evolved in a similar manner to the market for NMS stocks and therefore warrant similar treatment.[28] The commenter noted that, as with exchange-listed securities, many firms may prefer to handle retail-sized customer orders in OTC equity securities on an automated basis, separate and apart from their proprietary trading desks, including market-making desks.[29]

Two commenters also objected to FINRA's proposal to require firms that rely on the no-knowledge exception to obtain a unique MPID for their market-making desks.[30] These commenters stated that an additional MPID would add unnecessary complexities to FINRA's Order Audit Trail System and other regulatory reporting requirements and could create further technological and operational burdens.[31] One of these commenters noted that firms may need to make related changes to their clearing systems and that new MPIDs may require certifications with existing clients for which firms clear and for all destinations to which firms route.[32] This commenter further remarked that there would not be a commensurate benefit in light of the costs of obtaining and maintaining MPIDs, because other equally effective ways for firms to establish internal control systems to monitor information barriers currently exist.[33] Both commenters suggested that FINRA consider giving firms the option to utilize a unique MPID for their market-making desks.[34]

In its response to these comments, FINRA stated that it continues to believe that OTC equity securities should not be included within the no-knowledge exception, because the degree of automation in the OTC equity market is not commensurate with the market for NMS stocks. FINRA pointed out that, because trades in the OTC equity market are not as susceptible to automated routing for best execution, members should not be permitted to utilize the no-knowledge exception. Instead,

manner that does not disadvantage the customer or place the member's financial interests ahead of those of its customer." *See also* NASD Rule 2320 (Best Execution and Interpositioning).

[20] FINRA represents that customers always retain the right to withdraw consent at any time. Therefore, a member's reasonable conclusion that a customer has consented to the member trading along with such customer's order is subject to further instruction and modification from the customer.

[21] While a firm relying on this exception or any other exception must be able to provide evidence of its eligibility for and compliance with the exception, FINRA states that it believes that, when obtaining consent on an order-by-order basis, a member must, at a minimum, document not only the terms and conditions of the order (*e.g.,* the relative price and size of the allocated order/percentage split with the customer), but also the identity of the person at the customer who provided the consent. For example, the identity of the person must be noted in a manner that will enable subsequent contact with that person if a question as to the consent arises (*i.e.,* first names only, initials, and nicknames will not suffice).

[22] *See Notices to Members* 95–43 (June 1995), 03–74 (November 2003), and 06–03 (January 2006).

[23] Under NYSE Rule 92, a firm may trade ahead of a customer order as long as the person entering the proprietary order has no knowledge of the unexecuted customer order. Under NYSE Rule 92.10, a member or employee of a member or member organization is "presumed to have knowledge of a particular customer order unless the member organization has implemented a reasonable system of internal policies and procedures to prevent the misuse of information about customer orders by those responsible for entering proprietary orders."

[24] This proposed change would make FINRA Rule 5320 consistent with NYSE Rule 92, because the NYSE rule does not preclude members from walling off their market-making desks.

[25] *See* SIFMA Letter, Knight Letter, and Pink OTC Letter. Pink OTC stated that they agreed fully with the comments on the no-knowledge exception expressed by SIFMA.

[26] *See* SIFMA Letter and Knight Letter.

[27] *See* SIFMA Letter.

[28] *Id.*

[29] *Id.*

[30] *See* SIFMA Letter and Knight Letter.

[31] *See* SIFMA Letter and Knight Letter.

[32] *See* SIFMA Letter.

[33] *Id.*

[34] *See* SIFMA Letter and Knight Letter.

FINRA believed that, for these securities, interacting with the market-making desk is a critical source of liquidity for customer orders. With regard to commenters' concerns about acquiring separate MPIDs for firms' market-making desks, FINRA, as noted above, proposed to remove the requirement in Amendment No. 1.[35]

The Commission believes that the proposed change to the no-knowledge exception is appropriate. Although the OTC equity market may have become more automated in recent years, the Commission understands that the market for OTC equity securities is not as developed as the market for NMS stocks. The Commission concurs with FINRA that there is a continued benefit to retaining the current no-knowledge exception for OTC equity securities.[36] Further, the Commission notes that, while it would be more efficient from FINRA's perspective for the market-making unit of a firm to use a separate MPID, FINRA currently has the capability to surveil for violations of the customer order protection rules and will continue to use those mechanisms to surveil for violations of new FINRA Rule 5320, subject to necessary modifications to reflect the requirements of the new rule.[37] In addition, FINRA has noted its intention to examine alternative means of achieving the objective of the proposed MPID requirement.[38]

D. Odd Lot and Bona Fide Error Exception

FINRA proposes applying the customer order protection requirements to all customer orders but would provide an exception for a firm's proprietary trade that: (1) Offsets a customer odd-lot order (*i.e.,* an order less than one round lot, which is typically 100 shares); or (2) corrects a bona fide error.[39] Currently, there is a blanket exclusion for odd lots from the customer order protection requirements. With respect to bona fide errors, member firms would be required to demonstrate and document the basis upon which a transaction meets the bona fide error exception.

The Commission believes that FINRA's proposal with respect to odd-lot transactions and bona fide errors is appropriate. The Commission believes that the proposal is tailored to protect customer orders while allowing the market to operate efficiently. The Commission also believes that, by delineating exceptions for odd lots and bona fide errors, the proposal further clarifies market participants' obligations with respect to the protection of customer orders.

E. Trading Outside Normal Market Hours

FINRA proposes expanding the customer order protection requirements to apply at all times that a customer order is executable by a member. Currently, the customer order protection requirements apply only during normal market hours (9:30 a.m. to 4 p.m.) and after hours (4 p.m. to 6:30 p.m.).

One commenter objected to FINRA's proposal to extend customer order protection requirements beyond regular market hours.[40] The commenter pointed out that other rules relating to order handling, such as Regulation NMS, do not apply outside of regular trading hours and that there is no reason that those rules and the proposed FINRA rule should differ. According to the commenter, customers who send orders for extended-hours trading tend to be more sophisticated and therefore their orders should be handled like institutional orders, even if they are smaller in size or submitted by an individual investor.[41] Finally, the commenter noted that the costs and burdens of applying customer order protection requirements during extended-hours trading may be particularly onerous for firms that execute transactions in foreign securities during that period in light of fluctuations in U.S. and non-U.S. currency exchange rates.[42] The commenter stated that these currency fluctuations could inadvertently cause a member to trade ahead of customer orders.[43]

In Amendment No. 1, FINRA clarified that, as is the case during regular trading hours, during extended trading hours, Rule 5320 would continue to require that members fill executable customer orders whenever the member executes a proprietary transaction at a price that would satisfy the customer's order (or at a price that does not satisfy the customer limit order but does not provide the minimum level of price improvement). FINRA stated that the price at which the proprietary transaction is executed, not the price of the proprietary order, is the relevant factor in determining whether the customer order protection requirement has been triggered. Therefore, if a member receives an execution in a foreign security at a price (in U.S. dollars) that would satisfy a customer's order, the member must immediately thereafter execute the customer order up to the size and at the same or better price at which it traded for its own account.

The Commission believes that FINRA's proposal is appropriate and agrees that customer orders should be protected during after hours trading. Regardless of potential currency fluctuations in the price of foreign securities, customers should be able to receive an execution at the same or a better price as the member receives when it trades for its own account.

F. Other Comments

Two commenters commented on aspects of the current customer order protection rules that were not proposed to be amended by FINRA.[44] One commenter stated that customer orders generally should only qualify for price improvement if they use defined quotation price increments.[45] This commenter stated that, without such a rule, some customers could take unfair advantage of OTC market makers by submitting orders that are slightly higher than the market maker's quote in increments that cannot be displayed by interdealer quotation systems for OTC equity securities, which orders are then unfairly entitled to price improvement when a market maker "lifts" a published quote.[46] Further, the commenter stated that OTC market makers should not be required to provide price improvement for orders received while they are in the process of executing a trade for their own account and that market makers' publicly displayed proprietary quotes should have time priority over orders received after the proprietary quote is published.[47]

The Commission notes that FINRA does not propose to revise in this filing its minimum price increments for OTC equity securities. Further, in response, FINRA stated that the Commission recently approved a FINRA proposed

[35] *See supra* note 4.

[36] *See* FINRA Letter.

[37] *See* e-mail from Racquel Russell, Assistant General Counsel, FINRA, to Nancy Burke-Sanow, Assistant Director, Commission, dated February 10, 2011.

[38] *Id.*

[39] For purposes of FINRA Rule 5320, FINRA represents that the definition of a "bona fide error" is commensurate with Regulation NMS's exemption for error correction transactions. *See* Securities Exchange Act Release No. 55884 (June 8, 2007), 72 FR 32926 (June 14, 2007) (Order Exempting Certain Error Correction Transactions from Rule 611 of Regulation NMS under the Securities Exchange Act of 1934).

[40] *See* SIFMA Letter.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *See* Pink OTC Letter and Knight Letter.

[45] *See* Pink OTC Letter.

[46] *Id.*

[47] *See* Pink OTC Letter.

rule change that generally establishes a minimum increment of $0.01 for the display of orders in securities priced $1.00 or greater and $0.0001 for the display of orders in securities priced under $1.00.[48] FINRA, therefore, does not believe that it is necessary to separately address price increments in the customer order protection context.[49]

Regarding the commenter's second point, FINRA stated that, although FINRA Rules provide for an exception for member trading where the customer limit order is received after the member routed an intermarket sweep order ("ISO"), this exception is only available in connection with ISOs routed in compliance with Rule 600(b)(30)(ii) of Regulation NMS. FINRA believes, and the Commission agrees, that it is not appropriate to permit members to trade ahead of customer orders in the circumstances suggested by the commenter, other than in this narrow instance.

Another commenter stated that the proposed rule regarding limit orders priced below $1.00 should be modified.[50] Under the current rule and the proposed rule, for purposes of determining the minimum price improvement standards for customer limit orders in OTC equity securities priced below $1.00 where there is no published current inside spread, members may calculate a current inside spread by contacting and obtaining priced quotations from at least two unaffiliated dealers and using the highest bid and lowest offer obtained in calculating the current inside spread.[51] The commenter stated that market makers should be able to include their own quotes in calculating minimum price improvement standards.[52]

The Commission notes that FINRA does not propose changes to its current treatment of limit orders priced below $1.00 as part of the instant proposed rule change. Further, FINRA stated, and the Commission agrees, that allowing market makers to include their own quotes in calculating minimum price improvement standards would undermine the safeguard of obtaining independent, unaffiliated quotes.

III. Commission's Findings

After careful review of the proposed rule change as well as the comment letters and the FINRA Letter submitted with respect to the proposal, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[53] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,[54] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that the proposed rule change is designed to establish a single standard to protect customer orders from member firms trading ahead of those orders. By consolidating the current NASD and NYSE order protection rules, the Commission believes that the proposed rule change would reduce the complexity of the customer order protection rules for those firms subject to both sets of rules. Furthermore, the Commission believes that the proposed rule will help assure the protection for customer orders without imposing undue regulatory costs on industry participants.

IV. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,[55] for approving the proposed rule change, as modified by Amendment No. 1, prior to the 30th day after publication of Amendment No. 1 in the **Federal Register**. The changes proposed in Amendment No. 1 respond to specific concerns raised by commenters and do not raise any new or novel issues. As noted above, the changes proposed by Amendment No. 1 remove the proposed separate MPID requirement for market-making desks where the member structures its order handling practices in NMS stocks to permit its market-making desks to trade at prices that would satisfy customer orders held at a separate unit; addresses the applicability of interpretive guidance previously issued in connection with NASD IM–2110–2 and NASD Rule 2111 to new FINRA Rule 5320; clarifies the applicability of the rule in the case of extended hours trading in foreign securities where currency fluctuations are possible; and makes several non-substantive, technical changes to the rule text.

Accordingly, the Commission finds that good cause exists to approve the proposal, as modified by Amendment No. 1, on an accelerated basis.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2009–090 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2009–090. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make

[48] *See* FINRA Letter citing Securities Exchange Act Release No. 62359 (June 22, 2010), 75 FR 37488 (June 29, 2010) (SR–FINRA–2009–054).

[49] *See* FINRA Letter.

[50] *See* Knight Letter.

[51] *See* NASD IM–2110–2 and FINRA Rule 5320, Supplementary Material .06.

[52] *See* Knight Letter.

[53] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[54] 15 U.S.C. 78*o*–3(b)(6).

[55] 15 U.S.C. 78s(b)(2).

available publicly. All submissions should refer to File Number SR–FINRA–2009–090 and should be submitted on or before March 10, 2011.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[56] that the proposed rule change (SR–FINRA–2009–090), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[57]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–3581 Filed 2–16–11; 8:45 am]

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[56] 15 U.S.C. 78s(b)(2).

[57] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63892; File No. SR–NASDAQ–2011–021]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Revise an Optional Depth Data Enterprise License Fee for Broker-Dealer Distribution of Depth-of-Book Data

February 11, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on February 1, 2011, The NASDAQ Stock Market LLC ("NASDAQ") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes to revise an optional Depth Data Enterprise License Fee for broker-dealer distribution of depth-of-book data to non-professional users with which the firm has a brokerage relationship.

The text of the proposed rule change is below. Proposed new language is *italicized;* proposed deletions are in [brackets].[3]

* * * * *

7023. NASDAQ TotalView

(a) TotalView Entitlement.

The TotalView entitlement allows a subscriber to see all individual NASDAQ Market Center participant orders and quotes displayed in the system as well as the aggregate size of such orders and quotes at each price level in the execution functionality of the NASDAQ Market Center, including the NQDS feed.

(1)

(A)–(D) No change.

(E) *For a pilot period ending April 30, 2011, as an alternative to (a)(1)(A), (B), and (C), a broker-dealer distributor may purchase an enterprise license at a rate of $325,000 for non-professional subscribers. The enterprise license entitles a distributor to provide NQDS (as set forth in Rule 7017), TotalView and OpenView to an unlimited number of non-professional subscribers with whom the firm has a brokerage relationship. The enterprise license shall not apply to relevant Level 1 fees. The enterprise license shall not apply to Depth Distributor Fees.*

(2) 30-Day Free-Trial Offer. NASDAQ shall offer all new individual subscribers and potential new individual subscribers a 30-day waiver of the user fees for TotalView. This waiver shall not include the incremental fees assessed for the NQDS-only service, which are $30 for professional users and $9 for non-professional users per month. This fee waiver period shall be applied on a rolling basis, determined by the date on which a new individual subscriber or potential individual subscriber is first entitled by a distributor to receive access to TotalView. A distributor may only provide this waiver to a specific individual subscriber once.

For the period of the offer, the TotalView fee of $40 per professional user and $5 per non-professional user per month shall be waived.

(b) No change.

(c) No change.

(d) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[3] Changes are marked to the rules of The NASDAQ Stock Market LLC found at *http://nasdaq.cchwallstreet.com.*

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Current Proposal. Effective February 1, 2011, NASDAQ will begin offering a voluntary Enterprise License for non-professional usage of the National Quotation Dissemination Service or NQDS (Rule 7017) and TotalView and OpenView (Rule 7023) (collectively, "NASDAQ Depth Data"). The Depth Enterprise License will be identical to the program offered previously under SR–NASDAQ–2010–125 in that it will cost $325,000 per month and offer the same market data entitlement.[4] The Depth Data Enterprise License is available only to broker-dealers registered under the Securities Exchange Act of 1934, and it covers all non professional usage fees to customers with whom the firm has a brokerage relationship with an allowance to distribute data to external professional subscribers with which the firm has a brokerage relationship. This Depth Data Enterprise License Fee includes non-professional usage fees, but does not include distributor fees. The Depth Enterprise License is a pilot program that will automatically sunset on April 30, 2011.

Background. NASDAQ disseminates market data feeds in two capacities. First, NASDAQ disseminates consolidated or "core" data in its capacity as Securities Information Processor ("SIP") for the national market system plan governing securities listed on NASDAQ as a national securities exchange ("NASDAQ UTP Plan").[5] Second, NASDAQ separately disseminates proprietary or "non-core" data in its capacity as a registered national securities exchange. Non-core data is any data generated by the NASDAQ Market Center Execution System that is voluntarily disseminated by NASDAQ separate and apart from the consolidated data.[6] NASDAQ has numerous proprietary data products, such as NASDAQ TotalView, NASDAQ Last Sale, and NASDAQ Basic.

NASDAQ continues to seek broader distribution of non-core data and to reduce the cost of providing non-core data to larger numbers of investors. In the past, NASDAQ has accomplished

[4] *See* Securities Exchange Act Release No. 63084 (Oct. 13, 2010); 75 FR 64379 (Oct. 19, 20101) (SR–NASDAQ–2010–125). *See also* Securities Exchange Act Release No. 62908 (Sept. 14, 2010); 75 FR 57321 (Sept. 20, 20101) (SR–NASDAQ–2010–111).

[5] *See* Securities Exchange Act Release No. 59039 (Dec. 2, 2008) at p. 41.

[6] *Id.*

this goal in part by offering similar enterprise licenses for professional and non-professional usage of TotalView which contains the full depth of book data for the NASDAQ Market Center Execution System. NASDAQ believes that the adoption of enterprise licenses has led to greater distribution of market data, particularly among non-professional users.

Based on input from market participants, NASDAQ believes that this increase in distribution is attributable in part to the relief it provides distributors from the NASDAQ requirement that distributors count and report each non-professional user of NASDAQ proprietary data. In addition to increased administrative flexibility, enterprise licenses also encourage broader distribution by firms that are currently over the fee cap as well as those that are approaching the cap and wish to take advantage of the benefits of the program. Further, NASDAQ believes that capping fees in this manner creates goodwill with broker-dealers and increases transparency for retail investors.

Accordingly, effective February 1, 2011, NASDAQ is establishing the Depth Data Enterprise License Fee under NASDAQ Rule 7023(a)(1)(E), an optional non-professional enterprise license for distributors of any NASDQ depth-of-book data product including the National Quotation Dissemination Service or NQDS (Rule 7017) and TotalView and OpenView (Rule 7023) (collectively, "NASDAQ Depth Data"). This Depth Data Enterprise License Fee includes non-professional usage fees, but does not include distributor fees.[7] This program is available only to broker-dealers registered under the Securities Exchange Act of 1934, and would cover all non professional usage fees to customers with whom the firm has a brokerage relationship with an allowance to distribute data to external professional subscribers with which the firm has a brokerage relationship. Non-broker-dealer vendors and application service providers would not be eligible for the enterprise license; such firms typically pass through the cost of market data user fees to their customers.[8]

The Depth Data Enterprise License Fee covers usage fees for NASDAQ Depth Data received directly from NASDAQ as well as data received from third-party vendors (*e.g.,* Bloomberg, Thomson-Reuters, *etc.*). Upon joining the program, firms may inform third-party market data vendors they utilize (through a NASDAQ-provided form) that, going forward, depth data usage by the broker-dealer may be reported to NASDAQ on a non-billable basis. Such a structure attempts to address a long-standing concern that broker-dealers are over-billed for market data consumed by one person through multiple market-data display devices. At the same time, the proposed billing structure will continue to provide NASDAQ with accurate reporting information for purposes of usage monitoring and auditing.

The proposed Depth Data Enterprise License Fee is completely optional and does not replace existing enterprise license fee alternatives set forth in Rule 7023. Additionally, the proposal does not impact individual usage fees for any product or in any way raise the costs of any user of any NASDAQ data product. To the contrary, it provides broker-dealers with an additional approach to providing more NASDAQ data at a lower cost.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[9] in general, and with Section 6(b)(4) of the Act,[10] in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of NASDAQ data. In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[11]

By removing "unnecessary regulatory restrictions" on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well. NQDS, TotalView and OpenView are precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS.

On July 21, 2010, President Barack [sic] Obama signed into law H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), which amended Section 19 of the Act. Among other things, Section 916 of the Dodd-Frank Act amended paragraph (A) of Section 19(b)(3) of the Act by inserting the phrase "on any person, whether or not the person is a member of the self-regulatory organization" after "due, fee or other charge imposed by the self-regulatory organization." As a result, all SRO rule proposals establishing or changing dues, fees, or other charges are immediately effective upon filing regardless of whether such dues, fees, or other charges are imposed on members of the SRO, non-members, or both. Section 916 further amended paragraph (C) of Section 19(b)(3) of the Exchange Act to read, in pertinent part, "At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) [of Section 19(b)], the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) [of Section 19(b)] to determine whether the proposed rule should be approved or disapproved."

The recent decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoaliton [sic]* v. *SEC,* No. 09–1042 (DC Cir. 2010), although reviewing a Commission decision made prior to the effective date of the Dodd-Frank Act, upheld the Commission's reliance upon

[7] Distributors who utilize the enterprise license would still be liable for the applicable distributor fees.

[8] NASDAQ relies on distributor self-reporting of usage rather than on individual contact with each end-user customer. NASDAQ permits distributors to designate an entire user population as "non-professional" provided that the number of professional subscribers within that user population does not exceed ten percent (10%) of the total population.

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(4).

[11] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

competitive markets to set reasonable and equitably allocated fees for market data. "In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.' " *NetCoaltion* [sic], at 15 (quoting H.R. Rep. No. 94–229, at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 323). The court's conclusions about Congressional intent are therefore reinforced by the Dodd-Frank Act amendments, which create a presumption that exchange fees, including market data fees, may take effect immediately, without prior Commission approval, and that the Commission should take action to suspend a fee change and institute a proceeding to determine whether the fee change should be approved or disapproved only where the Commission has concerns that the change may not be consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Notwithstanding its determination that the Commission may rely upon competition to establish fair and equitably allocated fees for market data, the *NetCoaltion* [sic] court found that the Commission had not, in that case, compiled a record that adequately supported its conclusion that the market for the data at issue in the case was competitive. NASDAQ believes that a record may readily be established to demonstrate the competitive nature of the market in question.

There is intense competition between trading platforms that provide transaction execution and routing services and proprietary data products. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price and distribution of its data products. Without the prospect of a taking order seeing and reacting to a posted order on a particular platform, the posting of the order would accomplish little. Without trade executions, exchange data products cannot exist. Data products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, an exchange's customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A broker-dealer will direct orders to a particular exchange only if the expected revenues from executing trades on the exchange exceed net transaction execution costs and the cost of data that the broker-dealer chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the broker-dealer will choose not to buy it. Moreover, as a broker-dealer chooses to direct fewer orders to a particular exchange, the value of the product to that broker-dealer decreases, for two reasons. First, the product will contain less information, because executions of the broker-dealer's orders will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that broker-dealer because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the broker-dealer is directing orders will become correspondingly more valuable.

Thus, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. "No one disputes that competition for order flow is 'fierce'." *NetCoalition* at 24. However, the existence of fierce competition for order flow implies a high degree of price sensitivity on the part of broker-dealers with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A broker-dealer that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. Similarly, if a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected broker-dealers will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data.

Analyzing the cost of market data distribution in isolation from the cost of all of the inputs supporting the creation of market data will inevitably underestimate the cost of the data. Thus, because it is impossible to create data without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of market data. It would be equally misleading, however, to attribute all of the exchange's costs to the market data portion of an exchange's joint product. Rather, all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market information (or provide information free of charge) and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market information, and setting relatively low prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. This would be akin to strictly regulating the price that an automobile manufacturer can charge for car sound systems despite the existence of a highly competitive market for cars and the availability of after-market alternatives to the manufacturer-supplied system.

The market for market data products is competitive and inherently contestable because there is fierce

competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

Broker-dealers currently have numerous alternative venues for their order flow, including ten self-regulatory organization ("SRO") markets, as well as internalizing broker-dealers ("BDs") and various forms of alternative trading systems ("ATSs"), including dark pools and electronic communication networks ("ECNs"). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities ("TRFs") compete to attract internalized transaction reports. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products.

The large number of SROs, TRFs, BDs, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATS, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including NASDAQ, NYSE, NYSE Amex, NYSEArca, and BATS.

Any ATS or BD can combine with any other ATS, BD, or multiple ATSs or BDs to produce joint proprietary data products. Additionally, order routers and market data vendors can facilitate single or multiple broker-dealers' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from ATSs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as BATS and Arca did before registering as exchanges by publishing proprietary book data on the Internet. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace.

Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Yahoo, impose a discipline by providing only data that will enable them to attract "eyeballs" that contribute to their advertising revenue. Retail broker-dealers, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. NASDAQ and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, BATS Trading and Direct Edge. A proliferation of dark pools and other ATSs operate profitably with fragmentary shares of consolidated market volume.

Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While broker-dealers have previously published their proprietary data individually, Regulation NMS encourages market data vendors and broker-dealers to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg, and Thomson-Reuters.

The court in *NetCoalition* concluded that the Commission had failed to demonstrate that the market for market data was competitive based on the reasoning of the Commission's *NetCoalition* order because, in the court's view, the Commission had not adequately demonstrated that the depth-of-book data at issue in the case is used to attract order flow. NASDAQ believes, however, that evidence not before the court clearly demonstrates that availability of depth data attracts order flow. For example, NASDAQ submits that in and of itself, NASDAQ's decision voluntarily to cap fees on existing products, as is the effect of an enterprise license, is evidence of market forces at work. In fact, the instant proposal creates a second enterprise license for non-professional usage of depth data to complement the existing enterprise license set forth at NASDAQ Rule 7023(a)(1)(C).

The court in *NetCoalition* did cite favorably an economic study by Ordover and Bamberger which concluded that "[a]lthough an exchange may price its trade execution fees higher and its market data fees lower (or vice versa), because of "platform" competition the exchange nonetheless receives the same return from the two "joint products" in the aggregate." [12] Accordingly, NASDAQ hereby incorporates in this filing as Exhibit 3, additional comments from Ordover and Bamberger expanding upon the impact of platform competition.[13] Among the conclusions that Ordover and Bamberger reach are: NASDAQ is subject to significant competitive forces in setting the prices and other terms of execution services and proprietary data products.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of the array of its products, including the joint products at issue here. In particular, cross-platform competition, and the adverse effects from overpricing proprietary information on the volume of trading on the platform, constrain the pricing of proprietary information.

Competitive forces constrain the prices that platforms can charge for non-core market information. A trading platform cannot generate market information unless it receives trade orders. For this reason, a platform can be expected to use its market data product as a tool for attracting liquidity and trading to its exchange.

While, by definition, information that is proprietary to an exchange cannot be obtained elsewhere, this does not enable the owner of such information to exercise monopoly power over that information vis-à-vis firms with the need for such information. Even though

[12] *See NetCoalition* at fn. 16.

[13] Securities Exchange Act Release No. 63745 (Jan. 20, 2011); 76 FR 4970 (Jan. 27, 2011) (attached to original filing as Exhibit 3).

market information from one platform may not be a perfect substitute for market information from one or more other platforms, the existence of alternative sources of information can be expected to constrain the prices platforms charge for market data.

Besides the fact that similar information can be obtained elsewhere, the feasibility of supra-competitive pricing is constrained by the traders' ability to shift their trades elsewhere, which lowers the activity on the exchange and so in the long run reduces the quality of the information generated by the exchange.

Competition among platforms has driven NASDAQ continually to improve its platform data offerings and to cater to customers' data needs. For example, NASDAQ has developed and maintained multiple delivery mechanisms (IP, multi-cast, and compression) that enable customers to receive data in the form and manner they prefer and at the lowest cost to them. NASDAQ offers front end applications such as its "Bookviewer" to help customers utilize data. NASDAQ has created new products like TotalView Aggregate to complement TotalView ITCH and Level 2, because offering data in multiple formatting allows NASDAQ to better fit customer needs. NASDAQ offers data via multiple extranet providers, thereby helping to reduce network and total cost for its data products. NASDAQ has developed an online administrative system to provide customers transparency into their data feed requests and streamline data usage reporting. NASDAQ has also expanded its Enterprise License options that reduce the administrative burden and costs to firms that purchase market data.

Despite these enhancements and a dramatic increase in message traffic, NASDAQ's fees for depth-of-book data have remained flat. In fact, as a percent of total customer costs, NASDAQ data fees have fallen relative to other data usage costs—including bandwidth, programming, and infrastructure—that have risen. The same holds true for execution services; despite numerous enhancements to NASDAQ's trading platform, absolute and relative trading costs have declined. Platform competition has intensified as new entrants have emerged, constraining prices for both executions and for data.

Additional evidence cited by NYSE Arca in SR–NYSE Arca–2010–097 [14] which was not before the *NetCoalition* court also demonstrates that availability of depth data attracts order flow and that competition for order flow can constrain the price of market data:

1. Terrence Hendershott & Charles M. Jones, *Island Goes Dark: Transparence, Fragmentation, and Regulation,* 18 Review of Financial Studies 743 (2005);
2. Charts and Tables referenced in Exhibit 3B to that filing;
3. PHB Hagler Bailly, Inc., "Issues Surrounding Cost-Based Regulation of Market Data Prices;" and
4. PHB Hagler Bailly, Inc., "The Economic Perspective on Regulation of Market Data."

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[15] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2011–021 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2011–021. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2011–021 and should be submitted on or before March 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–3583 Filed 2–16–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63893; File No. SR–NASDAQ–2011–023]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Add Routing Option SOLV and Corresponding Fees

February 11, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2]

[14] *See* Securities Exchange Act Release No. 63291 (Nov. 9, 2010).

[15] 15 U.S.C. 78s(b)(3)(a)(ii).

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

notice is hereby given that on February 4, 2011, The NASDAQ Stock Market LLC (the "Exchange" or "Nasdaq") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been substantially prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes to amend NASDAQ Rule 4758 to add a new routing option, SOLV, and add corresponding fees to the fee schedule.

The text of the proposed rule change is available on Nasdaq's Web site *http://nasdaq.cchwallstreet.com,* at Nasdaq's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to add a routing strategy, SOLV, that will offer members a means of accessing liquidity in a wide range of execution venues at varying price levels. SOLV will operate in the same manner as the current SAVE strategy in most respects, but will differ in the treatment of shares that remain unexecuted after completing the order route and posting to the NASDAQ book. Whereas such shares under SAVE, if locked or crossed by another market center, are not routed to the locking or crossing market center, SOLV orders will be routed out for execution at the other market center.

Under the new SOLV routing option, like under the current SAVE routing option, a market participant may specify that an order will either (i) route to NASDAQ OMX BX ("BX") and NASDAQ OMX PSX ("PSX"), then check the NASDAQ book, and then route to other venues on the SOLV System routing table, or (ii) check the NASDAQ book first and then route to destinations on the SOLV System routing table.[3] Under the second option, the applicable routing table includes BX and PSX, and as is the case with all market destinations, the placement of BX and PSX on the routing table depends on NASDAQ's ongoing assessments of factors such as latency, fill rates, reliability, and cost. Under either routing option in SOLV and SAVE, shares that remain unexecuted after this routing are then posted on the NASDAQ book.[4] Under SOLV, however, unlike under SAVE, unexecuted shares posted to the NASDAQ book will be routed out if the order is locked or crossed by another market center.

NASDAQ has designed SOLV to comply with the requirements of Rule 611 of Regulation NMS, and believes that SOLV, like all NASDAQ routing strategies, conforms to Reg-NMS requirements.

SOLV is similar in concept to a routing strategy offered by BATS called "SLIM," under which an order checks the System for available shares, is routed to BATS Y–Exchange, Inc. and then is sent to destinations on the System routing table before posting to the book.[5]

This rule change also amends the fee schedule to account for the SOLV routing strategy. The fees charged for SOLV are the same as currently charged under SAVE. Under Rule 7018, NASDAQ passes through, without modification, applicable BX and PSX fees or rebates. In the case of BX, this means that NASDAQ passes through the $0.0014 per share executed credit paid by BX to market participants when accessing liquidity, and in the case of PSX, NASDAQ will pass through the fee charged by PSX to market participants when accessing liquidity.[6] SOLV thus provides market participants with the option of routing to a venue with a negative execution cost (BX) and a relatively lower execution cost (PSX) before accessing liquidity on NASDAQ and other venues. Market participants that wish to access NASDAQ before routing to BX and PSX may also do so using SOLV, and will receive the same pricing as those that opt to route to BX and PSX first, subject to the fact that they are likely to have more shares executed on NASDAQ, at a higher cost, than those that use SOLV to route to BX and PSX first. SOLV orders that execute at venues other than NASDAQ, BX or PSX or NYSE will be charged $0.0026 per share executed, orders that execute at NYSE will be charged $0.0022 per share executed, and orders that execute in NASDAQ are charged the same execution fee as SAVE, which is $0.0027 per share executed.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Sections 6(b)(5) of the Act,[8] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed routing option will accomplish those ends by providing more flexible options, insomuch as it offers NASDAQ members a routing strategy with a wide range of execution venues at varying price levels.

The rule change is also consistent with Section 6 of the Act,[9] in general, and with Sections 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls. The fees assessed for SOLV are the same fees and rebates currently charged for the similar routing strategy SAVE. Use of the routing option is, of course, entirely voluntary.

[3] As provided in Rule 4758(a)(1)(A), the term "System routing table" refers to the proprietary process for determining the specific trading venues to which the System routes orders and the order in which it routes them. NASDAQ reserves the right to maintain a different System routing table for different routing options and to modify the System routing table at any time without notice.

[4] Pursuant to NASDAQ Rule 4758(a)(1)(B), if a routed order is returned, in whole or in part, that order will receive a new time stamp reflecting the time of its return to the System.

[5] Securities Exchange Act Release No. 63147 (October 21, 2010), 75 FR 66183 (October 27, 2010) (SR–BATS–2010–029).

[6] The fee is currently $0.0013 per share executed, but NASDAQ OMX PSX anticipates increasing the fee to $0.0025 per share executed as of February 1, 2011.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [11] and Rule 19b–4(f)(6) thereunder.[12] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6) thereunder.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2011–023 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2011–023. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange.[15] All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2011–023 and should be submitted on or before March 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–3584 Filed 2–16–11; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A)(iii).

[12] 17 CFR 240.19b–4(f)(6).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[15] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov.*

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63900; File No. SR–NASDAQ–2011–026]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Offer Additional Routing Option

February 14, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 10, 2011, The NASDAQ Stock Market LLC ("NASDAQ" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. NASDAQ has designated the proposed rule change as constituting a rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing this proposed rule change to offer an additional routing option. NASDAQ proposes to implement the proposed rule change on February 22, 2011 or as soon thereafter as practicable. The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com/*, at NASDAQ's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ is amending Rule 4758, which describes its order routing processes, to add the new CART routing option. Under this routing option, the use of which is wholly voluntary, a market participant may specify that an order will route to NASDAQ OMX BX ("BX") and NASDAQ OMX PSX ("PSX") and then check the NASDAQ book, with any unexecuted shares posting to the NASDAQ book or cancelling, depending on the time-in-force of the order. Shares posted to the NASDAQ book are not routed out again. CART, like of all of NASDAQ's routing strategies, is designed to comply with the SEC Rule 611 and the other provisions of Regulation NMS.[4]

The rule change also introduces fees for the CART strategy. With respect to orders executed in BX or PSX, NASDAQ will pass along the applicable fee or rebate. In the case of BX, this means that NASDAQ passes through the $0.0014 per share executed credit paid by BX to market participants when accessing liquidity, and in the case of PSX, NASDAQ passes through the fee of $0.0025 per share executed charged by PSX to market participants when accessing liquidity. CART orders that access liquidity at NASDAQ will pay the standard NASDAQ take rate of $0.0030 per share executed, and CART orders that provide liquidity after posting to the NASDAQ book will receive the rebate for which the market participant otherwise qualifies under NASDAQ's fee schedule.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and with Sections 6(b)(5) of the Act,[6] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the proposed routing option will accomplish those ends by providing market participants with an additional voluntary routing option that will enable them easily to access liquidity available on all of the national securities exchanges operated by The NASDAQ OMX Group. NASDAQ expects the routing strategy will benefit firms that do not employ high-frequency trading strategies under which the firm itself would rapidly access liquidity provided on the multiple venues.

The rule change is also consistent with Section 6 of the Act,[7] in general, and with Sections 6(b)(4) of the Act,[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls. The fees assessed for CART for routing to BX and PSX are the same as the fees and rebates that are charged and offered to NASDAQ by these exchanges, and the fees associated with accessing or providing liquidity on NASDAQ through the strategy are the same as the fees and rebates applicable to orders that access NASDAQ without using the strategy. Use of the routing option is voluntary.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. NASDAQ provides routing services in a highly competitive market in which participants may avail themselves of a wide variety of routing options offered by self-regulatory organizations, alternative trading systems, other broker-dealers, market participants' own proprietary routing systems, and service bureaus. In such an environment, system enhancements such as the changes proposed in this rule filing do not burden competition, because they can succeed in attracting order flow to NASDAQ only if they offer investors higher quality and better value than services offered by others. Encouraging competitors to provide higher quality and better value is the essence of a well-functioning competitive marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[11] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[12] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. NASDAQ requests that the Commission waive the 30-day operative delay because it currently has the technological changes ready to support the proposed rule change, and believes that the benefits of greater flexibility that are expected from the rule change should not be delayed. The Commission believes that accelerating the 30-day operative delay[13] is consistent with the protection of investors and the public interest and designates the proposal operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[4] 17 CFR 242.611.

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NASDAQ has satisfied this requirement.

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6).

[13] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2011–026 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2011–026. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission,[14] all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NASDAQ–2011–026 and should be submitted on or before March 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–3645 Filed 2–16–11; 8:45 am]

BILLING CODE 8011–01–P

[14] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

[15] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 7321]

Department of State FY10 Service Contract Inventory

AGENCY: Department of State.

ACTION: Notice of the release of the Department of State FY10 Service Contract Inventory.

SUMMARY: The Department of State has publically released its Service Contract Inventory for FY10. Section 743 of Division C of the FY 2010 Consolidated Appropriations Act, Public Law 111–117, requires Department of State, and other civilian agencies, to submit an annual inventory of service contracts. A service contract inventory is a tool for assisting an agency in better understanding how contracted services are being used to support mission and operation, and whether the contractors' skills are being utilized in an appropriate manner. The Department followed OMB guidance, provided by memorandum titled 'Service Contract Inventories', to prepare the inventory.

DATES: The inventory is available on the Department's Web site as of Jan 31, 2011.

FOR FURTHER INFORMATION CONTACT: Jason Passaro, Director, A/CSM, 703–875–5114, *passaroja@state.gov.*

Dated: February 3, 2011.

Jason Passaro,

Director, A/CSM, Department of State.

[FR Doc. 2011–3615 Filed 2–16–11; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF TRANSPORTATION

ITS Joint Program Office; Pre-Proposal Safety Pilot Joint Bidders Conference; Notice of Public Meeting

AGENCY: Research and Innovative Technology Administration, U.S. Department of Transportation.

ACTION: Notice.

The U.S. Department of Transportation ITS Joint Program Office (ITS JPO) is conducting a Pre-proposal Conference ("Safety Pilot Joint Bidders Conference") on February 22, 2011 from 8:30 a.m. to 4:30 p.m. at the University of California—UC Washington Center, 1608 Rhode Island Avenue, NW., Washington, DC 20036. The conference is for interested parties to learn about and ask questions regarding the three current US DOT procurements/solicitations listed below in support of the Safety Pilot Program. US DOT officials will present and discuss the procurement process and requirements for each of the three planned procurements, as well as answer relevant questions from interested parties.

- Safety Pilot Test Conductor—Request for Proposals (RFP) DTFH61–11–R–00006 available at *http://www.FedBizOpps.gov.*
- Aftermarket Safety Devices—Request for Applications (RFA) DTFH61–11–RA–00003 available at *http://www.Grants.gov.*
- Roadside Equipment—Request for Quotations (RFQ) DTFH61–11–Q–00012 available at *http://www.FedBizOpps.gov.*

The Safety Pilot is intended to establish a real world model deployment test site for enabling wireless communications among vehicles and with roadside equipment for use in generating data to enable driver safety warning systems. The deployment site will encompass vehicles of various types that include a mix of integrated, retrofit, and aftermarket vehicle safety systems. The model deployment data generated will be used for establishing safety benefits in support of future policy decisions by US DOT, as well as for use by the broader industry in developing additional connected vehicle applications.

Interested parties are invited to attend in person or participate by webinar. For additional information including registration, please contact Adam Hopps (*ahopps@itsa.org*) or use the following link: *http://www.itsa.org/itsa/files/safety_pilot_bidders_conference_registration.doc.*

Issued in Washington, DC, on the 11th day of February 2011.

John Augustine,

Managing Director, ITS Joint Program Office.

[FR Doc. 2011–3604 Filed 2–16–11; 8:45 am]

BILLING CODE 4910–HY–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Aviation Medical Examiner Program

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our

intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on October 28, 2010, vol. 75, No. 208, page 66422. The collection of information is for the purpose of obtaining essential information concerning the applicants' professional and personal qualifications. The FAA uses the information to screen and select the designees who serve as aviation medical examiners.

DATES: Written comments should be submitted by March 21, 2011.

FOR FURTHER INFORMATION CONTACT: Carla Scott on (202) 267–9895, or by e-mail at: *Carla.Scott@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0604.

Title: Aviation Medical Examiner Program.

Form Numbers: FAA Form 8520–2.

Type of Review: Renewal of an information collection.

Background: The collection of information is currently accomplished by use of FAA Form 8520–2, Aviation Medical Examiner Designation Application. The information is necessary to determine the qualifications of those physicians applying to become aviation medical examiners. The information is also used to develop the AME directories used by approximately 620,000 airmen who must undergo periodic examinations by AMEs in order to obtain medical certificates.

Respondents: Approximately 450 aviation medical examiner applicants.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 30 minutes.

Estimated Total Annual Burden: 225 hours.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC on February 11, 2011.

Carla Scott,

FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2011–3551 Filed 2–16–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: NOTAM Realignment User Survey

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval for a new information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on September 9, 2010, vol. 75, no. 174, pages 54942–54943. In accordance with FAA Order JO 1030.4, ATO SysOps Services SMS Oversight, the FAA ATO System Operations Management, Safety Assurance Group (SAG) is conducting an assessment of the Notice to Airmen (NOTAM) Realignment Phase 1 (NRP–1) process to determine if unacceptable hazards exist within the National Airspace System (NAS). Essential to the assessment is a survey of airline and corporate pilots and dispatchers as well as airport operators and general aviation pilots.

DATES: Written comments should be submitted by March 21, 2011.

FOR FURTHER INFORMATION CONTACT: Carla Scott on (202) 267–9895, or by e-mail at: *Carla.Scott@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–XXXX.

Title: NOTAM Realignment User Survey.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Approval of a new information collection.

Background: Results of the SOSM SAG NOTAM Realignment Phase 1 (NRP–1) Assessment will be used to establish the status of identified hazards and ensure no new hazards have been introduced into the NAS. In addition to on-site visits, the SOSM SAG audit team has prepared three surveys. This submission only concerns an external survey directed to users of the National Airspace System (NAS).

Respondents: 150,607 users of the National Airspace System.

Frequency: This information is collected on occasion.

Estimated Average Burden per Response: 7 minutes.

Estimated Total Annual Burden: 881 hours.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202)395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC on February 11, 2011.

Carla Scott,

FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2011–3555 Filed 2–16–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Meeting of the National Parks Overflights Advisory Group Aviation Rulemaking Committee

ACTION: Notice of meeting.

SUMMARY: The Federal Aviation Administration (FAA) and the National Park Service (NPS), in accordance with the National Parks Air Tour Management Act of 2000, announce the next meeting of the National Parks Overflights Advisory Group (NPOAG) Aviation Rulemaking Committee (ARC). This notification provides the dates, location, and agenda for the meeting.

Dates and Location: The NPOAG ARC will meet on March 9–10, 2011. The meeting will take place in Salon #5 at the Rosen Centre Hotel, 9840 International Drive, Orlando, FL 32819. The phone number is (888) 800–2174. The meetings will be held from 8 a.m. to 5:30 p.m. on March 9–10, 2011. This NPOAG meeting will be open to the public.

FOR FURTHER INFORMATION CONTACT: Barry Brayer, AWP–1SP, Special Programs Staff, Federal Aviation Administration, Western-Pacific Region Headquarters, P.O. Box 92007, Los Angeles, CA 90009–2007, *telephone:* (310) 725–3800, *e-mail: Barry.Brayer@faa.gov,* or Karen Trevino, National Park Service, Natural Sounds and Night Skies Division, 1201 Oakridge Dr., Suite 100, Fort Collins, CO 80525, *telephone:* (970) 225–3563, *e-mail: Karen_Trevino@nps.gov.*

SUPPLEMENTARY INFORMATION:

Background

The National Parks Air Tour Management Act of 2000 (NPATMA), enacted on April 5, 2000, as Public Law 106–181, required the establishment of the NPOAG within one year after its enactment. The Act requires that the NPOAG be a balanced group of representatives of general aviation, commercial air tour operations, environmental concerns, and Native American tribes. The Administrator of the FAA and the Director of NPS (or their designees) serve as ex officio members of the group. Representatives of the Administrator and Director serve alternating 1-year terms as chairman of the advisory group.

The duties of the NPOAG include providing advice, information, and recommendations to the FAA Administrator and the NPS Director on: Implementation of Public Law 106–181; quiet aircraft technology; other measures that might accommodate interests to visitors of national parks; and at the request of the Administrator and the Director, on safety, environmental, and other issues related to commercial air tour operations over national parks or tribal lands.

Agenda for the March 9–10, 2011 NPOAG Meeting

The agenda for the meeting will include, but is not limited to, an update on ongoing Air Tour Management Program projects; an update on the safety assessments process; a discussion of roles and responsibilities; a discussion of the competitive bidding process, and a review of quiet technology incentives.

Attendance at the Meetings and Submission of Written Comments

Although these are not public meetings, interested persons may attend. Because seating is limited, if you plan to attend please contact one of the persons listed under **FOR FURTHER INFORMATION CONTACT** so that meeting space may be made to accommodate all attendees. Written comments regarding the meeting will be accepted directly from attendees or may be sent to the persons listed under **FOR FURTHER INFORMATION CONTACT**.

Record of the Meetings

If you cannot attend the NPOAG meeting, a summary record of the meeting will be made available under the NPOAG section of the FAA ATMP Web site at: *http://www.faa.gov/about/office_org/headquarters_offices/arc/programs/air_tour_management_plan/parks_overflights_group/minutes.cfm* or through the Special Programs Staff, Western-Pacific Region, P.O. Box 92007, Los Angeles, CA 90009–2007, *telephone:* (310) 725–3808.

Issued in Hawthorne, CA on February 8, 2011.

Barry Brayer,

Manager, Special Programs, Western-Pacific Region.

[FR Doc. 2011–3558 Filed 2–16–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Waiver Petition Docket Number FRA–2010–0145]

Union Pacific Railroad Company; Notice of Public Hearing and Extension of Public Comment Period

On October 22, 2010, the Federal Railroad Administration (FRA) published a notice in the **Federal Register** (75 FR 65399) announcing the Union Pacific Railroad Company's (UP) request for a waiver of compliance from certain provisions of Title 49 Code of Federal Regulations (CFR) part 232, *Brake System Safety Standards.* Specifically, UP has petitioned FRA for a determination that the engineering principles used in its design of its Continuous Speed Control Yard located at Roseville, California, are a sufficient primary retarder to prevent equipment rollouts and act as an acceptable form of alternate securement under 49 CFR 232.103(n)(1) (*Securement of unattended equipment*).

FRA has determined upon investigation that the facts of this proceeding warrant a public hearing. Accordingly, a hearing is hereby scheduled to begin at 9 a.m. on March 17, 2011, at the Hilton Garden Inn Roseville, 1951 Taylor Road, Roseville, California, USA 95661. Interested parties are invited to present oral statements at this hearing. For information on facilities or services for persons with disabilities or to request special assistance at the hearing, contact FRA's Docket Clerk, Michelle Silva, by telephone, e-mail, or in writing, at least five business days before the date of the hearing. Ms. Silva's contact information is as follows: FRA, Office of Chief Counsel, Mail Stop 10, 1200 New Jersey Avenue, SE., Washington, DC 20590; telephone 202–493–6030; e-mail *michelle.silva@dot.gov.*

The informal hearing will be conducted by a representative designated by FRA in accordance with FRA's Rules of Practice (*see* particularly 49 CFR 211.25). FRA's representative will make an opening statement outlining the scope of the hearing, as well as any additional procedures for the conduct of the hearing. The hearing will be a non-adversarial proceeding in which all interested parties will be given the opportunity to express their views regarding the waiver petition without cross-examination. After all initial statements have been completed, those individuals wishing to make brief rebuttal statements will be given an opportunity to do so.

In addition, FRA is hereby extending the comment period to April 17, 2011. All communications concerning these proceedings should identify the appropriate docket number (*e.g.,* Waiver Petition Docket Number FRA–2010–0145) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.

• *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.

• *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Page 19477) or at *http://www.dot.gov/privacy.html.*

Issued in Washington, DC on February 14, 2011.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2011–3643 Filed 2–16–11; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2011 0010]

Requested Administrative Waiver of the Coastwise Trade Laws

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel ARIELS SONG.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below. The complete application is given in DOT docket MARAD–2011–0010 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388 (68 FR 23084; April 30, 2003), that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

DATES: Submit comments on or before March 21, 2011.

ADDRESSES: Comments should refer to docket number MARAD–2011–0010. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, E-mail *Joann.Spittle@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel ARIELS SONG is:

Intended Commercial Use of Vessel: "Pleasure tours, cruises and sail instruction."

Geographic Region: "We will be based out of Newport RI and extend along the East coast and waterways from Maine to Florida, especially in the winter months. ME, NH, MA, RI, CT, NY, NJ, DE, MD, VA, NC, SC, GA, FL."

Privacy Act

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

By order of the Maritime Administrator.
Dated: February 8, 2011.

Murray Bloom,

Acting Secretary, Maritime Administration.

[FR Doc. 2011–3588 Filed 2–16–11; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 1053 (Sub-No. 1X)]

Michigan Air-Line Railway Co.—Abandonment Exemption—in Oakland County, MI

On January 28, 2011, Michigan Air-Line Railway Co. (MAL Railway) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon an approximately 5.45-mile rail line between milepost 45.26 (Engineer's Profile Station 2389+72), at the west line of Haggerty Road, and milepost 50.65 (Engineer's Profile Station 2677+67), at the intersection with the right-of-way of a CSX Transportation, Inc. rail line, in the City of Wixom, in Oakland County, Mich. The Line traverses U.S. Postal Service Zip Codes 48390 and 48393.

The line does not contain federally granted rights-of-way. Any documentation in MAL Railway's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

By issuing this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by May 18, 2011.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each OFA must be accompanied by a $1,500 filing fee. *See* 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public

use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than March 9, 2011. Each trail use request must be accompanied by a $250 filing fee. *See* 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to Docket No. AB 1053 (Sub-No. 1X), and must be sent to: (1) Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423–0001; and (2) W. Robert Alderson, 2101 S.W. 21st Street, Topeka, KS 66604. Replies to MAL Railway's petition are due on or before March 9, 2011.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or refer to the full abandonment or discontinuance regulations at 49 CFR pt. 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis (OEA) at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

An Environmental Assessment (EA) (or Environmental Impact Statement (EIS), if necessary) prepared by OEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact OEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: February 11, 2011.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2011–3597 Filed 2–16–11; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

Finding That the Lebanese Canadian Bank SAL Is a Financial Institution of Primary Money Laundering Concern

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

ACTION: Notice of finding.

SUMMARY: Pursuant to the authority contained in 31 U.S.C. 5318A, the Secretary of the Treasury, through his delegate, the Director of FinCEN, finds that reasonable grounds exist for concluding that the Lebanese Canadian Bank SAL ("LCB") is a financial institution of primary money laundering concern.

DATES: The finding made in this notice is effective as of February 17, 2011.

FOR FURTHER INFORMATION CONTACT: Regulatory Policy and Programs Division, FinCEN, (800) 949–2732.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Provisions

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the "USA PATRIOT Act"), Public Law 107–56. Title III of the USA PATRIOT Act amended the anti-money laundering provisions of the Bank Secrecy Act ("BSA"), codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314 and 5316–5332, to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism. Regulations implementing the BSA appear at 31 CFR part 103. The authority of the Secretary of the Treasury (the "Secretary") to administer the BSA and its implementing regulations has been delegated to the Director of FinCEN.[1]

Section 311 of the USA PATRIOT Act ("section 311") added section 5318A to the BSA, granting the Secretary the authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, institution, class of transaction, or type of account is of "primary money laundering concern," to require domestic financial institutions and financial agencies to take certain "special measures" against the primary money laundering concern. Section 311, as amended, identifies factors for the Secretary to consider and Federal agencies to consult before the Secretary may conclude that a jurisdiction, institution, class of transaction, or type of account is of primary money laundering concern. The statute also provides similar procedures, i.e., factors and consultation requirements, for selecting the specific special measures to be imposed against the primary money laundering concern.

Taken as a whole, section 311 provides the Secretary with a range of options that can be adapted to target specific money laundering and terrorist financing concerns most effectively. These options give the Secretary the authority to bring additional pressure on those jurisdictions and institutions that pose money laundering threats. Through the imposition of various special measures, the Secretary can gain more information about the jurisdictions, institutions, transactions, or accounts of concern; can more effectively monitor the respective jurisdictions, institutions, transactions, or accounts; or can protect U.S. financial institutions from involvement with jurisdictions, institutions, transactions, or accounts that are of money laundering concern.

Before making a finding that reasonable grounds exist for concluding that a foreign financial institution is of primary money laundering concern, the Secretary is required to consult with the both the Secretary of State and the Attorney General. The Secretary is also required by section 311 to consider "such information as the Secretary determines to be relevant, including the following potentially relevant factors":

- The extent to which such financial institution is used to facilitate or promote money laundering in or through the jurisdiction;
- The extent to which such financial institution is used for legitimate business purposes in the jurisdiction; and
- The extent to which the finding that the institution is of primary money laundering concern is sufficient to ensure, with respect to transactions involving the institution operating in the jurisdiction, that the purposes of the BSA continue to be fulfilled, and to guard against international money laundering and other financial crimes.

If the Secretary determines that reasonable grounds exist for concluding that a foreign financial institution is of primary money laundering concern, the Secretary must determine the appropriate special measure(s) to address the specific money laundering risks. Section 311 provides a range of special measures that can be imposed individually, jointly, in any combination, and in any sequence.[2] The

[1] Therefore, references to the authority of the Secretary of the Treasury under section 311 of the USA PATRIOT Act apply equally to the Director of FinCEN.

[2] Available special measures include requiring: (1) Recordkeeping and reporting of certain financial transactions; (2) collection of information relating to beneficial ownership; (3) collection of information relating to certain payable-through accounts; (4) collection of information relating to certain correspondent accounts; and (5) prohibition or

Continued

Secretary's imposition of special measures requires additional consultations to be made and factors to be considered. The statute requires the Secretary to consult with appropriate federal agencies and other interested parties [3] and to consider the following specific factors:

- Whether similar action has been or is being taken by other nations or multilateral groups;
- Whether the imposition of any particular special measures would create a significant competitive disadvantage, including any undue cost or burden associated with compliance, for financial institutions organized or licensed in the United States;
- The extent to which the action or the timing of the action would have a significant adverse systemic impact on the international payment, clearance, and settlement system, or on legitimate business activities involving the particular institution; and
- The effect of the action on the United States national security and foreign policy.[4]

B. The Lebanese Canadian Bank SAL

The Lebanese Canadian Bank SAL ("LCB") is based in Beirut, Lebanon, and maintains a network of 35 branches in Lebanon and a representative office in Montreal, Canada. The bank is eighth largest among Lebanese banks in assets and has over 600 employees. Originally established in 1960 as Banque des Activities Economiques SAL, it operated as a subsidiary of the Royal Bank of Canada Middle East (1968–1988) and is now a privately owned bank. LCB offers a broad range of corporate, retail, and investment products, and maintains extensive correspondent accounts with banks worldwide, including several U.S. financial institutions. As of 2009 LCB's total assets were worth over $5 billion.[5]

LCB has a controlling financial interest in a number of subsidiaries, including LCB Investments (Holding) SAL, LCB Finance SAL, LCB Estates SAL, LCB Insurance Brokerage House SAL, and Dubai-based Tabadul for Shares and Bonds LLC. Additionally, LCB is the majority shareholder of Prime Bank Limited, a private commercial bank and the LCB subsidiary located in Serrekunda, Gambia.[6] LCB owns 51% of Prime Bank while the remaining shares are held by local and Lebanese partners. LCB apparently serves as the sole correspondent bank for Prime Bank.[7] For purposes of this document and unless expressly stated otherwise, references to LCB include the aforementioned subsidiaries.

C. Lebanon

Lebanon is a financial hub for banking activities in the Middle East and eastern Mediterranean and has one of the more sophisticated banking sectors in the region. There are 66 banks incorporated in Lebanon,[8] and all major banks have correspondent relationships with U.S. financial institutions. The five largest commercial banks account for roughly 60% of total banking assets, estimated at $125 billion.[9] According to Treasury information, strong economic growth and a steady flow of diaspora deposits in recent years have helped the Lebanese banking system to maintain relatively robust lending, improve asset quality, and maintain adequate liquidity and capitalization positions. However, banks remain highly exposed to the heavily indebted sovereign, carry significant currency risk on their balance sheets, and operate in a volatile political security environment.

Lebanon also faces money laundering and terrorist financing vulnerabilities, according to the International Narcotics Control Strategy Report ("INCSR") published in March 2010 by the U.S. Department of State.[10] Of particular relevance is the possibility that a portion of the substantial flow of remittances from the Lebanese diaspora, estimated at $7 billion—21% of GDP—in 2009, according to the World Bank,[11] could be associated with underground finance and Trade-Based Money Laundering ("TBML") activities. Laundered criminal proceeds come primarily from Lebanese criminal activity and organized crime.[12]

Lebanon's Customs Authority ("Customs") supervises two free trade zones operating in the country. However, high levels of corruption within Customs create vulnerabilities for TBML and other threats. Moreover, Lebanon has no cross-border currency reporting requirements, resulting in a significant cash-smuggling vulnerability. Finally, Lebanon has not acceded to the UN Convention for the Suppression of the Financing of Terrorism, though it has adopted laws domestically criminalizing any funds resulting from the financing or contribution to the financing of terrorism.[13] However, such laws do not apply to Hizballah, which Lebanon considers to be a legitimate political party and resistance organization, and it is not subject to Lebanese anti-terrorist financing laws. The United States Government ("USG") designated Hizballah as a Foreign Terrorist Organization on October 8, 1997. Additionally, on October 31, 2001, Hizballah was designated by the USG as a Specially Designated Global Terrorist under Executive Order 13224.[14]

II. Analysis of Factors

Based upon a review and analysis of the administrative record in this matter, consultations with relevant Federal agencies and departments, and after consideration of the factors enumerated in section 311, the Director of FinCEN has determined that LCB is a financial institution of primary money laundering concern. FinCEN has reason to believe that LCB has been routinely used by drug traffickers and money launderers operating in various countries in Central and South America, Europe, Africa, and the Middle East; that Hizballah derived financial support from the criminal activities of this network; and that LCB managers are complicit in the network's

conditions on the opening or maintaining of correspondent or payable through accounts. 31 U.S.C. 5318A(b)(l)–(5). For a complete discussion of the range of possible countermeasures, *see* 68 FR 18917 (April 17, 2003) (proposing special measures against Nauru).

[3] Section 5318A(a)(4)(A) requires the Secretary to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Secretary of State, the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the National Credit Union Administration (NCUA), and, in the sole discretion of the Secretary, "such other agencies and interested parties as the Secretary may find to be appropriate." The consultation process must also include the Attorney General if the Secretary is considering prohibiting or imposing conditions on domestic financial institutions opening or maintaining correspondent account relationships with the designated jurisdiction.

[4] Classified information used in support of a section 311 finding and measure(s) may be submitted by Treasury to a reviewing court ex parte and in camera. See section 376 of the Intelligence Authorization Act for fiscal year 2004, Public Law 108–177 (amending 31 U.S.C. 5318A by adding new paragraph (f)).

[5] Lebanese Canadian Bank, 2009 Annual Report.

[6] *Id.*

[7] *http://primebankgambia.gm/index.*

[8] "Complete List of Operating Banks in Lebanon," Banque du Liban (*http://www.bdl.gov.lb).*

[9] *2010 Index of Economic Freedom,* The Heritage Foundation (*http://www.heritage.org/index/country/lebanon).*

[10] The 2010 International Narcotics Control Strategy Report ("INCSR"), Lebanon, pp 151–154 (*http://www.state.gov/g/inl/rls/nrcrpt/2010/vol2/137212.htm).*

[11] *The Daily Star,* "2009 Remittances to Lebanon Reach $7 Billion," November 10, 2009.

[12] 2010 INCSR.

[13] For additional information about Lebanon's legal framework and special mechanisms for anti-money laundering and terrorist financing measures, see The Middle East and North Africa Financial Task Force (MENAFATF) *Mutual Evaluation Report, Lebanese Republic,* November 10, 2009 (*http://www.menafatf.org).*

[14] Hizballah is a Lebanon-based terrorist group. Until September 11, 2001, Hizballah was responsible for more American deaths than any other terrorist organization.

money laundering activities. A discussion of the factors relevant to this finding follows:

1. The Extent to Which LCB Has Been Used To Facilitate or Promote Money Laundering in or Through the Jurisdiction

The USG has information through law enforcement and other sources indicating that LCB—through management complicity, failure of internal controls, and lack of application of prudent banking standards—has been used extensively by persons associated with international drug trafficking and money laundering. According to this information, this international drug trafficking and money laundering network generally moves illegal drugs from South America to Europe and the Middle East via West Africa, with proceeds laundered through the Lebanese financial system, as well as through TBML involving used cars and consumer goods.[15] Specifically, individuals mentioned below [16] (with the assistance of close family members who are key participants in the global drug trafficking and money laundering network) are known to hold or utilize cash deposit accounts at LCB to move hundreds of millions of dollars monthly in cash proceeds from illicit drug sales into the formal financial system, as well as to coordinate the laundering of these funds through key foreign nodes of the network using LCB accounts. The bank's involvement in money laundering is attributable to failure to adequately control transactions that are highly vulnerable to criminal exploitation, including cash deposits and cross-border wire transfers, inadequate due diligence on high-risk customers like exchange houses, and, in some cases, complicity in the laundering activity by LCB managers.

For example, in this global narco-money laundering network, U.S.-designated Ayman Joumaa [17] has coordinated the transportation, distribution, and sale of multi-ton bulk shipments of cocaine from South America, and laundered the proceeds—as much as $200 million per month—from the sale of cocaine in Europe and the Middle East. In this criminal scheme, the proceeds have been laundered through various methods, including bulk cash smuggling operations and use of several Lebanese exchange houses that utilize accounts at LCB branches managed by family members of other participants in the global money laundering network. Specifically, Ayman Joumaa deposits bulk cash into multiple exchange houses, including the one that he owns, which then deposit the currency into their LCB accounts. He or the exchange houses then instruct LCB to perform wire transfers in furtherance of one of two TBML schemes. For example, some of the funds move to LCB's U.S. correspondent accounts via suspiciously structured electronic wire transfers to multiple U.S.-based used car dealerships—some of which are operated by individuals who have been separately identified in drug-related investigations. The recipients use the funds to purchase vehicles in the United States, which are then shipped to West Africa and/or other overseas destinations, with the proceeds ultimately repatriated back to Lebanon. Other funds are sent through LCB's U.S. correspondent accounts to pay Asian suppliers of consumer goods, which are shipped to Latin America and sold and the proceeds are laundered through a scheme known as the Black Market Peso Exchange, in each case through other individuals referred to in this finding or via companies owned or controlled by them. According to USG information, Hizballah derived financial support from the criminal activities of Joumaa's network.

With respect to the exchanges and companies related to Ayman Joumaa, numerous instances indicate that substantial amounts of illicit funds may have passed through LCB. Since January 2006, hundreds of records with a cumulative equivalent value of $66.4 million identified a Lebanese bank that originated the transfer; approximately half of those were originated by LCB, for a cumulative equivalent value of $66.2 million, or 94%, thus, indicating that LCB probably is the favored bank for these exchange houses, particularly in the context of illicit banking activity. Similarly, a review of all dollar-denominated wire transfers with the two primary exchange houses either as sender or receiver between January 2004 and December 2008 showed 72% originated by one of the exchange houses through LCB.

Individual A, who owns a wide network of companies manufacturing or procuring consumer goods in Asia, Europe, and the Middle East, the Caribbean, and Lebanon, participates in this money laundering scheme by providing the consumer goods that are used for TBML, as described above. Despite his business being based in Asia, he is believed to have centralized his banking operations in Lebanon, particularly through the use of over 30 accounts at LCB. USG information shows Individual A receiving funds in his accounts from Ayman Joumaa, and exchanging funds with Latin American members of the network discussed below. Individual A is known to be in near daily communication with the bank from his professional base in Southeast Asia.

Individual B, based in Latin America, is part of a Lebanese drug trafficking organization that moves large quantities of drugs from Latin America to destinations throughout Africa, Europe, and the Middle East. For over a decade, Individual B and his family have been involved in a variety of TBML schemes with Latin American drug traffickers and Lebanese money launderers. In the criminal schemes, the individuals deposit the local currency proceeds from the sale of imported consumer goods to the accounts of local banks and convert them to hard currency. This completes the Latin America-based Black Market Peso Exchange money laundering cycle, and allows for the repatriation of proceeds for the Latin American drug producers. Individual B then uses accounts at LCB to exchange the funds—usually in suspiciously structured amounts—with previously mentioned individuals and other suspected criminals as part of the global money laundering network. Information available to the USG suggests that Individual B and his family members are supporters of Hizballah.

Additionally, USG information indicates that Individual C, connected to both drug trafficking and money laundering, has established a money exchange house in the same building as a key LCB branch. This exchange uses its LCB accounts to deposit bulk cash proceeds of drug sales and then wires the proceeds to U.S.-based used car dealers. Individuals managing this and another LCB branch—each of which houses key accounts accepting bulk

[15] For more information on Trade-Based Money Laundering, *see* "Advisory to Financial Institutions on Filing Suspicious Activity Reports regarding Trade-Based Money Laundering," Financial Crimes Enforcement Network, FIN02010–A001, February 18, 2010. *http://www.fincen.gov/financial_institutions/advisory.html.*

[16] These individuals are referred to by name and/or solely by letter reference (*i.e.,* Individual A, B, C, etc.) depending on the sensitivity of the source.

[17] On January 26, 2011, the U.S. Department of the Treasury's Office of Foreign Assets Control designated members and connected entities of the Ayman Joumaa drug trafficking and money laundering network, as Specially Designated Narcotics Traffickers due to their significant roles in international narcotics trafficking. This action, pursuant to the Foreign Narcotics Kingpin Designations Act (Kingpin Act), prohibits U.S. persons from conducting financial or commercial transactions with these entities and individuals and freezes any assets the designees may have under U.S. jurisdiction.

cash from exchange houses or wiring funds for the TBML schemes described above—are family members of one of the aforementioned individuals running Asia-based TBML activities.

At least one of these individuals has family relationships and personal contact with key LCB managers, in some cases working directly with those managers to conduct his transactions. The USG has information indicating that a minority owner of the bank, who concurrently serves as General Manager, his deputy, and the managers of key branches are in frequent—in some cases even daily—communication with various members of the aforementioned drug trafficking and money laundering network, and they personally process transactions on the network's behalf. Additionally, LCB managers are linked to Hizballah officials outside Lebanon. For example, Hizballah's Tehran-based envoy Abdallah Safieddine is involved in Iranian officials' access to LCB and key LCB managers, who provide them banking services.

Finally, information available to the U.S. Government indicates that LCB's subsidiary, Gambia-based Prime Bank, is partially owned by a Lebanese individual known to be a supporter of Hizballah. In addition to Gambian nationals, Prime Bank serves Iranian and Lebanese clientele throughout West Africa.

2. The Extent to Which LCB Is Used for Legitimate Business Purposes in the Jurisdiction

LCB is one of 49 mostly private Lebanese banks that make up Lebanon's financial sector. LCB has maintained modest but steady growth since 2000, with total assets of more than $5 billion in 2009.[18] LCB also appears to be aware of the risk posed by money laundering, as noted in its Anti-Money Laundering Policy Statement.[19] A publicly available source also indicates that U.S. financial institutions maintain correspondent relationships with LCB,[20] and it is likely that a high volume of those transactions through those accounts is legitimate. However, numerous instances have been identified where substantial volumes of illicit funds have passed through LCB. Thus, any legitimate use of LCB is significantly outweighed by the apparent use of LCB to promote or facilitate money laundering.

[18] Lebanese Canadian Bank, 2009 Annual Report.

[19] Lebanese Canadian Bank, AML Policy Statement, *http://www.lebcanbank.com.*

[20] Bankers Almanac, Lebanese Canadian Bank SAL, June 22, 2010 (http://www.bankersalmanac.com).

3. The Extent to Which Such Action Is Sufficient to Ensure, With Respect to Transactions Involving LCB, That the Purposes of the BSA Continue To Be Fulfilled, and To Guard Against International Money Laundering and Other Financial Crimes

As detailed above, FinCEN has reasonable grounds to conclude that LCB is being used to promote or facilitate money laundering, and is, therefore, an institution of primary money laundering concern. Currently, there are no protective measures that specifically target LCB. Thus, finding LCB to be a financial institution of money laundering concern, which would allow consideration by the Secretary of special measures to be imposed on the institution under Section 311, is a necessary first step to prevent LCB from facilitating money laundering or other financial crime through the U.S. financial system. The finding of primary money laundering concern will bring criminal conduct occurring at or through LCB to the attention of the international financial community and further limit the bank's ability to be used for money laundering or other criminal purposes.

III. Finding

Based on the foregoing factors, the Director of FinCEN hereby finds that the Lebanese Canadian Bank SAL is a financial institution of primary money laundering concern.

Dated: February 9, 2011.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. 2011–3346 Filed 2–16–11; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–100194–10]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning the existing proposed regulations, REG–100194–10, Specified Tax Return Preparers Required to File Individual Income Tax Returns Using Magnetic Media—Taxpayer Choice Statements.

DATES: Written comments should be received on or before April 18, 2011 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Ralph M. Terry at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–8144, or through the Internet at *Ralph.M.Terry@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Specified Tax Return Preparers Required to File Individual Income Tax Returns Using Magnetic Media—Taxpayer Choice Statements

OMB Number: 1545–2201.

Regulation Project Number: REG–100194–10.

Abstract: This document contains proposed regulations relating to the requirement for "specified tax return preparers," generally tax return preparers who reasonably expect to file more than 10 individual income tax returns in a calendar year, to file individual income tax returns using magnetic media pursuant to section 6011(e)(3) of the Internal Revenue Code (Code). The proposed regulations reflect changes to the law made by the Worker, Homeownership, and Business Assistance Act of 2009. The proposed regulations affect specified tax return preparers who prepare and file individual income tax returns, as defined in section 6011(e)(3)(C). For calendar year 2011, the proposed regulations define a specified tax return preparer as a tax return preparer who reasonably expects to file (or if the preparer is a member of a firm, the firm's members in the aggregate reasonably expect to file) 100 or more individual income tax returns during the year, while beginning January 1, 2012 a specified tax return preparer is a tax return preparer who reasonably expects to file (or if the preparer is a member of a firm, the firm's members in the aggregate reasonably expect to file) 11 or more individual income tax returns in a calendar year. The proposed regulations are unrelated to and are not intended to address the requirements for

obtaining a preparer tax identification number (PTIN) under section 6109. See the final regulations under section 6109 published in the **Federal Register** (75 FR 60309–01).

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 312.000.

Estimated Time per Respondent: 5.41 Hours.

Estimated Total Annual Burden Hours: 1,689,930.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 10, 2011.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2011–3547 Filed 2–16–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[AC–58 OTS No. 01292 and H 4762]

Fraternity Federal Savings & Loan Association, Baltimore, MD; Approval of Conversion Application

Notice is hereby given that on February 10, 2011, the Office of Thrift Supervision approved the application of Fraternity FS&LA, Baltimore, Maryland, to convert to the stock form of organization. Copies of the application are available for inspection by appointment (*phone number:* (202) 906–5922 or *e-mail: public.info@ots.treas.gov*) at the Public Reading Room, 1700 G Street, NW., Washington, DC 20552, and the OTS Southeast Regional Office, 1475 Peachtree Street, NE., Atlanta, Georgia 30309.

Dated: February 10, 2011.

By the Office of Thrift Supervision.

Sandra E. Evans,

Federal Register Liaison.

[FR Doc. 2011–3562 Filed 2–16–11; 8:45 am]

BILLING CODE 6720–01–M

DEPARTMENT OF VETERANS AFFAIRS

Research Advisory Committee on Gulf War Veterans' Illnesses; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Research Advisory Committee on Gulf War Veterans' Illnesses will meet on February 28–March 1, 2011. On February 28, the meeting will be held in room 230 at the Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC, from 8 a.m. until 3:15 p.m. On March 1, the meeting will be held in room 1143 of the Lafayette Building, 811 Vermont Avenue, NW., Washington, DC, from 8 a.m. until 1:30 p.m. The meeting is open to the public.

The purpose of the Committee is to provide advice and make recommendations to the Secretary of Veterans Affairs on proposed research studies, research plans and research strategies relating to the health consequences of military service in the Southwest Asia theater of operations during the Gulf War.

The Committee will review VA program activities related to Gulf War Veterans' illnesses and updates on relevant scientific research published since the last Committee meeting. The session on February 28 will include remarks and discussion with two panels (Veterans Service Organization representatives and Gulf War Veterans) in honor of the 20th anniversary of the 1990–1991 Gulf War. There will also be a panel discussion with the members of the VA Gulf War Steering Committee and VA researchers. On both days of the meeting, there will be presentations on ongoing VA, Department of Defense Congressionally Directed Medical Research Program, and National Institute for Health research programs. The session on March 1 will include discussion of Committee business and activities.

Public comments will be received on March 1, at 1 p.m. A sign-up sheet for five-minute comments will be available at the meeting. Individuals who speak are invited to submit a 1–2 page summary of their comments at the time of the meeting for inclusion in the official meeting record. Members of the public may also submit written statements for the Committee's review to Dr. Roberta White at *rwhite@bu.edu.*

Any member of the public seeking additional information should contact Dr. Roberta White, Scientific Director, at (617) 278–4517 or Dr. William Goldberg, Designated Federal Officer, at (202) 461–1667.

Dated: February 11, 2011.

By Direction of the Secretary.

William F. Russo,

Director of Regulations Management, Office of the General Counsel.

[FR Doc. 2011–3559 Filed 2–16–11; 8:45 am]

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Part II

Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants: Primary Lead Smelting; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2004–0305; FRL–9263–2]

RIN 2060–AQ43

National Emission Standards for Hazardous Air Pollutants: Primary Lead Smelting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing amendments to the national emission standards for hazardous air pollutants (NESHAP) for Primary Lead Smelting to address the results of the residual risk and technology reviews conducted as required under sections 112(d)(6) and (f)(2) of the Clean Air Act (CAA). These proposed amendments include revisions to the emission limits for lead, the addition of a lead concentration in air standard, and the modification and addition of testing and monitoring and related notification, recordkeeping, and reporting requirements. We are also proposing to revise provisions addressing periods of startup, shutdown, and malfunction to ensure that they are consistent with a recent court decision. Finally, we are proposing revisions to the rule's applicability provision to make it consistent with the definition of the source category and proposing other minor technical changes to the standard. We are also responding to a petition for rulemaking filed on the standard with regard to lead as a surrogate and regulation of volatile organic compounds (VOC) and acid gases.

DATES: Comments must be received on or before April 4, 2011. Under the Paperwork Reduction Act, comments on the information collection provisions are best assured of having full effect if the Office of Management and Budget (OMB) receives a copy of your comments on or before March 21, 2011.

Public Hearing. If anyone contacts EPA requesting to speak at a public hearing by February 28, 2011, a public hearing will be held on March 4, 2011.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–HQ–OAR–2004–0305, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov,* Attention Docket ID Number EPA–HQ–OAR–2004–0305.
- *Fax:* (202) 566–9744, Attention Docket ID Number EPA–HQ–OAR–2004–0305.
- *Mail:* U.S. Postal Service, send comments to: EPA Docket Center, EPA West (Air Docket), Attention Docket ID Number EPA–HQ–OAR–2004–0305, U.S. Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), Room 3334, 1301 Constitution Ave., NW., Washington, DC 20004, Attention Docket ID Number EPA–HQ–OAR–2004–0305. 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 Number EPA–HQ–OAR–2004–0305. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *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.*

Docket. The EPA has established a docket for this rulemaking under Docket ID Number EPA–HQ–OAR–2004–0305. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket Center, 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 EPA Docket Center is (202) 566–1742.

Public Hearing. If a public hearing is held, it will begin at 10 a.m. on March 4, 2011 and will be held at EPA's campus in Research Triangle Park, North Carolina, or at an alternate facility nearby. Persons interested in presenting oral testimony or inquiring as to whether a public hearing is to be held should contact Ms. Virginia Hunt, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Metals and Minerals Group (D243–02), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–0832.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Ms. Sharon Nizich, Sector Policies and Programs Division (D243–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541–2825; fax number: (919) 541–5450; and e-mail address: *nizich.sharon@epa.gov.* For specific information regarding the risk modeling methodology, contact Ms. Elaine Manning, Health and Environmental Impacts Division (C539–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5499; fax number: (919) 541–0840; and e-mail address: *manning.elaine@epa.gov.* For information about the applicability of

the NESHAP to a particular entity, contact the appropriate person listed in Table 1 to this preamble.

SUPPLEMENTARY INFORMATION:

TABLE 1—LIST OF EPA CONTACTS FOR THE NESHAP ADDRESSED IN THIS PROPOSED ACTION

NESHAP for:	OECA contact [1]	OAQPS contact [2]
Primary Lead Smelting ...	Maria Malave, (202) 564–7027, *malave.maria@epa.gov* ..	Sharon Nizich, (919) 541–2825, *nizich.sharon@epa.gov.*

[1] EPA's Office of Enforcement and Compliance Assurance.
[2] EPA's Office of Air Quality Planning and Standards.

I. Preamble Acronyms and Abbreviations

Several acronyms and terms used to describe industrial processes, data inventories, and risk modeling are included in this preamble. While this may not be an exhaustive list, to ease the reading of this preamble and for reference purposes, the following terms and acronyms are defined here:

ADAF Age-dependent Adjustment Factors
AERMOD Air dispersion model used by the HEM–3 model
AEGL Acute Exposure Guideline Levels
ANPRM Advance Notice of Proposed Rulemaking
BACT Best Available Control Technology
CAA Clean Air Act
CBI Confidential Business Information
CEEL Community Emergency Exposure Levels
CEMS Continuous Emissions Monitoring System
CERMS Continuous Emission Rate Monitoring System
CFR Code of Federal Regulations
EJ Environmental Justice
EPA Environmental Protection Agency
ERPG Emergency Response Planning Guidelines
HAP Hazardous Air Pollutants
HI Hazard Index
HEM–3 Human Exposure Model version 3
HON Hazardous Organic National Emissions Standards for Hazardous Air Pollutants
HQ Hazard Quotient
IRIS Integrated Risk Information System
Km Kilometer
LAER Lowest Achievable Emission Rate
LOAEL Lowest Observed Adverse Effect Level
MACT Maximum Achievable Control Technology
MACT Code Code within the NEI used to identify processes included in a source category
MIR Maximum Individual Risk
NAAQS National Ambient Air Quality Standard
NAC/AEGL Committee National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances
NAICS North American Industry Classification System
NAS National Academy of Sciences
NATA National Air Toxics Assessment
NESHAP National Emissions Standards for Hazardous Air Pollutants
NEI National Emissions Inventory
NOAEL No Observed Adverse Effects Level
NRC National Research Council
NTTAA National Technology Transfer and Advancement Act
OAQPS EPA's Office of Air Quality Planning and Standards
OECA EPA's Office of Enforcement and Compliance Assurance
OMB Office of Management and Budget
PB-HAP Hazardous air pollutants known to be persistent and bio-accumulative in the environment
POM Polycyclic Organic Matter
RACT Reasonably Available Control Technology
RBLC RACT/BACT/LAER Clearinghouse
RFA Regulatory Flexibility Act
RfC Reference Concentration
RfD Reference Dose
RTR Residual Risk and Technology Review
SAB Science Advisory Board
SBA Small Business Administration
SCC Source Classification Codes
SF3 2000 Census of Population and Housing Summary File 3
SIP State Implementation Plan
SOP Standard Operating Procedures
SSM Startup, Shutdown, and Malfunction
TOSHI Target Organ-Specific Hazard Index
TPY Tons Per Year
TRIM Total Risk Integrated Modeling System
TTN Technology Transfer Network
UF Uncertainty Factor
UMRA Unfunded Mandates Reform Act
URE Unit Risk Estimate
VOC Volatile Organic Compounds
VOHAP Volatile Organic Hazardous Air Pollutants
WWW Worldwide Web

Organization of this Document. The following outline is provided to aid in the location of information in this preamble.

I. Preamble Acronyms and Abbreviations
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I. National Technology Transfer and Advancement Act
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II. General Information

A. Does this action apply to me?

The regulated industrial source category that is the subject of this proposal is listed in Table 2 to this preamble. Table 2 is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this proposed action for the source categories listed. This standard, and any changes considered in this rulemaking, would be directly

applicable to sources as a Federal program. Thus, Federal, State, local, and tribal government entities are not affected by this proposed action. As defined in the source category listing report published by EPA in 1992, the Primary Lead Smelting source category is defined as any facility engaged in producing lead metal from ore concentrates; including, but not limited to, the following smelting processes: sintering, reduction, preliminary treatment, and refining operations.[1] As discussed in section III. (C)(3), to be consistent with the 1992 listing, EPA is proposing to change the applicability of the Primary Lead Smelting NESHAP to apply to any facility that produces lead metal from lead ore concentrates. Although the source category name in the 1992 listing will remain Primary Lead Smelting (as in 1992 listing) we are proposing to change the title of the rule to refer to Primary Lead Processing. For clarification purposes, all references to lead emissions in this preamble means "lead compounds" (which is a HAP) and all reference to lead production means elemental lead (which is not a HAP) as provided under CAA 112(b)(7)).

TABLE 2—NESHAP AND INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS PROPOSED ACTION

Source category	NESHAP	NAICS code [1]	MACT code [2]
Primary Lead Smelting	Primary Lead Processing	331419	0204

[1] North American Industry Classification System.
[2] Maximum Achievable Control Technology.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this proposal will also be available on the World Wide Web (WWW) through the Technology Transfer Network (TTN). Following signature by the EPA Administrator, a copy of this proposed 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/atw/rrisk/rtrpg.html.* The TTN provides information and technology exchange in various areas of air pollution control.

Additional information is available on the residual risk and technology review (RTR) Web page at *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html.* This information includes source category descriptions and detailed emissions and other data that were used as inputs to the risk assessments.

C. What should I consider as I prepare my comments for EPA?

Submitting CBI. Do not submit information containing CBI 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 on 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. If you submit a CD ROM or disk that does not contain CBI, 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 and EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID Number EPA–HQ–OAR–2004–0305.

III. Background

A. What is the statutory authority for this action?

Section 112 of the Clean Air Act (CAA) establishes a two-stage regulatory process to address emissions of hazardous air pollutants (HAP) from stationary sources. In the first stage, after EPA has identified categories of sources emitting one or more of the HAP listed in section 112(b) of the CAA, section 112(d) of the CAA calls for us to promulgate NESHAP for those sources. "Major sources" are those that emit or have the potential to emit 10 tons per year (TPY) or more of a single HAP or 25 TPY or more of any combination of HAP. For major sources, these technology-based standards must reflect the maximum degree of emission reductions of HAP achievable (after considering cost, energy requirements, and non-air quality health and environmental impacts) and are commonly referred to as maximum achievable control technology (MACT) standards.

MACT standards must require the maximum degree of emission reduction through the application of measures, processes, methods, systems, or techniques, including, but not limited to, measures which (A) Reduce the volume of or eliminate pollutants through process changes, substitution of materials or other modifications; (B) enclose systems or processes to eliminate emissions; (C) capture or treat pollutants when released from a process, stack, storage, or fugitive emissions point; (D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification); or (E) are a combination of the above. CAA section 112(d)(2)(A)–(E). The MACT standards may take the form of design, equipment, work practice, or operational standards where EPA first determines either that, (A) a pollutant cannot be emitted through a conveyance designed and constructed to emit or capture the pollutants, or that any requirement for, or use of, such a conveyance would be inconsistent with law; or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations. CAA sections 112(h)(1)–(2).

The MACT "floor" is the minimum control level allowed for MACT standards promulgated under CAA section 112(d)(3) and may not be based on cost considerations. For new sources, the MACT floor cannot be less stringent than the emission control that is achieved in practice by the best-

[1] USEPA. *Documentation for Developing the Initial Source Category List—Final Report,* USEPA/OAQPS, EPA–450/3–91–030, July, 1992.

controlled similar source. The MACT floors for existing sources can be less stringent than floors for new sources, but they cannot be less stringent than the average emissions limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory (or the best-performing 5 sources for categories or subcategories with fewer than 30 sources). In developing MACT standards, we must also consider control options that are more stringent than the floor. We may establish standards more stringent than the floor based on the consideration of the cost of achieving the emissions reductions, any non-air quality health and environmental impacts, and energy requirements.

The EPA is then required to review these technology-based standards and to revise them "as necessary (taking into account developments in practices, processes, and control technologies)" no less frequently than every 8 years, under CAA section 112(d)(6). In conducting this review, EPA is not obliged to completely recalculate the prior MACT determination. *NRDC* v. *EPA,* 529 F.3d 1077, 1084 (D.C. Cir., 2008).

The second stage in standard-setting focuses on reducing any remaining "residual" risk according to CAA section 112(f). This provision requires, first, that EPA prepare a *Report to Congress* discussing (among other things) methods of calculating the risks posed (or potentially posed) by sources after implementation of the MACT standards, the public health significance of those risks, and the recommendations regarding legislation of such remaining risk. EPA prepared and submitted this report (*Residual Risk Report to Congress,* EPA–453/R–99–001) in March 1999. Congress did not act in response to the report, thereby triggering EPA's obligation under CAA section 112(f)(2) to analyze and address residual risk.

Section 112(f)(2) of the CAA requires us to determine for source categories subject to certain MACT standards, whether the emissions standards provide an ample margin of safety to protect public health. If the MACT standards that apply to a source category emitting a HAP that is "classified as a known, probable, or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one-in-one million," EPA must promulgate residual risk standards for the source category (or subcategory) as necessary to provide an ample margin of safety to protect public health. CAA section 112(f)(2)(A). In doing so, EPA may adopt standards equal to existing MACT standards if EPA determines that the existing standards are sufficiently protective. As stated in *NRDC* v. *EPA,* 529 F.3d 1077, 1083 (D.C. Dir. 2008), "If EPA determines that the existing technology-based standards provide an 'ample margin of safety,' then the Agency is free to readopt those standards during the residual risk rulemaking." Section 112(f)(2) of the Clean Air Act further states that EPA must also adopt more stringent standards, if necessary, to "prevent taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect." [2]

When Section 112(f)(2) of the CAA was enacted in 1990, it expressly preserved our use of the two-step process for developing standards to address any residual risk and our interpretation of "ample margin of safety" developed in the *National Emission Standards for Hazardous Air Pollutants: Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants* (Benzene NESHAP) (54 FR 38044, September 14, 1989). The first step in this process is the determination of acceptable risk. The second step provides for an ample margin of safety to protect public health, which is the level at which the standards are set (unless a more stringent standard is required to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect).

The terms "individual most exposed," "acceptable level," and "ample margin of safety" are not specifically defined in the CAA. However, CAA section 112(f)(2)(B) preserves the interpretation set out in the Benzene NESHAP, and the Court in *NRDC* v. *EPA,* concluded that EPA's interpretation of subsection 112(f)(2) is a reasonable one. *See NRDC* v. *EPA,* 529 F.3d at 1083 (D.C. Cir. 2008), which says "[S]ubsection 112(f)(2)(B) expressly incorporates EPA's interpretation of the Clean Air Act from the Benzene standard, complete with a citation to the *Federal Register.*" See also, *A Legislative History of the Clean Air Act Amendments of 1990,* volume 1, p. 877 (Senate debate on Conference Report). We notified Congress in the *Residual Risk Report to Congress* that we intended to use the Benzene NESHAP approach in making CAA section 112(f) residual risk determinations (EPA–453/R–99–001, p. ES–11).

In the Benzene NESHAP, we stated as an overall objective:

> * * * in protecting public health with an ample margin of safety, we strive to provide maximum feasible protection against risks to health from hazardous air pollutants by (1) protecting the greatest number of persons possible to an individual lifetime risk level no higher than approximately 1-in-1 million; and (2) limiting to no higher than approximately 1-in-10 thousand [*i.e.,* 100-in-1 million] the estimated risk that a person living near a facility would have if he or she were exposed to the maximum pollutant concentrations for 70 years.

The Agency also stated that, "The EPA also considers incidence (the number of persons estimated to suffer cancer or other serious health effects as a result of exposure to a pollutant) to be an important measure of the health risk to the exposed population. Incidence measures the extent of health risks to the exposed population as a whole, by providing an estimate of the occurrence of cancer or other serious health effects in the exposed population." The Agency went on to conclude that "estimated incidence would be weighed along with other health risk information in judging acceptability." As explained more fully in our *Residual Risk Report to Congress,* EPA does not define "rigid line[s] of acceptability," but considers rather broad objectives to be weighed with a series of other health measures and factors (EPA–453/R–99–001, p. ES–11). The determination of what represents an "acceptable" risk is based on a judgment of "what risks are acceptable in the world in which we live" (*Residual Risk Report to Congress,* p. 178, quoting the Vinyl Chloride decision at 824 F.2d 1165) recognizing that our world is not risk-free.

In the Benzene NESHAP, we stated that "EPA will generally presume that if the risk to [the maximum exposed] individual is no higher than approximately 1-in-10 thousand, that risk level is considered acceptable." 54 FR 38045. We discussed the maximum individual lifetime cancer risk as being "the estimated risk that a person living near a plant would have if he or she were exposed to the maximum pollutant concentrations for 70 years." *Id.* We explained that this measure of risk "is an estimate of the upper bound of risk based on conservative assumptions, such as continuous exposure for 24 hours per day for 70 years." *Id.* We

[2] "Adverse environmental effect" is defined in CAA section 112(a)(7) as any significant and widespread adverse effect, which may be reasonably anticipated to wildlife, aquatic life, or natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental qualities over broad areas.

acknowledge that maximum individual lifetime cancer risk "does not necessarily reflect the true risk, but displays a conservative risk level which is an upper-bound that is unlikely to be exceeded." *Id.*

Understanding that there are both benefits and limitations to using maximum individual lifetime cancer risk as a metric for determining acceptability, we acknowledged in the 1989 Benzene NESHAP that "consideration of maximum individual risk * * * must take into account the strengths and weaknesses of this measure of risk." *Id.* Consequently, the presumptive risk level of 100-in-1 million (1-in-10 thousand) provides a benchmark for judging the acceptability of maximum individual lifetime cancer risk, but does not constitute a rigid line for making that determination.

The Agency also explained in the 1989 Benzene NESHAP the following: "In establishing a presumption for MIR [maximum individual cancer risk], rather than a rigid line for acceptability, the Agency intends to weigh it with a series of other health measures and factors. These include the overall incidence of cancer or other serious health effects within the exposed population, the numbers of persons exposed within each individual lifetime risk range and associated incidence within, typically, a 50-kilometer (km) exposure radius around facilities, the science policy assumptions and estimation uncertainties associated with the risk measures, weight of the scientific evidence for human health effects, other quantified or unquantified health effects, effects due to co-location of facilities, and co-emission of pollutants." *Id.*

In some cases, these health measures and factors taken together may provide a more realistic description of the magnitude of risk in the exposed population than that provided by maximum individual lifetime cancer risk alone. As explained in the Benzene NESHAP, "[e]ven though the risks judged "acceptable" by EPA in the first step of the Vinyl Chloride inquiry are already low, the second step of the inquiry, determining an "ample margin of safety," again includes consideration of all of the health factors, and whether to reduce the risks even further." In the ample margin of safety decision process, the Agency again considers all of the health risks and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including costs and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors. Considering all of these factors, the Agency will establish the standard at a level that provides an ample margin of safety to protect the public health, as required by CAA section 112(f). 54 FR 38046.

B. How did we consider the risk results in making decisions for this proposal?

As discussed in section III.A of this preamble, we apply a two-step process for developing standards to address residual risk. In the first step, EPA determines if risks are acceptable. This determination "considers all health information, including risk estimation uncertainty, and includes a presumptive limit on maximum individual lifetime [cancer] risk (MIR) [3] of approximately 1-in-10 thousand [*i.e.,* 100-in-1 million]." 54 FR 38045. In the second step of the process, EPA sets the standard at a level that provides an ample margin of safety "in consideration of all health information, including the number of persons at risk levels higher than approximately 1-in-1 million, as well as other relevant factors, including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision." *Id.*

In past residual risk actions, EPA has presented and considered a number of human health risk metrics associated with emissions from the category under review, including: the MIR; the numbers of persons in various risk ranges; cancer incidence; the maximum non-cancer hazard index (HI); and the maximum acute non-cancer hazard (72 FR 25138, May 3, 2007; 71 FR 42724, July 27, 2006). In our most recent proposals (75 FR 65068, October 21, 2010 and 75 FR 80220, December 21, 2010), EPA also presented and considered additional measures of health information, including: estimates of "facility-wide" risks (risks from all HAP emissions from the facility at which the source category is located); [4] demographic analyses (analyses of the distributions of HAP-related risks across different social, demographic, and economic groups living near the facilities); and estimates of the risks associated with the maximum level of emissions which might be allowed by the current MACT standards (*see, e.g.,* 75 FR 65068, October 21, 2010 and 75 FR 80220, December 21, 2010). EPA also discussed and considered risk estimation uncertainties. EPA is providing this same type of information in support of the proposed actions described in this **Federal Register** notice.

The Agency is considering all available health information to inform our determinations of risk acceptability and ample margin of safety under CAA section 112(f). Specifically, as explained in the Benzene NESHAP, "the first step judgment on acceptability cannot be reduced to any single factor" and thus "[t]he Administrator believes that the acceptability of risk under section 112 is best judged on the basis of a broad set of health risk measures and information." 54 FR at 38046. Similarly, with regard to making the ample margin of safety determination, as stated in the Benzene NESHAP "[I]n the ample margin decision, the Agency again considers all of the health risk and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including cost and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors." *Id.*

The Agency acknowledges that flexibility is provided by the Benzene NESHAP regarding what factors EPA might consider in making determinations and how they might be weighed for each source category. In responding to comment on our policy under the Benzene NESHAP, EPA explained that: "The policy chosen by the Administrator permits consideration of multiple measures of health risk. Not only can the MIR figure be considered, but also incidence, the presence of non-cancer health effects, and the uncertainties of the risk estimates. In this way, the effect on the most exposed individuals can be reviewed as well as the impact on the general public. These factors can then be weighed in each individual case. This approach complies with the Vinyl Chloride mandate that the Administrator ascertain an acceptable level of risk to the public by employing [her] expertise to assess available data. It also complies with the Congressional intent behind the CAA, which did not exclude the use of any particular measure of public health risk from the EPA's consideration with respect to CAA section 112 regulations, and, thereby, implicitly permits consideration of any and all measures of health risk which the Administrator, in [her] judgment, believes are appropriate to determining what will 'protect the public health.'" 54 FR at 38057.

For example, the level of the MIR is only one factor to be weighed in

[3] Although defined as "maximum individual risk," MIR refers only to cancer risk. MIR, one metric for assessing cancer risk, is the estimated risk were an individual exposed to the maximum level of a pollutant for a lifetime.

[4] EPA previously provided estimates of total facility risk in a residual risk proposal for coke oven batteries (69 FR 48338, August 9, 2004).

determining acceptability of risks. It is explained in the Benzene NESHAP that "an MIR of approximately 1-in-10 thousand should ordinarily be the upper end of the range of acceptability. As risks increase above this benchmark, they become presumptively less acceptable under CAA section 112, and would be weighed with the other health risk measures and information in making an overall judgment on acceptability. Or, the Agency may find, in a particular case, that a risk that includes MIR less than the presumptively acceptable level is unacceptable in the light of other health risk factors." *Id.* at 38045. Similarly, with regard to the ample margin of safety analysis, EPA stated in the Benzene NESHAP that: "* * * EPA believes the relative weight of the many factors that can be considered in selecting an ample margin of safety can only be determined for each specific source category. This occurs mainly because technological and economic factors (along with the health-related factors) vary from source category to source category." *Id.* at 38061.

EPA wishes to point out that certain health information has not been considered to date in making residual risk determinations. In assessing risks to populations in the vicinity of the facilities in each category, we present estimates of risk associated with HAP emissions from the source category alone (source category risk estimates) and HAP emissions from the entire facility at which the covered source category is located (facility-wide risk estimates). We do not attempt to characterize the risks associated with all HAP emissions impacting the populations living near the sources in these categories. That is, at this time, we do not attempt to quantify those HAP risks that may be associated with mobile source emissions, natural source emissions, persistent environmental pollution, or atmospheric transformation in the vicinity of the sources in these categories.

The Agency understands the potential importance of considering an individual's total exposure to HAP in addition to considering exposure to HAP emissions from the source category and facility. This is particularly important when assessing non-cancer risks, where pollutant-specific exposure levels (*e.g.,* Reference Concentration (RfC)) are based on the assumption that thresholds exist for adverse health effects. For example, the Agency recognizes that, although exposures attributable to emissions from a source category or facility alone may not indicate the potential for increased risk of adverse non-cancer health effects in a population, the exposures resulting from emissions from the facility in combination with emissions from all of the other sources (*e.g.,* other facilities) to which an individual is exposed may be sufficient to result in increased risk of adverse non-cancer health effects. In May 2010, the Science Advisory Board (SAB) advised us "* * * that RTR assessments will be most useful to decision makers and communities if results are presented in the broader context of aggregate and cumulative risks, including background concentrations and contributions from other sources in the area." [5]

While we are interested in placing source category and facility-wide HAP risks in the context of total HAP risks from all sources combined in the vicinity of each source, we are concerned about the uncertainties of doing so. At this point, we believe that such estimates of total HAP risks will have significantly greater associated uncertainties than for the source category or facility-wide estimates, and hence compounding the uncertainty in any such comparison. This is because we have not conducted a detailed technical review of HAP emissions data for source categories and facilities that have not previously undergone an RTR review or are not currently undergoing such review. We are requesting comment on whether and how best to estimate and evaluate total HAP exposure in our assessments, and, in particular, on whether and how it might be appropriate to use information from EPA's National Air Toxics Assessment (NATA) to support such estimates. We are also seeking comment on how best to consider various types and scales of risk estimates when making our acceptability and ample margin of safety determinations under CAA section 112(f). Additionally, we are seeking comments and recommendations for any other comparative measures that may be useful in the assessment of the distribution of HAP risks across potentially affected demographic groups.

[5] EPA's responses to this and all other key recommendations of the SAB's advisory on RTR risk assessment methodologies (which is available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf*) are outlined in a memo to this rulemaking docket from David Guinnup entitled, *EPA's Actions in Response to the Key Recommendations of the SAB Review of RTR Risk Assessment Methodologies.*

C. What other actions are we addressing in this proposal?

1. Startup, Shutdown and Malfunction

This proposed action would amend the provisions of the existing NESHAP that apply to periods of startup, shutdown, and malfunction (SSM). The proposed revisions of these provisions result from a Court decision that vacated portions of two provisions in EPA's "General Provisions" regulation under CAA section 112, governing the emissions of HAP during periods of SSM. The current Primary Lead Smelting MACT includes references to the vacated provisions in the General Provisions rule.

We are proposing to revise the Primary Lead Smelting MACT standard to require affected sources to comply with the emission limitations at all times and during periods of SSM. Specifically, we are proposing several revisions to subpart TTT including revising Table 1 to indicate that the requirements of the *General Provisions pertaining to SSM* do not apply and to revise language in § 63.1547 (g)(1) and (2) to remove the exemption for bag leak detection alarm time attributable to SSM from total allowed alarm time. For reasons discussed below, we are also proposing to promulgate an affirmative defense to civil penalties for exceedances of emission standards caused by malfunctions, as well as criteria for establishing the affirmative defense. These changes would go into effect upon the effective date of promulgation of the final rule.

The United States Court of Appeals for the District of Columbia Circuit vacated portions of two provisions in EPA's CAA Section 112 regulations governing the emissions of HAP during periods of SSM. *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008), *cert. denied, 130 S. Ct. 1735 (U.S. 2010).* Specifically, the Court vacated the SSM exemptions contained in 40 CFR 63.6(f)(1) and 40 CFR 63.6(h)(1), that are part of a regulation commonly known as the "General Provisions Rule," that EPA had promulgated under section 112 of the CAA. When incorporated into CAA section 112(d) regulations for specific source categories, these two provisions exempt sources from the requirement to comply with the otherwise applicable CAA section 112(d) emission standard during periods of SSM.

We are proposing the elimination of the SSM exemption in this rule. Consistent with *Sierra Club* v. *EPA,* EPA is proposing standards in this rule that apply at all times. We are also proposing several revisions to Table 1 (the General Provisions Applicability table). For

example, we are proposing to eliminate the incorporation of the General Provisions' requirement that the source develop an SSM plan. We also are proposing to eliminate or revise certain recordkeeping and reporting that relate to the SSM exemption. EPA has attempted to ensure that we have not included in the proposed regulatory language any provisions that are inappropriate, unnecessary, or redundant in the absence of the SSM exemption. We are specifically seeking comment on whether there are any such provisions that we have inadvertently incorporated or overlooked.

In proposing standards in this rule, EPA has taken into account startup and shutdown periods and, for the reasons explained below, has not proposed different standards for those periods. Information on periods of startup and shutdown in the industry indicate that emissions during these periods do not increase. Furthermore, all processes are controlled by either control devices or work practices and these controls would not typically be affected by an SSM event. Also, compliance with the standard already requires averaging of emissions over a three month period, which accounts for the variability of emissions that may result during periods of startup and shutdown. Therefore, separate standards for periods of startup and shutdown are not being proposed.

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source's operations. However, by contrast, malfunction is defined as a "sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or useful manner * * *" (40 CFR 63.2). EPA has determined that malfunctions should not be viewed as a distinct operating mode and, therefore, any emissions that occur at such times do not need to be factored into development of CAA section 112(d) standards, which, once promulgated, apply at all times. In *Mossville Environmental Action Now* v. *EPA,* 370 F.3d 1232, 1242 (D.C. Cir. 2004), the court upheld as reasonable standards that had factored in variability of emissions under all operating conditions. However, nothing in section 112(d) or in case law requires that EPA anticipate and account for the innumerable types of potential malfunction events in setting emission standards. See, *Weyerhaeuser* v. *Costle,* 590 F.2d 1011, 1058 (D.C. Cir. 1978)("In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by 'uncontrollable acts of third parties,' such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation.").

Further, it is reasonable to interpret section 112(d) as not requiring EPA to account for malfunctions in setting emission standards. For example, we note that CAA section 112 uses the concept of "best performing" sources in defining MACT, the level of stringency that major source standards must meet. Applying the concept of "best performing" to a source that is malfunctioning presents significant difficulties. The goal of best performing sources is to operate in such a way as to avoid malfunctions of their units.

Moreover, even if malfunctions were considered a distinct operating mode, we believe it would be impracticable to take malfunctions into account in setting CAA section 112(d) standards for Primary Lead Smelting. As noted above, by definition, malfunctions are sudden and unexpected events and it would be difficult to set a standard that takes into account the myriad different types of malfunctions that can occur across all sources in the category. Moreover, malfunctions can vary in frequency, degree, and duration, further complicating standard setting.

In the unlikely event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. EPA would also consider whether the source's failure to comply with the CAA section 112(d) standard was, in fact, "sudden, infrequent, not reasonably preventable" and was not instead "caused in part by poor maintenance or careless operation." 40 CFR 63.2 (definition of malfunction).

Finally, EPA recognizes that even equipment that is properly designed and maintained can sometimes fail and that such failure can sometimes cause or contribute to an exceedance of the relevant emission standard. (*See, e.g., State Implementation Plans: Policy Regarding Excessive Emissions During Malfunctions, Startup, and Shutdown (Sept. 20, 1999); Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions (Feb. 15, 1983).*) EPA is therefore proposing to add to the final rule an affirmative defense to civil penalties for exceedances of emission limits that are caused by malfunctions. *See* 40 CFR 63.1542 (defining "affirmative defense" to mean, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding). We also are proposing other regulatory provisions to specify the elements that are necessary to establish this affirmative defense; the source must prove by a preponderance of the evidence that it has met all of the elements set forth in § 63.1551. (*See* 40 CFR 22.24.) The criteria ensure that the affirmative defense is available only where the event that causes an exceedance of the emission limit meets the narrow definition of malfunction in 40 CFR 63.2 (sudden, infrequent, not reasonably preventable and not caused by poor maintenance and/or careless operation). For example, to successfully assert the affirmative defense, the source must prove by a preponderance of the evidence that excess emissions "[w]ere caused by a sudden, short, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner * * *" The criteria also are designed to ensure that steps are taken to correct the malfunction, to minimize emissions in accordance with §§ 63.1543(i) and 63.1544(e) and to prevent future malfunctions. For example, the source must prove by a preponderance of the evidence that "[r]epairs were made as expeditiously as possible when the applicable emission limitations were being exceeded * * *" and that "[a]ll possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health * * *." In any judicial or administrative proceeding, the Administrator may challenge the assertion of the affirmative defense and, if the respondent has not met its burden of proving all of the requirements in the affirmative defense, appropriate penalties may be assessed in accordance with section 113 of the Clean Air Act (*see* also 40 CFR part 22.77).

Specifically, we are proposing the following changes to the rule.

- Added general duty requirements in §§ 63.1543 and 63.1544 to replace General Provision requirements that reference vacated SSM provisions.

• Added replacement language that eliminates the reference to SSM exemptions applicable to performance tests in § 63.1546.

• Added paragraphs in § 63.1549(e) requiring the reporting of malfunctions as part of the affirmative defense provisions.

• Added paragraphs in § 63.1549(b) requiring the keeping of certain records during malfunctions as part of the affirmative defense provisions.

• Revised Table 1 to reflect changes in the applicability of the General Provisions to this subpart resulting from a court vacatur of certain SSM requirements in the General Provisions.

2. Lead as a Surrogate and Regulation of Volatile Organic Compounds (VOC) and Acid Gas Emissions

In a January 14, 2009, petition for rulemaking filed by the Natural Resources Defense Council and Sierra Club, the petitioners claim that for the Primary Lead Smelting MACT, EPA relied on lead as a surrogate for all HAP and they claim that it was inappropriate for EPA to do so in absence of a showing that lead is an appropriate surrogate for all other HAP (such as mercury, acid gases, and volatile organic compounds (VOC)). The petitioners asserted that EPA should set standards for other HAP absent a showing that lead is an appropriate surrogate for these HAP. They also assert that EPA's PM standard does not reflect the emission level achieved by the best performing sources and that EPA must re-open the rule to set floors for PM in accordance with CAA section 112(d)(3). A copy of the petition is included in the docket.

As part of this rulemaking, EPA is responding to the claims made by the petitioners regarding the Primary Lead Smelting MACT.

As an initial matter, the petitioners are incorrect in their claim that EPA considers lead as a surrogate for all HAP. Rather, EPA used lead as a surrogate only for other metal HAP compounds in establishing the emissions limit in the current MACT standard for this source category (63 FR 19206 and 64 FR 30195). EPA determined in the 1999 rule that lead, a nonvolatile metal HAP, is an appropriate surrogate for other nonvolatile metal HAP including antimony, arsenic, chromium, nickel, manganese, and cadmium. In the proposed rule for the Primary Lead Smelting MACT (63 FR 19206), EPA discussed the use of lead as a surrogate for metal HAP emissions and explained that strong correlations exist between emissions of lead and other metal HAP and that the technologies identified for the control of metal HAP are the same as those used to control lead emissions. Therefore, EPA expected that the standards requiring control of lead would achieve similar control of the other metal HAP emitted from primary lead smelters. No adverse comments were received regarding EPA's proposed rationale for relying on lead as a surrogate for other metal HAP emitted by these sources and EPA adopted that rationale in the final rule promulgating the Primary Lead Smelting MACT. The petitioners do not have any substantive basis as to why EPA's rationale is not supported. Nor do they claim that there is any new information that would support re-opening this issue. Thus they fail to present a basis for re-opening this issue.

The petitioners also insist that EPA should have set standards for VOC and acid gases that are HAP because lead would not be a surrogate for these pollutants. EPA noted in the original proposal that due to small amounts of coke fed to the blast furnace, organic HAP (VOC) was emitted at a rate so low as to be infeasible to reduce. Again, no adverse comments were received on EPA's proposed conclusions, which were adopted in the final rule, and the petitioners do not now provide substantive support for their claim. Nor do they explain why any such claim could not have been raised during the initial rulemaking. Thus, they fail to present a basis for re-opening the rule on this issue.

Finally, petitioners claim that the "PM standard does not reflect the emission level achieved by the best performing sources." This claim is unclear as there is no PM standard in the Primary Lead Smelting MACT. The monitoring provisions provide that PM should be measured in relation to a predetermined PM level as one test for indicating baghouse performance. However, the PM levels are not enforceable emission limits, but merely an indication that the baghouse may not be operating properly. Again, these provisions were clearly explained in the proposed and final Primary Lead Smelting MACT rulemakings. Any claims concerning the appropriateness of these monitoring requirements should have been raised during the initial rulemaking process. Petitioners do not claim any new grounds for raising this issue now. Thus, the petition fails to provide a basis for re-opening the MACT.

3. Modification of the Applicability Provision

EPA is proposing to amend the applicability section to apply to any facility processing lead ore concentrate to produce lead metal. Under the current applicability provisions, the affected sources include any sinter machine, blast furnace, dross furnace, process fugitive source, and fugitive dust source located at a primary lead smelter and excludes secondary lead smelters, lead refiners, or lead remelters. Combined with the current definition for "primary lead smelter," the current rule effectively only applies to facilities that produce lead metal from lead sulfide ore concentrates using pyrometallurgical techniques. While the only processes available for the production of lead from lead ore concentrate at the time the MACT rule was developed were pyrometallurgical techniques, that applicability language is narrower than the primary lead smelting source category description EPA identified in its source category listing issued pursuant to CAA section 112(c)(1), *Documentation for Developing the Initial Source Category List* (EPA–450/3–91–030, July 1992). In the source category listing, EPA defined the primary lead smelting source category as follows: "The Primary Lead Smelting source category includes any facility engaged in producing lead metal from ore concentrates. The category includes, but is not limited to, the following smelting processes: sintering reduction, preliminary treatment, and refining operations. The sintering process includes an updraft or downdraft sintering machine. The reduction process includes the blast furnace, electric smelting furnace with a converter or reverberatory furnace, and slag fuming furnace process units. The preliminary treatment process includes the drossing kettles and dross reverberatory furnace process units. The refining process includes the refinery process unit." The definition is clear that the primary intent was to cover sources that produce lead metal from ore concentrates, which would "include" the use of a pyrometallurgical process, but would not be limited to such. As noted previously, at the time we promulgated the MACT standard, the only method of producing lead metal from ore concentrates was through use of pyrometallurgical techniques and we adopted an applicability provision that focused on that process.

However, information provided by the sole operating primary lead smelting facility indicates that lead production is likely to continue at the current Doe Run facility, although using a process other than a pyrometallurgical technique. The new lead facility would continue to process lead ore concentrate

in order to produce lead metal. Based on the current applicability section and definitions, it could be interpreted that the future lead producing process, using techniques other than pyrometallurgical, would not be subject to the NESHAP for primary lead smelters. Such a limited interpretation is not consistent with EPA's intent as evidenced by the broader definition in the source category list. Therefore, EPA is proposing to amend the applicability section to specify that the MACT applies to any lead processing facility that produces lead metal from lead ore concentrate. Consistent with the proposed revision to the applicability section, we are proposing to remove the definition of "primary lead smelter" and add a definition of "primary lead processor" which means any facility engaged in the production of lead metal from lead sulfide ore concentrates through the use of pyrometallurgical or other techniques. In addition, we are proposing to replace "primary lead smelter" with "primary lead processor" throughout 40 CFR subpart TTT. (§ 63.1541 through § 63.1545, § 63.1547 through § 63.1549). We are specifically asking for comment on this proposed change in the definition.

Because there is only one primary lead processing facility in the U.S., there will be no impact of this change on the number of existing facilities covered by the MACT.

We note, however, that although we are changing the applicability section to clarify that the MACT applies to all processes for producing lead metal from ore concentrates, we are not today proposing a specific MACT standard that would apply to the as-yet undemonstrated hydrometallurgical process which Doe Run has indicated that it plans to build at the current Doe Run facility. If and when that process begins operation, we will consider whether to revise the MACT standard to specifically address that process or any other new processes. However, the limits applicable to specific emission sources currently in operation as specified in the MACT and as revised under CAA sections 112(d)(6) and (f)(2) in this rulemaking would continue to apply to any emission source at the facility that continues in operation, such as the refinery. In addition, to the extent that we establish a final air lead concentration limit as proposed in § 63.1544, those limits would also continue to apply to the facility. We also are proposing that the plant-wide emission limit we are proposing today should continue to apply to any facility that meets the revised applicability definition, but we are specifically soliciting comment on whether it should apply.

We are also taking this opportunity to clarify the reference to "lead refiners" in the second sentence of the applicability section, which provides that the MACT standard does not apply to "secondary lead smelters, lead refiners, or lead remelters." The intent of this provision was to make clear that secondary lead smelters would not be subject to the rule because secondary lead smelters were listed as a separate source category and addressed in a separate MACT standard. With regard to lead refiners and lead remelters, the intent was to provide that these activities, to the extent that they are not located at facilities that produce lead from lead ore concentrate, would not be subject to the Primary Lead Smelting MACT. However, it was not the intention of the rule to exempt kettle refining operations included as part of a primary lead processing facility. Therefore, EPA is proposing to add definitions for secondary lead smelters, lead refiners, and lead remelters in the definitions section of this NESHAP in order to further clarify the exemption in the applicability provisions with regard to these types of facilities. As this change only clarifies an existing provision in the rule, there will be no impact to the number of facilities covered by the rule.

4. Other Changes

The following lists additional minor changes we are proposing. This list includes rule changes that address editorial errors and plain language revisions.

- As part of EPA's effort to incorporate plain language into its regulations, replaced the word "shall" with "must." (§ 63.1543 through § 63.1550)
- Correction to the original rule ("thru" replaced with "through" in the definition of "tapping location"). (§ 63.1542)
- Minor wording change to definition of "fugitive dust source" to clarify meaning. (§ 63.1542)

IV. Analyses Performed and Background of the Source Category and MACT Standard

As discussed above, in this proposed rule we are proposing action to address the RTR requirements of CAA sections 112(d)(6) and (f)(2) for the Primary Lead Smelting MACT standard. In this section, we describe the analyses performed to support the proposed decisions for the RTR for this source category and we also include background information on the source category and the MACT standard.

A. How did we estimate risks posed by the source category?

The EPA conducted a risk assessment that provided estimates of the MIR posed by the HAP emissions from the one source in the source category, the distribution of cancer risks within the exposed populations, cancer incidence, HI for chronic exposures to HAP with the potential to cause non-cancer health effects, hazard quotients (HQ) for acute exposures to HAP with the potential to cause non-cancer health effects, and an evaluation of the potential for adverse environmental effects. The risk assessments consisted of seven primary steps, as discussed below.

The docket for this rulemaking contains the following document which provides more information on the risk assessment inputs and models: *Draft Residual Risk Assessment for the Primary Lead Smelting Source Category.*

1. Establishing the Nature and Magnitude of Actual Emissions and Identifying the Emissions Release Characteristics

For the Primary Lead Smelting source category, we compiled a preliminary dataset using readily available information, reviewed the data, and made changes where necessary. The preliminary dataset was based on data in the *2002 National Emissions Inventory (NEI) Final Inventory, Version 1* (made publicly available on February 26, 2006). The NEI is a database that contains information about sources that emit criteria air pollutants, their precursors, and HAP. The NEI database includes estimates of annual air pollutant emissions from point, non-point, and mobile sources in the 50 States, the District of Columbia, Puerto Rico, and the Virgin Islands. The EPA collects this information and releases an updated version of the NEI database every 3 years.

On December 4, 2009, a CAA Section 114 Information Collection Request (ICR) was issued requesting information from the one facility in this source category. An updated dataset was created through incorporation of changes to the dataset from the ICR data review process and additional information gathered by EPA. The updated dataset contains information for the one facility in the source category and was used to conduct the risk assessment and other analyses that form the basis for the proposed risk and technology reviews. A copy of the dataset used and documentation of the risk assessment can be found in the docket.

2. Establishing the Relationship Between Actual Emissions and MACT–Allowable Emissions Levels

The available emissions data in the NEI and from other sources typically represent the estimates of mass of emissions actually emitted during the specified annual time period. These "actual" emission levels are often lower than the emission levels that a facility might be allowed to emit and still comply with the MACT standards. The emissions level allowed to be emitted by the MACT standards is referred to as the "MACT-allowable" emissions level. This represents the highest emissions level that could be emitted by the facility without violating the MACT standards.

We discussed the use of both MACT-allowable and actual emissions in the final Coke Oven Batteries residual risk rule (70 FR 19998–19999, April 15, 2005) and in the proposed and final Hazardous Organic NESHAP (HON) residual risk rules (71 FR 34428, June 14, 2006, and 71 FR 76609, December 21, 2006, respectively). In those previous actions, we noted that assessing the risks at the MACT-allowable level is inherently reasonable since these risks reflect the maximum level sources could emit and still comply with national emission standards. But we also explained that it is reasonable to consider actual emissions, where such data are available, in both steps of the risk analysis, in accordance with the Benzene NESHAP. (54 FR 38044, September 14, 1989.) It is reasonable to consider actual emissions because sources typically seek to perform better than required by emission standards to provide an operational cushion to accommodate the variability in manufacturing processes and control device performance.

As described above, the actual emissions data were compiled based on the NEI, information gathered from the facility and State, and information received in response to the ICR. To estimate emissions at the MACT-allowable level, we developed a ratio of MACT-allowable to actual emissions for each source type (i.e., the individual stacks and the aggregate fugitive emissions) for the one facility in the source category. This ratio is based on the level of control required by the MACT standards compared to the level of reported actual emissions and available information on the level of control achieved by the emissions controls in use. For example, if there was information to suggest that an emission point type was being controlled by 98 percent while the MACT standards required only 92 percent control, we would estimate that MACT-allowable emissions from that emission point type could be as much as 4 times higher (8 percent allowable emissions compared with 2 percent actually emitted), and the ratio of MACT-allowable to actual would be 4:1 for this emission point type. After developing these ratios for each emission point type at the one facility in this source category, we next applied these ratios to the maximum chronic risk estimates from the inhalation risk assessment to obtain maximum risk estimates based on MACT-allowable emissions. The estimate of MACT-allowable emissions for the Primary Lead Smelting source category is described in section V of this preamble.

3. Conducting Dispersion Modeling, Determining Inhalation Exposures, and Estimating Individual and Population Inhalation Risks

Both long-term and short-term inhalation exposure concentrations and health risks from the source category addressed in this proposal were estimated using the Human Exposure Model (Community and Sector HEM–3 version 1.1.0). The HEM–3 performs three of the primary risk assessment activities listed above: (1) Conducting dispersion modeling to estimate the concentrations of HAP in ambient air, (2) estimating long-term and short-term inhalation exposures to individuals residing within 50 km of the modeled sources, and (3) estimating individual and population-level inhalation risks using the exposure estimates and quantitative dose-response information.

The dispersion model used by HEM–3 is AERMOD, which is one of EPA's preferred models for assessing pollutant concentrations from industrial facilities.[6] To perform the dispersion modeling and to develop the preliminary risk estimates, HEM–3 draws on three data libraries. The first is a library of meteorological data, which is used for dispersion calculations. This library includes 1 year of hourly surface and upper air observations for 130 meteorological stations, selected to provide coverage of the United States and Puerto Rico. However, in this instance, site-specific meteorological data for the one facility in this source category were supplied by the state of Missouri and used for the modeling. The data provided by the state of Missouri were for eight quarters (*i.e.,* eight three-month periods) from April 1997 through June 1999. To obtain one year of meteorological data, we used the middle portion of these data, the year 1998, in our modeling. A second library of United States Census Bureau census block[7] internal point locations and populations provides the basis of human exposure calculations (Census, 2000). In addition, for each census block, the census library includes the elevation and controlling hill height, which are also used in dispersion calculations. A third library of pollutant unit risk factors and other health benchmarks is used to estimate health risks. These risk factors and health benchmarks are the latest values recommended by EPA for HAP and other toxic air pollutants. These values are available at *http://www.epa.gov/ttn/atw/toxsource/summary.html* and are discussed in more detail later in this section.

In developing the risk assessment for chronic exposures, we used the estimated annual average ambient air concentration of each of the HAP emitted by each source for which we have emissions data in the source category. The air concentrations at each nearby census block centroid were used as a surrogate for the chronic inhalation exposure concentration for all the people who reside in that census block. We calculated the MIR for the one facility as the cancer risk associated with a lifetime (70-year period) of exposure to the maximum concentration at the centroid of an inhabited census block. Individual cancer risks were calculated by multiplying the estimated lifetime exposure to the ambient concentration of each of the HAP (in micrograms per cubic meter) by its Unit Risk Estimate (URE), which is an upper bound estimate of an individual's probability of contracting cancer over a lifetime of exposure to a concentration of 1 microgram of the pollutant per cubic meter of air. In general, for residual risk assessments, we use URE values from EPA's Integrated Risk Information System (IRIS). For carcinogenic pollutants without EPA IRIS values, we look to other reputable sources of cancer dose-response values, often using California Environmental Protection Agency (CalEPA) URE values, where available. In cases where new, scientifically credible dose-response values have been developed in a manner consistent with EPA guidelines and have undergone a peer review process similar to that used by

[6] U.S. EPA. Revision to the *Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions* (70 FR 68218, November 9, 2005).

[7] A census block is generally the smallest geographic area for which census statistics are tabulated.

EPA, we may use such dose response values in place of, or in addition to, other values, if appropriate. In this review, IRIS values were available for both carcinogenic pollutants (cadmium and arsenic) emitted by the facility in this source category, and therefore IRIS values were used in the assessment.

Incremental individual lifetime cancer risks associated with emissions from the one source in the source category were estimated as the sum of the risks for each of the carcinogenic HAP (including those classified as carcinogenic to humans, likely to be carcinogenic to humans, and suggestive evidence of carcinogenic potential [8]) emitted by the modeled source. Cancer incidence and the distribution of individual cancer risks for the population within 50 km of the source were also estimated for the source category as part of these assessments by summing individual risks. A distance of 50 km is consistent with both the analysis supporting the 1989 Benzene NESHAP (54 FR 38044) and the limitations of Gaussian dispersion models, including AERMOD.

To assess risk of non-cancer health effects from chronic exposures, we summed the HQ for each of the HAP that affects a common target organ system to obtain the HI for that target organ system (or target organ-specific HI, TOSHI). The HQ is the estimated exposure divided by the chronic reference value, which is either the EPA RfC, defined as "an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime," or, in cases where an RfC is not available, the Agency for Toxic Substances and Disease Registry (ATSDR) chronic Minimal Risk Level (MRL) or the CalEPA Chronic Reference Exposure Level (REL). The REL is defined as "the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration."

Screening estimates of acute exposures and risks were also evaluated for each of the HAP at the point of highest off-site exposure for each facility (*i.e.,* not just the census block centroids) assuming that a person was located at this spot at a time when both the peak (hourly) emission rate and hourly dispersion conditions occurred. In general, acute HQ values were calculated using best available, short-term dose-response value. These acute dose-response values include REL, Acute Exposure Guideline Levels (AEGL), and Emergency Response Planning Guidelines (ERPG) for 1-hour exposure durations. Notably, for HAP emitted from this source category, REL values were the only such dose-response values available. As discussed below, we used conservative assumptions for emission rates, meteorology, and exposure location for our acute analysis.

As described in the CalEPA's *Air Toxics Hot Spots Program Risk Assessment Guidelines, Part I, The Determination of Acute Reference Exposure Levels for Airborne Toxicants,* an acute REL value (*http://www.oehha.ca.gov/air/pdf/acuterel.pdf*) is defined as "the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration is termed the REL. REL values are based on the most sensitive, relevant, adverse health effect reported in the medical and toxicological literature. REL values are designed to protect the most sensitive individuals in the population by the inclusion of margins of safety. Since margins of safety are incorporated to address data gaps and uncertainties, exceeding the REL does not automatically indicate an adverse health impact.

To develop screening estimates of acute exposures, we first developed estimates of maximum hourly emission rates by multiplying the average actual annual hourly emission rates by a factor to cover routinely variable emissions. We chose the factor to use based on process knowledge and engineering judgment and with awareness of a Texas study of short-term emissions variability, which showed that most peak emission events, in a heavily-industrialized 4-county area (Harris, Galveston, Chambers, and Brazoria Counties, Texas) were less than twice the annual average hourly emission rate. The highest peak emission event was 74 times the annual average hourly emission rate, and the 99th percentile ratio of peak hourly emission rate to the annual average hourly emission rate was 9.[9] This analysis is provided in Appendix 4 of the *Draft Residual Risk Assessment for Primary Lead Smelting* which is available in the docket for this action. Considering this analysis, unless specific process knowledge or data are available to provide an alternate value, to account for more than 99 percent of the peak hourly emissions, we apply a conservative screening multiplication factor of 10 to the average annual hourly emission rate in these acute exposure screening assessments. For the Primary Lead Smelting source category, this factor of 10 was applied.

In cases where all acute HQ values from the screening step were less than or equal to 1, acute impacts were deemed negligible and no further analysis was performed. In the cases where an acute HQ from the screening step was greater than 1, additional site-specific data were considered to develop a more refined estimate of the potential for acute impacts of concern. Ideally, we would prefer to have continuous measurements over time to see how the emissions vary by each hour over an entire year. Having a frequency distribution of hourly emission rates over a year would allow us to perform a probabilistic analysis to estimate potential threshold exceedances and their frequency of occurrence. Such an evaluation could include a more complete statistical treatment of the key parameters and elements adopted in this screening analysis. However, we recognize that having this level of data is rare, hence our use of the multiplier (*i.e.,* factor of 10) approach in our screening analysis.

4. Conducting Multipathway Exposure and Risk Modeling

The potential for significant human health risks due to exposures via routes other than inhalation (*i.e.,* multipathway exposures) and the potential for adverse environmental impacts were evaluated in a three-step process. In the first step, we determined whether any facilities emitted any HAP known to be persistent and bio-accumulative in the environment (PB–HAP). There are 14 PB–HAP compounds or compound classes identified for this screening in EPA's *Air Toxics Risk Assessment Library* (available at *http://www.epa.gov/ttn/fera/risk_atra_vol1.html*). They are cadmium compounds, chlordane, chlorinated dibenzodioxins and furans, dichlorodiphenyldichloroethylene, heptachlor, hexachlorobenzene,

[8] These classifications also coincide with the terms "known carcinogen, probable carcinogen, and possible carcinogen," respectively, which are the terms advocated in the EPA's previous *Guidelines for Carcinogen Risk Assessment,* published in 1986 (51 FR 33992, September 24, 1986). Summing the risks of these individual compounds to obtain the cumulative cancer risks is an approach that was recommended by the EPA's SAB in their 2002 peer review of EPA's NATA entitled, *NATA—Evaluating the National-scale Air Toxics Assessment 1996 Data—an SAB Advisory,* available at: *http://yosemite.epa.gov/sab/sabproduct.nsf/214C6E915BB04E14852570CA007A682C/$File/ecadv02001.pdf.*

[9] *See http://www.tceq.state.tx.us/compliance/field_ops/eer/index.html* or docket to access the source of these data.

hexachlorocyclohexane, lead compounds, mercury compounds, methoxychlor, polychlorinated biphenyls, POM, toxaphene, and trifluralin. Emissions of two PB HAP were identified in the emissions inventory for the Primary Lead Smelting source category: Lead compounds and cadmium compounds.

Cadmium emissions were evaluated for potential non-inhalation risks and adverse environmental impacts using our recently developed screening scenario that was developed for use with the TRIM.FaTE model. This screening scenario uses environmental media outputs from the peer-reviewed TRIM.FaTE to estimate the maximum potential ingestion risks for any specified emission scenario by using a generic farming/fishing exposure scenario that simulates a subsistence environment. The screening scenario retains many of the ingestion and scenario inputs developed for EPA's Human Health Risk Assessment Protocols (HHRAP) for hazardous waste combustion facilities. In the development of the screening scenario a sensitivity analysis was conducted to ensure that its key design parameters were established such that environmental media concentrations were not underestimated, and to also minimize the occurrence of false positives for human health endpoints. See Appendix 3 of the risk assessment document for a complete discussion of the development and testing of the screening scenario, as well as for the values of facility-level *de minimis* emission rates developed for screening potentially significant multi-pathway impacts. For the purpose of developing *de minimis* emission rates for our cadmium multi-pathway screening, we derived emission levels for cadmium at which the maximum human health risk would be 1-in-1 million for lifetime cancer risk.

In evaluating the potential air-related multi-pathway risks from the emissions of lead compounds from the one facility in this source category, rather than developing a *de minimis* emission rate, we compared its maximum modeled 3-month average atmospheric lead concentration at any off-site location with the current primary National Ambient Air Quality Standard (NAAQS) for lead (promulgated in 2008), which is set to a level of 0.15 micro-grams per cubic meter (μg/m^3) based on a rolling 3-month period with a not-to-be-exceeded form, and which will require attainment by 2016. 73 FR 66964. Notably, in making these comparisons, we estimated maximum rolling 3-month ambient lead concentrations taking into account all of the elements of the NAAQS for lead. That is, our estimated 3-month lead concentrations are calculated in a manner that is consistent with the indicator, averaging time, and form of the NAAQS for lead, and those estimates are compared to the actual level of the lead NAAQS (0.15 μg/m^3).

The NAAQS value, a public health policy judgment, incorporated the Agency's most recent health evaluation of air effects of lead exposure for the purposes of setting a national standard. In setting this value, the Administrator promulgated a standard that was requisite to protect public health with an adequate margin of safety. We consider values below the level of the primary NAAQS to protect against multi-pathway risks because, as mentioned above, the primary NAAQS is set as to protect public health with an adequate margin of safety. However, ambient air lead concentrations above the NAAQS are considered to pose the potential for increased risk to public health. We consider this NAAQS assessment to be a refined analysis given the numerous health studies, detailed risk and exposure analyses, and level of external peer and public review that went into the development of the primary NAAQS for lead, combined with the site-specific dispersion modeling analysis performed to develop the ambient concentration estimates due to emissions from the one Primary Lead Processing facility being addressed in this RTR. It should be noted, however, that this comparison does not account for possible population exposures to lead from sources other than the one being modeled; for example, via consumption of water from untreated local sources or ingestion of locally grown food. Nevertheless, the Administrator judged that such a standard, would protect, with an adequate margin of safety, the health of children and other at-risk populations against an array of adverse health effects, most notably including neurological effects, particularly neurobehavioral and neurocognitive effects, in children. 73 FR 67007. The Administrator, in setting the standard, also recognized that no evidence-or risk based bright line indicated a single appropriate level. Instead a collection of scientific evidence and other information was used to select the standard from a range of reasonable values. 73 FR 67006.

We further note that comparing ambient lead concentrations to the NAAQS for lead, considering the level, averaging time, form and indicator, also informs whether there is the potential for adverse environmental effects. This is because the secondary lead NAAQS, which has the same averaging time, form, and level as the primary standard, was set to protect the public welfare which includes among other things soils, water, crops, vegetation and wildlife. CAA section 302(h). Thus, ambient lead concentrations above the NAAQS for lead also indicate the potential for adverse environmental effects.

For additional information on the multi-pathway analysis approach, see the residual risk documentation as referenced in section IV.A of this preamble. The EPA solicits comment generally on the modeling approach used herein to assess air-related lead risks, and specifically on the use of the lead NAAQS in this analytical construct.

5. Assessing Risks Considering Emissions Control Options

In addition to assessing baseline inhalation risks and screening for potential multi-pathway risks, we also estimated risks considering the potential emission reductions that would be achieved by the particular control options under consideration. The expected emissions reductions were applied to the specific HAP and emissions points in the source category dataset to develop corresponding estimates of risk reductions.

6. Conducting Other Risk-Related Analyses, Including Facility-Wide Assessments and Demographic Analyses

a. Facility-Wide Risk

To put the source category risks in context, for our residual risk review, we also examine the risks from the entire "facility," where the facility includes all HAP-emitting operations within a contiguous area and under common control. In other words, we examine the HAP emissions not only from the source category of interest, but also emissions of HAP from all other emission sources at the facility. In this rulemaking, for the sole facility in the Primary Lead Smelting source category, there are no other significant HAP emission sources present. With the exception of organic HAP sources determined to present insignificant risk, all HAP sources have been included in the risk analysis. Therefore, the facility-wide risks are the same as the source category risk and no separate facility-wide analysis was necessary.

b. Demographic Analysis

To examine the potential for any environmental justice issues that might be associated with HAP emissions with this source category, we evaluated the

distributions of HAP-related cancer and non-cancer risks across different social, demographic, and economic groups within the populations living near the one facility in this source category. The development of demographic analyses to inform the consideration of environmental justice issues in EPA rulemakings is evolving. EPA offers the demographic analyses in this rulemaking to inform the consideration of potential environmental justice issues, and invites public comment on the approaches used and the interpretations made from the results, with the hope that this will support the refinement and improve the utility of such analyses for future rulemakings.

For the demographic analyses, we focus on the populations within 50 km of any facility with emission sources subject to the MACT standard (identical to the risk assessment). Based on the emissions for the source category or the facility, we then identified the populations that are estimated to have exposures to HAP which result in: (1) Cancer risks of 1-in-1 million or greater, (2) non-cancer HI of 1 or greater, and/or (3) ambient lead concentrations above the level of the NAAQS for lead. We compare the percentages of particular demographic groups within the focused populations to the total percentages of those demographic groups nationwide. The results, including other risk metrics, such as average risks for the exposed populations, are documented in a technical report in the docket for the source category covered in this proposal.[10]

The basis for the risk values used in the demographic analyses for the one facility subject to the Primary Lead Smelting MACT was the modeling results based on actual emissions levels obtained from the HEM–3 model described above. The risk values for each census block were linked to a database of information from the 2000 decennial census that includes data on race and ethnicity, age distributions, poverty status, household incomes, and education level. The Census Department Landview® database was the source of the data on race and ethnicity, and the data on age distributions, poverty status, household incomes, and education level were obtained from the 2000 Census of Population and Housing Summary File 3 (SF3) Long Form. While race and ethnicity census data are available at the census block level, the age and income census data are only available at the census block group level (which includes an average of 26 blocks or an average of 1,350 people). Where census data are available at the block group level but not the block level, we assumed that all census blocks within the block group have the same distribution of ages and incomes as the block group.

We focused the analysis on those census blocks where source category risk results show either estimated lifetime inhalation cancer risks above 1-in-1 million or chronic non-cancer indices above 1. In addition, in this case we also focused on those census blocks where estimated ambient lead concentrations were above the level of the lead NAAQS. For each of these cases, we determined the relative percentage of different racial and ethnic groups, different age groups, adults with and without a high school diploma, people living in households below the national median income, and for people living below the poverty line within those census blocks. The specific census population categories included:

- Total population;
- White;
- African American (or Black);
- Native Americans;
- Other races and multiracial;
- Hispanic or Latino;
- People living below the poverty line;
- Children 18 years of age and under;
- Adults 19 to 64 years of age;
- Adults 65 years of age and over;
- Adults without a high school diploma.

It should be noted that these categories overlap in some instances, resulting in some populations being counted in more than one category (*e.g.,* other races and multiracial and Hispanic). In addition, while not a specific census population category, we also examined risks to "Minorities," a classification which is defined for these purposes as all race population categories except white.

The methodology and the results of the demographic analyses for this source category are included in the technical report available in the docket for this action. (Risk and Technology Review—Analysis of Socio-Economic Factors for Populations Living Near Primary Lead Smelting Operations).

7. Considering Uncertainties in Risk Assessment

Uncertainty and the potential for bias are inherent in all risk assessments, including that performed for the source category addressed in this proposal. Although uncertainty exists, we believe the approach that we took, which used conservative tools and assumptions, ensures that our decisions are health-protective. A brief discussion of the uncertainties in the emissions dataset, dispersion modeling, inhalation exposure estimates, and dose-response relationships follows below. A more thorough discussion of these uncertainties is included in the risk assessment documentation (*Draft Residual Risk Assessment for Primary Lead Smelting*) available in the docket for this action.

a. Uncertainties in the Emissions Dataset

Although the development of the RTR dataset involved quality assurance/quality control processes, the accuracy of emissions values will vary depending on the source of the data, the degree to which data are incomplete or missing, the degree to which assumptions made to complete the datasets are accurate, whether and to what extent errors were made in estimating emissions values, and other factors. The emission estimates considered in this analysis are annual totals provided by the facility that do not reflect short-term fluctuations during the course of a year or variations from year to year. In contrast, the estimates of peak hourly emission rates for the acute effects screening assessment were based on multiplication factors applied to the average annual hourly emission rates (the default factor of 10 was used for Primary Lead Smelting), which is intended to account for emission fluctuations due to normal facility operations.

b. Uncertainties in Dispersion Modeling

While the analysis employed EPA's recommended regulatory dispersion model, AERMOD, we recognize that there is uncertainty in ambient concentration estimates associated with any model, including AERMOD. In circumstances where we had to choose between various model options, where possible, we selected model options (*e.g.,* rural/urban, plume depletion, chemistry) that provided an overestimate of ambient concentrations of the HAP rather than an underestimate. However, because of practicality and data limitation reasons, some factors (*e.g.,* building downwash) have the potential in some situations to overestimate or underestimate ambient impacts. Despite these uncertainties, we believe that at off-site locations and census block centroids, the approach considered in the dispersion modeling analysis should generally yield overestimates of ambient HAP concentrations.

[10] *Risk and Technology Review—Analysis of Socio-Economic Factors for Populations Living Near Primary Lead Smelting Operations.*

c. Uncertainties in Inhalation Exposure

The effects of human mobility on exposures were not included in the assessment. Specifically, short-term mobility and long-term mobility between census blocks in the modeling domain were not considered.[11] As a result, this simplification will likely bias the assessment toward overestimating the highest exposures. In addition, the assessment predicted the chronic exposures at the centroid of each populated census block as surrogates for the exposure concentrations for all people living in that block. Using the census block centroid to predict chronic exposures tends to over-predict exposures for people in the census block who live farther from the facility, and under-predict exposures for people in the census block who live closer to the facility. Thus, using the census block centroid to predict chronic exposures may lead to a potential understatement or overstatement of the true maximum impact for any one individual, but is an unbiased estimate of average risk and incidence.

The assessments evaluate the projected cancer inhalation risks associated with pollutant exposures over a 70-year period, which is the assumed lifetime of an individual. In reality, both the length of time that modeled emissions sources at facilities actually operate (*i.e.,* more or less than 70 years), and the domestic growth or decline of the modeled industry (*i.e.,* the increase or decrease in the number or size of United States facilities), will influence the future risks posed by a given source or source category. Depending on the characteristics of the industry, these factors will, in most cases, result in an overestimate both in individual risk levels and in the total estimated number of cancer cases. However, in rare cases, where a facility maintains or increases its emission levels beyond 70 years, residents live beyond 70 years at the same location, and the residents spend most of their days at that location, then the risks could potentially be underestimated. Annual cancer incidence estimates from exposures to emissions from these sources would not be affected by uncertainty in the length of time emissions sources operate. For the specific source in this source category we anticipate significant reduction in activities and emissions in the relatively near future. If this happens, chronic risks based on the continuation of current emission levels will be over estimated.

The exposure estimates used in these analyses assume chronic exposures to ambient levels of pollutants. Because most people spend the majority of their time indoors, actual exposures may not be as high, depending on the characteristics of the pollutants modeled. For many of the HAP, indoor levels are roughly equivalent to ambient levels, but for very reactive pollutants or larger particles, these levels are typically lower. This factor has the potential to result in an overstatement of 25 to 30 percent of exposures.[12]

In addition to the uncertainties highlighted above, there are several factors specific to the acute exposure assessment that should be highlighted. The accuracy of an acute inhalation exposure assessment depends on the simultaneous occurrence of independent factors that may vary greatly, such as hourly emissions rates, meteorology, and human activity patterns. In this assessment, we assume that individuals remain for 1 hour at the point of maximum ambient concentration as determined by the co-occurrence of peak emissions and worst-case meteorological conditions. These assumptions would tend to overestimate actual exposures since it is unlikely that a person would be located at the point of maximum exposure during the time of worst-case impact.

d. Uncertainties in Dose-Response Relationships

There are uncertainties inherent in the development of the dose-response values used in our risk assessments for cancer effects from chronic exposures and non-cancer effects from both chronic and acute exposures. Some uncertainties may be considered quantitatively, and others generally are expressed in qualitative terms. We note as a preface to this discussion a point on dose-response uncertainty that is brought out in EPA's *2005 Cancer Guidelines;* namely, that "the primary goal of EPA actions is protection of human health; accordingly, as an Agency policy, risk assessment procedures, including default options that are used in the absence of scientific data to the contrary, should be health protective." (*EPA 2005 Cancer Guidelines,* pages 1–7.) This is the approach followed here as summarized in the next several paragraphs. A complete detailed discussion of uncertainties and variabilities in dose-response relationships is given in the residual risk documentation which is available in the docket for this action.

Cancer URE values used in our risk assessments are those that have been developed to generally provide an upper bound estimate of risk. That is, they represent a "plausible upper limit to the true value of a quantity" (although this is usually not a true statistical confidence limit).[13] In some circumstances, the true risk could be as low as zero; however, in other circumstances the risk could be greater.[14] When developing an upper bound estimate of risk and to provide risk values that do not underestimate risk, health-protective default approaches are generally used. To err on the side of ensuring adequate health-protection, EPA typically uses the upper bound estimates rather than lower bound or central tendency estimates in our risk assessments, an approach that may have limitations for other uses (*e.g.,* priority-setting or expected benefits analysis).

Chronic non-cancer reference (RfC and RfD) values represent chronic exposure levels that are intended to be health-protective levels. Specifically, these values provide an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure (RfC) or a daily oral exposure (RfD) to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime. To derive values that are intended to be "without appreciable risk," the methodology relies upon an uncertainty factor (UF) approach (U.S. EPA, 1993, 1994) which includes consideration of both uncertainty and variability. When there are gaps in the available information, UF are applied to derive reference values that are intended to protect against appreciable risk of deleterious effects. The UF are commonly default values,[15] *e.g.,* factors

[11] Short-term mobility is movement from one microenvironment to another over the course of hours or days. Long-term mobility is movement from one residence to another over the course of a lifetime.

[12] U.S. EPA. *National-Scale Air Toxics Assessment* for 1996. (EPA 453/R–01–003; January 2001; page 85.)

[13] IRIS glossary (*http://www.epa.gov/NCEA/iris/help_gloss.htm*).

[14] An exception to this is the URE for benzene, which is considered to cover a range of values, each end of which is considered to be equally plausible, and which is based on maximum likelihood estimates.

[15] According to the NRC report, *Science and Judgment in Risk Assessment* (NRC, 1994) "[Default] options are generic approaches, based on general scientific knowledge and policy judgment, that are applied to various elements of the risk assessment process when the correct scientific model is unknown or uncertain." The 1983 NRC report, *Risk Assessment in the Federal Government: Managing the Process,* defined default option as "the option chosen on the basis of risk assessment policy that

Continued

of 10 or 3, used in the absence of compound-specific data; where data are available, UF may also be developed using compound-specific information. When data are limited, more assumptions are needed and more UF are used. Thus, there may be a greater tendency to overestimate risk in the sense that further study might support development of reference values that are higher (*i.e.,* less potent) because fewer default assumptions are needed. However, for some pollutants, it is possible that risks may be underestimated.

While collectively termed "UF," these factors account for a number of different quantitative considerations when using observed animal (usually rodent) or human toxicity data in the development of the RfC. The UF are intended to account for: (1) Variation in susceptibility among the members of the human population (*i.e.,* inter-individual variability); (2) uncertainty in extrapolating from experimental animal data to humans (*i.e.,* interspecies differences); (3) uncertainty in extrapolating from data obtained in a study with less-than-lifetime exposure (*i.e.,* extrapolating from sub-chronic to chronic exposure); (4) uncertainty in extrapolating the observed data to obtain an estimate of the exposure associated with no adverse effects; and (5) uncertainty when the database is incomplete or there are problems with the applicability of available studies. Many of the UF used to account for variability and uncertainty in the development of acute reference values are quite similar to those developed for chronic durations, but they more often use individual UF values that may be less than 10. UF are applied based on chemical-specific or health effect-specific information (*e.g.,* simple irritation effects do not vary appreciably between human individuals, hence a value of 3 is typically used), or based on the purpose for the reference value (*see* the following paragraph). The UF applied in acute reference value derivation include: (1) Heterogeneity among humans; (2) uncertainty in extrapolating from animals to humans; (3) uncertainty in lowest observed adverse effect (exposure) level to no observed adverse effect (exposure) level adjustments; and (4) uncertainty in accounting for an incomplete database on toxic effects of potential concern. Additional adjustments are often applied to account for uncertainty in extrapolation from observations at one exposure duration (*e.g.,* 4 hours) to derive an acute reference value at another exposure duration (*e.g.,* 1 hour).

As further discussed below, there is no RfD or other comparable chronic health benchmark value for lead compounds. Thus, to address multipathway human health and environmental risks associated with emissions of lead from this facility, ambient lead concentrations were compared to the NAAQS for lead. In developing the NAAQS for lead, EPA considered human health evidence reporting adverse health effects associated with lead exposure, as well as an EPA conducted multipathway risk assessment that applied models to estimate human exposures to air-related lead and the associated risk (73 FR 66979). EPA also explicitly considered the uncertainties associated with both the human health evidence and the exposure and risk analyses when developing the NAAQS for lead. For example, EPA considered uncertainties in the relationship between ambient air lead and blood lead levels (73 FR 66974), as well as uncertainties between blood lead levels and loss of IQ points in children (73 FR 66981).

In considering the evidence and risk analyses and their associated uncertainties, the EPA Administrator noted his view that there is no evidence- or risk-based bright line that indicates a single appropriate level. Instead, he noted, there is a collection of scientific evidence and judgments and other information, including information about the uncertainties inherent in many relevant factors, which needs to be considered together in making this public health policy judgment and in selecting a standard level from a range of reasonable values (73 FR 66998). In so doing, the Administrator decided that, a level for the primary lead standard of 0.15 $\mu g/m^3$, in combination with the specified choice of indicator, averaging time, and form, is requisite to protect public health, including the health of sensitive groups, with an adequate margin of safety (73 FR 67006). A thorough discussion of the health evidence, risk and exposure analyses, and their associated uncertainties can be found in EPA's final rule revising the lead NAAQS (73 FR 66970–66981, November 12, 2008).

We also note the uncertainties associated with the health-based (*i.e.,* primary) NAAQS are likely less than the uncertainties associated with dose-response values developed for many of the other HAP, particularly those HAP for which no human health data exist. In 1988, EPA's IRIS program reviewed the health effects data regarding lead and its inorganic compounds and determined that it would be inappropriate to develop an RfD for these compounds, saying, "A great deal of information on the health effects of lead has been obtained through decades of medical observation and scientific research. This information has been assessed in the development of air and water quality criteria by the Agency's Office of Health and Environmental Assessment (OHEA) in support of regulatory decision-making by the Office of Air Quality Planning and Standards (OAQPS) and by the Office of Drinking Water (ODW). By comparison to most other environmental toxicants, the degree of uncertainty about the health effects of lead is quite low. It appears that some of these effects, particularly changes in the levels of certain blood enzymes and in aspects of children's neurobehavioral development, may occur at blood lead levels so low as to be essentially without a threshold. The Agency's RfD Work Group discussed inorganic lead (and lead compounds) at two meetings (07/08/1985 and 07/22/1985) and considered it inappropriate to develop an RfD for inorganic lead." EPA's IRIS assessment for Lead and compounds (inorganic) (CASRN 7439–92–1), *http://www.epa.gov/iris/subst/0277.htm.*

We also note that because of the multi-pathway, multi-media impacts of lead, the risk assessment supporting the NAAQS considered direct inhalation exposures and indirect air-related multi-pathway exposures from industrial sources like primary and secondary lead smelting operations. It also considered background lead exposures from other sources (like contaminated drinking water and exposure to lead-based paints). In revising the NAAQS for lead, we note that the Administrator placed more weight on the evidence-based framework and less weight on the results from the risk assessment, although he did find the risk estimates to be roughly consistent with and generally supportive of the evidence-based framework applied in the NAAQS determination. 73 FR 67004. Thus, when revising the NAAQS for lead to protect public health with an adequate margin of safety, EPA considered both

appears to be the best choice in the absence of data to the contrary" (NRC, 1983a, p. 63). Therefore, default options are not rules that bind the Agency; rather, the Agency may depart from them in evaluating the risks posed by a specific substance when it believes this to be appropriate. In keeping with EPA's goal of protecting public health and the environment, default assumptions are used to ensure that risk to chemicals is not underestimated (although defaults are not intended to overtly overestimate risk). See EPA, 2004, *An Examination of EPA Risk Assessment Principles and Practices,* EPA/100/B–04/001 available at: *http://www.epa.gov/osa/pdfs/ratf-final.pdf.*

the health evidence and the risk assessment, albeit to different extents.

In addition to the uncertainties discussed above with respect to chronic, cancer, and the lead NAAQS reference values, there are also uncertainties associated with acute reference values. Not all acute reference values are developed for the same purpose, and care must be taken when interpreting the results of an acute assessment of human health effects relative to the reference value or values being exceeded. Where relevant to the estimated exposures, the lack of short-term dose-response values at different levels of severity should be factored into the risk characterization as potential uncertainties.

Although every effort is made to identify peer-reviewed reference values for cancer and non-cancer effects for all pollutants emitted by the sources included in this assessment, some hazardous air pollutants continue to have no peer-reviewed reference values for cancer or chronic non-cancer or acute effects. Since exposures to these pollutants cannot be included in a quantitative risk estimate, an understatement of risk for these pollutants at environmental exposure levels is possible.

Additionally, chronic reference values for several of the compounds included in this assessment are currently under EPA IRIS review (*e.g.,* cadmium and nickel), and revised assessments may determine that these pollutants are more or less potent than the current value. We may re-evaluate residual risks for the final rulemaking if, as a result of these reviews, a dose-response metric changes enough to indicate that the risk assessment supporting this notice may significantly understate human health risk.

e. Uncertainties in the Multipathway and Environmental Effects Assessment

We generally assume that when exposure levels are not anticipated to adversely affect human health, they also are not anticipated to adversely affect the environment. For each source category, we generally rely on the site-specific levels of PB–HAP emissions to determine whether a full assessment of the multi-pathway and environmental effects is necessary. For PB–HAPS other than lead (*i.e.,* cadmium), site-specific PB–HAP emission levels were far below levels which would trigger a refined assessment of multi-pathway impacts, thus we are confident that these types of impacts are insignificant for the one facility in this source category.

f. Uncertainties in the Facility-Wide Risk Assessment

We did not conduct a separate facility-wide risk assessment for this proposal because all of the HAP emission sources at the one facility subject to the MACT are covered by the MACT standard under review. Thus, the level of the facility-wide HAP emissions is the same as the level of emissions from the emissions sources subject to the MACT standard under review.

g. Uncertainties in the Demographic Analysis

Our analysis of the distribution of risks across various demographic groups is subject to the typical uncertainties associated with census data (*e.g.,* errors in filling out and transcribing census forms), as well as the additional uncertainties associated with the extrapolation of census-block group data (*e.g.,* income level and education level) down to the census block level.

B. How did we perform the technology review?

Our technology review is focused on the identification and evaluation of developments in practices, processes, and control technologies. If a review of available information identifies such developments, then we conduct an analysis of the technical feasibility of these developments, along with the impacts (costs, emission reductions, risk reductions, *etc.*). We then make a decision on whether it is necessary to amend the regulation to require any identified developments.

Based on specific knowledge of the primary lead smelting source category, we began by identifying known developments in practices, processes, and control technologies. For the purpose of this exercise, we considered any of the following to be a "development":

- Any add-on control technology or other equipment that was not identified and considered during MACT development;
- Any improvements in add-on control technology or other equipment (that was identified and considered during MACT development) that could result in significant additional emission reduction;
- Any work practice or operational procedure that was not identified and considered during MACT development; and
- Any process change or pollution prevention alternative that could be broadly applied that was not identified and considered during MACT development.

In addition to looking back at practices, processes, or control technologies reviewed at the time we developed the MACT standards, we reviewed a variety of sources of data to aid in our evaluation of whether there were additional practices, processes, or controls to consider. One of these sources of data was subsequent air toxics rules. Since the promulgation of the MACT standard for the primary lead smelting source category addressed in this proposal, EPA has developed air toxics regulations for a number of additional source categories. We reviewed the regulatory requirements and/or technical analyses associated with these subsequent regulatory actions to identify any practices, processes, and control technologies considered in these efforts that could possibly be applied to emission sources in the primary lead smelting source category.

We also consulted EPA's RACT/BACT/LAER Clearinghouse (RBLC). The terms "RACT," "BACT," and "LAER" are acronyms for different program requirements under the CAA provisions addressing the national ambient air quality standards. Control technologies, classified as RACT (Reasonably Available Control Technology), BACT (Best Available Control Technology), or LAER (Lowest Achievable Emission Rate) apply to stationary sources depending on whether the sources are existing or new, and on the size, age, and location of the facility. BACT and LAER (and sometimes RACT) are determined on a case-by-case basis, usually by state or local permitting agencies. EPA established the RBLC to provide a central database of air pollution technology information (including technologies required in source-specific permits) to promote the sharing of information among permitting agencies and to aid in identifying future possible control technology options that might apply broadly to numerous sources within a category or apply only on a source-by-source basis. The RBLC contains over 5,000 air pollution control permit determinations that can help identify appropriate technologies to mitigate many air pollutant emission streams. We searched this database to determine whether any practices, processes, or control technologies are included for the types of processes covered by the primary lead smelting MACT.

We also requested information from the facility regarding developments in practices, processes, or control technology. Finally, we reviewed other information sources, such as state or

local permitting agency databases and industry-supported databases.

C. Overview of the Source Category and MACT Standards

1. Source Category and MACT Standard

The National Emission Standard for Primary Lead Smelting (or MACT rule) was promulgated on June 4, 1999 (64 FR 30194) and codified at 40 CFR part 63, subpart TTT. As promulgated in 1999, the MACT standard applies to affected sources of HAP at primary lead smelters.[16] The MACT defines "Primary lead smelters" as "any facility engaged in the production of lead metal from lead sulfide ore concentrates through the use of pyrometallurgical techniques." 40 CFR 63.1542. The MACT standard for the Primary Lead Smelting source category does not apply to secondary lead smelters, lead remelters, or lead refiners (§ 63.1541). Today there is one facility (The Doe Run Company in Herculaneum, Missouri) operating that is subject to the MACT standards (See Section V.A. below).

At the time of promulgation of the Primary Lead Smelting MACT rule, there were three operating lead smelters. Due to economic pressures (decreased market demand for lead) and regulatory pressures, two of the lead smelting facilities subject to the MACT standard have since been permanently closed, leaving one primary lead smelter currently operating in the United States. No new primary lead smelters have been built in the last 20 years, and no new primary lead processing facilities using pyrometallurgical techniques are anticipated in the foreseeable future. The one operating lead smelter is not collocated with other sources of HAP emissions.

Lead is used to make various construction and consumer products such as batteries, paint, glass, piping, and filler. Lead sulfide (PbS) ore concentrates are the main feed material to primary lead smelters. The primary lead smelting process consists of lead sulfide concentrate storage and handling, sintering of ore concentrates, sinter crushing and handling, smelting of sinter to lead metal, drossing (*i.e.,* removing the solid oxide deposits), refining and alloying of lead metal, and smelting of the drosses.

HAP are emitted from primary lead smelting as process emissions (stack), process fugitive emissions, and fugitive dust emissions. Process emissions are associated with the exhaust gases from sinter machines and blast and dross furnaces. HAP expected in process emissions are metals (mostly lead compounds, but also some arsenic, cadmium, and other metals) and also may include small amounts of organic compounds that result from incomplete combustion of coke, which is charged along with sinter to the blast furnace. Process fugitive emissions occur at various points during the smelting process (such as during charging and tapping of furnaces) and the only HAP emitted are metal HAP. Fugitive dust emissions result from the entrainment of dust due to material handling, vehicle traffic, and wind erosion from storage piles and the only HAP emitted are metal HAP.

The MACT standard (40 CFR part 63, subpart TTT) applies to process emissions (stack) from sinter machines, blast furnaces, and dross furnaces; process fugitive emissions from sinter, blast furnace, drossing and refining processes, concentrate handling, and locations around such processes; and fugitive dust emission sources, such as roadways, storage piles and the plant yard. Process emissions of lead compounds from sinter machines, blast furnaces, and dross furnaces, and process fugitive emissions from the blast furnace and dross furnace charging, blast furnace and dross furnace tapping, and the sinter machine (charging, discharging, crushing, and sizing) are limited to 500 grams (g) of lead emissions per mega gram (Mg) of lead produced (500 g/Mg), which is equal to 1.0 pound (lb) of lead emissions per ton of lead produced (1 lb/ton). 40 CFR 63.1542(a). A plant-wide limit format was used for MACT because it was consistent with SIPs, the commingling of exhaust gases from processes to a single stack made it impossible to set limits for individual sources, it gave the facilities more flexibility in complying with the standard, and it promoted pollution prevention by giving each facility the ability to meet the emission limit through any combination of source reduction and control technology options. (63 FR 19208).

In addition to being subject to the plant-wide emission limit of the standard, process fugitive emissions must be captured by a hood and ventilated to a baghouse or equivalent control device and the hood design and ventilation rate must be consistent with American Conference of Governmental Industrial Hygienists recommended practices. 40 CFR 63.1543(b). In addition, the sinter machine area fugitives must be enclosed in a building that is ventilated to a baghouse at a rate that maintains a positive in-draft through any doorway opening. 40 CFR 63.1543(c). The MACT standard also requires the use of bag leak detection systems for continuous monitoring of baghouses. 40 CFR 63.1547(c)(9). For fugitive dust sources, as defined in 40 CFR 63.1544, the MACT standard requires that the owner or operator prepare and operate at all times according to a standard operating procedures (SOP) manual. The SOP manual must describe in detail the measures used to control fugitive dust emissions from plant roadways, material storage and handling areas, sinter machine areas, blast and dross furnace areas, and refining and casting operations areas. Existing work practice manual(s) that describe the measures in place to control fugitive dust sources required as part of a state implementation plan for lead satisfy this requirement.

2. MACT as it Applies to Doe Run Company Primary Lead Smelter, Herculaneum, Missouri

As stated above, the Doe Run Smelter in Herculaneum, Missouri, is the sole remaining lead processing facility in the United States subject to the MACT. The 1999 MACT rule established a plant-wide lead emission limit of 1 lb of lead per ton of lead produced that applies to the aggregation of emissions from specific sources that discharge from air pollution control devices. Compliance with the plant-wide emission limit is demonstrated by annual stack testing. The rule lists nine sources as subject to the plant-wide limit including: (1) Sinter machine, (2) blast furnace, (3) dross furnace, (4) dross furnace charging location, (5) blast furnace and dross furnace tapping location, (6) sinter machine charging location, (7) sinter machine discharge end, (8) sinter crushing and sizing equipment, and (9) sinter machine area. At the Doe Run plant, lead emissions from these sources are controlled by baghouses that exhaust through two stacks. The sources in the sinter operation, the blast furnace, and the dross furnace are controlled by three baghouses all of which discharge through one emission point, which is designated as the main stack. The building that houses the blast furnace and dross kettles is vented to a separate baghouse (#7) which discharges through a separate stack, designated as the furnace area stack.

Under the 1999 MACT rule, all other sources of process fugitive and fugitive dust emissions are required to follow work practice standards detailed in the plant's standard operating procedures (SOP) manual.

The HAP emitted in the largest quantities from the Doe Run facility are

[16] As provided above in section III(C)(3), we are proposing to change the standard to apply to Primary Lead Processors.

lead compounds, which account for over 99 percent of the total HAP emissions by mass. The remaining HAP emissions are arsenic, antimony, cadmium, cobalt, nickel and trace organic HAP. Negligible levels of organic HAP are also emitted from natural gas-fired space heating at the facility and the incomplete combustion of coke in the blast furnace. Further discussions of the emission profile for this facility is included in the Technical Support Document in the docket.

3. Missouri SIP and the Lead NAAQS as They Apply to Doe Run Company, Herculaneum, Missouri

In addition to the MACT standard, the Doe Run Company's primary lead smelter in Herculaneum, Missouri is subject to a SIP for the purpose of attaining and maintaining the lead NAAQS.[17] The current SIP, which was approved in 2002, addresses the former lead ambient air concentration limit of 1.5 μg/m^3 NAAQS. In addition, the 2007 SIP submittal from the State includes requirements addressing lead emissions from the Doe Run facility and can be found at *http://www.dnr.mo.gov/env/apcp/docs/2009drh-leadsip.pdf.*

In 2008, EPA revised the lead NAAQS from 1.5 μg/m^3 to 0.15 μg/m^3. In November 2010, EPA identified or "designated" several areas as not meeting the lead NAAQS. These "nonattainment" designations include portions of Jefferson County, Missouri surrounding the Doe Run facility. Missouri is required by the Act to take steps to further control pollution in this area, and to detail these steps in a revision to the SIP. The revised SIP is due to EPA within eighteen months after the effective date of the designation, or by June 2012, and attainment of the NAAQS should be achieved by 2016.

The SIP and the pending 2007 SIP submittal contain specific measures to be implemented by the Doe Run plant to reduce lead emissions. The State of Missouri revised the control requirements for the Doe Run facility in 2001 and 2007, requiring numerous emissions-reducing measures and improvements to add-on control devices, processes, and work practices.[18] These included improvements to existing emission control technology, adding or upgrading enclosures, process changes and limitations, and work practices. These requirements are summarized below.

Point Source Requirements—As required under the SIP, lead emissions from the refining kettles and refining building emissions must be captured and vented to baghouses. Doe Run implemented these controls and vents the emissions to baghouses #8 and #9 and the exhaust from the baghouse #9 is combined with baghouse #7 exhaust and vented to a common stack. Although the MACT standard does not require Doe Run to do so, it has included emissions from refining Baghouses #8 and #9 in their demonstrations of compliance with the MACT plant-wide lead emission limit.

Under the 2007 SIP submittal, Doe Run was required to make improvements to existing baghouse controls including the installation of pleated filters and lowering the air-to-cloth ratio for baghouses, increased ventilation and improved ventilation hoods at the blast furnace, and using reverse flow technology for baghouse cleaning. The 2007 SIP submittal also required the installation of enclosures and/or partial enclosures for unloading ore concentrate, sinter storage, and the sides of the sinter machine (which will be evacuated to a baghouse).

Process Requirements—Process changes to reduce emissions required by the SIP included a process control system for the injection of air through the blast furnace tuyeres located at the bottom of the blast furnace, limitations on individual process and overall plant throughputs, and limiting specific operations to only certain times of the day when the impact on ambient air concentrations is less. The SIP also stipulates that emissions from malfunctions will be reduced by alarms that sound when the baghouse fan malfunctions, an interlock system to restrict air flow into the blast furnace when the baghouse is not operating properly, and cameras for the dross and refinery kettles to detect kettle failure (*i.e.,* when a plume of smoke is detected from the stack, the kettle burner can be immediately shut off and the problem corrected).

Fugitive Dust Requirements—Under both the current SIP and the 2007 SIP submittal, work practices are required to reduce fugitive dust emissions. Requirements include road watering and automatic sprinklers, using new regenerative sweepers to remove dust from paved surfaces to reduce emissions from traffic, maintaining a minimum water content percentage for ore concentrate and for baghouse dust that is loaded into railcars, and inspecting the siding that encloses buildings (followed by prompt repairs if needed).

Missouri requires Doe Run to report all metal HAP emissions annually based on a speciation analysis that was performed.[19] The state also requires an annual emissions inventory based on the stack tests for the point discharges and AP–42 or facility-specific emission factors for fugitive emissions.

As a result of the implementation of the emission control requirements in the currently approved 2002 SIP, and the additional requirements adopted by the state, as discussed above, the Doe Run facility has achieved a significant reduction of lead and metal HAP emissions since 2000 through a combination of reduced production levels and improved emissions controls. Based on emissions inventory data submitted to the Missouri Department of Natural Resources (DNR), total HAP emissions have been reduced from an estimated 140 tons in 2000 to 20 tons in 2008, and the majority of the 20 tons are lead compound emissions. The 2008 reported emissions reflect implementation of all emission controls stipulated in the 2002 SIP and the 2007 SIP revision.

4. Other Federal and State Actions Affecting Doe Run Company

More recently, the 2008 revision to the lead NAAQS has resulted in Doe Run Company deciding that it is not feasible for the facility to reduce emissions further to the level necessary to meet the newly revised NAAQS without closure of the current smelting operations. As a result of past and ongoing regulatory compliance issues at the facility, the facility has entered into a consent decree with U.S. EPA Region VII and the State of Missouri. Under the consent decree, the facility will, among other things, close the existing smelter operation and remediate the site to an agreed-upon level. The consent decree requires that all support operations for the smelter cease by December 31, 2013 and that the blast furnace cease operations by April 1, 2014. Remediation of the site is required to commence following approval of a plan to be submitted to EPA in January 2013. Under the consent decree, the existing refining, casting and alloying operations

[17] EPA most recently approved the Missouri SIP for Herculaneum in 2002 (67 FR 18497, April 16, 2002). Missouri Department of Natural Resources (MDNR) substantially revised the requirements for the smelter in 2007. EPA has proposed approval of this revision, but has not yet taken final action.

[18] EPA most recently approved the Missouri SIP for Herculaneum in 2002 (67 FR 18497, April 16, 2002). MDNR substantially revised the requirements for the smelter in 2007. EPA has proposed approval of this revision, but has not yet taken final action.

[19] Doe Run Company submits annual emissions inventories to MDNR that report speciated metals using speciation factors for each metal/source derived in the late 1990s through emissions testing.

will be allowed to continue operation. Notice of the consent decree was published for public comment on October 15, 2010, (75 FR 63506). Once finalized, the consent decree is federally enforceable among the parties.

Prior to closure of the current smelter, the Doe Run Company may build and bring to full operation a new hydrometallurgical process that will produce lead from lead sulfide ore, potentially adjacent to the current smelter. The hydrometallurgical process uses chemical reactions involving fluboric acid which allows recovery of lead metal through leaching, electrowinning, and co-product treatment processes. Some of the lead from the new process is likely to undergo further processing at the existing refinery, primarily for remelting/casting purposes. Based on limited data from a demonstration project, Doe Run expects that lead emissions from the hydrometallurgical process will be minimal.

V. Analyses Results and Proposed Decisions

This section of the preamble provides a description of the dataset used in the RTR analysis, the results of our RTR for the source category, and our proposed decisions concerning changes to the Primary Lead Smelting MACT standard. As noted previously, all references to lead emissions in this proposal means "lead compounds," which is the regulated HAP under CAA section 112. All reference to lead production means the production of element lead.

A. What data were used in our risk analyses?

For the Primary Lead Smelting source category, we compiled a preliminary dataset using readily available information, reviewed the data, and made changes where necessary. The preliminary dataset was based on data in the 2002 National Emissions Inventory (NEI) Final Inventory, Version 1 (made publicly available on February 26, 2006), and the 2005 National Emissions Inventory (NEI), version 2.0 (made publicly available in October 2008). The 2005 NEI was updated to develop the 2005 National Air Toxics Assessment (NATA) Inventory. NATA inventory updates for the primary lead smelting category included SIP data provided by the state of MO to EPA. The 2005 NATA inventory was used with updated 2008 data received in an Information Collection Request (ICR) response from the Doe Run facility. The NEI is a database that contains information about sources that emit criteria air pollutants, their precursors, and HAP. The NEI database includes estimates of annual air pollutant emissions from point and volume sources, emission release characteristic data such as emission release height, temperature, velocity, and location latitude/longitude coordinates. We reviewed the NEI datasets, checked geographic coordinates, and made changes based on available information. We also reviewed the emissions and other data to identify data anomalies that could affect risk estimates.

The risk assessment was based on estimates of the actual emissions and allowable emissions. The estimates of actual emissions were for the year 2008 and were based on data from the ICR along with data from our NEI dataset. These estimates included both stack and fugitive emission sources. Fugitive dust sources include material handling (concentrate, sinter, fume and dross), plantwide resuspension (roadways, storage piles and plant yard) and other miscellaneous sources (vents and heat stacks). The material handling sources contribute approximately 84 percent of the total fugitive dust emissions, while plantwide resuspension and miscellaneous sources contribute approximately 11 and 5 percent, respectively. The estimates of allowable emissions were calculated using production data from the ICR response combined with the current emissions limits in the MACT standard.

Lead compounds account for about 99 percent of the HAP emissions from the source category, or about 20 tons in 2008. The facility also reported small emissions of five other metal HAP, and trace levels of 25 organic HAP.

The emissions data, calculations and risk assessment inputs for the Primary Lead Smelting source category are described further in the Technical Support Document for this action which is available in the docket for this proposed rulemaking.

We used the 2008 production information as the basis for calculating the MACT allowable ratio (allowable to actual) because the 2008 emissions are the most recent reported emissions that also reflect implementation of the requirements of the 2007 SIP revision. For more information on the ratio of actual to MACT-allowable emissions, see the Technical Support Document in the docket for this action describing the emission data information and estimation of MACT-allowable emission levels and associated risks and impacts.

B. What are the results of the risk assessments and analyses?

For the Primary Lead Smelting source category, we conducted an inhalation risk assessment for all HAP emitted. We also conducted a multi-pathway analysis for cadmium and lead. With respect to lead, we used the recently-promulgated lead NAAQS to evaluate the potential for multi-pathway and environmental effects. Furthermore, we conducted a demographic analysis of population risks. Details of the risk assessments and additional analyses can be found in the residual risk documentation referenced in section IV.A of this preamble, which is available in the docket for this action.

1. Inhalation Risk Assessment Results

Table 3 provides an overall summary of the results of the inhalation risk assessment.

TABLE 3—PRIMARY LEAD SMELTING INHALATION RISK ASSESSMENT RESULTS

Maximum individual cancer risk (in 1 million) [1]		Estimated population at risk ≥ 1-in-1 million	Estimated annual cancer incidence (cases per year)	Maximum chronic non-cancer TOSHI [2]		Maximum off-site refined acute non-cancer HQ [3]
Actual emissions level	Allowable emissions level			Actual emissions level	Allowable emissions level	
30	30	4,900	0.0008	1	1	0.6

[1] Estimated maximum individual excess lifetime cancer risk.
[2] Maximum TOSHI. The target organ with the highest TOSHI for the Primary Lead Smelting source category is the kidney.
[3] The maximum acute HQ value shown uses the only available acute dose-response value for arsenic, which is the REL. See section IV.A of this preamble for explanation of acute dose-response values.

The results of the chronic inhalation cancer risk assessment indicate that, based on estimates of actual emissions from the base year 2008, the maximum individual lifetime cancer risk could be as high as 30-in-1 million with fugitive dust emissions of cadmium dominating the risk. The total estimated cancer incidence from this source category based on actual emission levels is 0.0008 excess cancer cases per year or one case in every 1,250 years. Approximately 200 people were estimated to have cancer risks above 10-in-1 million and approximately 4,900 people were estimated to have cancer risks above 1-in-1 million. When considering the maximum levels of emissions allowed under the current MACT standard, the MIR remains 30-in-1 million. The MIR remains the same since the fugitive dust emissions are governed by work practices, which under § 63.1544 are defined as the measures that will be "put into place to control fugitive dust emissions." Thus, the actual emissions, which reflect the measures that have been put in place, should be equivalent to the allowable emissions.

The maximum chronic noncancer TOSHI value is 1, with fugitive emissions of cadmium dominating those impacts. When considering MACT allowable emissions, the maximum chronic noncancer TOSHI value remains 1 since, for the reasons provided above, MACT-allowable fugitive emissions are equal to actual fugitive emissions.

Based on the acute REL value for arsenic, an off-site screening-level acute HQ value from this facility could be as high as 6. However, the emissions factor of 10 times the average hourly emissions rate is not appropriate in this instance, given that fugitive emissions are minimized during the meteorological conditions associated with the worst-case short-term impacts (*i.e.,* during low-wind, stable atmospheric conditions). Thus, we refined the assessment and estimated a maximum off-site HQ value of 0.6.

The results of a multipathway screening analysis for cadmium emissions from this facility were well below the *de minimis* emission rate that would indicate a non-negligible risk of adverse health effects from multipathway exposures. We estimate the specific multipathway *de minimis* emission rate for cadmium to be 0.65 TPY and only 0.1 TPY is emitted from the one facility in this source category. Thus, there appears to be little, if any, multipathway risk associated with cadmium emissions from this facility.

In evaluating the potential multi-pathway risks from emissions of lead compounds, we compared modeled maximum 3-month rolling average atmospheric concentrations with the NAAQS for lead. Table 4 presents the results of our lead impact analysis broken down by emission point considering actual 2008 emissions as well as the maximum emissions of lead that the MACT standard would have allowed based on production rates for calendar year 2008. For purposes of our analysis, we determined separately the risk from each of the types or processes/emissions sources regulated by the current MACT, with one exception. Under the MACT, emissions from the refining and casting area were considered fugitive emissions subject to work practice standards under § 63.1544. Since then, pursuant to requirements that the 2002 State SIP adopted for purposes of meeting the 1.50 μg/m^3 lead NAAQS, Doe Run enclosed the refining and casting area and vents those emissions to the refinery stacks. We considered these stack emissions separate from the fugitive dust emissions. Thus, the four emission process/sources we evaluated for risk were: (1) The main stack, (2) the furnace area stack, (3) the refinery stack, and (4) fugitive emissions.

The analysis indicates that under both actual 2008 or MACT allowable emission scenarios, emissions from the main stack do not result in lead levels above the NAAQS within the 50 km radius that was modeled. This is likely due to the height of the stack (500 feet), which would result in broader and further dispersal of lead emissions. However, results of the analysis did indicate that modeled ambient air lead concentrations resulting from this facility's fugitive dust emissions could exceed the NAAQS for lead by as much as 50-fold at the property boundary based on both actual and allowable emissions. Moreover, results indicate that modeled emissions from the furnace area stack could result in NAAQS exceedances under both actual 2008 and MACT-allowable emissions scenarios. In addition, the actual estimated emissions from the refining stacks, which were put into place based on requirements adopted by the State for purposes of the SIP, could result in NAAQS exceedances. We were unable to calculate a "MACT allowable" emission level for the refinery emissions, which under the MACT are included as fugitive emissions. This analysis also indicates that within 50 km of this facility, approximately 1,900 people could be exposed to ambient air lead concentrations exceeding the level of the NAAQS for lead.

As mentioned above, to evaluate the potential for adverse environmental effects, we also compared maximum 3-month rolling average atmospheric concentrations with the current secondary NAAQS for lead, which is the same as the primary standard. Thus, the analyses presented in Table 4 also indicate the potential for adverse environmental effects from emissions of lead. Note that modeling performed for this analysis is based on different inputs than SIP modeling done for the one remaining primary lead facility, and thus results differ.

TABLE 4—SUMMARY OF MODELED LEAD CONCENTRATIONS RELATIVE TO THE NAAQS BASED ON ESTIMATED ACTUAL 2008 AND MACT ALLOWABLE EMISSIONS

Emission point	Actual 2008 emissions (TPY)	Maximum impact—actual emissions	Allowable emissions [1] (TPY)	Maximum impact—allowable emissions
Main stack [2]	13.31	0.05 times the NAAQS	65.8	0.25 times the NAAQS.
Refining stacks	2.74	3 times the NAAQS	NA	NA.
Furnace area stack: (controlled blast and drossing fugitives)	1.81	2 times the NAAQS	8.94	10 times the NAAQS.
Fugitive dust [3]	2.85	50 times the NAAQS	2.85	50 times the NAAQS.

[1] Allowable emissions for the main stack and furnace area emission points are based on 1 lb of Pb/ton production (MACT limit); Refinery emissions are included as fugitive emissions under MACT but are now vented to a stack because of SIP requirements; therefore, we were unable to calculate a "MACT allowable" emission level.

[2] Main stack is the emission point for sinter machine, blast furnace and drossing operations.

[3] Fugitive dust emissions are covered by work practices under current MACT and were calculated via emission factors assuming compliance with the MACT. The site of maximum ambient air lead concentration resulting from fugitive dust emissions occurs in close proximity to the southeast boundary of the facility (see Figure 3.1–1 of the risk assessment document). Note that this maximum result and its location are based on modeling 2008 emissions using 1998 site-specific meteorology, and that these may differ from inputs used for other types of modeling (*e.g.,* SIP modeling.)

2. Facility-wide Risk Assessment Results

Our screening analysis determined that the organic HAP emissions from facility represented negligible risk and were determined to be insignificant with regard to this risk analysis. As a result, all significant HAP emissions from the one facility in this category are reflected in the risk analyses presented above; therefore, facility-wide risks are equivalent to those of the source category.

3. Model to Monitor Comparison

In addition to the results presented above, we also compared maximum AERMOD estimates of ambient air lead concentrations with those measured at 4 monitors in close proximity to the Herculaneum Primary Lead Smelting Facility for calendar year 2008. More specifically, we compared maximum 3-month rolling average lead concentrations (for calendar year 2008) calculated from data reported at the Main Street, Circle Street, South Cross, and Church Street monitors to the maximum 3-month rolling average lead concentrations at model receptor locations in close proximity to these monitoring sites. These monitor locations were chosen because they represented the closest offsite monitors to the Herculaneum primary lead smelter. Thus, lead measurements at these monitoring sites would likely be dominated by emissions from this facility which is important given that AERMOD estimates of ambient air lead concentrations only considered lead emissions from this facility (*i.e.,* only lead emissions from the Herculaneum primary lead smelter were used as inputs into AERMOD).

Results of this analysis are presented in Table 5 and indicate that with respect to the Main Street and Circle Street monitors, AERMOD underestimates 3-month maximum lead concentrations by approximately 2.8- and 4.2-fold, respectively. While these monitor to model comparisons are not in complete agreement on a point-by-point basis, we note that this would not be expected given the general uncertainties associated with using dispersion modeling to estimate ambient pollutant concentrations and considering that the meteorological data used to develop the model estimates were from a different year than the actual monitoring and emissions data (*i.e.,* meteorological data used in the AERMOD simulation was from 1998 while the emissions estimates and the monitoring data were from 2008). However, results do indicate that the maximum 3-month average lead concentration across the group of monitors nearest the facility is approximately equal to the maximum 3-month average lead concentration estimated by AERMOD across the group of these monitoring sites (*i.e.,* both the Main Street monitor and the South Cross AERMOD estimate indicate the maximum 3-month average lead concentration to be approximately 2.1 μg/m3). Taken together, these results indicate that AERMOD estimates of ambient air lead concentration provide a reasonable representation of the measured 3-month maximum lead concentrations present in the ambient air near this facility.

TABLE 5—COMPARISON OF AERMOD MODELED TO AMBIENT AIR LEAD CONCENTRATIONS REPORTED BY FOUR MONITORS SURROUNDING THE HERCULANEUM PRIMARY LEAD SMELTING FACILITY

Location	Maximum AEMOD modeled 3-month lead concentration (μg/m^3)	Maximum monitored 3-month lead concentration [20] (μg/m^3)	Model to monitor ratio [21]
Main Street	0.47	3.14	−4.6
Circle Street	0.38	1.14	−3.0
South Cross	2.13	0.75	2.8
Church Street	1.99	0.47	4.2

4. Demographic Risk Analysis Results

Demographic analyses were performed to investigate the population distribution of: (1) Cancer risks at or above 1-in-1 million and (2) risks from ambient air lead concentrations above the NAAQS for lead. Results are summarized in Table 5 and are based on modeling using estimated actual emissions levels for the population living within 50 km of this facility.

TABLE 6—PRIMARY LEAD SMELTING DEMOGRAPHIC RISK ANALYSIS RESULTS

	Nationwide	Population with cancer risk greater than 1 in a million	Population with ambient air lead concentrations exceeding the NAAQS
Total population	285,000,000	4,900	1,900
Race by percent			
White	75	96	96

[20] Maximum 3-month monitored concentrations were calculated for the year 2008 based on data submitted to EPA's Air Quality System (AQS).

[21] Negative sign denotes an underestimation of AERMOD modeled ambient lead concentrations, relative to monitored concentrations. AERMOD estimated concentrations were based on the 2008 emissions estimates described in section V.A.

TABLE 6—PRIMARY LEAD SMELTING DEMOGRAPHIC RISK ANALYSIS RESULTS—Continued

	Nationwide	Population with cancer risk greater than 1 in a million	Population with ambient air lead concentrations exceeding the NAAQS
All Other Races	25	4	4
Race by percent			
White	75	96	96
African American	12	4	3
Native American	0.9	0.2	0
Other and Multiracial	12	1	0.8
Ethnicity by percent			
Hispanic	14	1	0.3
Non-Hispanic	86	99	99.7
Income by percent			
Below poverty level	13	15	15
Above poverty level	87	85	85

Results of the risk assessment indicate that there are approximately 4,900 people exposed to a cancer risk greater than 1-in-1 million, and 1,900 people in areas with ambient air lead concentrations above the NAAQS for lead. In both instances, the demographics analysis estimates that about 4 percent of these populations can be classified as a minority (listed as "all Other Races" in the table), which is well below the national percentage of 25. Similarly, in the cancer and lead demographic analyses, the percentage of "African American," "Hispanic," "Native American," and "Other and Multiracial" population groups are well below the corresponding national percentages. With respect to the percentage of those "Below the Poverty Level," in both demographic analyses there is a small (2 percent) increment above the corresponding national percentage. However, given that the total population affected is small (*i.e.,* 4,900 individuals for cancer risk greater than 1-in-1 million and 1,900 individuals in areas with lead concentrations above the NAAQS), we do not think this indicates any significant potential for disparate impacts to the specific demographic groups analyzed.

Moreover, given the extent to which lead may impact children's health, we further note that our demographic analysis doesn't indicate the presence of a higher percentage of children than one would normally expect around this facility. That is, while the national percentage of children 18 years and younger is 27%, the percentage of children living near this facility who are estimated to be exposed to lead concentrations above the NAAQS is only slightly higher at 28% (see Risk and Technology Review—Analysis of Socio-Economic Factors for Populations Living Near Primary Lead Smelting Facilities in the docket for this proposed rulemaking), a difference which is likely not significant.

C. What are our proposed decisions on risk acceptability and ample margin of safety?

1. Risk Acceptability

As noted in section III.B of this preamble, we weigh all health risk factors in our risk acceptability determination, including cancer risks to the individual most exposed, risk estimation uncertainty, and other health information. For the Primary Lead Smelting source category, the risk analysis indicates that the cancer risks to the individual most exposed could be as high as 30-in-1 million due to actual or MACT-allowable emissions. These risks are considerably less than 100-in-1 million, which is the upper bound of the presumptive range of acceptability. The incidence of cancer is very low—0.0008 excess cancer cases per year; or one case every 1,250 years. Similarly, the risks of chronic non-cancer health effects from HAP emissions other than lead were low, with a maximum HQ of 1. Moreover, while an initial screening analysis suggested that fugitive emissions of arsenic had the potential to create a risk of acute health effects, a refined analysis based on our knowledge of this emission source indicated that the risk was low (HQ = 0.6). In addition to these health analyses, a demographics analysis did not indicate the potential for significantly disproportionate heath impacts (see above, section V(3)(c)). Thus, risks associated with the non-lead emissions from the Primary Lead Smelting source category for cancer, acute and chronic non-cancer health effects and environmental effects are considered acceptable.

However, since ambient air lead concentrations resulting from emissions from this facility were modeled to be in excess of the NAAQS for lead, the risks associated with lead emissions from this facility were judged to be significant. Our analysis estimated that modeled off-site ambient air lead concentrations (based on actual 2008 emissions) resulting from this facility could be as high as 50 times the NAAQS for lead based on fugitive dust emissions, and that approximately 1,900 individuals could be exposed to lead concentrations in excess of the NAAQS. Given that the NAAQS for lead was set to "provide increased protection for children and other at-risk populations against an array of adverse health effects, most notably including neurological effects in children, including neurocognitive and neurobehavioral effects (73 FR 67007)", we are proposing that risks associated with lead emissions from this source category are unacceptable.

As noted above, our risk analysis for lead was based on modeled 3-month rolling average lead concentrations in ambient air in comparison to the primary lead NAAQS. We believe that in order to provide an acceptable level of risk, lead concentrations in the ambient air must be reduced to the level of the lead NAAQS. Thus, we

considered specific emission limits for the three emission sources/points that were modeled to result in lead concentrations in excess of the NAAQS (*see* Table 4); refinery stack, furnace area stack, and fugitive dust emissions, with the majority of fugitive dust impacts from material handling sources. Based on our analysis, we conclude that in order to meet the NAAQS for lead at all model receptors, fugitive dust emissions would have to be reduced by approximately 98 percent to 0.064 TPY, refinery stack emissions and furnace area stack emissions would have to be reduced by approximately 80 percent to a total of 0.91 TPY (the maximum impacts of refinery and furnace emission points occur at the same location.) Further, because the maximum ambient air impacts of the refinery/furnace emissions, the fugitive dust emissions, and the main stack do not significantly overlap each other, we estimate that lead emissions from all emission points other than the main stack would have to be limited to a total of approximately 0.97 TPY in order to ensure 3-month rolling average ambient air lead concentrations do not exceed the lead NAAQS level of 0.15 $\mu g/m^3$. As noted above, emissions from the main stack (*i.e.,* emission point for sinter machine, blast furnace and drossing operations) did not result in ambient air lead concentrations in excess of the lead NAAQS at modeled locations within 50 km of the property boundary and thus we are not proposing any reductions at the main stack in order to ensure an acceptable level or risk.

Once we determined the emissions reductions necessary to achieve an acceptable level of risk, we investigated available emissions control options and their ability to reduce emissions and health risks for fugitive dust and for stack emissions from both the refining and furnace area stacks. Control options considered for reducing fugitive dust emissions and associated risks include improved or additional work practices, site remediation, application of additional capture/control measures, and lead production limitations. With the exception of site remediation, all of these control measures have been implemented to varying degrees at the Doe Run facility in response to the Missouri SIP, as revised in 2002 and the 2007 revisions submitted for approval to the SIP. As such, because the actual emissions for 2008 reflect the implementation of those control measures, requiring those controls under the MACT would be unlikely to yield the additional 98 percent reduction in fugitive emissions necessary to meet the primary lead NAAQS level of 0.15 $\mu g/m^3$. Thus, our evaluation of risks based on actual emissions already considered emissions with these controls largely in place. In order to ensure that site remediation efforts, or any other efforts the source may choose to undertake, will result in sufficient emission reductions to address the unacceptable level of risk, we are proposing to establish a lead concentration in air limit of 0.15 $\mu g/m^3$ to be measured at locations approved by the Administrator. This lead concentration in air limit would be established as the enforceable requirement to address fugitive emissions under the MACT standard.[22] Because we are proposing a concentration limit to address fugitive dust emissions, we no longer believe it is necessary for the affected facility to provide a plan to the Administrator describing work practices that will be used to reduce fugitive emissions. Therefore, we are proposing to remove the requirement to develop and submit a work practice standard operating procedure (SOP) manual as required in § 63.1544(a).

As an alternative to proposing compliance monitoring requirements for demonstration of compliance with the lead concentration in air limit, we considered retaining the current fugitive dust emissions requirement to develop and submit to the Administrator or delegated authority a work practices SOP. Using this alternative approach, we believe it would be necessary to modify the current general requirements for an SOP by specifying the minimum work practice requirements that the plan must include. For example, under this alternative approach, we would require that the SOP must include, at a minimum, detailed descriptions of all measures that would be used to control fugitive dust emissions from plant roadways; material storage, transfer and handling areas; sinter machine areas; furnace areas; refining and casting areas; and other areas the Administrator may identify. Further, EPA would require that the SOP contain detailed descriptions of work practices including road watering and automatic sprinklers, methods to remove dust from paved surfaces to reduce emissions from traffic, maintenance of minimum water content for ore concentrate and for baghouse dust that will be handled or transferred, and procedures for the inspection of building siding or damages and openings. The SOP would be required to include procedures, including recordkeeping, to ensure that the work practices are being implemented at a frequency and in a manner that would ensure that fugitive dust emissions are being minimized. To determine whether the work practices described in the SOP are reducing emissions sufficient to comply with the lead concentration in air limit, the owner or operator would be required once a year to model the fugitive dust emissions using measurement data or emission factors according to an approved fugitive dust emissions modeling plan. At a minimum, EPA would require that this modeling plan include a detailed description of each fugitive dust emission source; a detailed description of the control practices or techniques used to limit fugitive dust emissions from each source; the emission factors, test data or other methods used to characterize and quantify lead emissions from each source; a description of the emissions modeling that will be used to estimate the concentrations of lead in air at or near the property boundary as contributed by each source as well as cumulatively contributed by all sources; a description of process or other conditions that would indicate the need to demonstrate compliance more often than annually; the calculations to be used to show compliance with the air lead concentration limit that consider the highest modeled air lead concentrations from the modeled fugitive dust sources and any contributions from background lead concentrations in air; and a description of the records that will be kept. We are seeking comments on the proposed requirements to monitor air lead concentrations versus the alternative approach described above, of requiring extensive work practices and a work practice SOP in conjunction with emissions modeling, to demonstrate compliance with the air lead concentration limit.

Measures available for reducing lead emissions from the refining and furnace area stacks include upgrading existing baghouses by replacing the existing fabric bags with high efficiency membrane bag filters. Another option would be to add extra in-line baghouses after existing baghouses. Such measures would reduce lead emissions and associated risk to within acceptable levels.

In summary, our analysis indicates that in order to ensure that lead emissions from this source do not pose an unacceptable risk, emissions from

[22] Under the consent decree, of which we sought public comment last fall, fugitive dust sources will be addressed by site remediation; however, some fugitive dust emissions will remain during the remediation of the site, which will likely extend beyond April 2014.

this facility would need to be reduced to a level that would ensure that these emissions would not result in air lead levels greater than the 0.15 μg/m^3 for any 3-month period at all of the modeled locations. Further, we conclude that in order to achieve the 0.15 μg/m^3 level (for any 3-month rolling average) at all modeled locations, fugitive dust emissions would need to be reduced by 98 percent and the emissions from the furnace area and refining operation stacks would need to be reduced by 80 percent. We have identified emission reduction and control options for achieving the required reductions, which include implementation of site remediation, work practices, and upgrade of existing baghouses with membrane bags and/or addition of an additional in-series baghouse.

We are proposing the following requirements to ensure that risk is reduced to an acceptable level.

- A stack lead emission cap of 0.91 TPY that would apply to the furnace area stack and the refining operation stacks.
- An air lead concentration limit of 0.15 μg/m^3 based on 3-month rolling average (to be measured at locations approved by the Administrator) to ensure that fugitive dust emission levels will not exceed the NAAQS.

The proposed limits apply to both new and existing facilities. Any facility subject to the MACT would be required to meet these requirements for each emission unit it is operating that is subject to the limit. In order to address any fugitive dust emissions, the facility, regardless of whether it is operating all or just some of the emission sources covered by this action, would be required to meet the air lead concentration emission limit.

For both new and existing facilities, compliance with the air lead concentration limit would be demonstrated using lead compliance monitoring devices and would be based on a rolling 3-month average concentration. The proposed rule requires development of a monitoring plan for approval by the Administrator that includes the minimum sampling and analysis methods and compliance demonstration criteria provided in the rule. A provision is included in this proposed rule that allows for reduced monitoring if the facility demonstrates an air lead concentration for three consecutive years at less than 50 percent of the air lead concentration limit. The monitoring can be reduced to once every six months unless one of the 6-month monitoring events exceeds 50 percent of the air lead concentration limit, at which time monitoring will be required to resume based on the initial plan approved by the Administrator until another three years of consecutive monitoring below 50 percent of the air lead concentration limit is achieved. The compliance requirements discussed above were designed to allow for flexibility, prevention of redundant requirements, and also to provide consistency with current monitoring required at the site. We are soliciting comment on this approach. For existing facilities, compliance with the emission limit for the furnace area and refinery stacks would be demonstrated through stack testing conducted on a quarterly basis. All performance testing will be consistent with the existing MACT testing requirements, with the exception of frequency. As provided in § 63.153(e) of the current rule, the facility can reduce compliance testing frequency if the most recent three compliance tests demonstrated compliance. We are maintaining this provision, however, because this proposed rule increases the testing frequency to quarterly, the number of most recent tests necessary to comply with this provision will be increased from three to 12. New primary lead processing facilities would be required to demonstrate compliance using a lead continuous emission monitoring systems (CEMS). However, since the Agency has not finalized the performance specification for the use of these instruments, we are deferring the effective date of the requirement to install, correlate, maintain and operate lead CEMS until these actions can be completed. The lead CEMS installation deadline will be established through future rulemaking, along with other pertinent requirements. In the event operations commence at a new facility prior to promulgation of the performance specification, compliance would be demonstrated through quarterly stack testing until promulgation of the lead CEMS performance specification.

2. Ample Margin of Safety

Reducing lead emissions to meet the NAAQS would ensure that emissions of all HAP do not pose an unacceptable risk. Once we ensure that the risk is acceptable, we then look to determine whether further reductions are appropriate to ensure an ample margin of safety. In this part of our analysis, we again consider the health factors we considered to determine whether the risks are acceptable but we also consider the cost of controls.

With regard to lead emissions, we are proposing to require most of the emission sources at the facility to implement all technically feasible controls in order to ensure that the ambient air meets the level of the lead NAAQS, which is the level that we have determined will ensure an acceptable level of risk. Because all feasible controls will need to be adopted in order to meet that proposed standard, there are no additional controls to consider for the three emission sources: Fugitive dust emissions, the furnace area stack, and the refinery stacks. We further note that the same controls we have proposed for the three emission points to reduce lead emissions are the same controls that would reduce risks from cadmium and all other metal HAP known to be emitted from this source category. Thus, we are proposing that the controls required to ensure that risk from lead emissions from those three emission points is acceptable also protect public health with an ample margin of safety with regard to emissions from all metal HAP from these three emission points. Notably, after these standards are in place, we estimate that the MIR cancer risk due to the non-lead HAP will be less than 1-in-1 million.

Our risk analysis indicates that the main stack emissions do not result in ambient air lead levels exceeding the NAAQS based on either actual or allowable emission levels. We determined, as discussed section V.D. below, that it is technologically feasible to reduce emissions from the main stack to a level well below the allowable level of the MACT, since those levels are currently being achieved, and thus we are proposing to require such controls under CAA section 112(d)(6). We evaluated whether there were additional controls to further reduce emissions from the main stack and determined that lead emissions from the main stack could be further reduced by replacing the standard cloth bags with membrane bags at a capital cost of approximately $2 million and an annual cost of $0.3 million. Assuming a 50 percent reduction from 2008 main stack emissions, the cost of reducing lead emissions would be about $40,000 to $229,000 per ton of lead. (See the Technical Support Document included in the docket for a complete discussion of this analysis.) Because the highest ambient air lead concentration resulting from the emissions from the main stack already is more than 20 times below the level that is considered acceptable, it was determined that although additional controls such as membrane bags could result in additional emission reductions, the additional controls are not warranted since they would not

appreciably reduce risk. We are proposing that the MACT standard, with the changes we are proposing under the section 112(d)(6) technology review as described in section V.D. below will provide an ample margin of safety with regard to emissions of lead and other HAP from the main stack.

D. What are the results and proposed decisions from the technology review?

We evaluated developments in practices, processes, and control technologies applicable to emission sources subject to the Primary Lead Smelting MACT. This included a search of the RBLC Clearinghouse, the California BACT Clearinghouse, the internet, and correspondence with state agencies and industry. We have determined that there have been advances in emission control measures since the Primary Lead Smelting MACT standard was originally promulgated in 1999.

The 1999 MACT limit was set using the lead emission limits from the lead SIPs for the three states in which primary lead smelting sources were operational at the time of the rulemaking. EPA took each of the three lead SIP limits, in lb/day, divided them by the corresponding lead production capacity, in tons/day, and calculated a lead emission rate in lb/ton. The results were as follows:

ASARCO—Missouri 1.0 lb/ton
ASARCO—Montana 1.0 lb/ton
Doe Run—Missouri 0.84 lb/ton

The values were ranked and the median value (1.0 lb/ton) was selected as representative of the MACT floor.

Since the MACT standard was promulgated, the industry has undergone significant changes. Two of the three facilities have shut down. The only remaining primary lead smelting facility is the Doe Run smelter at Herculaneum, Missouri, which is subject to control requirements under the Missouri SIP for lead. The existing SIP, as well as a 2007 SIP revision submitted by the State and proposed for approval by EPA require numerous emissions-reducing measures and improvements to add-on control devices, processes, and work practices. We considered these developments in practices, processes, and control technologies in our technology review.

Recent emissions tests (2000 through 2008) at the Doe Run facility support that these improvements have resulted in significantly lower emissions and demonstrate that actual lead emissions from the facility are much lower than are allowed under the current MACT rule. To assess the impacts of developments in practices, processes and control technologies on lead emissions, emissions data from 2008 were compared with emissions data from 2000. Data from 2008 were selected because they reflect the many improvements that have been implemented at the facility since promulgation of the MACT rule. Emissions data from earlier years would not reflect all of the emission-reducing changes that have been implemented at the Doe Run facility given that some of the improvements were not implemented until 2007 and 2008. As described above, technological improvements to baghouses and processes that have been implemented at the facility since the MACT rule was promulgated have resulted in substantially lower emissions from these sources at this facility. These improvements include upgrade of cloth bags and ventilation improvements. In 2008, lead emissions from the main stack, which vents emissions from the sintering operation and the blast and dross furnace, were 13.31 TPY. In addition, emissions from the furnace area stack (*i.e.,* the blast furnace and dross plant building which vent to baghouse 7) were 1.81 TPY, for a total of approximately 15.1 TPY. At the 2008 lead production rate of 149,500 tons, the lead emission rate for these sources at Doe Run was about 0.2 lb/ton, or 80 percent less than the current MACT limit of 1 lb/ton. Based on this demonstrated performance, EPA believes that under Section 112(d)(6), the MACT standard should be revised to reflect the reduction achieved in practice.

Because we believe that the 2008 emissions of 13.31 TPY from the main stack (or combined sintering/blast furnace/drossing operations) reflect the annual rate of emissions achievable as a result of the technological improvements that have been made since 1999, we are proposing an emission limit based on the actual 2008 annual emissions that vent to the main stack (*i.e.,* sintering, blast furnace and drossing operations). In order to account for variability in the operation and emissions, recent stack tests were used to calculate the 95 percent upper predictive limit (UPL). The 95 percent UPL for the main stack is 15 TPY. Variability in the operations and emission for this source are discussed in more detail in Section E below.

Although we believe that there have been developments in processes, practices and control technologies with regard to the furnace area stack and with regard to refining and casting operations, as reflected by the more stringent requirements that have been implemented in accordance with the approved SIP and the 2007 SIP revisions; we are not proposing additional requirements for these stacks as part of our technology review because we have already proposed that these stacks implement all feasible controls, regardless of cost, in order to ensure that the risks due to these emission points are acceptable. Thus, there are no additional developments in practices, processes and control technologies beyond those which are reflected in the emission limits we have proposed to meet CAA section 112(f)(2), above.

To be consistent with the existing MACT standard, EPA is proposing to retain the plant-wide pound per ton of production format that currently applies to the aggregate emissions from the main stack and the furnace area stack. Because there are also stacks for the refining and casting operations, we are proposing to include those emissions as part of the plant-wide emission limit. Thus we are proposing a plant-wide lead emission limit of 0.22 pounds of lead per ton of lead produced based on the proposed reductions due to the section 112 (f)(2) risk review for the furnace area and refining operations stacks (discussed above in Section C) and the reduction in emissions from the main stack (sinter/blast furnace/drossing operations) based on this Section 112(d)(6) technology review This proposed plant-wide lead emission limit was determined by summing the 15 TPY for the main stack and the 0.91 TPY for the furnace area and the refining operation, and dividing by the annual production from 2008 of 149,564 tons. We note that variability was only applied in establishing technology-based emissions from the main stack in order to establish a plant-wide emission limit. Because the emission levels required from the refining operation and furnace area stacks are based on acceptable risk, we conclude it is not appropriate to consider variability in establishing limits for these emission points.

We are proposing that the plant-wide lead emission limit apply to new and existing facilities that are subject to the MACT. By default this would include any new, controlled lead processing source not currently covered, including lead processing by other than the current techniques. We are requesting comment on the appropriateness of applying the plant-wide lead emission limit to any future new lead processing technique.

For the existing facility, compliance with the plant-wide stack emission limit would be demonstrated in the same

manner as discussed above in section V.C.1 for the furnace area and refining stack limit (*i.e.,* stack testing on a quarterly basis). We are proposing stack testing on a quarterly basis as opposed to testing on an annual basis since this allows the facility the opportunity to adjust their emissions throughout the year to be in compliance, rather than to find they are out of compliance at the end of the year, thereby risking violations. This schedule also coincides with other quarterly monitoring and reporting required of the facility. Also as discussed in section V.C.1, new primary lead processing facilities would be required to demonstrate compliance using lead continuous emission monitoring systems (CEMS).

E. Variability

In assessing sources' performance, EPA may consider variability both in identifying which performers are "best" and in assessing their level of performance. *Brick MACT,* 479 F. 3d at 881–82; see also *Mossville Envt'l Action Now* v. *EPA,* 370 F.3d 1232, 1241–42 (D.C. Cir 2004) (EPA must exercise its judgment, based on an evaluation of the relevant factors and available data, to determine the level of emissions control that has been achieved by the best performing sources considering these sources' operating variability).

Variability in lead producers' performance has a number of causes. For emissions of lead compounds that are controlled by baghouses, the variability is chiefly due to variations in performance of the control device for which both run-to-run and test-to-test variability must be accounted.[23]

In determining the contribution to a plant-wide emission limit of the main stack, we considered annual emissions discharged from the air pollution control devices that control lead emissions. For this rule, we used the 2008 emissions reported by Doe Run to the State of Missouri.

We assessed variability using a statistical formula designed to estimate an emissions level that is equivalent to the source's performance based on future compliance tests. Specifically, the calculated limit is an upper prediction limit (UPL) calculated with the Student's t-test using the TINV function in Microsoft Excel®. The Student's t-test has also been used in other EPA rulemakings (*e.g.,* NESHAP for Portland Cement Manufacturing [75 FR 54970, September 9, 2010]; NSPS for Hospital/Medical/Infectious Waste Incinerators [74 FR 51368, October 6, 2009]; NESHAP for Industrial, Commercial, and Institutional Boilers and Process Heaters-Proposed [75 FR 32006, June 4, 2010]) in accounting for variability. A prediction interval for a future observation is an interval that will, with a specified degree of confidence, contain the next (or some other pre-specified) randomly selected observation from a population. In other words, the prediction interval estimates what the upper bound of future values will be, based upon present or past samples taken. The UPL consequently represents the value which we can expect the mean of future observations (3-run average for lead) to fall below within a specified level of confidence, based upon the results of an independent sample from the same population. In other words, if we were to randomly select a future test condition from any of these sources (*i.e.,* average of 3 runs or 30-day average) we can be 95 percent confident that the reported level will fall at or below the UPL value. Use of the UPL is appropriate in this rulemaking because it sets a limit any single or future source can meet based on the sources past performance.

This formula uses a pooled variance (in the s^2 term) that encompasses all the data-point to data-point variability. Where variability was calculated using the UPL statistical approach, we used the sample standard deviation calculated from the emissions data distributions for lead. The standard deviation is the common measure of the dispersion of the data set around an average. We note here that the methodology accounts for both short-term and long-term variability and encompasses run-to-run and test-to-test variability.

We adopted a form of the UPL equation that has been used in more recent rulemakings. See 75 FR 54970 (September 9, 2010), 75 FR 32020 (June 4, 2010) and 75 FR 31905 (June 4, 2010). The UPL used in this proposed rule is calculated by:

$$UPL = \bar{x} + t(0.99, n-1) \times \sqrt{s^2 \times \left(\frac{1}{n} + \frac{1}{m}\right)}$$

Where:

$\bar{x}$ = 2008 annual emissions
n = the number of test runs
m = the number of test runs in the compliance average
s^2 = observed variance
t = student t distribution statistic

This calculation was performed using the following Excel functions: 95 percent UPL = 2008 annual emissions + [STDEV (Test Runs) × TINV (2 × probability, n-1 degrees of freedom) × SQRT ((1/n) + (1/m))], for a one-tailed t-value, probability of 0.05, and sample size of n.

F. What other actions are we proposing?

As discussed in Section III.C. above, EPA is proposing to remove provisions in the existing standard that would have exempted sources from complying with the standard during periods of startup, shutdown and malfunction. Specifically we are proposing revisions to subpart TTT Table 1 and rule provisions to remove applicability of the General Provisions with regard to SSM and remove the exemption for bag leak detection alarm time attributable to SSM events from determining compliance with the total alarm time limit. In addition, we are proposing to promulgate an affirmative defense to civil penalties for exceedances of emission limits caused by malfunctions, as well as criteria for establishing the affirmative defense.

EPA has attempted to ensure that we have not included in the proposed regulatory language any provisions that are inappropriate, unnecessary, or redundant in the absence of the SSM exemption. We are specifically seeking comment on whether there are any such provisions that we have inadvertently incorporated or overlooked.

[23] Run-to-run variability is essentially within-test variability, and encompasses variability in individual runs comprising the compliance test, and includes uncertainties in correlation of monitoring parameters and emissions, and imprecision of stack test methods and laboratory analysis. 72 FR 54877 (Sept. 27, 2007). Test-to-test variability results from variability in pollution device control efficiencies over time (depending on many factors, including for fabric filters the point in the maintenance cycle in which a fabric filter is tested). Test-to-test variability can be termed long-term variability. 72 FR 54878.

VI. Proposed Action

A. What actions are we proposing as a result of the residual risk reviews?

Consistent with CAA section 112 (f)(2), we are proposing to amend the MACT standard for primary lead processing to include a lead concentration in air limit of 0.15 μg/m3 (based on 3-month rolling averages)to be measured at locations approved by the Administrator to address the risks from all fugitive dust emissions addressed in 40 CFR 63.1544. We are also proposing to remove refining and casting operations from § 63.1544 and to require that emissions from these operations be vented to one or more stacks. Finally, we are proposing to establish an emission cap of 0.91 TPY for the furnace area stack and the refining operation stacks. These limits were established based on the level of reductions in lead emissions from the three sources that are necessary to show that the lead NAAQS will not be exceeded within the 50 km modeled domain. We believe the NAAQS level represents an acceptable level of risk and that the proposed limits are necessary to ensure that risks from these sources are acceptable. We are proposing that the risk posed by lead emissions from the main stack and by emissions of all other HAP is acceptable.

We are proposing that compliance with the emission limits applicable to the furnace area and refinery stacks would be demonstrated based on stack testing for existing facilities and, for new facilities, using CEMS after promulgation of performance specifications for a CEMS capable of measuring lead emissions.

We are proposing that compliance with the lead concentration in air limit would be demonstrated using a compliance monitoring system approved by the Administrator.

We are also proposing that the Primary Lead Smelting standard, as we have proposed to revise it to ensure an acceptable level of risk, will also protect public health with an ample margin of safety. With regard to lead emissions from fugitive dust sources and from the furnace and refining area stacks, we have not identified any feasible controls beyond those needed to meet the proposed emission limits that will provide an acceptable level of risk . The standards we are proposing to ensure an acceptable level of risk for lead emissions will also reduce the risk from cadmium and will also reduce emissions of all other metal HAP known to be emitted from this source category because the controls that will reduce lead emissions are the same controls that will reduce emissions of these other metal HAP. The cancer risk from cadmium emissions will be reduced from 30-in-1 million to less than 1-in-1 million. Therefore, we are proposing that the existing MACT, as it would be modified based on our proposed requirements for lead emissions, would provide an ample margin of safety with respect to emissions from all metal HAP.

With regard to lead emissions from the main stack, we have identified developments in practices, processes and control technologies since promulgation of the MACT standard in 1999, and are proposing a reduced emission limit for the main stack based on these improvements. Since the main stack does not pose an unacceptable risk at its current emissions level, we are not proposing reductions for this emission point under 112(f)(2). However, we are proposing a reduced emission limit under 112(d)(6) due to the improvements we identified.

B. What actions are we proposing as a result of the technology reviews?

For the Primary Lead Smelting source category, we have determined that there have been developments in practices, processes, or control technologies since the promulgation of the MACT standards that are feasible for the one facility in this source category to implement at the main stack. The proposed limit is consistent with the current demonstrated performance of the facility based on obligations adopted by the State and reflected in the 2002 SIP and 2007 SIP revision for Doe Run.

We are proposing that a performance of 15.11 TPY has been demonstrated for emissions from the main stack, taking into consideration variability of emissions from that stack. The existing MACT lead emissions standard that is applicable to emissions from the main stack is a plant-wide emission limit that also applies to emissions from the furnace-area stack. We are proposing to revise the plant-wide limit to reflect the 15.11 TPY limit for the main stack as well as the emissions limits we are proposing for the furnace-area and refinery stacks under CAA section 112(f)(2). Thus, we are proposing to revise the plant-wide emissions limit from 1 pound of lead per ton of lead produced, to 0.22 pound of lead per ton of lead produced and the new limit would include emissions from the refinery stack as well as emissions from the main stack and the furnace area stack. Compliance with this limit would be demonstrated quarterly with stack testing. For new facilities, compliance would be demonstrated using lead CEMS.

C. What other actions are we proposing?

As described above, we are proposing to amend the applicability section for the MACT rule to tailor it to the definition of the source category we established under CAA section 112(c)(1). See "Documentation for Development of Initial Source Category List—Final Report", USEPA/OAQPS, EPA–450/3–91–030, July, 1992. In support of this applicability provision clarification, we are also proposing to replace the definition of "primary lead smelter" with a definition of "primary lead processor". The "primary lead processor" definition would include any facility that produces lead from processing of lead sulfide ore by pyrometallurgical (smelting) or any other technique. We are also proposing to add definitions of "secondary lead smelters", "lead refiners", and "lead remelters" to clarify the meaning of those terms in the second sentence of the applicability provision.

We propose to amend the Primary Lead Smelting MACT standards to remove the language that exempts bag leak detection system alarm time incurred during periods of SSM from inclusion in the allowable alarm time. This change is being made to ensure the rule is consistent with the court's ruling in *Sierra Club* v. *EPA,* 551 F.3d 1019 (D.C. Cir. 2008). We are also proposing minor modifications throughout the rule to incorporate plain language and to make editorial and clarifying revisions. In addition, we are proposing changes to Table 1 of the rule to reflect revisions to SSM requirements.

D. Compliance Dates

We are proposing that the requirements under CAA section 112(f)(2) for the one existing source, if finalized, must be implemented no later than two years after the effective date of this rule. Consistent with CAA section 112(f)(4)(B), we are proposing that a two-year compliance period is necessary so the facility has adequate time to install additional controls and demonstrate compliance, including the time necessary to purchase, install and test replacement bags, or if the facility decides to add a new baghouse in series with an existing baghouse, seek bids, select a vendor, install and test the new equipment; prepare and submit the required monitoring plan to monitor lead concentrations in air; purchase, install and conduct quality assurance and quality control measures on compliance monitoring equipment and; conduct site remediation necessary to

reduce fugitive emissions. A two-year compliance period is also consistent with the schedule of required actions contained in the Consent Decree.

In addition, we are proposing that the plant-wide limit that would reflect reductions required for the main stack pursuant to CAA section 112(d)(6) and for the furnace area and refinery stacks pursuant to CAA section 112(f)(2) must be met no later than two years after the effective date of this rule. Because these limits reflect the reductions from the furnace area and refinery stacks required under section 112(f)(2), we believe a two-year compliance timeframe is needed for the same reasons provided above.

VII. Request for Comments

We are soliciting comments on all aspects of this proposed action. All comments received during the comment period will be considered. In addition to general comments on this proposed actions, we are also interested in any additional data that may help to reduce the uncertainties inherent in the risk assessments. We are specifically interested in receiving corrections to the dataset used for risk modeling. Such data should include supporting documentation in sufficient detail to allow characterization of the quality and representativeness of the data or information. Please see the following section for more information on submitting data.

VIII. Submitting Data Corrections

The facility-specific data used in the source category risk analyses and demographic analyses are available for download on the RTR Web Page at *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html.* The data files include detailed information for each HAP emissions release point for the facility included in the source category.

If you believe the data are not representative or are inaccurate, please identify the data in question, provide your reason for concern, and provide any "improved" data that you have, if available. When you submit data, we request that you provide documentation of the basis for the revised values to support your suggested changes. To submit comments on the data downloaded from the RTR Web page, complete the following steps:

(1) Within this downloaded file, enter suggested revisions to the data fields appropriate for that information. The data fields that may be revised include the following:

Data element	Definition
Control Measure	Are control measures in place? (yes or no).
Control Measure Comment	Select control measure from list provided, and briefly describe the control measure.
Delete	Indicate here if the facility or record should be deleted.
Delete Comment	Describes the reason for deletion.
Emission Calculation Method Code For Revised Emissions	Code description of the method used to derive emissions. For example, CEM, material balance, stack test, etc.
Emission Process Group	Enter the general type of emission process associated with the specified emission point.
Fugitive Angle	Enter release angle (clockwise from true North); orientation of the y-dimension relative to true North, measured positive for clockwise starting at 0 degrees (maximum 89 degrees).
Fugitive Length	Enter dimension of the source in the east-west (x-) direction, commonly referred to as length (ft).
Fugitive Width	Enter dimension of the source in the north-south (y-) direction, commonly referred to as width (ft).
Malfunction Emissions	Enter total annual emissions due to malfunctions (TPY).
Malfunction Emissions Max Hourly	Enter maximum hourly malfunction emissions here (lb/hr).
North American Datum	Enter datum for latitude/longitude coordinates (NAD27 or NAD83); if left blank, NAD83 is assumed.
Process Comment	Enter general comments about process sources of emissions.
REVISED Address	Enter revised physical street address for MACT facility here.
REVISED City	Enter revised city name here.
REVISED County Name	Enter revised county name here.
REVISED Emission Release Point Type	Enter revised Emission Release Point Type here.
REVISED End Date	Enter revised End Date here.
REVISED Exit Gas Flow Rate	Enter revised Exit Gas Flowrate here (ft^3/sec).
REVISED Exit Gas Temperature	Enter revised Exit Gas Temperature here (F).
REVISED Exit Gas Velocity	Enter revised Exit Gas Velocity here (ft/sec).
REVISED Facility Category Code	Enter revised Facility Category Code here, which indicates whether facility is a major or area source.
REVISED Facility Name	Enter revised Facility Name here.
REVISED Facility Registry Identifier	Enter revised Facility Registry Identifier here, which is an ID assigned by the EPA Facility Registry System.
REVISED HAP Emissions Performance Level Code	Enter revised HAP Emissions Performance Level here.
REVISED Latitude	Enter revised Latitude here (decimal degrees).
REVISED Longitude	Enter revised Longitude here (decimal degrees).
REVISED MACT Code	Enter revised MACT Code here.
REVISED Pollutant Code	Enter revised Pollutant Code here.
REVISED Routine Emissions	Enter revised routine emissions value here (TPY).
REVISED SCC Code	Enter revised SCC Code here.
REVISED Stack Diameter	Enter revised Stack Diameter here (ft).
REVISED Stack Height	Enter revised Stack Height here (Ft).
REVISED Start Date	Enter revised Start Date here.
REVISED State	Enter revised State here.
REVISED Tribal Code	Enter revised Tribal Code here.
REVISED Zip Code	Enter revised Zip Code here.
Shutdown Emissions	Enter total annual emissions due to shutdown events (TPY).
Shutdown Emissions Max Hourly	Enter maximum hourly shutdown emissions here (lb/hr).

Data element	Definition
Stack Comment	Enter general comments about emission release points.
Startup Emissions	Enter total annual emissions due to startup events (TPY).
Startup Emissions Max Hourly	Enter maximum hourly startup emissions here (lb/hr).
Year Closed	Enter date facility stopped operations.

2. Fill in the commenter information fields for each suggested revision (*i.e.,* commenter name, commenter organization, commenter e-mail address, commenter phone number, and revision comments).

3. Gather documentation for any suggested emissions revisions (*e.g.,* performance test reports, material balance calculations, *etc.*).

4. Send the entire downloaded file with suggested revisions in Microsoft® Access format and all accompanying documentation to Docket ID Number EPA–HQ–OAR–2004–0305 (through one of the methods described in the **ADDRESSES** section of this preamble). To expedite review of the revisions, it would also be helpful if you submitted a copy of your revisions to the EPA directly at *RTR@epa.gov* in addition to submitting them to the docket.

5. If you are providing comments on a facility, you need only submit one file for that facility, which should contain all suggested changes for all sources at that facility. We request that all data revision comments be submitted in the form of updated Microsoft® Access files, which are provided on the *http://www.epa.gov/ttn/atw/rrisk/rtrpg.html* Web page.

IX. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a significant regulatory action because it raises novel legal and policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

The information collection requirements in this 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 1856.07.

We are proposing new paperwork requirements to the Primary Lead Smelting source category in the form of monitoring for lead concentrations in air and increased frequency for stack testing as described in 40 CFR 63.1547(k) (compliance monitoring) and 40 CFR 63.1546 (stack testing). These requirements are described in section VI.A and B. Although these are additional requirements under today's proposed rule, they are consistent with existing monitoring and testing currently conducted by the facility to meet MACT and SIP requirements. Therefore, we do not believe that the additional paperwork required by these proposed changes would constitute an undue burden to the facility.

We estimate one regulated entity is currently subject to subpart TTT and will be subject to all proposed standards. This facility will have no capital costs associated with the information collection requirements in the proposed rule.

The estimated recordkeeping and reporting burden after the effective date of the proposed rule is estimated to be 1,323 labor hours at a cost of $465,503. This estimate includes the cost of reporting, including reading instructions, and information gathering. Recordkeeping cost estimates include reading instructions, planning activities, monitoring plan development, conducting compliance monitoring, sampling and analysis and maintenance of rolling 3-month average data. The average hours and cost per regulated entity would be 1,323 hours and $465,503 based on one facility response per year. 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–2004–0305. 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 February 17, 2011, a comment to OMB is best assured of having its full effect if OMB receives it by March 21, 2011. 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 proposed rule on small entities, small entity is defined as: (1) A small business that is a small industrial entity 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, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities. This proposed rule is currently applicable to one operating facility that does not meet the definition of a small entity.

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 proposed rule does not contain a federal mandate 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 proposed rule would not result in expenditures of $100 million or more for State, local, and tribal governments, in aggregate, or the private sector in any 1 year. The proposed rule imposes no enforceable duties on any State, local or tribal governments or the private sector. Thus, this proposed rule is not subject to the requirements of sections 202 or 205 of the UMRA.

This proposed rule 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 because it contains no requirements that apply to such governments nor does it impose obligations upon them.

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. None of the facilities subject to this action are owned or operated by State governments, and, because no new requirements are being promulgated, nothing in this proposal will supersede State regulations. 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

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000) EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement. EPA has concluded that this proposed rule will not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effect on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

EPA specifically solicits additional comment on this proposed action from tribal officials.

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

This proposed rule is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866. However, the Agency does believe there is a disproportionate risk to children. Modeled ambient air lead concentrations from the one facility in this source category are in excess of the NAAQS for lead, which was set to "provide increased protection for children and other at-risk populations against an array of adverse health effects, most notably including neurological effects in children, including neurocognitive and neurobehavioral effects." 73 FR 67007. However, the control measures proposed in this notice will result in lead concentration levels that are in compliance with the lead NAAQS, thereby mitigating the risk of adverse health effects to children.

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

This action is not a "significant energy action" as defined under 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 significant adverse effect on the supply, distribution, or use of energy. This action will not create any new requirements for sources in the energy supply, distribution, or use sectors.

I. National Technology Transfer and Advancement Act

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

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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

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

To examine the potential for any environmental justice issues that might be associated with each source category, we evaluated the distributions of HAP-related cancer and non-cancer risks across different social, demographic, and economic groups within the populations living near the facilities where these source categories are located. The methods used to conduct demographic analyses for this rule are described in section IV.A of the preamble for this rule. The development of demographic analyses to inform the consideration of environmental justice issues in EPA rulemakings is an evolving science. The EPA offers the demographic analyses in today's rulemaking as examples of how such analyses might be developed to inform such consideration, and invites public comment on the approaches used and the interpretations made from the results, with the hope that this will support the refinement and improve utility of such analyses for future rulemakings.

In the case of Primary Lead Processing, we focused on populations within 50 km of the one facility in this source category with emission sources subject to the MACT standard. More specifically, for these populations we

evaluated exposures to HAP which could result in cancer risks of 1-in-1 million or greater, or population exposures to ambient air lead concentrations above the level of the NAAQS for lead. We compared the percentages of particular demographic groups within the focused populations to the total percentages of those demographic groups nationwide. The results of this analysis are documented in section V.B.1 (*see* Table 6), as well as in a technical report located in the docket for this rulemaking. In brief, although our analyses show that there is the potential for adverse environmental and human health effects from emissions of lead, it does not indicate any significant potential for disparate impacts to the specific demographic groups analyzed (*see* section V.B.1). Notably however, the proposed rule would require additional control measures to address the identified environmental and health risks and would therefore, decrease risks to any populations exposed to these sources.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Reporting and recordkeeping requirements, Lead.

Dated: January 31, 2011.

Lisa P. Jackson,

Administrator.

For reasons set out in the preamble, title 40, chapter I, of the Code of Federal Regulations is proposed to be amended:

PART 63—[AMENDED]

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

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

2. Section 63.1541 is revised to read as follows:

§ 63.1541 Applicability.

(a) The provisions of this subpart apply to any facility engaged in producing lead metal from ore concentrates. The category includes, but is not limited to, the following smelting processes: Sintering, reduction, preliminary treatment, refining and casting operations, process fugitive sources, and fugitive dust sources. The sinter process includes an updraft or downdraft sintering machine. The reduction process includes the blast furnace, electric smelting furnace with a converter or reverberatory furnace, and slag fuming furnace process units. The preliminary treatment process includes the drossing kettles and dross reverberatory furnace process units. The refining process includes the refinery process unit. The provisions of this subpart do not apply to secondary lead smelters, lead refiners, or lead remelters.

(b) Table 1 of this subpart specifies the provisions of subpart A of this part that apply and those that do not apply to owners and operators of primary lead processors.

3. Section 63.1542 is amended by:

a. Adding in alphabetical order definitions for "Affirmative defense," "Lead refiner," "Lead remelter," "Primary lead processor," and "Secondary lead smelter".

b. Removing the definition for "Primary lead smelter".

c. Revising the definitions for "Fugitive dust source," "Furnace area," "Malfunction," "Materials storage and handling area," "Plant roadway," "Process fugitive source," "Refining and casting area," Sinter machine area," and "Tapping location".

§ 63.1542 Definitions.

* * * * *

Affirmative defense means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

* * * * *

Fugitive dust source means a stationary source of hazardous air pollutant emissions at a primary lead processor resulting from the handling, storage, transfer, or other management of lead-bearing materials where the source is not part of a specific process, process vent, or stack. Fugitive dust sources include roadways, storage piles, materials handling transfer points, and materials transport areas.

Furnace area means any area of a primary lead processor in which a blast furnace or dross furnace is located.

Lead refiner means any facility that refines lead metal that is not located at a primary lead processor.

Lead remelter means any facility that remelts lead metal that is not located at a primary lead processor.

Malfunction means any sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner which causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded. Failures that are caused in part by poor maintenance or careless operation are not malfunctions.

Materials storage and handling area means any area of a primary lead processor in which lead-bearing materials (including ore concentrate, sinter, granulated lead, dross, slag, and flue dust) are stored or handled between process steps, including areas in which materials are stored in piles, bins, or tubs, and areas in which material is prepared for charging to a sinter machine or smelting furnace or other lead processing operation.

* * * * *

Plant roadway means any area of a primary lead processor that is subject to vehicle traffic, including traffic by forklifts, front-end loaders, or vehicles carrying ore concentrates or cast lead ingots. Excluded from this definition are employee and visitor parking areas, provided they are not subject to traffic by vehicles carrying lead-bearing materials.

Primary lead processor means any facility engaged in the production of lead metal from lead sulfide ore concentrates through the use of pyrometallurgical or other techniques.

Process fugitive source means a source of hazardous air pollutant emissions at a primary lead processor that is associated with lead smelting, processing or refining but is not the primary exhaust stream and is not a fugitive dust source. Process fugitive sources include sinter machine charging locations, sinter machine discharge locations, sinter crushing and sizing equipment, furnace charging locations, furnace taps, and drossing kettle and refining kettle charging or tapping locations.

Refining and casting area means any area of a primary lead processor in which drossing or refining operations occur, or casting operations occur.

Secondary lead smelter means any facility at which lead-bearing scrap material, primarily, but not limited to, lead-acid batteries, is recycled into elemental lead or lead alloys by smelting.

* * * * *

Sinter machine area means any area of a primary lead processor where a sinter machine, or sinter crushing and sizing equipment is located.

* * * * *

Tapping location means the opening through which lead and slag are removed from the furnace.

4. Section 63.1543 is revised to read as follows:

§ 63.1543 Standards for process and process fugitive sources.

(a) No owner or operator of any existing, new, or reconstructed primary lead processor shall discharge or cause to be discharged into the atmosphere lead compounds in excess of 0.22

pounds per ton of lead metal produced from the aggregation of emissions discharged from air pollution control devices used to control emissions at primary lead processing facilities, including the sources listed in paragraphs (a)(1) through (a)(10) of this section.

(1) Sinter machine;

(2) Blast furnace;

(3) Dross furnace;

(4) Dross furnace charging location;

(5) Blast furnace and dross furnace tapping location;

(6) Sinter machine charging location;

(7) Sinter machine discharge end;

(8) Sinter crushing and sizing equipment;

(9) Sinter machine area; and

(10) Refining and casting, and furnace area.

(b) No owner or operator of any existing, new, or reconstructed primary lead processor shall discharge or cause to be discharged into the atmosphere lead compounds in excess of 0.91 tons per year from the air pollution control devices used to control emissions from furnace area and refining and casting operations.

(c) The process fugitive sources listed in paragraphs (a)(4) through (a)(8) of this section must be equipped with a hood and must be ventilated to a baghouse or equivalent control device. The hood design and ventilation rate must be consistent with American Conference of Governmental Industrial Hygienists recommended practices.

(d) The sinter machine area must be enclosed in a building that is ventilated to a baghouse or equivalent control device at a rate that maintains a positive in-draft through any doorway opening.

(e) Except as provided in paragraph (f) of this section, following the initial tests to demonstrate compliance with paragraphs (a)and (b) of this section, the owner or operator of a primary lead processor must conduct compliance tests for lead compounds on an quarterly basis (no later than 100 days following any previous compliance test).

(f) If the 12 most recent compliance tests demonstrate compliance with the emission limit specified in paragraphs (a) and (b) of this section, the owner or operator of a primary lead processor shall be allowed up to 12 calendar months from the last compliance test to conduct the next compliance test for lead compounds.

(g) The owner or operator of a primary lead processor must maintain and operate each baghouse used to control emissions from the sources listed in paragraphs (a)(1) through (a)(10) of this section such that the alarm on a bag leak detection system required under § 63.1547(c)(8) does not sound for more than five percent of the total operating time in a 6-month reporting period.

(h) The owner or operator of a primary lead processor must record the date and time of a bag leak detection system alarm and initiate procedures to determine the cause of the alarm according to the corrective action plan required under § 63.1547(f) within 1 hour of the alarm. The cause of the alarm must be corrected as soon as practicable.

(i) At all times, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

5. Section 63.1544 is revised to read as follows:

§ 63.1544 Standards for fugitive dust sources.

(a) No owner or operator of any existing, new or reconstructed primary lead processor shall discharge or cause to be discharged into the atmosphere lead compounds that cause the concentration of lead in air to exceed 0.15 μg/m^3 on a 3-month rolling average measured at locations approved by the Administrator.

(b) At all times, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

6. Section 63.1545 is revised to read as follows:

§ 63.1545 Compliance dates.

(a) Each owner or operator of an existing primary lead processor must achieve compliance with the requirements of this subpart no later than [DATE TWO YEARS FROM PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER].

(b) Each owner or operator of a new primary lead processor must achieve compliance with the requirements of this subpart no later than [DATE 60 DAYS AFTER PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER] or startup, whichever is later.

7. Section 63.1546 is revised to read as follows:

§ 63.1546 Performance testing.

(a) The following procedures must be used to determine quarterly compliance with the emissions standard for lead compounds under § 63.1543(a) and (b) for existing sources:

(1) Each owner or operator of existing sources listed in § 63.1543(a)(1) through (10) must determine the lead compound emissions rate, in units of pounds of lead per hour according to the following test methods in appendices of part 60 of this chapter:

(i) Method 1 to appendix A–1 of 40 CFR part 60 must be used to select the sampling port location and the number of traverse points.

(ii) Methods 2 and 2F of appendix A–1 and Method 2G of appendix A–2 of 40 CFR part 60 must be used to measure volumetric flow rate.

(iii) Methods 3, 3A, 3B of appendix A–2 of 40 CFR part 60 must be used for gas analysis.

(iv) Method 4 of appendix A–3 of 40 CFR part 60 must be used to determine moisture content of the stack gas.

(v) Method 12 of appendix A–5 or Method 29 of appendix A–8 of 40 CFR part 60 must be used to determine lead emissions rate of the stack gas.

(2) A performance test shall consist of at least three runs. For each test run with Method 12 of appendix A–5 or Method 29 of appendix A–8 of 40 CFR part 60, the minimum sample time must be 60 minutes and the minimum volume must be 1 dry standard cubic meter (35 dry standard cubic feet).

(3) Performance tests shall be completed quarterly, once every 3 months, to determine compliance.

(4) The lead emission rate in pounds per quarter is calculated by multiplying the quarterly lead emission rate in pounds per hour by the quarterly plant operating time, in hours as shown in Equation 1:

$$E_{Pb} = ER_{Pb} \times QPOT \quad \text{(Eq. 1)}$$

Where:

E_{Pb} = quarterly lead emissions, pounds per quarter;

ER_{Pb} = quarterly lead emissions rate, pounds per hour; and
QPOT = quarterly plant operating time, hours per quarter.

(5) The lead production rate, in units of tons per quarter, must be determined based on production data for the previous quarter according to the procedures detailed in paragraphs (a)(5)(i) through (iv) of this section:

(i) Total lead products production multiplied by the fractional lead content must be determined in units of tons.

(ii) Total copper matte production multiplied by the fractional lead content must be determined in units of tons.

(iii) Total copper speiss production multiplied by the fractional lead content must be determined in units of tons.

(iv) Total quarterly lead production must be determined by summing the values obtained in paragraphs (a)(5)(i) through (a)(5)(iii) of this section.

(6) To determine compliance with the production-based lead compound emission rate in § 63.1543(a), the quarterly production-based lead compound emission rate, in units of pounds of lead emissions per ton of lead produced, is calculated as shown in Equation 2 by dividing lead emissions by lead production.

$$CE_{Pb} = \frac{E_{Pb}}{P_{Pb}} \qquad \text{(Eq. 2)}$$

Where:
CE_{Pb} = quarterly production-based lead compound emission rate, in units of pounds of lead emissions per ton of lead produced;
E_{Pb} = quarterly lead emissions, pounds per quarter; and
P_{Pb} = quarterly lead production, tons per quarter.

(7) To determine quarterly compliance with the emissions standard for lead compounds under § 63.1543(b), sum the lead compound emission rates for the current and previous three quarters for the sources in § 63.1543 (a)(10) to determine compliance with § 63.1543(b), as determined in accordance with paragraphs (a)(1) through (a)(4) of this section.

(b) Owner and operators must perform an initial compliance test to demonstrate compliance with the sinter building in-draft requirements of § 63.1543(d) at each doorway opening in accordance with paragraphs (b)(1) through (b)(4) of this section.

(1) Use a propeller anemometer or equivalent device.

(2) Determine doorway in-draft by placing the anemometer in the plane of the doorway opening near its center.

(3) Determine doorway in-draft for each doorway that is open during normal operation with all remaining doorways in their customary position during normal operation.

(4) Do not determine doorway in-draft when ambient wind speed exceeds 2 meters per second.

(c) Performance tests shall be conducted under such conditions as the Administrator specifies to the owner or operator based on representative performance of the affected source for the period being tested. Upon request, the owner or operator shall make available to the Administrator such records as may be necessary to determine the conditions of performance tests.

8. Section 63.1547 is revised to read as follows:

§ 63.1547 Monitoring requirements.

(a) Owners and operators of primary lead processors must prepare, and at all times operate according to, a standard operating procedures manual that describes in detail the procedures for inspection, maintenance, and bag leak detection and corrective action for all baghouses that are used to control process, process fugitive, or fugitive dust emissions from any source subject to the lead emission standards in §§ 63.1543 and 63.1544, including those used to control emissions from general ventilation systems.

(b) The standard operating procedures manual for baghouses required by paragraph (a) of this section must be submitted to the Administrator or delegated authority for review and approval.

(c) The procedures specified in the standard operating procedures manual for inspections and routine maintenance must, at a minimum, include the requirements of paragraphs (c)(1) through (c)(8) of this section.

(1) Weekly confirmation that dust is being removed from hoppers through visual inspection or equivalent means of ensuring the proper functioning of removal mechanisms.

(2) Daily check of compressed air supply for pulse-jet baghouses.

(3) An appropriate methodology for monitoring cleaning cycles to ensure proper operation.

(4) Monthly check of bag cleaning mechanisms for proper functioning through visual inspection or equivalent means.

(5) Quarterly visual check of bag tension on reverse air and shaker-type baghouses to ensure that bags are not kinked (kneed or bent) or laying on their sides. Such checks are not required for shaker-type baghouses using self-tensioning (spring loaded) devices.

(6) Quarterly confirmation of the physical integrity of the baghouse through visual inspection of the baghouse interior for air leaks.

(7) Quarterly inspection of fans for wear, material buildup, and corrosion through visual inspection, vibration detectors, or equivalent means.

(8) Except as provided in paragraph (h) of this section, continuous operation of a bag leak detection system.

(d) The procedures specified in the standard operating procedures manual for maintenance must, at a minimum, include a preventative maintenance schedule that is consistent with the baghouse manufacturer's instructions for routine and long-term maintenance.

(e) The bag leak detection system required by paragraph (c)(8) of this section must meet the specifications and requirements of (e)(1) through (e)(8) of this section.

(1) The bag leak detection system must be certified by the manufacturer to be capable of detecting particulate matter emissions at concentrations of 10 milligram per actual cubic meter (0.0044 grains per actual cubic foot) or less.

(2) The bag leak detection system sensor must provide output of relative particulate matter loadings, and the owner or operator must continuously record the output from the bag leak detection system.

(3) The bag leak detection system must be equipped with an alarm system that will sound when an increase in relative particulate loading is detected over a preset level, and the alarm must be located such that it can be heard or otherwise determined by the appropriate plant personnel.

(4) Each bag leak detection system that works based on the triboelectric effect must be installed, calibrated, and maintained in a manner consistent with guidance provided in the U.S. Environmental Protection Agency guidance document "Fabric Filter Bag Leak Detection Guidance" (EPA–454/R–98–015). Other bag leak detection systems must be installed, calibrated, and maintained in a manner consistent with the manufacturer's written specifications and recommendations.

(5) The initial adjustment of the system must, at a minimum, consist of establishing the baseline output by adjusting the sensitivity (range) and the averaging period of the device, and establishing the alarm set points and the alarm delay time.

(6) Following initial adjustment, the owner or operator must not adjust the sensitivity or range, averaging period, alarm set points, or alarm delay time, except as detailed in the approved SOP required under paragraph (a) of this

section. In no event shall the sensitivity be increased by more than 100 percent or decreased more than 50 percent over a 365-day period unless a responsible official certifies that the baghouse has been inspected and found to be in good operating condition.

(7) For negative pressure, induced air baghouses, and positive pressure baghouses that are discharged to the atmosphere through a stack, the bag leak detector must be installed downstream of the baghouse and upstream of any wet acid gas scrubber.

(8) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(f) The standard operating procedures manual required by paragraph (a) of this section must include a corrective action plan that specifies the procedures to be followed in the event of a bag leak detection system alarm. The corrective action plan must include at a minimum, procedures to be used to determine the cause of an alarm, as well as actions to be taken to minimize emissions, which may include, but are not limited to, the following.

(1) Inspecting the baghouse for air leaks, torn or broken bags or filter media, or any other condition that may cause an increase in emissions.

(2) Sealing off defective bags or filter media.

(3) Replacing defective bags or filter media, or otherwise repairing the control device.

(4) Sealing off a defective baghouse compartment.

(5) Cleaning the bag leak detection system probe, or otherwise repairing or maintaining the bag leak detection system.

(6) Shutting down the process producing the particulate emissions.

(g) The percentage of total operating time the alarm on the bag leak detection system sounds in a 6-month reporting period must be calculated in order to determine compliance with the five percent operating limit in § 63.1543(h). The percentage of time the alarm on the bag leak detection system sounds must be determined according to paragraphs (g)(1) through (g)(3) of this section.

(1) For each alarm where the owner or operator initiates procedures to determine the cause of an alarm within 1 hour of the alarm, 1 hour of alarm time must be counted.

(2) For each alarm where the owner or operator does not initiate procedures to determine the cause of the alarm within 1 hour of the alarm, alarm time will be counted as the actual amount of time taken by the owner or operator to initiate procedures to determine the cause of the alarm.

(3) The percentage of time the alarm on the bag leak detection system sounds must be calculated as the ratio of the sum of alarm times to the total operating time multiplied by 100.

(h) Baghouses equipped with HEPA filters as a secondary filter used to control process or process fugitive sources subject to the lead emission standards in § 63.1543 are exempt from the requirement in paragraph (c)(8) of this section to be equipped with a bag leak detector. The owner or operator of an affected source that uses a HEPA filter must monitor and record the pressure drop across the HEPA filter system daily. If the pressure drop is outside the limit(s) specified by the filter manufacturer, the owner or operator must take appropriate corrective measures, which may include, but not be limited to, the following:

(1) Inspecting the filter and filter housing for air leaks and torn or broken filters.

(2) Replacing defective filter media, or otherwise repairing the control device.

(3) Sealing off a defective control device by routing air to other comparable control devices.

(4) Shutting down the process producing the particulate emissions.

(i) Owners and operators must monitor sinter machine building in-draft to demonstrate continued compliance with the operating standard specified in § 63.1543(d) in accordance with either paragraph (i)(1), (i)(2), or (i)(3) of this section.

(1) Owners and operators must check and record on a daily basis doorway in-draft at each doorway in accordance with the methodology specified in § 63.1546(b).

(2) Owners and operators must establish and maintain baseline ventilation parameters which result in a positive in-draft according to paragraphs (i)(2)(i) through (i)(2)(iv) of this section.

(i) Owners and operators must install, calibrate, maintain, and operate a monitoring device that continuously records the volumetric flow rate through each separately ducted hood; or install, calibrate, maintain, and operate a monitoring device that continuously records the volumetric flow rate at the control device inlet of each exhaust system ventilating the building. The flow rate monitoring device(s) can be installed in any location in the exhaust duct such that reproducible flow rate measurements will result. The flow rate monitoring device(s) must have an accuracy of plus or minus 10 percent over the normal process operating range and must be calibrated according to manufacturer's instructions.

(ii) During the initial demonstration of sinter building in-draft, and at any time the owner or operator wishes to re-establish the baseline ventilation parameters, the owner or operator must continuously record the volumetric flow rate through each separately ducted hood, or continuously record the volumetric flow rate at the control device inlet of each exhaust system ventilating the building and record exhaust system damper positions. The owner or operator must determine the average volumetric flow rate(s) corresponding to the period of time the in-draft compliance determinations are being conducted.

(iii) The owner or operator must maintain the volumetric flow rate(s) at or above the value(s) established during the most recent in-draft determination at all times the sinter machine is in operation. Volumetric flow rate(s) must be calculated as a 15-minute average.

(iv) If the volumetric flow rate is monitored at the control device inlet, the owner or operator must check and record damper positions daily to ensure they are in the positions they were in during the most recent in-draft determination.

(3) An owner or operator may request an alternative monitoring method by following the procedures and requirements in § 63.8(f) of the General Provisions.

(j) Each owner or operator of new or modified sources listed under § 63.1543 (a)(1) through (a)(10) must install, calibrate, maintain, and operate a continuous emission monitoring system (CEMS) for measuring lead emissions and a continuous emission rate monitoring system (CERMS) subject to Performance Specification 6 of Appendix B to part 60.

(1) Each owner or operator of a source subject to the emissions limits for lead compounds under § 63.1543(a) and (b) must install a CEMS for measuring lead emissions within 180 days of promulgation of performance specifications for lead CEMS.

(i) Prior to promulgation of performance specifications for CEMS used to measure lead concentrations, an owner or operator must use the procedure described in § 63.1546(a)(1) through (a)(7) of this section to determine compliance.

(ii) [Reserved]

(2) If a CEMS used to measure lead emissions is applicable, the owner or operator must install a CERMS with a sensor in a location that provides representative measurement of the exhaust gas flow rate at the sampling

location of the CEMS used to measure lead emissions, taking into account the manufacturer's recommendations. The flow rate sensor is that portion of the system that senses the volumetric flow rate and generates an output proportional to that flow rate.

(i) The CERMS must be designed to measure the exhaust gas flow rate over a range that extends from a value of at least 20 percent less than the lowest expected exhaust flow rate to a value of at least 20 percent greater than the highest expected exhaust gas flow rate.

(ii) The CERMS must be equipped with a data acquisition and recording system that is capable of recording values over the entire range specified in paragraph (b)(2)(i) of this section.

(iii) Each owner or operator must perform an initial relative accuracy test of the CERMS in accordance with the applicable Performance Specification in Appendix B to part 60 of the chapter.

(iv) Each owner or operator must operate the CERMS and record data during all periods of operation of the affected facility including periods of startup, shutdown, and malfunction, except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, and required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments.

(3) Each owner or operator must calculate the lead emissions rate in tons per year by summing all hours of CEMS data for a year to determine compliance with 63.1543(b).

(i) When the CERMS are unable to provide quality assured data the following applies:

(A) When data are not available for periods of up to 48 hours, the highest recorded hourly emission rate from the previous 24 hours must be used.

(B) When data are not available for 48 or more hours, the maximum daily emission rate based on the previous 30 days must be used.

(ii) [Reserved]

(k) The owner or operator of each source subject to § 63.1544(a) must operate a continuous monitoring system for the measurement of lead compound concentrations in air.

(1) The owner or operator must operate compliance monitors sufficient in number, location, and frequency of sample collection to detect expected maximum concentrations of lead compounds in air due to emissions from the affected source(s) in accordance with a written plan as described in (k)(2) of this paragraph and approved by the Administrator. The plan must include descriptions of the sampling and analytical methods used. The plan may take into consideration existing monitoring being conducted under a state monitoring plan in accordance with part 58 of this chapter.

(2) The owner or operator must submit a written plan describing and explaining the basis for the design and adequacy of the compliance monitoring network, the sampling, analytical, and quality assurance procedures, and any other related procedures, and the justification for any seasonal, background, or other data adjustments within 45 days after the effective date of this subpart.

(3) The Administrator at any time may require changes in, or expansion of, the monitoring program, including additional sampling and analytical protocols and network design.

(l) If all rolling three-month average concentrations of lead in air measured by the compliance monitoring system are less than 50 percent of the lead concentration in air limit in § 63.1544(a) for three consecutive years, the owner or operator may submit a revised plan to reduce the monitoring sampling and analysis frequency (*e.g.,* from daily to weekly). For any subsequent period, if any rolling three-month average lead concentration in air measured at any monitor in the monitoring system exceeds 50 percent of the concentration limit in § 63.1544(a), the owner or operator must resume monitoring pursuant to paragraph (k)(1) of this section at all monitors until another three consecutive years of lead concentration in air measurements less than 50 percent of the lead concentration in air limit is demonstrated.

9. Section 63.1548 is revised to read as follows:

§ 63.1548 Notification requirements.

(a) The owner or operator of a primary lead processor must comply with the notification requirements of § 63.9 of subpart A, General Provisions as specified in Table 1 of this subpart.

(b) The owner or operator of a primary lead processor must submit the standard operating procedures manual for baghouses required under § 63.1547(a) to the Administrator or delegated authority along with a notification that the primary lead processor is seeking review and approval of the manual and procedures. Owners or operators of existing primary lead processors must submit this notification no later than November 6, 2000. The owner or operator of a primary lead processor that commences construction or reconstruction after April 17, 1998, must submit this notification no later than 180 days before startup of the constructed or reconstructed primary lead processor, but no sooner than September 2, 1999.

(c) The owner or operator of a primary lead processor must submit the compliance monitoring network plan required under § 63.1547(k)(2) to the Administrator or delegated authority along with a notification that the primary lead processor is seeking review and approval of the plan. Owners or operators of existing primary lead processors must submit this notification no later than 45 days after promulgation of this subpart. The owner or operator of a new, reconstructed, or modified primary lead processor must submit this notification no later than 180 days before startup of the constructed or reconstructed primary lead processor.

10. Section 63.1549 is revised to read as follows:

§ 63.1549 Recordkeeping and reporting requirements.

(a) The owner or operator of a primary lead processor must comply with the recordkeeping requirements of § 63.10 of subpart A, General Provisions as specified in Table 1 of this subpart.

(b) In addition to the general records required by paragraph (a) of this section, each owner or operator of a primary lead processor must maintain for a period of 5 years, records of the information listed in paragraphs (b)(1) through (b)(10) of this section.

(1) Production records of the weight and lead content of lead products, copper matte, and copper speiss.

(2) Records of the bag leak detection system output.

(3) An identification of the date and time of all bag leak detection system alarms, the time that procedures to determine the cause of the alarm were initiated, the cause of the alarm, an explanation of the actions taken, and the date and time the cause of the alarm was corrected.

(4) Any recordkeeping required as part of the requirements described in the compliance monitoring system plan required under § 63.1547(k)(2).

(5) Any recordkeeping required as part of the practices described in the standard operating procedures manual for baghouses required under § 63.1547(a).

(6) If an owner or operator chooses to demonstrate continuous compliance with the sinter building in-draft requirement under § 63.1543(d) by employing the method allowed in § 63.1547(i)(1), the records of the daily doorway in-draft checks, an

identification of the periods when there was not a positive in-draft, and an explanation of the corrective actions taken.

(7) If an owner or operator chooses to demonstrate continuous compliance with the sinter building in-draft requirement under § 63.1543(d) by employing the method allowed in § 63.1547(i)(2), the records of the output from the continuous volumetric flow monitor(s), an identification of the periods when the 15-minute volumetric flow rate dropped below the minimum established during the most recent in-draft determination, and an explanation of the corrective actions taken.

(8) If an owner or operator chooses to demonstrate continuous compliance with the sinter building in-draft requirement under § 63.1543(d) by employing the method allowed in § 63.1547(i)(2), and volumetric flow rate is monitored at the baghouse inlet, records of the daily checks of damper positions, an identification of the days that the damper positions were not in the positions established during the most recent in-draft determination, and an explanation of the corrective actions taken.

(9) Records of the occurrence and duration of each malfunction of operation (*i.e.,* process equipment) or the air pollution control equipment and monitoring equipment.

(10) Records of actions taken during periods of malfunction to minimize emissions in accordance with §§ 63.1543(i) and 63.1544(e), including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation.

(c) Records for the most recent 2 years of operation must be maintained on site. Records for the previous 3 years may be maintained off site.

(d) The owner or operator of a primary lead processor must comply with the reporting requirements of § 63.10 of subpart A, General Provisions as specified in Table 1 of this subpart.

(e) In addition to the information required under § 63.10 of the General Provisions, the owner or operator must provide semi-annual reports containing the information specified in paragraphs (e)(1) through (e)(9) of this section to the Administrator or designated authority.

(1) The reports must include records of all alarms from the bag leak detection system specified in § 63.1547(e).

(2) The reports must include a description of the actions taken following each bag leak detection system alarm pursuant to § 63.1547(f).

(3) The reports must include a calculation of the percentage of time the alarm on the bag leak detection system sounded during the reporting period pursuant to § 63.1547(g).

(4) If an owner or operator chooses to demonstrate continuous compliance with the sinter building in-draft requirement under § 63.1543(d) by employing the method allowed in § 63.1547(i)(1), the reports must contain an identification of the periods when there was not a positive in-draft, and an explanation of the corrective actions taken.

(5) If an owner or operator chooses to demonstrate continuous compliance with the sinter building in-draft requirement under § 63.1543(d) by employing the method allowed in § 63.1547(i)(2), the reports must contain an identification of the periods when the 15-minute volumetric flow rate(s) dropped below the minimum established during the most recent in-draft determination, and an explanation of the corrective actions taken.

(6) If an owner or operator chooses to demonstrate continuous compliance with the sinter building in-draft requirement under § 63.1543(d) by employing the method allowed in § 63.1547(i)(2), and volumetric flow rate is monitored at the baghouse inlet, the reports must contain an identification of the days that the damper positions were not in the positions established during the most recent in-draft determination, and an explanation of the corrective actions taken.

(7) The reports must contain a summary of the records maintained as part of the practices described in the standard operating procedures manual for baghouses required under § 63.1547(a), including an explanation of the periods when the procedures were not followed and the corrective actions taken.

(8) The reports must contain a summary of the compliance monitoring results for the required reporting period, including an explanation of any periods when the procedures outlined in the compliance monitoring system plan required by § 63.1547(k)(2) were not followed and the corrective actions taken.

(9) If there was a malfunction during the reporting period, the report shall also include the number, duration, and a brief description for each type of malfunction which occurred during the reporting period and which caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by an owner or operator during a malfunction of an affected source to minimize emissions in accordance with §§ 63.1543(i) and 63.1544(b), including actions taken to correct a malfunction.

11. Section 63.1550 is revised to read as follows:

§ 63.1550 Delegation of authority.

(a) In delegating implementation and enforcement authority to a State under section 112(1) of the Act, the authorities contained in paragraph (b) of this section must be retained by the Administrator and not transferred to a State.

(b) Authorities which will not be delegated to States: No restrictions.

12. Section 63.1551 is added to read as follows:

§ 63.1551 Affirmative defense for exceedance of emission limit during malfunction.

In response to an action to enforce the standards set forth in this subpart you may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by malfunction, as defined in 40 CFR 63.2. Appropriate penalties may be assessed, however, if you fail to meet your burden of proving all the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(a) To establish the affirmative defense in any action to enforce such a limit, you must timely meet the notification requirements in paragraph (b) of this section, and must prove by a preponderance of evidence that:

(1) The excess emissions:

(i) Were caused by a sudden, short, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner; and

(ii) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and

(iii) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(iv) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(2) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(3) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and

(4) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, severe personal injury, or severe property damage; and

(5) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health; and

(6) All emissions monitoring and control systems were kept in operation if at all possible; and

(7) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and

(8) At all times, the facility was operated in a manner consistent with good practices for minimizing emissions; and

(9) A written root cause analysis has been prepared to determine, correct and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(b) Notification. The owner or operator of the facility experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile (FAX) transmission as soon as possible, but no later than two business days after the initial occurrence of the malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 30 days of the initial occurrence of the exceedance of the standard in this subpart to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (a) of this section.

12. Table 1 to Subpart TTT of Part 63 is revised to read as follows:

TABLE 1 TO SUBPART TTT OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART TTT

Reference	Applies to subpart TTT	Explanation
§ 63.1	Yes.	
§ 63.2	Yes.	
§ 63.3	Yes.	
§ 63.4	Yes.	
§ 63.5	Yes.	
§ 63.6(a), (b), (c)	Yes.	
§ 63.6 (d)	No	Section reserved.
§ 63.6(e)(1)(i)	No	See § 63.1543(i) and § 63.1544(b) for general duty requirement.
§ 63.6(e)(1)(ii)	No.	
§ 63.6(e)(1)(iii)	Yes.	
§ 63.6(e)(2)	No	Section reserved.
§ 63.6(e)(3)	No.	
§ 63.6(f)(1)	No.	
§ 63.6(g)	Yes.	
§ 63.6(h)	No	No opacity limits in rule.
§ 63.6(i)	Yes.	
§ 63.6(j)	Yes.	
§ 63.7(a)–(d)	Yes.	
§ 63.7(e)(1)	No	See § 63.1546(c).
§ 63.7(e)(2)–(e)(4)	Yes.	
§ 63.7(f), (g), (h)	Yes.	
§ 63.8(a)–(b)	Yes.	
§ 63.8(c)(1)(i)	No.	
§ 63.8(c)(1)(ii)	Yes.	
§ 63.8(c)(1)(iii)	No.	
§ 63.8(c)(2)–(d)(2)	Yes.	
§ 63.8(d)(3)	Yes, except for last sentence.	
§ 63.8(e)–(g)	Yes.	
§ 63.9(a), (b), (c), (e), (g), (h)(1) through (3), (h)(5) and (6), (i) and (j)	Yes.	
§ 63.9(f)	No.	
§ 63.9(h)(4)	No	Reserved.
§ 63.10(b)(2)(i)	No.	
§ 63.10(b)(2)(ii)	No	See § 63.1549(b)(9) and (10) for recordkeeping of occurrence and duration of malfunctions and recordkeeping of actions taken during malfunction.
§ 63.10(b)(2)(iii)	Yes.	
§ 63.10(b)(2)(iv)–(b)(2)(v)	No.	
§ 63.10(b)(2)(vi)–(b)(2)(xiv)	Yes.	
§ 63.(10)(b)(3)	Yes.	
§ 63.10(c)(1)–(9)	Yes.	
§ 63.10(c)(10)–(11)	No	See § 63.1549(b)(9) and (10) for recordkeeping of malfunctions.
§ 63.10(c)(12)–(c)(14)	Yes.	
§ 63.10(c)(15)	No.	
§ 63.10(d)(1)–(4)	Yes.	

TABLE 1 TO SUBPART TTT OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART TTT—Continued

Reference	Applies to subpart TTT	Explanation
§ 63.10(d)(5)	No	See § 63.1549(e)(9) for reporting of malfunctions.
§ 63.10(e)–((f)	Yes.	
§ 63.11	No	Flares will not be used to comply with the emission limits.
§ 63.12 through 63.15	Yes.	

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Part III

Environmental Protection Agency

40 CFR Parts 9 and 63

National Emission Standards for Hazardous Air Pollutants: Gold Mine Ore Processing and Production Area Source Category; and Addition to Source Category List for Standards; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 63

[EPA–HQ–OAR–2010–0239; FRL–9242–3]

RIN 2060–AP48

National Emission Standards for Hazardous Air Pollutants: Gold Mine Ore Processing and Production Area Source Category; and Addition to Source Category List for Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is adding the gold mine ore processing and production area source category to the list of source categories to be regulated under Section 112(c)(6) of the Clean Air Act due to its mercury emissions. EPA is also promulgating national emission standards for hazardous air pollutants to regulate mercury emissions from this source category.

DATES: This final rule is effective on February 17, 2011. The incorporation by reference of certain publications listed in the final rule is approved by the Director of the **Federal Register** as of February 17, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2010–0239. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the EPA Headquarters Library, Room Number 3334, EPA West Building, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m. Eastern Standard Time (EST), Monday through Friday. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket and Information Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Chuck French, Sector Policies and Program Division, Office of Air Quality Planning and Standards (D243–02), Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number (919) 541–7912; fax number (919) 541–3207, e-mail address: *french.chuck@epa.gov.*

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

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I. General Information

A. Does this action apply to me?

The regulated categories and entities potentially affected by this final rule include:

Category	NAICS code [1]	Examples of regulated entities
Industry:		
Gold Ore Mining	212221	Establishments primarily engaged in developing the mine site, mining, and/or beneficiating (*i.e.,* preparing) ores valued chiefly for their gold content. Establishments primarily engaged in transformation of the gold into bullion or dore bar in combination with mining activities are included in this industry.

[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 would be regulated by this action, you should examine the applicability criteria in 40 CFR 63.11640 of subpart EEEEEEE (National Emission Standards for Hazardous Air Pollutants (NESHAP): Gold Mine Ore Processing and Production Area Source Category). If you have any questions regarding the applicability of this action to a particular entity, consult either the air permit authority for the entity or your EPA Regional representative, as listed in 40 CFR 63.13 of subpart A (General Provisions).

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

In addition to being available in the docket, an electronic copy of this final action will also be available on the Worldwide Web (WWW) through the EPA 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.

C. Judicial Review

Under Section 307(b)(1) of the Clean Air Act (CAA), judicial review of this final rule is available only by filing a petition for review in the U.S. Court of

Appeals for the District of Columbia Circuit by April 18, 2011. Under section 307(d)(7)(B) of the CAA, only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

Section 307(d)(7)(B) also provides a mechanism for us to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Addition to Section 112(c)(6) Source Category List

For reasons stated in the preamble to the proposed rule (75 FR 22470, April 28, 2010), we are adding the gold mine ore processing and production area source category to the list of source categories under section 112(c)(6) on the basis of its mercury emissions. The preamble for the proposed rule provides a description of this industry including the processes used and the typical control technologies applied.

III. What is the statutory authority and regulatory approach for the proposed standards?

As explained in the preamble to the proposed rule, CAA section 112(c)(6) requires that EPA set standards under section 112(d)(2) or (d)(4). The mercury standards for the gold mine ore processing and production area source category are being established under CAA section 112(d)(2), which requires maximum available control technology (MACT) level of control. Under CAA section 112(d), the MACT standards for existing sources must be at least as stringent as the average emissions limitation achieved by the best performing 12 percent of existing sources (for which the administrator has emissions information) for source categories and subcategories with 30 or more sources, or the best performing 5 sources for categories and subcategories with fewer than 30 sources (CAA section 112(d)(3)(A) and (B)). This level of minimum stringency is called the MACT floor. For new sources, MACT standards must be at least as stringent as the emission control that is achieved in practice by the best controlled similar source (CAA section 112(d)(3)). EPA also must consider more stringent "beyond-the-floor" control options. When considering beyond-the-floor options, EPA must consider not only the maximum degree of reduction in emissions of HAP, but must take into account costs, energy, and nonair quality health and environmental impacts when doing so.

IV. Summary of Significant Changes Since Proposal

This section summarizes the significant changes to the rule since proposal. Additional information on the basis for these changes and other changes can be found in the Summary of Responses to Major Comments in section V of this preamble and in the Summary of Comments and Responses document which is available in the docket for this action.

A. Applicability

We have clarified in § 63.11651 of the final rule that the term "gold mine ore processing and production facility" does not include individual prospectors and very small pilot scale mining operations. These types of operations are very small and were not included in the section 112(c)(6) inventory that was the basis for the listing of the gold mine ore processing and production source category.

B. Final Emission Standards

We have made changes to all of the proposed emission standards as the result of the following developments: (1) Inclusion of additional emissions test data received since proposal; [1] (2) additional analyses in response to public comments on the proposed rule; [2] and (3) further review of the data used to develop the standards for the proposed rule. The changes are summarized below and described in more detail in section V of this preamble. We estimate the final MACT standards will reduce mercury emissions from gold mine ore processing and production down to a level of about 1,180 pounds per year, which will be an estimated 77 percent reduction from the 2007 emissions level (5,000 lb/yr), a 95 percent reduction from year 2001 emissions level (about 23,000 lb/yr), and more than 97 percent reduction from uncontrolled emissions levels (more than 37,000 lb/yr).

Ore Pretreatment Processes

In the proposed rule, the proposed mercury emission standards for both existing and new ore pretreatment processes were 149 pounds per million tons of ore processed (lb/million tons of ore). In the final rule, the emission standard for existing sources is 127 lb/million tons of ore; and for new sources the emission standard is 84 lb/million tons of ore. The final emission standards are based on several changes to the data set used in the MACT analysis. Since we issued the proposed rule, we collected emissions data from more recent tests that were not available at proposal. Further, we learned that two emissions tests that we used to develop the MACT floor in our proposed rule had been invalidated by the Nevada Division of Environmental Protection (NDEP), and we removed those test results from the database. Information on the specific tests invalidated and the rationale are available in the docket (docket item number EPA–HQ–OAR–2010–0239–0061). We also discovered that the test data for a unit within the ore pretreatment affected source at a facility should have been included as part of a different unit at the same facility. We have also dropped the data for one facility from the analysis because their autoclave was shut down in 2007 and dismantled, and the only test data we had for them was one test of the autoclave when it was operating in 2006. Moreover, we conducted additional beyond-the-floor analyses for the ore pretreatment affected source. The new information and analyses described above are discussed in more detail in section V.C of this preamble and in the MACT Development Document which is available in the docket for this rulemaking.

The resulting data set included emissions data for four facilities that ranged from 45 to 165 lb/million tons of ore. Based on these data, and using the same upper prediction limit (UPL) approach used for proposal to account for variability, we determined the MACT floor to be 158 lb/million tons of ore for existing sources of ore pretreatment processes and 84 lb/

[1] The new test data used in final MACT standard calculations can be found in the docket as docket items: EPA–HQ–OAR–2010–0239–0359 and EPA–HQ–OAR–2010–0239–0360.

[2] Analyses for the final MACT standards can be found in the docket in the document titled: "Development of the MACT Floors and MACT for the Final NESHAP for Gold Mine Ore Processing and Production" (also known as the "MACT Development Document").

million tons of ore for new sources. As explained in the proposed rule (75 FR at 22482), the technologies that we estimate are needed to achieve the MACT floor level of performance for existing ore pretreatment processes include calomel-based mercury scrubbers on roasters and venturi scrubbers on autoclaves and ancillary roaster operations. The preamble to the proposed rule provides a description of the UPL and the approach and calculations used to derive the UPL. The UPL is also discussed further in section V.

In our beyond-the-floor analysis, we evaluated the potential to add condensers and carbon adsorbers to control autoclaves, and the potential to add carbon adsorbers to control the ore pre-heaters. Based on this beyond-the-floor analysis, we concluded that it is feasible and cost-effective to establish the MACT standard for existing sources at a level lower than the MACT floor. Based on the analysis, we determined the MACT standard for existing sources to be 127 lb/million tons of ore. For new sources, we determined that it was not feasible and cost-effective to establish a standard lower than the new source MACT Floor (of 84 lb/million tons); therefore the MACT standard for new sources was determined to be 84 lb/million tons.

The technologies needed to achieve the new source MACT floor will depend on the types of ore processed, amount of mercury in the ore, and specific process units used. Nevertheless, we conclude that, at a minimum, the controls that would be needed would include calomel-based mercury scrubbers on roasters and venturi scrubbers on autoclaves and ancillary roaster operations. Additional controls that will likely be needed to achieve emissions at or below the new source MACT floor level include condensers and carbon adsorbers on autoclaves, and carbon adsorbers on ore preheaters.

Table 1 summarizes the MACT floor analysis for existing and new ore pretreatment processes. The beyond-the-floor analyses are explained further in section V of this preamble and in more detail in the MACT Development document.

TABLE 1—MACT FLOOR RESULTS FOR ORE PRETREATMENT PROCESSES

Facility	Average performance (lb/million tons of ore)
A	45
C	56
E	71
D	165
Average of the 4 facilities	84
99% UPL for existing sources (*i.e.,* the MACT Floor for existing sources)	158
99% UPL for new sources [1] (*i.e.,* the MACT Floor for new sources)	84

[1] The MACT Floor for new sources is based on the average performance of Facility A (i.e., 45) plus an amount to account for variability (i.e., 45 + 39 = 84).

Carbon Processes

Under the proposed rule, all carbon processes were subject to the same proposed mercury emissions limits of 2.6 pounds per ton of concentrate (lb/ton of concentrate) for existing sources and, for new sources, either 0.14 lb/ton of concentrate or 97 percent reduction in uncontrolled mercury emissions. These limits would have applied to facilities that operate mercury retorts and facilities that do not operate mercury retorts. In the final rule, we distinguish between carbon processes with mercury retorts and carbon processes without mercury retorts because we believe there are unique differences in these two types of processes. Therefore, the final rule specifies separate emission standards for these two types of processes. Moreover, the final emission standards for carbon processes reflect inclusion of new test data that were not available at proposal. We also revised our data set based on new information that we received since proposal which impacted which sources were among the best performing sources. Based on the data that we have, there are 10 facilities that have carbon processes with mercury retorts, and we have mercury emissions data for all 10 of these facilities. There are approximately 7 facilities that have carbon processes without mercury retorts, and we have comprehensive and reliable mercury emissions data for 2 of these facilities. These 2 facilities are the best controlled facilities within that group based on the information we have. (*See* section V for further details.) For carbon processes with mercury retorts, the emission standard in the final rule is 2.2 lb/ton of concentrate for existing sources and 0.8 lb/ton of concentrate for new sources. For carbon processes without mercury retorts, the emission standard in the final rule is 0.17 lb/ton of concentrate for existing sources and 0.14 lb/ton of concentrate for new sources.

For carbon processes, regardless of whether the facility operates a mercury retort, we estimate that to meet the MACT floor facilities would generally need to have mercury condensers and carbon adsorbers to control mercury emissions. We also considered beyond-the-floor options for both existing and new sources for these process groups, which were based on the addition of a second carbon adsorber; however, we rejected those options because they are not cost effective. Additional information on the analyses performed can be found in the MACT Development document in the docket for this rulemaking.

We also eliminated in the final rule the compliance alternative of 97 percent reduction for new carbon processes. After reviewing the comments received on this proposed alternative standard and giving further consideration to the practicality of how it would be measured, we concluded that this option would be difficult to implement, particularly when multiple processes that are operated at different times vent to a single control device and stack. In addition, we have limited data supporting this compliance alternative. In proposing this alternative for comment, we had hoped to, but did not, receive additional data indicating that the 97 percent reduction option would be equivalent to the proposed new source limit of 0.14 pounds of mercury per ton of concentrate. For the reasons stated above, we eliminated the 97 percent control efficiency option for new carbon processes in the final rule.

Table 2 summarizes the results of the MACT floor analysis for carbon processes with mercury retorts, and Table 3 summarizes the analysis for carbon processes without mercury retorts.

TABLE 2—MACT FLOOR RESULTS FOR CARBON PROCESSES WITH MERCURY RETORTS

Facility	Average performance (lb/ton of concentrate)
N	0.53
J	0.74
I	1.06
A	1.47
H	1.67
D	2.20
C	3.71
G	8.17
E	14.49
B	20.60

TABLE 2—MACT FLOOR RESULTS FOR CARBON PROCESSES WITH MERCURY RETORTS—Continued

Facility	Average performance (lb/ton of concentrate)
Average of top 5	1.1
99% UPL for existing sources (*i.e.,* MACT Floor for existing sources)	2.2
99% UPL for new sources (*i.e.,* MACT Floor for new sources)	0.8

TABLE 3—MACT FLOOR RESULTS FOR CARBON PROCESSES WITHOUT MERCURY RETORTS

Facility	Average performance (lb/ton of concentrate)
M	0.058
F	0.098
Average of top 2 facilities	0.078
99% UPL for existing sources (*i.e.,* MACT Floor for existing sources)	0.17
99% UPL for new sources (*i.e.,* MACT Floor for new sources)	0.14

Non-Carbon Concentrate Processes

Under the proposed rule, the mercury emission standards for non-carbon concentrate processes were 0.25 lb/ton of concentrate for existing sources and 0.2 lb/ton of concentrate for new sources. In the final rule, the emission standards for these sources are 0.2 lb/ton of concentrate for existing sources and 0.1 lb/ton of concentrate for new sources. These standards are based on using new emissions data that were not available when we developed the proposal, along with the data that were used for the proposal. For non-carbon concentrate processes, we estimate that to meet the MACT floors, for both existing and new sources, facilities would generally need to control mercury emissions using mercury condensers and carbon adsorbers. As explained in the proposed rule, we considered beyond-the-floor controls for these processes (which were based on adding a second carbon adsorber to the MACT floor level controls) but concluded those controls would not be a cost-effective option. There are approximately 3 facilities in the U.S. that use these types of processes. We have emissions tests data for 2 of these facilities.

Table 4 summarizes the results of the MACT floor analysis for non-carbon concentrate processes.

TABLE 4—MACT FLOOR RESULTS FOR NON-CARBON CONCENTRATE PROCESSES

Facility	Average performance (lb/ton of concentrate)
K	0.047
L	0.078
Average of 2 facilities	0.062
99% UPL for existing sources (*i.e.,* MACT Floor for existing sources)	0.2
99% UPL for new sources (*i.e.,* MACT Floor for new sources)	0.1

C. Compliance Dates

In the final rule, we provide in § 63.11641 that the compliance date for existing sources is 3 years after promulgation of the final rule as opposed to 2 years as proposed. We reviewed the information provided in public comments on the challenges of installing new controls, especially for autoclaves, which, although the controls have not yet been demonstrated, have been proposed by facilities with autoclaves in their Nevada Mercury Control Program (NMCP) permit applications. We also considered the installation of new controls on the roaster preheaters, which also have not yet been demonstrated, but have been proposed by these facilities in their NMCP permit applications. We concluded that allowing 3 years for existing sources to comply is appropriate, given the complexity of the sources, the combinations of control devices that are needed in many cases, and the amount of time necessary for designing, installing, testing, and commissioning additional emission controls for mercury.

D. Compliance Requirements

Section 63.11646(a)(1) of the final rule does not include Method 30A, as was proposed, as an appropriate method for determining mercury concentration because it is not yet in general use. This paragraph further clarifies that the use of ASTM D6784–02 and Method 30B are allowed for compliance tests only if approved by the permit authority as opposed to automatically being allowed as in the proposal. The final rule also does not include the requirement to follow the acetone rinse procedures and the absence of cyclonic flow determination requirement, which were in subparagraphs (v) and (vi) respectively of our proposed § 63.11646(a)(1). Method 29 already includes requirements for the acetone rinse, so there is no need to specify those procedures in the rule; and Method 1, which is required by the rule, addresses the issue of cyclonic flow.

In § 63.11646(a)(2), we changed the minimum sample volume when Method 29 is used to determine compliance from the proposed 60 dry standard cubic feet (dscf) to 30 dscf. We believe this volume is adequate for detecting mercury in the samples and determining mercury emissions for this industry. We have also expanded this section to address non-detect values. If the emission testing results for any of the emission points yield a non-detect value, the final rule requires that the minimum detection limit (MDL) be used to calculate the mass of emissions (in pounds of mercury) for that emission point that would subsequently be used in the calculations to determine if the source is in compliance with the MACT standard. If the resulting calculations indicate that mercury emissions are greater than the MACT emission standard, the owner or operator may repeat the mercury emissions testing one additional time for any emission point for which the measured result was below the MDL using procedures that produce lower MDL results. If this additional testing is performed, the results from that testing must be used to determine compliance.

For sources with multiple emission units (*e.g.,* two roasters) ducted to a common control device and stack, we have clarified in § 63.11646(a)(3) that compliance testing must either be performed with all affected emissions units in operation, if this is possible, or units must be tested separately. We also clarified that the establishment of operating limits for units that share a common stack can be based on emissions when all process units are operating together, or based on testing units separately. However, this requirement does not affect the frequency and schedule for monitoring, which are specified in the rule. If facilities have batch type processes that cannot be operated simultaneously, then the facility can test some or all of the units individually.

In § 63.11646(a)(6) and (7), we clarify that the production data used in compliance determinations are based on full calendar months. For the initial compliance test, data for all the full calendar months between publication of the final rule and the initial compliance test must be used. This initial compliance determination must include at least one full month of production

data (*e.g.,* hours of operation, and million tons of ore processed or tons of concentrate processed) including the month the test was conducted. For subsequent annual compliance tests, data for the 12 full calendar months prior to the annual compliance test must be used to demonstrate compliance. In addition, we clarify in paragraphs § 63.11646(a)(5), (6) and (7) that compliance determinations are based on the number of 1-hour periods each process unit operates. By using the 1-hour period terminology, the final rule language is consistent with the terminology used in the General Provisions to part 63.

Because the final rule does not include the 97 percent reduction option that was in § 63.11645(e)(2) of the proposed rule, we have removed from the final rule the compliance requirement for that option that was in § 63.11646(b) of the proposed rule, which addressed testing the inlets and outlets for sources choosing that proposed option.

E. Monitoring Requirements

Section 63.11647(a) of the final rule includes an additional option for monitoring mercury emissions from roasters. The proposed rule specified two options for monitoring mercury emissions: Paragraph (a)(1) specified weekly sampling using PS 12B; and paragraph (a)(2) specified continuous monitoring using a mercury continuous emissions monitoring system (CEMS). In the final rule, we added paragraph (a)(3) to provide a third option of continuous sampling using PS 12B. In addition, paragraph (a)(1) in the final rule was changed to require sampling at least twice per month using either PS 12B or Method 30B rather than weekly. We believe that Method 30B is an acceptable alternative method for monitoring purposes and allows owners and operators more flexibility in how they monitor roaster emissions. We also believe that sampling twice per month coupled with extensive parametric monitoring of control devices (as explained below) is sufficient for the monitoring option in paragraph (a)(1).

Section 63.11647(a)(4)(iii) of the proposed rule would have required additional compliance testing if the mercury concentration in the ore fed to the roaster was higher than any concentration measured in the previous 12 months. We have removed this requirement from the final rule because it is not clear that the mercury content of the ore has a significant effect on the performance of mercury scrubbers applied to roasters, which are designed to handle and operate efficiently for a range of mercury inlet concentrations. In addition, condensers are used to recover liquid elemental mercury prior to the mercury scrubber, and any increase in mercury loading would likely result in an increase in the recovery of elemental mercury.

The final rule incorporates several changes to § 63.11647(b), which addresses monitoring of calomel-based mercury scrubbers (*i.e.,* mercury scrubbers) that are used to control emissions from roasters. The proposed rule required monitoring of the scrubber liquid flow, liquid chemistry, scrubber pressure drop, and scrubber inlet gas temperature hourly. The final rule does not include the requirement to monitor pressure drop across calomel-based scrubbers because we conclude that pressure drop is not related to mercury emission control performance by this type of control device. In addition, the final rule allows hourly monitoring of the line pressure in the scrubber liquid supply line as an alternative to hourly monitoring of scrubber liquid flow rate. Line pressure monitoring is already in practice at some facilities and provides the same type of information as does liquid flow rate. As was proposed, the final rule allows the operating limit for scrubber liquid flow rate (or line pressure) and inlet gas temperature to be based on the minimum flow rate (or line pressure) or maximum inlet gas temperature established during the initial performance test. It also includes two additional options for setting these operating limits: (1) Based on the manufacturer's specifications if certain types of systems are designed to operate within a specified range of flow rates or temperatures; and (2) based on limits established by the permitting authority. If the facility chooses the option to establish the limits during initial compliance, the final rule requires the scrubber flow rate operating limit to be based on either the lowest value for any run of the initial compliance test or 10 percent less than the average value measured during the compliance test and the inlet gas temperature operating limit to be based on either the highest value for any run of the initial compliance test or 10 percent higher than the average value measured during the compliance test. This requirement takes into account the fact that, although initially the system may exhibit little variability from test run to test run, the short-term variability in performance may increase with time. Additional discussion of these changes can be found in section V.E of this preamble and in the Summary of Public Comments and Responses document in the docket for this rulemaking.

In response to comments, we have revised the requirements for corrective action following control device monitoring parameter exceedances specified in § 63.11647(d). Under the final rule, if the corrective actions taken following an exceedance do not result in the parameter value (*e.g.,* liquid flow rate, line pressure, or inlet gas temperature) being returned to within the parameter range or limit within 48 hours, a mercury concentration measurement must be made to determine if the operating limit for mercury concentration is being exceeded. The measurement must be performed and the concentration determined within 48 hours after the initial 48 hours, or a total of 96 hours from the time the parameter was exceeded. If the measured mercury concentration meets the operating limit for mercury concentration, the corrective actions are deemed successful. In addition, the owner or operator may request approval from the permitting authority to change the parameter range or limit based on measurements of the parameter at the time the mercury concentration measurement was made. If, on the other hand, the measured mercury concentration indicates the operating limit for mercury concentration is exceeded, the exceedance must be reported as a deviation within 24 hours to the permitting authority, and the facility must perform a compliance test (pursuant to § 63.11647(d)) within 40 days to determine whether the source is in compliance with the MACT standard. We believe 40 days is appropriate because it may take 3 to 4 weeks to schedule and have the testing contractor on site, and, following completion of the test, another week or so to receive the final test results, and allows sufficient time to notify the permitting authority. We also removed the requirement that roasters must be shut down if a parameter is out of range.

In § 63.11647(a)(1)(ii) of the final rule, we require these same corrective actions described above (*i.e.,* measuring mercury concentration within 48 hours, reporting a deviation if the data show the operating limit was exceeded within 24 hours, and conducting a compliance test within 40 days) for exceedances of mercury concentration operating limits indicated by the results of the twice monthly monitoring using PS 12B or Method 30B, CEMS, or continuous monitoring using PS 12B. In such cases, the owner or operator must use the results of the compliance test to determine if the ore pretreatment

process affected source is in compliance with the emission standard. If the source is determined to be in compliance, the owner or operator may use this compliance test to establish a new operating limit for mercury concentration for the roaster. We also removed the requirement that roasters must be shut down if the mercury concentration is out of range.

In the final rule, § 63.11647(f)(1) requires monthly sampling of the exhaust stream of carbon adsorbers using Method 30B. The duration of sampling must be at least the minimum sampling time specified in Method 30B and up to one week. The proposed rule required a full week of such sampling, but, as pointed out by one of the commenters, breakthrough of the sampling trap from exhaust streams with high mercury concentrations could occur before a week had elapsed.

Section 63.11647(f)(2) of the final rule clarifies that sampling of the carbon bed must be collected from the inlet and outlet of the bed. This paragraph also specifies that, for carbon adsorbers with multiple carbon columns or beds, the sampling should be performed in the first and last column or bed rather than at the inlet or outlet.

We have deleted § 63.11647(f)(3) in the proposed rule, which allowed the carbon bed change-out rate to be determined based on historical data and the estimated life of the carbon. We have concluded that this method would not be adequate to ensure that breakthrough does not occur earlier than expected.

We have clarified § 63.11647(h) with respect to the monitoring of scrubbers (other than the calomel-based mercury scrubbers described above). Under the final rule, owners or operators are required to monitor and record water flow rate (or line pressure) and scrubber pressure drop once per shift; they also must record any occurrences when the water flow rate (line pressure) or pressure drop are outside the operating range, take corrective actions to return the water flow rate (line pressure) or pressure drop back in range, and record the corrective actions taken. At proposal, the water flow rate and pressure drop were to be monitored continuously. However, measuring the water flow rate (line pressure) and pressure drop once per shift will provide two to three measurements per day, and we believe that is sufficient to assure proper operations of the wet scrubber, and thus assure compliance with the emission standards. We have also added the option of monitoring the line pressure in the scrubber liquid supply line as an alternative to monitoring scrubber liquid flow rate because line pressure monitoring is already in practice at some facilities and provides the same type of information as does liquid flow rate. As was proposed, the final rule allows the operating limit for water flow rate and pressure drop to be based on the minimum value during the initial performance test. It also includes two additional options for setting the operating limit: (1) Based on the manufacturer's specifications; and (2) based on limits established by the permitting authority. We have also clarified that, for scrubbers on autoclaves, the pressure drop parameter range should be established from manufacturer's specifications only.

F. Definitions

We have added a definition of carbon adsorber to § 63.11651 to clarify that this term, as used in the final rule, includes control devices consisting of a single fixed carbon bed, multiple carbon beds or columns, carbon filter packs or modules, and other variations of carbon adsorber design.

The definition of "gold mine ore processing and production facility" in § 63.11651 of the rule has been clarified to state that small operations, such as prospectors and very small pilot scale mining operations, that process or produce less than 100 pounds of concentrate per year are excluded from the source category. These prospectors and very small pilot-scale operations (that process at or below this level) were not included in the section 112(c)(6) inventory that was the basis for the listing of gold mine ore processing and production source category. These types of very small operations were not intended to be subject to the final rule, and we do not expect any significant emissions from them. We also clarified that the source category does not include facilities at which 95 percent or more of the metals produced are metals other than gold. For example, if other non-ferrous metals (such as copper, lead, nickel, or zinc) comprise 95 percent or more of the product, the facility is not part of the gold ore processing and production source category.

V. Summary of Responses to Major Comments

A. Statutory Requirements

1. Listing of the Gold Mine Ore Processing and Production Source Category Under Section 112(c)(6)

Comment: One commenter stated that adding the gold mine ore processing and production category to the list of categories required by Clean Air Act (CAA) section 112(c)(6) was correct and required because gold mines accounted for a significant portion of the aggregate emissions of mercury in the baseline year (1990) and because they still do so today. Other commenters stated that EPA does not have the authority to list gold mining processing and production as a source category under section 112(c)(6) and noted that section 112(c)(6) requires EPA to list, by 1995, categories of sources that make up 90 percent of the 1990 emissions for a subset of hazardous air pollutants (HAP), including mercury. The commenters said that EPA concluded its statutory listing obligation for mercury in 1998 with the publication of a list of source categories constituting 90 percent of aggregate mercury emissions, and that gold mining was not included on that list in 1998. In addition, the commenters said that the CAA requires EPA to list all categories under section 112(c)(6) by 1995 and complete issuance of standards for all listed sources by 2000, a task that would be impossible if EPA had the authority to add source categories ad infinitum.

Response: We appreciate the commenter's support in listing the gold mine processing and production area source category pursuant to section 112(c)(6). We disagree, however, with the commenters that assert that EPA is precluded from listing additional categories pursuant to section 112(c)(6). The commenters appear to be arguing that EPA is limited to a single listing opportunity under section 112(c)(6) and, having not listed gold mine ore processing and production in the initial 1998 listing effort, EPA is now foreclosed from doing so. There is nothing in the language of section 112(c)(6), however, that precludes EPA from listing additional source categories to the extent EPA determines that those categories are needed to meet the 90 percent requirement in section 112(c)(6). Indeed, the commenter's reading is contrary to the fundamental purpose of section 112(c)(6).

The core requirement of section 112(c)(6) is that EPA "shall * * * list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant" are subject to standards under either 11217FE0(d)(2) or (d)(4). EPA reasonably interprets section 112(c)(6) as allowing it to revise the list to add categories, where, as here, it determines that it needs the additional categories to meet the 90 percent requirement in section 112(c)(6). Indeed, EPA has previously revised the section 112(c)(6)

list to add a source category, where EPA determined that category was needed to meet its 90 percent requirement for mercury. *See* 72 FR 74087 (Dec. 28, 2007) (adding area source electric arc furnaces to the section 112(c)(6) list).

As explained in the proposed rule, we have a 1990 baseline emissions inventory, and it is against this baseline that we assess compliance with the 90 percent requirement for each of the pollutants specified in section 112(c)(6). EPA explained in the initial 1998 listing notice that it was using 1990 as the baseline year for assessing compliance with the 90 percent requirement. As EPA has developed emission standards for the sources included on the initial section 112(c)(6) list, it has acquired additional information on those sources and their emissions in 1990, which has resulted in some revisions to the 1990 baseline emissions inventory estimates. These revisions resulted in the need to regulate an additional source category. *See* 72 FR 74087 (setting standards for area source electric arc furnaces).

In addition to obtaining additional information concerning the source categories on the initial list, EPA has obtained additional information concerning the 1990 emissions of other sources. As explained in the preamble to the proposed rule, at the time of the initial section 112(c)(6) listing, there was very little available information on mercury emissions from gold mine ore processing and production. *See* 75 FR 22471. Because EPA lacked emissions information on mercury emissions from this source category at the time of the listing decision, EPA was unable to estimate the 1990 baseline mercury emissions from the gold mine ore processing and production source category and include this category in the first listing effort. Based on information that became available after the initial listing, EPA now finds that regulation of the area source gold mine ore processing and production category is needed to meet the 90 percent requirement for mercury. 75 FR 22471. Under the commenters' view, EPA cannot add any additional categories to the section 112(c)(6) list following the initial listing. If true, EPA could not meet its section 112(c)(6) obligation—a result Congress could not have intended. EPA reasonably interprets section 112(c)(6) in a manner that allows the Agency to achieve that provision's core requirement. EPA repeats that it sees nothing in the language or purpose of section 112(c)(6) that precludes it from listing additional source categories as needed.

Finally, Congress left to EPA's discretion which categories and subcategories of sources to include on the section 112(c)(6) list. We have determined that we need the gold mine ore processing and production source category to meet the 90 percent requirement in section 112(c)(6) for mercury and are therefore now setting standards for that category.

We also reject the comment that the task of completing standards by 2000 would be impossible if EPA had the authority to add source categories. Nevertheless, EPA is under a court ordered deadline to complete section 112(c)(6) standards by January 16, 2011. (*Sierra Club* v. *EPA,* Consolidated Case No. 01–1537, D.D.C).

Comment: Some commenters claimed that EPA did not provide an adequate basis for its 1990 emissions estimate for gold mining processing and production. Specifically, they questioned EPA's estimated emissions of 4.4 tons from this source category in the 1990 baseline year.

Response: Although the commenters question EPA's estimated emissions of 4.4 tons from this source category in the 1990 baseline year, they did not provide an alternative method for calculating such emissions or alternative data or assumptions that should be used. They also did not explain what they think the 1990 baseline emissions should have been. EPA continues to maintain that its baseline emissions estimate is reasonable. The methodology EPA used to derive that estimate is described in docket item EPA–HQ–OAR–2010–0239–0175.

Comment: Several commenters stated that Phase 2 permits under the Nevada Mercury Control Program (NMCP), which are scheduled for issuance by the end of 2010, will result in MACT-level controls on all thermal units at Nevada gold mines. According to the commenters, these permits are the culmination of a 7-year collaborative effort between NDEP and the gold mining industry to substantially reduce mercury emissions from gold mine processes. The commenters said that the proposal does not address how the NESHAP will result in reductions in mercury at gold mines in areas of the country other than Nevada, where the mercury content of the ore in gold mines is non-existent or only a fraction of the amount found in Nevada, and Nevada accounted for 99 percent of mercury emissions associated with gold mining operations in the United States. According to the commenters, this shows that if Nevada has an equivalent mercury control program for the gold mining industry, then there is nothing to be gained from imposing a Federal program, and if EPA acknowledges that the mines in Nevada are already well controlled, then the listing of gold mining and the promulgation of an additional layer of regulation at substantial cost to industry, but with little environmental benefit, is both legally indefensible and practically unsupportable.

Response: As explained above, we are regulating the gold mine ore processing and production source category to meet the 90 percent requirement in section 112(c)(6) for mercury and are therefore setting standards for that category. Based on our 1990 baseline inventory for section 112(c)(6) and other emissions information for subsequent years, we estimate that this industry was among the top ten highest emitting categories of mercury emissions in the U.S. in 1990 and has remained in the top 10 since that time. Moreover, even though most emissions are from facilities located in Nevada, several commenters expressed serious concerns about the potential for mercury emissions from new gold mines in other States (*e.g.,* Alaska). We share these concerns about potential emissions from new gold mine facilities. Finally, Congress left to EPA's discretion which categories and subcategories of sources to include on the section 112(c)(6) list. We are regulating the gold mine ore processing and production source category to meet the 90 percent requirement in section 112(c)(6) for mercury and are therefore now promulgating a Federal NESHAP for existing and new gold mine ore processing and production facilities.

2. Emission Standards for HAP Other Than Mercury

Comment: One commenter stated that CAA section 112(c)(6) provides that EPA must "list categories and subcategories of sources assuring that sources accounting for not less than 90 percent of each [enumerated] pollutant are subject to standards under subsection (d)(2) or (d)(4) of this section." The commenter also stated that the D.C. Circuit has held repeatedly that when EPA sets standards for a category or subcategory of sources under section 112(d)(2), EPA has a statutory duty to set emission standards for each HAP that the sources in that category or subcategory emit (*e.g., National Lime Ass'n* v. *EPA,* 233 F.3d 625, 633–634 (D.C. Cir. 2000)). The commenter concluded that when EPA sets standards for gold mines under section 112(d)(2), as section 112(c)(6) requires it to do, EPA must set section 112(d)(2) emission standards for all the HAP that gold mines emit.

The commenter said that EPA appears to believe that because gold mines are

needed only to reach the section 112(c)(6) requirement of 90 percent for mercury and not for the other pollutants enumerated in section 112(c)(6), EPA's only obligation under section 112(c)(6) is to set section 112(d)(2) standards for mercury. The commenter said that section 112(c)(6) expressly requires EPA to issue section 112(d)(2) standards for the "sources" in the categories listed under section 112(c)(6), not some subset of the pollutants that those sources emit, and that section 112(d)(2) standards must include emission standards for each HAP that a source category emits. The commenter continued by stating that nothing in the CAA exempts EPA from this requirement. The commenter concluded that, had Congress wished to give EPA discretion to set standards for only some of the pollutants emitted by a category listed under section 112(c)(6), it would have done so expressly.

Response: EPA disagrees with the comment that, even though EPA lists a category under section 112(c)(6) due to the emissions of one or more HAP specified in that section, EPA must issue emission standards for all HAP (including HAP not listed in section 112(c)(6)) that sources in that category emit. The commenter cited in support the opinion by the United States Court of Appeals for the DC Circuit in *National Lime Ass'n* v. *EPA,* 233 F.3d 625, 633–634 (D.C. Cir. 2000)). The part of the National Lime opinion referenced in the comment dealt with EPA's failure to set emission standards for certain HAPs emitted by major sources of cement manufacturing because the Agency found no sources using control technologies for those HAP. In rejecting EPA's argument, the court stated that EPA has "a statutory obligation to set emission standards for each listed HAP." Id. at 634. The Court noted the list of HAP in section 112(b) and stated that section 112(d)(1) requires that EPA "promulgate regulations establishing emission standards for each category or subcategory of *major sources* * * * of hazardous air pollutants listed for regulation. * * *" Id. (Emphasis added). For the reasons stated below, we do not believe that today's final rule is controlled by or otherwise conflicts with the *National Lime* decision.

National Lime did not involve section 112(c)(6). That provision is ambiguous as to whether standards for listed source categories must address all HAP or only the section 112(c)(6) HAP for which the source category was listed. Section 112(c)(6) requires that "sources accounting for not less than 90 per centum of the aggregate emissions of each such [specific] pollutant are subject to standards under subsection (d)(2) or (d)(4)." This language can reasonably be read to mean standards for the section 112(c)(6) HAP or standards for all HAP emitted by the source. Under either reading, the source would be subject to a section 112(d)(2) or (d)(4) standard.

The commenter insists that once a section 112(d)(2) standard comes into play, all HAP must be controlled (per *National Lime*). But this result is not compelled by the pertinent provision, section 112(c)(6). That provision is obviously intended to ensure controls for specific persistent, bioaccumulative HAP, and this purpose is served by a reading which compels regulation under section 112(d)(2) only of the HAP for which a source category is listed under section 112(c)(6), rather than for all HAP.

The facts here support the reasonableness of EPA's approach. Gold mine ore processing is an area source category listed under section 112(c)(6) for regulation under section 112(d)(2) solely due to its mercury emissions. There is special statutory sensitivity to regulation of area source categories in section 112. For example, an area source category may be listed for regulation under section 112 if EPA makes an adverse effects finding pursuant to Section 112(c)(3) or if EPA determines that the area source category is needed to meet its section 112(c)(3) obligations to regulate urban HAP or its section 112(c)(6) obligations to regulate certain persistent bioaccumulative HAP. Therefore, unless an area source category emits a section 112(c)(3) urban HAP or a section 112(c)(6) HAP and EPA determines that such category is needed to meet the 90 percent requirement set forth in section 112(c)(3) and (c)(6), findings related to adverse human health or environmental effects are required before EPA can regulate that area source category—findings EPA is unable to make for non-mercury HAP emitted from the gold mine ore processing and production source category at this time. Moreover, to the extent EPA lists an area source category pursuant to section 112(c)(3) (whether that finding is based on adverse effects to human health or the environment or a finding that the source is needed to meet the 90 percent requirement in section 112(c)(3), the statute gives EPA discretion to set generally available control technology ("GACT") standards for such sources. 42 U.S.C. 7412(d)(5).

EPA does not interpret section 112(c)(6) to create a means of automatically compelling regulation of all HAP emitted by area sources unrelated to the core object of section 112(c)(6), which is control of the specific persistent, bioaccumulative HAP, and thereby bypassing these otherwise applicable preconditions to setting section 112(d) standards for area sources. Nor does *National Lime* address the issue, since the case dealt exclusively with major sources.[3] 233 F. 3d at 633. Consequently, EPA disagrees with the comment that it is compelled to promulgate section 112(d)(2) MACT standards for all HAP emitted by gold mine ore processors.

3. Emission Standards for Fugitive Emissions

Comment: One commenter stated that gold mines have significant fugitive emissions of mercury, but that EPA did not propose standards for these emissions or mention them in its proposal. The commenter said that EPA has a statutory obligation to set standards for gold mine mercury emissions under section 112(d)(2) and (3), and must set emission standards for all the mercury emissions from the listed category. Another commenter described a recent preliminary study at two facilities in Nevada that found fugitive mercury air emissions from various non-point sources at those two mining operations such as from leach pads and tailings ponds.

One commenter stated that means to control fugitive emissions are available, such as enclosing their leaching operations. By enclosing the leaching process, the commenter believes that mines could eliminate this source of fugitive emissions. The commenter also stated that mines should not send tailings into open tailing ponds, but into closed treatment facilities that would remove mercury and other HAP from the tailings and prevent their release to the air. The commenter recommended that EPA evaluate the use of sulfur-based complexing agents for removing mercury during cyanidization of gold. According to the commenter, research indicates that these products appear useful for substantially reducing mercury in process solution during heap leaching.

Response: Due to the lack of information, we have not included fugitive mercury emissions at gold mine facilities in our 1990 baseline emission estimate (or in our more recent emissions estimates) for the gold mine ore processing and production area source category. Accordingly, these fugitive emissions are not part of the

[3] EPA acknowledges that major sources regulated under section 112 must be subject to MACT standards for all HAP emitted from the source category consistent with *National Lime.*

source category we are listing and regulating in this final rule. Other than the recent preliminary research at two facilities, we have no data on fugitive mercury emissions at gold mine facilities. The recent preliminary research suggests that some fugitive emissions may be occurring at these facilities from large non-point sources such as tailings ponds, leach fields and waste rock piles. However, it is our understanding that this preliminary research has not yet been published or peer-reviewed. Thus, at this juncture, we do not have sufficient information on fugitive emissions.

Furthermore, we have very little information on how these fugitive mercury emissions might be controlled. A few commenters suggested that certain compounds were available that may be useful for limiting these emissions. However, as far as we know, there has been no demonstration that these compounds would work effectively to limit the emissions, and we do not know the costs or potential adverse impacts of applying these chemicals. Therefore, we question the feasibility and practicality of applying these chemicals to limit fugitive mercury emissions from these non-point sources. We also question the feasibility and practicality of enclosing the leaching operations or the tailings ponds, as suggested by some commenters.

As explained in the proposed rule, the gold mine ore processing and production area source category covers the thermal processes that occur after ore crushing, including roasting operations (*i.e.,* ore dry grinding, ore preheating, roasting, and quenching), autoclaves, carbon kilns, electrowinning, preg tanks, mercury retorts, and furnaces. The data and calculations used to derive the estimated 4.4 tons of mercury emissions for this source category for the 1990 baseline inventory for section 112(c)(6) reflect emissions from the thermal processes described above, and the final MACT standards address all of these processes.

4. Major Source Determination

Comment: One commenter noted that the proposal stated that the gold mining processing and production source category consists of only area sources; however, the proposal indicated that actual emissions of hydrogen cyanide (HCN) at a few facilities were near the major source threshold. The commenter concluded that EPA violates both the CAA and its own regulations by basing its evaluation of whether gold mines are major sources on their actual emissions instead of their potential emissions.

The commenter further noted that the proposal requested comment on a certification process that would allow gold mines to avoid major source status whereby companies could certify that they are area sources by implementing certain "management practices" and then certifying to EPA that they had done so. The commenter stated that such a certification process would be unlawful in calculating a sources "potential to emit" because the management practices are not "control equipment," "restrictions on hours of operation or on the type or amount of material combusted, stored, or processed," and would not be "federally enforceable."

Other commenters supported EPA's conclusion and determination that the gold mines are area sources of HAP. According to the commenters, EPA's methodology in making this determination was extremely conservative because EPA did not apply what the commenters believe to be a key correction factor. Application of this correction factor would have reduced the HCN emissions estimates from by approximately 40–50%. The commenters also stated that fence line testing at selected gold mine operations demonstrated that these levels of HCN were below all applicable public health standards.

The commenters believe that, because the gold mines are area sources of HCN, they should not be subject to section 112 work practice standards or newly developed certification requirements. The commenters noted that it is not technically practical to set systematic work practice standards to reduce HCN emissions for every gold mining operation to follow because each mine is unique in its mineralogy and cyanide leaching processes, and different process solution pH values are necessary to enhance gold recovery.

The commenters explained that for economic, health, and safety reasons, they already implement work practice standards designed to minimize HCN. The commenter concluded that the combination of these work practice standards and the annual TRI reporting more than adequately ensure that gold mining operations will remain area sources of HCN.

Response: Contrary to the assertions of one of the commenter's, EPA did not state in the preamble to the proposed rule that the sources at issue had actual emissions ranging from 5 to 9 tons. By contrast, EPA stated that "a few facilities are close to the major source threshold due to hydrogen cyanide (HCN)." 75 FR 22479. EPA failed to clarify in the preamble to the proposed rule that the range of 5 to 9 tons represented potential to emit calculations for the largest-emitting sources. Specifically, as explained in the document "Estimated Emissions of HCN from Gold Mine Facilities in the U.S." (which is available in the docket for this rulemaking), EPA estimated the potential to emit for the five largest sources assuming that these sources would be operating every day of the year, 24 hours a day, at 100 percent of its current capacity. These assumptions and calculations resulted in a potential to emit estimate of 5 tons of HCN per year for the largest source. EPA then completed a second set of calculations, using the same assumptions (*i.e.,* operating every day of the year, 24 hours a day, at full capacity), but without applying the surface area correction factor, and those calculations resulted in a conservative potential to emit estimate of 9 tons of HCN per year for the largest source. The emission estimates for the remaining large facilities were all below 9 tons.

The commenters correctly point out that in determining whether a source is a "major source" under CAA section 112, we must consider the source's potential to emit, as well as its actual emissions. See CAA section 112(a)(1) and 40 CFR 63.2. As noted above, we specifically examined the sources' potential to emit and concluded that all sources' potential to emit were below the major source thresholds.

Some commenters allege that EPA significantly overestimated HCN emissions from the larger sources by not accounting for certain correction factors. They assert that if one were to account for the appropriate correction factors in developing the potential to emit values, HCN emissions would "range from 3.7–4.5 tpy for the larger mines compared to the 5–9 tpy estimate" (*See* document titled "PTE Emission Estimates for HCN" by the Nevada Mining Association, which is available in the docket for this action). Other commenters make a blanket, unsupported assertion that the Agency has underestimated HCN emissions from the source category because they believe that without the management practices currently employed by sources in the category, HCN emissions would exceed the major source thresholds at the larger sources. These latter commenters, however, made only conclusory statements and did not demonstrate that HCN emissions from the larger sources would exceed the major source thresholds if the management practices were not employed.

In sum, EPA has developed conservative estimates of the sources' potential to emit HCN. At one end of the range EPA estimates potential emissions of 5 tons per year of HCN for the largest source, which is well below the major source threshold of 10 tons per year of a single HAP. At the other end of the range EPA estimates potential emissions of 9 tons per year for that same largest source, which is a conservative estimate and is still below the major source threshold. The emission estimates for the remaining large facilities were all below 9 tons. We understand that the sources at issue implement various management practices as part of their operations to minimize the use and emissions of cyanide to protect workers, to comply with Mine Safety and Health Administration (MSHA) standards, to comply with their agreements to the International Cyanide Code, and for economic reasons (to reduce operational and supply costs). We currently do not have sufficient information to explicitly quantify emissions reductions achieved through these management practices, but nothing in the record suggests that the facilities would be major sources if they failed to employ the management practices. Accordingly, we are taking final action today to list the gold mine ore processing and production area source category and regulate its mercury emissions pursuant to CAA section 112(c)(6).

Although not required, we intend to send letters to various Gold Mining Processing and Production companies pursuant to Section 114 of the Clean Air Act to confirm our conclusion that the sources' potential to emit remain below major source thresholds.

5. Title V Permit Exemption

Comment: In the proposal preamble, EPA solicited comment on whether a title V exemption "is appropriate under section 502(a) for any particular sources in this category." One commenter offered the following reasons for not exempting gold mines from title V permitting requirements:

- EPA did not properly determine whether some or all sources in the category are major sources by determining each source's potential to emit.
- The CAA allows EPA to exempt area sources from title V permitting only if it establishes that compliance with the title V permitting requirements would be "impracticable, infeasible or unnecessarily burdensome." However, EPA does not claim that such requirements are "impracticable," "infeasible," or "unnecessarily burdensome" for gold mines.
- It is feasible and within the gold mining companies' financial means to comply with title V permitting requirements.

The commenter believes that the text and legislative history of the CAA make plain that Congress intended ordinary citizens to be able to get emissions and compliance information about air toxics sources and to be able to use that information in enforcement actions and in public policy decisions on a State and local level. According to the commenter, Congress did not think that enforcement by States or other government entities was enough; if it had, Congress would not have enacted the citizen suit provisions. The commenter said that, if a source does not have a title V permit, it is difficult or impossible for a member of the public to obtain relevant information about its emissions and compliance status or to bring enforcement actions. The commenter stated that to the extent the informational and enforcement benefits provided by title V permits can be considered a burden, these benefits far outweigh that burden.

The commenter also noted that title V provides important monitoring benefits and that title V permits are necessary to provide adequate monitoring. The commenter concluded by stating that the legislative history of the CAA shows that Congress did not intend EPA to exempt source categories from compliance with title V unless doing so would not adversely affect public health, welfare, or the environment; however, exempting gold mines from title V would adversely affect public health, welfare and the environment by depriving the public of important informational and enforcement benefits.

One State agency commented that additional title V permitting would subject both the source and the State agency to additional resource burdens. The commenter points out that major sources of criteria pollutant emissions are currently subject to title V permit requirements in Nevada and that sources not subject to major source permitting requirements are subject to Nevada's minor source permitting program. In addition, the NMCP requires all mining sources to obtain mercury-specific operating permits to construct. The commenter believes that these permit programs would provide a strong basis for implementing and enforcing any Federal MACT requirements for the gold mining industry, and there would be nothing gained by subjecting these sources to title V permitting.

Several commenters stated that EPA should exercise its discretion and exempt the gold mine ore processing and production industry from the title V requirements as impracticable, infeasible, and unnecessarily burdensome. The commenters said that, in light of EPA's findings in other similar rulemakings for area sources, the four factors set forth in the Exemption Rule support a finding that title V permitting is "unnecessarily burdensome" for the gold mine ore processing and production area source category.

In discussing the first factor of the Exemption Rule, whether title V would result in significant improvements to the compliance requirements, the commenters said that the proposed NESHAP for the gold mine ore processing and production area source category includes extensive monitoring, recordkeeping, and reporting requirements that are more comprehensive than title V requirements. The commenters believe that Nevada regulations and permits provide an additional layer of compliance assurance on the Federal NESHAP that obviates the need for title V permitting. The commenters claimed that the additional layering of title V does not "significantly improve" upon the proposed and existing compliance requirements.

Regarding the second factor in the Exemption Rule, whether title V permitting would impose significant burdens on the area source category and whether the burdens would be aggravated by any difficulty the sources may have in obtaining assistance from permitting agencies, the commenters said that there are extensive administrative burdens and costs associated with the title V permitting process, including mandatory activities that have been previously identified by EPA. The commenters claimed that many of the area source gold mines are owned and operated by small entities that are already required to comply with comprehensive State permitting requirements for mercury emissions and that requiring title V permits for them would result in resources being redirected away from more useful and necessary efforts.

The commenters explained that the third factor in the Exemption Rule examines whether the costs of title V permitting for the area source category would be justified, taking into consideration any potential gains in compliance likely to occur for such sources. The commenters claim that there do not appear to be any gains in compliance to justify the additional costs that would be imposed on these area sources from title V permitting

based on the lack of significant improvements in compliance requirements and the substantial additional costs and burdens associated with title V compliance.

The commenters noted that the fourth factor in the Exemption Rule analysis is whether there are implementation and enforcement programs in place that are sufficient to assure compliance with the NESHAP for the area source category, without relying on title V permits. The commenters claimed that the proposed rule includes all necessary monitoring to effectively implement its requirements, and the area sources for the gold mine ore processing and production are already permitted under State permit programs. According to the commenters, all non-title V sources in Nevada are required to hold "Class II" operating permits that must contain, among other things, all applicable emission limitations and standards. The commenters said that other States where gold mine ore processing and production area source are located either would be covered by a comparable delegated State air program or by EPA.

The commenters stated that EPA regularly provides title V exemptions for area sources similar to gold mine ore processing and production area sources and cited examples from the past year. The commenters claim that the existing and proposed compliance and monitoring requirements for the gold mines are generally more stringent than those found in the other NESHAPs for which EPA has granted a title V permit exemption.

The commenters stated that exempting the gold mine ore processing and production area source category from title V permitting will not adversely affect public health, welfare, or the environment because title V permits do not generally impose substantive air quality control requirements. According to the commenters, requiring title V permits also carries the potential of adversely affecting public health, welfare, or the environment by shifting State agency resources away from ensuring compliance with a program that is reducing mercury emissions from gold mines.

The commenters stated that EPA should exempt the gold mine ore processing and production area source category from title V permitting requirements, and at a minimum, should exempt area source gold mines that are subject to Nevada's comprehensive mercury control program.

Response: After reviewing the comments, we continue to believe that it is appropriate that all gold mine ore processing and production facilities be required to obtain title V permits. Most of the other area source categories for which we have provided title V permit exemptions have hundreds or thousands of facilities that are mostly owned by small businesses. In contrast, there are an estimated 21 facilities that are subject to this final rule, and, based on our research and analyses, none of the facilities are owned by small businesses; most of these facilities are owned by large, and in some cases, multi-national, corporations. Therefore, we conclude that the argument of financial burden, which has supported title V exemption for other source categories, does not apply to the gold mining industry (see Economic and Small Business Analysis, which is available in the docket).

Currently, it is our understanding that 7 of the 21 facilities that will be subject to the final rule already have title V permits (5 in Nevada and 2 in other states). Further, there are approximately 5 facilities in all other States (*i.e.,* except Nevada) that do not currently have title V permits that will be subject to this final rule, so title V permitting will apply to no more than a few facilities in any one of these other States. Therefore, we do not believe the requirement for title V permitting will be overly burdensome to the permitting authorities in those States. Although there are more facilities in Nevada that will be subject to the final rule, as the commenters point out, Nevada already has an effective permitting system in place. Five of the 14 gold mine facilities in Nevada already have title V permits. Because of Nevada's existing permitting system and experience with title V permitting, we do not think that it is an undue burden on the State of Nevada to require title V permits from the other gold mine facilities located within the State. We also think it is important for the public in States where these facilities are located to have access to emissions and monitoring data and the opportunity for public involvement in the permitting of these facilities that is provided by title V permitting.

6. Reconstruction

Comment: Several commenters believe it is appropriate to group under each of the umbrella "affected sources" all the equipment associated with each particular process in order to ensure a reasonable application of the reconstruction provisions found in the General Provisions. The commenters asked that EPA reaffirm that the 50 percent fixed capital cost trigger for determining reconstruction would be measured against all equipment components needed for the defined processes, and that reconstruction at one affected source as defined in the standard will not affect or result in reconstruction at another affected source.

The commenters also noted that the definition of "reconstruction" authorizes EPA to establish special provisions in a particular standard for the application of the reconstruction criteria to the affected source. The commenters said that the "carbon processes" affected source illustrates that the affected source can consist of several pieces of interconnected equipment that together constitute the process line, and it can be anticipated that production needs will give rise to the need to add more pieces of equipment to an existing carbon process line or even to install a whole new carbon process line. The commenters provided three examples: Adding a new component to an existing carbon processes group; construction of a new carbon group due to expansion at a facility that has an existing carbon group; and installation of new pollution control equipment. The commenter said that consideration of whether or where new MACT requirements should apply in these examples warrants the development of special reconstruction provisions in this standard, or EPA should clarify that the three examples would not be considered reconstruction under the proposed rule.

The commenters asked that EPA either clarify that the three examples would not be considered reconstruction, or alternatively, add the following provisions to the proposed rule: (1) An addition of a new piece of equipment to address production requirements is not considered a reconstruction, (2) the expansion of a facility by the construction of a completely new process line will not be considered a reconstruction of an existing process line, and (3) the installation of air pollution control equipment to comply with this standard is not considered a reconstruction.

Response: The determination of what constitutes a reconstruction is directly tied to the definition of the affected source and the definition of reconstruction in the part 63 General Provisions:

> Reconstruction, unless otherwise defined in a relevant standard, means the replacement of components of an affected or a previously nonaffected source to such an extent that:
>
> (1) The fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to

construct a comparable new [affected] source; and

(2) It is technologically and economically feasible for the reconstructed source to meet the relevant standard(s) established by the Administrator (or a State) pursuant to section 112 of the Act. Upon reconstruction, an affected source, or a stationary source that becomes an affected source, is subject to relevant standards for new sources, including compliance dates, irrespective of any change in emissions of hazardous air pollutants from that source.

For each of the four affected sources in the final rule, we have defined the affected source as the collection of processes associated within each affected source. Consequently, if one process within the affected source is upgraded or replaced with a new process, the 50 percent fixed capital cost criterion would be based on the fixed capital cost of replacing all processes in the affected source, not just the capital cost of the process being upgraded or replaced. For example, if a new carbon kiln is added to an existing group of carbon processes with mercury retorts, the capital cost of the new carbon kiln would be divided by the fixed capital cost of constructing a comparable new affected source containing all of the processes within the existing affected source of carbon processes with mercury retorts to calculate the percent for comparison to the 50 percent criterion.

With regard to the scenario where a new carbon process with a mercury retort is installed, the affected source is defined as the collection of all applicable processes within the affected source, and because of this, a facility could not have two carbon processes with mercury retorts affected sources, such as the commenter suggested, where one group is new and the other is existing. For example, if a new group of carbon processes with mercury retorts is installed at a facility in addition to an existing group of carbon processes with mercury retorts, the two groups (all carbon processes with mercury retorts at the facility) collectively would be a single affected source. In this case, the fixed capital cost criterion would be based on the fixed capital cost of replacing the existing affected source with a comparable new affected source, and if the new processes exceed 50 percent of that cost, all of the carbon processes with mercury retorts would be subject to the new source limit for carbon processes. There would not be separate and different emission standards for the two sets of carbon sources with mercury retorts (the older group and newer group) because the collection of all of these processes is the affected source.

We do not see a necessity to provide criteria for this final rule that are different from the requirements in the General Provisions for determining what constitutes a reconstruction. We also think it is appropriate to exclude the cost of emission control equipment from the cost calculation for reconstruction determinations.

B. Applicability

Comment: Several commenters stated the rule should exempt individuals (prospectors), laboratories, small mining operations, and non-leaching operations. The commenters urged EPA to include in the final rule all of the following exemptions to avoid the problem of unintended regulation of sources that were not meant to be included in the source category: Gold mining operations that produce less than 100 pounds of concentrate per year, which would exempt analytical labs that perform small bench scale processing tests on gold ores; gold mining operations that do not leach or dissolve gold, which would exempt placer and other non-leaching operators, including both small commercial efforts as well as individual recreation-type prospectors; and gold mining operations that process less than 1,000 tons per year of gold ore, which would exempt certain small scale pilot plants and related testing operations. The commenters said that the exemptions suggested above will not reduce in any way the effectiveness of the proposed rule in controlling mercury emissions from the targeted larger mines, nor will they lead to increased mercury emissions, but they will exclude regulation of a large number of small operators who do not emit any significant mercury.

Response: Section 63.11640(c) of the proposed rule provides that the emissions standards for this area source category do not apply to research and development facilities, as that term is defined under CAA section 112(c)(7). We did not receive any adverse comments concerning this provision, and are finalizing the provision in this rule.

Further, as mentioned above in section IV, we are clarifying in this final rule that this area source category does not include individual prospectors and very small pilot scale mining operations. Prospectors and other very small pilot-scale operations (*e.g.,* operations that produce or process less than 100 pounds of concentrate per year) are very small and were not included in the section 112(c)(6) inventory that was the basis for the listing of gold mine ore processing and production source category. We believe that emissions from the very small scale operations described above to be very minimal.

By contrast, the commenter's suggested 1,000 tons/yr ore threshold may include operations beyond the very small scale pilot operations discussed above. We believe that the 100 pounds of concentrate per year more appropriately reflect these very small scale operations.

We are not making the suggested change of excluding operations that do not leach or dissolve gold because certain gold mine facilities in the source category use flotation or gravity flotation processes and perform thermal processing of concentrate in melt furnaces, which can have significant emissions of mercury. However, as mentioned above we are clarifying that this final rule does not apply to these very small scale operations.

C. MACT Floors

1. Consideration of Variability in Determining Floors

Comment: One commenter acknowledged that EPA may consider variability in calculating the best sources' performance, but stated that EPA's method of considering variability seeks to assure that none of the sources among those identified as best performers would ever exceed the floor level. The commenter claims that such an approach ignores the reality that sources' emission levels are largely within their control, and although a great deal of variability may be statistically conceivable if EPA chooses a high enough prediction limit (in this case the 99th percentile) that does not mean that a well-operated source actually would experience such variability. The commenter said that one of the main points of having emission standards is to ensure that sources not only deploy the appropriate control measures, but also use those control measures consistently to minimize emissions.

The commenter said that using an upper prediction limit to set standards reflecting the statistical worst performance these sources could have in a purely statistical sense does not yield an accurate picture of the best sources actual performance, and it is especially arbitrary in the absence of any explanation of why EPA thinks that the relevant best sources' performance would ever be so bad, other than the fact that it is statistically possible.

Response: As described previously, the MACT floor limits are calculated based on the performance of the lowest

emitting sources in each of the MACT floor pools. We ranked all of the sources for which we had data based on their emissions and identified the lowest emitting sources.

As the commenter concedes, EPA can consider variability in assessing sources' performance when setting MACT standards. See *Brick MACT,* 479 F.3d at 881–82; and *Mossville Envt'l Action Now* v. *EPA,* 370 F.3d 1232, 1241–42 (D.C. Cir 2004) (reaffirming that EPA can assess variability in determining the level of emissions control achieved by the best performing sources).

Variability in facilities' performance has various causes. One source of variability for these facilities is the differing mercury concentrations in the input materials. Another source of variability is due to normal variations in performance of the control devices for which both run-to-run and test-to-test variability must be accounted.[4] A review of the run-by-run emissions data in the record shows that emission rates from one run to the next for well-operated sources can vary by as much as a factor of 8. We need to account for sources' variability (both due to control device performance and variability in inputs) in assessing sources' performance when developing technology-based standards. Accordingly, EPA accounts for variance in test data, between units, and among facilities when developing the MACT standard.

In determining the MACT floor limits, we first determine the average emissions of the top performers based on available data. We then assess variability of the best performers by using a statistical formula designed to estimate a MACT floor level that is equivalent to the average of the best performing sources based on future compliance tests. Specifically, the MACT floor limit is an upper prediction limit (UPL) calculated with the Student's t-test. The Student's t-test has also been used in other EPA rulemakings (*e.g.,* NESHAP for Cement Manufacturing, NSPS for Hospital/Medical/Infectious Waste Incinerators, and NESHAP for Industrial, Commercial, and Institutional Boilers and Process Heaters) in accounting for variability. A prediction interval for a future observation is an interval that will, with a specified degree of confidence, contain the next (or some other pre-specified) randomly selected observation from a population. In other words, the prediction interval estimates what the upper bound of future values will be, based upon present or past background samples taken. The UPL consequently represents the value which we can expect the mean of future observations (*i.e.,* emission test runs) to fall below within a specified level of confidence, based upon the results of an independent sample from the same population. In other words, if we were to randomly select a future test condition from any of these sources (*e.g.,* average of 3 runs) we can be 99 percent confident that the reported level will fall at or below the 99 percent UPL value. We note that the methodology accounts for both short-term and long-term variability and encompasses run-to-run and test-to-test variability.

For this rule, we used the 99 percent UPL analysis on the emissions data for the top performing sources to account for the variance. In the context of determining the MACT floor, the 99 percent UPL represents the value below which the mean of future compliance tests (based on, for example, a 3-run average) would fall 99 percent of the time. A 99 percent level of confidence means that a facility, whose emissions are consistent with the best performing sources, has one chance in 100 of exceeding the emission standard.

We believe that using the 99 percent UPL is appropriate for this rule. As noted above, this approach is consistent with several other previous rulemakings. It also makes sense from a practical standpoint. If we selected a lower number (*e.g.,* 95 percent UPL) this would mean that a best performing source that is performing at the MACT level of control would potentially exceed the limit 5 percent of the time—which we do not believe is a reasonable approach for this rule. *See Mossville,* 379 F.3d at 1241–42); *see also* 70 FR at 59438 (Oct. 12, 2005) (explaining use of 99th percentile). With regard to the commenter's statement that no sources among the best performers would ever exceed the MACT standard, we believe this is incorrect. The commenter provided no basis for this statement, and we do not believe the commenter based this statement on an analysis of the variability in the data.

We do not believe that the UPL analysis reflects the statistical worst performance the top five performing sources could have. The UPL calculation is dependent on the data that we have, and reflects the actual variability in the test data for the best performing sources. It does not reflect worst-case performance. We continue to believe that the UPL does yield an accurate picture of the best sources' performance as best as possible with taking into account variance between the facilities, units at the facilities, and between test runs for the different units (including variability in input materials).

Furthermore, although the average of several data sets may show a top performing source meeting the emission standard by a significant margin, the variability in emissions inherent in any one compliance test could easily indicate much higher emissions, and, in some cases, an exceedance of the emission standard. We continue to believe that the UPL analysis evaluated at 99 percent confidence is appropriate for this source category.

Moreover, we believe the data we used to calculate the MACT standards are representative of the normal performance of the best performing sources for several reasons. First, the test results that we are using in our MACT database are tests conducted under Nevada's mercury emission control program, and are conducted to determine whether a facility is in compliance with State requirements. Facilities typically try to perform as well as they can during such tests. State (and often EPA) permitting authority staff are notified before a performance test is conducted to provide an opportunity to attend and observe the test, and they often attend to ensure the source is operating properly and that the testing is performed according to the strict requirements in the codified test methods.

Test reports are carefully reviewed by the permitting authority, and any failure to follow the test method or abnormal operation of a source is flagged. These data are usually invalidated, and invalidated tests are not used in our MACT standard calculations. For example, several tests from these facilities were invalidated by the NDEP because the specified testing procedures were not followed or the emission control device was not operating properly, and we have not used those results in our analysis for those reasons. We have collected additional data from test reports not available at the time of proposal, and one of those tests was invalidated because NDEP representatives discovered that the emission control device was not operating properly during the test. Therefore, we also did not use those test data.

The commenter believes that floors must be set at the average emission level

[4] Run-to-run variability is essentially within-test variability, and encompasses variability in individual runs comprising the compliance test, and includes uncertainties in correlation of monitoring parameters and emissions, and imprecision of stack test methods and laboratory analysis. 72 FR at 54877 (Sept. 27, 2007). Test-to-test variability results from variability in pollution device control efficiencies over time. Test-to-test variability can be termed long-term variability. 72 FR at 54878.

achieved by the best performers when they are operating properly. We agree that the performance data characterizing the emission level achieved by the top performers must be data obtained when they are operating properly, and we believe that is the case for our current database for this source category.

As described above, the MACT floor is based on the average performance of the top performers plus an amount to account for variability. We have appropriately developed a MACT standard based on emissions from the top 5 best performing sources that accounts for variability because, over an extended period of time, the emissions from each of these best performing facilities (even the best controlled) will vary above and below the facility average. For example, we expect that about half of the duration of the year the emissions from a best performing facility would be somewhat below their average and that about half of the duration of the year their emissions would be somewhat higher than their average. If we set the MACT limit exactly equal to the average emissions level achieved by the best performers (without accounting for variability), and we had a source that was performing at exactly the MACT level over the course of the year, the measured emissions level on roughly half the days of the year would suggest that the source is emitting at levels above the MACT limit, and on about half of the other days of the year the measured emissions level would suggest that the source is emitting at levels less than the MACT limit. We reasonably and appropriately accounted for variability in the data consistent with established statistical theory and practice and judicial precedent. Finally, ignoring variability of the best performing sources and using only the average performance would virtually guarantee that some of even the best performers would exceed the floor limit at least some of the time.

Thus, we developed a MACT standard based on the average of the best performing sources that accounts for variability. We accomplished this by calculating the MACT standard from this average performance and accounting for variability by using the 99 percent UPL. The specific calculations are presented in the MACT floor document in the docket for this rulemaking. Furthermore, we agree with the comment that one of the points of having emission standards is to ensure that sources not only deploy the appropriate control measures, but also use those control measures consistently to minimize emissions. We believe that the MACT standards established in this rule along with the requirements to monitor and maintain control device parameters within certain ranges will ensure control measures are applied consistently to minimize emissions.

Comment: Another commenter stated that consideration should be given to defining the inherent range of measurement error and requiring more test runs in order to reduce variability due to process variation. The commenter said that this would also better clarify when variability was due to operational controls, which could be addressed, rather than due to factors that cannot be controlled, such as mercury content in the ore. The commenter asked for clarification on how inconsistent runs should be treated, what defines an acceptable set of runs, and at what point more runs would be required to provide reliable data.

The commenter also stated that the degree of variability allowed in the development of the new source limit for ore pretreatment appears to be out of line with the new source limits for carbon processes and non-carbon processes. The commenter believes that ore pretreatment variability for new sources is higher than existing sources because low thermal units were included in the same category, high emissions were allowed in the data set, and variable emissions were allowed in data set. The commenter recommended that, if EPA continues to use Goldstrike as the best performing source for new source MACT, then they should re-evaluate and reduce the variability to be equal to or less than the variability for existing sources.

Response: We agree with the commenter that the testing process would be more accurate if the number of test runs was increased. However, we balance several factors in determining the minimum number of runs required, and because the compliance testing is supplemented by various types of continuous or periodic parametric monitoring, we have concluded that three test runs are appropriate for this final rule. Although we have not proposed a formal procedure to assess the consistency of test runs, the permitting authority performs routine reviews of compliance test data to identify potential outliers and results that suggest further investigation is needed. For example, a routine review tracks trends in performance, and in particular, flags any trends in deteriorating performance over time. An unusually high run among the three runs also attracts attention and would be examined to determine if it might have been caused by a problem with the process, control device, sampling, or analysis. If the permitting authority identifies inconsistent runs, they have the authority to invalidate any or all runs. A source would be required to perform more runs to provide reliable data if two to three runs were invalidated.

We agree with the commenter that the degree of variability used in the development of the proposed new source MACT standard for the ore pretreatment group appeared to be inconsistent with the degree of variability used in the development of the proposed new source MACT standard for carbon processes and non-carbon concentrate processes. We agree with the commenter that the ore pretreatment degree of variability at proposal for new sources was higher than the degree of variability for existing sources. We do not believe that the variability was higher because low thermal units (*i.e.,* autoclaves) were included in the same category, but because two tests of the ore preheater/dry grinding processes at Goldstrike were allowed in the data set. These tests had, as the commenter identified, inconsistently high emissions (as compared to other tests at other times for the same units) and inconsistent variability between the runs. We have determined that the tests the commenter is referring to are not representative of normal operation, and those tests have been removed from our database because the NDEP invalidated the tests due to possible sample contamination. (*See* the MACT Floor Document in the docket for the final rulemaking for more details). We continue to use Goldstrike as the best performing source for the ore pretreatment new source MACT, and the variability for new source MACT is now less than that of the variability for existing source MACT, and is less than the variability calculated at the time of proposal.

2. General Comments on MACT

Comment: Some commenters stated that the MACT floor already represents installation and operation of MACT controls, and the use of emissions data from facilities that are already controlling their mercury emissions creates an artificially low MACT floor. The commenters said that the low MACT floor penalizes facilities that voluntarily invested in pollution control technology and creates a substantial disincentive for industry and States to move ahead of EPA in reducing emissions of HAP.

Response: We acknowledged at proposal that many gold mine facilities are already well controlled for many

reasons, including participation in the NMCP. We also acknowledge that the top performing facilities that are the basis for the MACT floor calculation are the top performers because they have installed controls. CAA section 112(d)(3)(B) requires that, for a category with fewer than 30 sources, the MACT floor not be less stringent than "the average emission limitation achieved by the best performing 5 sources (*for which the Administrator has or could reasonably obtain emission information*)." (Emphasis added). EPA has information on the well-controlled facilities and used the information to conduct MACT floor analysis, as required by the CAA. Although the MACT floor may be considered more stringent in comparison to floors that would have been established if no facilities had mercury emission controls, we do not consider the floor to be "artificially low" because consistent with the statute, it reflects the level achieved in practice by the best performing sources. *See* 112(d)(3). We do not believe that the MACT floor penalizes facilities that invested in pollution control technology because those facilities will be able to meet the MACT standards. We do not consider that this final rule creates a disincentive for industry and States to move ahead of EPA in reducing HAP emissions because as facilities reduce mercury emissions by adding controls required by State programs, they will be able to meet the NESHAP. Most of the facilities that will not meet the current final standards have already proposed to add controls to their units in their Phase 2 applications for the NMCP.

3. MACT for the Ore Pretreatment Group

Comment: Several commenters supported EPA's general approach to establish three groups of affected sources in the proposal. On the other hand, several commenters suggested that EPA develop separate emission standards for roasters and autoclaves for existing and new sources. One commenter stated that roaster and autoclave processes are different from each other based on the mercury species released, controls utilized, and their rates of mercury emissions. The commenter said that roasters commonly reach temperatures of 400° to 700°C, releasing gaseous elemental mercury, whereas autoclaves commonly reach temperatures of 175° to 230°C producing reactive gaseous mercury and sulfate and forming mercury sulfate. According to the commenter, autoclaves are expected to be able to improve efficiency over time. The commenter noted that roasters produce one to two orders of magnitude higher emissions than do autoclaves. The commenter believes that facilities that only use autoclaves should not be allowed the leeway to emit at the rate that facilities employing roasters are allowed. The commenter recommends that the ore pretreatment group be divided into high temperature pretreatment processes (roasters) and low temperature pretreatment processes (autoclaves and ancillary roaster processes, such as dry grinding, pre-heating, and quenching).

Response: We discussed in section V.A. of the preamble to the proposed rule our rationale for establishing the different affected sources, including the ore pretreatment processes affected source. We believe it is appropriate to maintain the ore pretreatment group affected source, as we had proposed. We do not agree with the comment that roasters necessarily have higher emissions that are one to two orders of magnitude higher than emission from autoclaves. The available data show a wide range in emissions from autoclaves (from 0.4 to 115 lb/million tons of ore). This range overlaps the range for roasters and their ancillary equipment, which have combined emissions between 42 to 71 lb/million tons of ore. Regardless of the mercury species released, controls utilized, operating temperatures, or control efficiency over time, autoclaves and roasters process the same input material (*i.e.,* ore) and are intended for the same purpose (*i.e.,* to oxidize the ore). Therefore, we believe that it is appropriate to maintain the ore pretreatment affected source as we had proposed, keeping roasting operations and autoclaves together.

Comment: One commenter stated that EPA failed to consider beyond-the-floor standards for roasters and that if additional reductions are achievable at roasters, then EPA must set additional beyond-the-floor standards for roasters.

A commenter also stated that although EPA's standard for new ore pretreatment facilities is as high as its standard for existing facilities, EPA does not propose or discuss setting beyond-the-floor standards for new sources. The commenter claims that EPA has a statutory obligation to ensure that its new source standards reflect the maximum achievable reduction in emissions.

Response: Following proposal, we continued to investigate the performance of facilities with ore pretreatment processes and opportunities for additional control. We collected data from more recent tests that were not available at proposal, and these new data show that emission control performance at these facilities has continued to improve. We identified two previous tests in the proposal database that were suspect, and we confirmed with NDEP that these tests should be invalidated and not used in the analysis because of possible sample contamination. We have also dropped the data for one facility from the analysis because their autoclave was shutdown in 2007 and dismantled, and we only had one test of the autoclave when it was operating in 2006. For these reasons, we did not include data for that facility in the analysis, which is now based on the only four facilities currently operating.

Based on the addition and change described above with respect to our available data, we revised the MACT floor analysis for the ore pretreatment processes. The revised MACT floor for existing sources decreased from 175 lb/million tons at proposal to 158 lb/million tons, and the new source MACT floor dropped from 163 lb/million tons to 84 lb/million tons.

The MACT floor limit for existing ore pretreatment processes is based on the use of calomel-based mercury scrubbers on roasters and wet scrubbers on autoclaves and ancillary roaster operations. We conducted a beyond-the-floor analysis during the development of the proposed rule. The roasters were already equipped with very good mercury controls (condensers and calomel-based mercury scrubbers), and we did not identify any beyond-the-floor options for the roasters. However, we identified as a beyond-the-floor control for autoclaves the installation of both a refrigeration unit (or condenser) and a carbon adsorber. We continue to believe that the roasters stacks are well controlled, but since our proposal, we have identified a beyond-the-floor control option (carbon adsorption) for the ore pre-heaters/dryers (ancillary roaster operation) that could achieve additional emissions reductions of approximately 70 percent (or more) for those units. Two of the three facilities with roasters have already proposed in their NMCP Phase 2 permit applications to apply controls to their preheaters/ore dryers, and these two companies have submitted cost estimates for applying a carbon adsorption system. Using the cost estimates submitted by the affected facilities, we estimate the capital costs for control of roaster preheaters/dryers for the three facilities with roasters as $3 million with a total annualized cost of $1.6 million per year. We also estimate a reduction of 118 lb/yr of mercury emissions would be achieved at an overall cost effectiveness of about $13,800 per pound of mercury. We

believe that these costs and cost effectiveness are reasonable. As required under CAA section 112(d)(2), we have also considered non-air quality health and environmental impacts and energy requirements of this additional control. We conclude that this is an acceptable beyond-the-floor control technology for existing roaster preheaters/ore dryers. Therefore, we included the beyond-the-floor control for ore preheaters/dryers, as well as the beyond-the-floor control for autoclaves, in determining the MACT standard in this final rule for existing sources of ore pre-treatment processes. After applying the appropriate variability analyses to the data, we determined that the MACT standard for existing sources is 127 lb/million tons of ore.

As mentioned above, we have revised the new source MACT floor. We also did a beyond-the-floor analysis for new sources in the ore pre-treatment processes group. However, we did not establish the MACT standard for new sources based on this beyond-the-floor analysis because we did not identify a feasible and cost-effective option to achieve reductions greater than the new source MACT floor. Therefore, for new sources of ore pretreatment processes, the MACT "floor" is the MACT standard for the affected source. The final new source MACT standard is 84 lb/million tons of ore, which is considerably more stringent compared to the proposed standard of 149 lb/million tons of ore and reflects the maximum achievable reduction in emissions.

Comment: One commenter stated that the proposed estimated capital costs of $890,000 and total annualized cost of $720,000 for beyond-the-floor autoclave controls are not representative of actual costs of installing a refrigeration unit (or condenser) and a carbon adsorber on autoclaves. The commenter estimates that capital costs for autoclave controls will range from $18 million to at least $30 million, and annual operating costs could range from $2 million to $60 million, depending on which controls, if any, are determined to be technically feasible. The commenter believes that based on these cost estimates, beyond-the-floor MACT controls would be cost prohibitive and are not justified for the ore pretreatment affected source group.

Another commenter estimated that for the installation of carbon adsorbers on their autoclaves to control mercury emissions, the capital costs would range from $30 million to $35 million, annual operating costs would be $2 million per year, and the annual energy requirements would be 11,400 megawatt-hours per year with an annual energy cost of $900,000.

Response: After reviewing the new cost estimates provided by the commenters, we agree that capital and total annualized cost estimates of the beyond-the-floor controls on autoclaves in the proposal were underestimated. We evaluated the detailed cost estimate based on an engineering study for a carbon adsorption system provided by one of the commenters (see details in the comment above on capital, operating, and energy costs), and our review of these details indicates it to be a reasonable cost estimate and more representative. Therefore, we have used this estimate as the basis for our estimate of the costs of the beyond-the-floor mercury emission controls for autoclaves. Our revised estimates are that the capital cost for installing carbon adsorbers on autoclaves would be $29.3 million, with a total annualized cost of $4.9 million per year, which would result in an estimated reduction of 431 lb/yr of mercury emissions per year and an overall cost effectiveness of about $11,000 per pound of mercury. Based on these new costs and estimated reductions we conclude that the beyond the floor controls are affordable and justified for the ore pretreatment affected source.

Comment: Several commenters noted that, at the proposed new source MACT limit of 149 pounds/million tons of ore, the proposed new source Donlin Creek Mine, located in Alaska, would be allowed to emit 3,200 lb/yr of mercury based on a projected production rate of 22 million tons/yr of ore.

Response: With respect to this proposed new gold mine in Alaska, the commenters' estimate of 3,200 lb/yr of mercury emissions is inaccurate and a significant overestimate for a number of reasons. The two primary reasons are that, based on available information, if the facility is built, only an estimated 15 percent of the ore mined will be processed in autoclaves (not 100 percent as assumed by the commenters), and that the commenters' estimate is based on assuming that the average emissions level for the facility throughout the year would be at the maximum allowed at the proposed new source limit (149 lb/million tons of ore), which has been significantly reduced since proposal.

With the new source MACT standard in the final rule that is about two times more stringent (*i.e.,* lower) than the proposed MACT standard, along with corrections described above, we estimate that far less than 3,200 lb/yr would be emitted from this new source if it is ever built. Assuming continuous operation for 365 days per year, an estimated 21.5 million tons/yr of ore mined, about 3.2 million tons/yr processed in autoclaves (15 percent), and assuming the source would emit at the average emission level used to calculate the revised new source MACT (45 lb/million tons of ore), we calculate that mercury emissions would be about 144 lb/yr, which is about 5 percent of the estimate provided by the commenters. Considering that the facility has yet to go through the permitting process and that, if it is built, it will likely include emissions controls that would reduce the emissions below 45 lb/million tons of ore, we believe that, if the facility is built, emissions would quite likely be lower than 144 lb/yr.

4. MACT for Carbon Processes

Comment: Several commenters objected to including Facility M in the MACT floor determination for new and existing sources in the carbon processes affected source because it is not representative of, or similar to, other sources, because it has unusually low mercury concentrations in its ore, and no need for a retort to remove and recover mercury. They noted that, because the mercury content of the gold ore is fixed, the only way for other facilities to reduce emissions of mercury is to apply mercury emission controls, but, for many facilities, emission controls will not be enough to meet the proposed MACT standard. The commenters stated they were aware that the DC Circuit Court had constrained EPA's discretion to set floors that fail to consider material inputs, but they said gold mines were different from the remanded source categories (brick kilns and cement kilns) because gold mining operations process very large quantities of ore, and the ore is the only material input that results in mercury emissions. The commenters stated that, in adopting section 112, Congress expressly cautioned EPA against setting standards that would require mining operations to change the ore used as essential feedstock. The commenters said that, by ignoring the mercury content in the ore being mined and processed at the facilities in the MACT floor determination, EPA is requiring facilities to consider the substitution of, or changes in, the ore that is processed because there is no other way to achieve the standard. The commenters recommended that EPA address, as a threshold matter, the differences in processing and emissions across facilities that result from the variable concentration of mercury in ore. The commenters recommended that Facility M not be considered the "best controlled similar source" for purposes of setting the new source MACT floor because the

facility is not similar to other sources. The commenters stated that, if EPA does not exclude from the source category facilities that do not use retorts to process concentrate, then they should subcategorize them.

Response: After consideration of comments and a re-examination of the design of the facilities at issue, the emission controls, and other factors affecting emissions from the carbon processes at Facility M, we agree that this facility is quite different and unique compared to most other gold mine ore processing and production facilities, including other facilities in Nevada, in its carbon process. The difference is manifested in the processing train in that mercury retorts are not needed or used at Facility M to recover mercury. As the commenter notes, the CAA allows EPA to "distinguish among classes, types and sizes of sources within a category" in developing MACT emission standards, and gold mine facilities without mercury retorts are different in both class and type from those with mercury retorts. Accordingly, in the final rule, we identify and set separate MACT standards for these two different types of carbon processes: those that use mercury retorts; and those, such as the carbon process at Facility M, that do not use mercury retorts.

As part of our re-analysis of the MACT floor and the MACT for sources that are in the carbon processes with mercury retorts group and sources that are in the carbon processes without mercury retorts group, we considered new data that were not available at the time of proposal. Over the past one to two years since our data collection effort for the proposal, facilities in Nevada have continued to add controls and improve emission control as part of the NMCP. The new data indicate there were two facilities with carbon processes without mercury retorts operating in 2009. Using the data from these two facilities, we determined that the MACT floor limits for carbon processes without mercury retorts are 0.17 lb/ton of concentrate for existing sources and 0.14 lb/ton of concentrate for new sources (based on the best performing facility, Facility M).

In our beyond-the-floor analysis, we considered the addition of a carbon adsorber on an uncontrolled emission unit within an existing affected source. We estimate the capital cost as $210,000 with a total annualized cost of $72,000 per year, an emission reduction of 1.63 lb/yr of mercury, and a cost effectiveness of $44,000/lb of mercury. We do not believe that the small emission reduction that this control option would achieve is justified in light of its cost. We therefore decided not to go beyond-the-floor. We also considered possible beyond-the-floor options for new carbon processes without mercury retorts, but concluded these options were not cost-effective or feasible. Therefore, for new and existing sources of carbon processes without mercury retorts, the MACT floor limit is the MACT standard for this affected source.

As part of our re-analysis for the carbon group processes with mercury retorts, we collected and evaluated additional data. As discussed above, several of the facilities have improved emission control over the levels observed in the database we used at proposal. Two facilities with newly-installed controls replaced two higher-emitting facilities that were in the top 5 at proposal, and all three of the other facilities that remained in the top 5 had lower levels of emissions after considering the new data. The results are that the MACT floor limits for carbon processes with mercury retorts are 2.2 lb/ton of concentrate for existing sources and 0.8 lb/ton of concentrate for new sources (based on the best performing facility, Facility N). In the beyond-the-floor analysis, we evaluated the impacts of adding a second carbon adsorber in series with the controls applied to achieve the MACT floor level of control. We estimate the capital cost would be $3 million with a total annualized cost of $1.3 million per year, an emission reduction of 9 lb/yr of mercury, and a cost effectiveness of $150,000/lb of mercury. Because of the small emission reduction and high cost effectiveness associated with this additional control, we decided not to go beyond the floor. Therefore, for existing sources of carbon processes with mercury retorts, the MACT floor limit is the MACT standard for this affected source. We also considered possible beyond-the-floor options for new carbon processes with mercury retorts, but concluded these options were not cost-effective or feasible.

5. Compliance Alternative for New Carbon Process Sources

Comment: One commenter noted that the compliance "alternative" of 97 percent would be unlawful unless EPA specified that carbon sources had to meet the more stringent of either the floor standard or a 97 percent reduction standard. The commenter stated that because floors must reflect the emission level achieved by the best performing sources, allowing sources to meet a 97 percent reduction standard that was less stringent than the emission level actually achieved by the relevant best sources would contravene section 112(d)(3) and well-established D.C. Circuit court precedent.

One commenter supported EPA's use of the percent control alternative to the new source MACT for the carbon group. The commenter believes that the percent control alternative for new source carbon group MACT should also be available as an alternative to the existing source MACT for the carbon group.

Another commenter stated that another facility, which has an average mercury reduction efficiency level of 99.995 percent, represents the "best controlled" similar source for the carbon process group and should be the basis for the alternative limits for new carbon processes.

Several commenters requested clarification of the way in which compliance with the alternative for percent reduction would be demonstrated for new sources when there are multiple control devices on an emission unit.

Response: We eliminated in the final rule the compliance alternative of 97 percent reduction for new carbon processes. After reviewing the comments received on this standard and giving further consideration to the practicality of how it would be measured, we concluded that this option would be difficult to implement, particularly when multiple processes that are operated at different times vent to a single control device and stack. In addition, we have limited data supporting this compliance alternative. In proposing this alternative for comment, we had hoped to, but did not receive additional data indicating that the 97 percent reduction option would be equivalent in stringency to the proposed new source limit of 0.14 pounds of mercury per ton of concentrate. Largely due to the reasons stated above, we have eliminated the 97 percent control efficiency option for new carbon processes in the final rule. In addition we are not allowing this percent reduction to be used for existing carbon sources. We also note that the facility that one commenter identified as having an average mercury reduction efficiency level of 99.995 percent is now being used as the "best controlled" similar source for the final MACT standard for new carbon processes with mercury retorts.

D. Compliance Determinations

1. Timing for Compliance Determinations

Comment: Several commenters requested that the compliance deadline for existing sources be 3 years after the effective date of the rule, rather than the 2 years proposed. The commenters noted that several facilities will have to install control devices to achieve the MACT floor limits that have been proposed. The commenters explained that the controls must be custom designed for the unique characteristics of each process and associated process streams at each facility and stated that it can be time consuming and difficult to design, procure, construct, and implement emission controls to ensure effective operation for the particular source.

Response: After reviewing the information provided in public comments on the challenges of retrofitting new controls, we believe that allowing 3 years for existing sources to comply is appropriate. Given the complexity of the sources, the combinations of control devices that are needed in many cases, and the amount of time necessary for designing, installing, testing, and commissioning additional emission controls for mercury, we conclude that 2 years may not provide adequate time for existing sources to comply with the final emission standards.

Comment: Several commenters recommended that the rule specify that source testing results be used to determine compliance for the calendar year in which the test was conducted rather than to determine compliance for the prior 12 months. The commenters suggested that the source test results be applied to the hours of operation at the end of the calendar year to determine the source's compliance with the MACT standard on an annual basis, as required in the NMCP. The commenters suggested that, if more than one source test is conducted in a year, the facility should average the mercury emission test results to determine compliance for the calendar year in which the tests were conducted.

Another commenter commented that the annual compliance testing should not be constrained to the same calendar quarter each year. The commenter stated that this can lead to testing during periods of operation that may not represent normal production capacities. The commenter believes that mercury emissions testing should be scheduled for the most appropriate time interval throughout the calendar year.

Response: The permitting authority needs to be able to determine compliance with the NESHAP as soon as possible after the tests are completed and test results are available. Consequently, the final rule requires that initial compliance be determined based on production data and operating hours for all full calendar months between the date the rule is published in the **Federal Register** and the date of the compliance test, and subsequently, annual compliance must be based on production data and operating hours for the 12 full calendar months preceding the compliance test. This allows the permitting authority to determine if the affected source is in compliance in a timely manner. (This is consistent with the way compliance determinations are made in another MACT rule that uses a similar format—National Emission Standards for Hazardous Air Pollutants for Primary Lead Smelting, 40 CFR part 63, subpart TTT.) If compliance was based on a calendar year, as suggested by the commenter, then we would not know if a source is in compliance until after December each year. For example, if a source conducted its compliance test in March, we would have to wait about 9 more months before we could determine if that source was actually in compliance. After those 9 months, if the source was not in compliance, it would mean that the source could have been out of compliance for the previous 9 months.

Moreover, we do not believe that compliance with the NESHAP based on the production data from the 12 months prior to the compliance test would cause problems with reporting under the State program. It is our understanding that the emissions limits in the Nevada State Phase 2 permits are (or will be) based on concentration in the stacks (*e.g.,* micrograms per cubic meter ($\mu g/m^3$)). The limits in this final rule are based either on pounds of mercury per million tons of ore or pounds of mercury per tons of concentrate. Therefore, the companies can continue to report the annual emissions as required under the TRI program and the State program without conflict with this rule.

If multiple compliance tests are conducted during the year, then a compliance determination must be made for each separate compliance test based on the production data and hours of operation for the 12 full calendar months preceding each test (*i.e.,* the results of multiple compliance tests conducted throughout the year are not averaged to provide a single compliance determination for the year).

We understand that the rule, as proposed, may have required all existing sources to conduct their subsequent annual compliance tests in the same calendar quarter, and this may pose a scheduling problem because of the large number of facilities located in the same State (*e.g.,* Nevada). Our concern was that subsequent annual compliance tests, if not separated in time, could be conducted for two different years with little time between the two tests (*e.g.,* only a few days apart for the extreme case where the first test is conducted in late December and the second one in early January of the following year). We are providing scheduling flexibility by requiring that annual compliance tests be at least 3 months apart and no more than 15 months apart, and we are providing a similar separation for the period between the initial compliance test and the first annual compliance test. We do not believe that tracking multiple compliance dates is a particular problem for the permitting authority because that is the case for many other source categories subject to annual compliance testing.

2. Test Methods

Comment: Several commenters supported EPA's proposal of alternate Methods 30A and 30B for demonstrating compliance. One commenter supported EPA's requirement to use Method 29 as an emission test method, but recommended two revisions: Requiring a determination of the absence of cyclonic flow before sampling, and a minimum sampling time of 90 minutes for each test run. The commenter also stated that they do not support the use of the Ontario Hydro Method (ASTM D6784–02), Method 30A, or Method 30B as mercury test methods. The commenter believes that the methods of demonstrating compliance with the emissions standards should be consistent with the methods utilized to establish the emission standards, which were based mainly on Method 29 data. The commenter said that the typical gas streams associated with the gold mining industry have high particulate loadings, high mercury concentrations, sulfur dioxide (SO_2), and contain particulate-bound mercury. The commenter also stated that the alternative methods were not developed specifically for the gold mining industry and their typical gas streams and concluded that the results from the various alternative methods will yield varying results, will not be comparable, and will provide inconsistent reporting of overall mercury emissions.

Response: Method 29 references Method 1, which requires cyclonic flow checks under certain circumstances. Consequently, in the final rule, we have removed the specific requirements for cyclonic flow checks prior to every stack test that were in § 63.11646(a)(1)(vi) of the proposed rule. Owners or operators should follow the requirements in the applicable EPA reference method and any additional requirements specified by the permitting authority.

When specifying the minimum requirements for compliance tests, it is more important to specify a minimum sampling volume than a minimum sampling time because the detection of a regulated pollutant is a function of the volume of the sample rather than the length of time taken to collect the sample. Thus, the final rule does not specify a minimum sampling time. We are also changing the required minimum sampling volume to be 30 dscf rather than the 60 dscf as proposed in § 63.11646(a)(2) because we believe that 30 dscf generally will be adequate for detecting mercury emissions for this industry. Affected facilities should be aware, however, that the minimum sample volume may sometimes result in a failure to detect any mercury (a non-detect) emitted from a process unit subject to the emission standard (for the group of process units within the affected source) because of a mercury concentration at the outlet lower than expected. If the emission testing results for any of the emission points yield a non-detect value, then the minimum detection limit (MDL) must be used in calculating the emissions for that emission point and, in turn, for calculating the sum of the mass emissions for all emission points subject to the emission standard for determining compliance. If the resulting mercury emissions (in pounds of mercury per ton of concentrate, or pounds of mercury per million tons of ore) for the affected source are greater than the MACT emission standard, the owner or operator may use procedures that produce lower MDL results and repeat the mercury emissions testing one additional time for any emission point for which the measured result was below the MDL. If this additional testing is performed, the results from that testing must be used to determine compliance (*i.e.,* there are no additional opportunities allowed to lower the MDL).

After reviewing the information provided by the commenter about Method 29, we agree with the commenter that Method 29 is the most appropriate method for compliance determinations for this source category because of the unique characteristics of these sources. Therefore, we are promulgating Method 29 as the main method for compliance in this rule. Alternative methods, such as 30B and the Ontario Hydro method (OHM; ASTM D6784–02), could be used to demonstrate compliance for this source category if approved by the permitting authority. These alternative methods (such as 30B and OHM) may prove to be more appropriate under certain circumstances. However, we have omitted Method 30A as an option in the final rule, as it is not yet in general use.

E. Monitoring

1. Compliance Assurance

Comment: One commenter noted that EPA's proposed mercury standards are expressed in a format of pounds of mercury per million tons of ore processed and observed that the proposed rule requires stack testing only once a year. The commenter claims that EPA's proposed monitoring requirements would not demonstrate whether sources are in compliance with their emission standards, which renders the rule unenforceable. According to the commenter, the once-a-year stack test would provide no indication as to what a mine's emissions were the rest of the year. The commenter said that a source that failed its stack test would have only one violation of emission standards, even if that test showed that the source likely violated its emission standard throughout the year. The commenter believes that EPA's proposed monitoring requirements would not assure compliance with the proposed emission standards. The commenter also noted that EPA proposed to require sources to monitor their mercury emissions either with CEMs, sampling, or various types of parametric monitoring; however, these methods do not provide direct information about the pounds of mercury emitted. Consequently, none of these monitoring methods could be used to demonstrate whether a source is in or out of compliance with the proposed emission standards.

According to another commenter, all three affected source categories should be required to use CEMS at all times and at all emission points. The commenter stated that the ore pretreatment group especially needs CEMS because of variable levels of mercury in the ore and different operational measures within the control of the facility.

Other commenters supported a requirement for continuous monitoring and said that the CEMS should be incorporated into the compliance regime as well. The commenters believe that, if the monitoring results indicate that the mine is consistently out of compliance for a period of one week without correction, the process unit should be subject to compliance-based penalties and/or shut down until corrections are made and the process unit is back in compliance. According to the commenters, quarterly stack testing should still be required to demonstrate that the CEMS is working.

Response: We recognize the importance of requiring adequate monitoring to assure compliance with the emission standards. Because of the higher mercury emitting potential of the roaster, we proposed the option of mercury monitoring using CEMS or weekly monitoring with PS 12B with associated parametric monitoring as well. We are including in the final rule the option to perform continuous PS 12B monitoring, and, as with the CEMS, associated parametric monitoring would not be required. We are changing the frequency of the proposed weekly concentration monitoring approach for roasters to twice per month (at least 11 days apart) and would allow a facility to conduct a Method 30B test (as an alternative to a PS 12B test), supplemented with continuous parametric monitoring. We changed the frequency because we believe that sampling twice per month, coupled with continuous parametric monitoring, is sufficient for determining that the roaster control devices are operating properly. We added the alternative of using Method 30B because this method directly measures mercury concentration and is a valid means of determining whether the concentration is below the operating limit established during the initial performance test. The twice per month Method 30B measurements will provide a concentration value that can be compared to that operating limit to determine if an exceedance of the operating limit has occurred. Also, if the twice monthly sampling shows repeated deviations over time, EPA could decide at a later date that CEMS or continuous monitoring with PS 12B are appropriate and necessary for roasters.

We disagree with the commenter that the proposed monitoring requirements render the rule unenforceable. Although the mercury concentrations monitoring for roasters along with the parametric monitoring of all control devices on all units do not directly measure pounds of mercury per ton of input, we believe that these actions, along with the annual emissions compliance tests, is still an acceptable approach to assure

compliance with the emission standards all year long. Parametric monitoring of control devices assures that the control devices are operating properly (and reducing emissions) on an ongoing basis. Any exceedance of the parameter limits or operating limits triggers corrective action. If corrective action does not return the mercury concentration within the established limits, the plant must conduct a full compliance test and determine if the source is meeting the mass-based (lb/million tons of ore) emission standard.

We do not believe that we should include CEMS as a monitoring option for the non-roaster sources. These sources have less potential mercury emissions, and requiring CEMS on all these other units would be quite costly and burdensome. Moreover, most of these other units are, or will be, controlled with carbon adsorbers, and the carbon adsorber monitoring required by the final rule is an effective means of ensuring the controls are working effectively on a continuing basis. We consider that either frequent testing of carbon beds to monitor for breakthrough using Method 30B, or frequent adsorbent sampling for mercury content, is an effective way to ensure these mercury control systems are operating properly on a continuing basis. The final rule also requires parametric monitoring of wet scrubbers that are considered the final mercury control (*i.e.,* not followed by a carbon adsorber or calomel mercury scrubber). We believe that annual tests coupled with appropriate parametric monitoring of the wet scrubbers are sufficient to ensure emissions are properly controlled on a continuing basis.

With regard to the comment that quarterly stack testing should be required for facilities using a CEMS, we believe that following the Quality Assurance (QA) procedures detailed in 40 CFR 60, Appendix F, are sufficient to ensure the CEMS continues to operate as designed, and in this case, additional stack sampling is not necessary.

2. Operating Limits

Comment: One commenter stated that the operating limits for roasters and for carbon adsorbers are inappropriate and set up a second set of MACT standards. The commenter claimed that the operating limits do not take into account the effects of: Hours of operation of a process unit on mercury emissions; reduction in performance of a process unit offset by an improvement in performance of another process unit; variability in the exhaust gas flow rates with no appreciable effect on the corresponding mercury emission rate; and variability in the inlet mercury concentrations to a carbon adsorber. These factors all result in variability in the outlet mercury concentration. The commenter also noted that the proposed operating limit for carbon adsorbers could result in premature carbon change out, resulting in the generation of more waste. The commenter recommended that EPA defer to the Nevada state monitoring requirements and only provide for monitoring of throughput and annual mercury emission testing to demonstrate compliance with the MACT emission standard. The commenter believes that any operating limit parameters must be established based on manufacturer specifications and recommendations in coordination with the permitting authority and not based on values measured during source compliance testing.

Response: We proposed the mercury operating limits as a monitoring tool to ensure that the processes within individual affected sources and their associated control devices are functioning properly on a continuing basis and not as a second set of MACT standards. We developed emission standards for four affected sources, and the emission standard for an affected source applies to the sum of emissions from all process units within the affected source. One unit could have an upward fluctuation in mercury concentration, but the group of process units could still meet the MACT limit. We see the value of the operating limit approach as sufficient to detect significant increases in emissions and as a valuable tool to ensure the control devices are operating effectively and provide quick notification of a potential problem with controls or emissions. The monitoring parameters are used as compliance indicators, and the relevant mercury operating limits are the main "triggers" of a possible emissions increase and are set to alert facility operators when emissions are greater than the corresponding mercury operating limit. We believe it is important to have such monitoring in the rule to ensure the control devices are working properly.

Regarding specific comments about monitoring the carbon adsorber, the State of Nevada has had good results with conducting sampling of the carbon adsorber to maintain its performance. The final rule offers an additional option of measuring the mercury concentration exiting the carbon adsorber that also achieves the same objective of avoiding breakthrough of the bed. We do not expect sudden dramatic failures of this technology. Instead, we expect to obtain close control of performance by ensuring that the carbon is changed in a way that prevents breakthrough. This monitoring methodology should also prevent premature replacement of the bed.

We disagree with the comments that only monitoring for throughput and annual emissions testing are sufficient to demonstrate compliance with the MACT standards. Such an approach does not yield sufficient data to assure compliance with the emission standards either directly or indirectly by assuring that the control devices are operating properly. The parametric monitoring and operating limits specified in this final rule provide assurance that control devices are properly operated and maintained between emissions tests, and exceedances of the operating limit require corrective action. With regard to the comment that any operating limit parameters should be based solely on manufacturer specifications and/or in consultation with the permitting authority, we have provided various options in this rule for establishing control device parameter limits. Control device operating parameter values sometimes are site-specific and are associated with a level of emissions from the source. Therefore, it is generally preferable for certain control device parameter limits to be associated with an emissions test that demonstrates compliance with the emissions standards. However, we agree that certain parameters for mercury scrubbers applied to roasters, such as the ranges associated with ensuring the proper chemistry of the scrubber, are best provided by the system's manufacturer. Guarantees of performance are usually conditioned by requiring that the system be operated as designed and specified by the manufacturer, and there is no assurance that a potentially narrow range that would be established during a short performance test reflects the full applicable range of proper operation. We also realize that it may be preferable that the permit authority establish the parameter limits for some of the control devices in this industry because of some of the unique characteristics of the processes and control devices used in this industry and the experience of the permit authority with addressing these sources. Therefore, this final rule allows three options for establishing parameter limits: (1) Based on the initial compliance test; (2) according to the manufacturer's specifications; or (3) based on limits established by the permitting authority.

Comment: Some commenters stated that their established parametric

monitoring programs are sufficient to confirm that mercury emission controls are functioning properly for roasters. The commenters also stated that the NMCP permits have required parametric limits and that additional CEMS for mercury would neither improve the operation of these current controls, nor reduce mercury emissions. The commenters concluded that the operating parameters monitored on a regular basis are key parameters for measuring the efficiency and operation of the mercury controls and that operating each of these units within the optimum ranges ensures that mercury emissions are being effectively controlled.

Response: As discussed above, we do not believe parametric monitoring alone is sufficient for roasters because of the very high mercury emission potential, unless the facility has adequately demonstrated that the mercury emissions from the roasters are consistently very low (*e.g.,* less than 10 pounds per million tons). We have concluded that the combined approach of annual stack compliance testing along with the mercury concentration monitoring and parametric monitoring requirements and options outlined in this rule are necessary to detect excess emissions and to ensure controls are working effectively on a continuous basis. We note that for facilities that choose to monitor the mercury concentration from the roaster with CEMS or continuous PS 12B sampling, they do not have to do parametric monitoring. For facilities that can demonstrate their mercury emissions are less than 10 lbs per million tons of ore, they only have to do parametric monitoring, no mercury concentration monitoring.

3. Mercury Concentration Monitoring for Roasters

Comment: One commenter stated that the proposed provisions for monitoring mercury concentrations in roaster emissions are not based on roaster process and pollution control device operational parameters and would not yield reliable information that can be used for detecting and correcting problems. The commenter also stated that the formula for establishing the mercury operation limit for roasters is not appropriate because it uses an emission limit that is based on emission test data from several process units in addition to the roaster. The commenter recommended using the methods proposed for parametric monitoring of roaster emission control devices for all roasters. The commenter also has concerns about utilizing PS 12A (mercury CEMS) and PS 12B for emissions monitoring purposes because there are terms and conditions listed in the proposed rule that are not fully defined. The commenter also recommended deleting the emissions monitoring requirements for mercury concentration for carbon adsorbers for the same reasons described above for roasters.

Response: We disagree with the comment that monitoring the mercury concentration in roaster emissions would not yield reliable information that can be used for detecting and correcting problems. An elevated mercury concentration in the roaster stack gas indicates that there could be a problem with either the process or the control device, which could result in excess mercury emissions from that unit. Monitoring the mercury concentration in roaster emissions provides a direct measure of the regulated pollutant (mercury). The commenter is correct that the formula for establishing the mercury operating limit for roasters is based on emission tests performed on several processes units in addition to the roaster. However, for the facilities with roasters that will be subject to the requirements to monitor mercury concentration, the roaster is the biggest source of potential mercury emissions within the affected source. Therefore, we conclude that changes in the mercury concentration in the roaster exhaust gases provide a reasonable indication of overall emissions from the affected source. In addition, the operating limit is not used directly to determine compliance with the MACT emission standard. As mentioned above, it is designed to detect elevated mercury concentrations in the roaster stack gas, which could indicate a problem with either the process or the control device. We continue to believe that it is necessary and appropriate to monitor mercury concentration for the largest source of potential mercury emissions in the source category (*i.e.,* the roaster) to detect excursions in emissions that must be addressed when the operating limit is exceeded. By developing the mercury operating limit from the emission standard and compliance test results, an exceedance of the mercury operating limit will indicate a potential increase in emissions and that corrective actions are needed.

As described above, we believe that either continuous mercury sampling or mercury sampling twice per month (coupled with continuous parametric monitoring of the control device) should be required for the roaster emissions. If a CEMS is used, the daily average mercury concentration is calculated by averaging the hourly emissions concentrations during that day. The final rule includes continuous sampling with PS 12B as an option for monitoring roasters. If PS 12B is used for continuous integrated sampling (*i.e.,* without parametric monitoring), the daily average concentration is determined by assigning the mercury concentration measured by the sorbent trap monitoring system (total mass of mercury collected during the sampling period divided by the sample volume) as the daily average value to each of the days covered by the integrated sample.

A third option is based on short-term sampling twice per month (at least 11 days apart) for mercury concentration using either PS 12B or Method 30B, and if this option is chosen, continuous parametric monitoring of the mercury scrubber must also be performed. For this short-term sampling option (twice per month sampling) each measured mercury concentration must be compared to the operating limit to determine if an exceedance has occurred. For the contents of the monitoring plan, see 40 FR 63.8(d)(3) and 40 CFR part 60, Appendix F.

We also disagree that parametric monitoring alone is sufficient for carbon adsorbers. For carbon adsorbers, measuring the mercury concentration exiting the carbon bed is also a direct measure of the pollutant of interest. (The other option as established for years in NDEP operating permits involves sampling the carbon for mercury content.) An elevated mercury concentration indicates that there could be a problem with either the process or the control device, which could result in excess mercury emissions from that unit. We have established exit concentration monitoring requirements in many rules for emissions of organic compounds exiting carbon adsorbers. That monitoring has proven to be effective to prevent or detect breakthrough, and the same principles apply here for mercury.

Comment: Commenters stated that CEMS for gold mining operations are not capable of accurately measuring mercury emissions and that there are three major challenges with the feasibility of mercury CEMS for the gold mining industry: Mercury CEMS calibration, sample transport, and system operability and reliability. The commenters are concerned with the unavailability of a means to calibrate the CEMS for roasters because existing calibrator designs are simply not capable of generating mercury concentrations high enough to provide meaningful upscale calibration points

that correspond to gold mining source characteristics. The commenters noted the unavailability of National Institute of Standards and Technology (NIST) traceable calibration gases and stated that the current calibration standards traceable to NIST do not apply to the full range of mercury concentrations that can be present in the exhaust gases of roasters. The commenters concluded that the lack of a NIST-traceable standard is a fatal flaw that precludes using mercury CEMS to monitor roaster emissions. Regarding sample transport, the commenters said that current designs of mercury CEMS for coal-fired electric generating units require high temperature umbilical lines to transport the sample from the stack to the analyzer and that CEMS on coal-fired electric generating units have seen umbilical failures occur, representing another challenge to having CEMS function consistently for the continuous monitoring of mercury from industrial sources. The commenters were also concerned with the CEMS operability and reliability because mercury CEMS must contain some type of converter to reduce oxidized mercury to elemental mercury and premature catalytic failures periodically occur in these units resulting in several days of missing data. The commenters continued by stating that users reported mercury CEMS to be unavailable as much as 30 to 40 percent of the electric generating unit operating time. The commenters believe the amount of downtime to be expected from these systems on roasters would likely be even higher. The commenter concluded that the breakdown events, combined with the other types of failures, result in data availability that is substantially inferior to parametric monitoring and cannot justify the significant cost and resource investment necessary to install, operate, and maintain these devices.

The commenters are concerned that continuous data reports of mercury emissions that are not accurate, reliable, or credible could be offered as "credible evidence" to assert a violation. The commenter concluded by stating that this concern was particularly troubling in Nevada, where there are separate mercury limits established pursuant to State law.

Response: Regarding the feasibility of using CEMS to monitor mercury emissions from roasters, CEMS have been demonstrated for process units similar to roasters (*e.g.,* coal-fired power plants), and we believe there is no technical reason why they will not work for the roasters. (See NESCAUM, 2010. Technologies for Control and Measurement of Mercury Emissions from Coal-Fired Power Plants in the United States: A 2010 Status Report Northeast States for Coordinated Air Use Management (NESCAUM) July 2010).

Many of the issues with mercury CEMS have been resolved as facilities have gained experience with their use. However, we realize that mercury concentrations in the exhaust gases from roasters can be higher than the range of concentrations for coal-fired power plants, and that the calibration standards traceable to NIST, that have been available in the past, have not applied to the full range of mercury concentrations that can be present in the exhaust gases from roasters. Nevertheless, as we discussed in the proposal preamble, CEMS manufacturers supply calibration standards for the ranges of concentrations seen at roasters.

In addition, the NIST has recently completed certification of a 'NIST Prime' elemental mercury gas generator at concentrations of 41, 68, 85, 105, 140, 185, 230, 287, and 353 $\mu g/m^3$. Mercury gas generator vendors may now submit elemental mercury gas generators for certification to serve as 'Vendor Primes' in a wide range of concentrations. Therefore NIST traceable mercury gas standards can now be made available in concentrations that cover the full range of the concentrations typically measured from roasters.

After consideration of public comments, we continue to believe CEMS are a valuable tool and a reasonable option for monitoring mercury concentrations and comparing those concentrations to the operating limit that is established by CEMS measurements made during the compliance test. However, we also point out that the final rule does not require the use of CEMS; instead, the final rule includes CEMS as one of the three monitoring options. The other two options that we are promulgating for monitoring mercury from roasters are: (1) Continuous monitoring using PS 12B; and (2) twice per month sampling using PS 12B or Method 30B coupled with parametric monitoring. All three of these monitoring options are intended to ensure that emissions from the roasters are not exceeding operating limits, or if they do exceed the operating limits, that corrective actions are taken in a timely manner to bring the emissions down to within the operating limits. If these corrective actions are not successful then the facility must perform a complete compliance test using the methods in section 63.11646 to determine whether the affected source is in compliance with the MACT standard. The CEMs can also be used to help identify problems with control systems and ensure that corrective actions are taken immediately to fix such problems. The exceedance of the operating limit is not intended to determine if the source in violation of the MACT standard. Rather, it would be the subsequent compliance test pursuant to section 63.11646 that would be used to determine if the source is in compliance with the MACT standard.

We understand the commenter's concerns regarding the transport of samples and converter failures. However, we have revised the final rule to give facilities 3 years to comply with the rule which will allow extra time to successfully set-up and operate controls and monitoring equipment to be able to comply with the MACT standards. We believe this will provide sufficient time, for facilities that choose the CEMs monitoring option, to identify and resolve issues with the transport of samples and converters.

Comment: One commenter stated that the regulated industry has no experience with direct measurements of mercury concentrations at the roaster exhaust gas stream. As a result, the commenter believes that there will be problems in collecting data, establishing appropriate timeframes for sampling under PS 12B, maintaining instrument reliability for CEMS, and in establishing confidence in the accuracy of the results reported by these methods. The commenter claimed that the calculated operating limit based on source testing and simultaneous direct measurements may not be reflective of the future daily operations of all the stack emissions. The commenter noted that flow rate measurements are critical in verifying compliance with actual emission limits because sometimes lower flow rates of the stack exhaust gas flow can artificially elevate the mercury concentration in the gas stream with no real effect on emissions. The commenter concluded that any exceedance in mercury concentration should be verified first with a compliance test before halting the roaster production.

Response: We have learned from the comments received that there may be a learning curve for facilities to implement the concentration monitoring procedures. As described in section V.D. of this preamble, we have established in the final rule a compliance date that is 3 years after the effective date of the final rule for existing sources, partly to allow sources time to ensure they can successfully comply with the monitoring requirements, but mainly to allow time to install new mercury emission

controls that we believe will be necessary to meet the emission standards in the final rule.

We agree that mercury concentration measurements are not direct measurements of the emissions rate from the affected source and that flow rate, production, and other factors need to be considered. These are some of the reasons that the operating limit is not being used as a direct measure of compliance with the MACT standards. However, concentration measurements above the operating limit should indicate that either controls are not working effectively or other problems are occurring. In either case, exceedances of the operating limit require investigation and may require corrective actions. The requirement to shut down the roaster has been removed from this final rule. However an exceedance of the mercury concentration does trigger corrective action, and if not corrected requires a compliance test.

Comment: One commenter requested that EPA reduce the weekly Method 12B monitoring frequency to quarterly or at most monthly. The commenter also requested that EPA include a provision that allows for a source to demonstrate a correlation or consistency of performance such that the Method 12B sampling frequency can be further reduced based on the permitting authority's acceptance of the demonstration. The commenter suggested that if multiple Method 12B samples are collected in a single day or over multiple days in the calendar week, then the samples should be averaged, and this average concentration should be compared to the operating limit. The commenter said that, for stacks with high mercury concentration, the sample collection time may be only an hour or two, and in this case, it may be important to collect more than one sample in a single day or over multiple days to obtain a representative mercury concentration measurement.

Response: After taking into consideration the commenter's rationale, under this monitoring option, the final rule requires the sampling of mercury concentration at least twice per month (with 2 samples taken at least 11 days apart) instead of weekly sampling as proposed. If multiple samples are taken during the twice per month period, each result must be compared to the operating limit separately (*i.e.,* not averaged). Otherwise, a high result from a sample taken near the end of the sampling period might not trigger corrective actions to correct a problem that developed at that time if the results are averaged with previous samples during periods of good performance. We do not agree with the suggestion to allow the monitoring frequency to be reduced if the monitoring results demonstrate consistency over the long term. We believe that monitoring the mercury concentration at least twice per month is necessary for roasters to ensure that potential problems with control systems are identified quickly and corrective actions are taken in a timely manner.

4. Parametric Monitoring of Control Device for Roasters

Comment: Some commenters recommended that EPA remove the provisions requiring monitoring of the mercury scrubber liquor flow rate and scrubber pressure drop because each facility that has a roaster has a unique sequence of air pollution control devices, and monitoring parameters that may be appropriate for one roaster may not be applicable to another. One of the commenters said that the scrubber liquor flow rate is not currently monitored, nor is it considered a critical parameter in the daily operation of the scrubber mercury removal tower associated with roasters at their facility. The commenter further explained that the scrubber is not a spray tower, but instead the liquor is recirculated in the tower, so the pump is monitored to insure it is operational. The commenter stated that the pressure drop across the mercury removal tower at its roasters is monitored, but is not considered a critical parameter and that the mercuric ion and chloride ion concentrations that they monitor are the critical parameters that define the effectiveness of the mercury scrubber.

Another commenter added that, for the calomel-based mercury scrubbers, the key parameter is the reagent concentration in the solution exiting the scrubber and that maintaining the exit reagent concentration ensures there is sufficient reagent to react with the mercury vapor. The commenter noted that low exit concentrations indicate that either the liquor flow rate is too low, or the fresh reagent addition rate is too low. Thus, liquor flow rate does not need to be monitored in addition to reagent exit concentration. The commenter stated that if EPA continues to require them, the ranges should be based on the manufacturer's specification or an alternative value approved by the permitting authority, as opposed to the three test runs from the initial compliance test. One commenter recommended that the corresponding range or limit for parametric deviations be applied to a daily average value rather than continuous instantaneous values or single samples.

Another commenter also stated that the requirement to establish the minimum water flow rate and pressure drop of the wet scrubber on readings taken during the performance test should not apply to scrubbers on roasters. The commenter noted that these parameters were intended to monitor for physical processes, and the scrubbers on roasters often include chemical reactions, which are not monitored.

Response: We agree that pressure drop is not relevant to mercury scrubbers because, unlike venturi scrubbers applied to control PM emissions, it is not related to its mercury emission control performance. We have removed pressure drop monitoring from the final rule for mercury scrubbers. However, we continue to believe that it is important to monitor the scrubber flow rate to ensure the scrubber solution is being delivered to the system and that the flow is adequate, which is related to the system's performance. We understand that some facilities monitor mercury scrubber solution line pressure (solution header pressure) as an indicator of flow rate, and we agree this is adequate to ensure proper flow. Consequently, the final rule requires hourly monitoring of scrubber flow rate (or line pressure) for mercury scrubbers on roasters. As with the inlet temperature operating range, the minimum flow rate or line pressure must be established by one of the following three ways: (1) During the initial compliance test, (2) from the manufacturer's specifications, or (3) based on the limits established by the permitting authority. If the facility chooses the option to establish the limits during initial compliance, the final rule requires the scrubber flow rate operating limit to be based on either the lowest value for any run of the initial compliance test or 10 percent less than the average value measured during the compliance test and the inlet gas temperature operating limit to be based on either the highest value for any run of the initial compliance test or 10 percent higher than the average value measured during the compliance test. The final rule requires hourly monitoring and that corrective action is triggered if the flow rate or line pressure falls below the established parameter limit.

Regarding the acceptability of scrubber flow rate and inlet gas temperature parameter values that were approved by permitting authorities prior to this final rule, such values must be established as specified in the final rule

and are not presumed in advance to be acceptable. Note that the monitoring requirements for wet scrubbers in § 63.11647 of the final rule would not apply to the mercury scrubbers on roasters, or any wet scrubber prior to the mercury scrubber on the roasters.

Comment: One commenter believes that establishing a maximum operating temperature for inlet gas concentrations by artificially increasing this temperature during compliance testing may destroy the control equipment, conflict with recommended operating temperatures, and artificially increase the reported mercury emissions. The commenter concluded that these parameters are not deemed critical in the effective operation of a mercury calomel scrubber. Another commenter added that their Compliance Assurance Monitoring (CAM) plan provides for an inlet gas temperature range of 32° to 134 °F to prevent water freezing problems or extremely hot gas temperatures that could damage the mercury scrubber. The commenter stated that mercury scrubbers remove mercury from the gas stream through a chemical reaction and not a condensation mechanism and that lower temperatures will not remove (via condensation) additional mercury. The commenter explained that, although mercury scrubber inlet gas temperature is not a relevant control performance parameter, their facility maintains the inlet gas temperature below 134 °F and monitors the temperature daily to prevent damage to the controls system from excessively low or high gas temperatures.

Response: After additional review of operating permits and consideration of public comments, we have found that the inlet temperature of the mercury scrubber is monitored and maintained within a range to provide operational flexibility with the lower end bounded to prevent freezing and the upper end bounded to prevent damage to equipment, which in turn could lead to excess emissions. In addition, we have learned that this temperature is dependent on the cooling tower water temperature used in the process, and this water temperature can vary quite widely from winter to summer. Facilities may not be able to address the issues described above if they can only use initial compliance testing to establish the inlet temperature operating range, as we proposed. Consequently, the final rule provides the following three ways for a facility with a roaster to establish an operating range for inlet temperature: (1) Based on the maximum inlet temperature during the initial compliance test; (2) from the manufacturer's specifications; or (3) based on the limits established by the permitting authority. If the facility chooses the option to establish the limits during initial compliance, the final rule requires the inlet gas temperature operating limit to be based on either the highest value for any run of the initial compliance test or 10 percent higher than the average value measured during the compliance test. The facility must monitor the temperature hourly, and any exceedance of the upper limit for temperature would trigger corrective action.

5. Exceeding the Operating Limits for Roasters

Comment: One commenter was concerned about the consequences of exceeding a parametric monitoring limit. The commenter remarked that shutting down the roaster for exceeding a monitoring parameter without evidence of an ongoing emission limit exceedance is arbitrary and capricious, unnecessarily punitive, and threatens the economic viability of the regulated sources. The commenter pointed out that the ranges of parameters measured during source testing are not necessarily the only ranges within which the unit can operate effectively. The parameters proposed by EPA are not the best parameters for monitoring roaster emissions and do not directly correlate to mercury emissions or proper control system operation. The commenter also objected to the period of only 45 minutes to investigate and take corrective action.

One commenter recommended that the corrective action response time be extended minimally to 48 hours after daily average values are processed, plus an additional 24 hours to verify the daily average parametric value was within limits. For facilities that conduct PS 12B sampling and a daily average parametric deviation persists for 96 hours, the commenter recommended requiring sampling of the roaster's exhaust using PS 12B within the next 24 hours, then evaluating the mercury concentration results. If the mercury concentration is below the operating limit, then, within 10 days of receiving the analytical results, the facility should be required to either petition the permitting authority for a change in the parametric limits, or provide the permitting authority with a compliance plan that details corrective actions taken to date and the plan and schedule for bringing the parameter back within range. The commenter said that, if the mercury concentration is above the operating limit, the facility will be required to schedule an independent source testing firm to perform a compliance test within 45 days using one of the approved methods described in the rule. The commenter noted that the Nevada State agency requires 30 days to review the testing protocol, and source testing companies typically require 30 days or more advanced notice.

For roasters where direct concentration measurements are not required and a daily average parametric deviation persists for 96 hours, the commenter recommended that within 48 hours, the facility should: (1) Provide the permitting authority with a compliance plan that details corrective actions taken to date and the plan and schedule for bringing the parameter back within the limits; or (2) schedule an independent source testing firm to perform a compliance test within 45 days using one of the approved methods described in the rule. The commenter concluded that, if the test results show that the source has exceeded the threshold of 10 lb/million tons of ore, the facility would be required to implement direct mercury concentration measurements.

One commenter requested that EPA provide an exception from the shutdown requirement when it can be demonstrated that, notwithstanding an exceedance of the parametric operating range, the roaster mercury emissions are less than the operating limit for mercury concentration. The commenter stated that the mercury concentration measurement is a more direct indication of the ultimate mercury emissions that the parametric monitors are designed to address.

Response: We have investigated in greater detail the issues associated with monitoring roasters, and we have consulted with NDEP and the owners and operators of roasters to learn more about appropriate roaster monitoring. We understand that sometimes the ranges of parameters measured during source testing are not necessarily the only ranges within which the unit can operate effectively, that is why in the final rule we are offering two other options for establishing the ranges: (1) Based on manufacturer's specifications; and (2) ranges approved by the permitting authority. We believe that monitoring the scrubber flow rate, inlet gas temperature, and scrubber liquid chemistry, as required in the final rule, are appropriate parameters to monitor. We have also revised the requirements of this final rule to provide assurance that timely corrective actions are taken when a monitoring parameter is exceeded, and we have included requirements for testing for

mercury concentrations to determine if the corrective actions were successful or if a deviation has occurred. The final rule includes parametric monitoring of the mercury scrubbers applied to roasters to control mercury. If a parameter is outside of the established range or limit, corrective actions are triggered. If corrective actions do not result in the parameter reading being corrected and verified within 48 hours, a mercury concentration measurement (using CEMs, Method 30B, 29, OHM, or PS 12B) must be made to determine if the operating limit for mercury concentration is being exceeded. The measurement must be performed and the concentration determined within 48 hours (after the initial 48 hours, or a total of 96 hours). If the measured mercury concentration meets the operating limit for mercury concentration, the corrective actions are deemed successful. In addition, the owner or operator may request approval from the permitting authority to change the parameter range or limit based on measurements of the parameter at the time the mercury concentration measurement was made. If, on the other hand, the operating limit is exceeded, the exceedance must be reported as a deviation and the facility must conduct a full compliance test within 40 days to determine if the source is in compliance with the MACT limit. *See* § 63.11647(d) of final rule.

Comment: For facilities that monitor roasters with a CEMS, one commenter proposed that corrective action be required within 48 hours of receiving and processing the results from the CEMS data, plus an additional 24 hours should be allowed to collect verification data to see if the daily average concentration was restored below the operating limit. The commenter recommended that, if the exceedance persists, the facility should be required to schedule an independent source testing firm to perform a compliance test within 45 days.

For facilities that choose PS 12B monitoring, the commenter recommended that a deviation be considered an exceedance of the operating limit if the average of three consecutive sampling results (three weeks) were above the established limit. The commenter proposed that the facility should then have one week to take corrective actions, an additional week to take the verification sample using PS 12B, with receipt of results the following week (three weeks total). The commenter stated that if the exceedance persists, the facility should be required to schedule an independent source testing firm to perform a compliance test within 45 days using one of the approved methods described in the proposed rule.

Response: After considering these comments on the mercury concentration operating limit and the above discussion on parametric monitoring of roasters, we have made several clarifications in the final rule. If a mercury concentration operating limit is exceeded from either daily average measurements from a CEMS, continuous sampling using PS 12B, or from sampling twice per month (at least 11 days apart) using PS 12B or Method 30B, the exceedance must be reported to the permit authority as a deviation and corrective actions must be implemented within 48 hours upon receipt of the sampling results that show the deviation. Moreover, within 96 hours of the exceedance, the owner or operator must measure the concentration again (with the CEMS, PS 12B, Method 30B, Method 29, or OHM) and demonstrate to the permit authority that the operating limit for mercury concentration has been met, or inform the permit authority that the limit continues to be exceeded. If the operating limit is still exceeded after these 96 hours, the owner or operator must conduct a full compliance test for the ore pretreatment affected source within 40 days to determine if the affected source is in compliance with the MACT emission standard. If the source is determined to be in compliance, the compliance test may also be used to establish a new operating limit for mercury concentration. *See* § 63.11647(a)(1)(ii), (a)(2)(ii), and (a)(3)(ii) of the final rule.

Comment: One commenter requested that EPA provide an exception to the shutdown requirement for facilities that have well-controlled roasters and elect to monitor under the proposed Option 3. The commenter believes a facility should have time (45 days) to demonstrate that the roaster's mercury emissions remain less than 10 lbs of mercury per million tons of ore. The commenter stated that this would be achieved by scheduling an independent source testing firm to perform a compliance test using methods described in the rule, and calculations that demonstrate compliance with the limit of 10 lbs per million tons of ore.

Response: As we have discussed above, the final rule relies in part on parametric monitoring of mercury scrubbers used on roasters to assure compliance with the applicable emission standards, and when the measured parametric values are out of the established operating range, corrective actions must be taken. This is no different for facilities that qualify for the exemption described in § 63.11647(a)(5) of the final rule (*i.e.,* facilities exempt from mercury concentration monitoring by having demonstrated that their roaster emissions are less than 10 lb/million tons of ore). For these facilities, the final rule similarly requires that corrective actions be taken to restore the scrubber operating parameters to the established operating range. If the parameters are not restored to the established range within 48 hours of triggering the corrective actions, the owner or operator must perform mercury concentration sampling of the roaster emissions using PS 12B, Method 30B, Method 29, CEMS or OHM and determine the mercury concentration within 48 hours following the initial 48 hours (or a total of 96 hours from the time the parameter range was exceeded). The measured concentration must be compared to a mercury concentration operating limit that is based on Equation 2 in the final rule, where the value for "C_{trap}" in Equation 2 is based on the mercury concentration for the roaster measured during the most recent compliance test. If the measured mercury concentration meets the operating limit for mercury concentration, the corrective actions are deemed successful. In addition, the owner or operator may request approval from the permitting authority to change the parameter range or limit based on measurements of the parameter at the time the mercury concentration measurement was made. If the operating limit is exceeded, the facility must take corrective actions and report it to the permit authority as a deviation. The owner or operator must also conduct a compliance test within 40 days to determine if the roaster operations are in compliance with the emission standard. *See* § 63.11647(d) of the final rule. We also note that the requirement to shut down the roaster has been removed from this final rule.

6. Carbon Adsorber Temperature Monitoring

Comment: Several commenters stated their concern with the proposed requirement of monitoring gas stream temperature at the inlet to the carbon adsorber and maintaining the inlet temperature below the maximum temperature established during the compliance test. They noted that the primary purpose for monitoring the inlet gas stream temperature of carbon adsorbers is to prevent spontaneous combustion of the sulfidized carbon in the adsorber, not to detect excursions in mercury emissions. The commenters also stated that some carbon adsorption systems heat the gas stream prior to the

carbon adsorber to prevent moisture buildup and/or subsequent condensation in the carbon. The commenters explained that the NMCP already requires that the exit gas temperature of condensers prior to the carbon adsorbers be established to minimize mercury emissions from the condenser. The commenters believe that an increase in inlet gas temperature to a carbon adsorption unit is not indicative of an increase in inlet gas stream mercury emissions because the high operating temperatures of the processes volatilize approximately 100 percent of mercury. The commenters stated that establishing a maximum operating temperature for inlet gas concentrations by artificially increasing this temperature during compliance testing may destroy mercury control equipment; conflict with NMCP requirements and/or manufacturer's recommended operating temperatures; artificially increase the reported mercury emissions; or artificially decrease the allowable operating limit for mercury concentration.

The commenters continued by stating that, if EPA persisted in requiring the monitoring of the gas stream inlet temperature, the maximum inlet temperature limit should be established by either the manufacturer's recommendation and/or concurrence with the permitting authority. The commenters proposed monitoring the inlet temperature once per shift as an option to continuously monitoring the inlet temperature and comparing the daily averages rather than the hourly averages to the operating limit. The commenters noted that many facilities do not have digital acquisition systems capable of recording continuous data, and monitoring once per shift is sufficient to maintain control performance. The commenters suggested that, if corrective action is needed, the facility should be allowed to sample the carbon loading to demonstrate that the effectiveness of the carbon adsorber has not been adversely impacted.

Response: The purpose of monitoring the inlet temperature to carbon adsorbers is not to provide an indication of higher mercury concentrations in the inlet stream as suggested by the commenters. The purpose is related to the fact that temperature is a fundamental parameter that affects the efficiency and capacity of carbon adsorbers. Generally, higher temperatures result in lower capacity and earlier breakthrough and, in fact, high temperatures are used to desorb adsorbed pollutants to regenerate carbon. In the extreme of temperature, the carbon adsorber might actually be desorbing rather than acting as a control device. This is particularly important for those carbon adsorbers applied to high temperature thermal processes, such as carbon kilns and melt furnaces, where it is possible for the exhaust temperature to rise above the normal operating temperature or above the temperature at which the carbon adsorber was designed to operate. For high temperature processes (such as furnaces), and not those such as electrowinning where the temperature may be near ambient conditions, we continue to require monitoring the inlet temperature. Owners or operators must establish an operating limit for temperature based on one of the following: (1) The maximum temperature during the initial compliance test; (2) from the manufacturer's specifications; or (3) based on limits established by the permitting authority. If this established operating limit is exceeded corrective action must be taken and the exceedance reported as a deviation to the permit authority. Further, the final rule requires facilities to monitor inlet temperature once per shift rather than continuously, as was proposed. Because inlet temperatures should not vary greatly over the course of an 8- to 12-hour period, we believe monitoring once per shift is adequate. We also conclude that if a temperature exceedance has occurred, the carbon bed should be sampled or the outlet concentration determined, depending on the monitoring option chosen, within 48 hours to ensure no permanent damage to the carbon adsorber occurred as a result of the deviation. We believe the temperature exceedance should be reported as a deviation even if the subsequent monitoring shows that the carbon bed is operating properly because the subsequent monitoring would not necessarily detect if mercury had been desorbed and excess emissions occurred.

7. Monitoring of Wet Scrubbers

Comment: One commenter proposed that only the scrubber water flow rate monitoring be required for wet scrubbers on the quenching circuits associated with the roaster. The commenter wanted to confirm that wet scrubber monitoring does not apply to wet scrubbers or condensers on roasters. Another commenter asked that EPA confirm that the term "wet scrubbers" does not include condensers, which are used throughout the mining processes for gas cooling to condense water or (in the case of retorts) mercury. Another commenter asked EPA to confirm that wet scrubber monitoring does not apply to wet scrubbers associated with ore preheaters.

One commenter noted that continuous readings on wet scrubbers are unreliable and proposed monitoring the water flow rate and pressure drop once per shift. The commenter noted that if any water flow rate or pressure drop reading exceeds the operating limit, the facility should follow the procedures for operating limit exceedances. The commenter stated that many facilities do not have data acquisition systems capable of recording continuous data and that wet scrubbers are primarily used to control particulates. The commenter concluded by stating that wet scrubbers are not key mercury controls and monitoring once per shift is sufficient to maintain control performance on a continuing basis.

One commenter wanted to confirm that the limits established during testing would not be more stringent than the requirements set forth in the Standards of Performance for New Stationary Sources for Metallic Mineral Processing Plants, which allows for plus or minus 30 percent. Another commenter recommended that the operating limit for wet scrubber monitoring be based on either the lowest average value during any test run or no lower than 10 percent *below* the average value measured during the test.

Response: We are clarifying in the final rule that § 63.11647(h) applies only to wet scrubbers not followed by a mercury control system (*i.e.,* carbon adsorber, calomel mercury scrubber, *etc.*). It is necessary to monitor the primary mercury emission control device, which is the last stage of the exhaust gas cleaning treatment train, to ensure it is operating properly and controlling mercury emissions, and the rule does not require that wet scrubbers in the gas treatment train (typically used for control of PM and/or SO_2) prior to the primary mercury emission control device be monitored under this rule for mercury emissions. However, if there is no carbon adsorber or mercury scrubber, and the wet scrubber in question is the only control device for mercury emissions, the final rule requires that it be monitored once per shift per operating day (*e.g.,* minimum of two times per day) for pressure drop and flow rate with operating limits that are either established during the initial compliance test, from the manufacturer's specifications, or based on approval from the permitting authority (except for pressure drop for autoclaves as discussed above). This applies to wet scrubbers on ore preheaters and quenching if there is no

carbon adsorber or mercury scrubber in the exhaust gas treatment train. As discussed above, the scrubber monitoring for roasters applies to the mercury scrubber (located at or near the end of the exhaust gas treatment train) and does not apply to the wet scrubbers that are used to remove PM and SO_2 prior to the mercury scrubber.

We are clarifying in the final rule that condensers, such as those found at roasters and mercury retorts, are not wet scrubbers. We agree that monitoring and recording the pressure drop once per shift is adequate for monitoring these wet scrubbers to ensure they are operating properly. We disagree that a buffer of ± 30 percent based on a certain New Source Performance Standard (NSPS) subpart is appropriate for this NESHAP for mercury. The comment suggesting an option of a ± 10 percent buffer around the average value during the performance test has merit as an option to only using the lowest value during any individual run as the operating limit. If the system is so stable that it shows very minimal variability during the performance test, we agree that it is appropriate to add ± 10 percent to account for potential future variability. Consequently, we are incorporating this option in the final rule, as suggested by the commenter. However, we are using ± 10 percent rather than ± 30 percent. We are also clarifying for the final rule for wet scrubbers on an autoclave, that facilities must establish the pressure drop range according to manufacturer's specifications.

8. Monitoring of Multiple Units Ducted to One Stack

Comment: Commenters requested clarification that, for facilities that have two roasters ducted together through a shared mercury control system, the mercury concentration monitoring would be conducted on the combined exhaust stream. The commenters also requested clarification that the mercury concentration operating limit for two roasters that share a control system would be established during the simultaneous operation of the roasters in order to account for the combined mercury emissions from both roasters.

Commenters also requested clarification that, for facilities with multiple process units ducted together through a shared carbon adsorber, the mercury concentration monitoring would be conducted on the combined exhaust stream. The commenters also requested clarification that the mercury concentration operating limit for a carbon adsorber for multiple units that share the carbon adsorber would be established during the simultaneous operations of all process units in order to account for the combined mercury emissions.

Response: We agree with the commenters in general and have made the following clarifications in the final rule. If two roasters share a common control device and stack, the mercury concentration operating limit can be based on both roasters operating if possible. However, monitoring for mercury concentration must be performed at the frequency specified in the final rule whether only one or both roasters are operating. We also have clarified that, for multiple process units vented to a common carbon adsorber, the mercury concentration operating limit can be based on all units operating if possible. However, the ongoing mercury concentration monitoring must be performed at the frequency specified in the final rule for whatever units are operating at the time.

9. Monitoring Mercury Concentration in Roaster Ore

Comment: One commenter objected to the proposed requirement to conduct additional compliance testing if the mercury concentration in the ore fed to the roaster is higher than any concentration measured in the previous 12 months. The commenter stated that there would not be an increase in the mercury emissions from their roasters because of the extensive series of mercury controls, some of which operate more efficiently at higher mercury loadings with unchanged stack emissions. In addition, the commenter noted that the rule does not provide details on how to measure the mercury ore concentration or what threshold of significance would be used to show an increase in ore mercury content occurred. The commenter concluded that the requirement would only provide extra cost and burden without any environmental benefit.

Response: We agree with the commenter and have removed this requirement (§ 63.11647(a)(4)(iii) of proposed rule) from the final rule. We have no data showing that the mercury content of the ore has a significant effect on the performance of mercury scrubbers applied to roasters, which are designed to handle and operate efficiently for a range of mercury inlet concentrations. In addition, roasters condense and recover elemental mercury prior to the mercury scrubber, and any increase in mercury loading would likely result in an increase in the recovery of liquid elemental mercury. We have identified and require the monitoring of parameters associated with the scrubber chemistry, and maintaining these parameters within the established range for which the mercury scrubber was designed. This monitoring approach helps ensure that the mercury scrubbers are controlling mercury emission independent of variations in ore mercury content.

VI. Summary of Environmental, Economic and Health Benefits

For proposal, we estimated baseline mercury emissions to be 3,119 lb/yr based on the available emissions data and average process data for the period 2007 to 2009. To estimate the impacts of the final rule, we have revised our baseline mercury emissions estimate to account for the recent installation of new mercury emission controls at two facilities and additional test data received since proposal. As a result of these changes, we now estimate baseline mercury emissions to be 2,636 lb/yr. We estimate the final MACT standard will reduce mercury emissions from gold mine ore processing and production by 1,461 lb/yr from the baseline emissions levels of 2,636 lb/yr down to a level of 1,176 lb/yr once this NESHAP is fully implemented. The annual emissions expected after the MACT standards are implemented (1,176 lb/yr) represent an estimated 77 percent reduction from 2007 emissions (5,000 lb/yr), a 95 percent reduction from the emissions level in 2001 (about 23,000 lb/yr), and more than 97 percent reduction from uncontrolled emissions levels (more than 37,000 lb/yr). The capital cost of emission controls is estimated as $36 million with a total annualized cost of $8 million per year. The capital costs for monitoring, reporting, and recordkeeping are estimated as $0.5 to $1.0 million with a total annualized cost of $0.7 to $1.5 million per year, depending on the monitoring option that is chosen. The overall cost effectiveness is estimated to be about $6,300 per pound of mercury reduced. The cost of compliance is estimated to be less than 0.8 percent of sales for all affected firms. We therefore believe that the economic impact on an affected company would be insignificant. Electricity consumption is expected to increase by about 12,600 megawatt-hours per year due to increased fan capacity for carbon adsorbers and the installation of refrigeration units or condensers on a few process units. Non-hazardous solid waste (spent carbon containing mercury that must be regenerated or disposed of) would increase by about 7 tons per year.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) because it may raise novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866, and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR No. 2383.01.

The recordkeeping and reporting requirements in this final rule are based, in large part, on the information collection requirements in EPA's NESHAP General Provisions (40 CFR part 63, subpart A). The recordkeeping and reporting requirements in the General Provisions are specifically authorized by section 114 of the CAA (42 U.S.C. 7414). All information other than emissions data submitted to EPA pursuant to the information collection requirements for which a claim of confidentiality is made is safeguarded according to CAA section 114(c) and EPA's implementing regulations at 40 CFR part 2, subpart B.

This final NESHAP will require applicable one-time notifications according to the NESHAP General Provisions. In addition, owners or operators must submit annual notifications of compliance status and report any deviations in each semiannual reporting period. Records of all performance tests, measurements of feed input rates, monitoring data, and corrective actions will be required.

The average annual burden for this information collection averaged over the first 3 years of this ICR is estimated to total 483 labor hours per year at a cost of approximately $26,847 per year for the 21 facilities that will be subject to this final rule, or approximately 23 hours per year per facility. Capital costs are estimated as $1.0 million, operation and maintenance costs are estimated as $52,000 per year, and total annualized cost (including capital recovery) is estimated as $360,210 per year for this final rule's information collection requirements. No costs or burden hours are estimated for new sources because none is projected for the next 3 years. 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 the collection displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR part 63 are listed in 40 CFR part 9. In addition, EPA is amending the table in 40 CFR part 9 of currently approved OMB control numbers for various regulations to list the regulatory citations for the information requirements contained in this final rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that this 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 final NESHAP on small entities, a small entity is defined as: (1) A small business whose parent company meets the Small Business Administration size standards for small businesses found at 13 CFR 121.201 (less than 500 employees for gold mine ore processing and production facilities—NAICS 212221); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this 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 final rule is estimated to impact about 21 gold mine ore processing and production facilities, none of which are owned by small entities. Thus, there are no impacts to small entities from this final rule. Although this final rule will contain requirements for new sources, EPA expects few, if any, new sources to be constructed in the next several years. Therefore, EPA did not estimate the impacts for new affected sources for this final rule.

Although this final rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this final rule on small and large entities. These standards establish emission limits that reflect practices and controls that are used throughout the industry and in many cases are already required by State operating permits. These standards also require only the essential monitoring, recordkeeping, and reporting needed to verify compliance. These final standards were developed based on information obtained from industry representatives in our surveys, consultation with business representatives and their trade association and other stakeholders.

D. Unfunded Mandates Reform Act

This 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 final rule is not expected to impact State, local, or tribal governments. The total nationwide annualized cost of this final rule for affected industrial sources is $9.1 million/yr. Thus, this final rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act (UMRA).

This final rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This final rule will not apply to such governments and will not impose any obligations upon them.

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 final rule does not impose any requirements on state and local governments. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicited comment on this proposed action 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 final rule imposes no requirements on tribal governments; thus, Executive Order 13175 does not apply to this action. Although EPA requested comment from tribal officials in developing this action, no comments on the proposal were received from tribal governments. However, the reductions in mercury emissions to the environment, which will be achieved by this final rule, will certainly benefit tribal populations within the vicinity of affected gold mine ore processing and production facilities.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 22, 1997) as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Executive 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. However, we note that the final rule will result in significant reductions in emissions of mercury, and thus will provide benefits to children's health.

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

This action 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. We have concluded that this final rule will not likely have any significant adverse energy effects because energy consumption would increase by only 12,600 megawatt-hours per year.

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 (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, 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 VCS.

This final rulemaking involves technical standards. EPA decided to use ASME PTC 19.10–1981, "Flue and Exhaust Gas Analyses," for its manual methods of measuring the oxygen or carbon dioxide content of the exhaust gas. These parts of ASME PTC 19.10–1981 are acceptable alternatives to EPA Method 3B. This standard is available from the American Society of Mechanical Engineers (ASME), Three Park Avenue, New York, NY 10016–5990.

Another VCS, ASTM D6784–02, "Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method)" is an acceptable alternative to EPA Method 29 for this NESHAP if approved by the permit authority. This performance test method is available from ASTM International. *See http://www.astm.org/.*

EPA has also decided to use EPA Methods 1, 1A, 2, 2A, 2C, 2D, 2F, 2G, 3, 3A, 3B, 4, 12A, 12B, 29, 30B, SW–846 Method 7471B, "Mercury in Solid or Semisolid Waste (Manual Cold-Vapor Technique)," (incorporated by reference—see § 63.14) and ASTM D6784–02, "Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources," (incorporated by reference—see § 63.14). Although the Agency has identified 14 VCS as being potentially applicable to these methods cited in this rule, we have decided not to use these standards in this final rulemaking. The use of these VCS would have been impractical because they do not meet the objectives of the standards cited in this rule. The search and review results are in the docket for this final rule.

Under section 63.7(f) and section 63.8(f) of Subpart A of the General Provisions, a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications, or procedures in the final rule.

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

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

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it will increase 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.

Additionally, the Agency has reviewed this rule to determine if there were any existing disproportionately high and adverse human health or environmental effects on minority or low-income populations that could be mitigated by this rulemaking. An analysis of demographic data showed that the areas in closest proximity to gold mines are very rural, with low total populations. The population total for block groups which centers are within 3 miles of a gold mine facility is 1,580. At the three mile radius, minority populations and children's populations are underrepresented when compared to national averages, while populations living below poverty are overrepresented. The aggregate average percentages for these groups are 26.3 percent, 30.5 percent, and 26 percent for minority populations, populations living below poverty, and children's populations, respectively. These averages are compared to national averages across block groups for these populations which are 31.8 percent, 12.5 percent, and 25.7 percent. There were only two block groups with centers within 3 miles of any gold mine, and the total population living below poverty was found to be 492.

In determining the aggregate demographic makeup of the communities near affected sources, EPA used census data at the block group level to identify demographics of the populations considered to be living near affected sources, such that they have notable exposures to current emissions from these sources. In this approach, EPA reviewed the distributions of different socio-demographic groups in the locations of the expected emission reductions from this rule. The review

identified those census block groups within a circular distance of a 1, 3, and 5 miles of affected sources and determined the demographic and socio-economic composition (*e.g.,* race, income, education, etc.) of these census block groups. The radius of 3 miles (or approximately 5 kilometers) has been used in other demographic analyses focused on areas around potential sources.[5 6 7 8] Gold mine facilities were assumed to have an average area of 7 square miles and buffered distances were calculated beyond the 7 square mile area to count populations not within the mine boundaries. EPA's demographic analysis has shown that these areas have an overrepresentation of populations below poverty, and an underrepresentation of minority and children's populations.[9]

This action establishes national emission standards for new and existing gold mines. The EPA estimates that there are approximately 23 such locations covered by this rule. The rule will reduce emissions of mercury (Hg), and as a result have positive health and welfare benefits to sustenance fishing communities, many of which are often considered to have environmental justice concerns.

EPA defines "Environmental Justice" to include meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. To promote meaningful involvement, EPA has developed a communication and outreach strategy to ensure that interested communities have access to this rule and are aware of its content. EPA will publicize the rulemaking via EJ newsletters, Tribal newsletters, EJ listservs, and the Internet, including EPA's Office of Policy's Rulemaking Gateway Web site (*http://yosemite.epa.gov/opei/RuleGate.nsf/*). EPA will also conduct targeted outreach to EJ communities as appropriate. Outreach activities may include providing general rulemaking fact sheets (*e.g.,* why is this important for my community) for EJ community groups and conducting conference calls with interested communities. In addition, State and Federal permitting requirements will provide State and local governments and members of affected communities the opportunity to provide comments on the permit conditions associated with permitting the sources affected by this rulemaking.

Overall, this final rule is expected to reduce mercury emissions from gold mine ore processing and production facilities and thus decrease the amount of such emissions to which all affected populations are exposed.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this final rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This final rule will be effective on February 17, 2011.

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Incorporation by reference, Reporting and recordkeeping requirements.

Dated: December 16, 2010.

Lisa P. Jackson,

Administrator.

For the reasons stated in the preamble, title 40, chapter I, of the Code of Federal Regulations is amended as follows:

PART 9—[AMENDED]

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135, *et seq.,* 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251, *et seq.,* 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345(d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857, *et seq.,* 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

Subpart A—[Amended]

* * * * *

■ 2. The table in § 9.1 is amended by adding an entry in numerical order for "63.11647–63.11648" under the heading "National Emission Standards for Hazardous Air Pollutants for Source Categories" to read as follows:

§ 9.1 OMB Approvals under the Paperwork Reduction Act.

* * * * *

40 CFR citation	OMB control No.
* * * * *	
National Emission Standards for Hazardous Air Pollutants for Source Categories [3]	
* * * * *	
63.11647–63.11648	2060–NEW
* * * * *	
* * * * *	

[3] The ICRs referenced in this section of the table encompass the applicable general provisions contained in 40 CFR part 63, subpart A, which are not independent information collection requirements.

* * * * *

PART 63—[AMENDED]

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

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

Subpart A—[Amended]

■ 4. Section 63.14 is amended by adding paragraph (b)(66), revising paragraph (i)(1), and adding paragraph (k)(1)(v) to read as follows:

§ 63.14 Incorporation by reference.

* * * * *

(b) * * *

(66) ASTM D6784–02 (Reapproved 2008), Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method),

[5] U.S. GAO (Government Accountability Office). *Demographics of People Living Near Waste Facilities.* Washington, DC: Government Printing Office; 1995.

[6] Mohai P, Saha R. "Reassessing Racial and Socio-economic Disparities in Environmental Justice Research". *Demography.* 2006;43(2):383–399.

[7] Mennis J. "Using Geographic Information Systems to Create and Analyze Statistical Surfaces of Populations and Risk for Environmental Justice Analysis". *Social Science Quarterly,* 2002;83(1):281–297.

[8] Bullard RD, Mohai P, Wright B, Saha R, *et al. Toxic Waste and Race at Twenty 1987–2007.* United Church of Christ. March 2007.

[9] The results of the demographic analysis are presented in "Review of Environmental Justice Impacts for Gold Mines", December 2010, a copy of which is available in the docket.

approved April 1, 2008, IBR approved for § 63.11646(a)(1)(vi), § 63.11647(a)(1)(ii), § 63.11647(a)(3)(ii), and § 63.11647(d).

* * * * *

(i) * * *

(1) ANSI/ASME PTC 19.10–1981, Flue and Exhaust Gas Analyses [Part 10, Instruments and Apparatus], issued August 31, 1981 IBR approved for §§ 63.309(k)(1)(iii), 63.865(b), 63.3166(a)(3), 63.3360(e)(1)(iii), 63.3545(a)(3), 63.3555(a)(3), 63.4166(a)(3), 63.4362(a)(3), 63.4766(a)(3), 63.4965(a)(3), 63.5160(d)(1)(iii), 63.9307(c)(2), 63.9323(a)(3), 63.11148(e)(3)(iii), 63.11155(e)(3), 63.11162(f)(3)(iii) and (f)(4), 63.11163(g)(1)(iii) and (g)(2), 63.11410(j)(1)(iii), 63.11551(a)(2)(i)(C), 63.11646(a)(1)(iii), table 5 to subpart DDDDD of this part, and table 1 to subpart ZZZZZ of this part.

* * * * *

(k) * * *

(1) * * *

(v) SW–846 Method 74741B, Revision 2, "Mercury in Solid or Semisolid Waste (Manual Cold-Vapor Technique)" February 2007, IBR approved for § 63.11647(f)(2).

* * * * *

■ 5. Part 63 is amended by adding subpart EEEEEEE to read as follows:

Subpart EEEEEEE—National Emission Standards for Hazardous Air Pollutants: Gold Mine Ore Processing and Production Area Source Category

Applicability and Compliance Dates

Sec.
63.11640 Am I subject to this subpart?
63.11641 What are my compliance dates?

Standards and Compliance Requirements

63.11645 What are my mercury emission standards?
63.11646 What are my compliance requirements?
63.11647 What are my monitoring requirements?
63.11648 What are my notification, reporting, and recordkeeping requirements?

Other Requirements and Information

63.11650 What General Provisions apply to this subpart?
63.11651 What definitions apply to this subpart?
63.11652 Who implements and enforces this subpart?
63.11653 [Reserved]

Tables to Subpart EEEEEEE of Part 63

Table 1 to Subpart EEEEEEE of Part 63—Applicability of General Provisions to Subpart EEEEEEE

Subpart EEEEEEE—National Emission Standards for Hazardous Air Pollutants: Gold Mine Ore Processing and Production Area Source Category

Applicability and Compliance Dates

§ 63.11640 Am I subject to this subpart?

(a) You are subject to this subpart if you own or operate a gold mine ore processing and production facility as defined in § 63.11651, that is an area source.

(b) This subpart applies to each new or existing affected source. The affected sources are each collection of "ore pretreatment processes" at a gold mine ore processing and production facility, each collection of "carbon processes with mercury retorts" at a gold mine ore processing and production facility, each collection of "carbon processes without mercury retorts" at a gold mine ore processing and production facility, and each collection of "non-carbon concentrate processes" at a gold mine ore processing and production facility, as defined in § 63.11651.

(1) An affected source is existing if you commenced construction or reconstruction of the affected source on or before April 28, 2010.

(2) An affected source is new if you commenced construction or reconstruction of the affected source after April 28, 2010.

(c) This subpart does not apply to research and development facilities, as defined in section 112(c)(7) of the Clean Air Act (CAA).

(d) If you own or operate a source subject to this subpart, you must have or you must obtain a permit under 40 CFR part 70 or 40 CFR part 71.

§ 63.11641 What are my compliance dates?

(a) If you own or operate an existing affected source, you must comply with the applicable provisions of this subpart no later than February 17, 2014.

(b) If you own or operate a new affected source, and the initial startup of your affected source is on or before February 17, 2011, you must comply with the provisions of this subpart no later than February 17, 2011.

(c) If you own or operate a new affected source, and the initial startup of your affected source is after February 17, 2011, you must comply with the provisions of this subpart upon startup of your affected source.

Standards and Compliance Requirements

§ 63.11645 What are my mercury emission standards?

(a) For existing ore pretreatment processes, you must emit no more than 127 pounds of mercury per million tons of ore processed.

(b) For existing carbon processes with mercury retorts, you must emit no more than 2.2 pounds of mercury per ton of concentrate processed.

(c) For existing carbon processes without mercury retorts, you must emit no more than 0.17 pounds of mercury per ton of concentrate processed.

(d) For existing non-carbon concentrate processes, you must emit no more than 0.2 pounds of mercury per ton of concentrate processed.

(e) For new ore pretreatment processes, you must emit no more than 84 pounds of mercury per million tons of ore processed.

(f) For new carbon processes with mercury retorts, you must emit no more than 0.8 pounds of mercury per ton of concentrate processed.

(g) For new carbon processes without mercury retorts, you must emit no more than 0.14 pounds of mercury per ton of concentrate processed.

(h) For new non-carbon concentrate processes, you must emit no more than 0.1 pounds of mercury per ton of concentrate processed.

(i) The standards set forth in this section apply at all times.

§ 63.11646 What are my compliance requirements?

(a) Except as provided in paragraph (b) of this section, you must conduct a mercury compliance emission test within 180 days of the compliance date for all process units at new and existing affected sources according to the requirements in paragraphs (a)(1) through (a)(13) of this section. This compliance testing must be repeated annually thereafter, with no two consecutive annual compliance tests occurring less than 3 months apart or more than 15 months apart.

(1) You must determine the concentration of mercury and the volumetric flow rate of the stack gas according to the following test methods and procedures:

(i) Method 1 or 1A (40 CFR part 60, appendix A–1) to select sampling port locations and the number of traverse points in each stack or duct. Sampling sites must be located at the outlet of the control device (or at the outlet of the emissions source if no control device is present) and prior to any releases to the atmosphere.

(ii) Method 2, 2A, 2C, 2D, 2F (40 CFR part 60, appendix A–1), or Method 2G (40 CFR part 60, appendix A–2) to determine the volumetric flow rate of the stack gas.

(iii) Method 3, 3A, or 3B (40 CFR part 60, appendix A–2) to determine the dry

molecular weight of the stack gas. You may use ANSI/ASME PTC 19.10, "Flue and Exhaust Gas Analyses" (incorporated by reference-see § 63.14) as an alternative to EPA Method 3B.

(iv) Method 4 (40 CFR part 60, appendix A–3) to determine the moisture content of the stack gas.

(v) Method 29 (40 CFR part 60, appendix A–8) to determine the concentration of mercury, except as provided in paragraphs (a)(1)(vi) and (vii) of this section.

(vi) Upon approval by the permitting authority, ASTM D6784; "Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method)" (incorporated by reference—see § 63.14) may be used as an alternative to Method 29 to determine the concentration of mercury.

(vii) Upon approval by the permitting authority, Method 30B (40 CFR part 60, appendix A–8) may be used as an alternative to Method 29 to determine the concentration of mercury for those process units with relatively low particulate-bound mercury as specified in Section 1.2 of Method 30B.

(2) A minimum of three test runs must be conducted for each performance test of each process unit. Each test run conducted with Method 29 must collect a minimum sample volume of 0.85 dry standard cubic meters (30 dry standard cubic feet). If conducted with Method 30B or ASTM D6784, determine sample time and volume according to the testing criteria set forth in the relevant method. If the emission testing results for any of the emission points yields a non-detect value, then the minimum detection limit (MDL) must be used to calculate the mass emissions rate (lb/hr) used to calculate the emissions factor (lb/ton) for that emission point and, in turn, for calculating the sum of the emissions (in units of pounds of mercury per ton of concentrate, or pounds of mercury per million tons of ore) for all emission points subject to the emission standard for determining compliance. If the resulting mercury emissions are greater than the MACT emission standard, the owner or operator may use procedures that produce lower MDL results and repeat the mercury emissions testing one additional time for any emission point for which the measured result was below the MDL. If this additional testing is performed, the results from that testing must be used to determine compliance (*i.e.,* there are no additional opportunities allowed to lower the MDL).

(3) Performance tests shall be conducted under such conditions as the Administrator specifies to the owner or operator based on representative performance of the affected source for the period being tested. Upon request, the owner or operator shall make available to the Administrator such records as may be necessary to determine the conditions of performance tests. Performance tests must be conducted under operating conditions (including process or production throughputs) that are based on representative performance. Record and report to the permit authority the process throughput for each test run. For sources with multiple emission units (*e.g.,* two roasters, or a furnace, electrowinning circuit and a mercury retort) ducted to a common control device and stack, compliance testing must be performed either by conducting a single compliance test with all affected emissions units in operation or by conducting a separate compliance test on each emissions unit. Alternatively, the owner or operator may request approval from the permit authority for an alternative testing approach. If the units are tested separately, any emissions unit that is not tested initially must be tested as soon as is practicable. If the performance test is conducted when all affected units are operating, then the number of hours of operation used for calculating emissions pursuant to paragraphs (a)(6) and (7) of this section must be the total number of hours for the unit that has the greatest total operating hours for that period of time, or based on an appropriate alternative method approved by the permit authority to account for the hours of operation for each separate unit in these calculations.

(4) Calculate the mercury emission rate (lb/hr), based on the average of 3 test run values, for each process unit (or combination of units that are ducted to a common stack and are tested when all affected sources are operating pursuant to paragraph (a)(3) of this section) using Equation (1) of this section:

$$E = Cs * Qs * K \qquad \text{(Eq. 1)}$$

Where:

E = mercury emissions in lb/hr;

Cs = concentration of mercury in the stack gas, in grains per dry standard cubic foot (gr/dscf);

Qs = volumetric flow rate of the stack gas, in dry standard cubic feet per hour; and

K = conversion factor for grains (gr) to pounds (lb), 1.43×10^{-4}.

(5) Monitor and record the number of one-hour periods each process unit operates during each month.

(6) For the initial compliance determination for both new and existing sources, determine the total mercury emissions for all the full calendar months between the compliance date and the date of the initial compliance test by multiplying the emission rate in lb/hr for each process unit (or combination of units ducted to a common stack that are tested together) by the number of one-hour periods each process unit (or the unit that had the greatest total operating hours among the combination of multiple units with one stack that are tested together, or an alternative method approved by the permit authority, pursuant to paragraph (a)(3) of this section) operated during those full calendar months prior to the initial compliance test. This initial period must include at least 1 full month of operations. After the initial compliance test, for subsequent compliance tests, determine the mercury mass emissions for the 12 full calendar months prior to the compliance test in accordance with the procedures in paragraph (a)(7) of this section. Existing sources may use a previous emission test for their initial compliance determination in lieu of conducting a new test if the test was conducted within one year of the compliance date using the methods specified in paragraphs (a)(1) through (a)(4) of this section, and the tests were representative of current operating processes and conditions. If a previous test is used for their initial compliance determination, 3 to 12 full months of data on hours of operation and production (*i.e.,* million tons of ore or tons of concentrate), including the month the test was conducted, must be used to calculate the emissions rate (in units of pounds of mercury per million tons of ore for the ore pretreatment affected sources, or in units of pounds of mercury per tons of concentrate for the other affected sources).

(7) For compliance determinations following the initial compliance test for new and existing sources, determine the total mercury mass emissions for each process unit for the 12 full calendar

months preceding the performance test by multiplying the emission rate in lb/hr for each process unit (or combination of units ducted to a common stack that are tested together) by the number of one-hour periods each process unit (or the unit that had the greatest total operating hours among the combination of multiple units with one stack that are tested together, or an alternative method approved by the permit authority, pursuant to paragraph (a)(3) of this section) operated during the 12 full calendar months preceding the completion of the performance tests.

(8) You must install, calibrate, maintain and operate an appropriate weight measurement device, mass flow meter, or densitometer and volumetric flow meter to measure ore throughput for each roasting operation and autoclave and calculate hourly, daily and monthly totals in tons of ore according to paragraphs (a)(8)(i) and (a)(8)(ii) of this section.

(i) Measure the weight or the density and volumetric flow rate of the oxidized ore slurry as it exits the roaster oxidation circuit(s) and before the carbon-in-leach tanks. Alternatively, the weight of the ore can be measured "as fed" if approved by the permit authority as an acceptable equivalent method to measure amount of ore processed.

(ii) Measure the weight or the density and volumetric flow rate of the ore slurry as it is fed to the autoclave(s). Alternatively, the weight or the density and volumetric flow rate of the oxidized ore slurry can be measured as it exits the autoclave and before the carbon-in-leach tanks if approved by the permit authority as an acceptable equivalent method to measure amount of ore processed.

(9) Measure the weight of concentrate (produced by electrowinning, Merrill Crowe process, gravity feed, or other methods) using weigh scales for each batch prior to processing in mercury retorts or melt furnaces. For facilities with mercury retorts, the concentrate must be weighed in the same state and condition as it is when fed to the mercury retort. For facilities without mercury retorts, the concentrate must be weighed prior to being fed to the melt furnace before drying in any ovens. For facilities that ship concentrate offsite, measure the weight of concentrate as shipped offsite. You must keep accurate records of the weights of each batch of concentrate processed and calculate, and record the total weight of concentrate processed each month.

(10) You must maintain the systems for measuring density, volumetric flow rate, and weight within ± 5 percent accuracy. You must describe the specific equipment used to make measurements at your facility and how that equipment is periodically calibrated. You must also explain, document, and maintain written procedures for determining the accuracy of the measurements and make these written procedures available to your permitting authority upon request. You must determine, record, and maintain a record of the accuracy of the measuring systems before the beginning of your initial compliance test and during each subsequent quarter of affected source operation.

(11) Record the weight in tons of ore for ore pretreatment processes and concentrate for carbon processes with mercury retorts, carbon processes without mercury retorts, and for non-carbon concentrate processes on a daily and monthly basis.

(12) Calculate the emissions from each new and existing affected source for the sum of all full months between the compliance date and the date of the initial compliance test in pounds of mercury per ton of process input using the procedures in paragraphs (a)(12)(i) through (a)(12)(iv) of this section to determine initial compliance with the emission standards in § 63.11645. This must include at least 1 full month of data. Or, if a previous test is used pursuant to paragraph (a)(6) of this section for the initial compliance test, use a period of time pursuant to paragraph (a)(6) of this section to calculate the emissions for the affected source. After this initial compliance test period, determine annual compliance using the procedures in paragraph (a)(13) of this section for existing sources.

(i) For ore pretreatment processes, divide the sum of mercury mass emissions (in pounds) from all roasting operations and autoclaves during the number of full months between the compliance date and the initial compliance test by the sum of the total amount of gold mine ore processed (in million tons) in these process units during those same full months following the compliance date. Or, if a previous test is used to determine initial compliance, pursuant to paragraph (a)(6) of this section, then the same 3 to 12 full months of production data (*i.e.,* million tons of ore) and hours of operation referred to in paragraph (a)(6) of this section, must be used to determine the emissions in pounds of mercury per million tons of ore.

(ii) For carbon processes with mercury retorts, divide the sum of mercury mass emissions (in pounds) from all carbon kilns, preg tanks, electrowinning, mercury retorts, and melt furnaces during the initial number of full months between the compliance date and the initial compliance tests by the total amount of concentrate (in tons) processed in these process units during those same full months following the compliance date. If a previous test is used to determine initial compliance, pursuant to paragraph (a)(6) of this section, then the same 3 to 12 full months of production data (*i.e.,* tons of concentrate) and hours of operation referred to in paragraph (a)(6) of this section, must be used to determine the emissions in pounds of mercury per tons of concentrate.

(iii) For carbon processes without mercury retorts, divide the sum of mercury mass emissions (in pounds) from all carbon kilns, preg tanks, electrowinning, and melt furnaces during the initial number of full months between the compliance date and the initial compliance tests by the total amount of concentrate (in tons) processed in these process units during those same full months following the compliance date. If a previous test is used to determine initial compliance, pursuant to paragraph (a)(6) of this section, then the same 3 to 12 full months of production data (*i.e.,* tons of concentrate) and hours of operation referred to in paragraph (a)(6) of this section, must be used to determine the emissions in pounds of mercury per tons of concentrate.

(iv) For non-carbon concentrate processes, divide the sum of mercury mass emissions (in pounds) from mercury retorts and melt furnaces during the initial number of full months between the compliance date and the initial compliance tests by the total amount of concentrate (in tons) processed in these process units during those same full months following the compliance date. If a previous test is used to determine initial compliance, pursuant to paragraph (a)(6) of this section, then the same 3 to 12 full months of production data (*i.e.,* tons of concentrate) and hours of operation referred to in paragraph (a)(6) of this section, must be used to determine the emissions in pounds of mercury per tons of concentrate.

(13) After the initial compliance test, calculate the emissions from each new and existing affected source for each 12-month period preceding each subsequent compliance test in pounds of mercury per ton of process input using the procedures in paragraphs (a)(13)(i) through (iv) of this section to determine compliance with the emission standards in § 63.11645.

(i) For ore pretreatment processes, divide the sum of mercury mass

emissions (in pounds) from all roasting operations and autoclaves in the 12-month period preceding a compliance test by the sum of the total amount of gold mine ore processed (in million tons) in that 12-month period.

(ii) For carbon processes with mercury retorts, divide the sum of mercury mass emissions (in pounds) from all carbon kilns, preg tanks, electrowinning, mercury retorts, and melt furnaces in the 12-month period preceding a compliance test by the total amount of concentrate (in tons) processed in these process units in that 12-month period.

(iii) For carbon processes without mercury retorts, divide the sum of mercury mass emissions (in pounds) from all carbon kilns, preg tanks, electrowinning, and melt furnaces in the 12-month period preceding a compliance test by the total amount of concentrate (in tons) processed in these process units in that 12-month period.

(iv) For non-carbon concentrate processes, divide the sum of mercury mass emissions (in pounds) from mercury retorts and melt furnaces in the 12-month period preceding a compliance test by the total amount of concentrate (in tons) processed in these process units in that 12-month period.

(b) At all times, you must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

§ 63.11647 What are my monitoring requirements?

(a) Except as provided in paragraph (a)(5) of this section, you must monitor each roaster for mercury emissions using one of the procedures in paragraphs (a)(1), (a)(2), or (a)(3) of this section and establish operating limits for mercury concentration as described in paragraph (a)(4) of this section.

(1) Perform sampling and analysis of the roaster's exhaust for mercury concentration using EPA Performance Specification 12B (40 CFR part 60, appendix B and Procedure 5 of appendix F) or EPA Method 30B (40 CFR part 60, appendix A–8) at least twice per month. A minimum of two measurements must be taken per month that are at least 11 days apart from other consecutive tests. The mercury concentration must be maintained below the operating limit established in paragraph (a)(4) of this section. The results of the sampling must be obtained within 72 hours of the time the sample is taken.

(i) To determine the appropriate sampling duration, you must review the available data from previous stack tests to determine the upper 99th percentile of the range of mercury concentrations in the exit stack gas. Based on this upper end of expected concentrations, select an appropriate sampling duration that is likely to provide a valid sample and not result in breakthrough of the sampling tubes. If breakthrough of the sampling tubes occurs, you must re-sample within 7 days using a shorter sampling duration.

(ii) If any mercury concentration measurement from the twice per month sampling with PS 12B or Method 30B is higher than the operating limit, the exceedance must be reported to the permit authority as a deviation and corrective actions must be implemented within 48 hours upon receipt of the sampling results. Moreover, within 96 hours of the exceedance, the owner or operator must measure the concentration again (with PS 12B (40 CFR part 60, appendix B and Procedure 5 of appendix F), Method 30B or Method 29 (40 CFR part 60, appendix A–8), or ASTM D6784(incorporated by reference—see § 63.14)) and demonstrate to the permit authority that the mercury concentration is no higher than the operating limit, or inform the permit authority that the limit continues to be exceeded. If the measured mercury concentration exceeds the operating limit for mercury concentration after these 96 hours, the exceedance must be reported as a deviation within 24 hours to the permitting authority. The owner or operator must conduct a full compliance test pursuant to § 63.11646(a) for the roaster operations within 40 days to determine if the affected source is in compliance with the MACT emission standard. For facilities that have roasters and autoclaves, the owner or operator can use the results of the previous compliance test for the autoclaves to determine the emissions for those process units to be used in the calculations of the emissions for the affected source. If the source is determined to be in compliance, the compliance test may also be used to establish a new operating limit for mercury concentration (in accordance with paragraph (e) of this section).

(2) Install, operate, calibrate, and maintain a continuous emissions monitoring system (CEMS) to continuously measure the mercury concentration in the final exhaust stream from each roaster according to the requirements of Performance Specification 12A (40 CFR part 60, appendix B) except that calibration standards traceable to the National Institute of Standards and Technology are not required. You must perform a data accuracy assessment of the CEMS according to section 5 of Appendix F in part 60 and follow the applicable monitoring requirements in § 63.8 as provided in Table 1 to subpart EEEEEEE.

(i) You must continuously monitor the daily average mercury concentration from the roaster and maintain the daily average concentration below the operating limit established in paragraph (a)(4) of this section.

(ii) If the daily average mercury concentration from the CEMs is higher than the operating limit, the exceedance must be reported to the permit authority as a deviation and corrective actions must be implemented within 48 hours upon receipt of the sampling results. Moreover, within 96 hours of the exceedance, the owner or operator must measure the concentration again (with the CEMs (40 CFR part 60, appendix B and Procedure 5 of appendix F) and demonstrate to the permit authority that the mercury concentration is no higher than the operating limit, or inform the permit authority that the limit continues to be exceeded. If the measured mercury concentration exceeds the operating limit for mercury concentration after these 96 hours, the exceedance must be reported as a deviation within 24 hours to the permitting authority, and the owner or operator must conduct a full compliance test pursuant to § 63.11646(a) for the roaster operations within 40 days to determine if the affected source is in compliance with the MACT emission standard. For facilities that have roasters and autoclaves, the owner or operator can use the results of the previous compliance test for the autoclaves to determine the emissions for those process units to be used in the calculations of the emissions for the affected source. If the source is determined to be in compliance, the compliance test results may also be used to establish a new operating limit for mercury concentration (in accordance with paragraph (e) of this section).

(iii) You must submit a monitoring plan that includes quality assurance and quality control (QA/QC) procedures sufficient to demonstrate the accuracy of

the CEMS to your permitting authority for approval 180 days prior to your initial compliance test. At a minimum, the QA/QC procedures must include daily calibrations and an annual accuracy test for the CEMS.

(3) Continuously measure the mercury concentration in the final exhaust stream from each roaster using EPA Performance Specification 12B (40 CFR part 60 appendix B and Procedure 5 of appendix F).

(i) You must continuously measure the mercury concentration in the roaster exhaust and maintain the average daily mercury concentration below the operating limit established in paragraph (a)(4) of this section. To determine the appropriate sampling duration, you must review the available data from previous stack tests to determine the upper 99th percentile of the range of mercury concentrations in the exit stack gas. Based on this upper end of expected concentrations, select an appropriate sampling duration that is likely to provide a valid sample and not result in breakthrough of the sampling tubes. If breakthrough of the sampling tubes occurs, you must re-sample within 7 days using a shorter sampling duration.

(ii) If the daily average mercury concentration is higher than the operating limit, the exceedance must be reported to the permit authority as a deviation and corrective actions must be implemented within 48 hours upon receipt of the sampling results. Moreover, within 96 hours of the exceedance, the owner or operator must measure the concentration again with PS 12B (40 CFR part 60, appendix B and Procedure 5 of appendix F), Method 30B or Method 29 (40 CFR part 60, appendix A–8), or ASTM D6784(incorporated by reference—see § 63.14) and demonstrate to the permit authority that the mercury concentration is no higher than the operating limit, or inform the permit authority that the limit continues to be exceeded. If the measured mercury concentration exceeds the operating limit for mercury concentration after these 96 hours, the exceedance must be reported as a deviation within 24 hours to the permitting authority and the owner or operator must conduct a full compliance test pursuant to § 63.11646(a) for the roaster operations within 40 days to determine if the affected source is in compliance with the MACT emission standard. For facilities that have roasters and autoclaves, the owner or operator can use the results of the previous compliance test for the autoclaves to determine the emissions for those process units to be used in the calculations of the emissions for the affected source. If the source is determined to be in compliance, the compliance test results may also be used to establish a new operating limit for mercury concentration (in accordance with paragraph (e) of this section).

(4) Use Equation (2) of this section to establish an upper operating limit for mercury concentration as determined by using the procedures in paragraphs (a)(1), (a)(2), or (a)(3) of this section concurrently while you are conducting your annual compliance performance stack tests according to the procedures in § 63.11646(a).

$$OLR = C_{test} * (EL/CT) \qquad \text{(Eq 2)}$$

Where:

OLR = mercury concentration operating limit for the roaster (or roasters that share a common stack) (in micrograms per cubic meter);

C_{test} = average mercury concentration measured by the monitoring procedures (PS 12A or PS 12B or 30B) during the compliance performance stack test (in micrograms per cubic meter);

EL = emission standard for ore pretreatment processes (in lb/million tons of ore);

CT = compliance test results for ore pretreatment processes (in lb/million tons of ore).

(5) For roasters that utilize calomel-based mercury control systems for emissions controls, you are not required to perform the monitoring for mercury emissions in paragraphs (a)(1), (a)(2), or (a)(3) of this section if you demonstrate to the satisfaction of your permitting authority that mercury emissions from the roaster are less than 10 pounds of mercury per million tons of ore throughput. If you make this demonstration, you must conduct the parametric monitoring as described below in paragraphs (b) and (c) of this section.

(i) The initial demonstration must include three or more consecutive independent stack tests for mercury at least one month apart on the roaster exhaust stacks. Subsequent demonstrations may be based upon the single stack test required in paragraph (a) of section § 63.11646. The results of each of the tests must be less than 10 pounds of mercury per million tons of ore. The testing must be performed according to the procedures in § 63.11646(a)(1) through (a)(4) to determine mercury emissions in pounds per hour.

(ii) Divide the mercury emission rate in pounds per hour by the ore throughput rate during the test expressed in millions of tons per hour to determine the emissions in pounds per million tons of ore.

(b) For facilities with roasters and a calomel-based mercury control system that choose to monitor for mercury emissions using the procedures in paragraph (a)(1) of this section or that qualify for and choose to follow the requirements in paragraph (a)(5) of this section, you must establish operating parameter limits for scrubber liquor flow (or line pressure) and scrubber inlet gas temperature and monitor these parameters. You may establish your operating parameter limits from the initial compliance test, according to the manufacturer's specifications, or based on limits established by the permitting authority. If you choose to establish your operating parameter limits from the initial compliance test, monitor the scrubber liquor flow (or line pressure) and scrubber inlet gas temperature during each run of your initial compliance test. The minimum operating limit for scrubber liquor flow rate (or line pressure) is either the lowest value during any run of the initial compliance test or 10 percent less than the average value measured during the compliance test, and your maximum scrubber inlet temperature limit is the highest temperature measured during any run of the initial compliance test or 10 percent higher than the average value measured during the compliance test. You must monitor the scrubber liquor flow rate (or line pressure) and scrubber inlet gas temperature hourly and maintain the scrubber liquor flow (or line pressure) at or above the established operating parameter and maintain the inlet gas temperature below the established operating parameter limit.

(c) For facilities with roasters and a calomel-based mercury control system that choose to monitor for mercury emissions using the procedures in paragraph (a)(1) of this section or that qualify for and follow the requirements in paragraph (a)(5) of this section, you must establish operating parameter ranges for mercuric ion and chloride ion concentrations or for oxidation reduction potential and pH using the

procedures in paragraph (c)(1) or (c)(2) of this section respectively.

(1) Establish the mercuric ion concentration and chloride ion concentration ranges for each calomel-based mercury control system. The mercuric ion concentration and chloride ion concentration ranges for each calomel-based mercury control system must be based on the manufacturer's specifications, or based on approval by your permitting authority. Measure the mercuric ion concentration and chloride ion concentrations at least once during each run of your initial compliance test. The measurements must be within the established concentration range for mercuric ion concentration and chloride ion concentration. Subsequently, you must sample at least once daily and maintain the mercuric ion concentration and chloride ion concentrations within their established range.

(2) Establish the oxidation reduction potential and pH range for each calomel-based mercury control system. The oxidation reduction potential and pH range for each calomel-based mercury control system must be based on the manufacturer's specifications, or based on approval by your permitting authority. Install monitoring equipment to continuously monitor the oxidation reduction potential and pH of the calomel-based mercury control system scrubber liquor. Measure the oxidation reduction potential and pH of the scrubber liquor during each run of your initial compliance test. The measurements must be within the established range for oxidation reduction potential and pH. Subsequently, you must monitor the oxidation reduction potential and pH of the scrubber liquor continuously and maintain it within the established operating range.

(d) If you have an exceedance of a control device operating parameter range provided in paragraphs (b) or (c) of this section, you must take corrective action and bring the parameters back into the established parametric ranges. If the corrective actions taken following an exceedance do not result in the operating parameter value being returned within the established range within 48 hours, a mercury concentration measurement (with PS 12B or PS 12A CEMS (40 CFR part 60, appendix B and Procedure 5 of appendix F), Method 30B or Method 29 (40 CFR part 60, appendix A–8), or ASTM D6784 (incorporated by reference—see § 63.14)) must be made to determine if the operating limit for mercury concentration is being exceeded. The measurement must be performed and the mercury concentration determined within 48 hours (after the initial 48 hours, or a total of 96 hours from the time the parameter range was exceeded). If the measured mercury concentration meets the operating limit for mercury concentration established under § 63.11647(a)(4), the corrective actions are deemed successful, and the owner or operator can request the permit authority to establish a new limit or range for the parameter. If the measured mercury concentration exceeds the operating limit for mercury concentration after these 96 hours, the exceedance must be reported as a deviation within 24 hours to the permitting authority and the owner or operator must conduct a full compliance test pursuant to § 63.11646(a) for the roaster operations within 40 days to determine if the affected source is in compliance with the MACT emission standard. For facilities that have roasters and autoclaves, the owner or operator can use the results of the previous compliance test for the autoclaves to determine the emissions for those process units to be used in the calculations of the emissions for the affected source. If the source is determined to be in compliance with the MACT emission standard, the compliance test may also be used to establish a new operating limit for mercury concentration (see paragraph (e) of this section).

(e) You may submit a request to your permitting authority for approval to change the operating limits established under paragraph (a)(4) of this section for the monitoring required in paragraph (a)(1),(a)(2), or (a)(3) of this section. In the request, you must demonstrate that the proposed change to the operating limit detects changes in levels of mercury emission control. An approved change to the operating limit under this paragraph only applies until a new operating limit is established during the next annual compliance test.

(f) You must monitor each process unit at each new and existing affected source that uses a carbon adsorber to control mercury emissions using the procedures in paragraphs (f)(1) or (f)(2) of this section. A carbon adsorber may include a fixed carbon bed, carbon filter packs or modules, carbon columns, and other variations.

(1) Continuously sample and analyze the exhaust stream from the carbon adsorber for mercury using Method 30B (40 CFR part 60, appendix A–8) for a duration of at least the minimum sampling time specified in Method 30B and up to one week that includes the period of the annual performance test.

(i) Establish an upper operating limit for the process as determined using the mercury concentration measurements from the sorbent trap (Method 30B) as calculated from Equation (3) of this section.

$$OLC = C_{trap} * (EL/CT) \qquad \text{(Eq 3)}$$

Where:

OLC = mercury concentration operating limit for the carbon adsorber control device on the process as measured using the sorbent trap, (micrograms per cubic meter);

C_{trap} = average mercury concentration measured using the sorbent trap during the week that includes the compliance performance test, (micrograms per cubic meter);

EL = emission standard for the affected sources (lb/ton of concentrate);

CT = compliance test results for the affected sources (lb/ton of concentrate).

(ii) Sample and analyze the exhaust stream from the carbon adsorber for mercury at least monthly using Method 30B (40 CFR part 60, appendix A–8). When the mercury concentration reaches 75 percent of the operating limit, begin weekly sampling and analysis. When the mercury concentration reaches 90 percent of the operating limit, replace the carbon in the carbon adsorber within 30 days. If mercury concentration exceeds the operating limit, change the carbon in the carbon adsorber within 30 days and report the deviation to your permitting authority.

(2) Conduct an initial sampling of the carbon in the carbon bed for mercury 90 days after the replacement of the carbon. A representative sample must be collected from the inlet of the bed and the exit of the bed and analyzed using SW–846 Method 7471B (incorporated by reference—see § 63.14). The depth to which the sampler is inserted must be recorded. The design capacity is established by calculating the average carbon loading from the inlet and outlet measurements. Sampling and analysis

of the carbon bed for mercury must be performed quarterly thereafter. When the carbon loading reaches 50 percent of the design capacity of the carbon, monthly sampling must be performed until 90 percent of the carbon loading capacity is reached. The carbon must be removed and replaced with fresh carbon no later than 30 days after reaching 90 percent of capacity. For carbon designs where there may be multiple carbon columns or beds, a representative sample may be collected from the first and last column or bed instead of the inlet or outlet. If the carbon loading exceeds the design capacity of the carbon, change the carbon within 30 days and report the deviation to your permitting authority.

(g) You must monitor gas stream temperature at the inlet to the carbon adsorber for each process unit (*i.e.,* carbon kiln, melt furnace, *etc.*) equipped with a carbon adsorber. Establish a maximum value for the inlet temperature either during the annual performance test (required in § 63.11646(a)), according to the manufacturer's specifications, or as approved by your permitting authority. If you choose to establish the temperature operating limit during the performance test, establish the temperature operating limit based on either the highest reading during the test or at 10°F higher than the average temperature measured during the performance test. Monitor the inlet temperature once per shift. If an inlet temperature exceeds the temperature operating limit, you must take corrective actions to get the temperature back within the parameter operating limit within 48 hours. If the exceedance persists, within 144 hours of the exceedance, you must sample and analyze the exhaust stream from the carbon adsorber using Method 30B (40 CFR part 60, appendix A–8) and compare to an operating limit (calculated pursuant to (f)(1)(i)) or you must conduct carbon sampling pursuant to (f)(2) of this section. If the concentration measured with Method 30B is below 90 percent of the operating limit or the carbon sampling results are below 90 percent of the carbon loading capacity, you may set a new temperature operating limit 10°F above the previous operating limit or at an alternative level approved by your permit authority. If the concentration is above 90 percent of the operating limit or above 90 percent of the carbon loading capacity you must change the carbon in the bed within 30 days and report the event to your permitting authority, and reestablish an appropriate maximum temperature limit based on approval of your permit authority.

(h) For each wet scrubber at each new and existing affected source not followed by a mercury control system, you must monitor the water flow rate (or line pressure) and pressure drop. Establish a minimum value as the operating limit for water flow rate (or line pressure) and pressure drop either during the performance test required in § 63.11646(a), according to the manufacturer's specifications, or as approved by your permitting authority. If you choose to establish the operating limit based on the results of the performance test, the new operating limit must be established based on either the lowest value during any test run or 10 percent less than the average value measured during the test. For wet scrubbers on an autoclave, establish the pressure drop range according to manufacturer's specifications. You must monitor the water flow rate and pressure drop once per shift and take corrective action within 24 hours if any daily average is less than the operating limit. If the parameters are not in range within 72 hours, the owner or operator must report the deviation to the permitting authority and perform a compliance test for the process unit(s) controlled with the wet scrubber that has the parameter exceedance within 40 days to determine if the affected source is in compliance with the MACT limit. For the other process units included in the affected source, the owner or operator can use the results of the previous compliance test to determine the emissions for those process units to be used in the calculations of the emissions for the affected source.

(i) You may conduct additional compliance tests according to the procedures in § 63.11646 and re-establish the operating limits required in paragraphs (a) through (c) and (f) through (h) of this section at any time. You must submit a request to your permitting authority for approval to re-establish the operating limits. In the request, you must demonstrate that the proposed change to the operating limit detects changes in levels of mercury emission control. An approved change to the operating limit under this paragraph only applies until a new operating limit is established during the next annual compliance test.

§ 63.11648 What are my notification, reporting, and recordkeeping requirements?

(a) You must submit the Initial Notification required by § 63.9(b)(2) no later than 120 calendar days after the date of publication of the final rule in the **Federal Register** or within 120 days after the source becomes subject to the standard. The Initial Notification must include the information specified in § 63.9(b)(2)(i) through (b)(2)(iv).

(b) You must submit an initial Notification of Compliance Status as required by § 63.9(h).

(c) If a deviation occurs during a semiannual reporting period, you must submit a deviation report to your permitting authority according to the requirements in paragraphs (c)(1) and (2) of this section.

(1) The first reporting period covers the period beginning on the compliance date specified in § 63.11641 and ending on June 30 or December 31, whichever date comes first after your compliance date. Each subsequent reporting period covers the semiannual period from January 1 through June 30 or from July 1 through December 31. Your deviation report must be postmarked or delivered no later than July 31 or January 31, whichever date comes first after the end of the semiannual reporting period.

(2) A deviation report must include the information in paragraphs (c)(2)(i) through (c)(2)(iv) of this section.

(i) Company name and address.

(ii) Statement by a responsible official, with the official's name, title, and signature, certifying the truth, accuracy and completeness of the content of the report.

(iii) Date of the report and beginning and ending dates of the reporting period.

(iv) Identification of the affected source, the pollutant being monitored, applicable requirement, description of deviation, and corrective action taken.

(d) If you had a malfunction during the reporting period, the compliance report required in § 63.11648(b) must include the number, duration, and a brief description for each type of malfunction which occurred during the reporting period and which caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by an owner or operator during a malfunction of an affected source to minimize emissions in accordance with § 63.11646(b), including actions taken to correct a malfunction.

(e) You must keep the records specified in paragraphs (e)(1) through (e)(3) of this section. The form and maintenance of records must be consistent with the requirements in section 63.10(b)(1) of the General Provisions.

(1) As required in § 63.10(b)(2)(xiv), you must keep a copy of each

notification that you submitted to comply with this subpart and all documentation supporting any Initial Notification, Notification of Compliance Status, and semiannual compliance certifications that you submitted.

(2) You must keep the records of all performance tests, measurements, monitoring data, and corrective actions required by §§ 63.11646 and 63.11647, and the information identified in paragraphs (c)(2)(i) through (c)(2)(vi) of this section for each corrective action required by § 63.11647.

(i) The date, place, and time of the monitoring event requiring corrective action;

(ii) Technique or method used for monitoring;

(iv) Operating conditions during the activity;

(v) Results, including the date, time, and duration of the period from the time the monitoring indicated a problem to the time that monitoring indicated proper operation; and

(vi) Maintenance or corrective action taken (if applicable).

(3) You must keep records of operating hours for each process as required by § 63.11646(a)(5) and records of the monthly quantity of ore and concentrate processed or produced as required by § 63.11646(a)(10).

(f) Your records must be in a form suitable and readily available for expeditious review, according to § 63.10(b)(1). As specified in § 63.10(b)(1), you must keep each record for 5 years following the date of each recorded action. You must keep each record onsite for at least 2 years after the date of each recorded action according to § 63.10(b)(1). You may keep the records offsite for the remaining 3 years.

(g) After December 31, 2011, within 60 days after the date of completing each performance evaluation conducted to demonstrate compliance with this subpart, the owner or operator of the affected facility must submit the test data to EPA by entering the data electronically into EPA's WebFIRE data base through EPA's Central Data Exchange. The owner or operator of an affected facility shall enter the test data into EPA's data base using the Electronic Reporting Tool or other compatible electronic spreadsheet. Only performance evaluation data collected using methods compatible with ERT are subject to this requirement to be submitted electronically into EPA's WebFIRE database.

Other Requirements and Information

§ 63.11650 What General Provisions apply to this subpart?

Table 1 to this subpart shows which parts of the General Provisions in §§ 63.1 through 63.16 apply to you.

§ 63.11651 What definitions apply to this subpart?

Terms used in this subpart are defined in the Clean Air Act, in § 63.2, and in this section as follows:

Autoclave means a pressure oxidation vessel that is used to treat gold ores (primarily sulfide refractory ore) and involves pumping a slurry of milled ore into the vessel which is highly pressurized with oxygen and heated to temperatures of approximately 350° to 430° F.

Calomel-based mercury control system means a mercury emissions control system that uses scrubbers to remove mercury from the gas stream of a roaster or combination of roasters by complexing the mercury from the gas stream with mercuric chloride to form mercurous chloride (calomel). These scrubbers are also referred to as "mercury scrubbers."

Carbon adsorber means a control device consisting of a single fixed carbon bed, multiple carbon beds or columns, carbon filter packs or modules, and other variations that uses activated carbon to remove pollutants from a gas stream.

Carbon kiln means a kiln or furnace where carbon is regenerated by heating, usually in the presence of steam, after the gold has been stripped from the carbon.

Carbon processes with mercury retorts means the affected source that includes carbon kilns, preg tanks, electrowinning cells, mercury retorts, and melt furnaces at gold mine ore processing and production facilities that use activated carbon, or resins that can be used as a substitute for activated carbon, to recover (adsorb) gold from the pregnant cyanide solution.

Carbon processes without mercury retorts means the affected source that includes carbon kilns, preg tanks, electrowinning cells, and melt furnaces, but has no retorts, at gold mine ore processing and production facilities that use activated carbon, or resins that can be used as a substitute for activated carbon, to recover (adsorb) gold from the pregnant cyanide solution.

Concentrate means the sludge-like material that is loaded with gold along with various other metals (such as silver, copper, and mercury) and various other substances, that is produced by electrowinning, the Merrill-Crowe process, flotation and gravity separation processes. *Concentrate* is measured as the input to mercury retorts, or for facilities without mercury retorts, as the input to melt furnaces before any drying takes place. For facilities without mercury retorts or melt furnaces, *concentrate* is measured as the quantity shipped.

Deviation means any instance where an affected source subject to this subpart, or an owner or operator of such a source:

(1) Fails to meet any requirement or obligation established by this subpart, including but not limited to any emissions limitation or work practice standard;

(2) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating permit for any affected source required to obtain such a permit; or

(3) Exceeds any operating limit established under this subpart.

Electrowinning means a process that uses induced voltage on anode and cathode plates to remove metals from the continuous flow of solution, where the gold in solution is plated onto the cathode. Steel wool is typically used as the plating surface.

Electrowinning Cells means a tank in which the electrowinning takes place.

Gold mine ore processing and production facility means any industrial facility engaged in the processing of gold mine ore that uses any of the following processes: Roasting operations, autoclaves, carbon kilns, preg tanks, electrowinning, mercury retorts, or melt furnaces. Laboratories (see CAA section 112(c)(7)), individual prospectors, and very small pilot scale mining operations that processes or produces less than 100 pounds of concentrate per year are not a gold mine ore processing and production facility. A facility that produces primarily metals other than gold, such as copper, lead, zinc, or nickel (where these metals other than gold comprise 95 percent or more of the total metal production) that may also recover some gold as a byproduct is not a gold mine ore processing and production facility. Those facilities whereby 95 percent or more of total mass of metals produced are metals other than gold, whether final metal production is onsite or offsite, are not part of the gold mine ore processing and production source category.

Melt furnace means a furnace (typically a crucible furnace) that is used for smelting the gold-bearing material recovered from mercury retorting, or the gold-bearing material from electrowinning, the Merrill-Crowe

process, or other processes for facilities without mercury retorts.

Mercury retort means a vessel that is operated under a partial vacuum at approximately 1,100 ° to 1,300 °F to remove mercury and moisture from the gold bearing sludge material that is recovered from electrowinning, the Merrill-Crowe process, or other processes. Mercury retorts are usually equipped with condensers that recover liquid mercury during the processing.

Merrill-Crowe process means a precipitation technique using zinc oxide for removing gold from a cyanide solution. Zinc dust is added to the solution, and gold is precipitated to produce a concentrate.

Non-carbon concentrate processes means the affected source that includes mercury retorts and melt furnaces at gold mine ore processing and production facilities that use the Merrill-Crowe process or other processes and do not use carbon (or resins that substitute for carbon) to recover (adsorb) gold from the pregnant cyanide solution.

Ore dry grinding means a process in which the gold ore is ground and heated (dried) prior to additional preheating or prior to entering the roaster.

Ore preheating means a process in which ground gold ore is preheated prior to entering the roaster.

Ore pretreatment processes means the affected source that includes roasting operations and autoclaves that are used to pre-treat gold mine ore at gold mine ore processing and production facilities prior to the cyanide leaching process.

Pregnant solution tank (or preg tank) means a storage tank for pregnant solution, which is the cyanide solution that contains gold-cyanide complexes that is generated from leaching gold ore with cyanide solution.

Pregnant cyanide solution means the cyanide solution that contains gold-cyanide complexes that are generated from leaching gold ore with a dilute cyanide solution.

Quenching means a process in which the hot calcined ore is cooled and quenched with water after it leaves the roaster.

Roasting operation means a process that uses an industrial furnace in which milled ore is combusted across a fluidized bed to oxidize and remove organic carbon and sulfide mineral grains in refractory gold ore. The emissions points of the roasting operation subject to this subpart include ore dry grinding, ore preheating, the roaster stack, and quenching.

§ 63.11652 Who implements and enforces this subpart?

(a) This subpart can be implemented and enforced by the U.S. EPA or a delegated authority, such as your state, local, or tribal agency. If the U.S. EPA Administrator has delegated authority to your state, local, or tribal agency, then that agency has the authority to implement and enforce this subpart. You should contact your U.S. EPA Regional Office to find out if this subpart is delegated to your state, local, or tribal agency.

(b) In delegating implementation and enforcement authority of this subpart to a state, local, or tribal agency under 40 CFR part 63, subpart E, the authorities contained in paragraph (c) of this section are retained by the Administrator of the U.S. EPA and are not transferred to the state, local, or tribal agency.

(c) The authorities that will not be delegated to state, local, or tribal agencies are listed in paragraphs (c)(1) through (4) of this section.

(1) Approval of alternatives to the applicability requirements in § 63.11640, the compliance date requirements in § 63.11641, and the applicable standards in § 63.11645.

(2) Approval of an alternative nonopacity emissions standard under § 63.6(g).

(3) Approval of a major change to a test method under § 63.7(e)(2)(ii) and (f). A "major change to test method" is defined in § 63.90(a).

(4) Approval of a major change to monitoring under § 63.8(f). A "major change to monitoring" is defined in § 63.90(a).

(5) Approval of a waiver of recordkeeping or reporting requirements under § 63.10(f), or another major change to recordkeeping/reporting. A "major change to recordkeeping/reporting" is defined in § 63.90(a).

§ 63.11653 [Reserved]

Tables to Subpart EEEEEEE of Part 63

TABLE 1 TO SUBPART EEEEEEE OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART EEEEEE

[As stated in § 63.11650, you must comply with the applicable General Provisions requirements according to the following table]

Citation	Subject	Applies to subpart EEEEEEE	Explanation
§ 63.1(a)(1), (a)(2), (a)(3), (a)(4), (a)(6), (a)(10)–(a)(12), (b)(1), (b)(3), (c)(1), (c)(2), (c)(5), (e).	Applicability	Yes.	
§ 63.1(a)(5), (a)(7)–(a)(9), (b)(2), (c)(3), (c)(4), (d).	Reserved	No.	
§ 63.2	Definitions	Yes.	
§ 63.3	Units and Abbreviations	Yes.	
§ 63.4	Prohibited Activities and Circumvention.	Yes.	
§ 63.5	Preconstruction Review and Notification Requirements.	Yes.	
§ 63.6(a), (b)(1)–(b)(5), (b)(7), (c)(1), (c)(2), (c)(5), (e)(1)(iii), (f)(2), (f)(3), (g), (i), (j).	Compliance with Standards and Maintenance Requirements.	Yes.	
§ 63.6(e)(1)(i) and (ii), (e)(3), and (f)(1)	Startup, Shutdown and Malfunction Requirements (SSM).	No	Subpart EEEEEEE standards apply at all times.
§ 63.6(h)(1), (h)(2), (h)(4),(h)(5)(i), (ii), (iii) and (v), (h)(6)–(h)(9).	Compliance with Opacity and Visible Emission Limits.	No	Subpart EEEEEEE does not contain opacity or visible emission limits.
§ 63.6(b)(6), (c)(3), (c)(4), (d), (e)(2), (e)(3)(ii), (h)(3), (h)(5)(iv).	Reserved	No.	
§ 63.7, except (e)(1)	Applicability and Performance Test Dates.	Yes.	
§ 63.7(e)(1)	Performance Testing Requirements Related to SSM.	No.	

TABLE 1 TO SUBPART EEEEEEE OF PART 63—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART EEEEEE—Continued

[As stated in § 63.11650, you must comply with the applicable General Provisions requirements according to the following table]

Citation	Subject	Applies to subpart EEEEEEE	Explanation
§ 63.8(a)(1), (b)(1), (f)(1)–(5), (g)	Monitoring Requirements	Yes.	
§ 63.8(a)(2), (a)(4), (b)(2)–(3), (c), (d), (e), (f)(6), (g).	Continuous Monitoring Systems	Yes	Except cross references to SSM requirements in § 63.6(e)(1) and (3) do not apply.
§ 63.8(a)(3)	[Reserved]	No.	
§ 63.9(a), (b)(1), (b)(2)(i)–(v), (b)(4), (b)(5), (c), (d), (e), (g), (h)(1)–(h)(3), (h)(5), (h)(6), (i), (j).	Notification Requirements	Yes.	
§ 63.9(f)		No.	
§ 63.9(b)(3), (h)(4)	Reserved	No.	
§ 63.10(a), (b)(1), (b)(2)(vi)–(xiv), (b)(3), (c), (d)(1)–(4), (e), (f).	Recordkeeping and Reporting Requirements.	Yes.	
§ 63.10(b)(2)(i)–(v), (d)(5)	Recordkeeping/Reporting Associated with SSM.	No.	
§ 63.10(c)(2)–(c)(4), (c)(9)	Reserved	No.	
§ 63.11	Control Device Requirements	No.	
§ 63.12	State Authority and Delegations	Yes.	
§§ 63.13–63.16	Addresses, Incorporation by Reference, Availability of Information, Performance Track Provisions.	Yes.	

[FR Doc. 2011–2608 Filed 2–16–11; 8:45 am]

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Part IV

The President

Memorandum of February 14, 2011—Delegation of Reporting and Other Authorities

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Presidential Documents

Title 3—

The President

Memorandum of February 14, 2011

Delegation of Reporting and Other Authorities

Memorandum for the Secretary of Agriculture

By the authority vested in me as President by the Constitution and the laws of the United States, including section 301 of title 3, United States Code, I hereby delegate to you the functions and authority conferred upon the President by section 7 of the Soil and Water Resources Conservation Act of 1977 (16 U.S.C. 2006), as amended by section 2804 of the Food, Conservation, and Energy Act of 2008, to make the specified reports to the Congress.

You are authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, February 14, 2011

[FR Doc. 2011–3818
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H.R. 366/P.L. 112-1
To provide for an additional temporary extension of programs under the Small Business Act and the Small Business Investment Act of 1958, and for other purposes. (Jan. 31, 2011)

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