AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

# FEDERAL REGISTER

Vol. 76 Wednesday,
No. 61 March 30, 2011

Pages 17521–17754

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.ofr.gov.*

**The seal of the National Archives and Records Administration authenticates the Federal Register** as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.fdsys.gov*, a service of the U.S. Government Printing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, 1 (January 2, 1994) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Printing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpo@custhelp.com.*

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Printing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

**How To Cite This Publication:** Use the volume number and the page number. Example: 76 FR 12345.

**Postmaster:** Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Printing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

## SUBSCRIPTIONS AND COPIES

**PUBLIC**

**Subscriptions:**

| | |
|---|---|
| Paper or fiche | **202–512–1800** |
| Assistance with public subscriptions | **202–512–1806** |

**General online information** **202–512–1530; 1–888–293–6498**

**Single copies/back copies:**

| | |
|---|---|
| Paper or fiche | **202–512–1800** |
| Assistance with public single copies | **1–866–512–1800 (Toll-Free)** |

**FEDERAL AGENCIES**

**Subscriptions:**

| | |
|---|---|
| Paper or fiche | **202–741–6005** |
| Assistance with Federal agency subscriptions | **202–741–6005** |

**FEDERAL REGISTER WORKSHOP**

**THE FEDERAL REGISTER: WHAT IT IS AND HOW TO USE IT**

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, April 12, 2011
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

Printed on recycled paper.

# Contents

**Federal Register**

Vol. 76, No. 61

Wednesday, March 30, 2011

**Agriculture Department**
*See* Animal and Plant Health Inspection Service
*See* Forest Service

**Animal and Plant Health Inspection Service**
NOTICES
Changes to Treatments for Citrus Fruit from Australia, 17617
Meetings:
Multi-Agency, Information Concerning Compliance with Federal Select Agent Program, 17617–17618

**Census Bureau**
NOTICES
Meetings:
Census Advisory Committees, 17620

**Centers for Medicare & Medicaid Services**
NOTICES
Meetings:
Consumer Operated and Oriented Plan Advisory Board, 17653–17654

**Children and Families Administration**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Evaluation of Adolescent Pregnancy Prevention Approaches – First Follow-up Data Collection, 17654–17655
Personal Responsibility Education Program (PREP) Multi Component Evaluation – Design Survey, 17655–17656
Work Participation and TANF/WIA Coordination Project, 17654

**Coast Guard**
RULES
Drawbridge Operation Regulations:
Mermentau River, Grand Chenier, LA, 17541–17542
Rainy River, Ranier, MN, 17542–17544
Inflatable Personal Flotation Devices, 17561–17568
Special Local Regulations and Safety Zones:
Recurring Events in Northern New England, 17530–17541

**Commerce Department**
*See* Census Bureau
*See* International Trade Administration
*See* National Oceanic and Atmospheric Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 17619–17620

**Defense Department**
*See* Navy Department

**Defense Nuclear Facilities Safety Board**
NOTICES
Meetings; Sunshine Act, 17627–17628

**Department of Transportation**
*See* Pipeline and Hazardous Materials Safety Administration

**Drug Enforcement Administration**
NOTICES
Decisions And Orders:
Alfred E. Boyce, M.D., 17672–17673
Denials of Applications:
Bienvenido Tan, M.D., 17673–17694
Revocation of Registration:
Scott C. Bickman, M.D., 17694–17704
Revocations of Registrations:
Roger A. Pellmann, M.D., 17704–17710

**Education Department**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 17628–17629
Applications for New Awards:
Transition to Teaching Grant Program, 17629–17636

**Energy Department**
*See* Energy Efficiency and Renewable Energy Office
*See* Federal Energy Regulatory Commission
PROPOSED RULES
Energy Conservation Standards for Commercial Refrigeration Equipment:
Public Meeting and Availability of the Preliminary Technical Support Document, 17573–17577
Increased Scope of Coverage for Electric Motors, 17577–17582
NOTICES
Meetings:
Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation, 17637
Environmental Management Site-Specific Advisory Board, Paducah, 17636–17637

**Energy Efficiency and Renewable Energy Office**
NOTICES
Waivers from Residential Clothes Dryer Test Procedures:
Miele, Inc., 17637–17639
Waivers from Residential Dishwasher Test Procedures:
BSH Corp., 17639–17642

**Environmental Protection Agency**
RULES
Exemptions from Requirements of Tolerances:
Sodium Ferric Ethylenediaminetetraacetate, 17556–17561
Prevention of Significant Deteriorations and Nonattainment New Source Reviews:
Reconsideration of Inclusion of Fugitive Emissions; Stay and Revisions, 17548–17556
PROPOSED RULES
Approvals and Promulgations of Implementation Plans:
Kansas, 17599–17607
Nebraska, 17592–17599
Oklahoma; Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution, etc., 17584–17585
State of Missouri, 17585–17592
Labeling Requirements for Pesticides and Devices:
Request to Require Labelling of Pesticides in Spanish and English, 17607–17610
Pesticide Tolerances:
Propylene Oxide, 17611–17613

NOTICES
Pesticide Products; Registration Applications, 17644–17645
Registration Applications:
Pesticide Products, 17645–17646
Registration Reviews:
Pesticide Dockets Opened for Review and Comment And Other Docket Actions, etc., 17646–17649
SAB Mercury Review Panel; Nominations, 17649–17650

**Federal Aviation Administration**
PROPOSED RULES
Special Conditions:
Bombardier Model BD–700–1A10 and BD–700–1A11 Airplanes Heads-Up Display with Video Synthetic Vision System, 17582–17584
NOTICES
Petitions for Exemption; Summaries of Petitions Received, 17735–17736

**Federal Communications Commission**
RULES
Amateur Service Rules, 17569
Practice and Procedure, 17568
PROPOSED RULES
Aviation Service Rules, 17613–17615
NOTICES
Communications Security, Reliability, and Interoperability Council:
Rechartering; Nominations for Membership, 17650–17652
Joint Petition for Reconsideration of a High-Cost Universal Service Order:
Cellular South Licenses, Inc. and United States Cellular Corp., 17652–17653

**Federal Deposit Insurance Corporation**
RULES
Assessments, Large Bank Pricing:
Correction, 17521

**Federal Energy Regulatory Commission**
NOTICES
Combined Filings, 17642–17644

**Federal Maritime Commission**
NOTICES
Agreements Filed, 17653

**Federal Motor Carrier Safety Administration**
PROPOSED RULES
Highway-Rail Grade Crossing; Safe Clearance, 17615–17616

**Federal Railroad Administration**
NOTICES
Applications for Approval of Discontinuance or Modification of a Railroad Signal System, 17736

**Federal Transit Administration**
NOTICES
Major Capital Investment Program:
New Starts, 17736–17738
Over-the-Road Bus Accessibility Program Announcement of Project Selections, 17738–17746

**Fish and Wildlife Service**
NOTICES
Endangered and Threatened Wildlife and Plants; Permits:
City of Scotts Valley and Santa Cruz County, CA, 17664–17666
Joint Supplemental Environmental Impact Report/Environmental Impact Statement, Riverside County, CA, 17666–17668

**Food and Drug Administration**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Additional Listing Information for Medical Device Registration and Listing, 17656–17657
Medical Devices; Recommended Glossary and Educational Outreach to Support Use of Symbols on Labels, 17656
Meetings:
Medical Device Epidemiology Network 2011, Second Annual Public Workshop, 17657–17658

**Forest Service**
NOTICES
Meetings:
Land Between The Lakes Advisory Board, 17618
South Mt. Baker–Snoqualmie Resource Advisory Committee, 17618

**Health and Human Services Department**
*See* Centers for Medicare & Medicaid Services
*See* Children and Families Administration
*See* Food and Drug Administration
*See* Health Resources and Services Administration
*See* National Institutes of Health

**Health Resources and Services Administration**
NOTICES
National Forum for State and Territorial Chief Executives Program Cooperative Agreement, 17658

**Homeland Security Department**
*See* Coast Guard

**Housing and Urban Development Department**
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for Resident Opportunities and Self Sufficiency Program, 17663
Brownfields Economic Development Initiative Grant Application, 17662–17663
Certification of Consistency and Nexus between Activities Proposed by Applicant with Livability Principles, etc., 17663–17664
Public/Private Partnerships for Mixed-Finance Development of Public Housing Units, 17661–17662

**Interior Department**
*See* Fish and Wildlife Service
*See* Land Management Bureau
*See* National Park Service

**Internal Revenue Service**
RULES
Specified Tax Return Preparers Required to File Individual Income Tax Returns Using Magnetic Media, 17521–17530

**International Trade Administration**
NOTICES
Applications for Duty-Free Entry of Scientific Instruments:
University of Colorado, et al., 17620–17621

Biotech Life Science Trade Mission to China, 17621–17622
U.S. Education Mission to India, 17622–17624

**International Trade Commission**
**NOTICES**
Investigations:
Certain Ground Fault Circuit Interrupters and Products Containing Same, 17670–17671

**Justice Department**
*See* Drug Enforcement Administration
**NOTICES**
Proposed Consent Decrees:
United States v. Mariana Acquisition Corp., 17671–17672

**Labor Department**
*See* Labor Statistics Bureau

**Labor Statistics Bureau**
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 17710–17711

**Land Management Bureau**
**NOTICES**
Environmental Impact Statements; Availability, etc.:
Quartzsite Solar Energy Project, La Paz County, AZ, 17668–17669
Filing of Plats of Survey:
Oregon/Washington, 17669
Meetings:
Steens Mountain Advisory Council, 17669–17670

**Legal Services Corporation**
**NOTICES**
Calendar Year 2012 Competitive Grant Funds; Availability, 17711–17712

**National Aeronautics and Space Administration**
**NOTICES**
Meetings:
NASA Advisory Council; Commercial Space Committee, 17712

**National Credit Union Administration**
**NOTICES**
Meetings; Sunshine Act, 17712

**National Highway Traffic Safety Administration**
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 17746–17748

**National Institutes of Health**
**NOTICES**
Meetings:
Eunice Kennedy Shriver National Institute of Child Health and Human Development, 17659
National Center for Complementary and Alternative Medicine Stakeholder Roundtable, 17659–17660
National Institute of Allergy and Infectious Diseases, 17658–17659
National Institute of Diabetes and Digestive and Kidney Diseases, 17658
National Institute of Mental Health, 17660–17661
National Library of Medicine, 17660

**National Oceanic and Atmospheric Administration**
**RULES**
Fisheries of the Exclusive Economic Zone Off Alaska:
Pacific Cod by Catcher Vessels Using Trawl Gear in the Bering Sea and Aleutian Islands Management Area; Closure, 17569–17570
Pollock in the West Yakutat District of the Gulf of Alaska, 17570–17571
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Emergency Beacon Registrations, 17625
Meetings:
Fisheries of the South Atlantic; Southeast Data, Assessment, and Review, 17625–17626
National Climate Assessment Development and Advisory Committee, 17626–17627
New England Fishery Management Council, 17626
SEDAR Steering Committee, 17627

**National Park Service**
**NOTICES**
National Register of Historic Places:
Pending Nominations and Related Actions, 17670

**Navy Department**
**NOTICES**
Exclusive Patent Licenses:
Quest Integrated, Inc., 17627

**Nuclear Regulatory Commission**
**NOTICES**
Director's Decisions:
Vermont Yankee Nuclear Power Station, 17712–17715
Exemptions:
Virginia Electric and Power Co., North Anna Power Station, Units 1 and 2, 17715–17717

**Pipeline and Hazardous Materials Safety Administration**
**PROPOSED RULES**
Highway-Rail Grade Crossing; Safe Clearance, 17615–17616
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 17748–17751
Request for Approval of International Atomic Energy Agency Special Arrangement:
Transport of Radioactively Contaminated Steam Generators via the Great Lakes, 17751

**Postal Regulatory Commission**
**NOTICES**
Post Office Closings, 17717–17718

**Securities and Exchange Commission**
**NOTICES**
Applications:
American Family Life Insurance Company, et al., 17720–17726
Simple Alternatives, LLC and The RBB Fund, Inc., 17718–17720
Orders of Suspension of Trading:
Euro Solar Parks, Inc., 17726–17727
Self-Regulatory Organizations; Proposed Rule Changes:
Chicago Stock Exchange, Inc., 17728–17730
NASDAQ OMX BX, Inc., 17733–17734
NASDAQ OMX PHLX LLC, 17730–17733
Options Clearing Corp., 17727

**State Department**
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Foreign Service Officer Test Registration Form, 17734–17735
Specially Designated Global Terrorists:
Ibrahim Hassan Tali al–Asiri, 17735

**Transportation Department**
*See* Federal Aviation Administration
*See* Federal Motor Carrier Safety Administration
*See* Federal Railroad Administration
*See* Federal Transit Administration
*See* National Highway Traffic Safety Administration
*See* Pipeline and Hazardous Materials Safety Administration

**Treasury Department**
*See* Internal Revenue Service
**PROPOSED RULES**
Reducing Regulatory Burden; Retrospective Review under E.O. 13563, 17572–17573
**NOTICES**
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 17751–17752

**Veterans Affairs Department**
**RULES**
Board of Veterans' Appeals; Remand or Referral for Further Action:
Notification of Evidence Secured by the Board and Opportunity for Response, 17544–17548
**NOTICES**
Environmental Impact Statements; Availability, etc.:
San Francisco Veterans Affairs Medical Center Institutional Master Plan, 17752–17753

**Reader Aids**

Consult the Reader Aids section at the end of this page for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

## CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.


**5 CFR**

**Proposed Rules:**

Ch. XXI .....17572

**10 CFR**

**Proposed Rules:**

431 (2 documents) .....17573, 17577

**12 CFR**

327.....17521

**Proposed Rules:**

Ch. I .....17572
Ch. V.....17572
Ch. XV .....17572
Ch. XVIII .....17572

**14 CFR**

**Proposed Rules:**

25.....17582

**17 CFR**

**Proposed Rules:**

Ch. IV.....17572

**19 CFR**

**Proposed Rules:**

Ch. I .....17572

**26 CFR**

1.....17521
301.....17521

**Proposed Rules:**

Ch. I .....17572

**27 CFR**

**Proposed Rules:**

Ch. I .....17572

**31 CFR**

**Proposed Rules:**

Ch. I .....17572
Ch. II .....17572
Ch. IV.....17572
Ch. V.....17572
Ch. VI.....17572
Ch. VII.....17572
Ch. VIII.....17572
Ch. IX.....17572
Ch. X.....17572

**33 CFR**

100.....17530
117 (2 documents) .....17541, 17542
165.....17530

**38 CFR**

19.....17544
20.....17544

**40 CFR**

51.....17548
52.....17548
180.....17556

**Proposed Rules:**

52 (4 documents) .....17584, 17585, 17592, 17599
156.....17607
170.....17607
180.....17611

**46 CFR**

160.....17561

**47 CFR**

1.....17568
97.....17569

**Proposed Rules:**

87.....17613

**48 CFR**

**Proposed Rules:**

Ch. 10 .....17572

**49 CFR**

**Proposed Rules:**

177.....17615
392.....17615

**50 CFR**

679 (2 documents) .....17569, 17570

# Rules and Regulations

Federal Register
Vol. 76, No. 61
Wednesday, March 30, 2011

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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.

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Part 327

**RIN 3064–AD66**

### Assessments, Large Bank Pricing

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Final rule; correction.

**SUMMARY:** The FDIC is correcting a final rule that appeared in the **Federal Register** of February 25, 2011 (76 FR 10672), regarding Assessments, Large Bank Pricing. This correction clarifies words of amendatory instruction numbered 8 on page 10720.

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

**FOR FURTHER INFORMATION CONTACT:** Christopher Bellotto, Counsel, Legal Division, (202) 898–3801, 550 17th Street, NW., Washington, DC 20429.

**SUPPLEMENTARY INFORMATION:** In FR Doc. 2011–3086, appearing on page 10720 in the **Federal Register** of Friday, February 25, 2011, the following correction is made:

On page 10720, in the third column, amendatory instruction 8 is revised, and asterisks and a section VI heading are added below the Appendix A heading to read as follows:

■ 8. Amend appendix A to subpart A of part 327 by adding section VI, and revise appendices B and C to subpart A of part 327 to read as follows:

### Appendix A to Subpart A of Part 327—Description of Scorecard Measures

* * * * *

**VI. Description of Scorecard Measures**

Dated: March 25, 2011.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

[FR Doc. 2011–7457 Filed 3–29–11; 8:45 am]

**BILLING CODE 6714–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Parts 1 and 301

**[TD 9518]**

**RIN 1545–BJ52**

### Specified Tax Return Preparers Required To File Individual Income Tax Returns Using Magnetic Media

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations on the requirement for "specified tax return preparers" to file individual income tax returns using magnetic media pursuant to section 6011(e)(3) of the Internal Revenue Code (Code). The final regulations reflect changes made to the law by the Worker, Homeownership, and Business Assistance Act of 2009. These regulations provide guidance to specified tax return preparers who prepare and file individual income tax returns. Unless an exception in these regulations applies, a tax return preparer who meets the definition of a "specified tax return preparer" must electronically file Federal income tax returns that the preparer prepares and files for individuals, trusts, and estates. These regulations provide a two-year transition period for certain specified tax return preparers.

**DATES:** *Effective Date:* These regulations are effective March 30, 2011.

*Applicability Dates:* In accordance with sections 7805(b)(1)(B) and (b)(2) and section 6011(e)(3), these regulations are applicable to individual income tax returns filed after December 31, 2010. See § 301.6011–7(g).

**FOR FURTHER INFORMATION CONTACT:** Keith L. Brau, (202) 622–4940 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

### Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–2201. The collection of information in these final regulations is in § 301.6011–7(a)(4)(ii). This taxpayer choice statement information will be used by tax return preparers and specified tax return preparers to demonstrate to the IRS that the related individual income tax returns filed in paper format were not required to be filed electronically pursuant to section 6011(e)(3), § 1.6011–7, and § 301.6011–7. The collection of information is voluntary to obtain a benefit.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

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.

### Background

This document contains final amendments to the Regulations on Income Taxes (26 CFR part 1) and the Regulations on Procedure and Administration (26 CFR part 301) under section 6011(e) of the Code relating to the requirement for specified tax return preparers to file individual income tax returns using magnetic media (electronically). Section 17 of the Worker, Homeownership, and Business Assistance Act of 2009 (Pub. L. 111–92 (123 Stat. 2984, 2996)) amended section 6011(e)(1) and added new section 6011(e)(3) as an exception to the restriction in section 6011(e)(1) that the Secretary may not require returns of any tax imposed by subtitle A on individuals, estates, and trusts to be filed in any format other than paper forms supplied by the Secretary. New section 6011(e)(3) provides that the Secretary shall require the filing on magnetic media of any individual income tax returns prepared and filed by a specified tax return preparer. Section 6011(e)(3)(B) defines a *specified tax return preparer* as, with respect to any calendar year, any tax return preparer unless such preparer reasonably expects to file 10 or fewer individual income tax returns during such calendar year. Section 6011(e)(3) does not define the term "filed."

Under section 6011(e)(3)(C), an *individual income tax return* is any

return of the tax imposed by subtitle A on individuals, estates, and trusts. This includes any return of income tax in the Form 1040 series and Form 1041 series. It also includes Form 990–T (Exempt Organization Business Income Tax Return) when the exempt organization is a trust subject to tax on unrelated business taxable income under section 511(b). At this time, certain individual income tax returns such as Form 990–T, Form 1040–NR (U.S. Nonresident Alien Income Tax Return), Form 1041–QFT (U.S. Income Tax Return for Qualified Funeral Trusts), and all amended individual income tax returns, such as Form 1040X (Amended U.S. Individual Income Tax Return), cannot be filed electronically and, therefore, currently are exempt from the electronic filing requirement. See § 301.6011–7(c)(2) and Notice 2011–26.

A notice of proposed rulemaking (REG–100194–10) was published in the **Federal Register** (75 FR 75439) on December 3, 2010. That document proposed to amend the regulations under section 6011(e) by adding new §§ 1.6011–6 and 301.6011–6. These sections would provide guidance on the electronic filing requirement contained in section 6011(e)(3), including, but not limited to, the following: (1) Clarifying the definition of a *specified tax return preparer* as any person who is a tax return preparer, as defined in section 7701(a)(36) and § 301.7701–15, unless the tax return preparer reasonably expects to file 10 or fewer individual income tax returns in a calendar year, and if a person who is a tax return preparer is a member of a firm, that person would be a specified tax return preparer unless the person's firm members in the aggregate reasonably expect to file 10 or fewer individual income tax returns in a calendar year; (2) providing a definition of the term *file* based on whether the tax return preparer or specified tax return preparer submits the individual income tax return to the IRS; (3) recognizing a taxpayer's ability to choose to file an individual income tax return in paper format and providing that a tax return preparer or a specified tax return preparer is not considered to have filed an individual income tax return if the preparer obtains a signed writing from the taxpayer attesting that the taxpayer chooses to file the individual income tax return in paper format and the taxpayer, and not the preparer, will file (submit) the individual income tax return to the IRS; (4) providing exclusions from the electronic filing requirement for individual income tax returns filed in paper format pursuant to an undue hardship waiver or administrative exemption; (5) giving examples of the application of the proposed rules; and (6) providing a two-year transition rule for the implementation of section 6011(e)(3). For calendar year 2011, the proposed regulations would define a *specified tax return preparer* as a tax return preparer who reasonably expects to file (or if the tax return 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* would be a tax return preparer who reasonably expects to file (or if the tax return 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.

Concurrently with publication of the proposed regulations, the IRS released Notice 2010–85, see IR–2010–116 (December 1, 2010) and 2010–51 IRB 877 (December 20, 2010), which contained a proposed revenue procedure that would provide guidance to tax return preparers regarding the format and content of undue hardship waiver requests and taxpayer choice statements.

Written comments were received by the Treasury Department and the IRS in response to the notice of proposed rulemaking and concurrent notice. A public hearing was held on January 7, 2011. Commentators appeared at the public hearing and commented on the notice of proposed rulemaking and Notice 2010–85. All comments were considered and are available for public inspection at *http://www.regulations.gov* or upon request. This preamble addresses all substantive comments received by the Treasury Department and the IRS. After consideration of the written comments and the comments provided at the public hearing, the proposed regulations under section 6011(e)(3) are adopted as revised by this Treasury decision. The revisions are discussed in this preamble. In addition, although not discussed in the preamble, a few minor, non-substantive changes were made to the text of the final regulations to conform the language used throughout the regulations. Further, the "1.6011–6" and "301.6011–6" numbering used in the proposed regulations have been changed to "1.6011–7" and "301.6011–7" in these final regulations because "301.6011–6" was used in another proposed regulation, proposed § 301.6011–6 (Statement of series and series organizations), which is unrelated to these regulations.

Concurrent with the publication of these regulations, the IRS is publishing a revenue procedure providing guidance to tax return preparers regarding the format and content of undue hardship waiver requests and taxpayer choice statements under § 301.6011–7(c)(1) and § 301.6011–7(a)(4)(ii), a notice containing administrative exemptions to the electronic filing requirement under § 301.6011–7(c)(2), and a transition notice regarding the mailing of individual income tax returns by specified tax return preparers during the 2011 calendar year.

**Summary of Comments**

Fifty-three written comments were received in response to the notice of proposed rulemaking and Notice 2010–85, and two commentators spoke at the public hearing.

*1. Definition of a Specified Tax Return Preparer*

The proposed regulations do not apply to individuals described in section 7701(a)(36)(B)(i) through (iv) and § 301.7701–15(f) who are not defined as tax return preparers under that Code section and regulation, such as an individual who provides tax assistance under a Volunteer Income Tax Assistance (VITA) program or a person who prepares a return as a fiduciary. One commentator stated that section 6011(e)(3) made no distinction with respect to whether the tax return preparer is compensated and requested that the final regulations delete the phrase "as defined in section 7701(a)(36) and § 301.7701–15" so that the rules would apply to any tax return preparer who prepares and files the requisite number of individual income tax returns. The final regulations do not adopt this recommendation. Section 7701(a) provides that "[w]hen used in this title, where not otherwise directly expressed or manifestly incompatible with the intent thereof," the definition of "tax return preparer" is that which is provided by that Code section. Section 6011(e)(3) does not define "tax return preparer," nor is the definition provided by section 7701(a)(36) "manifestly incompatible with the intent" of section 6011(e)(3). These final regulations therefore adopt the definition set forth in section 7701(a)(36) and its corresponding regulations. See § 301.6011–7(a)(3).

One commentator suggested that the definition of *specified tax return preparer* should be applied solely on a firm basis, not on an individual basis, and the individual income tax returns a

tax return preparer prepares independently for the preparer's own business should not be aggregated with any individual income tax returns that the same person prepares as an employee for a firm. For example, if a tax return preparer prepares and files 60 individual income tax returns (that is, fewer than 100 in 2011) while working as an employee of a firm, and independently prepares and files 60 individual income tax returns as a sole proprietor, the commentator believes the tax return preparer should not be subject to the electronic filing requirement for the latter returns. The Treasury Department and the IRS do not adopt this approach in the final regulations. The suggested approach would not be consistent with the statute. Congress placed the electronic filing responsibility of section 6011(e)(3) on each individual tax return preparer who reasonably expects to prepare and file more than 10 individual income tax returns in a calendar year.

Other commentators stated that the reasonable expectation for filing individual income tax returns in a calendar year should be determined solely at the individual tax return preparer level and not take into consideration the individual income tax returns prepared and filed by other tax return preparers in the firm. Under the proposed regulations, in the above example, the individual income tax returns that the other members of the firm expect to prepare and file would be aggregated with the 60 individual income tax returns that the above-mentioned person expects to prepare and file as an employee of the firm. Firm aggregation rules were included in the proposed regulations to limit avoidance of the statutory requirement, for example, by a firm purposely arranging its workload to prevent one or more of its tax return preparers from becoming a specified tax return preparer under section 6011(e)(3). As a result, the Treasury Department and the IRS do not adopt the commentators' recommendation and have maintained the proposed firm aggregation rules in the final regulations. See § 301.6011–7(a)(3) and § 301.6011–7(d).

Instead of determining the reasonable filing expectation based on the individual income tax returns reasonably expected to be filed in the calendar year, another commentator recommended that the reasonable filing expectation be determined based solely on the number of individual income tax returns filed in the immediately preceding year. This comment is not adopted. Section 6011(e)(3)(B), and not the regulations, establishes the reasonable expectation standard. Further, the Treasury Department and the IRS have concluded that the number of individual income tax returns filed in the immediately preceding year may be a relevant factor but should not be the only factor in making a reasonable expectation determination for a calendar year.

*2. Definition of File*

a. Mailing Paper Returns for Taxpayer-Clients

Several commentators opposed the requirement that individual income tax returns prepared and filed by a specified tax return preparer be filed electronically. These commentators stated that they sometimes mail to the IRS the paper tax returns that they prepare for their clients as a service for their clients, often for those who are elderly, incapacitated, on travel, or in other situations in which it would not be practical or convenient to have the client mail the return to the IRS. For some of these clients, the individual income tax return may be unusually large in size or a filing due date may be imminent. For similar reasons, other commentators objected to the requirement in proposed § 301.6011–6(a)(4)(ii) that a taxpayer, not the specified tax return preparer, must submit the paper individual income tax return to the IRS when the taxpayer chooses to file in paper format. They recommended that this requirement be eliminated, or, if the clients choose to have their individual income tax returns prepared in paper format and sign a statement documenting that choice, the specified tax return preparers should be able to mail those returns if the clients request this additional service from them.

Congress established the requirement that any individual income tax return prepared by a tax return preparer be filed on magnetic media (electronically) if such individual income tax return is filed by the tax return preparer and the preparer is a specified tax return preparer for the calendar year during which the individual income tax return is filed. The language that Congress used in the statute, in particular section 6011(e)(3)(A)(i) and (B), specifically refers to the act of "filing" the individual income tax return by the tax return preparer or specified tax return preparer. The statute did not, however, define the term "file." The Treasury Department and the IRS believe that, with respect to paper returns, a definition of the term *file* based on the act of the tax return preparer or specified tax return preparer (or a member of the preparer's firm) submitting the individual income tax return is reasonable and necessary to give effect to the electronic filing requirement enacted by Congress. Otherwise, the requirement would have no meaning or consequence. As a result, the Treasury Department and the IRS do not adopt the commentators' recommendations that the mailing restrictions be eliminated. Consistent with section 6011(e)(3), the final regulations provide that tax return preparers qualify as specified tax return preparers if they (or their firm) reasonably expect to file, that is, submit to the IRS, the specified number of individual income tax returns, and even if the tax return preparers file more than the specified number of individual income tax returns and therefore qualify as specified tax return preparers, these preparers need not electronically file an individual tax return if they (or their firm) do not file the return, that is, submit it to the IRS, as defined in the regulations. See § 301.6011–7(a)(4).

The Treasury Department and the IRS recognize that the mailing restriction may create unforeseen or unavoidable difficulties for immediate compliance, particularly in situations in which specified tax return preparers have customarily mailed individual income tax returns to the IRS as part of the specified tax return preparer's general business practice, or in which they mail a client's paper individual income tax return to the IRS on the client's behalf due to special circumstances, for example, the disability, incapacitation or infirmity of the client. Under these final regulations the IRS has the authority to issue additional guidance in the form of announcements, notices, or FAQs to address issues related to the filing of a taxpayer's individual income tax return under section 6011(e)(3) that will promote fair and efficient tax administration. In response to the public comments and concurrent with the publication of these regulations, the IRS is also publishing a transition notice regarding the mailing of individual income tax returns by specified tax return preparers during the 2011 calendar year. Solely for calendar year 2011, a specified tax return preparer who prepares individual income tax returns may mail any such return in paper format to the IRS, at the request of the taxpayer, subject to the conditions specified in Notice 2011–27. The specified tax return preparer must obtain a signed and dated statement from the taxpayer containing the taxpayer's choice to have the individual income tax return filed in paper format,

and the taxpayer's unambiguous request to have the specified tax return preparer mail the individual income tax return to the IRS. See Notice 2011–27 for details.

b. Acts of Assistance Beyond Providing Filing or Delivery Instructions to Taxpayers

The definition of *file* in the proposed regulations would include the submission by the tax return preparer or specified tax return preparer of an individual income tax return, either electronically (e-filed) or in paper format. Submission in non-electronic (paper) form would include "the direct or indirect transmission, sending, mailing or otherwise delivering of the paper tax return to the IRS by the preparer * * *and includes any act or acts of assistance beyond providing filing or delivery instructions to the taxpayer." Several commentators expressed confusion as to which acts of assistance would amount to filing by the tax return preparer. For example, if a tax return preparer provides the client with an addressed envelope or proper postage to make sure the postage is correct, but the client physically mails the individual income tax return, would that be considered filing by the tax return preparer? In response to these commentators' concerns, the phrases "direct or indirect" and "and includes any act or acts of assistance beyond providing filing or delivery instructions to the taxpayer" were deleted from the final regulations. Acts such as providing filing or delivery instructions, an addressed envelope, postage estimates, stamps, or similar acts designed to assist the taxpayer in the taxpayer's efforts to correctly mail or otherwise deliver an individual income tax return to the IRS do not constitute filing by the tax return preparer or specified tax return preparer as long as the taxpayer actually mails or otherwise delivers the paper individual income tax return to the IRS.

*3. Taxpayer Choice Statements To File in Paper Format*

The proposed regulations contain a provision that would provide taxpayers, who have their individual income tax returns prepared by a tax return preparer, the choice to have those returns filed in paper format. In particular, proposed § 301.6011–6(a)(4)(ii) states that an individual income tax return would not be considered to be filed by a tax return preparer or specified tax return preparer if the preparer obtained, on or prior to the date the individual income tax return is filed, a signed and dated written statement from the taxpayer, stating the taxpayer chooses to file the individual income tax return in paper format, and that the taxpayer, and not the preparer, would submit the paper individual income tax return to the IRS. Further, this statement would have to be signed by both spouses if it was a joint return.

a. Taxpayer Choice Statement Form

The Treasury Department and the IRS received several comments supporting a taxpayer's choice to file an individual income tax return in paper format. Some commentators, however, questioned the need for the taxpayer choice statement, especially for tax return preparers who never mail individual income tax returns to the IRS on behalf of their clients, but instead give the returns to their clients to mail to the IRS. According to these comments, under the proposed regulations, the electronic filing requirement would apply only to specified tax return preparers, that is, those who file the requisite number of individual income tax returns. In their view, if the tax return preparer never files individual income tax returns on behalf of clients, or files ten or fewer (fewer than 100 in 2011), the tax return preparer would not meet the definition of a "specified tax return preparer," and should not have to obtain a taxpayer choice statement from these clients.

The burden of compliance with the electronic filing requirement is on the tax return preparer and specified tax return preparer. Neither the fact that the IRS receives a taxpayer's paper individual income tax return in the mail nor the fact that the tax return preparer's or specified tax return preparer's general business practice is to not mail paper individual income tax returns for clients necessarily establishes that the preparer did not file a particular individual income tax return with the IRS. See Revenue Procedure 2011–25. Based on the above, the Treasury Department and the IRS adopt proposed § 301.6011–6(a)(4)(ii) in the final regulations, except for the modification described in paragraph 3.b of this preamble. If the tax return preparer or specified tax return preparer obtains a signed statement in compliance with the requirements established in Revenue Procedure 2011–25, the signed statement will demonstrate compliance with the electronic filing requirement should the IRS question a preparer about the filing of a particular individual income tax return in paper format.

b. Only One Spouse Is Required To Sign the Taxpayer Choice Statement for a Joint Return

Several commentators recommended that only one spouse, instead of both spouses, should be required to sign the taxpayer choice statement related to a joint individual income tax return. They expressed concerns that the two-signature requirement might not be practical in some cases, for example, when one spouse is unable to sign due to a health condition, or not available because of distance due to a temporary absence from the spouse's customary residence. Although the Treasury Department and the IRS continue to encourage tax return preparers to obtain both spouses' signatures on the taxpayer choice statement as a best practice, the commentators' recommendation that one spouse's signature will suffice for a joint return is adopted in the final regulations.

c. Suggested Alternatives to Signed Taxpayer Choice Statement

The proposed regulations requested comments on how the burden of complying with the proposed taxpayer choice statement could be minimized. The comments received several suggested alternatives: (1) The IRS create a form similar to the "opt-out" forms used by some states that have an electronic filing requirement; (2) the IRS create a check-box on individual income tax returns in lieu of a separate writing obtained from the taxpayer; (3) the IRS accept IRS Form 8948 (Preparer Explanation for Not Filing Electronically) if the check-box for taxpayer choice to file in paper format is checked; or (4) the IRS allow a contemporaneous email (unsigned) from the taxpayer to the preparer, containing the recommended language.

The Treasury Department and the IRS have considered these suggestions in finalizing the revenue procedure on taxpayer choice statements and do not adopt them at this time. See Revenue Procedure 2011–25. Regarding the recommendations that the IRS create a new form or add a check-box to the individual income tax return forms affected by section 6011(e)(3), it is unclear how the provision of an additional form would be any more beneficial, easier to implement, or time or cost effective than the taxpayer choice statement provided because that statement is short and easy and inexpensive to reproduce. Regarding use of the Form 8948, because this form is completed by a specified tax return preparer and is not signed by the taxpayer, checking a box on Form 8948 is insufficient proof of a taxpayer's choice to file in paper format. Finally, an email message from the taxpayer is insufficient proof of a taxpayer's choice to file an individual income tax return in paper format. If sent as a scanned

attachment to an email, however, a copy of a hand-signed statement in compliance with the final regulations and related guidance will suffice. See Rev. Proc. 2011–25. The Treasury Department and the IRS have concluded that the taxpayer's hand-written signature is necessary to establish that the taxpayer chose to file in paper format and should be required on all taxpayer choice statements. See § 301.6011–7(a)(4)(ii).

*4. Undue Hardship Waivers*

The proposed regulations contain a provision which would provide an exclusion from the electronic filing requirement in cases of undue hardship. The Treasury Department and the IRS received several comments supporting this provision and the relief that it would provide. The final regulations adopt this exclusion, recognizing that there may be facts and circumstances in which the electronic filing requirement would create an undue hardship on the specified tax return preparer. Specified tax return preparers may request an undue hardship waiver from the IRS in the time and manner as set forth in the regulations and other published guidance.

One commentator recommended that taxpayers should be able to submit a hardship waiver request to the IRS. This recommendation was not adopted. The electronic filing requirement of section 6011(e)(3) and the final regulations is imposed on a specified tax return preparer, not on a preparer's taxpayer-client. Since the burden of compliance rests with the specified tax return preparer, the preparer should be the person responsible for submission of undue hardship waiver requests.

As mentioned above, the Treasury Department and the IRS published Notice 2010–85 and received comments on the proposed undue hardship waiver procedures. All comments were considered and some adopted in the revenue procedure published concurrently with these final regulations. See Rev. Proc. 2011–25.

*5. Administrative Exemptions*

The proposed regulations contain a provision that would provide an exclusion from the electronic filing requirement pursuant to administrative exemptions established by the IRS in additional guidance. The Treasury Department and the IRS received several comments in support of this provision, suggesting several possible administrative exemptions. The final regulations adopt this provision. The Treasury Department and the IRS considered the comments and included many of the suggested administrative exemptions in Notice 2011–26, which provides administrative exemptions to the electronic filing requirement and is being issued contemporaneously with these final regulations.

Among the suggested administrative exemptions, Notice 2011–26 includes exemptions for (1) Certain specified tax return preparers who are members of certain religious groups, certain foreign preparers without social security numbers, or specified tax return preparers who are currently ineligible for the IRS e-file program due to an IRS e-file sanction; (2) individual income tax returns that are not electronically filed due to technological difficulties, including a return that a specified tax return preparer was unable to e-file because the return was rejected, a return prepared by a tax return preparer or specified tax return preparer whose e-file software package does not support one or more forms or schedules that are part of the return, or a return prepared by a tax return preparer or specified tax return preparer who experiences a short-term inability to electronically file the return or returns due to some other verifiable and documented technological problem; and (3) individual income tax returns currently not accepted electronically (for example, Forms 1040–NR and 990–T) or any documentation or attachments not accepted electronically, such as documentation for section 6707A disclosures or required appraisals to support charitable contributions. Some individual income tax returns, however, can be filed electronically and the attachments mailed to the IRS using a transmittal Form 8453 (U.S. Individual Income Tax Transmittal for an IRS e-file Return) or Form 8453–F (U.S. Estate or Trust Income Tax Declaration and Signature for Electronic Filing). The associated return must be filed electronically if prepared and filed by a specified tax return preparer and otherwise capable of being e-filed, and the attachments mailed to the IRS using a transmittal Form 8453. See the instructions to Form 8453 and the instructions to Form 8453–F.

*6. Transition Period*

To enhance compliance and to promote effective and efficient administration of the electronic filing requirement of section 6011(e)(3), the proposed regulations would provide a transition rule that would phase in the new electronic filing requirement for specified tax return preparers over a two-year period—100 or more returns in 2011 and 11 or more returns starting in 2012. Solely for the 2011 calendar year, a tax return preparer would not be considered a specified tax return preparer if the tax return preparer reasonably expects, or the preparer's firm members in the aggregate reasonably expect, to file fewer than 100 individual income tax returns in the 2011 calendar year.

Several commentators supported the concept of a transition rule. For various reasons, primarily the issuance of these final regulations and other guidance at the beginning of the 2011 filing season, some commentators urged that the effective date of the electronic filing requirement be delayed until January 2012. Due to similar concerns, another commentator recommended that the transition period be expanded by lengthening the period to three years and increasing the filing threshold for calendar year 2011 from 100 to 200 individual income tax returns. This commentator pointed out that some states used 200 returns for their state return electronic filing requirement at least for the initial filing season. Either approach would allow tax return preparers more time to become familiar with these final regulations and to give those subject to the new rules more time to make the necessary preparations and arrangements to comply with the rules.

The final regulations adopt the transition period proposed in the proposed regulations—100 or more individual income tax returns in 2011, and 11 or more individual income tax returns in 2012 and thereafter. This approach maintains the congressionally-mandated effective date applicable to all individual income tax returns filed after December 31, 2010, while providing both tax return preparers and the IRS with the ability to effectively and efficiently transition to the mandatory electronic filing of individual income tax returns. In addition, tax return preparers who have not already entered the IRS e-file system and who have always prepared their clients' individual income tax returns in paper format are unlikely to be adversely affected by the difference between 100 and 200 returns. Since the final regulations (like the proposed regulations) do not count the paper individual income tax returns filed by taxpayers who sign a taxpayer choice statement to file in paper format, these tax return preparers may not meet the definition of "specified tax return preparer" if the tax return preparers either reasonably expect their clients to continue to file their individual income tax returns in paper format or obtain this statement from their clients.

It is also noted that throughout 2010 the IRS performed extensive educational

outreach across the country, informing the tax return preparer community of the anticipated 100-return transition rule for 2011. This educational outreach included, among other things, a discussion of the administrative exemptions that the IRS anticipated would be included in final guidance.

*7. Electronic Filing Burden*

Some commentators stated that the electronic filing requirement is burdensome, including imposing additional costs on tax return preparers and their clients, and questioned the accuracy of the hour burden estimates set forth in the Paperwork Reduction Act section of the proposed regulations. The proposed regulations, however, did not provide an estimate of the burden related to the electronic filing of individual income tax returns, but rather the burden, measured in hours, to obtain the recommended statements from taxpayer-clients to document their choice to file individual income tax returns in paper format and submit the returns to the IRS themselves. See § 301.6011–7(a)(4)(ii). Any burden associated with the congressionally-mandated electronic filing requirement of section 6011(e)(3) was not at issue in or established by the proposed regulations, but is a direct result of that statutory requirement. One commentator remarked that there should not be an electronic filing mandate if the government does not reimburse the tax return preparer for any additional cost of electronic filing. The Congress, however, established the requirement, which does not include a reimbursement requirement.

In its comments, the Small Business Administration Office of Advocacy (SBA) stated that the proposed regulations, if finalized, would impact small business tax return preparers by "increasing the scope of specified tax return preparers." Specifically, the SBA stated that, because the proposed regulations would require specified tax return preparers to electronically file individual income tax returns and would define a specified tax return preparer as a tax return preparer who reasonably expects to file more than 10 individual income tax returns in a calendar year, the proposed regulations would increase the scope of specified tax return preparers. For the same reasons, the SBA stated that the proposed regulations contain a significant collection of information and have the potential to have a significant economic impact on a substantial number of small entities if the proposed regulations are adopted as final regulations. The SBA stated that the certification in the proposed regulations that a Regulatory Flexibility Analysis under the Regulatory Flexibility Act, 5. U.S.C. chapter 6 (RFA), was not required was not supported by a factual basis. The SBA recommended that the IRS publish for public comment either a supplemental RFA assessment or an Initial Regulatory Flexibility Analysis.

The Treasury Department and the IRS disagree with the SBA's conclusions and do not adopt its recommendation. As discussed in the preamble of the proposed regulations, the 10-return threshold for determining whether a tax return preparer is a specified tax return preparer is a statutory condition under section 6011(e)(3). The Congress by statute, and not the proposed regulations, established the electronic filing requirement, including the 10-return threshold for specified tax return preparers. As a result, a Regulatory Flexibility Analysis under the RFA is not required regarding the electronic filing requirement and its burden. The Treasury Department and the IRS have certified in the proposed regulations (and again in these final regulations) that the only collection of information contained in the regulations (the taxpayer choice statement) would not have a significant impact on a substantial number of small entities.

In its comments the SBA stated:

> Prior to passage of the Worker, Homeownership, and Business Assistance Act of 2009 (the Act), the IRS was prohibited from requiring filers of individual income tax returns to file electronically unless the person was required to file at least 250 returns during the calendar year. The Act authorized the IRS to issue this NPRM to increase the scope of specified tax return preparers.

Page 2, SBA Office of Advocacy Letter of December 20, 2010.

Prior to the Act, the IRS was prohibited from requiring that income tax returns for individuals, estates, and trusts be other than on paper forms regardless of the number of returns filed, as specifically provided by the last sentence of section 6011(e)(1). The referenced 250-return rule, contained in section 6011(e)(2), is only applicable to non-individual taxpayer filers, for example, corporations and partnerships. Following passage of the Act, there are now two separate rules that can affect individual taxpayers. The first rule is still provided by section 6011(e)(1), which prohibits the IRS from requiring income tax returns of individuals, estates, and trusts be on anything other than paper forms if the individual taxpayer prepares and files the taxpayer's income tax return. The second rule is the newly enacted rule, contained in section 6011(e)(3), that applies when an individual taxpayer uses the services of a tax return preparer to prepare the taxpayer's income tax return. The 250-return rule similarly is not applicable to either of these rules.

In addition, the requirements and restrictions contained in section 6011(e)(2) only apply to "regulations [prescribed] under paragraph [6011(e)](1)," while the proposed and final regulations involved here are being prescribed pursuant to section 6011(e)(3) and the specific requirement detailed in section 6011(e)(3)(A) ("The Secretary shall require tha[t] any individual income tax return prepared by a tax return preparer be filed on magnetic media if…"). There is no "increase" in the scope of specified tax return preparers provided by the regulations. Prior to the Act and section 6011(e)(3), specified tax return preparers did not exist. The taxpayer choice statement provision, together with the provision for administrative exemptions, may work to reduce the number of specified tax return preparers because individual income tax returns affected by these provisions are not counted in determining whether a tax return preparer files more than 10 (100 or more in 2011) individual income tax returns in a calendar year. Further, these provisions, as well as the undue hardship waiver provision, will benefit tax return preparers in their efforts to comply with the electronic filing requirement placed upon them by section 6011(e)(3). Furthermore, even if a tax return preparer is a specified tax return preparer, under both the proposed and final regulations a preparer would not have to electronically file an individual income tax return that a taxpayer chooses to have prepared in paper format and which the taxpayer will file with the IRS, providing a further compliance benefit to all tax return preparers subject to section 6011(e)(3).

The collection of information analysis in the proposed regulations was limited to the sole collection of information contained in the proposed regulations; that is, the taxpayer choice statements. The proposed regulations, in the preamble, stated:

> This information [taxpayer choice statement] can be used by tax return preparers and specified tax return preparers, if necessary, to demonstrate to the IRS that the related individual income tax returns filed in paper format were not required to be filed electronically pursuant to section 6011(e)(3) and § 301.6011–6. The collection of information is voluntary to obtain a benefit.

As discussed in this preamble, the electronic filing requirement applicable to specified tax return preparers is congressionally mandated and flows directly from the statute, that is, section 6011(e)(3); therefore, a Regulatory Flexibility Analysis under the RFA is not required. The Treasury Department and the IRS have adequately and appropriately certified in the proposed regulations that the taxpayer choice statement would not have a significant impact on a substantial number of small entities. This collection of information has been reviewed and approved by OMB.

As previously mentioned, the certification in the proposed regulations was sufficient. This certification certified that the collection of information contained in the proposed regulations, the collection related to the taxpayer choice statement, would not have a significant economic impact on a substantial number of small entities and referred to the Paperwork Reduction Act section in the preamble to the proposed regulations for further information as to why economic impact on affected small entities was not significant. That section identified the small entities likely affected, estimated the number of affected firms, and discussed the time and nature of preparation and recordkeeping. Although the certification in the proposed regulations did not reduce the paperwork burden items to monetary costs, the proposed regulations solicited "Estimates of capital or start-up costs and costs of operation, maintenance, and purchases of service to provide information." No such estimates were received during the public comment period.

Section 605(b) of the RFA requires that the certification appear in either the proposed or final rule. Although not required, these final regulations include another certification that a Regulatory Flexibility Analysis under the RFA is not required. See the Special Analyses section.

*8. Filing Perfection Period*

One commentator recommended a 10-day perfection period for individual income tax returns. Because of issues that could arise with technology, the IRS e-file systems allow perfection of the e-file submission if the initial submission was made on or before the return due date, the submitter received a "rejection" of the return from the IRS, and the submitter resolved the issue to successfully e-file the return to the IRS within a prescribed period. The current perfection period for individual returns is five days. The Treasury Department and the IRS do not adopt this recommendation in these final regulations because this type of provision is more appropriate for inclusion in administrative procedures.

**Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

When an Agency issues a rulemaking proposal, the Regulatory Flexibility Act, 5 U.S.C. chapter 6 (RFA), requires the Agency to "prepare and make available for public comment an initial regulatory flexibility analysis" which will "describe the impact of the proposed rule on small entities." 5 U.S.C. 603(a). Section 605 of the RFA allows an Agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

The collection of information in these final regulations is in § 301.6011–7(a)(4)(ii) (taxpayer choice statement). This information will be used by tax return preparers and specified tax return preparers to demonstrate to the IRS that the related individual income tax returns filed in paper format were not required to be filed electronically pursuant to section 6011(e)(3) and these final regulations, thus reducing the burden on tax return preparers and specified tax return preparers. This collection of information is voluntary to obtain a benefit, that is, conclusive proof of a taxpayer's choice to file an individual income tax return in paper format, which will be used by tax return preparers and specified tax return preparers to demonstrate to the IRS that the individual income tax return filed in paper format was not required to be filed electronically.

The final regulations affect self-employed specified tax return preparers and small businesses that employ specified tax return preparers who prepare individual income tax returns in exchange for compensation. Section 601(3) of the RFA defines a small business as having the same meaning as "small business concern" under section 3 of the Small Business Act, 15 U.S.C. 632. The IRS estimates that 135,000 firms in 2011 and 312,000 in 2012 qualifying as small businesses will obtain taxpayer choice statements from taxpayers who choose to have their individual income tax returns prepared in paper format and will submit the paper returns to the IRS. (These estimates are based on Tax Year 2007 figures, including firms that filed all of their individual income tax returns on paper and those firms that electronically filed individual income tax returns for that tax year.) Therefore, the Treasury Department and the IRS have determined that this Treasury decision will have an impact on a substantial number of small businesses.

The IRS has also determined, however, that the impact on entities affected by these final regulations will not be significant. The recordkeeping burden associated with obtaining and keeping documentation of a taxpayer choice to file in paper format is minimal. It is estimated that five minutes of preparation time is needed for a preparer to explain the purpose of the information and obtain the taxpayer choice statement from the taxpayer in the manner prescribed by the IRS, and six minutes for maintaining a copy in the preparer's records. A tax return preparer generally will not be submitting this documentation to the IRS. Based on the estimated numbers of firms (135,000 in 2011 and 312,000 in 2012) and estimates for the number of individual income tax returns that taxpayers chose to file (6,669,900 in 2011 and 9,217,800 in 2012), the estimated hours per firm is 9.06 in 2011 and 5.42 in 2012; with an average number of 1.2 preparers per firm, the estimated hours per preparer is 7.55 in 2011 and 4.51 in 2012.

Additionally, the Treasury Department and the IRS note that section 6011(e)(3) and these regulations only prescribe the method of filing individual income tax returns that are already required to be filed. Further, these regulations are implementing the electronic filing requirement imposed by statute on specified tax return preparers, as defined in section 6011(e)(3)(B). The taxpayer choice statement reduces any burden associated with the electronic filing requirement because paper individual income tax returns for which the tax return preparer obtains a taxpayer choice statement from the taxpayer are not counted in determining whether a tax return preparer files more than 10 (100 or more in 2011) individual income tax returns in a calendar year. There are no capital or start-up costs, such as the purchase of tax software, associated with the taxpayer choice statement; tax return preparers do not have to buy tax software to obtain a signed statement from their clients. Finally, the IRS has provided procedures for specified tax return preparers to request a waiver of

the electronic filing requirement in cases of undue hardship. Therefore, specified tax return preparers who receive an approved hardship waiver would not have to obtain taxpayer choice statements for any individual income tax returns that are covered under the waiver.

Accordingly, the Treasury Department and the IRS hereby certify that the collection of information contained in these regulations will not have a significant economic impact on a substantial number of small entities. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

**Drafting Information**

The principal author of these final regulations is Keith L. Brau, Office of the Associate Chief Counsel (Procedure and Administration).

**List of Subjects**

*26 CFR Part 1*

Income taxes, Reporting and recordkeeping requirements.

*26 CFR Part 301*

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

**Adoption of Amendments to the Regulations**

Accordingly, 26 CFR parts 1 and 301 are amended as follows:

## PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries in numerical order to read, in part, as follows:

**Authority:** 26 U.S.C. 7805 * * *

Section 1.6011–6 also issued under 26 U.S.C. 6011(a). * * *

Section 1.6011–7 also issued under 26 U.S.C. 6011(e). * * *

■ **Par. 2.** Section 1.6011–6 is added and reserved to read as follows:

**§ 1.6011–6 [Reserved]**

■ **Par. 3.** Section 1.6011–7 is added to read as follows:

**§ 1.6011–7 Specified tax return preparers required to file individual income tax returns using magnetic media.**

Individual income tax returns that are required to be filed on magnetic media by tax return preparers under section 6011(e)(3) and § 301.6011–7 of this chapter must be filed in accordance with Internal Revenue Service regulations, revenue procedures, revenue rulings, publications, forms or instructions, including those posted electronically.

## PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 4.** The authority citation for part 301 is amended by adding an entries in numerical order to read, in part, as follows:

**Authority:** 26 U.S.C. 7805 * * *

Section 301.6011–6 also issued under 26 U.S.C. 6011(a). * * *

Section 301.6011–7 also issued under 26 U.S.C. 6011(e). * * *

■ **Par. 5.** Section 301.6011–6 is added and reserved to read as follows:

**§ 301.6011–6 Statement of series and series organizations [Reserved]**

■ **Par. 6.** Section 301.6011–7 is added to read as follows:

**§ 301.6011–7 Specified tax return preparers required to file individual income tax returns using magnetic media.**

(a) *Definitions.*

(1) *Magnetic media.* For purposes of this section, the term *magnetic media* has the same meaning as in § 301.6011–2(a)(1).

(2) *Individual income tax return.* The term *individual income tax return* means any return of tax imposed by subtitle A on individuals, estates, and trusts.

(3) *Specified tax return preparer.* The term *specified tax return preparer* means any person who is a tax return preparer, as defined in section 7701(a)(36) and § 301.7701–15, unless that person reasonably expects to file 10 or fewer individual income tax returns in a calendar year. If a person who is a tax return preparer is a member of a firm, that person is a specified tax return preparer unless the person's firm members in the aggregate reasonably expect to file 10 or fewer individual income tax returns in a calendar year. Solely for the 2011 calendar year, a person will not be considered a specified tax return preparer if that person reasonably expects, or if the person is a member of a firm, the firm's members in the aggregate reasonably expect, to file fewer than 100 individual income tax returns in the 2011 calendar year. Solely for purposes of this section, a person is considered a member of a firm if the person is an employee, agent, member, partner, shareholder, or other equity holder of the firm.

(4) *File or Filed.* (i) For purposes of section 6011(e)(3) and these regulations only, an individual income tax return is considered to be "filed" by a tax return preparer or a specified tax return preparer if the preparer submits the individual income tax return to the IRS on the taxpayer's behalf, either electronically (by e-file or other magnetic media) or in non-electronic (paper) form. Submission of an individual income tax return by a tax return preparer or a specified tax return preparer in non-electronic form includes the transmission, sending, mailing or otherwise delivering of the paper individual income tax return to the IRS by the preparer, any member, employee, or agent of the preparer, or any member, employee, or agent of the preparer's firm.

(ii) An individual income tax return will not be considered to be filed, as defined in paragraph (a)(4)(i) of this section, by a tax return preparer or specified tax return preparer if the tax return preparer or specified tax return preparer who prepared the return obtains, on or prior to the date the individual income tax return is filed, a hand-signed and dated statement from the taxpayer (by either spouse if a joint return) that states the taxpayer chooses to file the individual income tax return in paper format, and that the taxpayer, and not the preparer, will submit the paper individual income tax return to the IRS. The IRS may provide guidance through forms, instructions or other appropriate guidance regarding how tax return preparers and specified tax return preparers can document a taxpayer's choice to file an individual income tax return in paper format.

(iii) The rules contained in this section do not alter or affect a taxpayer's obligation to file returns under any other provision of law. The definition of *file* or *filed* by a tax return preparer or specified tax return preparer contained in paragraph (a)(4)(i) of this section applies only for the purposes of section 6011(e)(3) and these regulations and does not apply for any other purpose under any other provision of law.

(b) *Magnetic media filing requirement.* Except as provided in paragraphs (a)(4)(ii) and (c) of this section, any individual income tax return prepared by a specified tax return preparer in a calendar year must be filed on magnetic media if the return is filed by the specified tax return preparer.

(c) *Exclusions.* The following exclusions apply to the magnetic media filing requirement in this section:

(1) *Undue hardship waiver.* The IRS may grant a waiver of the requirement of this section in cases of undue

hardship. An undue hardship waiver may be granted upon application by a specified tax return preparer consistent with instructions provided in published guidance and as prescribed in relevant forms and instructions. A determination of undue hardship will be based upon all facts and circumstances. The undue hardship waiver provided to a specified tax return preparer may apply to a series or class of individual income tax returns or for a specified period of time, subject to the terms and conditions regarding the method of filing prescribed in such waiver.

(2) *Administrative exemptions.* The IRS may provide administrative exemptions from the requirement of this section for certain classes of specified tax return preparers, or regarding certain types of individual income tax returns, as the IRS determines necessary to promote effective and efficient tax administration. The IRS may provide administrative exemptions and any criteria or procedures necessary to claim an administrative exemption through forms, instructions, or other appropriate guidance.

(d) *Reasonably expect to file*—(1) *In general.* The determination of whether a tax return preparer reasonably expects, or if the preparer is a member of a firm, the firm's members in the aggregate reasonably expect, to file 10 or fewer individual income tax returns (or, in the case of the 2011 calendar year, fewer than 100 individual income tax returns) is made by adding together all of the individual income tax returns the tax return preparer and, if the preparer is a member of a firm, the firm's members reasonably expect to prepare and file in the calendar year. In making this determination, individual income tax returns that the tax return preparer reasonably expects will not be subject to the magnetic media filing requirement under paragraph (a)(4)(ii) of this section or are excluded from the requirement under (c)(2) of this section are not to be counted. Individual income tax returns excluded from the magnetic media filing requirement under paragraph (c)(1) of this section are to be counted for purposes of making this determination.

(2) *Time for making determination of reasonable expectations.* The determination regarding reasonable expectations is made separately for each calendar year in order to ascertain whether the magnetic media filing requirement applies to a tax return preparer for that year. For each calendar year, the determination of whether a tax return preparer and the preparer's firm reasonably expect to file 10 or fewer individual income tax returns (or, in the case of the 2011 calendar year, fewer than 100 individual income tax returns) is made based on all relevant, objective, and demonstrable facts and circumstances prior to the time the tax return preparer and the preparer's firm first file an individual income tax return during the calendar year.

(e) *Examples.* The following examples illustrate the rules of paragraphs (a) through (d) of this section.

*Example 1.* Tax Return Preparer A is an accountant who recently graduated from college with an accounting degree and has opened his own practice. A has not prepared individual income tax returns for compensation in the past and does not plan to focus his practice on individual income tax return preparation. A intends instead to focus his practice on providing specialized accounting services to certain health care service providers. A has no plans to, and does not, employ or engage any other tax return preparers. A estimates that he may be asked by some clients to prepare and file their individual income tax returns for compensation, but A expects that the number of people who do ask him to provide this service will be no more than seven in 2012. In fact, A actually prepares and files six paper Forms 1040 (U.S. Individual Income Tax Return) in 2012. Due to a growing client base, and based upon his experience in 2012, A expects that the number of individual income tax returns he will prepare and file in 2013 will at least double, estimating he will prepare and file 12 Form 1040 returns in 2013. A does not qualify as a specified tax return preparer for 2012 because A reasonably expects to file 10 or fewer returns (seven) in 2012. Consequently, A is not required to electronically file the individual income tax returns he prepares and files in 2012. A's expectation is reasonable based on his business projections, individual income tax return filing history, and staffing decisions. A is a specified tax return preparer in 2013, however, because based on those same factors A reasonably expects to file more than 10 individual income tax returns (12) during that calendar year. A, therefore, must electronically file all individual income tax returns that A prepares and files in 2013 that are not otherwise excluded from the electronic filing requirement.

*Example 2.* Same facts as in *Example 1,* except three of Tax Return Preparer A's clients specifically chose to have A prepare their individual income tax returns in paper format in 2012 with the clients mailing their respective returns to the IRS. A expects that these three clients will similarly choose to have him prepare their returns in paper format in 2013, with the clients being responsible for mailing their returns to the IRS. A is not required to electronically file these three returns in 2013 because the taxpayers chose to file their returns in paper format. A obtained a hand-signed and dated statement from each of those taxpayers, indicating that they chose to file their returns in paper format. These three individual income tax returns are not counted in determining how many individual income tax returns A reasonably expects to file in 2013. Because the total number of individual income tax returns A reasonably expects to file in 2013 (nine) does not exceed 10, A is not a specified tax return preparer for calendar year 2013, and A is not required to electronically file any individual income tax return that he prepares and files in 2013.

*Example 3.* Tax Return Preparer B is a solo general practice attorney in a small county. Her practice includes the preparation of wills and assisting executors in administering estates. As part of her practice, B infrequently prepares and files Forms 1041 (U.S. Income Tax Return for Estates and Trusts) for executors. In the past three years, she prepared and filed an average of five Forms 1041 each year and never exceeded more than seven Forms 1041 in any year. Based on B's prior experience and her estimate for 2012, made prior to the time she first files an individual income tax return in 2012, she reasonably expects to prepare and file no more than five Forms 1041 in 2012. Due to the unforeseen deaths of several of her clients in late 2011, B actually prepares and files 12 Forms 1041 in 2012. B does not find out about these deaths until after she has already filed the first Form 1041 in 2012 for another client. B is not required to electronically file these returns in 2012. She does not qualify as a specified tax return preparer for calendar year 2012 because prior to the time she filed the first Form 1041 in 2012, she reasonably expected to file 10 or fewer individual income tax returns in 2012.

*Example 4.* Same facts as *Example 3,* except, in addition to the five Forms 1041 that she expects to prepare and file in 2012, Tax Return Preparer B also expects to prepare and file 10 paper Forms 1040 (U.S. Individual Income Tax Return) in 2012, based upon the requests that she has received from some of her clients. Because the total number of individual income tax returns B reasonably expects to file in 2012 (fifteen) exceeds 10, B is a specified tax return preparer for calendar year 2012, and B must electronically file all individual income tax returns that B prepares and files in 2012 that are not otherwise excluded from the electronic filing requirement.

*Example 5.* Firm X consists of two tax return preparers, Tax Return Preparer C who owns Firm X, and Tax Return Preparer D who is employed by C in Firm X. Based upon the firm's experience over the past three years, C and D reasonably expect to file nine and ten individual income tax returns for compensation, respectively, in 2012. Both C and D must electronically file the individual income tax returns that they prepare in 2012, unless the returns are otherwise excluded from the electronic filing requirement, because they are members of the same firm and the aggregated total of individual income tax returns that they reasonably expect to file in 2012 (nineteen), exceeds 10 individual income tax returns.

(f) *Additional guidance.* The IRS may implement the requirements of this section through additional guidance, including by revenue procedures, notices, publications, forms and instructions, including those issued electronically.

(g) *Effective/applicability date.* This section is effective on March 30, 2011,

and applicable to individual income tax returns filed after December 31, 2010.

**Steven T. Miller,**

*Deputy Commissioner for Services and Enforcement.*

Approved: March 25, 2011.

**Michael Mundaca,**

*Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. 2011–7571 Filed 3–28–11; 4:15 pm]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Parts 100 and 165

**[Docket No. USCG–2010–0110]**

**RIN 1625–AA08; AA00**

## Special Local Regulations and Safety Zones; Recurring Events in Northern New England

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is amending special local regulations and establishing permanent safety zones in the Coast Guard Northern New England Captain of the Port (COTP) Zone for annual recurring marine events. When these special local regulations or safety zones are activated, and thus subject to enforcement, this rule restricts vessels from portions of water areas during annual events in the Northern New England COTP Zone. The revised special local regulations and safety zones reduce administrative overhead, expedite public notification of events, and ensure the protection of the maritime public and event participants from the hazards associated with firework displays, boat races, and other marine events.

**DATES:** This rule is effective April 29, 2011.

**ADDRESSES:** Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2010–0110 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0110 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or e-mail Lieutenant Junior Grade Terence Leahy, Waterways Management Division at Coast Guard Sector Northern New England, telephone 207–767–0398, e-mail *Terence.O.Leahy@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

### Regulatory Information

On Tuesday, January 11, 2011, the Coast Guard published a notice of proposed rulemaking (NPRM) entitled "Special Local Regulations and Safety Zones; Recurring Events in Northern New England" in the **Federal Register** (76 FR 1568). We received no comments or requests for a public meeting on the proposed rule.

### Basis and Purpose

Marine events are annually held on a recurring basis on the navigable waters within the Coast Guard Northern New England COTP Zone. These events include sailing regattas, powerboat races, rowboat races, parades, swim events, and fireworks displays. In the past, the Coast Guard has established special local regulations and regulated navigation areas for these events on a case by case basis to ensure the protection of the maritime public and event participants from the hazards associated with these marine events. Issuing individual regulations annually has proved to be administratively cumbersome.

This rule will significantly relieve administrative overhead and consistently apprise the public in a timely manner through permanent publication in Title 33 of the Code of Federal Regulations (CFR). The TABLES in this regulation list each recurring marine event requiring a regulated area as administered by the Coast Guard.

By establishing permanent regulations for these events, the Coast Guard has eliminated the need to establish temporary rules for events that occur on an annual basis. This provided opportunity for the public to comment while limiting the unnecessary burden of continually establishing temporary rules every year. Some of the events discussed below are duplicated in 33 CFR 100.114, a citation that no longer meets the Coast Guard's intended purposes. While 33 CFR part 100 is designed for Regattas and Marine Parades, 33 CFR part 165 is for Regulated Navigation Areas and Limited Access Areas. The Coast Guard has identified a number of events in 33 CFR part 100 which would be more appropriately located in 33 CFR part 165. This rulemaking amends local regulations for events already contained in 33 CFR part 100 both to update event information as well as to move firework displays to part 165, a citation that better meets the Coast Guard's intended purpose of ensuring safety during these events.

In addition, the Coast Guard has promulgated safety zones or special local regulations for all of these 52 areas in the past, and has not received public comments or concerns regarding the impact to waterway traffic from these annually recurring events.

### Background

The Coast Guard in Northern New England processes over 180 marine event applications on an annual basis. Consequently, we created this rule to reduce costly administrative overhead and to decrease time consumed when drafting multiple special local regulations and regulated navigation areas for these marine events. By having permanent regulations for these events in Title 33 of the CFR also eliminates the need to establish multiple temporary rules for events that occur on an annual basis, hence greatly reducing administrative costs associated with that process.

Another purpose of this rule is to list events on a permanent basis in order to expedite public notice of all marine activity in the Coast Guard Northern New England COTP Zone.

### Discussion of Comments and Changes

The Coast Guard did not receive any comments in response to the NPRM published in the **Federal Register** (76 FR 1568) on Tuesday, January 11, 2011. Accordingly, no changes were made to the regulatory text in the final rule.

We have added figure 2–1, paragraph (34)(g) of Commandant Instruction M16475.1D in the Environment section of the regulatory analysis, as this paragraph also pertains to the Categorical Exclusion determination for safety zones.

### 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. Although this regulation may have some impact on the public, the potential impact will be minimized for the following reasons: vessels will only be restricted from safety zones and special local regulation areas for a short duration of time unless otherwise noted; vessels may transit in all portions of the affected waterway except for those areas covered by the zones; the Coast Guard has promulgated safety zones or special local regulations in accordance with 33 CFR parts 100 and 165 for all event areas in the past and has not received notice of any negative impact caused by any of the safety zones or special local regulations; and notifications will also be made to the local maritime community via the Local Notice to Mariners and Broadcast Notice to Mariners well in advance of the events. The effect of this action simply establishes the approximate dates on which the existing regulations would be enforced and consolidates them within one regulation. No new or additional restrictions will be imposed on vessel traffic.

**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 might be small entities: owners or operators of vessels intending to transit, fish, or anchor in the areas where safety zones for marine related fireworks events and special local regulations for regattas are being held. For the reasons outlined in the Regulatory Planning and Review section above, this rule will not have a significant 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 will 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 will 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), in the NPRM we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

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

**Collection of Information**

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

**Federalism**

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

**Unfunded Mandates Reform Act**

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

**Taking of Private Property**

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

**Civil Justice Reform**

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

**Protection of Children**

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

**Indian Tribal Governments**

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

**Energy Effects**

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

**Technical Standards**

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of

Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

**Environment**

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraphs (34)(g) and (34)(h) of the Instruction since it involves establishment of safety zones for marine related fireworks events and special local regulations for regattas, respectively. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

**List of Subjects**

*33 CFR Part 100*

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

*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 parts 100 and 165 as follows:

## PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 reads as follows:

**Authority:** 33 U.S.C. 1233.

### §§ 100.107, 100.108, 100.109, 100.110, 100.111, and 100.118 [Removed]

■ 2. Remove §§ 100.107, 100.108, 100.109, 100.110, 100.111, and 100.118.

### § 100.114 [Amended]

■ 3. In § 100.114, amend the table in paragraph (a) by removing the entries for 6.1, 7.3, 7.8, 7.12, 7.13, 7.14, 7.15, 7.41, 8.8, and 9.2.

■ 4. Add a new § 100.120 to read as follows:

### § 100.120 Special Local Regulations; Marine Events Held in the Coast Guard Sector Northern New England Captain of the Port Zone.

The following regulations apply to the marine events listed in the Table to § 100.120. These regulations will be enforced for the duration of each event, on or about the dates indicated. Annual notice of the exact dates and times of the effective period of the regulations with respect to each event, the geographical description of each regulated area, and details concerning the nature of the event and the number of participants and type(s) of vessels involved will be published in a Notice of Enforcement in the **Federal Register** and in Local Notices to Mariners. Mariners should consult the **Federal Register** or their Local Notice to Mariners to remain apprised of schedule or event changes. First Coast Guard District Local Notice to Mariners can be found at: *http://www.navcen.uscg.gov/.* The Sector Northern New England Marine Events schedule can also be viewed electronically at *http://www.homeport.uscg.mil.*

**Note to introductory paragraph of § 100.20:** Although listed in the Code of Federal Regulations, sponsors of events listed in the Table to § 100.20 are still required to submit marine event applications in accordance with 33 CFR 100.15.

(a) The Coast Guard may patrol each event area under the direction of a designated Coast Guard Patrol Commander. The Patrol Commander may be contacted on Channel 16 VHF–FM (156.8 MHz) by the call sign "PATCOM." Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the Captain of the Port, Sector Northern New England.

(b) Vessels may not transit the regulated areas without the Patrol Commander approval. Vessels permitted to transit must operate at a no wake speed, in a manner which will not endanger participants or other crafts in the event.

(c) Spectators or other vessels shall not anchor, block, loiter, or impede the transit of event participants or official patrol vessels in the regulated areas during the effective dates and times, or dates and times as modified through the Local Notice to Mariners, unless authorized by an official patrol vessel.

(d) The Patrol Commander may control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the lawful directions issued. Failure to comply with a lawful direction may result in expulsion from the area, citation for failure to comply, or both.

(e) The Patrol Commander may delay or terminate any marine event in this subpart at any time it is deemed necessary to ensure the safety of life or property.

(f) For all power boat races listed, vessels operating within the regulated area must be at anchor within a designated spectator area or moored to a waterfront facility in a way that will not interfere with the progress of the event.

(g) For all regattas and boat parades listed, spectator vessels operating within the regulated area shall maintain a separation of at least 50 yards from the participants.

(h) For all rowing and paddling boat races listed, vessels not associated with the event shall maintain a separation of at least 50 yards from the participants.

TABLE TO § 100.120

| 5.0 | MAY |
|---|---|
| 5.1 Tall Ships Visiting Portsmouth | • *Event Type:* Regatta and Boat Parade.<br>• *Sponsor:* Portsmouth Maritime Commission, Inc.<br>• *Date:* A four day event from Friday through Monday during the last weekend in May, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 9:00 a.m. to 8:00 p.m. each day. |

TABLE TO § 100.120—Continued

| | |
|---|---|
| 5.0 | MAY |
| | • *Location:* The regulated area includes all waters of Portsmouth Harbor, New Hampshire in the vicinity of Castle Island within the following points (NAD 83):<br>43° 03′11″ N 070° 42′26″ W.<br>43° 03′18″ N 070° 41′51″ W.<br>43° 04′42″ N 070° 42′11″ W.<br>43° 04′28″ N 070° 44′12″ W.<br>43° 05′36″ N 070° 45′56″ W.<br>43° 05′29″ N 070° 46′09″ W.<br>43° 04′19″ N 070° 44′16″ W.<br>43° 04′22″ N 070° 42′33″ W. |
| 6.0 | JUNE |
| 6.1 Bar Harbor Blessing of the Fleet. | • *Event Type:* Regatta and Boat Parade.<br>• *Sponsor:* Town of Bar Harbor, Maine.<br>• *Date:* A one day event on Sunday during the first weekend of June, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 12:00 p.m. to 1:30 p.m.<br>• *Location:* The regulated area includes all waters of Bar Harbor, Maine within the following points (NAD 83):<br>44° 23′32″ N 068° 12′19″ W.<br>44° 23′30″ N 068° 12′00″ W.<br>44° 23′37″ N 068° 12′00″ W.<br>44° 23′35″ N 068° 12′19″ W. |
| 6.2 Charlie Begin Memorial Lobster Boat Races | • *Event Type:* Power Boat Race.<br>• *Sponsor:* Boothbay Harbor Lobster Boat Race Committee.<br>• *Date:* A one day event on Saturday during the third weekend of June, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 10:00 a.m. to 3:00 p.m.<br>• *Location:* The regulated area includes all waters of Boothbay Harbor, Maine in the vicinity of within John's Island the following points (NAD 83):<br>43° 50′04″ N 069° 38′37″ W.<br>43° 50′54″ N 069° 38′06″ W.<br>43° 50′49″ N 069° 37′50″ W.<br>43° 50′00″ N 069° 38′20″ W. |
| 6.3 Rockland Harbor Lobster Boat Races | • *Event Type:* Power Boat Race.<br>• *Sponsor:* Rockland Harbor Lobster Boat Race Committee.<br>• *Date:* A one day event on Sunday during the third weekend of June, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 9:00 a.m. to 5:00 p.m.<br>• *Location:* The regulated area includes all waters of Rockland Harbor, Maine in the vicinity of the Rockland Breakwater Light within the following points (NAD 83):<br>44° 05′59″ N 069° 04′53″ W.<br>44° 06′43″ N 069° 05′25″ W.<br>44° 06′50″ N 069° 05′05″ W.<br>44° 06′05″ N 069° 04′34″ W. |
| 6.4 Windjammer Days Parade of Ships | • *Event Type:* Tall Ship Parade.<br>• *Sponsor:* Boothbay Region Chamber of Commerce.<br>• *Date:* A one day event on Wednesday during the last week of June, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 12:00 p.m. to 5:00 p.m.<br>• *Location:* The regulated area includes all waters of Boothbay Harbor, Maine in the vicinity of Tumbler's Island within the following points (NAD 83):<br>43° 51′02″ N 069° 37′33″ W.<br>43° 50′47″ N 069° 37′31″ W.<br>43° 50′23″ N 069° 37′57″ W.<br>43° 50′01″ N 069° 37′45″ W.<br>43° 50′01″ N 069° 38′31″ W.<br>43° 50′25″ N 069° 38′25″ W.<br>43° 50′49″ N 069° 37′45″ W. |
| 7.0 | JULY |
| 7.1 Moosabec Lobster Boat Races. | • *Event Type:* Power Boat Race.<br>• *Sponsor:* Moosabec Boat Race Committee.<br>• *Date:* A one day event held on July 4th, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 10:00 a.m. to 12:30 p.m. |

TABLE TO § 100.120—Continued

| 7.0 | JULY |
|---|---|
| | • *Location:* The regulated area includes all waters of Jonesport, Maine within the following points (NAD 83):<br>44° 31′21″ N 067° 36′44″ W.<br>44° 31′36″ N 067° 36′47″ W.<br>44° 31′44″ N 067° 35′36″ W.<br>44° 31′29″ N 067° 35′33″ W. |
| 7.2 The Great Race | • *Event Type:* Rowing and Paddling Boat Race.<br>• *Sponsor:* Franklin County Chamber of Commerce.<br>• *Date:* A one day event on Sunday during the first week of July, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 10:00 a.m. to 12:30 p.m.<br>• *Location:* The regulated area includes all waters of Lake Champlain in the vicinity of Saint Albans Bay within the following points (NAD 83):<br>44° 47′18″ N 073° 10′27″ W.<br>44° 47′10″ N 073° 08′51″ W. |
| 7.3 Searsport Lobster Boat Races | • *Event Type:* Power Boat Race.<br>• *Sponsor:* Searsport Lobster Boat Race Committee.<br>• *Date:* A one day event on Saturday during the second week of July, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 9:00 a.m. to 4:00 p.m.<br>• *Location:* The regulated area includes all waters of Searsport Harbor, Maine within the following points (NAD 83):<br>44° 26′50″ N 068° 55′20″ W.<br>44° 27′04″ N 068° 55′26″ W.<br>44° 27′12″ N 068° 54′35″ W.<br>44° 26′59″ N 068° 54′29″ W. |
| 7.4 Stonington Lobster Boat Races. | • *Event Type:* Power Boat Race.<br>• *Sponsor:* Stonington Lobster Boat Race Committee.<br>• *Date:* A one day event on Saturday during the second week of July, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:00 a.m. to 3:30 p.m.<br>• *Location:* The regulated area includes all waters of Stonington, Maine within the following points (NAD 83):<br>44° 08′55″ N 068° 40′12″ W.<br>44° 09′00″ N 068° 40′15″ W.<br>44° 09′11″ N 068° 39′42″ W.<br>44° 09′07″ N 068° 39′39″ W. |
| 7.5 Mayor's Cup Regatta | • *Event Type:* Sailboat Parade.<br>• *Sponsor:* Plattsburgh Sunrise Rotary.<br>• *Date:* A one day event on Saturday during the second week of July, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 10:00 a.m. to 4:00 p.m.<br>• *Location:* The regulated area includes all waters of Cumberland Bay on Lake Champlain in the vicinity of Plattsburgh, New York within the following points (NAD 83):<br>44° 39′26″ N 073° 26′25″ W.<br>44° 41′27″ N 073° 23′12″ W. |
| 7.6 The Challenge Race | • *Event Type:* Rowing and Paddling Boat Race.<br>• *Sponsor:* Lake Champlain Maritime Museum.<br>• *Date:* A one day event on Saturday during the third week of July, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 11:00 a.m. to 3:00 p.m.<br>• *Location:* The regulated area includes all waters of Lake Champlain in the vicinity of Button Bay State Park within the following points (NAD 83):<br>44° 12′25″ N 073° 22′32″ W.<br>44° 12′00″ N 073° 21′42″ W.<br>44° 12′19″ N 073° 21′25″ W.<br>44° 13′16″ N 073° 21′36″ W. |
| 7.7 Friendship Lobster Boat Races. | • *Event Type:* Power Boat Race.<br>• *Sponsor:* Friendship Lobster Boat Race Committee.<br>• *Date:* A one day event on Saturday during the last week of July, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 9:30 a.m. to 3:00 p.m. |

TABLE TO § 100.120—Continued

| | |
|---|---|
| 7.0 | JULY |
| | • *Location:* The regulated area includes all waters of Friendship Harbor, Maine within the following points (NAD 83):<br>43° 57′51″ N 069° 20′46″ W.<br>43° 58′14″ N 069° 19′53″ W.<br>43° 58′19″ N 069° 20′01″ W.<br>43° 58′00″ N 069° 20′46″ W. |
| 7.8 Arthur Martin Memorial Regatta. | • *Event Type:* Rowing and Paddling Boat Race.<br>• *Sponsor:* I Row.<br>• *Date:* A one day event on Saturday during the last week of July, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 9:00 a.m. to 1:00 p.m.<br>• *Location:* The regulated area includes all waters of the Piscataqua River, in the vicinity of Kittery Point, Maine within the following points (NAD 83):<br>43° 03′51″ N 070° 41′55″ W.<br>43° 04′35″ N 070° 42′18″ W.<br>43° 04′42″ N 070° 43′15″ W.<br>43° 05′14″ N 070° 43′12″ W.<br>43° 05′14″ N 070° 43′06″ W.<br>43° 04′44″ N 070° 43′11″ W.<br>43° 04′35″ N 070° 42′13″ W.<br>43° 03′53″ N 070° 41′40″ W. |
| 7.9 Harpswell Lobster Boat Races. | • *Event Type:* Power Boat Race.<br>• *Sponsor:* Harpswell Lobster Boat Race Committee.<br>• *Date:* A one day event on Sunday during the last week of July, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 10:00 a.m. to 3:00 p.m.<br>• *Location:* The regulated area includes all waters of Potts Harbor, Maine within the following points (NAD 83):<br>43° 46′50″ N 070° 01′37″ W.<br>43° 46′50″ N 070° 01′18″ W.<br>43° 46′28″ N 070° 01′36″ W.<br>43° 46′28″ N 070° 01′19″ W. |
| 8.0 | AUGUST |
| 8.1 Eggemoggin Reach Regatta | • *Event Type:* Wooden Boat Parade.<br>• *Sponsor:* Rockport Marine, Inc. and Brookline Boat Yard.<br>• *Date:* A one day event on Saturday during the first week of August, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 11:00 a.m. to 7:00 p.m.<br>• *Location:* The regulated area includes all waters of Eggemoggin Reach and Jericho Bay in the vicinity of Naskeag Harbor, Maine within the following points (NAD 83):<br>44° 15′16″ N 068° 36′26″ W.<br>44° 12′41″ N 068° 29′26″ W.<br>44° 07′38″ N 068° 31′30″ W.<br>44° 12′54″ N 068° 33′46″ W. |
| 8.2 Southport Rowgatta Rowing and Paddling Boat Race. | • *Event Type:* Rowing and Paddling Boat Race.<br>• *Sponsor:* Boothbay Region YMCA.<br>• *Date:* A one day event on Saturday during the second week of August, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:00 a.m. to 3:00 p.m.<br>• *Location:* The regulated area includes all waters of Sheepscot Bay and Boothbay, on the shore side of Southport Island, Maine within the following points (NAD 83):<br>43° 50′26″ N 069° 39′10″ W.<br>43° 49′10″ N 069° 38′35″ W.<br>43° 46′53″ N 069° 39′06″ W.<br>43° 46′50″ N 069° 39′32″ W.<br>43° 49′07″ N 069° 41′43″ W.<br>43° 50′19″ N 069° 41′14″ W.<br>43° 51′11″ N 069° 40′06″ W. |
| 8.3 Winter Harbor Lobster Boat Races | • *Event Type:* Power Boat Race.<br>• *Sponsor:* Winter Harbor Chamber of Commerce.<br>• *Date:* A one day event on Saturday during the second week of August, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 9:00 a.m. to 3:00 p.m. |

TABLE TO § 100.120—Continued

| 8.0 | AUGUST |
|---|---|
| | • *Location:* The regulated area includes all waters of Winter Harbor, Maine within the following points (NAD 83):<br>44° 22′06″ N 068° 05′13″ W.<br>44° 23′06″ N 068° 05′08″ W.<br>44° 23′04″ N 068° 04′37″ W.<br>44° 22′05″ N 068° 04′44″ W. |
| 8.4 Lake Champlain Dragon Boat Festival | • *Event Type:* Rowing and Paddling Boat Race.<br>• *Sponsor:* Dragonheart Vermont.<br>• *Date*: A one day event on Sunday during the second week of August, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 7:00 a.m. to 5:00 p.m.<br>• *Location:* The regulated area includes all waters of Burlington Bay within the following points (NAD 83):<br>44° 28′51″ N 073° 13′28″ W.<br>44° 28′40″ N 073° 13′40″ W.<br>44° 28′37″ N 073° 13′29″ W.<br>44° 28′40″ N 073° 13′17″ W. |
| 8.5 Merritt Brackett Lobster Boat Races | • *Event Type:* Power Boat Race.<br>• *Sponsor:* Town of Bristol, Maine.<br>• *Date:* A one day event on Sunday during the second week of August, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 10:00 a.m. to 3:00 p.m.<br>• *Location:* The regulated area includes all waters of Pemaquid Harbor, Maine within the following points (NAD 83):<br>43° 52′16″ N 069° 32′10″ W.<br>43° 52′41″ N 069° 31′43″ W.<br>43° 52′35″ N 069° 31′29″ W.<br>43° 52′09″ N 069° 31′56″ W. |
| 8.6 Multiple Sclerosis Regatta | • *Event Type:* Regatta and Sailboat Race.<br>• *Sponsor:* Maine Chapter, Multiple Sclerosis Society.<br>• *Date:* A one day event on Saturday during the third week of August, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 10:00 a.m. to 4:00 p.m.<br>• *Location:* The regulated area for the start of the race includes all waters of Casco Bay, Maine in the vicinity of Peaks Island within the following points (NAD 83):<br>43° 40′24″ N 070° 14′20″ W.<br>43° 40′36″ N 070° 13′56″ W.<br>43° 39′58″ N 070° 13′21″ W.<br>43° 39′46″ N 070° 13′51″ W. |
| 8.7 Multiple Sclerosis Harborfest Tugboat Race | • *Event Type:* Power Boat Race.<br>• *Sponsor:* Maine Chapter, National Multiple Sclerosis Society.<br>• *Date:* A one day event on Sunday during the third week of August, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 10:00 a.m. to 3:00 p.m.<br>• *Location:* The regulated area includes all waters of Portland Harbor, Maine in the vicinity of Maine State Pier within the following points (NAD 83):<br>43° 40′25″ N 070° 14′21″ W.<br>43° 40′36″ N 070° 13′56″ W.<br>43° 39′58″ N 070° 13′21″ W.<br>43° 39′47″ N 070° 13′51″ W. |
| 9.0 | SEPTEMBER |
| 9.1 Eastport Pirates Festival Lobster Boat Races | • *Event Type:* Power Boat Race.<br>• *Sponsor:* Eastport Pirates Festival.<br>• *Date:* A one day event on Sunday during the second weekend of September, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 11:00 a.m. to 6:00 p.m.<br>• *Location:* The regulated area includes all waters in the vicinity of Eastport Harbor, Maine within the following points (NAD 83):<br>44° 54′14″ N 066° 58′52″ W.<br>44° 54′14″ N 068° 58′56″ W.<br>44° 54′24″ N 066° 58′52″ W.<br>44° 54′24″ N 066° 58′56″ W. |

## 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, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add a new § 165.171 to read as follows:

### § 165.171 Safety Zones for Fireworks Displays held in Coast Guard Sector Northern New England Captain of the Port Zone.

The Coast Guard is establishing safety zones for the fireworks displays listed in the Table to § 165.171. These regulations will be enforced for the duration of each event, on or about the dates indicated in the Table to § 165.171. Annual notice of the exact dates and times of the effective period of the regulations with respect to each firework displays, the geographical description of each regulated area, and details concerning the nature of the event and the number of participants and type(s) of vessels involved will be published in a Notice of Enforcement in the Federal Register and in Local Notices to Mariners. Mariners should consult the **Federal Register** and their Local Notice to Mariners to remain apprised of minor schedule or event changes. First Coast Guard District Local Notice to Mariners can be found at: *http://www.navcen.uscg.gov/.* The Sector Northern New England Marine Events schedule can also be viewed electronically at: *www.homeport.uscg.mil.*

**Note to introductory paragraph of § 165.171:** Although listed in the Code of Federal Regulations, sponsors of events listed in the Table to § 165.171 shall submit an application each year in accordance with 33 CFR 100.15.

(a) The Coast Guard may patrol each event area under the direction of a designated Coast Guard Patrol Commander. The Patrol Commander may be contacted on Channel 16 VHF–FM (156.8 MHz) by the call sign "PATCOM." The "official patrol vessels" may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the Captain of the Port, Sector Northern New England.

(b) Vessels may not transit the regulated areas without Patrol Commander approval. Vessels permitted to transit must operate at a no wake speed, in a manner which will not endanger participants or other crafts in the event.

(c) Spectators or other vessels shall not anchor, block, loiter, or impede the movement of event participants or official patrol vessels in the regulated areas during the effective dates and times, or dates and times as modified through the Local Notice to Mariners, unless authorized by an official patrol vessel.

(d) The Patrol Commander may control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the lawful directions issued. Failure to comply with a lawful direction may result in expulsion from the area, citation for failure to comply, or both.

(e) The Patrol Commander may delay or terminate any event in this subpart at any time to assure safety. Such action may be justified as a result of weather, traffic density, spectator operation or participant behavior.

(f) For all swim events listed, vessels not associated with the event shall maintain a separation zone of 200 feet from participating swimmers.

(g) For all fireworks displays listed below, the regulated area is that area of navigable waters within a 350 yard radius of the launch platform or launch site for each fireworks display, unless modified in USCG District 1 Local Notice to Mariners at: *http://www.navcen.uscg.gov/.*

TABLE TO SEC. 165.171

| 6.0 | JUNE |
|---|---|
| 6.1 Windjammer Days Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Boothbay Harbor Region Chamber of Commerce.<br>• *Date:* One night event on Wednesday during the last week of June, as specified in the USCG District 1 Local Notice to Mariners at: *www.navcen.uscg.gov/?pageName=lnmDistrict&region=1*<br>• *Time:* 8:00 pm to 10:30 pm.<br>• *Location:* In the vicinity of McFarland Island, Boothbay Harbor, Maine in approximate position:<br>43° 50′38″ N, 069° 37′57″ W (NAD 83). |
| **7.0** | **JULY** |
| 7.1 Burlington Independence Day Fireworks | • *Event Type:* Firework Display.<br>• *Sponsor:* City of Burlington, Vermont.<br>• *Date:* July 3rd, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 9:00 pm to 11:00 pm.<br>• *Location:* From a barge in the vicinity of Burlington Harbor, Burlington, Vermont in approximate position:<br>44° 28′31″ N, 073° 13′31″ W (NAD 83). |
| 7.2 Camden 3rd of July Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Camden, Rockport, Lincolnville Chamber of Commerce.<br>• *Date:* July 3rd, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:00 pm to 10:00 pm.<br>• *Location:* In the vicinity of Hampton Beach, New Hampshire in approximate position:<br>44° 12′32″ N, 069° 02′58″ W (NAD 83). |
| 7.3 Bangor 4th of July Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Bangor 4th of July Fireworks.<br>• *Date:* July 4th, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:00 pm to 10:30 pm. |

TABLE TO SEC. 165.171—Continued

| 6.0 | JUNE |
|---|---|
| | • *Location:* In the vicinity of the Bangor Waterfront, Bangor, Maine in approximate position:<br>44° 47′27″ N, 068° 46′31″ W (NAD 83). |
| 7.4 Bar Harbor 4th of July Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Bar Harbor Chamber of Commerce.<br>• *Date:* July 4th, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:00 pm to 10:30 pm.<br>• *Location:* In the vicinity of Bar Harbor Town Pier, Bar Harbor, Maine in approximate position:<br>44° 23′31″ N, 068° 12′15″ W (NAD 83). |
| 7.5 Boothbay Harbor 4th of July Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Town of Boothbay Harbor.<br>• *Date:* July 4th, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:00 pm to 10:30 pm.<br>• *Location:* In the vicinity of McFarland Island, Boothbay Harbor, Maine in approximate position:<br>43° 50′38″ N, 069° 37′57″ W (NAD 83). |
| 7.6 Colchester 4th of July Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Town of Colchester, Recreation Department.<br>• *Date:* July 4th, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:00 pm to 10:00 pm.<br>• *Location:* In the vicinity of Bayside Beach and Mallets Bay in Colchester, Vermont at approximate position:<br>44° 32′44″ N, 073° 13′10″ W (NAD 83). |
| 7.7 Eastport 4th of July Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Eastport 4th of July Committee.<br>• *Date:* July 4th, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 9:00 pm to 9:30 pm.<br>• *Location:* From the Waterfront Public Pier in Eastport, Maine at approximate position:<br>44° 54′25″ N, 066° 58′55″ W (NAD 83). |
| 7.8 Hampton Beach 4th of July Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Hampton Beach Village District.<br>• *Date:* July 4th, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:30 pm to 11:00 pm.<br>• Location: In the vicinity of Hampton Beach, New Hampshire in approximate position:<br>42° 54′40″ N, 070° 48′31″ W (NAD 83). |
| 7.9 Jonesport 4th of July Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Jonesport 4th of July Committee.<br>• *Date:* July 4th, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 9:30 pm to 10:00 pm.<br>• Location: In the vicinity of Beals Island, Jonesport, Maine in approximate position:<br>44° 31′18″ N, 067° 36′43″ W (NAD 83). |
| 7.10 Main Street Heritage Days 4th of July Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Main Street Inc.<br>• *Date:* July 4th, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:00 pm to 10:30 pm.<br>• *Location:* In the vicinity of Reed and Reed Boat Yard, Woolwich, Maine in approximate position:<br>43° 54′56″ N, 069° 48′16″ W (NAD 83). |
| 7.11 Portland Harbor 4th of July Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Department of Parks and Recreation, Portland, Maine.<br>• *Date:* July 4th, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:30 pm to 10:30 pm.<br>• *Location:* In the vicinity of East End Beach, Portland, Maine in approximate position:<br>43° 40′16″ N, 070° 14′44″ W (NAD 83). |
| 7.12 St. Albans Day Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* St. Albans Area Chamber of Commerce.<br>• *Date:* July 4th, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 9:00 pm to 10:00 pm.<br>• *Location:* From the St. Albans Bay dock in St. Albans Bay, Vermont in the approximate position: |

TABLE TO SEC. 165.171—Continued

| 6.0 | JUNE |
|---|---|
| | 44° 48′25″ N, 073° 08′23″ W (NAD 83). |
| 7.13 Stonington 4th of July Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Deer Isle—Stonington Chamber of Commerce.<br>• *Date:* July 4th, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:00 pm to 10:30 pm.<br>• *Location:* In the vicinity of Two Bush Island, Stonington, Maine in approximate position:<br>44° 08′57″ N, 068° 39′54″ W (NAD 83). |
| 7.14 Urban/EPIC Triathlon | • *Event Type:* Swim Event.<br>• *Sponsor:* Tri-Maine Productions.<br>• *Date:* A one day event on Saturday during the second week of July, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 7:00 am to 11:00 am.<br>• *Location:* The regulated area includes all waters of Portland Harbor in the vicinity of East End Beach in Portland, Maine within the following points (NAD 83):<br>43° 40′00″ N 070° 14′20″ W.<br>43° 40′00″ N 070° 14′00″ W.<br>43° 40′15″ N 070° 14′29″ W.<br>43° 40′17″ N 070° 13′22″ W. |
| 7.15 Tri for a Cure Swim Clinics | • *Event Type:* Swim Event.<br>• *Sponsor:* Maine Cancer Foundation.<br>• *Date:* A two day event held on third Sunday and Thursday in July, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 12:30 pm to 7:30 pm.<br>• *Location:* The regulated area includes all waters of Portland Harbor, Maine in the vicinity of Spring Point Light within the following points (NAD 83):<br>43° 39′01″ N 070° 13′32″ W.<br>43° 39′07″ N 070° 13′29″ W.<br>43° 39′06″ N 070° 13′41″ W.<br>43° 39′01″ N 070° 13′36″ W. |
| 7.16 Richmond Days Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Town of Richmond, Maine.<br>• *Date:* A one day event on Saturday during the fourth weekend of July, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:00 pm to 10:00 pm.<br>• *Location:* From a barge in the vicinity of the inner harbor, Tenants Harbor, Maine in approximate position:<br>44° 08′42″ N, 068° 27′06″ W (NAD83). |
| 7.17 Colchester Triathlon | • *Event Type:* Swim Event.<br>• *Sponsor:* Colchester Parks and Recreation Department.<br>• *Date:* A one day event on Wednesday during the last week of July, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 7:00 am to 11:00 am.<br>• *Location:* The regulated area includes all waters of Malletts Bay on Lake Champlain, Vermont within the following points (NAD 83):<br>44° 32′18″ N 073° 12′35″ W.<br>44° 32′28″ N 073° 12′56″ W.<br>44° 32′57″ N 073° 12′38″ W. |
| 7.18 Peaks to Portland Swim | • *Event Type:* Swim Event.<br>• *Sponsor:* Cumberland County YMCA.<br>• *Date:* A one day event on Saturday during the last week of July, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 5:00 am to 1:00 pm.<br>• *Location:* The regulated area includes all waters of Portland Harbor between Peaks Island and East End Beach in Portland, Maine within the following points (NAD 83):<br>43° 39′20″ N 070° 11′58″ W.<br>43° 39′45″ N 070° 13′19″ W.<br>43° 40′11″ N 070° 14′13″ W.<br>43° 40′08″ N 070° 14′29″ W.<br>43° 40′00″ N 070° 14′23″ W.<br>43° 39′34″ N 070° 13′31″ W.<br>43° 39′13″ N 070° 11′59″ W. |
| 8.0 | AUGUST |
| 8.1 Sprucewold Cabbage Island Swim | • *Event Type:* Swim Event. |

TABLE TO SEC. 165.171—Continued

| 6.0 | JUNE |
|---|---|
| | • *Sponsor:* Sprucewold Association.<br>• *Date:* A one day event on Saturday during the first week of August, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 1:00 pm to 6:00 pm.<br>• *Location:* The regulated area includes all waters of Linekin Bay between Cabbage Island and Sprucewold Beach in Boothbay Harbor, Maine within the following points (NAD 83):<br>43° 50′37″ N 069° 36′23″ W.<br>43° 50′37″ N 069° 36′59″ W.<br>43° 50′16″ N 069° 36′46″ W.<br>43° 50′22″ N 069° 36′21″ W. |
| 8.2 Westerlund's Landing Party Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Portside Marina.<br>• *Date:* A one day event on Saturday during the first weekend of August, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:00 pm to 10:30 pm.<br>• *Location:* In the vicinity of Westerlund's Landing in South Gardiner, Maine in approximate position:<br>44° 10′19″ N, 069° 45′24″ W (NAD 83). |
| 8.3 Y–Tri Triathlon | • *Event Type:* Swim Event.<br>• *Sponsor:* Plattsburgh YMCA.<br>• *Date:* A one day event on Saturday during the first week of August, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 9:00 am to 10:00 am.<br>• *Location:* The regulated area includes all waters of Treadwell Bay on Lake Champlain in the vicinity of Point Au Roche State Park, Plattsburgh, New York within the following points (NAD 83):<br>44° 46′30″ N 073° 23′26″ W.<br>44° 46′17″ N 073° 23′26″ W.<br>44° 46′17″ N 073° 23′46″ W.<br>44° 46′29″ N 073° 23′46″ W. |
| 8.4 Greater Burlington YMCA Lake Swim | • *Event Type:* Swim Event.<br>• *Sponsor:* Greater Burlington YMCA.<br>• *Date:* A one day event on Saturday during the second week of August, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:00 am to 6:00 pm.<br>• *Location:* The regulated area includes all waters in Lake Champlain in the vicinity of North Hero Island within the following points (NAD 83):<br>44° 46′55″ N 073° 22′14″ W.<br>44° 47′08″ N 073° 19′05″ W.<br>44° 46′48″ N 073° 17′13″ W.<br>44° 46′10″ N 073° 16′39″ W.<br>44° 41′08″ N 073° 20′58″ W.<br>44° 41′36″ N 073° 23′01″ W. |
| 8.5 Tri for a Cure Triathlon | • *Event Type:* Swim Event.<br>• *Sponsor:* Maine Cancer Foundation.<br>• *Date:* A one day event on the second Sunday in August, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 12:30 pm to 4:30 pm.<br>• *Location:* The regulated area includes all waters of Portland Harbor, Maine in the vicinity of Spring Point Light within the following points (NAD 83):<br>43° 39′01″ N 070° 13′32″ W.<br>43° 39′07″ N 070° 13′29″ W.<br>43° 39′06″ N 070° 13′41″ W.<br>43° 39′01″ N 070° 13′36″ W. |
| 8.6 Tri for a Cure Swim Clinics | • *Event Type:* Swim Event.<br>• *Sponsor:* Maine Cancer Foundation.<br>• *Date:* A two day event held on the first and second Saturday in August, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:30 am to 11:30 am.<br>• *Location:* The regulated area includes all waters of Portland Harbor, Maine in the vicinity of Spring Point Light within the following points (NAD 83):<br>43° 39′01″ N 070° 13′32″ W.<br>43° 39′07″ N 070° 13′29″ W.<br>43° 39′06″ N 070° 13′41″ W.<br>43° 39′01″ N 070° 13′36″ W. |

TABLE TO SEC. 165.171—Continued

| 6.0 | JUNE |
|---|---|
| 8.7 Rockland Breakwater Swim | • *Event Type:* Swim Event.<br>• *Sponsor:* Pen-Bay Masters.<br>• *Date:* A one day event on Saturday during the fourth week of August, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 7:30 am to 1:30 pm.<br>• *Location:* The regulated area includes all waters of Rockland Harbor, Maine in the vicinity of Jameson Point within the following points (NAD 83):<br>44° 06′16″ N 069° 04′39″ W.<br>44° 06′13″ N 069° 04′36″ W.<br>44° 06′12″ N 069° 04′43″ W.<br>44° 06′17″ N 069° 04′44″ W.<br>44° 06′18″ N 069° 04′40″ W. |
| **9.0** | **SEPTEMBER** |
| 9.1 Windjammer Weekend Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Town of Camden, Maine.<br>• *Date:* A one day event on Friday during the first weekend of September, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:00 pm to 9:30 pm.<br>• *Location:* From a barge in the vicinity of Northeast Point, Camden Harbor, Maine in approximate position:<br>44° 12′10″ N, 069° 03′11″ W (NAD 83). |
| 9.2 The Lobsterman Triathlon | • *Event Type:* Swim Event.<br>• *Sponsor:* Tri-Maine Productions.<br>• *Date:* A one day swim event on Saturday during the second weekend of September, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:00 am to 11:00 am.<br>• Location: The regulated area includes all waters in the vicinity of Winslow Park in South Freeport, Maine within the following points (NAD 83):<br>43° 47′59″ N 070° 06′56″ W.<br>43° 47′44″ N 070° 06′56″ W.<br>43° 47′44″ N 070° 07′27″ W.<br>43° 47′57″ N 070° 07′27″ W. |
| 9.3 Burlington Triathlon | • *Event Type:* Swim Event.<br>• *Sponsor:* Race Vermont.<br>• *Date:* A one day swim event on Sunday during the second weekend of September, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 7:00 am to 10:00 am.<br>• *Location:* The regulated area includes all waters in the vicinity of North Beach, Burlington, Vermont within the following points (NAD 83):<br>44° 29′31″ N 073° 14′22″ W.<br>44° 29′12″ N 073° 14′14″ W.<br>44° 29′17″ N 073° 14′34″ W. |
| 9.4 Eliot Festival Day Fireworks | • *Event Type:* Fireworks Display.<br>• *Sponsor:* Eliot Festival Day Committee.<br>• *Date:* A one day event on Saturday during the fourth weekend of September, as specified in the USCG District 1 Local Notice to Mariners.<br>• *Time:* 8:00 pm to 10:30 pm.<br>• *Location:* In the vicinity of Eliot Town Boat Launch, Eliot, Maine in approximate position:<br>43° 08′56″ N, 070° 49′52″ W (NAD 83). |

Dated: March 10, 2011.

**J.B. McPherson,**

*Captain, U.S. Coast Guard, Captain of the Port Sector Northern New England.*

[FR Doc. 2011–6783 Filed 3–29–11; 8:45 am]

BILLING CODE 9110–04–P

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 117**

**[Docket No. USCG–2011–0163]**

## Drawbridge Operation Regulation; Mermentau River, Grand Chenier, LA

**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 SR 82 swing span bridge across the Mermentau River, mile 7.1, at Grand Chenier, Cameron Parish, Louisiana. This deviation is necessary for physical and mechanical repairs pertaining to the bridge's main span and components.

This deviation allows the bridge to remain closed to navigation for approximately 5 consecutive days, sometime within a nineteen day period.

**DATES:** This deviation is effective from 6 a.m. on April 25, 2011 through 5 p.m. on May 13, 2011.

**ADDRESSES:** Documents mentioned in this preamble as being available in the docket are part of docket USCG–2010–0203 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0203 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 Jim Wetherington, Bridge Administration Branch, Coast Guard; telephone 504–671–2128, e-mail *james.r.wetherington@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 Louisiana Department of Transportation and Development has requested a temporary deviation from the operating schedule of the swing span bridge across the Mermentau River at mile 7.1 in Grand Chenier, Cameron Parish, Louisiana. The closure is necessary in order to perform physical and mechanical repairs pertaining to the bridge's main span and components. This maintenance is essential for the continued operation of the bridge.

The operating schedule for the bridge is in 33 CFR 117.480 and states the bridge opens on signal; except that, from 6 p.m. to 6 a.m. the draw shall open on signal if at least 4 hours notice is given, for the passage of vessels. This deviation allows the bridge to remain closed to navigation for approximately 5 consecutive days, occurring sometime between April 25, 2011 and May 13, 2011. Exact times and dates for the closures will be published in the Local Notice to Mariners and broadcast via the Coast Guard Broad Notice to Mariners system.

The vertical clearance of the swing span bridge in the closed-to-navigation position is 13.15 feet above Mean High Water, elevation 3.1 feet Mean Sea Level. Vessels are able to transit under the bridge during operations. There is an alternate navigation route via Grand Lake for vessels unable to pass under the bridge. Navigation on the waterway consists of tugs with tows, fishing vessels and recreational craft. Due to prior experience and coordination with waterway users, it has been determined that the closure will not have a significant effect on navigation.

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: March 15, 2011.

**David M. Frank,**

*Bridge Administrator.*

[FR Doc. 2011–7416 Filed 3–29–11; 8:45 am]

**BILLING CODE 9110–04–P**

---

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 117

**[Docket No. USCG–2010–1055]**

**RIN 1625–AA09**

## Drawbridge Operation Regulations; Rainy River, Ranier, MN

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is establishing a drawbridge regulation for the Canadian National Railway Bridge across the Rainy River at Mile 85.0 at Rainer, Minnesota. This rule addresses the request by the bridge owner to remotely operate the drawbridge and establishes seasonal dates of operation.

**DATES:** This rule is effective: April 29, 2011.

**DATES:** Comments and related materials received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2010–1055 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–1055 in the "Keyword" box, and then clicking "Search". This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or e-mail Mr. Lee Soule, Bridge Management Specialist, Ninth Coast Guard District; telephone (216) 902–6085, e-mail *lee.d.soule@uscg.mil.* If you have questions on viewing material in the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

### Regulatory Information

On December 27, 2010, we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulation; Rainey River, Rainer, MN. in the **Federal Register** (75 FR 32381). We received 7 positive comments and 1 negative comment. No public meeting was requested, and none was held.

### Basis and Purpose

Currently, there is no drawbridge regulation for this drawbridge or waterway. The drawbridge is required to open on signal at all times in accordance with the general opening requirements at 33 CFR 117.5. Rainy River and Rainy Lake serve as the border between the United States of America and Canada. This bridge is a single leaf bascule type railroad bridge that provides a horizontal clearance of 125 feet. The water level on Rainy Lake and under the bridge is controlled by a hydro-electric dam facility at International Falls, Minnesota, thus charted datum is based on the water level surface of Rainy Lake when the gauge at Fort Frances, Canada reads 1107.0 feet resulting in a variable vertical clearance of 6 to 10 feet in the closed position. Pursuant to 33 CFR 117.8, numerous local entities, including; local governments, federal entities, and private citizens requested improvement to the service provided at the drawbridge to allow greater reliability for bridge openings for vessel traffic. Vessel traffic on the waterway consists of federal, state, and local public vessels, small commercial vessels, and both power and sail recreational vessels. The railroad bridge carries significant train traffic across the international border. Rainer is a customs port-of-entry, with particular requirements for trains and vessels.

The drawbridge was remotely operated for several years without explicit approval by Commander, Ninth Coast Guard District. The bridge owner, Canadian National Railway (CN RR), requested approval to continue using remote operation equipment and operate the drawbridge with remotely located drawtenders in accordance with 33 CFR 117.42. In the last year, the Coast Guard was informed the drawbridge is routinely unresponsive to signals and communications from vessels for bridge openings. In addition, the presence of government and public

vessels operating between Rainy River and Rainy Lake has magnified the need for the drawbridge to be responsive and reliable for all vessel traffic.

This regulation does not authorize remote operations and requires the bridge owner to provide the necessary drawtender(s) for the safe and prompt opening of the drawbridge each year between May 1 and October 15, 24 hours a day, 7 days a week. From October 16 to April 30 each year the bridge would open for vessels if 12-hours advance notice is provided. Additionally, this regulation requires the bridge owner to post and maintain a clearance gauge to indicate to vessels the water levels and available clearance while the bridge is in the closed-to-navigation position.

**Discussion of Comments and Changes**

We received eight (8) comments in response to the NPRM. Seven (7) comments generally supported the proposed regulation, as written, including letters of support from the City of International Falls, the City of Rainer, and Koochiching County Board of Commissioners. Among the supporting comments, one commenter requested the Coast Guard require the bridge to be maintained in the open-to-navigation position, require radiotelephone operation, require additional visual signals to advise when the drawbridge would open for vessels, and to specify a maximum amount of time that the drawbridge could remain closed to vessel traffic. The Coast Guard did not include a specific time requirement in the NPRM due to the wide variation in times for train and border processes. The same time could not be applied for every instance. The Coast Guard passed the commenter's requests to leave the bridge in the open-to-navigation position when trains are not crossing, install and operate radiotelephone, and provide additional visual signals to improve communications with vessels and access through the crossing to the bridge owner. The Coast Guard may require radiotelephone installation and operation in the future.

One negative comment was submitted by the bridge owner, Canadian National Railway (CN RR). The comment from CN RR questions the justification to require drawtenders due to infrequent bridge openings for vessels in recent years. The commenter also requests that the Coast Guard alter the proposed dates and times that drawtenders would be required to be at the drawbridge. CN RR states that no bridge opening requests were received until June 20th last year, and that between Memorial Day and Labor Day last year the bridge was required to be opened a total of 31 times, resulting in an average of 2.2 bridge openings per week. Based on the information provided by other comments received in response to the NPRM the Coast Guard is concerned about the drawbridge being responsive to requests for bridge openings and not being operated in accordance with federal drawbridge regulations. No other comments were received in response to the NPRM concerning the proposed dates and times that the bridge must open on signal.

We made two modifications to the rule from the NPRM that were not based on comments in response to the NPRM. The name "Rainey" will be changed to "Rainy" to conform to the spelling on U.S. nautical charts and publications. An editorial change was made to the language describing the requirement for clearance gauges, citing the applicable Code of Federal Regulations.

This rule is expected to provide for the reasonable balance of all modes of transportation and effectively accomplish the requested goal of improving bridge openings and communications between vessel operators and the CN RR drawtender(s).

**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. The Coast Guard believes that the drawbridge has not been operated in accordance with the drawbridge regulations in 33 CFR part 117. This rule is expected to bring the drawbridge into full compliance with the federal drawbridge regulations.

**Regulatory Planning and Review**

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, 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.

**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 would not have a significant economic impact on a substantial number of small entities. This rule will provide for on demand drawbridge openings from May 1 to October 16, thereby improving access for any small entities during warmer weather, when most transits typically occur, and provide for openings with 12 hour advance notice during the rest of the year.

**Assistance for Small Entities**

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

**Collection of Information**

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

**Protection of Children**

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

**Indian Tribal Governments**

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

**Energy Effects**

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

**Technical Standards**

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

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

**Environment**

We have analyzed this rule under Department of Homeland Security Management Directive 023–01, and Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that 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. Add § 117.664 to read as follows:

**§ 117.664 Rainy River, Rainy Lake and their tributaries.**

The draw of the Canadian National Bridge, mile 85.0, at Rainer, shall open on signal; except that, from October 16 to April 30, the draw shall open on signal if at least 12-hours advance notice is provided. The commercial phone number to provide advance notice shall be posted on the bridge so that it is plainly visible to vessel operators approaching the up or downstream side of the bridge. The owners of the bridge shall maintain clearance gauges in accordance with 33 CFR 118.160 of this chapter.

Dated: March 21, 2011.

**M.N. Parks,**

*Rear Admiral, U.S. Coast Guard, Commander, Ninth Coast Guard District.*

[FR Doc. 2011–7466 Filed 3–29–11; 8:45 am]

BILLING CODE 9110–04–P

## DEPARTMENT OF VETERANS AFFAIRS

## 38 CFR Parts 19 and 20

**RIN 2900–AN34**

## Board of Veterans' Appeals: Remand or Referral for Further Action; Notification of Evidence Secured by the Board and Opportunity for Response

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is amending the Appeals Regulations of the Board of Veterans' Appeals (Board) to articulate the Board's practice of referring unadjudicated claims to the Agency of Original Jurisdiction (AOJ) for appropriate action, and to describe when it is appropriate for the Board to remand a claim to the AOJ for the limited purpose of issuing a Statement of the Case (SOC). We are also amending the Board's Rules of Practice to outline the procedures the Board must follow when supplementing the record with a recognized medical treatise, and to remove the notice procedures the Board must currently follow when considering law not considered by the AOJ. The purpose of these amendments is to codify existing practices derived from caselaw, enhance efficiency, and provide guidance and clarification.

**DATES:** *Effective Date:* The final rule is effective April 29, 2011.

**FOR FURTHER INFORMATION CONTACT:** Laura H. Eskenazi, Principal Deputy Vice Chairman, Board of Veterans' Appeals (012), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–8078. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** On December 18, 2009, VA published in the **Federal Register** (74 FR 67149) a Notice of Proposed Rulemaking (NPRM) that proposed to amend 38 CFR 19.9 to articulate the Board's practice of referring unadjudicated claims to the AOJ for appropriate action and to define when the Board can remand a claim to the AOJ for the limited purpose of issuing an SOC. The NPRM also proposed to amend 38 CFR 20.903 to codify the notice procedures the Board must follow when supplementing the record with a recognized medical treatise, and to eliminate the notice procedures the Board must currently follow when considering law not previously considered by the AOJ. Interested persons were invited to

submit written comments on or before February 16, 2010.

We received two comments on the proposed rule. One commenter was fully supportive of all aspects of the proposal. The second commenter expressed concerns with various parts of the NPRM, the specifics of which will be discussed in greater detail below. Based on the rationale set forth in this document and in the NPRM, VA adopts the proposed rule as final with one minor clarification.

**A. Referral of Unadjudicated Claims**

We proposed to amend 38 CFR 19.9(b) to articulate the Board's practice of referring to the AOJ for appropriate action unadjudicated claims that have been reasonably raised by the record, except for claims over which the Board has original jurisdiction. One commenter voiced support for the referral practice in general, but expressed concern that the Board will make "many unnecessary, unjustified and time-consuming referrals" unless Board attorneys and Veterans Law Judges are provided with written guidance and training on what constitutes a claim and when it is appropriate to refer a claim to the AOJ. The commenter specifically suggested that the Board should provide training on the difference between separate claims and separate theories of entitlement.

As explained in the NPRM, the purpose of this rulemaking is to provide guidance as to what action the Board must take when it discovers an unadjudicated claim in the record. Questions regarding the Board's training practices and when filings must be interpreted as raising a new claim are outside the scope of this rulemaking.

We agree with the commenter that the training of Board employees is extremely important. The Board has an established training office that organizes regular training sessions for its employees on a wide range of topics in the constantly-evolving field of veterans' benefits law. The Board fully intends to continue training its employees on all aspects of veterans' law, including matters addressed in this rulemaking. We also emphasize that the Board has referred unadjudicated claims for many years, and implementation of this final rule will not result in any deviation from current Board practice. The final rule we are adopting by this rulemaking merely codifies the Board's referral practice in regulation. We therefore make no changes to the proposed rule based on this comment.

**B. Remand for Issuance of an SOC**

Proposed 38 CFR 19.9(c) stated that in situations where a claimant timely filed a Notice of Disagreement (NOD) with a determination of the AOJ, but the record does not reflect that the AOJ subsequently granted the claim in full or furnished the claimant with an SOC, the Board shall remand the claim to the AOJ with instructions to prepare and issue an SOC. *See generally Manlincon* v. *West,* 12 Vet. App. 238 (1999). While agreeing with the substance of the proposed regulatory amendment, one commenter expressed concern that "the statement at 74 FR 67151 [of the Preamble] that the claimant must file *another* timely Substantive Appeal to perfect the appeal is contrary to law" (emphasis added). The commenter cited to *Hamilton* v. *Brown,* 39 F.3d 1574, 1585 (Fed. Cir. 1994), as support for the proposition that a claim that has been remanded to the AOJ will be "automatically returned to the Board for further processing if full relief is not awarded by the [AOJ] on remand." *See Hamilton,* 39 F.3d at 1584–85 (citing 38 CFR 19.182 (1988) (now codified in 38 CFR 19.9, 19.31, and 19.38)).

We respectfully disagree with the commenter as the Preamble does not state that a claimant must file *another* Substantive Appeal after issuance of an SOC. The portion of the Preamble referenced by the commenter states the following: "The appeal initiated by the filing of the NOD will be subsequently returned to the Board only if, after the AOJ issues the SOC, the appellant files a timely Substantive Appeal that perfects the appeal to the Board." NPRM, 74 FR at 67151. This sentence explains that the situation addressed in proposed § 19.9(c) is one where a claimant has not had an opportunity to file a Substantive Appeal on the issue being remanded because the AOJ has not yet issued an SOC. Therefore, the commenter's characterization of proposed § 19.9(c) as requiring the filing of a *second* Substantive Appeal is simply incorrect. Rather, the law is well settled that an appeal to the Board consists of a timely filed NOD in writing and, after an SOC has been furnished, the submission of a timely filed Substantive Appeal. 38 U.S.C. 7105(a); 38 CFR 20.200. Accordingly, a matter that is remanded pursuant to proposed § 19.9(c) for issuance of an SOC may be returned to the Board only if a timely Substantive Appeal is filed, following the issuance of the SOC, for purposes of perfecting the appeal of the matter to the Board.

The commenter's reliance on *Hamilton* is also misplaced. Unlike proposed § 19.9(c), *Hamilton* did not address remand by the Board for the limited purpose of issuing an SOC. *Hamilton* instead addressed a remand for evidentiary development in an appeal that had already been perfected by the timely filing of a Substantive Appeal. *Hamilton,* 39 F.3d at 1577–78. In *Hamilton,* the United States Court of Appeals for the Federal Circuit (Federal Circuit) specifically discussed whether a statement filed in response to a Supplemental SOC (SSOC) could be considered an NOD. *Hamilton,* 39 F.3d at 1584–85. The Federal Circuit concluded that, since an SSOC was not an initial determination made by the AOJ, such a statement could not be considered an NOD, even if it raised new issues in connection with the claim. *Id.* at 1584. The Federal Circuit did not discuss whether a claimant needed to submit multiple Substantive Appeals; it addressed whether multiple NODs could be filed in one claim. Thus, the situation in *Hamilton* was markedly different from that addressed by proposed § 19.9(c), which concerns the Board's remand of a claim to the AOJ for issuance of an SOC so an appellant can have an opportunity to file a *single* Substantive Appeal necessary to complete the appeal to the Board. We accordingly make no change to the proposed rule based on this comment.

We are, however, making one minor revision to proposed § 19.9(c). In the NPRM, we proposed the following rule language: "In cases before the Board in which a claimant has timely filed a Notice of Disagreement with a determination of the agency of original jurisdiction on a claim, but the record does not reflect that the agency of original jurisdiction subsequently granted the claim in full or furnished the claimant with a Statement of the Case, the Board shall remand the claim to the agency of original jurisdiction with instructions to prepare and issue a Statement of the Case * * *." 74 FR at 67154. Upon further consideration of this language, we have determined that the use of the disjunctive "or" between the phrase "but the record does not reflect that the [AOJ] subsequently granted the claim in full" and the phrase "furnished the claimant with a[n SOC]" could cause confusion as to the possible situations under which the Board must remand a case pursuant to § 19.9(c). Taken literally, the use of the disjunctive "or" could lead to the misinterpretation that the Board is required to remand a case in situations where the AOJ has *not* granted the claim in full following the filing of an NOD, but where an SOC *has already been*

issued. This outcome was not our intent in issuing proposed § 19.9(c). For obvious reasons, if an SOC has already been issued on a claim subsequent to the NOD, the Board would not be required to remand for issuance of *another* SOC. To avoid this incorrect construction, we have slightly reworded § 19.9(c) and replaced the disjunctive "or" with the conjunctive "and" to clarify that the Board will only be required to remand a claim to the AOJ for issuance of an SOC following the timely filing of an NOD when: (1) the AOJ has not subsequently granted the claim in full, *and* (2) the AOJ has not furnished the claimant with an SOC. We believe this minor revision more clearly describes when the Board will remand for issuance of an SOC pursuant to § 19.9(c).

**C. Thurber Procedures**

We proposed to amend 38 CFR 20.903(b) to clarify the notice procedures the Board must follow when it supplements the record with a recognized medical treatise. One commenter objected to the proposed language which stated that, as part of the notice procedures, the Board will inform appellants that it "will consider such recognized medical treatise in the adjudication of the appeal." The commenter believed that this language does not provide a claimant and his or her representative with the requisite notice regarding the reliance proposed to be placed on the treatise, and thus, does not comply with the *notice* requirements outlined in *Thurber* v. *Brown,* 5 Vet. App. 119 (1993).

We respectfully disagree with this comment. As explained in the NPRM, we chose not to use the term "reliance" in § 20.903(b) because such language could be misconstrued to suggest that the Board has already reached a preliminary decision on a claim. NPRM, 74 FR at 67152. We do not interpret *Thurber* as requiring the Board to pre-adjudicate a claim before following the requisite notice procedures. *Id.* This interpretation is in accordance with other areas of VA adjudicatory procedure that do not require the Secretary to rule on the probative value of evidence prior to reaching a decision on the merits. For example, the United States Court of Appeals for Veterans Claims (Veterans Court) has interpreted VA notice requirements under 38 U.S.C. 5103(a) as not imposing upon the Secretary a "legal obligation to rule on the probative value of information and evidence presented in connection with a claim prior to rendering a decision on the merits of the claim itself." *Locklear* v. *Nicholson,* 20 Vet. App. 410, 415–16 (2006) (noting that the VA adjudication process is "longitudinal and sequential" and that the gathering of information and evidence is meant to precede VA analysis and adjudication). In addition, the Federal Circuit has held that the notice letter provided under section 5103(a) does not need to "describe the VA's evaluation of the veteran's particular claim." *Wilson* v. *Mansfield,* 506 F.3d 1055, 1062 (Fed. Cir. 2007).

Moreover, § 20.903(a) requires the Board to provide an appellant with a copy of a medical opinion obtained pursuant to § 20.901 and an opportunity to respond to the opinion. This provision is substantially similar to proposed § 20.903(b) in that it provides a claimant with notice and an opportunity to respond, but does not require the Board to pre-adjudicate an appellant's claim when providing this notice. In *Wilson,* the Federal Circuit noted that when § 20.903(a) was promulgated the Secretary rejected a proposal to provide the claimant with "a form of predecisional adjudication." *Wilson,* 506 F.3d at 1061 n.3 (citing 67 FR 3099, 3100 (Jan. 23, 2002)). The Federal Circuit explained that notice under § 20.903(a) is not meant to inform an appellant of how the Board intends to weigh the evidence or analyze the claim. *Id.* The same logic applies to proposed § 20.903(b), as it is also not meant to provide an appellant with a pre-adjudication of the merits of a claim. The purpose of the notice procedures outlined in *Thurber* is to elicit additional evidence and argument that will more fully inform the Board's eventual decision. We believe the language of proposed § 20.903(b) serves this purpose, while at the same time avoiding any implication that the Board has reached a preliminary decision on the appeal. Therefore, we make no changes to the proposed rule based on this comment.

**D. Board Consideration of Law Not Already Considered by the AOJ**

The NPRM proposed to completely remove the provisions of current 38 CFR 20.903(b) from the Board's Rules of Practice. Current § 20.903(b) requires that if the Board intends to consider law not already considered by the AOJ, and such consideration could result in denial of the appeal, the Board must notify the appellant and his or her representative of its intent to do so, provide a copy or summary of the law to be considered, and allow 60 days for a response. One commenter stated a belief that it is "ill conceived" to remove this provision. While the commenter acknowledged that the Board as an appellate body can consider law not previously considered by the AOJ, the commenter believed that the same due process considerations underlying the *Thurber* notice requirements apply.

We reject this comment for the following reasons. The situation set out in *Thurber* is fundamentally different than when VA relies on a provision of law not previously considered by the AOJ. *Thurber* specifically addresses whether an appellant is entitled to receive notice and an opportunity to respond before the Board considers a medical treatise in making a decision. *Thurber,* 5 Vet. App. at 120. The appellant would not be aware of the content of a medical treatise relied upon unless the Board provided the appellant with notice of its provisions. In contrast, statutes, regulations, and case law are all matters of public record. The United States Supreme Court has held that everyone dealing with the Government is charged with knowledge of federal statutes and lawfully promulgated agency regulations. *Fed. Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380, 384–85 (1947); *see Morris* v. *Derwinski,* 1 Vet. App. 260, 265 (1991) (applying *Fed. Crop Ins. Corp.* in the context of VA regulations); *Velez* v. *West,* 11 Vet. App. 148, 156 (1998) (same); *see also ATC Petroleum, Inc.* v. *Sanders,* 860 F.2d 1104, 1111–12 (DC Cir. 1988) (noting that "parties dealing with the government are expected to know the law" and that "there is no grave injustice in holding parties to a reasonable knowledge of the law" (internal quotation marks omitted)). Information about governing law, including relevant case law, is available to the public without the Board providing the notice required by current § 20.903(b).

As explained in the NPRM, in *Disabled American Veterans* v. *Secretary of Veterans Affairs,* 327 F.3d 1339 (Fed. Cir. 2003), the Federal Circuit considered a challenge to the validity of § 19.9(b)(2), which permits the Board to consider law not considered by the AOJ in the first instance. *Id.* at 1349. The Federal Circuit deferred to VA's interpretation that the "Board's status as an appellate body does not bar it from considering law not considered by the AOJ," and held that in considering "whether the proper law was applied by the AOJ in a particular claim, the Board inherently provides legal questions 'one review on appeal to the Secretary' as required by [38 U.S.C.] 7104(a)." *Id.* The Federal Circuit's holding was not predicated on the Board's adherence to the notice provisions outlined in current § 20.903(b). *Id.*

Several statutory provisions also contemplate the Board's consideration

of all applicable law, whether or not such law has been considered by the AOJ and regardless of whether the notice provisions of current § 20.903(b) have been satisfied. Section 7104(a) requires that "[d]ecisions of the Board shall be based * * * upon consideration of all * * * applicable provisions of law and regulation." Section 7104(c) provides that the "Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department." Moreover, 38 U.S.C. 7104(d)(1) requires that each Board decision include "a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on *all material issues of fact and law* presented on the record" (emphasis added). None of these provisions is conditioned on the Board's following notice procedures similar to those currently outlined in 38 CFR 20.903(b).

Removing current § 20.903(b) is consistent with the jurisprudence of both the Veterans Court and the Federal Circuit, and more accurately depicts the Board's statutory obligation to consider all applicable provisions of law and regulation. 38 U.S.C. 7104. We therefore make no changes to the proposed rule based on the commenter's suggestion.

**Paperwork Reduction Act**

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

**Regulatory Flexibility Act**

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. These amendments would not directly affect any small entities. Only VA beneficiaries and their survivors could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

**Executive Order 12866—Regulatory Planning and Review**

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Order classifies a rule as a significant regulatory action requiring review by the Office of Management and Budget if it meets any one of a number of specified conditions, including: having an annual effect on the economy of $100 million or more, creating a serious inconsistency or interfering with an action of another agency, materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues. VA has examined the economic, legal, and policy implications of this final rule and has concluded that it is not a significant regulatory action under Executive Order 12866 because it primarily codifies longstanding VA practice and already existing law, does not raise any novel legal or policy issues, and will have little to no effect on the economy.

**Unfunded Mandates**

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any given year. This rule would have no such effect on State, local, and tribal governments, or on the private sector.

**Catalog of Federal Domestic Assistance Numbers and Titles**

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.100, Automobiles and Adaptive Equipment for Certain Disabled Veterans and Members of the Armed Forces; 64.101, Burial Expenses Allowance for Veterans; 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.103, Life Insurance for Veterans; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.106, Specially Adapted Housing for Disabled Veterans; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.114, Veterans Housing-Guaranteed and Insured Loans; 64.115, Veterans Information and Assistance; 64.116,Vocational Rehabilitation for Disabled Veterans; 64.117, Survivors and Dependents Educational Assistance; 64.118, Veterans Housing-Direct Loans for Certain Disabled Veterans; 64.119, Veterans Housing-Manufactured Home Loans; 64.120, Post-Vietnam Era Veterans' Educational Assistance; 64.124, All-Volunteer Force Educational Assistance; 64.125, Vocational and Educational Counseling for Servicemembers and Veterans; 64.126, Native American Veteran Direct Loan Program; 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida; and 64.128, Vocational Training and Rehabilitation for Vietnam Veterans' Children with Spina Bifida or Other Covered Birth Defects.

**Signing Authority**

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, approved this document on March 18, 2011 for publication.

**List of Subjects in 38 CFR Parts 19 and 20**

Administrative practice and procedure, Claims, Veterans.

Dated: March 24, 2011.

**Robert C. McFetridge,**

*Director, Regulations Policy and Management, Department of Veterans Affairs.*

For the reasons set forth in the Preamble to this final rule, VA amends 38 CFR parts 19 and 20 as follows:

## PART 19—BOARD OF VETERANS' APPEALS: APPEALS REGULATIONS

■ 1. The authority citation for part 19 continues to read as follows:

**Authority:** 38 U.S.C. 501(a), unless otherwise noted.

### Subpart A—Operation of the Board of Veterans' Appeals

■ 2. Amend § 19.9 by:
■ a. Revising the section heading and paragraph (a) heading.
■ b. Revising paragraphs (b) and (c).
■ c. Adding paragraph (d).
■ d. Revising the authority citation at the end of the section.

The revisions and addition read as follows:

**§ 19.9 Remand or referral for further action.**

(a) *Remand* . * * *

(b) *Referral.* The Board shall refer to the agency of original jurisdiction for appropriate consideration and handling in the first instance all claims reasonably raised by the record that have not been initially adjudicated by the agency of original jurisdiction,

except for claims over which the Board has original jurisdiction.

(c) *Remand for a Statement of the Case.* In cases before the Board in which a claimant has timely filed a Notice of Disagreement with a determination of the agency of original jurisdiction on a claim, but the record reflects that the agency of original jurisdiction has not subsequently granted the claim in full and has not furnished the claimant with a Statement of the Case, the Board shall remand the claim to the agency of original jurisdiction with instructions to prepare and issue a Statement of the Case in accordance with the provisions of subpart B of this part. A remand for a Statement of the Case is not required if the claimant, consistent with the withdrawal requirements of § 20.204 of this chapter, withdraws the Notice of Disagreement.

(d) *Exceptions.* A remand or referral to the agency of original jurisdiction is not necessary for any of the following purposes:

(1) Clarifying a procedural matter before the Board, including the appellant's choice of representative before the Board, the issues on appeal, or requests for a hearing before the Board;

(2) Considering law not already considered by the agency of original jurisdiction, including, but not limited to, statutes, regulations, and court decisions;

(3) Reviewing additional evidence received by the Board, if, pursuant to § 20.1304(c) of this chapter, the appellant or the appellant's representative waives the right to initial consideration by the agency of original jurisdiction, or if the Board determines that the benefit or benefits to which the evidence relates may be fully allowed on appeal;

(4) Requesting an opinion under § 20.901 of this chapter;

(5) Supplementing the record with a recognized medical treatise; or

(6) Considering a matter over which the Board has original jurisdiction.

(Authority: 38 U.S.C. 7102, 7103(c), 7104(a), 7105).

## PART 20—BOARD OF VETERANS' APPEALS: RULES OF PRACTICE

■ 3. The authority citation for part 20 continues to read as follows:

**Authority:** 38 U.S.C. 501(a) and as noted in specific sections.

### Subpart J—Action by the Board

■ 4. Amend § 20.903 by:

■ a. Revising the section heading.

■ b. Revising paragraph (b).

The revisions read as follows:

**§ 20.903 Rule 903. Notification of evidence to be considered by the Board and opportunity for response.**

* * * * *

(b) *If the Board supplements the record with a recognized medical treatise*—(1) *General.* If, pursuant to § 19.9(d)(5) of this chapter, the Board supplements the record with a recognized medical treatise, the Board will notify the appellant and his or her representative, if any, that the Board will consider such recognized medical treatise in the adjudication of the appeal. The notice from the Board will contain a copy of the relevant portions of the recognized medical treatise. The appellant will be given 60 days after the date of the notice described in this section to file a response, which may include the submission of relevant evidence or argument. The date the Board gives the notice will be presumed to be the same as the date of the notice letter for purposes of determining whether a response was timely filed.

(2) *Exception.* The notice described in paragraph (b)(1) of this section is not required if the Board uses a recognized medical treatise or medical dictionary for the limited purpose of defining a medical term and that definition is not material to the Board's disposition of the appeal.

■ 5. In § 20.1304, revise paragraph (b)(2) to read as follows:

**§ 20.1304 Rule 1304. Request for change in representation, request for personal hearing, or submission of additional evidence following certification of an appeal to the Board of Veterans' Appeals.**

* * * * *

(b) * * *

(2) *Exception.* The motion described in paragraph (b)(1) of this section is not required to submit evidence in response to a notice described in § 20.903 of this chapter.

* * * * *

[FR Doc. 2011–7395 Filed 3–29–11; 8:45 am]

BILLING CODE 8320–01–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Parts 51 and 52

**[EPA–HQ–OAR–2004–0014: FRL–9280–8]**

**RIN 2060–AQ73**

## Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Reconsideration of Inclusion of Fugitive Emissions; Interim Rule; Stay and Revisions

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

**ACTION:** Interim rule; stay and revisions.

**SUMMARY:** EPA is taking an interim action to effectuate and extend a stay of the final rule entitled "Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Reconsideration of Inclusion of Fugitive Emissions" ("Fugitive Emissions Rule") published in the **Federal Register** on December 19, 2008. The Fugitive Emissions Rule under the Federal NSR program required that fugitive emissions be included in determining whether a physical or operational change results in a major modification only for sources in designated industries. EPA issued a stay of the Fugitive Emissions Rule on March 31, 2010, that was effective for 18 months through October 3, 2011. This action supersedes the stay and thereby corrects potential confusion caused by that stay. To effectuate a stay of the Fugitive Emissions Rule, this action clarifies the stay and the revisions of specific paragraphs in the NSR regulations that were affected by the Fugitive Emissions Rule. This action also extends the stay until EPA completes its reconsideration of the Fugitive Emissions Rule.

**DATES:** *Effective date:* This interim rule is effective March 30, 2011.

The administrative stay of provisions in 40 CFR 51.165, 51.166, Appendix S to part 51, and 40 CFR 52.21 published on March 31, 2010 (75 FR 16012) is lifted; and

The following Code of Federal Regulations sections are stayed indefinitely: 40 CFR 51.165(a)(1)(v)(G) and (a)(1)(vi)(C)(*3*); 51.166(b)(2)(v) and (b)(3)(iii)(*d*); Appendix S to Part 51, Paragraph II.A.5(vii); and 52.21(b)(2)(v) and (b)(3)(iii)(*c*). The EPA will publish a document in the **Federal Register** lifting this stay.

*Comment date:* Comments must be received on or before April 29, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–

OAR–2004–0014, by one of the following methods:

- *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–1741.
- *Mail:* Air and Radiation Docket, Environmental Protection Agency, Mail code 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to the applicable docket. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* 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 form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. 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) 566–1742, and the telephone number for the Air Docket is (202) 566–1744.

**FOR FURTHER INFORMATION CONTACT:** Mr. Peter Keller, Air Quality Policy Division, (C504–03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number (919) 541–5339; fax number (919) 541–5509; or e-mail address: *keller.peter@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this action apply to me?*

Entities potentially affected by this action include sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups.

| Industry group | SIC [a] | NAICS [b] |
|---|---|---|
| Electric Services | 491 | 221111, 221112, 221113, 221119, 221121, 221122 |
| Petroleum Refining | 291 | 324110 |
| Industrial Inorganic Chemicals | 281 | 325181, 325120, 325131, 325182, 211112, 325998, 331311, 325188 |
| Industrial Organic Chemicals | 286 | 325110, 325132, 325192, 325188, 325193, 325120, 325199 |
| Miscellaneous Chemical Products | 289 | 325520, 325920, 325910, 325182, 325510 |
| Natural Gas Liquids | 132 | 211112 |
| Natural Gas Transport | 492 | 486210, 221210 |
| Pulp and Paper Mills | 261 | 322110, 322121, 322122, 322130 |
| Paper Mills | 262 | 322121, 322122 |
| Automobile Manufacturing | 371 | 336111, 336112, 336211, 336992, 336322, 336312, 336330, 336340, 336350, 336399, 336212, 336213 |
| Pharmaceuticals | 283 | 325411, 325412, 325413, 325414 |
| Mining | 211, 212, 213 | 21 |
| Agriculture, Fishing and Hunting | 111, 112, 113, 115 | 11 |

[a] Standard Industrial Classification
[b] North American Industry Classification System.

Entities potentially affected by this action also include state, local, and tribal governments.

### *B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit information containing CBI to EPA through *http://www.regulations.gov* or e-mail. Send or deliver information identified as CBI only to the following address: Mr. Roberto Morales, OAQPS Document Control Officer (C404–02), U.S. EPA, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, Attention: Docket ID EPA–HQ–OAR–2004–0014. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is

claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting your comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

*C. 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 interim rule will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this interim rule will be posted in the regulations and standards section of our NSR home page located at *http://www.epa.gov/nsr.*

*D. How is this preamble organized?*

I. General Information
A. Does this action apply to me?
B. What should I consider as I prepare my comments for EPA?
C. Where can I get a copy of this document and other related information?
D. How is this preamble organized?
II. Background Information
III. This Action
A. Why is EPA staying, reinstating, or revising, as appropriate, the regulatory text in specific paragraphs affected by the Fugitive Emissions Rule?
B. Why is EPA issuing an interim rule?
C. What specific revisions are being made?
IV. Fugitive Emissions Rule Reconsideration
V. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act
VI. Statutory Authority

## II. Background Information

On December 19, 2008, EPA ("we") issued a final rule revising the requirements of the major NSR programs regarding the treatment of fugitive emissions ("Fugitive Emissions Rule") 73 FR 77882. The final rule required fugitive emissions to be included in determining whether a physical or operational change results in a major modification only for sources in industries that have been designated through rulemaking under section 302(j) of the Clean Air Act (Act or CAA). Previously, EPA rules required that fugitive emissions be included in major modification applicability determinations for all source categories. The final rule amended all portions of the major NSR program regulations: Permit requirements, the PSD program, and the emission offset interpretive ruling.

On February 17, 2009, the Natural Resources Defense Council (NRDC) submitted a petition for reconsideration of the December 2008 final rule as provided for in CAA 307(d)(7)(B).[1]

On April 24, 2009, we responded to the February 17, 2009, petition by letter indicating that we were convening a reconsideration proceeding for the December 2008 rule on inclusion of fugitive emissions challenged in the petition and granting a 3-month administrative stay of the rule contained in the federal NSR program at 40 CFR parts 51 and 52. The letter also indicated that we would publish a notice of proposed rulemaking "in the near future" to address the specific issues for which we were granting reconsideration.[2]

The initial 3-month administrative stay of the Fugitive Emissions Rule became effective on September 30, 2009. *See* 74 FR 50115. An interim final rule extending the stay for an additional 3 months became effective on December 31, 2009. *See* 74 FR 65692. An additional 18 month stay was finalized on March 31, 2010, and ends on October 3, 2011. *See* 75 FR 16012. That stay was put in place to allow sufficient time for EPA to propose, take public comment on, and issue a final action concerning the inclusion of fugitive emissions in the Federal NSR program.

## III. This Action

*A. Why is EPA staying, reinstating, or revising, as appropriate, the regulatory text in specific paragraphs affected by the Fugitive Emissions Rule?*

The initial stay of the Fugitive Emissions Rule, put in place on September 30, 2009, may have caused confusion as to the scope of the stay. In staying the Fugitive Emissions Rule, EPA reinstated the NSR regulations as they existed prior to the Fugitive Emissions Rule. In particular, we stated: "To effectuate this stay of the December 19, 2008, rule, we are reinstating previous provisions on a temporary basis." *See* 74 FR at 50115–16. In several cases, however, paragraphs of the affected regulations in 40 CFR 51.165, 40 CFR 51.166, 40 CFR 51 Appendix S, and 40 CFR 52.21 appeared to be stayed in their entirety rather than amended to undo the changes made by the Fugitive Emissions Rule as intended. The subsequent extensions of the stay used the same terms as the stay published on September 30, 2009, and accordingly did not correct the ambiguity created by the original promulgation of the stay. This action clarifies the regulations to accurately reflect EPA's intent to revert back to the regulation text that existed prior to the Fugitive Emissions Rule amendments to the Federal NSR regulations.

*B. Why is EPA issuing an interim rule?*

We are issuing an interim rule to effectuate a stay of the Fugitive Emissions Rule. This interim rule supersedes the stay issued on March 31, 2010, and thereby corrects ambiguity contained in that stay. EPA is using the "good cause" exemption under the Administrative Procedure Act (APA) to take the actions set forth in this interim rule without prior notice and comment. *See* 5 U.S.C. 553(b)(3)(B). Section 553(b)

[1] John Walke, NRDC, EPA–HQ–OAR–2004–0014–0060.

[2] Lisa Jackson, US EPA, EPA–HQ–OAR–2004–0014–0062.

of the APA generally requires that any rule to which it applies be issued only after the public has received notice of, and had an opportunity to comment on, the proposed rule. However, section 553(b)(3)(B) exempts from those requirements any rule for which the issuing agency for good cause finds that providing prior notice and comment would be impracticable, unnecessary, or contrary to the public interest. Thus, any rule for which EPA makes such a finding is exempt from the notice and comment requirements of section 553(b).

We believe that the circumstances here provide good cause to take the actions set forth in this interim rule without prior notice and comment, because providing prior notice and comment would be unnecessary and contrary to the public interest.

With this action, EPA is simply staying the provisions of the Fugitive Emissions Rule consistent with our original intent, which we believe was broadly understood. We believe that soliciting public comment on this interim rule prior to making it effective would be contrary to the public interest because it is in the public interest to correct the ambiguity contained in the current stay as expeditiously as possible to avoid potential confusion regarding the regulatory text. The NSR program is a vital component of the Act's regime for protecting public health, and it is in the public's interest that the requirements of the program be clear and unambiguous.

EPA is also using the APA's good cause exception to make this interim rule immediately effective. *See* 5 U.S.C. 553(d)(3). Section 553(d) of the APA generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register.** However, section 553(d)(3) provides that if the issuing agency has made a finding of good cause and has published its reasoning with the rule, the rule may take effect earlier. EPA has determined that good cause exists to stay, reinstate, and revise, as appropriate, certain paragraphs in 40 CFR parts 51 and 52 by interim rule without prior notice and comment, because prior notice and comment would be unnecessary and contrary to the public interest for the reasons stated above. Based on this determination, EPA is making this interim rule effective immediately.

Notwithstanding EPA's "good cause" finding, we are providing a 30-day public comment period for this interim rule, and upon reviewing and considering comments received, we will issue a final rule either affirming the interim rule or affirming the interim rule with revisions.

*C. What specific revisions are being made?*

We are issuing this interim rule to:

- Stay the following paragraphs: 40 CFR 51.165(a)(1)(v)(G) and (a)(1)(vi)(C)(*3*), 40 CFR 51.166(b)(2)(v) and (b)(3)(iii)(*d*), 40 CFR 51 Appendix S II.A.5(vii), and 40 CFR 52.21 (b)(2)(v) and (b)(3)(iii)(*c*);
- Reinstate the following paragraphs: 40 CFR 51.165(a)(4), 40 CFR 51.166(i)(1)(ii), 40 CFR 51 Appendix S II.F, and 40 CFR 52.21(i)(1)(vii); and
- Revise the following paragraphs to revert back to the regulatory text that existed prior to the Fugitive Emissions Rule amendments: 40 CFR 51.165(a)(1)(ix), (a)(1)(xxviii)(B)(*2*), (a)(1)(xxviii)(B)(*4*), (a)(1)(xxxv)(A)(*1*), (a)(1)(xxxv)(B)(*1*), (a)(1)(xxxv)(C), (a)(1)(xxxv)(D), (a)(2)(ii)(B), (a)(6)(iii), (a)(6)(iv), and (f)(4)(i)(D); 40 CFR 51.166(a)(7)(iv)(*b*), (b)(3)(iii)(*c*), (b)(20), (b)(40)(ii)(*b*), (b)(40)(ii)(*d*), (b)(47)(i)(*a*), (b)(47)(ii)(*a*), (b)(47)(iii), (b)(47)(iv), (r)(6)(iii), (r)(6)(iv), and (w)(4)(i)(*d*); 40 CFR 51 Appendix S II.A.6(iii), II.A.9, II.A.24(ii)(*b*), II.A.24(ii)(*d*), II.A.30(i)(*a*), II.A.30(ii)(*a*), II.A.30(iii), II.A.30(iv), IV.I.1(ii), IV.J.3, IV.J.4, and IV.K.4(i)(*d*); and 40 CFR 52.21(a)(2)(iv)(*b*), (b)(3)(iii)(*b*), (b)(20), (b)(41)(ii)(*b*), (b)(41)(ii)(*d*), (b)(48)(i)(*a*), (b)(48)(ii)(*a*), (b)(48)(iii), (b)(48)(iv), (r)(6)(iii), (r)(6)(iv), and (aa)(4)(i)(*d*).

The overall effect of this action is to revert the treatment of fugitive emissions in applicability determinations to the approach that applied prior to the Fugitive Emissions Rule on an interim basis, while EPA completes the reconsideration.

## IV. Fugitive Emissions Rule Reconsideration

Following the public comment period, EPA will issue a final rule either affirming the interim rule or affirming the interim rule with changes. The final rule will be in effect until EPA completes its reconsideration of the Fugitive Emissions Rule. We intend to propose and finalize a rule based on the results of the reconsideration by October 4, 2012.

## V. Statutory and Executive Order Reviews

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

This action is not a "significant regulatory action" under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), because it does not raise novel legal or policy issues. Accordingly, this action is not subject to review under EO 12866.

*B. Paperwork Reduction Act*

This action does not impose any new information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). This action only corrects inadvertent errors in the existing stay of the regulations at 40 CFR parts 51 and 52 concerning the inclusion of fugitive emissions and further stays the regulations until EPA completes its reconsideration.

The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (40 CFR parts 51 and 52) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* and has assigned OMB control number 2060–0003. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

*C. Regulatory Flexibility Act*

This interim rule is not subject to the Regulatory Flexibility Act (RFA), which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA or any other statute. This rule is not subject to notice and comment requirements under the APA or any other statute because, although the rule is subject to the APA, the Agency has invoked the "good cause" exemption under 5 U.S.C. 553(b), therefore it is not subject to the notice and comment requirement.

*D. Unfunded Mandates Reform Act*

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. This action only corrects inadvertent errors in the existing stay of the regulations at 40 CFR parts 51 and 52 concerning the inclusion of fugitive emissions and further stays the regulations until EPA completes its reconsideration. Therefore, this action is not subject to the requirements of sections 202 or 205 of UMRA.

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

*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 EO 13132. This action only corrects inadvertent errors in the existing stay of the regulations at 40 CFR parts 51 and 52 concerning the inclusion of fugitive emissions and further stays the regulations until EPA completes its reconsideration. Thus, EO 13132 does not apply to this rule.

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

This action does not have tribal implications, as specified in EO 13175 (65 FR 67249, November 9, 2000). This action will not impose any new obligations or enforceable duties on tribal governments. Thus, EO 13175 does not apply to this action.

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

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

This action is not subject to EO 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

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

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

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

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

EPA has determined that this interim rule will not have disproportionately high and adverse human health or environmental effects on minority or low income populations because it only corrects inadvertent errors in the existing stay of the regulations at 40 CFR parts 51 and 52 concerning the inclusion of fugitive emissions and further stays the regulations until EPA completes its reconsideration.

*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. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary, or contrary to the public interest. This determination must be supported by a brief statement, 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefore, and established an effective date of March 30, 2011. EPA will submit a report containing this rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

**VI. Statutory Authority**

The statutory authority for this action is provided by section 301(a) of the CAA as amended (42 U.S.C. 7601(a)).

**List of Subjects**

*40 CFR Part 51*

Administrative practices and procedures, Air pollution control, Carbon monoxide, Fugitive emissions, Intergovernmental relation, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Transportation, Volatile organic compounds.

*40 CFR Part 52*

Administrative practices and procedures, Air pollution control, Carbon monoxide, Fugitive emissions, Intergovernmental relation, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Transportation, Volatile organic compounds.

Dated: March 10, 2011.

**Lisa P. Jackson,**

*Administrator.*

For the reasons stated in the preamble, 40 CFR parts 51 and 52 are amended as follows:

## PART 51—[AMENDED]

■ 1. The authority citation for part 51 continues to read as follows:

**Authority:** 23 U.S.C. 101; 42 U.S.C. 7401—7671q.

■ 2. Section 51.165 is amended as follows:

■ a. The stay of § 51.165(a)(1)(v)(G), (a)(1)(vi)(C)(*3*), (a)(1)(ix), (a)(1)(xxviii)(B)(*2*), (a)(1)(xxviii)(B)(*4*), (a)(1)(xxxv)(A)(*1*), (a)(1)(xxxv)(B)(*1*), (a)(1)(xxxv)(C), (a)(1)(xxxv)(D), (a)(2)(ii)(B), (a)(6)(iii), (a)(6)(iv), and (f)(4)(i)(D), published on March 31, 2010 (75 FR 16012), is lifted.

■ b. Paragraphs (a)(1)(ix), (a)(1)(xxviii)(B)(*2*), (a)(1)(xxviii)(B)(*4*),(a)(1)(xxxv)(A)(*1*), (a)(1)(xxxv)(B)(*1*), (a)(1)(xxxv)(C), and (a)(1)(xxxv)(D) are revised.

■ c. Paragraph (a)(2)(ii)(B) is revised.

■ d. Temporary paragraph (a)(4), is removed.

■ e. A new paragraph (a)(4), is added.

■ f. Paragraphs (a)(6)(iii) and (a)(6)(iv) are revised.

■ g. Paragraph (f)(4)(i)(D) is revised.

■ h. Paragraphs (a)(1)(v)(G) and (a)(1)(vi)(C)(*3*) are stayed.

**§ 51.165 Permit requirements.**

(a) * * *

(1) * * *

(ix) *Fugitive emissions* means those emissions which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening.

* * * * *

(xxviii) * * *

(B) * * *

(*2*) Shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions; and

* * * * *

(*4*) In lieu of using the method set out in paragraphs (a)(1)(xxviii)(B)(*1*) through (*3*) of this section, may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph (a)(1)(iii) of this section.

* * * * *

(xxxv) * * *

(A) * * *

(*1*) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.

* * * * *

(B) * * *

(*1*) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.

* * * * *

(C) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit.

(D) For a PAL for a major stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in paragraph (a)(1)(xxxv)(A) of this section, for other existing emissions units in accordance with the procedures contained in paragraph (a)(1)(xxxv)(B) of this section, and for a new emissions unit in accordance with the procedures contained in paragraph (a)(1)(xxxv)(C) of this section.

* * * * *

(2) * * *

(ii) * * *

(B) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(ii)(C) through (F) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.,* the second step of the process) is contained in the definition in paragraph (a)(1)(vi) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

(4) Each plan may provide that the provisions of this paragraph do not apply to a source or modification that would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

(i) Coal cleaning plants (with thermal dryers);

(ii) Kraft pulp mills;

(iii) Portland cement plants;

(iv) Primary zinc smelters;

(v) Iron and steel mills;

(vi) Primary aluminum ore reduction plants;

(vii) Primary copper smelters;

(viii) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) Hydrofluoric, sulfuric, or citric acid plants;

(x) Petroleum refineries;

(xi) Lime plants;

(xii) Phosphate rock processing plants;

(xiii) Coke oven batteries;

(xiv) Sulfur recovery plants;

(xv) Carbon black plants (furnace process);

(xvi) Primary lead smelters;

(xvii) Fuel conversion plants;

(xviii) Sintering plants;

(xix) Secondary metal production plants;

(xx) Chemical process plants—The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;

(xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) Taconite ore processing plants;

(xxiv) Glass fiber processing plants;

(xxv) Charcoal production plants;

(xxvi) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(xxvii) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

* * * * *

(6) * * *

(iii) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions units identified in paragraph (a)(6)(i)(B) of this section; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated NSR pollutant at such emissions unit.

(iv) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority within 60 days after the end of each year during which records must be generated under paragraph (a)(6)(iii) of this section setting out the unit's annual emissions during the year that preceded submission of the report.

* * * * *

(f) * * *

(4) * * *

(i) * * *

(D) The PAL shall include fugitive emissions, to the extent quantifiable, from all emissions units that emit or have the potential to emit the PAL pollutant at the major stationary source.

* * * * *

■ 3. Section 51.166 is amended as follows:

■ a. The stay of § 51.166(a)(7)(iv)(*b*), (b)(2)(v), (b)(3)(iii)(*c*), (b)(3)(iii)(*d*), (b)(20), (b)(40)(ii)(*b*), (b)(40)(ii)(*d*), (b)(47)(i)(*a*), (b)(47)(ii)(*a*), (b)(47)(iii), (b)(47)(iv), (r)(6)(iii) and (r)(6)(iv), and (w)(4)(i)(*d*), published on March 31, 2010 (75 FR 16012), is lifted.

■ b. Paragraph (a)(7)(iv)(*b*) is revised.

■ c. Paragraphs (b)(3)(iii)(*c*), (b)(20), (b)(40)(ii)(*b*), (b)(40)(ii)(*d*), (b)(47)(i)(*a*), (b)(47)(ii)(*a*), (b)(47)(iii), and (b)(47)(iv) are revised.

■ d. Temporary paragraph (i)(1)(ii) is removed.

■ e. A new paragraph (i)(1)(ii) is added.

■ f. Paragraphs (r)(6)(iii) and (r)(6)(iv) are revised.

■ g. Paragraph (w)(4)(i)(*d*) is revised.

■ h. Paragraphs (b)(2)(v) and (b)(3)(iii)(*d*) are stayed.

**§ 51.166 Prevention of significant deterioration of air quality.**

(a) * * *

(7) * * *

(iv) * * *

(*b*) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(7)(iv)(*c*) through (*f*) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(*c*) The increase or decrease in emissions did not occur at a Clean Unit, except as provided in paragraphs (t)(8) and (u)(10) of this section.

* * * * *

(20) Fugitive emissions means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

* * * * *

(40) * * *

(ii) * * *

(*b*) Shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions; and

* * * * *

(*d*) In lieu of using the method set out in paragraphs (b)(40)(ii)(*a*) through (*c*) of this section, may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph (b)(4) of this section.

* * * * *

(47) * * *

(i) * * *

(*a*) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.

* * * * *

(ii) * * *

(*a*) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.

* * * * *

(iii) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit.

(iv) For a PAL for a stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in paragraph (b)(47)(i) of this section, for other existing emissions units in accordance with the procedures contained in paragraph (b)(47)(ii) of this section, and for a new emissions unit in accordance with the procedures contained in paragraph (b)(47)(iii) of this section.

* * * * *

(i) * * *

(1) * * *

(ii) The source or modification would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and such source does not belong to any of the following categories:

(*a*) Coal cleaning plants (with thermal dryers);

(*b*) Kraft pulp mills;

(*c*) Portland cement plants;

(*d*) Primary zinc smelters;

(*e*) Iron and steel mills;

(*f*) Primary aluminum ore reduction plants;

(*g*) Primary copper smelters;

(*h*) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(*i*) Hydrofluoric, sulfuric, or nitric acid plants;

(*j*) Petroleum refineries;

(*k*) Lime plants;

(*l*) Phosphate rock processing plants;

(*m*) Coke oven batteries;

(*n*) Sulfur recovery plants;

(*o*) Carbon black plants (furnace process);

(*p*) Primary lead smelters;

(*q*) Fuel conversion plants;

(*r*) Sintering plants;

(*s*) Secondary metal production plants;

(*t*) Chemical process plants—The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;

(*u*) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(*v*) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(*w*) Taconite ore processing plants;

(*x*) Glass fiber processing plants;

(*y*) Charcoal production plants;

(*z*) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(*aa*) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act; or

* * * * *

(r) * * *

(6) * * *

(iii) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions unit identified in paragraph (r)(6)(i)(*b*) of this section; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated NSR pollutant at such emissions unit.

(iv) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority within 60 days after the end of each year during which records must be generated under paragraph (r)(6)(iii) of this section setting out the unit's annual emissions during the calendar year that preceded submission of the report.

* * * * *

(w) * * *

(4) * * *

(i) * * *

(*d*) The PAL shall include fugitive emissions, to the extent quantifiable, from all emissions units that emit or have the potential to emit the PAL pollutant at the major stationary source.

* * * * *

■ 4. Appendix S. to Part 51 is amended as follows:

■ a. The stay of appendix S, paragraphs II.A.5(vii), II.A.6(iii), II.A.9, II.A.24(ii)(*b*), II.A.24(ii)(*d*), II.A. 30(i)(*a*), II.A.30(ii)(*a*), II.A.30(iii), II.A.30(iv), IV.I.1(ii), IV.J.3, IV.J.4, and IV.K.4(i)(*d*) published on March 31, 2010 (75 FR 16012) is lifted.

■ b. Paragraphs II.A.6(iii), II.A.9, II.A.24(ii)(*b*), II.A.24(ii)(*d*), II.A.30(i)(*a*), II.A.30(ii)(*a*), II.A.30(iii), and II.A.30(iv) are revised.

■ c. Temporary paragraph II.F is removed.

■ d. A new paragraph II.F is added.

■ e. Paragraphs IV.I.1(ii), IV.J.3, IV.J.4, and IV.K.4(i)(*d*) are revised.
■ f. Paragraph II.A.5(vii) is stayed.

## Appendix S to Part 51—Emission Offset Interpretative Ruling

* * * * *

II. * * *

A. * * *

6. * * *

(iii) An increase or decrease in actual emissions is creditable only if the reviewing authority has not relied on it in issuing a permit for the source under this Ruling, which permit is in effect when the increase in actual emissions from the particular change occurs.

* * * * *

9. *Fugitive emissions* means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

* * * * *

24. * * *

(ii) * * *

(*b*) Shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions; and

* * * * *

(*d*) In lieu of using the method set out in paragraphs II.A.24(ii)(*a*) through (*c*) of this Ruling, may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph II.A.3 of this Ruling.

* * * * *

30. * * *

(i) * * *

(*a*) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.

* * * * *

(ii) * * *

(*a*) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.

* * * * *

(iii) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit.

(iv) For a PAL for a major stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in paragraph II.A.30(i) of this Ruling, for other existing emissions units in accordance with the procedures contained in paragraph II.A.30(ii) of this Ruling, and for a new emissions unit in accordance with the procedures contained in paragraph II.A.30(iii) of this Ruling.

* * * * *

F. *Fugitive emission sources.* Section IV.A. of this Ruling shall not apply to a source or modification that would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and such source does not belong to any of the following categories:

(1) Coal cleaning plants (with thermal dryers);

(2) Kraft pulp mills;

(3) Portland cement plants;

(4) Primary zinc smelters;

(5) Iron and steel mills;

(6) Primary aluminum ore reduction plants;

(7) Primary copper smelters;

(8) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(9) Hydrofluoric, sulfuric, or nitric acid plants;

(10) Petroleum refineries;

(11) Lime plants;

(12) Phosphate rock processing plants;

(13) Coke oven batteries;

(14) Sulfur recovery plants;

(15) Carbon black plants (furnace process);

(16) Primary lead smelters;

(17) Fuel conversion plants;

(18) Sintering plants;

(19) Secondary metal production plants;

(20) Chemical process plants—The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;

(21) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(22) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(23) Taconite ore processing plants;

(24) Glass fiber processing plants;

(25) Charcoal production plants;

(26) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(27) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

* * * * *

IV. * * *

I. * * *

1. * * *

(ii) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (*i.e.,* the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs IV.I.1(iii) through (v) of this Ruling. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.,* the second step of the process) is contained in the definition in paragraph II.A.6 of this Ruling. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

J. * * *

3. The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions units identified in paragraph IV.J.1(ii) of this Ruling; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated NSR pollutant at such emissions unit.

4. If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the reviewing authority within 60 days after the end of each year, during which records must be generated under paragraph IV.J.3 of this Ruling setting out the unit's annual emissions during the year that preceded submission of the report.

* * * * *

K. * * *

4. * * *

(i) * * *

(*d*) The PAL shall include fugitive emissions, to the extent quantifiable, from all emissions units that emit or have the potential to emit the PAL pollutant at the major stationary source.

* * * * *

## PART 52—[AMENDED]

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

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

■ 6. Section 52.21 is amended as follows:
■ a. The stay of § 52.21 (a)(2)(iv)(*b*), (b)(2)(v), (b)(3)(iii)(*b*), (b)(3)(iii)(*c*), (b)(20), (b)(41)(ii)(*b*), (b)(41)(ii)(*d*), (b)(48)(i)(*a*), (b)(48)(ii)(*a*), (b)(48)(iii), (b)(48)(iv), (r)(6)(iii), (r)(6)(iv), and (aa)(4)(i)(*d*), published on March 31, 2010 (75 FR 16012), is lifted.
■ b. Paragraph (a)(2)(iv)(*b*) is revised.
■ c. Paragraphs (b)(3)(iii)(*b*), (b)(20), (b)(41)(ii)(*b*), (b)(41)(ii)(*d*), (b)(48)(i)(*a*), (b)(48)(ii)(*a*), (b)(48)(iii), and (b)(48)(iv) are revised.
■ d. Temporary paragraph (i)(1)(vii) is removed.
■ e. A new paragraph (i)(1)(vii) is added.
■ f. Paragraphs (r)(6)(iii) and (r)(6)(iv) are revised.
■ g. Paragraph (aa)(4)(i)(*d*) is revised.
■ h. Paragraphs (b)(2)(v) and (b)(3)(iii)(*c*) are stayed.

### § 52.21 Prevention of significant deterioration of air quality.

(a) * * *

(2) * * *

(iv) * * *

(*b*) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(iv)(*c*) through (*f*) of this section. The procedure for calculating (before

beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(*b*) The increase or decrease in emissions did not occur at a Clean Unit except as provided in paragraphs (x)(8) and (y)(10) of this section.

* * * * *

(20) *Fugitive emissions* means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

* * * * *

(41) * * *

(ii) * * *

(*b*) Shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions; and

* * * * *

(*d*) In lieu of using the method set out in paragraphs (a)(41)(ii)(*a*) through (*c*) of this section, may elect to use the emissions unit's potential to emit, in tons per year, as defined under paragraph (b)(4) of this section.

* * * * *

(48) * * *

(i) * * *

(*a*) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.

* * * * *

(ii) * * *

(*a*) The average rate shall include fugitive emissions to the extent quantifiable, and emissions associated with startups, shutdowns, and malfunctions.

* * * * *

(iii) For a new emissions unit, the baseline actual emissions for purposes of determining the emissions increase that will result from the initial construction and operation of such unit shall equal zero; and thereafter, for all other purposes, shall equal the unit's potential to emit.

(iv) For a PAL for a stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in paragraph (b)(48)(i) of this section, for other existing emissions units in accordance with the procedures contained in paragraph (b)(48)(ii) of this section, and for a new emissions unit in accordance with the procedures contained in paragraph (b)(48)(iii) of this section.

* * * * *

(i) * * *

(1) * * *

(vii) The source or modification would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

(*a*) Coal cleaning plants (with thermal dryers);

(*b*) Kraft pulp mills;

(*c*) Portland cement plants;

(*d*) Primary zinc smelters;

(*e*) Iron and steel mills;

(*f*) Primary aluminum ore reduction plants;

(*g*) Primary copper smelters;

(*h*) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(*i*) Hydrofluoric, sulfuric, or nitric acid plants;

(*j*) Petroleum refineries;

(*k*) Lime plants;

(*l*) Phosphate rock processing plants;

(*m*) Coke oven batteries;

(*n*) Sulfur recovery plants;

(*o*) Carbon black plants (furnace process);

(*p*) Primary lead smelters;

(*q*) Fuel conversion plants;

(*r*) Sintering plants;

(*s*) Secondary metal production plants;

(*t*) Chemical process plants—The term chemical processing plant shall not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140;

(*u*) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(*v*) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(*w*) Taconite ore processing plants;

(*x*) Glass fiber processing plants;

(*y*) Charcoal production plants;

(*z*) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(*aa*) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act; or

* * * * *

(r) * * *

(6) * * *

(iii) The owner or operator shall monitor the emissions of any regulated NSR pollutant that could increase as a result of the project and that is emitted by any emissions unit identified in paragraph (r)(6)(i)(*b*) of this section; and calculate and maintain a record of the annual emissions, in tons per year on a calendar year basis, for a period of 5 years following resumption of regular operations after the change, or for a period of 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit that regulated NSR pollutant at such emissions unit.

(iv) If the unit is an existing electric utility steam generating unit, the owner or operator shall submit a report to the Administrator within 60 days after the end of each year during which records must be generated under paragraph (r)(6)(iii) of this section setting out the unit's annual emissions during the calendar year that preceded submission of the report.

* * * * *

(aa) * * *

(4) * * *

(i) * * *

(*d*) The PAL shall include fugitive emissions, to the extent quantifiable, from all emissions units that emit or have the potential to emit the PAL pollutant at the major stationary source.

* * * * *

[FR Doc. 2011–6670 Filed 3–29–11; 8:45 am]

**BILLING CODE 6560–50–P**

---

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 180

**[EPA–HQ–OPP–2010–0097; FRL–8867–7]**

## Sodium Ferric Ethylenediaminetetraacetate; Exemption From the Requirement of a Tolerance

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

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes an exemption from the requirement of a tolerance for residues of sodium ferric ethylenediaminetetraacetate (EDTA) in or on all food commodities when applied as a molluscicide and used in accordance with good agricultural practices. W. Neudorff GmbH KG submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from

the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of sodium ferric EDTA under the FFDCA.

**DATES:** This regulation is effective March 30, 2011. Objections and requests for hearings must be received on or before May 31, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0097. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** John Fournier, Biopesticides and Pollution Prevention Division (7511P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0169; e-mail address: *fournier.john@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. How can I get electronic access to other related Information?*

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr.* To access the harmonized test guidelines referenced in this document electronically, please go to *http://www.epa.gov/oscpp* and select "Test Methods and Guidelines."

*C. How can I file an objection or hearing request?*

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2010–0097 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before May 31, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2010–0097, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

## II. Background and Statutory Findings

In the **Federal Register** of September 30, 2010 (75 FR 60452) (FRL–8837–2), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 9F7668) by W. Neudorff GmbH KG, An der Mühle 3, Postfach 1209, 31860 Emmerthal, Germany (c/o Walter G. Talarek, P.C., 1008 Riva Ridge Dr., Great Falls, VA 22066–1620). The petition requested that 40 CFR part 180 be amended by establishing an exemption from the requirement of a tolerance for residues of sodium ferric EDTA. This notice referenced a summary of the petition prepared by the petitioner, W. Neudorff GmbH KG, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is "safe." Section 408(c)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Pursuant to section 408(c)(2)(B) of FFDCA, in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in section 408(b)(2)(C) of FFDCA, which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue." Additionally, section 408(b)(2)(D) of FFDCA requires that the Agency consider "available information

concerning the cumulative effects of a particular pesticide's residues" and "other substances that have a common mechanism of toxicity."

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides. Second, EPA examines exposure to the pesticide through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings.

## III. Toxicological Profile

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness, and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

### *A. Overview of Sodium Ferric EDTA*

The pesticidal active ingredient, sodium ferric EDTA, is a molluscicide that has historically been used to control terrestrial slugs and snails in agriculture and on ornamental landscaping. The compound is comprised of iron in a sodium chelate. This chelate forms a soluble, complex molecule with iron ions, inactivating the ions so that they cannot normally react with other elements or ions to produce precipitates or scale. In this form, the iron is more bioavailable than in other mineral sources (Ref. 1). Bioavailability of iron is an essential quality of sodium ferric EDTA as the iron in this compound is responsible for controlling slugs and snails. That is, when slugs or snails ingest sodium ferric EDTA, the iron in the compound interacts with hemocyanin, a copper-based respiratory protein common to the blood of mollusks and responsible for their oxygen transport. This interaction with hemocyanin causes suffocation and eventually results in the death of slugs and snails. Iron does not have this interaction, however, in organisms that do not use hemocyanin for oxygen transport (*e.g.,* mammals).

Iron is a necessary nutrient for all mammals and other vertebrates because it is a component of hemoglobin, the oxygen transport protein found in red blood cells of vertebrates. It is the most abundant element on Earth and, as such, can be found in most soil and water. It is an essential nutrient listed as Generally Recognized as Safe (GRAS) by the Food and Drug Administration (FDA) for direct addition to food (21 CFR 184.1375) and is added to commonly consumed, fortified foods such as enriched flour, bread, pasta, and grains. Sodium Ferric EDTA is allowed as a direct food additive by the FDA and is used as a source of iron for nutritional fortification in foods such as powdered meal replacements, flavored milk, and fruit-flavored beverages (Ref. 2), as well as soy, fish, teriyaki, and hoisin sauces (Ref. 3). The compound is also a common constituent of many cosmetic products and, despite being present at much higher concentrations than those found in sodium ferric EDTA end-use pesticide products used for control of slugs and snails, has an extensive history of safe use as an agricultural fertilizer.

In 2008, EPA registered the first sodium ferric EDTA-containing product for control of slugs and snails. EPA assessed the risks to human health and concluded that, when sodium ferric EDTA was used in accordance with widespread and commonly recognized practices, no unreasonable adverse effects on the environment were expected (Ref. 4). At the time of this initial sodium ferric EDTA registration, the applicant did not petition EPA to establish a tolerance or tolerance exemption because all uses were non-food. On December 6, 2009, however, EPA was petitioned by W. Neudorff GmbH KG to establish an exemption from the requirement of a tolerance for residues of sodium ferric EDTA in or on all food commodities. Accordingly, EPA has completed a risk assessment of mammalian toxicology data submitted in support of this request. The overall conclusions from these data are described in Unit III.B., while more in-depth synopses of the study results can be found in the risk assessment and Biopesticides Registration Action Document provided as references in Unit IX. (Refs. 5 and 6).

### *B. Biochemical Pesticide Human Health Assessment Data Requirements*

1. *Acute toxicity.* Tier I acute toxicity studies of technical grade sodium ferric EDTA (Slugkil MP, containing 71.42% sodium ferric EDTA) showed that the active ingredient is a Toxicity Category III (slightly toxic) compound via the oral and dermal routes of exposure, a Toxicity Category III (slightly irritating) compound via the dermal and eye routes of exposure, and a Toxicity Category IV (practically nontoxic) compound for inhalation exposure. Moreover, sodium ferric EDTA is not a dermal sensitizer. Given the results of these studies, no additional toxicity (*i.e.,* Tiers II or III) or residue data are required to support food uses of this biochemical active ingredient. These acute toxicity studies confirm sodium ferric EDTA's low toxicity profile.

i. The acute oral median lethal dose ($LD_{50}$) for sodium ferric EDTA in rats was greater than 2,000 milligrams per kilogram (mg/kg) and confirmed low toxicity through oral exposure (Master Record Identification Number (MRID No.) 47942507). Sodium Ferric EDTA is classified as Toxicity Category III for acute oral toxicity.

ii. The acute dermal $LD_{50}$ for sodium ferric EDTA in rats was greater than 2,000 mg/kg, which confirmed low dermal toxicity (MRID No. 47942508). Sodium Ferric EDTA is classified as Toxicity Category III for acute dermal toxicity.

iii. The acute inhalation median lethal concentration ($LC_{50}$) for sodium ferric EDTA in rats was greater than 2.75 milligrams per liter (mg/L) and showed practically no inhalation toxicity (MRID No. 47942512). Sodium Ferric EDTA is classified as Toxicity Category IV for acute inhalation toxicity.

iv. A primary eye irritation study showed that exposure to sodium ferric EDTA will cause temporary, mild eye irritation (MRID No. 47942509). Accordingly, EPA has determined that sodium ferric EDTA is Toxicity Category III for primary eye irritation.

v. A primary dermal irritation study showed that exposure to sodium ferric EDTA is slightly irritating (MRID No. 47942510) and a skin sensitization study showed that sodium ferric EDTA is not a sensitizer to the skin (MRID No. 47942511). Accordingly, EPA has determined that sodium ferric EDTA is Toxicity Category III for dermal irritation.

2. *Subchronic toxicity.*—i. Submission of 90-day oral toxicity data was waived by EPA because the acute oral toxicity study demonstrated sodium ferric EDTA's low toxicity ($LD_{50}$ >2,000 .mg/kg). In their waiver rationale, the petitioner also cited information from EPA's 2008 sodium ferric EDTA Biopesticides Registration Action Document (BRAD):

> No references for feeding studies using sodium ferric EDTA were located in the published literature. Rats fed low mineral diets with or without calcium disodium EDTA for four months had reduced weight gain, but their general condition was comparable to that of controls (Ref. 7). Rats fed 1%, 5%, or 10% disodium salt of EDTA for 90 days had significantly lower food consumption and weight gain than controls (Ref. 8). Hematology was comparable among all groups, except that prothrombin time was increased in the 10% group. The only significant necropsy finding was pale livers in the 10% group.

Mice fed 3,750 or 7,500 ppm trisodium EDTA for 103 weeks had no treatment-related clinical signs, and gross and microscopic pathology were unremarkable (Ref. 9). A companion study conducted by NCI using rats produced the same results (Ref. 9). In a 12-month feeding study using dogs, Oser et al (1963) found no significant changes in hematology or urinalysis parameters, and no abnormal gross or microscopic findings in groups receiving up to 250 mg/kg body weight/day of calcium disodium EDTA (Ref. 10).

The information cited above refers to feeding studies using sodium EDTA and calcium disodium EDTA. The Agency has assessed the toxicity profile of these and other EDTA salts (Refs. 11 and 12), and concluded that they are closely related. This information sufficed for the assessment of toxicological risk characterization of sodium ferric EDTA.

Additionally, iron is an essential nutrient listed as GRAS by the FDA, and both iron and sodium ferric EDTA are allowed as direct food additives to increase the nutritional content of food and food supplements. Sodium Ferric EDTA is also used in agriculture as a fertilizer. Given all of this information, EPA concluded that no subchronic oral toxicity is expected when this compound is used in accordance with good agricultural practices.

ii. Submission of 90-day dermal toxicity data was waived by EPA because acute guideline studies demonstrated that sodium ferric EDTA has low dermal toxicity ($LD_{50}$ >2,000 mg/kg), is a slight dermal irritant, and is not a dermal sensitizer. Repeated dermal exposure, under conditions of product use at a concentration that could be toxic, is not anticipated.

iii. Submission of 90-day inhalation data was waived by EPA because the acute inhalation toxicity study demonstrated sodium ferric EDTA's lack of toxicity (Toxicity Category IV). Repeated inhalation exposure, under conditions of product use at a concentration that could be toxic, is not anticipated.

3. *Developmental toxicity and mutagenicity.* Acceptable waiver requests were submitted to address the data requirements for Developmental toxicity and Mutagenicity (OPPTS 870.3700). The Agency concluded that humans are regularly exposed to iron found abundantly in nature and from the use of sodium ferric EDTA as fertilizer. No negative effects of sodium ferric EDTA have been reported because of its low toxicity and low water solubility, which decreases its absorption in the intestine. Moreover, the active ingredient is not a mutagen nor is it related to any known classes of mutagens. After considering the aforementioned information and the extensive history of use of sodium ferric EDTA in agriculture and food without deleterious effects, EPA waived the requirement to submit developmental toxicity and mutagenicity data.

## IV. Aggregate Exposures

In examining aggregate exposure, section 408 of FFDCA directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

### *A. Dietary Exposure*

1. *Food.* The primary route of sodium ferric EDTA exposure to the general population will be through consumption of food; however, there is no reason to expect that practical use of sodium ferric EDTA, in accordance with good agricultural practices, will constitute any significant hazard.

Sodium Ferric EDTA is comprised of iron in a sodium chelate. Iron is abundant in nature, an essential nutrient, and listed as GRAS for direct addition to food (21 CFR 184.1375). Sodium Ferric EDTA is regarded as safe for use as a dietary supplement to increase iron bioavailability and prevent iron deficiency. In humans, iron is an essential nutrient that is vital to the processes by which cells generate energy. It is available to animals from food derived from other animals and plants.

When sodium ferric EDTA is ingested, the chelate holds the iron in the stomach until pH rises in the upper small intestine. As pH rises, the strength of the complex progressively diminishes, allowing exchange with other metals and iron for absorption. Iron dissociates from the EDTA moiety and is released in the duodenum prior to absorption. Only a very small fraction of the sodium ferric EDTA complex (less than 1%) is absorbed intact. Intact EDTA metal complexes are rapidly excreted; they do not accumulate or undergo biotransformation (Ref. 13).

European Food Safety Authority Panel on Food Additives and Nutrient Sources added to Food (2010) concluded that, when sodium ferric EDTA is used in food supplements at levels that provide 22.3 milligrams (mg) of iron/day for adults and 11.1 mg of iron/day for children, the use of sodium ferric EDTA as a source of iron in foods is of no safety concern as long as it does not lead to an exposure of EDTA above 1.9 mg/kg/day.

Exposure to EDTA and salts of EDTA already occurs through certain FDA-approved uses as food additives, in sanitizing solutions, and in pharmaceutical products, or through their use in soaps, shampoos, or cosmetics. EDTA has also been administered safely under medical supervision as treatment for heavy metal poisoning. The results of toxicity testing and information found in public literature indicate that there is no risk to human health from residues of sodium ferric EDTA in food crops. Furthermore, residues from the formulations in agricultural use sites (certified limits <4% by weight) and residential use sites (<1% of typical formulations) are not likely to exceed levels currently consumed in commonly eaten foods. In addition, the use of EDTA and EDTA salts in pesticide products is expected to result in much lower exposure than the FDA-regulated use of these compounds, as well as lower exposure than their use in pharmaceuticals or cosmetic products.

The concentration of iron needed for good plant growth is below the concentration needed by animals for good cellular functioning. In agriculture, iron sodium chelate is used as micronutrient fertilizer at much higher concentrations than those present in sodium ferric EDTA-containing pesticide products, which are labeled for maximum application rates of below 25 mg of sodium ferric EDTA per square foot. The use of sodium ferric EDTA in pesticides is expected to result in much lower exposure than through its use in plant fertilizers, pharmaceutical products, or cosmetic products. Based on review and evaluation of available information, EPA concludes that there is a reasonable certainty of no harm from residues of sodium ferric EDTA when applied as a molluscicide and used in accordance with good agricultural practices.

2. *Drinking water exposure.* No significant drinking water exposure or residues are expected to result from the use of sodium ferric EDTA as a molluscicide. The active ingredient is intended for use directly on food commodities or the soil around crops and is not to be applied directly to water. If used in accordance with EPA-approved labeling and good agricultural practices, sodium ferric EDTA is not likely to accumulate in drinking water. Overall, exposures from residues in drinking water are unlikely and are not expected to pose a quantifiable risk due to environmental fate of sodium ferric

EDTA and lack of residues of toxicological concerns.

*B. Other Non-Occupational Exposure*

The potential for non-dietary exposure of the general population, including infants and children, is limited based on the use patterns of sodium ferric EDTA. The end use products containing sodium ferric EDTA are granules or pellets that do not produce any dust and are applied directly to the ground. Therefore, it is unlikely that there will be any dermal or inhalation exposure when the product is applied according to the label use directions. Furthermore, sodium ferric EDTA was demonstrated to be practically non-toxic (Toxicity Category IV) to rats in an acute dermal toxicity guideline study (MRID 45848104) and practically non-toxic (Toxicity Category IV) to rats in an acute inhalation toxicity guideline study (MRID 45848105). Non-dietary exposures are not expected to pose any quantifiable risk to the general population.

## V. Cumulative Effects From Substances With a Common Mechanism of Toxicity

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA has not found sodium ferric EDTA to share a common mechanism of toxicity with any other substances, and sodium ferric EDTA does not appear to produce a toxic metabolite as its mode of action against the target pests. For the purposes of this tolerance action, therefore, EPA has assumed that sodium ferric EDTA does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

## VI. Determination of Safety for U.S. Population, Infants and Children

FFDCA section 408(b)(2)(C) provides that EPA shall assess the available information about consumption patterns among infants and children, special susceptibility of infants and children to pesticide chemical residues, and the cumulative effects on infants and children of the residues and other substances with a common mechanism of toxicity. In addition, FFDCA section 408(b)(2)(C) provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database unless EPA determines that a different margin of safety will be safe for infants and children. Margins of exposure (safety), which are often referred to as uncertainty factors, are incorporated into EPA risk assessments either directly or through the use of a margin of exposure analysis, or by using uncertainty (safety) factors in calculating a dose level that poses no appreciable risk.

Based on the results of the toxicological data discussed in Unit III.B., as well as all other available information, EPA concludes that there is a reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to the residues of sodium ferric EDTA. This includes all anticipated dietary exposures and all other exposures for which there is reliable information. EPA has arrived at this conclusion based on the low level of toxicity of the compound, the minimal exposure from application/use of sodium ferric EDTA as a molluscicide, and the already widespread exposure through use as a fertilizer and food additive without any reported adverse effects on human health. Thus, there are no threshold effects of concern and, as a result, an additional margin of safety is not necessary.

## VII. Other Considerations

*A. Analytical Enforcement Methodology*

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

*B. International Residue Limits*

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level. The Codex has not established a MRL for sodium ferric EDTA.

## VIII. Conclusions

EPA concludes that there is a reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of sodium ferric EDTA. Therefore, an exemption is established for residues of sodium ferric EDTA in or on all food commodities when applied as a molluscicide and used in accordance with good agricultural practices.

## IX. References

1. Heimbach J, Rieth S, Mohamedshah F, Slesinski R, Samuel-Fernando P, Sheehan T, Dickmann R, Borzelleca J. 2000. Safety assessment of iron EDTA sodium ion (Fe(3+)) ethylenediaminetetraacetic acid: Summary of toxicological, fortification and exposure data. *Food Chemical Toxicology* 38(1):99–111.
2. U.S. FDA. 2006 Agency Response Letter GRAS Notice No. GRN 000178 (Sodium Iron EDTA). Available from: *http://www.fda.gov/Food/FoodIngredientsPackaging/GenerallyRecognizedasSafeGRAS/GRASListings/ucm154622.htm.*
3. U.S. FDA. 2004. Agency Response Letter GRAS Notice No. GRN 000152 (Sodium Iron EDTA). Available from: *http://www.fda.gov/Food/FoodIngredientsPackaging/GenerallyRecognizedasSafeGRAS/GRASListings/ucm154378.htm.*
4. U.S. EPA. 2008. Sodium Ferric EDTA Biopesticides Registration Action document dated November 20, 2008.
5. U.S. EPA. 2011. Dietary Risk Assessment (Ferric Sodium EDTA). Memorandum from C. Fuentes, PhD to J. Fournier dated January 5, 2011.
6. U.S. EPA. 2011. Sodium Ferric EDTA Biopesticides Registration Action Document dated February 7, 2011 (available as "Supporting & Related Materials" within Docket Number EPA–HQ–OPP–2010–0144 at *http://www.regulations.gov*).
7. Yang SS. 1964. Toxicology of EDTA. *Food Cosmetics Toxicology* 2:763–765.
8. Wynn JE, Van't Riet B, Borzelleca JF. 1970. The toxicity and pharmacodynamics of EGTA: oral administration to rats and comparisons with EDTA. *Toxicology Applied Pharmacology* 16(3):807–817.
9. National Cancer Institute. 1977. Bioassay of trisodium ethylenediaminetetraacetate trihydrate (EDTA) for possible carcinogenicity: CAS No. 150–38–9. Bethesda (MD): National Cancer Institute, Carcinogenesis Program/Research Triangle Park (NC): National

Toxicology Program (NTP); Technical Report Series No. 11.
10. Oser BL, Oser M, Spencer HC. 1963. Safety evaluation studies of calcium EDTA. *Toxicology Applied Pharmacology* 5:142–162.
11. U.S. EPA. 2004. Recommendation for Tolerance Reassessment for Ethylenediaminetetraacetic Acid (EDTA) and various ammonium, calcium, copper, iron, potassium, manganese, sodium and zinc salts of EDTA. Memorandum from K. Boyle to B. Shackleford dated January 28, 2004.
12. U.S. EPA. 2004. Ethylenediaminetetraacetic acid (EDTA) and the salts of EDTA: Science Assessment Document for Tolerance Reassessment. Memorandum from E. Reaves to K. Boyle dated January 26, 2004.
13. European Food Safety Authority Panel on Food Additives and Nutrient Sources added to Food 2010. Scientific opinion on the use of ferric sodium EDTA as a source of iron added for nutritional purposes to foods for the general population (including food supplements) and to foods for particular nutritional uses. *EFSA Journal* 8(1):1414.

## X. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children From Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

## XI. Congressional Review Act

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

## List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: March 17, 2011.

**Steven Bradbury,**

*Director, Office of Pesticide Programs.*

Therefore, 40 CFR chapter I is amended as follows:

## PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.1302 is added to subpart D to read as follows:

### § 180.1302 Sodium Ferric Ethylenediaminetetraacetate (EDTA); exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of sodium ferric EDTA in or on all food commodities when applied as a molluscicide and used in accordance with good agricultural practices.

[FR Doc. 2011–7465 Filed 3–29–11; 8:45 am]

BILLING CODE 6560–50–P

---

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 46 CFR Part 160

**[USCG–2011–0076]**

**RIN 1625–AB60**

## Inflatable Personal Flotation Devices

**AGENCY:** Coast Guard, DHS.

**ACTION:** Direct final rule; request for comments.

**SUMMARY:** By this direct final rule, the Coast Guard is harmonizing structural and performance standards for inflatable recreational personal flotation devices (PFDs) with current voluntary industry consensus standards. This direct final rule also slightly modifies regulatory text in anticipation of a future rulemaking addressing the population for which inflatable recreational PFDs are approved, but does not change the current affected population.

**DATES:** This rule is effective September 26, 2011 unless an adverse comment, or notice of intent to submit an adverse comment, is either submitted to our online docket via *http://www.regulations.gov* on or before May 31, 2011 or reaches the Docket Management Facility by that date. If an adverse comment, or notice to submit an adverse comment, is received by May 31, 2011, we will withdraw this direct final rule and publish a timely notice of withdrawal in the **Federal Register.** The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register on September 26, 2011.

**ADDRESSES:** You may submit comments identified by docket number USCG–

2011–0076 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 rule, e-mail or call Ms. Brandi Baldwin, Commercial Regulations and Standards Directorate, Office of Design and Engineering Standards, Lifesaving and Fire Safety Division (CG–5214), Coast Guard, telephone number 202–372–1394, or e-mail *Brandi.A.Baldwin@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**

I. Public Participation and Request for Comments
A. Submitting comments
B. Viewing comments and documents
C. Viewing incorporation by reference material
D. Privacy Act
E. Public meeting
II. Abbreviations
III. Regulatory Information
IV. Basis and Purpose
V. Discussion of the Rule
VI. Incorporation by Reference
VII. Regulatory Analyses
A. Executive Order 12866 and Executive Order 13563
B. Small Entities
C. Assistance for Small Businesses
D. Collection of Information
E. Federalism
F. Unfunded Mandates Reform Act
G. Taking of Private Property
H. Civil Justice Reform
I. Protection of Children
J. Indian Tribal Governments
K. Energy Effects
L. Technical Standards
M. Coast Guard Authorization Act Sec. 608 (46 U.S.C. 2118(a))
N. Environment

## 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 comments, please include the docket number for this rulemaking (USCG–2011–0076), 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 materials 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,* and type "USCG–2011–0076" in the "Keyword" box. 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 them by mail and would like to know that they have reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

### *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–2011–0076" and click "Search." Click the "Open Docket Folder" in the "Actions" column. If you do not have access to the Internet, you may also 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. Viewing Incorporation by Reference Material*

You may inspect the material incorporated by reference at U.S. Coast Guard Headquarters, 2100 2nd St., SW., STOP 7126, Washington, DC 20593–7126 between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–372–1385. Copies of the material are available as indicated in the "Incorporation by Reference" section of this preamble.

### *D. 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).

### *E. Public Meeting*

We do not plan to hold a public meeting for this rulemaking. But you may submit a request for one to the 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 to be announced by a later notice in the **Federal Register**.

## II. Abbreviations

ANSI American National Standards Institute
CFR Code of Federal Regulations
DHS Department of Homeland Security
NEPA National Environmental Policy Act of 1969
NTTAA National Technology Transfer and Advancement Act
OMB Office of Management and Budget
PFDs Personal Flotation Devices
STP Standards Technical Panel
UL Underwriters Laboratories
USCG United States Coast Guard

## III. Regulatory Information

We are publishing this direct final rule under 33 CFR 1.05–55 because we do not expect an adverse comment. If no adverse comment or notice of intent to submit an adverse comment is received by May 31, 2011, this rule will become effective as stated in the **DATES** section. In that case, approximately 30 days before the effective date, we will publish a document in the **Federal Register** stating that no adverse comment was received and confirming that this rule will become effective as scheduled. However, if we receive an adverse comment or notice of intent to

submit an adverse comment, we will publish a notice in the **Federal Register** announcing the withdrawal of all or part of this direct final rule. If an adverse comment applies only to part of this rule (*e.g.,* to an amendment, a paragraph, or a section) and it is possible to remove that part without defeating the purpose of this rule, we may adopt, as final, those parts of this rule on which no adverse comment was received. We will withdraw the part of this rule that was the subject of an adverse comment. If we decide to proceed with a rulemaking following receipt of an adverse comment, we will publish a separate notice of proposed rulemaking (NPRM) and provide a new opportunity for comment.

A comment is considered adverse if the comment explains why this rule or a part of this rule would be inappropriate, including a challenge to its underlying premise or approach, or would be ineffective or unacceptable without a change. A comment addressing the merits of using inflatable PFDs, or expanding the population for which inflatable PFDs are approved, will not be considered an adverse comment because this rulemaking does not address those issues. The Coast Guard will consider those issues as part of a separate, future rulemaking.

## IV. Basis and Purpose

The Coast Guard is charged with establishing minimum safety standards, and procedures and tests required to measure conformance with those standards, for recreational vessels and associated equipment. *See* 46 U.S.C. 4302, and Homeland Security Delegation # 0170.1, section II, paragraph (92)(b). Under this authority, in 1995 the Coast Guard promulgated regulations establishing structural and performance standards for inflatable recreational PFDs and procedures and tests necessary for Coast Guard approval of such PFDs meeting the standards. *See* 46 CFR part 160, subpart 160.076 (Inflatable Recreational Personal Floatation Devices); 60 FR 32835 (June 23, 1995). Subpart 160.076 incorporates by reference three Underwriters Laboratories (UL) Standards 1180, "Fully Inflatable Personal Flotation Devices" (First Edition); 1191, "Components for Personal Flotation Devices" (Second Edition); and 1123, "Marine Buoyant Devices" (Fifth Edition).

The editions of these UL Standards currently incorporated by reference into subpart 160.076 were current when the Coast Guard promulgated subpart 160.076 in 1995. However, UL has since published newer editions of these Standards that the Coast Guard considers to contain technological and safety developments since 1995 that are important to codify in subpart 160.076. In this direct final rule, the Coast Guard is updating the editions of the UL Standards incorporated by reference in subpart 160.076.

The editions of these UL Standards currently incorporated by reference in subpart 160.076, as well the editions that will replace the currently incorporated versions, limit the use of inflatable PFDs to persons at least 16 years of age and weighing more than 80 pounds. Therefore, the Coast Guard only approves inflatable PFDs with these age and weight limitations. When the Coast Guard promulgated subpart 160.076, inflatable PFD-technology was relatively new and the appropriateness of these devices for children had not yet been explored. At that time, the Coast Guard stated, "The Coast Guard agrees with those comments that suggested that approval of inflatable PFDs for children is not appropriate at this time . . . . The issue of inflatable PFDs for children can be revisited after more experience is gained with the approval of inflatable PFDs for adults." 60 FR 32839, 32841. As such, subpart 160.076 currently limits Coast Guard-approved inflatable PFDs to "use by adults only." 46 CFR 160.076–1(b)(2).

Although the Coast Guard is not yet ready to revisit the issue of inflatable PFDs for children, the industry has begun considering the experience it has gained from adults' usage of inflatable PFDs during the past 15 years, as well as advances in inflatable PFD technology, to explore the appropriateness of these devices for children and create an appropriate standard.

In 2009, a member of the PFD industry submitted a proposal to the UL Standards Technical Panel (STP) proposing new standards for inflatable PFDs designed for children. The Coast Guard understands that the UL Standards development effort continues to move forward, and there may be other standards addressing inflatable PFDs for children in development. Inflatable PFDs constructed and tested to any new standard adopted by a consensus body, however, would not be eligible for Coast Guard approval until that standard is incorporated by reference into Coast Guard regulations after consideration of the appropriateness of incorporating such a new standard during a rulemaking that includes an opportunity for public comment. The Coast Guard plans to initiate such a rulemaking in the future and is using this to prepare for such a rulemaking as discussed below.

This rulemaking does not constitute approval of the use of inflatable PFDs for users under 16 years of age. The newer editions of the UL Standards incorporated by reference in this rule retain requirements for inflatable PFDs for adult wearers only. While there are still outstanding concerns relative to the considerations for designing an inflatable PFD intended for use by wearers under the age of 16, the Coast Guard recognizes that these matters are being addressed by UL's STP through the American National Standards Institute (ANSI)-accredited standards development process. The Coast Guard actively participates in the STP and continues to work cooperatively with the PFD industry to develop appropriate design, testing, and marking requirements for inflatable PFDs for use by children. This rule would facilitate and encourage the continuation of this process, but is not intended to resolve any technical issues.

## V. Discussion of the Rule

The Coast Guard is revising 46 CFR part 160, subpart 160.076 to update the editions of the UL Standards incorporated by reference and to make necessary conforming changes resulting from incorporating the updated standards. The conforming changes include removing test methods, acceptance criteria, and other standards currently contained in subpart 160.076 that are made redundant by the newer editions of the UL Standards. The Coast Guard is also making minor regulatory text revisions to subpart 160.076 that have a non-substantive effect.

### *A. Incorporations by Reference*

Updating the standards incorporated by reference in 46 CFR 160.076–11 is intended to harmonize the requirements for Coast Guard approval of recreational inflatable PFDs with voluntary industry consensus standards.

The updated UL Standards are as follows:

- UL 1180, "UL Standard for Safety for Fully Inflatable Recreational Personal Flotation Devices," is updated from the May 1995 version (First Edition) to the February 2009 version (Second Edition);
- UL 1191, "UL Standard for Safety for Components for Personal Flotation Devices" is updated from the May 1995 version (Second Edition) to the February 2008 version (Fourth Edition); and
- UL 1123, "UL Standard for Safety for Marine Buoyant Devices," is updated from the February 1995 version (Fifth

Edition) to the October 2008 version (Seventh Edition).

These updated versions of the UL Standards include revisions that have been evaluated and adopted by UL's STP, the ANSI-accredited Standards Development Organization for these standards, and reflect the industry-wide consensus standard for design, manufacturing, and testing of inflatable PFDs and PFD components. As discussed above in the "Basis and Purpose" section, the Coast Guard participated fully in the development of these standards through its representation on the STP.

1. UL 1180

UL 1180, "UL Standard for Safety for Fully Inflatable Recreational Personal Flotation Devices," contains the design, construction, testing, and performance requirements for fully inflatable recreational PFDs for use by users over 16 years of age and weighing at least 80 pounds. Significant revisions in the Second Edition of UL 1180 from the First Edition include a revision to the temperature cycling test and the addition of testing requirements for an optional buddy line. The revision to the temperature cycle narrows the range of temperature extremes to harmonize with international test methods in the International Organization for Standardization's ISO 12402–9 "Personal flotation devices—Part 9: Test methods." The additional testing requirements for an optional buddy line provides the test procedures and acceptance criteria for an inflatable PFD equipped with a buddy line. This addition only impacts manufacturers who choose to equip inflatable PFDs with the optional buddy line.

In a response to industry seeking approval for inflatable PFD designs not covered by UL 1180 First Edition, the Second Edition also includes four new supplements containing requirements for user-assisted inflatable PFDs, user convertible manual/automatic inflatable PFDs, manual inflators without cylinder seal indication, and inflatable work vests. The supplements address design innovations that manufacturers developed after publication of the First Edition.

By incorporating by reference UL 1180 Second Edition with these four new supplements, user-assisted inflatable PFDs, user convertible manual/automatic inflatable PFDs, manual inflators without cylinder seal indication, and inflatable work vests may now be approved under revised 46 CFR part 160, subpart 160.076 setting forth design and performance standards for these types of inflatable PFDs. Currently, in order to review these design innovations for Coast Guard approval, the Coast Guard has been evaluating each submitted design innovation in accordance with 46 CFR 160.076–16(g)(2) for an equivalent measure of safety to the specific standards in subpart 160.076. Section 160.076–13(g)(2) provides for Coast Guard approval of an inflatable PFD that does not meet the specific standards in subpart 160.076 if the PFD "provides at least the same degree of safety provided by other PFDs that meet the requirements of this subpart." *See also* 46 CFR 159.005–7(e) (providing for similar "equivalent" approval, not specific to PFDs, for lifesaving equipment that "has equivalent performance characteristics" and "is at least as effective as [equipment] that meets the requirements [in relevant Coast Guard regulations]"). The Coast Guard has been evaluating and approving user-assisted inflatable PFDs, user convertible manual/automatic inflatable PFDs, manual inflators without cylinder seal indication, and inflatable work-vests under 46 CFR 160.076–13(g)(2) because the Coast Guard has determined that they provide at least the same degree of safety provided by inflatable PFDs meeting the standards in subpart 160.076. This rulemaking will make this extra evaluation under 46 CFR 160.076–13(g)(2) unnecessary for user-assisted inflatable PFDs, user convertible manual/automatic inflatable PFDs, manual inflators without cylinder seal indication, and inflatable work-vests; these types of PFDs will be reviewed for compliance with the specific standards set forth in the revised subpart 160.076.

UL 1180 Second Edition also includes the option for the laboratory conducting required performance tests to use youth subjects who fit the necessary size requirements (*e.g.,* weight and chest circumference) in the testing of adult-sized PFDs, where appropriately sized adult subjects are not available. This new option, however, does not affect the Coast Guard approval of inflatable PFDs for use by adults only. Use of youth subjects is limited to performance testing only.

UL 1180 Second Edition also includes editorial changes to correct typos and erroneous internal references. These editorial changes: clarify the requirements for the body, primary closure, collar, shoulder, and secondary closure strength tests; revise the format of the labels required by 46 CFR 160.076–39, but do not change the required information; add a definition of "white-water paddling"; move component and material tests from UL 1180 to UL 1191; and renumber the paragraphs in UL 1180. These changes are editorial in nature and have no substantive effect on Coast Guard approval of inflatable PFDs.

2. UL 1191

UL 1191, "UL Standard for Safety for Components for Personal Flotation Devices," contains the construction, testing, and performance requirements for the materials and components used in the construction of PFDs generally. Several revisions in the Fourth Edition of UL 1191 from the Second Edition are not relevant to this rulemaking because the revisions address only inherently buoyant and hybrid PFDs, not inflatable PFDs. This rulemaking only addresses inflatable PFDs, and incorporating by reference the Fourth Edition into 46 CFR part 160, subpart 1 160.076 only incorporates the portions of UL 1191 pertaining to inflatable PFDs.

The most notable substantive changes in UL 1191 Fourth Edition specific to inflatable PFDs are the addition of testing and performance standards for automatic and convertible manual/automatic inflation systems. When the Coast Guard first promulgated 46 CFR part 160, subpart 160.076 in 1995, the only design for an inflatable PFD involved manual activation of the inflation mechanism. Since then, automatic and convertible manual/automatic inflation systems have been developed, and nearly half of the inflatable PFD designs available in the U.S. market utilize automatic inflation. The addition of testing and performance standards for automatic and convertible manual/automatic inflation systems covers the innovative designs created by manufacturers since the Second Edition. As discussed above, the Coast Guard has been approving inflatable PFDs using automatic or convertible manual/automatic inflation systems under 46 CFR 160.076–13(g)(2) because they provide at least the same degree of safety provided by inflatable PFDs meeting the standards in 46 CFR part 160, subpart 160.076. By incorporating UL 1191 Fourth Edition, inflatable PFDs using automatic or convertible manual/automatic inflation systems will now be approved under the specific standards set forth in revised subpart 160.076, rather than as equivalent safety devices.

UL 1191 Fourth Edition includes minor substantive changes from the Second Edition that provide greater flexibility to manufacturers in performing required tests or clarify existing requirements. These changes increase the tolerance for the gross cylinder weight to reflect the actual weights of available cylinders and add

tolerances for the cycle rate for fatigue conditioning of buckles to provide greater flexibility for laboratory equipment. The Fourth Edition eliminates the perchloroethylene exposures during the Operability/Discharge Test because this test was determined not to be representative of the user environment of an inflatable PFD and therefore inapplicable as a safety test. The Fourth Edition also adds Xenon exposure as an optional accelerated weathering method to provide manufacturers another option to choose from for the required weathering tests. The Fourth Edition includes, for the first time, specifications for the water hardness and liquid detergent used for conditioning PFD components and materials to clarify certain test requirements and ensure repeatable test results. The Fourth Edition adds clarifying language to the test procedure for evaluating torsional stiffness of tie tapes.

The Fourth Edition also includes one substantive change to incorporate directly in UL 1191 a portion of the requirements currently contained in subpart 160.076. The Fourth Edition contains the additional marking requirements for inflation systems currently required by 46 CFR 160.067–39(e). Because the Fourth Edition includes the additional marking requirements, these requirements will be deleted from the regulatory text in section 160.067–39(e), as discussed below in the "Conforming Changes" section.

The Fourth Edition also includes editorial changes to correct typos and references to clarify the inflation system discharge test procedure and the maximum crack pressure for the operability test.

3. UL 1123

UL 1123, "UL Standard for Safety for Marine Buoyant Devices," contains the design, construction, testing, and performance requirements for inherently buoyant recreational PFDs. The Coast Guard uses this standard in 46 CFR part 160, subpart 160.076 only to define the format and content of the informational pamphlet required by 46 CFR 160.076–35. The only revision in UL 1123 Seventh Edition relevant to inflatable PFDs is the removal of the statement in the standard erroneously indicating a sole publisher of the pamphlet. As such, this revision has no impact on Coast Guard approval of inflatable PFDs.

*B. Conforming Changes*

Because of the above discussed updates to the UL Standards incorporated by reference, the Coast Guard is making several conforming changes to the regulatory text to account for the revisions in the newer editions of the UL Standards.

The Coast Guard is removing regulatory text that addresses requirements for inflatable PFDs that are contained in the UL 1180 Second Edition or UL 1191 Fourth Edition. Specifically, the Coast Guard is deleting from 46 CFR 160.076–21(b)–(c) and 160.076–25(d)(2)(i)–(iv) the requirements and acceptance criteria for the grab breaking strength, tear strength, seam strength, and permeability tests for inflation chamber materials, which are included in the UL 1191 Fourth Edition. The Coast Guard is also deleting the repacking and rearming test from 45 CFR 160.076–25(c) and the requirements for marking inflation mechanisms from 46 CFR 160.076–21(d) and 160.076–39(e) because these provisions are included in the UL 1180 Second Edition. The deletion of this regulatory text has no substantive effect on the requirements for Coast Guard approval of recreational inflatable PFDs, because the requirements are retained in the updated UL Standards incorporated by reference in revised 46 CFR 160.076–11. Because incorporating a standard by reference is treated as if the requirements of the standards are published in the CFR, retaining this regulatory text would be redundant.

The Coast Guard is also removing standards currently incorporated by reference in subpart 160.076 that will now apply through the newer edition of UL 1191. Because these standards will still apply to inflatable PFDs through the UL 1191 Fourth Edition incorporated by reference in subpart 160.076, it would be redundant to retain the standards in subpart 160.076 text. Specifically, the Coast Guard is removing Federal Test Method Standard No. 191A (Federal Standard for Textile Test Methods), American Society for Testing and Materials' ASTM D 751–95 (Standard Test Methods for Coated Fabrics), and ASTM D 1434–82 (Standard Test Method for Determining Gas Permeability Characteristics of Plastic Film and Sheeting), because those standards, or equivalent test methods, are referenced in UL 1191 Fourth Edition.

Finally, for the updated standards, the Coast Guard proposes editorial changes throughout the subpart to resolve references to deleted paragraphs, to update or remove cross-references to specific sections of the UL Standards, and to conform the formatting of incorporated references to current **Federal Register** requirements.

*C. Regulatory Text Revisions*

To prepare for a future rulemaking addressing inflatable PFDs for use by children, the Coast Guard is removing from § 160.076–1 (Scope) the words "approved for use by adults only." This removal, however, has no substantive effect on Coast Guard approval of inflatable PFDs because the editions of the UL Standards replacing the editions currently incorporated by reference in subpart 160.076 still limit the use of inflatable PFDs to persons who are at least 16 years of age and weigh more than 80 pounds. Removing these words prepares subpart 160.076 for a future rulemaking because, if the Coast Guard decides as part of that future rulemaking to extend the use of inflatable PFDs to children, the Coast Guard anticipates it will do so by again updating the standards incorporated by reference, which will be the only place in subpart 160.076 that contains age and weight limitations after the effective date of this direct final rule.

The Coast Guard is also revising § 160.076–19 (Recognized laboratories) to replace the reference to Underwriters Laboratories (UL) as the sole recognized laboratory for testing of inflatable PFDs and PFD components with a reference to the Coast Guard's Marine Information Exchange (CGMIX) Web site, where all Coast Guard recognized laboratories are listed. When subpart 160.076 was initially published in 1995, UL was, and currently continues to be, the only laboratory recognized by the Coast Guard for approval testing and production oversight of Coast Guard-approved inflatable PFDs and PFD components. However, additional laboratories may be recognized by the Coast Guard to perform these functions. In order to maintain a listing of recognized laboratories outside of the regulatory text consistent with such listings and information for other types of lifesaving equipment, the Coast Guard is replacing the list in subpart 160.076 with the reference to where to find the list on the CGMIX.

## VI. Incorporation by Reference

The Director of the Federal Register has approved the material in 46 CFR 160.115–5 for incorporation by reference under 5 U.S.C. 552 and 1 CFR part 51. 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 paragraph (b) of § 160.115–5.

## VII. 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.

### *A. Executive Order 12866 and Executive Order 13563*

This rulemaking is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

The Coast Guard does not expect this rulemaking to result in additional costs to industry, as manufacturers of Coast Guard-approved inflatable PFDs already follow the editions of the UL Standards being incorporated by reference into 46 CFR part 160, subpart 160.076 by this rulemaking. The Coast Guard requires approval tests to be performed by an independent laboratory recognized by the Coast Guard under 46 CFR part 159, subpart 159.010. Currently, UL is the only recognized independent laboratory for inflatable PFDs, and UL requires manufacturers to conform to its most current standards, which are the editions being incorporated by reference into subpart 160.076. Additionally, UL offers a certification for recreational inflatable PFDs that conform to UL's most current standards. The UL certification provides a product liability benefit to manufacturers, and obtaining the UL certification has become an industry custom for manufacturers of commercially-sold recreational inflatable PFDs.

As described above, industry is currently following the editions of the UL Standards incorporated by reference into subpart 160.076 in this rulemaking, and PFD manufacturers will adhere to these standards regardless of whether this rule is promulgated. Therefore, this modification to 46 CFR part 160, subpart 160.076 is not expected to impose a burden on industry.

In addition, the Coast Guard does not expect removing the language "approved for use by adults only" in 46 CFR 160.076–1 to have a substantive impact because the Coast Guard will continue approving recreational inflatable PFDs with the current age and weight limitations. As discussed above in the "Discussion of the Rule" section, the age and weight limitations are found in current editions of the UL Standards incorporated in subpart 160.076 and will be retained in the newer editions of the UL Standards being incorporated by reference into subpart 160.076 in this rulemaking. The remaining changes to subpart 160.076 are minor editorial updates. Please see the "Discussion of the Rule" section above for additional details.

The primary benefit of this rulemaking will be the increase in regulatory efficiencies in the maritime community by harmonizing Coast Guard regulations in 46 CFR part 160, subpart 160.076 with current voluntary industry consensus standards. This rulemaking will result in greater consistency between Coast Guard regulations and consensus standards and will reduce burdens on manufacturers who currently have to maintain multiple editions of the UL Standards to comply with Coast Guard regulations, to use UL as an independent laboratory to perform required tests, and to obtain the UL certification. This rulemaking will also result in better compliance with the National Technology Transfer and Advancement Act (NTTAA), which directs agencies to use voluntary consensus standards in their regulatory activities.

Because the rulemaking will harmonize subpart 160.076 with existing UL Standards, any ambiguity associated with inflatable PFD standards will be reduced. Harmonization of these standards is important to fulfill the Coast Guard's mission of establishing minimum safety standards, and procedures and tests required to measure conformance with those standards, for recreational vessels and associated equipment.

### *B. Small Entities*

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rulemaking will 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 fewer than 50,000 people.

The Coast Guard expects that this rule will not have an impact on small entities. As described in the "Executive Order 12866 and Executive Order 13563" section, we do not expect this rule to result in additional costs to industry. However, this rule will improve efficiency by providing consistency between Coast Guard regulations and UL Standards. Therefore, the Coast Guard certifies that under 5 U.S.C. 605(b), this rule will not have a 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 will have a significant economic impact on it, please submit a comment to the Docket Management Facility at the address under **ADDRESSES**. In your comment, explain why you think your business or organization qualifies, as well as how and to what degree this rule will economically affect it.

### *C. 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.

### *D. 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).

### *E. Federalism*

A rule has implications for federalism under Executive Order 13132, Federalism, if the rule 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.

### *F. 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.

*G. 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.

*H. Civil Justice Reform*

This rule meets the 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.

*I. 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.

*J. 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.

*K. 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.

*L. 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 uses the following voluntary consensus standards: UL 1123, "UL Standard for Safety for Marine Buoyant Devices"; UL 1180, "UL Standard for Safety for Fully Inflatable Recreational Personal Flotation Devices"; and UL 1191, "UL Standard for Safety for Components for Personal Flotation Devices."

*M. Coast Guard Authorization Act Sec. 608 (46 U.S.C. 2118(a))*

Section 608 of the Coast Guard Authorization Act of 2010 (Pub. L. 111–281) adds new section 2118 to 46 U.S.C. Subtitle II (Vessels and Seamen), Chapter 21 (General). New section 2118(a) sets forth requirements for standards established for approved equipment required on vessels subject to 46 U.S.C. Subtitle II (Vessels and Seamen), Part B (Inspection and Regulation of Vessels). Those standards must be "(1) based on performance using the best available technology that is economically achievable; and (2) operationally practical." *See* 46 U.S.C. 2118(a). This rulemaking addresses inflatable recreational PFDs for Coast Guard approval that are required on vessels subject to 46 U.S.C. Subtitle II, Part B, and the Coast Guard has ensured this rule satisfies the requirements of 46 U.S.C. 2118(a), as necessary.

*N. 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 that this action is one of a category of actions that does not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded under section 6(a) of the "Appendix to National Environmental Policy Act: Coast Guard Procedures for Categorical Exclusions, Notice of Final Agency Policy" (67 FR 48244, July 23, 2002). This rule involves personal flotation device standards and falls under regulations concerning safety equipment. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

**List of Subjects in 46 CFR Part 160**

Marine safety, Incorporation by reference, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, the Coast Guard amends 46 CFR part 160 as follows:

## PART 160—LIFESAVING EQUIPMENT

■ 1. The authority citation for part 160 is revised to read as follows:

**Authority:** 46 U.S.C. 2103, 3306, 3703 and 4302; E.O. 12234; 45 FR 58801; 3 CFR, 1980 Comp., p. 277; 49 CFR 1.46; and Department of Homeland Security Delegation No. 0170.1.

■ 2. Revise § 160.076–1(b) to read as follows:

**§ 160.076–1 Scope.**

* * * * *

(b) Inflatable PFDs approved under this subpart rely entirely upon inflation for buoyancy.

**§ 160.076–7 [Amended]**

■ 3. Amend § 160.076–7(b) by adding the words "(incorporated by reference, see 160.076–11)" after the words "UL 1180".

**§ 160.076–9 [Amended]**

■ 4. Amend § 160.076–9(b) by adding the words "(incorporated by reference, see 160.076–11)" after the words "UL 1180".

■ 5. Amend § 160.076–11 as follows:

■ a. In paragraph (a), remove the first occurrence of the words "paragraph (b) of", which appears after the words "one listed in".

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

**§ 160.076–11 Incorporation by reference.**

* * * * *

(b) Underwriters Laboratories (UL) *Underwriters Laboratories, Inc., 333 Pfingsten Road, Northbrook, IL 60062–2096 (Phone (847) 272–8800; Facsimile: (847) 272–8129).*

(1) UL Standard for Safety for Marine Buoyant Devices, UL 1123, Seventh Edition, October 1, 2008, ("UL 1123"), incorporation by reference approved for § 160.076–35.

(2) UL Standard for Safety for Fully Inflatable Recreational Personal

Flotation Devices, UL 1180, Second Edition, February 13, 2009, ("UL 1180"), incorporation by reference approved for §§ 160.076–7; 160–076–9; 160.076–21; 160.076–23; 160.076–25; 160.076–31; 160.076–37; and 160.076–39.

(3) UL Standard for Safety for Components for Personal Flotation Devices, UL1191, Fourth Edition, December 12, 2008, ("UL 1191"), incorporation by reference approved for §§ 160.076–21; 160.076–25; 160.076–29; and 160.076–31.

■ 6. Revise § 160.076–19 to read as follows:

**§ 160.076–19 Recognized laboratories.**

The approval and production oversight functions that this subpart requires to be conducted by a recognized laboratory must be conducted by an independent laboratory recognized by the Coast Guard under subpart 159.010 of part 159 of this chapter to perform such functions. A list of recognized independent laboratories is available from the Commandant and online at *http://cgmix.uscg.mil.*

■ 7. Revise § 160.076–21 to read as follows:

**§ 160.076–21 Component materials.**

Each component material used in the manufacture of an inflatable PFD must—

(a) Meet the applicable requirements of subpart 164.019 of this chapter, UL 1191 and UL 1180 (incorporated by reference, see § 160.076–11), and this section; and

(b) Be of good quality and suitable for the purpose intended.

**§ 160.076–23 [Amended]**

■ 8. Amend § 160.076–23(a)(1) by adding the words "(incorporated by reference, see § 160.076–11)" after the words "UL 1180".

■ 9. Amend § 160.076–25 as follows:

■ a. In paragraph (a), after the words "UL 1180", add the words "(incorporated by reference, see § 160.076–11)";

■ b. Remove and reserve paragraph (c); and

■ c. Revise paragraph (d) to read as follows.

**§ 160.076–25 Approval Testing.**

* * * * *

(d) Each PFD design must be visually examined for compliance with the construction and performance requirements of §§ 160.076–21 and 160.076–23 and UL 1180 and UL 1191 (incorporated by reference, see § 160.076–11).

* * * * *

■ 10. Amend § 160.076–29 as follows:

■ a. In paragraph (d), remove the words "in accordance with UL 1180"; and

■ b. Revise paragraph (e)(4)(i) to read as follows:

**§ 160.076–29 Production oversight.**

* * * * *

(e) * * *

(4) * * *

(i) Samples must be selected from each lot of incoming material. Unless otherwise specified, Table 29.1 of UL 1191 (incorporated by reference, see § 160.076–11) prescribes the number of samples to select.

* * * * *

**§ 160.076–31 [Amended]**

■ 11. Amend § 160.076–31 as follows:

■ a. In paragraph (c)(1), remove the words "The average and individual results of testing the minimum number of samples prescribed by § 160.076–25(d)(2)" and add, in their place, the words "The materials in each inflatable chamber"; and remove the words "§ 160.076–21(b) and (c)" and add, in their place, the words "Table 29.1 of UL 1191 (incorporated by reference, see § 160.076–11)";

■ b. In paragraph (c)(2), remove the words "§ 160.076–21(d)(2)(iv). The results for each inflation chamber must be at least 90% of the results obtained in approval testing" and add, in their place, the words "Table 29.1 of UL 1191.";

■ c. In paragraph (c)(3), after the words "UL 1180", add the words "(incorporated by reference, see § 160.076–11)", and remove the number "7.15", and add, in its place, the number "41";

■ d. In paragraph (c)(4), after the words "UL 1180", remove the number "7.16", and add, in its place, the number "42";

■ e. In paragraph (c)(5), after the words "UL 1180", remove the words "7.2.2–7.2.10, except 7.2.5" and add, in their place, the number "29"; and

■ f. In paragraph (c)(6), after the words "UL 1180", remove the words "7.4.1 and .2" and add, in their place, the number "31".

**§ 160.076–35 [Amended]**

■ 12. Amend § 160.076–35 by adding the words "(incorporated by reference, see § 160.076–11)" after the words "UL 1123".

**§ 160.076–37 [Amended]**

■ 13. Amend § 160.076–37(b) by removing the words "section 11 of" after the words "specified in" and by adding the words "(incorporated by reference, see § 160.076–11)" after the words "UL 1180".

**§ 160.076–39 [Amended]**

■ 14. Amend § 160.076–39 as follows:

■ a. In § 160.076–39(a), remove the words "section 10" after the words "UL 1180" and add, in their place, the words "(incorporated by reference, see § 160.076–11)"; and

■ b. Remove paragraph (e).

Dated: March 18, 2011.

**J.G. Lantz,**

*Director of Commercial Regulations and Standards, U.S. Coast Guard.*

[FR Doc. 2011–7283 Filed 3–29–11; 8:45 am]

BILLING CODE 9110–04–P

## FEDERAL COMMUNICATIONS COMMISSION

## 47 CFR Part 1

**[FCC 06–94]**

## Practice and Procedure

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; announcement of effective date.

**SUMMARY:** The Federal Communications Commission has published a number of requirements related to practice and procedure before the Commission. This document announces the approval of the Office of Management and Budget (OMB) for information collection requirements contained in the sections outlined in the **DATES** section.

**DATES:** Effective March 30, 2011, the following regulation has been approved by OMB: 47 CFR 1.47(h), published at 71 FR 38781, July 10, 2006.

**FOR FURTHER INFORMATION CONTACT:** Nicholas Degani, Telecommunications Access Policy Division, Wireline Competition Bureau, at (202) 418–7400.

**SUPPLEMENTARY INFORMATION:** On July 10, 2006, the Commission published a Report and Order at 71 FR 38781. That Report and Order amended, among other sections, § 1.47(h) of the Commission rules to require interconnected Voice over Internet Protocol (VoIP) providers to designate an agent for service of documents. On March 19, 2007, OMB approved the information collection requirements contained in § 1.47(h) of title 47 of the United States Code of Federal Regulations as a revision to OMB Control Number 3060–0855.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 2011–7383 Filed 3–29–11; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 97

**[WT Docket No. 10–62; FCC 11–22]**

### Amateur Service Rules

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document revises the Amateur Radio Service rules to amend and clarify the rules with respect to amateur stations transmitting spread spectrum emissions. The rule amendments are necessary to eliminate the requirement that an amateur station use automatic power control to reduce transmitter power when the station transmits a spread spectrum emission, and to reduce the maximum allowed transmitter output power for an amateur station transmitting a spread spectrum emission. The effect of this action is to eliminate the automatic power control provision which has proven to be virtually impossible to implement, and to encourage amateur stations to experiment with spread spectrum communications technologies.

**DATES:** Effective April 29, 2011.

**FOR FURTHER INFORMATION CONTACT:** William T. Cross, Mobility Division, Wireless Telecommunications Bureau, at (202) 418–0680, or TTY (202) 418–7233.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Report and Order* (*R&O*), adopted February 22, 2011, and released March 4, 2011. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov.* Alternative formats are available to persons with disabilities by sending an e-mail to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

1. By this action, the Commission amends the amateur service rules to eliminate the requirement that an amateur station use automatic power control (APC) to reduce transmitter power when the station transmits a spread spectrum emission using more than 1 watt transmitter power.

2. Also, by this action, the Commission limits the transmitter power that amateur stations may transmit to 10 watts when the station is transmitting a spread spectrum emission.

3. The rules that the Commission adopted in this *R&O* apply to the control operator and station licensee of an amateur station, none of which may be small entities. The Commission certifies that no regulatory flexibility analysis is necessary here because, even if a substantial number of small entities, namely, amateur radio clubs, were affected by the rules, there would not be a significant economic impact on those entities. The rules we are adopting do not impose economic requirements. Instead, they relate to rules for the amateur radio service. Therefore, we certify that the rule changes adopted in this *R&O* will not have a significant economic impact on a substantial number of small entities.

4. This *R&O* and the rule amendments are issued under the authority contained in 47 U.S.C. 154(i), 303(r), and 403.

7. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Report and Order,* including the Final Regulatory Flexibility Certifications, to the Chief Counsel for Advocacy of the Small Business Administration.

### List of Subjects in 47 CFR Part 97

Radio.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

### Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 97 as follows:

## PART 97—AMATEUR RADIO SERVICE

■ 1. The authority citation for part 97 continues to read as follows:

**Authority:** 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064–1068, 1081–1105, as amended; 47 U.S.C. 151–155, 301–609, unless otherwise noted.

**§ 97.311 [Amended]**

■ 2. Section 97.311 is amended by removing paragraph (d).

■ 3. Section 97.313 is amended by adding paragraph (j) to read as follows:

**§ 97.313 Transmitter power standards.**

* * * * *

(j) No station may transmit with a transmitter output exceeding 10 W PEP when the station is transmitting a SS emission type.

[FR Doc. 2011–7381 Filed 3–29–11; 8:45 am]

BILLING CODE 6712–01–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 101126521–0640–2]**

**RIN 0648–XA275**

### Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher Vessels Using Trawl Gear in the Bering Sea and Aleutian Islands Management Area

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for Pacific cod by catcher vessels using trawl gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the A season allowance of the 2011 Pacific cod allowable catch (TAC) specified for catcher vessels using trawl gear in the BSAI.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), March 26, 2011, through 1200 hrs, A.l.t., April 1, 2011.

**FOR FURTHER INFORMATION CONTACT:** Obren Davis, 907–586–7228.

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

The A season allowance of the 2011 Pacific cod TAC allocated to catcher vessels using trawl gear in the BSAI is 33,290 metric tons (mt) as established by the final 2011 and 2012 harvest specifications for groundfish in the BSAI (76 FR 11139, March 1, 2011).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS, has determined that the A season allowance of the 2011 Pacific

cod TAC allocated to catcher vessels using trawl gear in the BSAI will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 33,140 mt, and is setting aside the remaining 150 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by catcher vessels using trawl gear in the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

## Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific cod by catcher vessels using trawl gear in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of March 24, 2011.

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

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

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

Dated: March 25, 2011.

**Margo Schulze-Haugen,**

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

[FR Doc. 2011–7481 Filed 3–25–11; 4:15 pm]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 101126522–0640–02]**

**RIN 0648–XA331**

# Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in the West Yakutat District of the Gulf of Alaska

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

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

**SUMMARY:** NMFS is opening directed fishing for pollock in the West Yakutat District of the Gulf of Alaska (GOA). This action is necessary to fully use the 2011 total allowable catch of pollock in the West Yakutat District of the GOA.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), March 26, 2011, through 2400 hrs, A.l.t., December 31, 2011. Comments must be received at the following address no later than 4:30 p.m., A.l.t., April 11, 2011.

**ADDRESSES:** Send comments to James W. Balsiger, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, *Attn:* Ellen Sebastian. You may submit comments, identified by RIN 0648–XA331, by any one of the following methods:

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

*Instructions:* All comments received are a part of the public record. Comment will generally be posted without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

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

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

NMFS closed directed fishing for pollock in the West Yakutat District of the GOA under § 679.20(d)(1)(iii) on March 5, 2011 (76 FR 12883, March 9, 2011).

As of March 23, 2011, NMFS has determined that approximately 850 metric tons of pollock remain in the directed fishing allowance for pollock in the West Yakutat District of the GOA. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C), and (a)(2)(iii)(D), and to fully utilize the 2011 total allowable catch (TAC) of pollock in the West Yakutat District of the GOA, NMFS is terminating the previous closure and is reopening directed fishing for pollock in the West Yakutat District of the GOA. The Administrator, Alaska Region (Regional Administrator) considered the following factors in reaching this decision: the current catch of pollock in the West Yakutat District of the GOA and, the harvest capacity and stated intent on future harvesting patterns of vessels in participating in this fishery.

## Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of pollock in the West Yakutat District of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of March 23, 2011.

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

the reasons provided above for waiver of prior notice and opportunity for public comment.

Without this inseason adjustment, NMFS could not allow the fishery for pollock in the West Yakutat District of the GOA to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until April 11, 2011.

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

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

Dated: March 25, 2011.

**Margo Schulze-Haugen,**

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

[FR Doc. 2011–7482 Filed 3–25–11; 4:15 pm]

BILLING CODE 3510–22–P

# Proposed Rules

Federal Register
Vol. 76, No. 61
Wednesday, March 30, 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 THE TREASURY

**5 CFR Chapter XXI**

**12 CFR Chapters I, V, XV, and XVIII**

**17 CFR Chapter IV**

**19 CFR Chapter I**

**26 CFR Chapter I**

**27 CFR Chapter I**

**31 CFR Subtitle A and Chapters I, II, IV through VIII, IX, and X**

**48 CFR Chapter 10**

## Reducing Regulatory Burden; Retrospective Review Under E.O. 13563

**AGENCY:** Department of the Treasury.

**ACTION:** Request for information.

**SUMMARY:** On January 18, 2011, the President issued Executive Order 13563, "Improving Regulation and Regulatory Review," which sets forth principles and requirements designed to promote public participation, improve integration and innovation, increase flexibility, ensure scientific integrity, and increase retrospective analysis of existing rules. The Department of the Treasury, in its effort to improve Treasury regulations, invites interested members of the public to submit comments on its preliminary plan to review retrospectively its regulations and to submit suggestions as to which Treasury regulations should be modified, expanded, streamlined, or repealed.

**DATES:** *Comment due date:* April 29, 2011.

**ADDRESSES:** Interested persons are invited to submit comments regarding this notice according to the instructions below. All submissions must refer to the document title. Treasury encourages the early submission of comments.

*Electronic Submission of Comments.* Interested persons must submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the Department to make them available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public.

Commenters should follow the instructions provided on that site to submit comments electronically.

*Public Inspection of Comments.* All properly submitted comments will be available for inspection and downloading at *http://www.regulations.gov.*

*Additional Instructions.* In general, comments received, including attachments and other supporting materials, are part of the public record and are immediately available to the public. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

**FOR FURTHER INFORMATION CONTACT:** Office of the Assistant General Counsel for General Law, Ethics, and Regulation at *guidance@treasury.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background—Executive Order 13563

On January 18, 2011, the President signed Executive Order 13563, "Improving Regulation and Regulatory Review," which outlines the following guiding principles:

- Consistent with law, agencies must consider costs and benefits of its regulations and choose the least burdensome path.
- The regulatory process must be transparent and include public participation.
- Agencies must attempt to coordinate, simplify, and harmonize regulations to reduce costs and promote certainty for businesses and the public.
- Agencies must consider approaches that maintain freedom of choice and flexibility, including disclosure of relevant information to the public.
- Regulations must be guided by objective scientific evidence.

Section 6 of Executive Order 13563 emphasizes the importance of retrospective analysis of rules and requires agencies to "develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, expanded, streamlined, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

### Request for Comments

The Department of the Treasury, in implementing Executive Order 13563, invites public comments on two areas of interest. First, comments are invited concerning the development of its preliminary plan to periodically review existing significant regulations. Second, Treasury invites comments about which regulations should be modified, expanded, streamlined, or repealed in order to make the Department's regulations more effective or less burdensome or both. Although Treasury welcomes general comments, in addressing these two areas, commenters are encouraged to respond to the questions below:

1. What factors should Treasury consider in selecting and prioritizing existing rules for retrospective review?
2. Which regulatory programs are working well and should serve as a model for other Treasury programs?
3. Are there Treasury rules that are outdated or contrary to recently enacted statutes, or otherwise in need of updating?
4. In which Treasury regulations are there opportunities to use new information technologies to improve or ease burdens?
5. How often should Treasury review its existing regulations?
6. Are there any Treasury rules that duplicate requirements or contain conflicting requirements, either with another Treasury bureau or another Federal agency? If so, please identify and explain how these duplicative or conflicting requirements could be modified.
7. How can Treasury improve public outreach and increase public participation in the rulemaking process?
8. Please provide any additional information that will help the Department to develop and implement

its preliminary plan for retrospective review of regulations.

The Department advises that this notice and request for comments is issued for information and policy development purposes. Although the Department encourages responses to this notice, such comments do not bind the Department to taking any further actions related to the submission.

**George W. Madison,**

*General Counsel, Department of the Treasury.*

[FR Doc. 2011–7468 Filed 3–29–11; 8:45 am]

**BILLING CODE 4810–25–P**

---

## DEPARTMENT OF ENERGY

### 10 CFR Part 431

**[Docket No. EERE–2010–BT–STD–0003]**

**RIN 1904–AC19**

### Energy Conservation Standards for Commercial Refrigeration Equipment: Public Meeting and Availability of the Preliminary Technical Support Document

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of public meeting and availability of preliminary technical support document.

**SUMMARY:** The U.S. Department of Energy (DOE) will hold a public meeting to discuss and receive comments on the equipment classes that DOE plans to analyze for establishing energy conservation standards for commercial refrigeration equipment; the analytical framework, models, and tools that DOE is using to evaluate standards for this equipment; the results of preliminary analyses performed by DOE for this equipment; the potential energy conservation standard levels derived from these analyses that DOE could consider for this equipment; and any other issues relevant to the development of energy conservation standards for commercial refrigeration equipment. In addition, DOE encourages written comments on these subjects. To inform interested parties and facilitate this process, DOE has prepared an agenda, a preliminary technical support document (preliminary TSD), and briefing materials.

**DATES:** DOE will hold a public meeting on Tuesday, April 19, 2011, from 9 a.m. to 2 p.m. in Washington, DC. Additionally, DOE plans to allow for participation in the public meeting via webinar. DOE will accept comments, data, and other information regarding this rulemaking before or after the public meeting, but no later than May 16, 2011. See section IV, "Public Participation," of this notice of public meeting (NOPM) for details.

**ADDRESSES:** The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Please note that foreign nationals participating in the public meeting are subject to advance security screening procedures which require advance notice prior to attendance of the public meeting. If a foreign national wishes to participate in the public meeting, please inform DOE of this fact as soon as possible by contacting Ms. Brenda Edwards at (202) 586–2945 so that the necessary procedures can be completed.

Interested persons may submit comments, identified by docket number EERE–2010–BT–STD–0003 or Regulation Identification Number (RIN) 1904–AC19, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: CRE–2010–STD–0003@ee.doe.gov.* Include the docket number EERE–2010–BT–STD–0003 and/or RIN 1904–AC19 in the subject line of the message.
- *Postal Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Public Meeting for Commercial Refrigeration Equipment, EERE–2010–BT–STD–0003, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone (202) 586–2945. Please submit one signed paper original.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024. Telephone (202) 586–2945. Please submit one signed paper original.

*Instructions:* All submissions received must include the docket number or RIN for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see section IV, "Public Participation," of this document.

*Docket:* For access to the docket to read background documents or a copy of the transcript of the public meeting or comments received, go to the U.S. Department of Energy, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at (202) 586–2945 for additional information regarding visiting the Resource Room.

DOE has prepared an agenda, a preliminary TSD, and briefing materials, which are available at: *http://www1.eere.energy.gov/buildings/appliance_standards/commercial/refrigeration_equipment.html.*

**FOR FURTHER INFORMATION CONTACT:** Direct requests for additional information to Mr. Charles Llenza, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–2192. E-mail: *Charles.Llenza@ee.doe.gov.* In the Office of General Counsel, contact Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–8145, *Michael.Kido@hq.doe.gov*; or Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–7796, *Elizabeth.Kohl@hq.doe.gov.*

For information on how to submit or review public comments and on how to participate in the public meeting, contact Ms. Brenda Edwards, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone (202) 586–2945. E-mail: *Brenda.Edwards@ee.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

I. Statutory Authority
II. History of Standards Rulemaking for Commercial Refrigeration Equipment
  A. Background
  B. Current Rulemaking Process
III. Summary of the Analyses Performed by DOE
  A. Engineering Analysis
  B. Markups To Determine Installed Price
  C. Energy Use Analysis
  D. Life-Cycle Cost and Payback Period Analyses
  E. National Impact Analysis
  F. Submission of Comments
IV. Public Participation
  A. Attendance at Public Meeting
  B. Procedure for Submitting Requests To Speak
  C. Conduct of Public Meeting
  D. Submission of Comments
V. Approval of the Office of the Secretary

## I. Statutory Authority

Title III of the Energy Policy and Conservation Act of 1975, as amended, (EPCA or the Act) sets forth a variety of provisions designed to improve energy efficiency. Part B of Title III (42 U.S.C. 6291–6309) provides for the Energy

Conservation Program for Consumer Products Other Than Automobiles. Part C of Title III, which established an energy conservation program for certain industrial equipment [a] (42 U.S.C. 6311 – 6317), includes provisions for commercial refrigeration equipment, which is the subject of this rulemaking.

DOE is required to design each standard for this equipment to: (1) Achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified; and (2) result in significant conservation of energy. (42 U.S.C. 6295(o)(2)(A) and (o)(3)(B); 42 U.S.C. 6316(e)(1)(A)) To determine whether a proposed standard is economically justified, DOE will, after receiving comments on the proposed standard, determine whether the benefits of the standard exceed its burdens to the greatest extent practicable, using the following seven factors:

1. The economic impact of the standard on manufacturers and consumers of equipment subject to the standard;
2. The savings in operating costs throughout the estimated average life of the covered equipment in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered equipment which are likely to result from the imposition of the standard;
3. The total projected amount of energy savings likely to result directly from the imposition of the standard;
4. Any lessening of the utility or the performance of the covered equipment likely to result from the imposition of the standard;
5. The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;
6. The need for national energy conservation; and
7. Other factors the Secretary of Energy considers relevant.

(*See* 42 U.S.C. 6295(o)(2)(B)(i); 6316(e)(1)(A))

Before proposing a standard, DOE typically seeks public input on the analytical framework, models, and tools that DOE will use to evaluate standards for the product at issue; and the results of preliminary analyses DOE performed for the product. DOE publishes this document to announce the availability of the preliminary TSD, which details the preliminary analyses, discusses the comments on the framework document, and summarizes the preliminary results of DOE's analyses. In addition, DOE announces a public meeting to solicit feedback from interested parties on its analytical framework, models, and preliminary results.

## II. History of Standards Rulemaking for Commercial Refrigeration Equipment

### *A. Background*

EPCA, as amended by EPACT 2005, prescribes energy conservation standards for certain commercial refrigeration equipment: self-contained commercial refrigerators, freezers and refrigerator-freezers with transparent and solid doors designed for holding temperature applications, and self-contained commercial refrigerators with transparent doors designed for pull-down temperature applications. (42 U.S.C. 6313(c)(2) – (3)) Compliance with these standards was required as of January 1, 2010. *Id.* In addition, EPCA required DOE to set standards for additional commercial refrigeration equipment, namely: commercial ice-cream freezers; self-contained commercial refrigerators, freezers, and refrigerator-freezers without doors; and remote condensing commercial refrigerators, freezers, and refrigerator-freezers. (*See* generally, 42 U.S.C. 6313(c)(4)) DOE published a final rule establishing these standards on January 9, 2009 (74 FR 1092), and manufacturers must comply with these standards starting on January 1, 2012. (42 U.S.C. 6313(c)(4)(A))

Additionally, EPCA requires DOE to conduct a second rulemaking to determine whether to amend the standards established under 42 U.S.C. 6313(c), which includes both the standards prescribed by EPACT 2005 and those prescribed by DOE in the January 2009 final rule. (42 U.S.C. 6313(c)(5)) If DOE decides as part of this ongoing rulemaking to amend the standards, DOE must publish a final rule establishing such amended standards by January 1, 2013. *Id.*

### *B. Current Rulemaking Process*

In initiating this rulemaking, DOE prepared a framework document, "Rulemaking Framework for Commercial Refrigeration Equipment," which describes the procedural and analytical approaches DOE anticipates using to evaluate energy conservation standards for commercial refrigeration equipment. DOE published a notice that announced both the availability of the framework document and a public meeting to discuss the proposed analytical framework for the rulemaking. That notice also invited written comments from the public. 75 FR 24824 (May 6, 2010). The framework document is available at *http://www1.eere.energy.gov/buildings/appliance_standards/commercial/pdfs/cre_framework_04-30-10.pdf.*

DOE held a public meeting on May 18, 2010, at which it presented the various analyses DOE would conduct as part of the rulemaking, such as the engineering analysis, the life-cycle cost (LCC) and payback period (PBP) analyses, and the national impact analysis (NIA). Manufacturers, trade associations, environmental and energy-efficiency advocates and other interested parties attended the meeting. The participants discussed the following major topics: (1) Issues pertaining to the scope of coverage of the current rulemaking; (2) equipment classes; (3) analytical approaches and methods used in the rulemaking; (4) impacts of standards and burden on manufacturers; (5) technology options; (6) distribution channels, shipments, and end users; (7) impacts of outside regulations; and (8) environmental issues.

Comments received since publication of the framework document have helped DOE identify and resolve issues involved in the preliminary analyses. Chapter 2 of the preliminary TSD, available at the Web address given in the **ADDRESSES** section of this notice, summarizes and addresses the comments received in response to the framework document.

## III. Summary of the Analyses Performed by DOE

For the commercial refrigeration equipment covered in this rulemaking, DOE conducted in-depth technical analyses in the following areas: (1) Engineering; (2) markups to determine equipment price; (3) life-cycle cost and payback period; and (4) national impacts. The preliminary TSD that presents the methodology and results of each of these analyses is available at *http://www1.eere.energy.gov/buildings/appliance_standards/commercial/refrigeration_equipment.html.*

DOE also conducted, and has included in the preliminary TSD, several other analyses that either support the five major analyses. These analyses include: (1) The market and technology assessment; (2) the screening analysis, which contributes to the engineering analysis; and (3) the shipments analysis, which contributes to the LCC and PBP analysis and NIA. In addition to these analyses, DOE has begun preliminary work on the manufacturer impact analysis and identified the methods to be used for the

[a] For editorial reasons, Parts B and C were re-designated as Parts A and A–1, respectively, on codification in the U.S. Code.

LCC subgroup analysis, the environmental assessment, the employment analysis, the regulatory impact analysis, and the utility impact analysis. DOE will expand on these analyses in the notice of proposed rulemaking (NOPR).

*A. Engineering Analysis*

The engineering analysis establishes the relationship between the manufacturer selling price and equipment efficiency that DOE is evaluating for energy conservation standards. This relationship serves as the basis for cost-benefit calculations for individual consumers, manufacturers, and the nation. The engineering analysis identifies representative baseline equipment, which is the starting point for analyzing technologies that provide energy efficiency improvements. Baseline equipment refers to a model or models having features and technologies typically found in the minimum efficiency equipment currently available on the market. After identifying the baseline models, DOE estimated manufacturer selling prices by using a consistent methodology and pricing scheme including material costs, cost of shipping, and manufacturer markups. DOE used these inputs to develop manufacturer selling prices for the baseline and more efficient designs. Later, in the markups to determine the installed price analysis, DOE converts these manufacturer selling prices into installed prices. In the preliminary TSD, section 2.4 of chapter 2 and chapter 5 each provide details on the engineering analysis and the derivation of the manufacturer selling prices.

*B. Markups To Determine Installed Price*

DOE derives the installed prices for equipment based on manufacturer markups, distributor markups, contractor markups, and sales taxes. In deriving these markups, DOE determined the major distribution channels for equipment sales, the markup associated with each party in each distribution channel, and the existence and magnitude of differences between markups for baseline equipment (baseline markups) and higher efficiency equipment (incremental markups). DOE calculates both overall baseline and overall incremental markups based on the equipment markups at each step in each distribution channel. In the preliminary TSD, section 2.5 of chapter 2 and chapter 6 provide detail on the estimation of markups.

*C. Energy Use Analysis*

DOE carries out the energy use analysis to estimate the energy consumption of the commercial refrigeration equipment installed in the field, such as in grocery stores and restaurants. DOE also carries out additional studies to understand the impact of variations in building interior temperature and relative humidity on the energy consumption of the refrigeration equipment. Details of the energy use analysis are provided in section 2.6 of chapter 2 and chapter 7 of the TSD.

*D. Life-Cycle Cost and Payback Period Analyses*

The LCC and PBP analyses determine the economic impact of potential standards on individual consumers. The LCC is the total cost of the equipment to the customer over the life of the equipment. The LCC analysis compares the LCCs of equipment designed to meet possible energy conservation standards with the LCCs of the equipment likely to be installed in the absence of standards. DOE determines LCCs by considering (1) total installed cost to the purchaser (which consists of manufacturer selling price, sales taxes, distribution chain markups, and installation cost); (2) the operating cost of the equipment (energy cost and maintenance and repair cost); (3) equipment lifetime; and (4) a discount rate that reflects the real consumer cost of capital and puts the LCC in present-value terms. The PBP represents the number of years needed to recover the increase in purchase price (including installation cost) of higher efficiency equipment through savings in the operating cost of the equipment. PBP is calculated by dividing the incremental increase in installed cost of the higher efficiency equipment, compared to baseline equipment, by the annual savings in operating costs. Section 2.7 of chapter 2 and chapter 8 of the preliminary TSD provide details on the LCC and PBP analyses.

*E. National Impact Analysis*

The NIA estimates the NES and the NPV of total consumer costs and savings expected to result from new standards at specific efficiency levels (referred to as candidate standard levels). DOE calculated NES and NPV for each candidate standard level for commercial refrigeration equipment as the difference between a base-case forecast (without new standards) and the standards-case forecast (with standards). DOE determined national annual energy consumption by multiplying the number of units in use (by vintage) by the average unit energy consumption (also by vintage). Cumulative energy savings are the sum of the annual NES determined from 2016 – 2045. The national NPV is the sum over time of the discounted net savings each year, which consists of the difference between total operating cost savings and increases in total installed costs. Critical inputs to this analysis include shipments projections, equipment retirement rates (based on estimated equipment lifetimes), equipment installed costs and operating costs, equipment annual energy consumption, and discount rates. Section 2.8 of chapter 2 and chapter 10 of the preliminary TSD provide details on the NIA.

## IV. Public Participation

DOE invites input from the public on all the topics described above. The preliminary analytical results are subject to revision following further review and input from the public. A complete and revised TSD will be made available upon issuance of a NOPR. The final rule establishing any amended energy conservation standards will contain the final analysis results and be accompanied by a final rule TSD.

DOE encourages those who wish to participate in the public meeting to obtain the preliminary TSD from DOE's Web site and to be prepared to discuss its contents. A copy of the preliminary TSD is available at the Web at *http://www1.eere.energy.gov/buildings/appliance_standards/commercial/refrigeration_equipment.html.* However, public meeting participants need not limit their comments to the topics identified in the preliminary TSD. DOE is also interested in receiving views concerning other relevant issues that participants believe would affect energy conservation standards for this equipment or that DOE should address in the NOPR.

Furthermore, DOE welcomes all interested parties, regardless of whether they participate in the public meeting, to submit in writing by May 16, 2011 comments and information on matters addressed in the preliminary TSD and on other matters relevant to consideration of standards for commercial refrigeration equipment.

The public meeting will be conducted in an informal, conference style. A court reporter will be present to record the minutes of the meeting. There shall be no discussion of proprietary information, costs or prices, market shares, or other commercial matters regulated by United States antitrust laws.

After the public meeting and the closing of the comment period, DOE will consider all timely submitted comments and additional information obtained from interested parties, as well as information obtained through further analyses, and prepare a NOPR. The NOPR will include proposed energy conservation standards for the equipment covered by the rulemaking, and members of the public will be given an opportunity to submit written and oral comments on the proposed standards.

*A. Attendance at Public Meeting*

The time and date of the public meeting are listed in the **DATES** and **ADDRESSES** sections at the beginning of this NOPM. The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue, SW., Washington, DC 20585–0121. To attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945. Any foreign national wishing to participate in the meeting should advise DOE of this fact as soon as possible by contacting Ms. Brenda Edwards to initiate the necessary procedures.

You can attend the public meeting via webinar, and registration information, participant instructions, and information about the capabilities available to webinar participants will be published on the following Web site: *http://www1.eere.energy.gov/buildings/appliance_standards/commercial/refrigeration_equipment.html.* Participants are responsible for ensuring their systems are compatible with the webinar software.

The purpose of the meeting is to receive comments and to help DOE understand potential issues associated with this proposed rulemaking. DOE must receive requests to speak at the meeting before 4 p.m., Tuesday, April 12, 2011. DOE must receive a signed original and an electronic copy of statements to be given at the public meeting before 4 p.m., Tuesday, April 12, 2011.

*B. Procedure for Submitting Requests To Speak*

Any person who has an interest in today's notice or who is a representative of a group or class of persons that has an interest in these issues may request an opportunity to make an oral presentation. Such persons may hand-deliver requests to speak, along with a computer diskette or CD in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format to the address shown in the **ADDRESSES** section at the beginning of this NOPM between 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays. Requests may also be sent by mail or e-mail to *Brenda.Edwards@ee.doe.gov*.

Persons requesting to speak should briefly describe the nature of their interest in this rulemaking and provide a telephone number for contact. DOE requests persons selected to be heard to submit an advance copy of their statements at least two weeks before the public meeting. At its discretion, DOE may permit any person who cannot supply an advance copy of their statement to participate, if that person has made advance alternative arrangements with the Building Technologies Program. The request to give an oral presentation should ask for such alternative arrangements.

*C. Conduct of Public Meeting*

DOE will designate a DOE official to preside at the public meeting and may also employ a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA. (42 U.S.C. 6306) A court reporter will record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. After the public meeting, interested parties may submit further comments on the proceedings as well as on any aspect of the rulemaking until the end of the comment period.

The public meeting will be conducted in an informal conference style. DOE will present summaries of comments received before the public meeting, allow time for presentations by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a prepared general statement (within DOE-determined time limits) prior to the discussion of specific topics. DOE will permit other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly and comment on statements made by others. Participants should be prepared to answer questions from DOE and other participants concerning these issues. DOE representatives may also ask questions of participants concerning other matters relevant to this rulemaking. The official conducting the public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the public meeting.

DOE will make the entire record of this proposed rulemaking, including the transcript from the public meeting, available for inspection at the U.S. Department of Energy, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m. Monday through Friday, except Federal holidays. The transcript will also be available on DOE's Web site at: *http://www1.eere.energy.gov/buildings/appliance_standards/commercial/refrigeration_equipment.html.*

*D. Submission of Comments*

DOE will accept comments, data, and other information regarding the proposed rule before or after the public meeting, but no later than the date provided at the beginning of this NOPM. Please submit comments, data, and other information as provided in the **ADDRESSES** section. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format and avoid the use of special characters or any form of encryption. Comments in electronic format should be identified by the docket number EERE–2010–BT–STD–0003 and/or RIN 1904–AC19 and wherever possible carry the electronic signature of the author. No telefacsimiles (faxes) will be accepted.

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: One copy of the document including all the information believed to be confidential and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination as to the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include (1) a description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) a date upon which such information might lose its confidential nature due to the

passage of time; and (7) why disclosure of the information would be contrary to the public interest.

## V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this NOPM.

Issued in Washington, DC, on March 24, 2011.

**Kathleen B. Hogan,**

*Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.*

[FR Doc. 2011–7452 Filed 3–29–11; 8:45 am]

BILLING CODE 6450–01–P

---

## DEPARTMENT OF ENERGY

## 10 CFR Part 431

**[Docket Number EERE–2010–BT–STD–0027]**

**RIN 1904–AC28**

## Increased Scope of Coverage for Electric Motors

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Request for information (RFI).

**SUMMARY:** The U.S. Department of Energy (DOE or the Department) seeks certain information to help inform its current rulemaking to set energy conservation standards for electric motors. Specifically, DOE seeks information to assist DOE in determining whether to develop energy conservation standards for certain types of electric motors that are currently unregulated by any standards. Should DOE receive sufficient information supporting the inclusion of these motor types, DOE will consider including these motor types in the electric motors standards rulemaking.

**DATES:** Written comments and information are requested on or before April 19, 2011.

**ADDRESSES:** Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2010–BT–STD–0027, by any of the following methods:

- *E-mail: ElecMotors–2010–STD–0027@ee.doe.gov.* Include docket number EERE–2010–BT–STD–0027 and/or RIN 1904–AC28 in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Revisions to Energy Efficiency Enforcement Regulations, EERE–2010–BT–STD–0027, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Phone: (202) 586–2945. Please submit one signed paper original.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024. Phone: (202) 586–2945. Please submit one signed paper original.

*Instructions:* All submissions received must include the agency name and docket number or RIN for this rulemaking.

*Docket:* For access to the docket to read background documents, or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mr. James Raba, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–8654, e-mail: *Jim.Raba@ee.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

*Authority and Background:* DOE intends to publish a final rule determining whether to amend the current energy conservation standards for electric motors. On September 28, 2010, DOE published a notice of availability of the "Energy Conservation Standards Rulemaking Framework Document for Electric Motors" (Framework Document), which describes the procedural and analytical approaches DOE anticipates using in its evaluation. 75 FR 59657. DOE must publish a final rule determining whether to amend the electric motors standards by December 19, 2012. (42 U.S.C. 6313(b)(4)(B)).

The current energy conservation standards for electric motors, as set forth in the Energy Independence and Security Act of 2007 (EISA 2007) amendments to the Energy Policy and Conservation Act (ECPA), establish energy conservation standards for two types of general purpose electric motors: (1) Subtype I, and (2) subtype II. (42 U.S.C. 6313(b)(2)) These broad categories include various types of motors, such as the National Electrical Manufacturers Association (NEMA) Design B motors rated from 1 to 500 horsepower, NEMA Design A and C motors rated from 1 to 200 horsepower, vertical solid shaft motors and close-coupled pump motors. These standards do not apply to vertical hollow shaft motors, integral shafted partial motors, brake motors, or NEMA Design A motors between 200 and 500 horsepower, among other motor types. This is so because these types of electric motors do not meet currently prescribed definitions for general purpose electric motor (subtype I) and general purpose electric motor (subtype II), in that they are not general purpose motors and cannot be used in most general purpose applications. (42 U.S.C. 6311(13)(A)–(B); 10 CFR 431.12).

During the Framework Document comment period, energy efficiency advocates (the Appliance Standards Awareness Project (ASAP) and the American Council for an Energy-Efficient Economy (ACEEE)), manufacturers (NEMA and Baldor), and utilities (the Pacific Gas and Electric Company (PG&E), Southern California Gas Company (SCGC), San Diego Gas and Electric (SDG&E), and Southern California Edison (SCE)) urged DOE to consider including additional motor types currently without energy conservation standards in DOE's analyses and establishing such standards. (ASAP/NEMA, No. 12 at p. 1; ACEEE, No. 10 at p. 1; Baldor, No. 8 at p. 2; PG&E/SCGC/SDG&E/SCE, No. 11 at p. 1) [1] In the commenters' view, this approach would more effectively increase energy savings than setting more stringent standards for the electric motors that are currently being examined as part of the energy conservation standards rulemaking that DOE has initiated. See 75 FR 59657 (September 28, 2010). These parties also asserted that expanding the scope of DOE's current efforts, along with specially tailored exemptions for certain types of electric motors,would enable DOE to simplify its compliance and enforcement efforts. (ASAP/NEMA, No. 12 at p. 1–2; ACEEE, No. 10 at p. 1)

In light of these comments, DOE requests information regarding definite purpose and special purpose motors, including the additional motor types that DOE describes in Table 1 and Table 2. DOE is considering including definite and special purpose motors in the electric motors standards rulemaking.

[1] Notations of this form appear throughout this document and identify statements made in written comments or at public hearings that DOE has received and has included in the docket for this rulemaking. For example, "NEMA, No. 12 at p. 7" refers to a comment: (1) From the National Electrical Manufacturers Association; (2) in document number 12 in the docket of this rulemaking; and (3) appearing on page 7 of the submission, while "Baldor, Framework Public Meeting Transcript, p.126" refers to a comment: (1) From Baldor Electric Company; (2) in the transcript for the public meeting on the Framework document; and (3) appearing on page 126 of the transcript.

Although DOE is particularly interested in information on the specific motor types identified in comments received in response to the Framework Document, commenters are welcome to provide information similar to the information sought for any additional motor type that the commenter believes should be included in this rulemaking and the reasons for their inclusion as part of the standards rulemaking.

*Description:* Public comments are sought from interested parties regarding establishment of energy conservation standards for several types of definite and special purpose motors for which EISA 2007 did not provide energy conservation standards. DOE has the authority to set energy conservation standards for a wider range of electric motors than those classified as general purpose electric motors (*e.g.,* definite or special purpose motors). The Energy Policy Act of 1992 ("EPAct 1992") amendments to EPCA defined "electric motor" to include a certain type of "general purpose" motor. (42 U.S.C. 6311(13)(A) (1992)) EPAct 1992 set energy conservation standards for such "electric motors" and explicitly stated that the standards did not apply to definite purpose or special purpose motors. (42 U.S.C. 6313(b)(1)) (1992)) In EISA 2007, Congress removed the definition of "electric motors," added a definitional heading for "electric motors," and then denoted several types of "electric motors," including general purpose electric motors, definite purpose motors, and special purpose motors. (See 42 U.S.C. 6311(13) (2010)) EISA 2007 also amended the energy conservation standards for general purpose motors and removed the exclusion for definite purpose and special purpose motors. (42 U.S.C. 6313(b)(2)–(3) (2010)) Based on these changes, in spite of the absence of any current standards for these types of motors, it is DOE's view that definite and special purpose motors are "electric motor" categories covered under EPCA. Accordingly, DOE is considering establishing standards for certain definite and special purpose motors in the context of the electric motors rulemaking.

While existing energy conservation standards cover a majority of the electric motors market, based on DOE's initial findings, several categories of the definite or special purpose motors that interested parties recommended for standards coverage have significant sales volumes, and thus energy savings potential. Adding these motors to the group of motors for which DOE has already set energy conservation standards would also reduce the incentive for manufacturers to attempt to circumvent existing or amended standards by substituting unregulated motors for regulated motors. To this end, DOE examined each motor type to determine whether it would require an engineering analysis separate from covered general purpose electric motors, and whether it could be evaluated using DOE's current test procedure, located in subpart B of 10 CFR part 431.

To inform its decision-making process, DOE seeks information regarding whether any of the motor types listed in Table 1 below have any unique design features that affect the cost or efficiency of the motor. For instance, DOE is interested in whether a particular design feature for a brake motor would prevent it from meeting an efficiency level that its general purpose counterpart can meet. Furthermore, if the cost-efficiency relationship for a comparable general purpose motor cannot be applied to the motor type in question, DOE requests information on the relationship between cost and efficiency. DOE seeks information on whether a scaling relationship can be used to extend the cost-efficiency relationship of a general purpose motor to the motor type in question.

DOE also requests comments on whether inclusion of each of the motor types listed in Table 1 in the electric motors rulemaking would require changes to the current DOE test procedure. DOE requests information on whether the change would require that a new test method or test procedure be incorporated by reference, or whether it would require a slight modification or clarification as to how the test is performed, similar to what is currently done for vertical solid shaft motors, which, as DOE understands the current practice, are tested in the horizontal configuration. If a new test procedure is needed, DOE requests information on any test procedures or test methods that are applicable and available and the reasons for those procedures or methods.

Table 1 summarizes DOE's preliminary findings for each of the motor types that stakeholders support including within the electric motors standards rulemaking. DOE requests comment on the preliminary conclusions included in the table, as well as the market share of each of these motor types, and the potential energy saved by including each motor type. The market analysis consists of motors sold in the U.S. by NEMA-member companies and does not include any imports. DOE also requests comment on whether there are any other types of motors not listed in Table 1 that DOE should consider including in the standards rulemaking.

TABLE 1—ELECTRIC MOTOR TYPES WHICH STAKEHOLDER COMMENTS INDICATED SHOULD BE INCLUDED IN THE STANDARDS RULEMAKING

| Motor type | Requires separate analysis from general purpose motors? | Requires changes to the DOE test procedure? | Approximate percentage of the motor market | Notes |
|---|---|---|---|---|
| NEMA Design A Motors from 200 to 500 HP. | No | No | Unknown | DOE believes that these motors are similar to the lower horsepower Design A electric motors already covered. |
| Brake Motors | No | No | 10.1% | DOE believes that when not applied, the brake unit does not interfere with normal operation and therefore the motor can be tested with the brake in the off position using the current test procedure. DOE believes that the cost-efficiency relationship is similar to that of a general purpose electric motor. |

TABLE 1—ELECTRIC MOTOR TYPES WHICH STAKEHOLDER COMMENTS INDICATED SHOULD BE INCLUDED IN THE STANDARDS RULEMAKING—Continued

| Motor type | Requires separate analysis from general purpose motors? | Requires changes to the DOE test procedure? | Approximate percentage of the motor market | Notes |
|---|---|---|---|---|
| Partial Motors or Component Sets | Yes | Yes | 11.9% | DOE has been advised that these motors do not include a full frame, front plate, bearings, shaft, or shaft support. Because the ability of these components to dissipate heat is strongly dependent on the type of frame, bearings, etc. chosen, the efficiency of these motors is therefore dependent on the application. Because of this, they would also require a new test procedure. |
| Integral Shafted Partial Motors | No | No | | DOE believes that unlike partial motors or component sets, integral shafted partial motors are only missing the drive end face plate, and therefore can be tested with a "dummy test bracket" using the current test procedure. DOE believes that when equipped with a dummy end plate, the cost-efficiency relationship of this type of motor would be similar to that of a general purpose motor. |
| Vertical Hollow Shaft Motors | No | No | 0.8% | DOE believes that these motors do not differ from vertical solid shaft motors in performance or electrical characteristics. When tested with their bearings swapped for ball bearings and in a horizontal configuration, these motors can meet designated efficiency levels of general purpose motors. DOE believes that the test procedure would mirror that performed on vertical solid shaft motors, which are currently covered by DOE standards. |
| Integral Gear Motors | No | No | 15.6% | DOE has been advised that these motors are almost identical to integral shafted partial motors in function, and therefore can be tested similarly, with a "dummy test bracket" in lieu of a standard face plate. As with integral shafted motors, DOE believes that when equipped with a dummy end plate, the cost-efficiency relationship of this type of motor would be similar to that of a general purpose motor. |
| TENV Motors | Yes | No | 3.0% | DOE understands that these motors have no built-in fan, and therefore require enough exterior clearance to allow for free convection. Furthermore, the frame is generally larger to aid in dissipation of heat. Because of this, DOE believes that the cost-efficiency relationship for a general purpose motor cannot be directly applied to a TENV motor, as TENV motors have unique efficiency-affecting features that distinguish them from general purpose motors. |

TABLE 1—ELECTRIC MOTOR TYPES WHICH STAKEHOLDER COMMENTS INDICATED SHOULD BE INCLUDED IN THE STANDARDS RULEMAKING—Continued

| Motor type | Requires separate analysis from general purpose motors? | Requires changes to the DOE test procedure? | Approximate percentage of the motor market | Notes |
|---|---|---|---|---|
| TEAO Motors | Yes | Yes | | DOE understands that these motors are intended to be cooled by ventilation means external to the motor and that the motor must be provided with additional ventilation to prevent it from overheating. DOE believes the addition of a separate means for cooling would require a new test procedure. Furthermore, DOE believes that the cost-efficiency relationship for a general purpose motor cannot be directly applied to a TEAO motor, as TEAO motors have unique efficiency-affecting features that distinguish them from general purpose motors. |

The joint comments from ASAP and NEMA also identified several types of motors that the commenters believe should not be included in the standards rulemaking. (ASAP/NEMA, No. 12 at p. 9) These motors are presented in Table 2. To inform its decision-making process, DOE seeks information regarding the merits of this recommendation and whether any of the motor types listed in Table 2 have any unique design features that affect the cost or efficiency of the motor. Furthermore, if the cost-efficiency relationship for a comparable general purpose motor cannot be applied to the motor type in question, DOE requests information on the relationship between cost and efficiency. DOE seeks information on whether a scaling relationship can be used to extend the cost-efficiency relationship of a general purpose motor to the motor type in question.

DOE also requests comments on whether inclusion of each of the motor types listed in Table 2 in the electric motors rulemaking would require changes to the current DOE test procedure and if so, whether those changes would require that a new test method or test procedure be incorporated by reference. If a new test procedure is needed, DOE requests information on any test procedures or test methods that are applicable and available and why those procedures or methods are needed.

Table 2 summarizes DOE's preliminary findings for each of the motor types that ASAP and NEMA do not support for inclusion within the electric motors standards rulemaking. DOE requests comment on the preliminary conclusions included in Table 2, as well as the market share of each of these motor types and their potential energy savings.

TABLE 2—ELECTRIC MOTOR TYPES WHICH STAKEHOLDER COMMENTS INDICATED SHOULD BE EXCLUDED FROM THE STANDARDS RULEMAKING

| Motor type | Requires separate analysis from general purpose motors? | Requires changes to the DOE test procedure? | Notes |
|---|---|---|---|
| Multispeed Motors | Yes | Yes | The current standards only cover single-speed motors, and therefore, DOE believes that the cost-efficiency relationship for general purpose motors cannot be directly applied to multispeed motors. Also, these motors would require a new test procedure. |
| DC Motors | Yes | Yes | The current standards only cover AC motors, and therefore, DOE believes that the cost-efficiency relationship for general purpose motors cannot be directly applied to DC motors. Also, these motors would require a new test procedure. |
| Single Phase Motors | Yes | Yes | The current standards only cover polyphase motors, and therefore, DOE believes that the cost-efficiency relationship for general purpose motors cannot be directly applied to single phase motors. Also, these motors would require a new test procedure. |
| Liquid Cooled and Submersible or Immersible Motors. | DOE Requests Comment. | Yes | DOE understands that the submersible motor is completely sealed for use in submersible applications, and that cooling is accomplished by surrounding liquid. DOE requests comment on whether the cost-efficiency relationship for a general purpose motor can be directly applied to a submersible motor. |

TABLE 2—ELECTRIC MOTOR TYPES WHICH STAKEHOLDER COMMENTS INDICATED SHOULD BE EXCLUDED FROM THE STANDARDS RULEMAKING—Continued

| Motor type | Requires separate analysis from general purpose motors? | Requires changes to the DOE test procedure? | Notes |
|---|---|---|---|
| Electronically Commutated Motors | Yes | Yes | The current standards only cover squirrel-cage induction motors, and therefore, DOE believes that the cost-efficiency relationship for general purpose motors cannot be directly applied to electrically commutated motors. Also, these motors would require a new test procedure. |
| Switched Reluctance Motors | Yes | Yes | The current standards only cover squirrel-cage induction motors, and therefore, DOE believes that the cost-efficiency relationship for general purpose motors cannot be directly applied to switched reluctance motors. Also, these motors would require a new test procedure. |
| Interior Permanent Magnet Motors | Yes | Yes | The current standards only cover squirrel-cage induction motors, and therefore, DOE believes that the cost-efficiency relationship for general purpose motors cannot be directly applied to interior permanent magnet motors. Also, these motors would require a new test procedure. |
| Inverter-duty Motors | Yes | No | DOE is aware that these motors are designed to run on variable frequency drives and typically are designed to run at lower speeds. Because they are designed to run at lower speeds where they won't be cooled as effectively, in order to prevent the motor from overheating, the insulation differs from that used in a general purpose motor. This difference in internal design leads to a different cost-efficiency curve. |
| Intermittent-duty Motors | Yes | Yes | DOE is aware that these motors are designed to run on an intermittent basis to allow for proper cooling without overheating. The current standards and test procedure only cover continuous duty motors. Therefore, DOE believes that the cost-efficiency relationship for general purpose motors cannot be directly applied to intermittent-duty motors. Also, these motors would require a new test procedure. |

In addition to the above issues, DOE seeks information and comment regarding the possible consolidation of two different sets of motors into one equipment class for the purposes of its analysis. Specifically, Baldor and NEMA both recommended that DOE combine Design A and Design B motors into a single equipment class. (Baldor, Framework Public Meeting Transcript, p.77; NEMA, No. 13, p.4) ("Design A" and "Design B" are NEMA-developed designations that define a motor's performance characteristics such as the locked-rotor torque, pull-up torque, breakdown torque, inrush current, and locked-rotor current.) These motors are identical except with respect to the limit on inrush current [2]—Design B motors are limited to certain prescribed levels while Design A motors have no such limitation. DOE is interested in receiving information about any differences in efficiencies between similar Design A and Design B motors. DOE is also interested in receiving information about the respective market shares of Design A and Design B motors.

Baldor and NEMA made a similar recommendation for U-frame and T-frame motors. (Baldor, Framework Public Meeting Transcript, p.126; NEMA, No. 13, p.13) T-frame motors, which are more compact than U-frame motors, are increasingly being used as replacements for their U-frame counterparts. While installing a T-frame motor into a U-frame application requires minor adjustments (*e.g.* shimming of the mounting plate and/or using a different shaft coupling, which are changes that a technician can make expeditiously) to enable it to fit within a U-frame application, this motor would provide the same functionality as the U-frame motor it replaces. Partly because of their smaller size and lower weight for similarly rated motors (*i.e.* horsepower), information reviewed by DOE indicates that T-frame motors are replacing U-frame motors in both new and existing applications. (NEMA/ACEEE, No. 25, p. 6) [3] DOE is interested in receiving information about the difference in efficiencies between similar T-frame and U-frame motors. DOE is also interested in receiving information about the respective market shares of T-frame and U-frame motors.

## Public Participation

### *A. Submission of Information*

DOE will accept comments in response to this RFI under the timeline provided in the **DATES** section. Comments submitted to the Department through the eRulemaking Portal or by e-mail should be provided in WordPerfect, Microsoft Word, portable document format (PDF), or text file format. Those responding should avoid the use of special characters or any form of encryption. No facsimiles will be accepted. Comments submitted in response to this notice will become a matter of public record and will be made publicly available.

### *B. Issues on Which DOE Seeks Information*

For this RFI, DOE requests comments, information, and recommendations on the following concepts for the purpose of determining whether additional motor types currently without energy

[2] Inrush current refers to the maximum, instantaneous input current drawn by an electrical device when first turned on. For example, an alternating current electric motor may draw several times its normal full-load current when first energized, for a few cycles of the input waveform.

[3] This written comment was submitted to the docket of the supplemental notice of proposed rulemaking on test procedures for electric motors and small electric motors (refer to *http://www.regulations.gov,* Docket No. EERE–2008–BT–TP–0008; RIN number 1904–AB71).

conservation standards can and should be assigned energy conservation standards. DOE also seeks information and comment regarding the possible consolidation of NEMA Design A and Design B motors into one equipment class and NEMA T- and U-frame motors into one equipment class for the purpose of its analysis and energy conservation standards.

1. DOE requests comment on the preliminary conclusions included in Table 1 and Table 2.

2. DOE seeks comment on whether the analyses performed for motors that currently have standards can be extended to those electric motors listed in Table 1 and Table 2.

3. DOE seeks information regarding whether any of the motor types listed in Table 1 and Table 2 have any unique design features that affect the cost or efficiency of the motor compared to general purpose motors.

a. If the cost-efficiency relationship for a comparable general purpose motor cannot be applied to the motor type in question, DOE requests information on the relationship between cost and efficiency.

b. DOE requests information on whether a scaling relationship can be used to extend the cost-efficiency relationship of a general purpose motor to the motor type in question.

4. DOE requests comment on the market share of each of these motor types listed in Table 1 and Table 2.

5. DOE requests comment on the potential energy saved by including each motor type listed in Table 1 and Table 2 in the standards rulemaking.

6. DOE seeks information on methods for testing the motors listed in Table 1 and Table 2, and how they may differ from the current test procedures for electric motors. If a new test procedure is needed, DOE requests information on the reasons why such a new procedures is needed and the current availability and applicability of any test procedures or test methods. DOE also seeks confirmation of the accuracy of its understanding with respect to the testing of vertical shaft motors.

7. DOE seeks information on any other types of definite purpose or special purpose motors not listed in Table 1 and Table 2 that DOE should consider including in this rulemaking.

8. DOE seeks comment on the possible consolidation of NEMA Design A and Design B motors into one equipment class, and NEMA T- and U-frame motors into one equipment class.

a. What are the possible differences in achievable efficiency between Design A and Design B motors?

b. What are the respective market shares of Design A and Design B motors?

c. What are the possible differences in achievable efficiency between U-frame and T-frame motors?

d. What are the respective market shares of U-frame and T-frame motors?

**Statutory Authority:** 42 U.S.C. 6313(b)(4).

Issued in Washington, DC, on March 24, 2011.

**Kathleen B. Hogan,**

*Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.*

[FR Doc. 2011–7440 Filed 3–29–11; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 25

**[Docket No. NM451; Notice No. 25–11–10–SC]**

## Special Conditions: Bombardier Model BD–700–1A10 and BD–700–1A11 Airplanes, Head-Up Display (HUD) With Video Synthetic Vision System (SVS)

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

**ACTION:** Notice of proposed special conditions.

**SUMMARY:** This action proposes special conditions for Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes. These airplanes, as modified by Bombardier Inc., will have a novel or unusual design features associated with a SVS that displays video imagery on the HUD. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

**DATES:** We must receive your comments by April 19, 2011.

**ADDRESSES:** You must mail two copies of your comments to: Federal Aviation Administration, Transport Airplane Directorate, Attn: Rules Docket (ANM–113), Docket No. NM451, 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. NM451. 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:** Dale Dunford, FAA, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2239 facsimile (425) 227–1100.

**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 January 26, 2007, Transport Canada Civil Aviation (TCCA), on behalf of Bombardier Inc., located in Montreal Canada, applied to the New York Aircraft Certification Office (NYACO) for FAA approval of a type-design change on the Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes. Per Type Certificate Data Sheet (TCDS) T00003NY, those aircraft models are known under the marketing designation of Global Express and Global 5000, respectively. The change is to introduce the Rockwell-Collins avionics suite to replace the existing Honeywell Primus 2000EP avionics suite. It includes the installation of a SVS that displays video imagery.

Video display on the HUD constitutes new and novel technology for which the

FAA has no certification criteria. Title 14, Code of Federal Regulations (14 CFR) 25.773 does not permit visual distortions and reflections that could interfere with the pilot's normal duties and was not written in anticipation of such technology. Other applications for certification of such technology are anticipated in the near future and magnify the need to establish FAA safety standards that can be applied consistently for all such approvals. Special conditions are therefore proposed as prescribed under the provisions of § 21.16.

**Type Certification Basis**

Under the provisions of 14 CFR 21.101, Bombardier Inc. must show that the Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in T00003NY or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the "original type certification basis." The regulations incorporated by reference in T00003NY are as follows:

Based on the application date, January 26, 2007, under the provisions of § 21.101, the applicable type-certification standards for the modification to the Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes are as follows:

**Airworthiness & Environmental Standards for Components and Areas Not Affected by the Change**

The original certification basis for the Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes shown on TCDS T00003NY, Revision 13.

**Airworthiness and Environmental Standards for Components and Areas Affected by the Change**

14 CFR part 25, effective February 1, 1965, including the latest applicable requirements of Amendments 25–1 through 25–119.

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 Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of 14 CFR 21.16.

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 or similar novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same or similar novel or unusual design feature, the special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36 .

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

**Novel or Unusual Design Features**

The Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes will incorporate the following novel or unusual design features:

An SVS that displays video imagery on a HUD.

**Discussion**

For many years the FAA has approved, on transport category airplanes, the use of HUD that display flight symbology, without a significant visual obscuration of the outside view. When the FAA began to evaluate the display of enhanced vision system (EVS) imagery on the HUD, significant potential to obscure the outside view became apparent, contrary to the requirements of 14 CFR 25.773. This rule does not permit distortions and reflections in the pilot-compartment view that can interfere with normal duties, and the rule was not written in anticipation of such technology. The video image potentially interferes with the pilot's ability to see the natural scene in the center of the forward field of view. Therefore, the FAA issued special conditions for such HUD/EVS installations to ensure that the level of safety required by § 25.773 would be met even when the image might partially obscure the outside view. While many of the characteristics of EVS and SVS video differ in some ways, they have one thing in common; the potential for interference with the outside view through the airplane windshield. The FAA proposes special conditions for new and novel technologies to achieve equivalent levels of safety.

Although the pilot may readily be able to see around and through small, individual, stroke-written symbols on the HUD, the pilot may not be able to see around or through the image that fills the display without some interference of the outside view. Nevertheless, the SVS may be capable of meeting the required level of safety when considering the combined view of the image and the outside scene visible to the pilot through the image. It is essential that the pilot can use this combination of image and natural view of the outside scene as safely and effectively as the pilot-compartment view currently available without the SVS image.

Because § 25.773 does not provide for any alternatives or considerations for such a new and novel system, the FAA establishes safety requirements that assure an equivalent level of safety and effectiveness of the pilot-compartment view as intended by that rule. The purpose of this special condition is to provide the unique pilot-compartment-view requirements for the SVS installation.

**Applicability**

As discussed above, these special conditions are applicable to the Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes. Should Bombardier Inc. apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

**Conclusion**

This action affects only certain novel or unusual design features on Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes. 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, and 44704.

**The Proposed Special Conditions**

Accordingly, the Federal Aviation Administration (FAA) proposes the following special conditions as part of the type-certification basis for Bombardier Model BD–700–1A10 and BD–700–1A11 airplanes.

1. During any phase of flight in which it is to be used, the SVS imagery on the HUD must not degrade flight safety or interfere with the effective use of outside visual references for required pilot tasks.

2. To avoid unacceptable interference with the safe and effective use of the

pilot-compartment view, the SVS must meet the following requirements:

a. The SVS design must minimize unacceptable display characteristics or artifacts (e.g., terrain shadowing against a dark background) that obscure the desired image of the scene, impair the pilot's ability to detect and identify visual references, mask flight hazards, distract the pilot, or otherwise degrade task performance or safety.

b. Control of SVS image display brightness must be sufficiently effective in dynamically changing background (ambient) lighting conditions to avoid pilot distraction, impairment of the pilot's ability to detect and identify visual references, masking of flight hazards, or to otherwise degrade task performance or safety. If automatic control for image brightness is not provided, it must be shown that a single, manual setting is satisfactory for the range of lighting conditions encountered during a time-critical, high-workload phase of flight (*e.g.,* low-visibility instrument approach).

c. A readily accessible control must be provided that permits the pilot to immediately deactivate and reactivate display of the SVS image on demand, without having to remove hands from the flight controls and throttles.

d. The SVS image on the HUD must not impair the pilot's use of guidance information, or degrade the presentation and pilot awareness of essential flight information displayed on the HUD, such as alerts, airspeed, attitude, altitude and direction, approach guidance, windshear guidance, TCAS resolution advisories, or unusual-attitude recovery cues.

e. The SVS image and the HUD symbols, which are spatially referenced to the pitch scale, outside view, and image, must be scaled and aligned (*i.e.,* conformal) to the external scene. In addition, the SVS image and the HUD symbols—when considered singly or in combination—must not be misleading, cause pilot confusion, or increase workload. Airplane attitudes or cross-wind conditions may cause certain symbols (*e.g.,* the zero-pitch line or flight-path vector) to reach field-of-view limits, such that they cannot be positioned conformally with the image and external scene. In such cases, these symbols may be displayed but with an altered appearance that makes the pilot aware that they are no longer displayed conformally (for example, "ghosting"). The combined use of symbology and runway image may not be used for path monitoring when path symbology is no longer conformal.

f. A HUD system used to display SVS images must, if previously certified, continue to meet all of the requirements of the original approval.

3. The safety and performance of the pilot tasks associated with the use of the pilot-compartment view must be not be degraded by the display of the SVS image. These tasks include the following:

a. Detection, accurate identification and maneuvering, as necessary, to avoid traffic, terrain, obstacles, and other flight hazards.

b. Accurate identification and utilization of visual references required for every task relevant to the phase of flight.

4. Appropriate limitations must be stated in the Operating Limitations section of the Airplane Flight Manual to prohibit the use of the SVS for functions that have not been found to be acceptable.

Issued in Renton, Washington, on March 18, 2011.

**K.C. Yanamura,**

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

[FR Doc. 2011–7414 Filed 3–29–11; 8:45 am]

**BILLING CODE 4910–13–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R06–OAR–2010–0190; FRL–9287–7]**

## Approval and Promulgation of Implementation Plans; Oklahoma; Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations

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

**ACTION:** Announcement of public hearing.

**SUMMARY:** On March 22, 2011, EPA published a proposal in the **Federal Register** to approve and disapprove portions of State Implementation Plan (SIP) revisions submitted by the State of Oklahoma and promulgate a Federal Implementation Plan (FIP) to address the Clean Air Act requirement for best available retrofit technology (BART) for sulfur dioxide ($SO_2$) emissions and to prevent emissions from Oklahoma sources from interfering with other states' measures to protect visibility. In the notice EPA announced an open house and public hearing for the proposal to be held April 13, 2011, in Oklahoma City, Oklahoma. In this notice EPA is announcing an additional open house and public hearing to be held in Tulsa, Oklahoma on April 14, 2011. More information is provided in **SUPPLEMENTARY INFORMATION**.

**DATES:** Public hearings, preceded by an open house, will be held on April 13, 2011, in Oklahoma City, Oklahoma, and April 14, 2011, in Tulsa, Oklahoma.

**ADDRESSES:** The April 13, 2011, open house and public hearing will be held at the Metro Technology Centers, Springlake Campus, Business Conference Center, Meeting Rooms H and I, 1900 Springlake Drive, Oklahoma City, Oklahoma 73111, (405) 424–8324. The April 14, 2011, open house and public hearing will be held at the Tulsa Tech—Riverside Campus, in the Auditorium of the Alliance Conference Center, 801 East 91st Street, Tulsa, Oklahoma 74132, (918) 828–4000. Driving directions to the Tulsa Tech—Riverside Campus may also be found using the following address: 801 West K Place, Jenks, Oklahoma 74037.

**FOR FURTHER INFORMATION CONTACT:** Joe Kordzi, EPA Region 6 Air Planning Section, telephone (214) 665–7186, e-mail address *r6air_okhaze@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever "we", "us", or "our" is used, we mean the EPA. On March 22, 2011, we published a proposal in the **Federal Register** to (1) approve and disapprove portions of SIP revisions submitted by the State of Oklahoma and (2) promulgate a FIP to address the Clean Air Act requirement for BART for $SO_2$ emissions and to prevent emissions from Oklahoma sources from interfering with other states' measures to protect visibility. *See* 76 FR 16168. Our proposal can be accessed online at *http://www.regulations.gov* (Docket No. EPA–R06–OAR–2010–0190). In the notice we announced an open house and public hearing for the proposal to be held Wednesday, April 13, 2011, in Oklahoma City, Oklahoma. We have scheduled an additional open house and public hearing to be held in Tulsa, Oklahoma on Thursday, April 14, 2011.

The Oklahoma City open house and public hearing is scheduled to be held on Wednesday April 13, 2011, at the Metro Technology Centers, Springlake Campus, Business Conference Center, Meeting Rooms H and I, 1900 Springlake Drive, Oklahoma City, Oklahoma 73111, (405) 424–8324. The Metro Technology Centers Springlake Campus is located at the intersection of Martin Luther King Ave. and Springlake Drive between NE. 36th and NE. 50th just south of the Oklahoma City Zoo and Kirkpatrick Center. Parking for the

Business Conference Center is available at no charge.

The Tulsa open house and public hearing is scheduled to be held on Thursday, April 14, 2011, at the Tulsa Tech—Riverside Campus, in the Auditorium of the Alliance Conference Center, 801 East 91st Street, Tulsa, Oklahoma 74132, (918) 828–4000. Driving directions to the Tulsa Tech—Riverside Campus may also be found using the following address: 801 West K Place, Jenks, Oklahoma 74037. The Tulsa Tech—Riverside Campus is located on the south side of Tulsa, and is east of Highway 75 and north of the Creek Turnpike. Parking is available on campus at no charge.

For both locations the open house will begin at 1 p.m. and end at 3 p.m. local time. The public hearing will be held from 4 p.m. until 6 p.m., and again from 7 p.m. until 9 p.m. Opening remarks for the public hearing will be provided at 4 p.m., and again at 7 p.m. The public hearing will provide interested parties the opportunity to present information and opinions to EPA concerning our proposal. Interested parties may also submit written comments, as discussed in the proposal. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at the public hearing. We will not respond to comments during the public hearing. When we publish our final action, we will provide written responses to all oral and written comments received on our proposal. To provide opportunities for questions and discussion, we will hold an open house prior to the public hearing. During the open house, EPA staff will be available to informally answer questions on our proposed action. Any comments made to EPA staff during the open house must still be provided formally in writing or orally during the public hearing in order to be considered in the record.

At the public hearing, the hearing officer may limit the time available for each commenter to address the proposal to 5 minutes or less if the hearing officer determines it to be appropriate. We will not be providing equipment for commenters to show overhead slides or make computerized slide presentations. Any person may provide written or oral comments and data pertaining to our proposal at the Public Hearing. Verbatim transcripts, in English, of the hearing and written statements will be included in the rulemaking docket.

Dated: March 23, 2011.

**Carl E. Edlund,**

*Multimedia Planning and Permitting Division, Director, Region 6.*

[FR Doc. 2011–7459 Filed 3–29–11; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R07–OAR–2011–0309; FRL–9287–9]**

## Approval and Promulgation of Implementation Plans; State of Missouri

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve the State Implementation Plan (SIP) submittal from the state of Missouri addressing the requirements of Clean Air Act (CAA) sections 110(a)(1) and (2) for the 1997 revisions to the National Ambient Air Quality Standards (NAAQS) for ozone. Section 110(a)(1) requires that each state adopt and submit a SIP to support implementation of each new or revised NAAQS promulgated by the EPA and these SIPs are commonly referred to as "infrastructure" SIPs. EPA believes that Missouri's infrastructure SIP adequately addresses the elements described in section 110(a)(2) and further described in the October 2, 2007, guidance for infrastructure SIPs issued by the EPA Office of Air Quality Planning and Standards. However, because EPA already approved the portion of Missouri's SIP submittal relating to the interstate transport infrastructure element, section 110(a)(2)(D)(i), this proposed rulemaking does not address the interstate transport element, nor does this proposal reopen any aspect of EPA's prior action on the interstate transport element. Furthermore, this action does not address infrastructure requirements with respect to the 1997 $PM_{2.5}$ NAAQS or the 2006 revisions to the NAAQS. Those requirements will be addressed in future rulemaking.

**DATES:** Comments must be received on or before April 29, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R07–OAR–2011–0309 by one of the following methods:

1. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
2. *E-mail: kramer.elizabeth@epa.gov.*
3. *Mail:* Ms. Elizabeth Kramer, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, Air and Waste Management Division, 901 North 5th Street, Kansas City, Kansas 66101.
4. *Hand Delivery or Courier:* Deliver your comments to Ms. Elizabeth Kramer, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, Air and Waste Management Division, 901 North 5th Street, Kansas City, Kansas 66101.

*Instructions:* Direct your comments to Docket ID No. EPA–R07–OAR–2011–0309. 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 should 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, 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 U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101, from 8 a.m. to 4:30 p.m., Monday through Friday,

excluding legal holidays. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

**FOR FURTHER INFORMATION CONTACT:** Ms. Elizabeth Kramer, Air Planning and Development Branch U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101; *telephone number:* (913) 551–7186; *fax number:* (913) 551–7844; *e-mail address: kramer.elizabeth@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever "we," "us," or "our" is used, we refer to EPA. This section provides additional information by addressing the following questions:

I. What is a section 110(a)(1) and (2) infrastructure SIP?
II. What elements are applicable under section 110(a)(1) and (2)?
III. What is EPA's evaluation of how the state addressed the relevant elements of section 110(a)(1) and (2)?
IV. What action is EPA proposing?
V. Statutory and Executive Order Reviews

## I. What is a section 110(a)(1) and (2) infrastructure SIP?

Section 110(a)(1) and (2) of the CAA require, in part, that states submit to EPA plans to implement, maintain and enforce each of the NAAQS promulgated by EPA. These provisions require states to address basic SIP requirements including, for example, adequate provisions for emission inventory development, monitoring, and modeling to assure attainment and maintenance of the applicable standards. By statute, SIPs meeting the requirements of section 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised standard. These SIPs are commonly referred to as "infrastructure" SIPs.

## II. What elements are applicable under section 110(a)(1) and (2)?

On October 2, 2007, EPA issued guidance to address infrastructure SIP elements required under section 110(a)(1) and (2) for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS.[1] EPA will address these elements below under the following headings: (A) Emission limits and other control measures; (B) Ambient air quality monitoring/data system; (C) Program for enforcement of control measures (PSD, New Source Review for nonattainment areas, and construction and modification of all stationary sources); (D) Interstate and international transport; (E) Adequate authority, resources, implementation, and oversight; (F) Stationary source monitoring system; (G) Emergency authority; (H) Future SIP revisions; (I) Nonattainment areas;[2] (J) Consultation with government officials, public notification, prevention of significant deterioration (PSD), and visibility protection;[3] (K) Air quality and modeling/data; (L) Permitting fees; and (M) Consultation/participation by affected local entities.[4]

## III. What is EPA's evaluation of how the state addressed the relevant elements of section 110(a)(1) and (2)?

On July 18, 1997, EPA promulgated new 8-hour ozone and new fine particulate matter primary and secondary NAAQS. (62 FR 38894; 62 FR 38711.) On February 27, 2007, EPA Region 7 received the state of Missouri's ozone and particulate matter infrastructure SIP submittal. The SIP submission was determined to be complete on March 27, 2007. EPA has reviewed the state's formal submission and the relevant statutory and regulatory authorities and provisions generally referenced in the submittal from Missouri.

As described below, today's action only pertains to the 1997 ozone standard; it does not pertain to EPA's 1997 promulgation of the $PM_{2.5}$ standards. In addition, it does not address issues relating to interstate transport under section 110(a)(2)(D)(i), which have already been addressed for the 1997 ozone and $PM_{2.5}$ NAAQS in prior rulemaking (72 FR 25975).

Missouri's SIP submittal addresses the provisions of section 110(a)(1) and (2) as described below. EPA believes that Missouri has the adequate infrastructure needed to address all applicable elements of section 110(a)(1) and (2) for the 1997 8-hour ozone NAAQS.

*(A) Emission limits and other control measures:* Section 110(a)(2)(A) requires SIPs to include enforceable emission limits and other control measures, means or techniques, schedules for compliance and other related matters as needed to implement, maintain and enforce each NAAQS.

The state of Missouri's Air Conservation Law and Air Pollution Control Rules authorize the Missouri Department of Natural Resources (MDNR) to regulate air quality and implement air quality control regulations. Section 643.030 of the Missouri Revised Statutes ("Air Conservation Law") authorizes the "Air Conservation Commission of the State of Missouri" (MACC) to control air pollution, which is defined in Section 643.020 to include air contaminants, which cause or contribute to injury to public health or welfare. Section 643.050 authorizes the MACC to classify and identify air contaminants.

State rule 10 Code of State Regulations (CSR) 10–6.010 ("Ambient Air Quality Standards") adopts the 1997 ozone standards promulgated by EPA. EPA also notes that emissions from new and existing sources of both volatile organic compounds (VOCs) and nitrogen oxides ($NO_X$)—which are known ozone precursors[5]—are also regulated (*e.g.,* 10 CSR 10–2.360 relating to VOC emissions from bakery ovens in Kansas City, 10 CSR 10–5.510 relating to $NO_X$ emissions from various sources in the St. Louis area). In addition, 10 CSR 10–6.040 incorporates by reference the relevant appendices in 40 CFR part 50 for measuring and calculating the concentration of photochemical oxidants (ozone) in the atmosphere to determine whether the ozone standards have been met. Therefore, ozone is an air contaminant which may be regulated under Missouri law.

Section 643.050 of the Air Conservation Law authorizes the MACC, among other things, to regulate the use of air contaminant sources and to establish emissions limitations for air contaminant sources. Missouri also establishes timetables for compliance in its rules, as appropriate. Appendix A of the state submittal contains a link to the Missouri Air Conservation Law and Appendix C contains a link to Missouri's Effective State Rules and Forms.

EPA notes that 10 CSR 10–6.050 provides that sources may submit information relating to excess emissions during startup, shutdown or malfunction (SSM) events, but expressly provides that nothing in this rule limits the ability of MDNR or the MACC to

[1] William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards. "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards." Memorandum to EPA Air Division Directors, Regions I–X, October 2, 2007.

[2] As discussed in further detail below, subsection 110(a)(2)(I) is not applicable for the infrastructure SIP approval process and therefore EPA will take action on the requirements of part D attainment plans separately.

[3] As discussed in further detail below, subsection 110(a)(2)(J), as it relates to visibility protection, is also not applicable for the infrastructure SIP approval process, and therefore EPA is not addressing it in today's proposed rulemaking.

[4] This action also does not address infrastructure requirements with respect to the 1997 $PM_{2.5}$ NAAQS or the 2006 revisions to the NAAQS. Those requirements will be addressed in future rulemaking.

[5] VOCs and $NO_X$ as precursors to ozone are also discussed in element (C).

take appropriate enforcement action. In today's proposed rulemaking, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during a SSM of operations at a facility. EPA believes that a number of states have SSM provisions that are contrary to the Clean Air Act and existing EPA guidance,[6] and the Agency plans to address such state regulations in the future. In the meantime, EPA encourages any state having a deficient SSM provision to take steps to correct it as soon as possible.

EPA also notes that the Air Conservation Law contains provisions at Sections 643.055 and 643.110, which give the MACC the authority, under certain circumstances, to grant variances from rules and regulations established pursuant to the Clean Air Act.[7] Furthermore, the Missouri air regulations contain provisions which allow the Director of MDNR to exercise his or her discretion to approve alternatives to the Missouri regulations (see, *e.g.,* 10 CSR 10–6.030(19), which allows for the use of an alternative sampling method). In this action, EPA is not proposing to approve or disapprove any existing state rules with regard to "variance" or "Director's discretion" provisions. EPA believes that a number of states have such provisions that are contrary to the Clean Air Act and existing EPA guidance,[8] and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a "variance" or "Director's discretion" provision that is contrary to the Clean Air Act and EPA guidance to take steps to correct the deficiency as soon as possible.

EPA believes that Missouri has statutory and regulatory authority to establish additional emissions limitations and other measures, as necessary to address attainment and maintenance of the ozone standards. Therefore, EPA believes that the Missouri SIP adequately addresses the requirements of section 110(a)(2)(A) for the 1997 8-hour ozone NAAQS.

*(B) Ambient air quality monitoring/data system:* Section 110(a)(2)(B) requires SIPs to include provisions to provide for establishment and operation of ambient air quality monitors, collection and analysis of ambient air quality data, and making these data available to EPA upon request.

To address this element, section 643.050 of the Air Conservation Law provides the enabling authority necessary for Missouri to fulfill the requirements of section 110(a)(2)(B). The Air Pollution Control Program and Air Quality Analysis Section, within MDNR, implement these requirements. Along with their other duties, the monitoring program collects air monitoring data, quality assures the results, and reports the data.

MDNR submits annual monitoring network plans to EPA for approval, including plans for its ozone monitoring network, as required by 40 CFR 58.10.[9] Prior to submission to EPA, Missouri makes the plans available for public review on MDNR's Web site. See *http://dnr.mo.gov/env/apcp/monitoring/monitoringnetworkplan.pdf.* MDNR also conducts five-year monitoring network assessments, including the ozone monitoring network, as required by 40 CFR 58.10(d). On October 27, 2010, EPA approved Missouri's 2010 Ambient Air Quality Monitoring Plan and Missouri's Five-Year Air Monitoring Network Assessment. As mentioned previously under element (A), 10 CSR 10–6.040(4)(D) requires that ambient concentrations of ozone be measured in accordance with the applicable Federal regulations in 40 CFR Part 50, App. D, or equivalent methods as approved by EPA pursuant to 40 CFR Part 53. Missouri submits air quality data to EPA's Air Quality System (AQS) system quarterly, pursuant to the provisions of work plans developed in conjunction with EPA grants to the state.

Based on the foregoing, EPA believes that the Missouri SIP meets the requirements of section 110(a)(2)(B) for the 1997 8-hour ozone NAAQS.

*(C) Program for enforcement of control measures* (PSD, New Source Review for nonattainment areas, and construction and modification of all stationary sources): Section 110(a)(2)(C) requires states to include the following elements in the SIP: (1) A program providing for enforcement of all SIP measures described in section 110(a)(2)(A); (2) a program for the regulation of the modification and construction of stationary sources as necessary to protect the applicable NAAQS; and (3) a permit program to meet the major source permitting requirements of the Act (including the program for areas designated as not attaining the NAAQS, and a program for the prevention of significant deterioration of air quality program in other areas). As discussed in further detail below, this infrastructure SIP rulemaking will not address the Missouri program for nonattainment area-related provisions, since these submittals are not applicable for the infrastructure SIP approval process.

(1) With respect to enforcement of requirements of the SIP, the Missouri statutes provide authority for MDNR to enforce the requirements of the Air Conservation Law, and any regulations, permits, or final compliance orders issued under the provisions of that law. For example, Section 643.080 of the Air Conservation Law authorizes MDNR to issue compliance orders for violations of the Air Conservation Law, rules promulgated thereunder (which includes rules comprising the Missouri SIP), and conditions of permits (which includes permits under SIP-approved permitting programs). Section 643.085 authorizes MDNR to assess administrative penalties for violations of the statute, regulations, permit conditions, or administrative orders. Section 643.151 authorizes the MACC to initiate civil actions for these violations, and to seek penalties and injunctive relief to prevent any further violation. Section 643.191 provides for criminal penalties for knowing violations of the statute, regulations or permit conditions, in addition to other acts described in that section.

(2) Section 110(a)(2)(C) also requires that the SIP include measures to regulate construction and modification of stationary sources to protect the NAAQS. With respect to smaller sources (Missouri's major source permitting program is discussed in (3) below), Missouri has a program under rule 10 CSR 10–6.060 to review such sources to ensure, among other requirements, that new and modified sources will not interfere with NAAQS attainment. The state rule contains two general categories of sources subject to the minor source permitting program. The first category is "de minimis" sources (regulated at 10 CSR 10–6.060(5))—sources which are not exempt by virtue

[6] Steven Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation. "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown." Memorandum to EPA Air Division Directors, September 20, 1999.

[7] With respect to Missouri, we note that the EPA-approved SIP rules do not contain variance provisions. In any event, any variances issued by the MACC under its statutory authority must be approved by EPA as revisions to the SIP before they can alter any requirements of the approved SIP (see, 40 CFR 51.104(d)).

[8] J. Craig Potter, Assistant Administrator for Air and Radiation, Thomas L. Adams, Jr., Assistant Administrator for Enforcement and Compliance Monitoring, and Francis S. Blake, General Counsel, Office of General Counsel. "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency." Memorandum, September 23, 1987. *See also* 52 FR 45109 (November 24, 1987).

[9] *See http://www.dnr.mo.gov/env/esp/aqm/critmap.htm,* for a description of the monitoring network for all pollutants, including identification of locations for the ozone monitoring network.

of rule 10–6.061, permit exemptions, and emit below specified levels (*e.g.,* 40 tons per year of VOCs). De minimis sources which emit above certain levels specified in rule 10–6.061 (*e.g.,* 2.75 pounds per hour of $NO_x$ or VOCs, and, for VOCs that do not contain hazardous air pollutants, more than 4 tons per year) are required to do an ambient air quality analysis to show that they are not adversely impacting the NAAQS. MDNR may also require impact analyses for other sources (sources lower than these levels) that may be likely to adversely affect air quality. 10 CSR 10–6.060(5).

Missouri also requires preconstruction permits for a second category of sources above the de minimis levels, but below the major source levels. Permits for these sources may only be issued after a determination, among other requirements, that the proposed source or modification would not interfere with attainment or maintenance of a NAAQS. 10 CSR 10–6.060(6).

EPA has determined that Missouri's minor new source review (NSR) program adopted pursuant to section 110(a)(2)(C) of the Act regulates emissions of ozone and its precursors. EPA has also determined that certain provisions of the state's minor NSR program adopted pursuant to section 110(a)(2)(C) of the Act likely do not meet all the requirements found in EPA's regulations implementing that provision. See 40 CFR 51.160–51.164. EPA previously approved Missouri's minor NSR program into the SIP, and at the time there was no objection to the provisions of this program. *See* 61 FR 7714 (February 29, 1996) (originally approved at 37 FR 10842 (May 31, 1972). Since then, the state and EPA have relied on the existing state minor NSR program to assure that new and modified sources not captured by the major NSR permitting programs do not interfere with attainment and maintenance of the NAAQS.

In this action, EPA is proposing to approve Missouri's infrastructure SIP for ozone with respect to the general requirement in section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. EPA is not proposing to approve or disapprove the state's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program. EPA believes that a number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and EPA believes it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

(3) Missouri also has a program approved by EPA as meeting the requirements of Part C, relating to prevention of significant deterioration of air quality. Missouri's implementing rule, 10 CSR 10–6.060(8), incorporates the relevant portions of the Federal rule, 40 CFR 52.21, by reference, including the relevant portions of EPA's "NSR reform" rule promulgated by EPA on December 31, 2002. In this action, EPA is not proposing to approve or disapprove any state rules with regard to NSR reform requirements. EPA will act on NSR reform submittals through a separate rulemaking process. For Missouri, we have previously approved the relevant portions of Missouri's NSR reform rules for attainment areas. See 71 FR 36486 (June 27, 2006).

The Missouri SIP also contains a permitting program for major sources and modifications in nonattainment areas; however, this requirement is not addressed in this rulemaking (see discussion of the section 110(a)(2)(I) requirements for nonattainment areas, below).

With respect to the PSD program, EPA notes that the Missouri SIP provides that ozone precursors (volatile organic compounds—VOC and nitrogen oxides—$NO_x$) are regulated. For example, a source that is major for $NO_x$ is major for ozone under the state's prevention of significant deterioration of air quality program in rule 10 CSR 10–6.060(8). In addition, rules 10 CSR 10–6.060(1)(A) and 10–6.060(8)(A) incorporate 40 CFR 52.21(b)(50)(i)(a) by reference. The latter regulation specifically identifies volatile organic compounds and nitrogen oxides as precursors to ozone in all attainment and unclassifiable areas.

Finally, with respect to the applicability of the Missouri PSD program to greenhouse gas (GHG) emissions, EPA notes that Missouri promulgated an emergency amendment to its rules effective January 3, 2011, to ensure that it maintains full authority over its permitting program with respect to GHGs and avoids an overwhelming increase in the number of required permits and resulting burden on Missouri's permitting resources. *See* 36 Missouri Register 218–219 (January 18, 2011). Although this emergency amendment expires on July 2, 2011, EPA understands that prior to that date, Missouri intends to take further regulatory action to more permanently address GHGs.[10]

In the interim, on March 8, 2011, Missouri informed EPA that the infrastructure SIP for the 1997 ozone standard that it submitted on February 22, 2007 only covered the portion of Missouri's PSD program that remained approved after promulgation of EPA's GHG PSD "Narrowing Rule" (75 FR 82536, December 30, 2010).[11] Therefore, EPA believes that it can approve the SIP submission as meeting the applicable infrastructure SIP requirements for the PSD requirements referenced in section 110(a)(2)(C).

On the basis of the foregoing, EPA believes that the Missouri SIP and underlying statutory authority are adequate to meet the requirements of section 110(a)(2)(C) for the 1997 8-hour ozone NAAQS.

*(D) Interstate and international transport:* Section 110(a)(2)(D)(i) requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment in, or interfering with maintenance by, another state with respect to the NAAQS, or from interfering with measures required in another state to prevent significant deterioration of air quality or to protect visibility.

Missouri addressed the provisions of section 110(a)(2)(D)(i), as it relates to the 1997 ozone and PM standards, in the SIP submission received by EPA on February 27, 2007. EPA approved the portion of the Missouri SIP submittal relating to section 110(a)(2)(D)(i), on May 8, 2007 (72 FR 25975). Therefore, the proposed action addressed in this notice does not include the interstate transport elements, nor does this rulemaking reopen any aspect of EPA's prior action on the transport elements for Missouri for the 1997 standards.

Section 110(a)(2)(D)(ii) requires that the SIP insure compliance with the

[10] Missouri proposed regulations, by notice dated February 15, 2011, to adopt EPA's "tailoring rule" (75 FR 31514, June 3, 2010).

[11] The narrowing rule, in effect, narrowed EPA's approval of Missouri's PSD program for GHGs so that the approved SIP would only cover sources of GHGs consistent with the timing and thresholds specified by EPA in the tailoring rule referenced previously.

applicable requirements of Sections 126 and 115, relating to interstate and international pollution abatement.

Missouri sources have not been identified by EPA as having any interstate or international impacts under Section 126 or Section 115 in any pending actions relating to the 1997 ozone standards. Missouri sources have been identified in findings under 110(a)(2)(D)(i)(I), relating to interstate impacts, in the $NO_x$ SIP call (63 FR 57355) and the Clean Air Interstate Rule (70 FR 25162),[12] and Missouri has satisfactorily revised its SIP to respond to these findings.

Section 126(a) of the Act requires new or modified sources to notify neighboring states of potential impacts from sources within the state. Missouri regulations require that affected states receive notice prior to the commencement of any construction or modification of a source. Rule 10 CSR 10–6.060(6) requires that the review of all PSD permit applications follow the procedures of 10 CSR 10–6.060(12)(A), Appendix A. Appendix A in turn requires that the permitting authority notify affected states once a draft permit goes out for public comment. 10 CSR 10–6.060(12)(A)11.

Based on the foregoing, EPA believes that Missouri has the adequate infrastructure needed to address section 110(a)(2)(D)(ii) for the 1997 8-hour ozone NAAQS.

*(E) Adequate authority, resources, implementation, and oversight:* Section 110(a)(2)(E) requires that SIPs provide for the following: (1) Necessary assurances that the state (and other entities within the state responsible for implementing the SIP) have adequate personnel, funding, and authority under state or local law to implement the SIP, and that there are no legal impediments to such implementation; (2) requirements that the state comply with the requirements relating to state boards, pursuant to section 128 of the Act; and (3) necessary assurances that the state has responsibility for implementation of any plan provision for which it relies on local governments or other entities to carry out that portion of the plan.

(1) With respect to adequate authority, we have previously discussed Missouri's authority to implement the SIP for the 1997 ozone standards, primarily in the discussion of section 110(a)(2)(A). Neither Missouri nor EPA has identified any legal impediments to implementation of those standards.

With respect to adequate resources, MDNR asserts that it has adequate personnel to implement the SIP. The SIP submittal for the 1997 ozone standards describes the regulations governing the various functions of personnel within the Air Pollution Control Program, including the Technical Support (Air Quality Analysis), Air Quality Planning, Enforcement, and Permitting Sections of the program (10 CSR 10–1.010(2)(D)).

With respect to funding, the Air Conservation Law requires the MACC to establish an annual emissions fee for sources in order to fund the reasonable costs of the implementing various air pollution control programs. Section 643.079 of the Air Conservation Law provides for the deposit of the fees into various subaccounts (*e.g.,* a subaccount for the Title V operating permit program used for Title V activities; a subaccount for non-Title V activities) for use in implementing the programs. The state uses funds in the non-Title V subaccounts, along with General Revenue funds and EPA grants under, for example, sections 103 and 105 of the Act, to fund the programs. EPA conducts periodic program reviews to ensure that the state has adequate resources and funding to, among others, implement the SIP.

(2) Conflict of interest provisions—Section 128.

Section 110(a)(2)(E) also provides that the state must meet the requirements of Section 128, relating to representation on state boards and conflicts of interest by members of such boards. We note that this particular provision is not related to promulgation or revision of any NAAQS, and we have not determined that Missouri must show specifically that it meets this requirement with respect to the ozone infrastructure SIP for the 1997 standards. However, the following discussion shows how Missouri generally meets the requirements of Section 128.

Section 128 requires that a SIP-implementing body which approves permits or enforcement orders under the Act must have at least a majority of members who represent the public interest and do not derive a "significant portion" of income from entities or individuals subject to permits and enforcement orders under the Act. In addition, Section 128 requires that members of such a body or the agency head with similar authorities adequately disclose any potential conflicts of interest.

Section 643.040 of the Air Conservation Law generally tracks the language of section 128 of the Act, and requires that the Missouri Air Conservation Commission promulgate rules regarding conflict of interest. Rule 10 CSR 10–1.020 provides the specific process for disclosure of potential conflicts of interest prior to discussion of, or voting on, a rule, variance, appeal or order, and rules for voting when a member has been excluded from participation. The MACC also has an operations manual which directs members to comply with statutory requirements relating to conflict of interest, including Chapter 105 of the Missouri Revised Statutes, which contains more general prohibitions relating to conflict of interest.

MDNR officials, including the Director, are also subject to the conflict of interest provisions in Chapter 105 of the Missouri Revised Statutes. Sections 105.452 and 105.454 contain prohibitions on actions which may result in a conflict of interest.

(3) With respect to assurances that the state has responsibility to adequately implement the SIP when it authorizes local or other agencies to carry out portions of the plan, Section 643.190 designates the MDNR as the air pollution control agency "for all purposes" of the Clean Air Act. Although Section 643.140 authorizes the MACC to allow local governments such as cities or counties to carry out their own air pollution control programs, the MACC retains authority to carry out the provisions of Missouri's Air Conservation Law in local areas, notwithstanding any such authorization.

The MDNR Air Program oversees the activities of the local agencies to ensure adequate implementation of the plan by the local agencies (Kansas City, City of St. Louis, St. Louis County, and Springfield-Greene County). MDNR utilizes subgrants to the local agencies both to provide adequate funding, and as an oversight mechanism with respect to the local agencies. EPA conducts reviews of the local program activities in conjunction with its oversight of the state program.

Based on the foregoing, EPA believes that Missouri has the adequate infrastructure needed to address section 110(a)(2)(E) for the 1997 8-hour ozone NAAQS.

*(F) Stationary source monitoring system:* Section 110(a)(2)(F) requires states to establish a system to monitor emissions from stationary sources and to submit periodic emission reports. That section also requires that the state

[12] EPA notes that subsequent to the promulgation of the Clean Air Interstate Rule, on December 23, 2008, the District of Columbia Circuit Court of Appeals remanded the rule back to EPA without vacatur. *North Carolina* v. *EPA,* 550 F.3d 1176 (DC Cir. 2008). EPA has since proposed the Transport Rule (75 FR 45210) that would replace CAIR when final.

correlate the source reports with emission limitations or standards established under the Act and make reports available for public inspection.

To address this element, Section 643.050.1(3)(a) of the Air Conservation Law authorizes the state to require persons engaged in operations which result in air pollution to monitor or test emissions and to file reports containing information relating to rate, period of emission and composition of effluent. Missouri rule 10 CSR 10–6.030 incorporates various EPA reference methods for testing source emissions, including methods for $NO_X$ and VOCs. The Federal test methods are in 40 CFR Part 60, App. A.

Missouri rule 10 CSR 10–6.110 also requires monitoring of emissions and filing of periodic reports on emissions, and Missouri makes this information available to the public. Missouri uses this information to track progress towards maintaining the NAAQS, developing control and maintenance strategies, identifying sources and general emission levels, and determining compliance with emission regulations and additional EPA requirements. Missouri rule 10 CSR 10–6.210, relating to treatment of confidential information, specifically excludes emissions data from confidential treatment. Under that rule emissions data includes information regarding monitoring results required to be reported by sources under Missouri's air pollution control rules. Finally, Section 643.192.2 of the Air Conservation Law requires that MDNR provide an annual report that summarizes annual changes in air quality.

EPA believes that Missouri has the adequate infrastructure needed to address section 110(a)(2)(F) for the 1997 8-hour ozone NAAQS.

*(G) Emergency authority:* Section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health or welfare or the environment (comparable to the authorities provided in Section 303 of the Act), including contingency plans to implement the emergency authorities.

Section 643.090 of the Air Conservation Law authorizes the MACC or the Director of MDNR to declare an emergency where the ambient air, due to meteorological conditions and a buildup of air contaminants, may present an "emergency risk" to public health, safety, or welfare. The MACC or Director may, with the written approval of the governor, by order prohibit, restrict or condition all sources of air contaminants contributing to the emergency condition, during such periods of time necessary to alleviate or lessen the effects of the emergency condition. The statute also enables MDNR to promulgate implementing regulations. Even in the absence of an emergency condition, Section 643.090 also authorizes the Director to issue "cease and desist" orders to specific persons engaging in activities which involve a discharge of air contaminants, or a risk of air contamination, that presents a danger to public health or welfare.

Missouri rule 10 CSR 10–6.130 ("Controlling Emissions During Episodes of High Air Pollution Potential") includes action levels and contingency measures for ozone and other pollutants. This rule specifies the conditions that establish an air pollution alert, watch or emergency and the associated procedures and emissions reduction objectives for dealing with each. The rule establishes action levels for one-hour and eight-hour average concentrations. The action levels and associated contingency measures vary depending on the level of ozone concentrations in a particular area. This rule is contained in the Federally approved SIP.

EPA believes that the Missouri SIP adequately addresses section 110(a)(2)(G) for the 1997 8-hour ozone NAAQS.

*(H) Future SIP revisions:* Section 110(a)(2)(H) requires states to have the authority to revise their SIPs in response to changes in the NAAQS, availability of improved methods for attaining the NAAQS, or in response to an EPA finding that the SIP is substantially inadequate to attain the NAAQS.

In addition to Missouri's general enabling authority in Section 643.050 of the Air Conservation Law, discussed previously, Section 643.055 and rules 10 CSR 10–1.010(2)(B)9 and (D) grant MACC authority to promulgate rules, and establish standards and guidelines, to ensure that the state complies with the provisions of the Federal Clean Air Act. This includes authority to revise rules as necessary to respond to a revised NAAQS and to respond to EPA findings of substantial inadequacy (*see,* for example, 71 FR 46860, August 15, 2006, in which EPA approved Missouri rules promulgated in response to EPA's $NO_X$ SIP call for Missouri and other states).

EPA believes that Missouri has the adequate authority to address section 110(a)(2)(H) for the 1997 8-hour ozone NAAQS.

*(I) Nonattainment areas:* Section 110(a)(2)(I) requires that in the case of a plan or plan revision for areas designated as nonattainment areas, states must meet applicable requirements of Part D of the Act, relating to SIP requirements for designated nonattainment areas.

The plan submitted by Missouri is a statewide ozone infrastructure SIP and was not intended by Missouri to meet its obligations for nonattainment areas. Missouri has one ozone nonattainment area (the St. Louis metropolitan area).

EPA has not addressed Section 110(a)(2)(I) in its recent infrastructure SIP guidance because Part D SIPs are due on a different schedule than the infrastructure SIP submittal schedule. (See, *e.g.,* the infrastructure SIP guidance for the revised lead standard, 73 FR 67034, n. 113, Nov. 12, 2008, and the infrastructure SIP guidance for the revised $NO_2$ standards, 75 FR 6523, n. 27, Feb. 9, 2010.) Therefore, this proposal does not address Section 110(a)(2)(I). EPA will take action on any Part D nonattainment plans through a separate rulemaking.

*(J) Consultation with government officials, public notification, PSD and visibility protection:* Section 110(a)(2)(J) requires SIPs to meet the applicable requirements of the following CAA provisions: (1) section 121, relating to interagency consultation regarding certain CAA requirements; (2) section 127, relating to public notification of NAAQS exceedances and related issues; and (3) Part C of the Act, relating to prevention of significant deterioration of air quality and visibility protection.

(1) With respect to interagency consultation, Section 643.050.3 of the Air Conservation Law requires the MACC to consult and cooperate with other Federal and state agencies, and with political subdivisions, for the purpose of implementing its air pollution control responsibilities. Missouri also has appropriate interagency consultation provisions in its preconstruction permit program. For instance, Missouri rule 10 CSR 10–6.060(12)(B) requires that when a permit goes out for public comment, the permitting authority must provide notice to local air pollution control agencies, the chief executive of the city and county where the installation or modification would be located, any comprehensive regional land use planning agency, any state air program permitting authority, and any Federal Land Manager whose lands may be affected by emissions from the installation or modification.

(2) With respect to the requirements for public notification in Section 127, Missouri rule 10 CSR 10–6.130, discussed previously in connection with

the state's authority to address emergency episodes, contains provisions for public notification of elevated ozone and other air pollutant levels, and measures which can be taken by the public to reduce concentrations. In addition, information regarding air pollution and related issues, is provided on an MDNR website, *http://www.dnr.mo.gov/pubs/index.html.*

(3) With respect to the applicable requirements of Part C, relating to prevention of significant deterioration of air quality and visibility protection, we previously noted in the discussion of section 110(a)(2)(C) (relating to enforcement of control measures) how the Missouri SIP meets the PSD requirements, incorporating the Federal rule by reference. With respect to the visibility component of section 110(a)(2)(J), we reiterate the statutory requirement providing, in relevant part, that each plan must meet the "applicable requirements" of Part C (of Title I of the Act) relating to visibility protection. We note that the other Part C requirements specified in Section 110(a)(2)(J) (applicable requirements relating to prevention of significant deterioration of air quality), specifically relate to the 1997 and 2006 NAAQS (as well as other pollutants regulated under the CAA), and a state must be able to implement those requirements with respect to a new or revised NAAQS when promulgated. In contrast to the PSD program, the visibility protection requirements are not directly related to the promulgation of, or revision to, a NAAQS. While the SIP must independently meet the visibility protection requirements of Part C by virtue of the specific SIP requirements in Sections 169A and 169B of the Act, EPA believes that the visibility protection requirements are not "applicable requirements" within the meaning of Section 110(a)(2)(J) and that the infrastructure SIP is not required to be revised with respect to visibility protection merely due to promulgation of, or revision to, these 1997 ozone NAAQS.

For the reasons stated above, EPA believes that Missouri has met the applicable requirements of Section 110(a)(2)(J) for the 1997 8-hour ozone NAAQS in the state.

*(K) Air quality and modeling/data:* Section 110(a)(2)(K) requires that SIPs provide for performing air quality modeling, as prescribed by EPA, to predict effects on ambient air quality of emissions of any NAAQS pollutant, and for submission of such data to EPA upon request.

Missouri has authority to conduct air quality modeling and report the results of such modeling to EPA. Section 643.050 of the Air Conservation Law provides Missouri with the general authority to develop a general comprehensive plan to prevent, abate, and control air pollution. EPA believes that this statutory authority, along with other authorities such as found in Section 643.055 discussed above, provides MDNR with authority to conduct modeling to address NAAQS issues. As an example of regulatory authority to perform modeling for purposes of determining NAAQS compliance, Missouri regulation 10 CSR 10–6.060, App. F requires the use of EPA-approved air quality models (*e.g.,* those found in 40 CFR part 51, App. W) for construction permitting. Rule 10 CSR 10–6.110 requires specified sources of air pollution to report emissions to MDNR, which among other purposes may be utilized in modeling analyses. These data are available to any member of the public, upon request. 10 CSR 10–6.110(3)(D).

EPA believes that Missouri has the adequate infrastructure needed to address section 110(a)(2)(K) for the 1997 8-hour ozone NAAQS.

*(L) Permitting Fees:* Section 110(a)(2)(L) requires SIPs to require each major stationary source to pay permitting fees to the permitting authority to cover the cost of reviewing, approving, implementing and enforcing a permit. That section provides that the fee requirement applies until a fee program established by the state pursuant to Title V of the Act, relating to operating permits, is approved by EPA.

Section 643.079 of the Air Conservation Law provides authority for MDNR to collect permit fees, including Title V fees. Missouri's Title V program, including the fee program addressing the requirements of the Act and 40 CFR 70.9 relating to Title V fees, was approved by EPA in May 1997 (62 FR 26405, May 14, 1997). Therefore, EPA believes that the requirements of section 110(a)(2)(L) are met.

*(M) Consultation/participation by affected local entities:* Section 110(a)(2)(M) requires SIPs to provide for consultation and participation by local political subdivisions affected by the SIP.

Section 643.050.3(6) of the Air Conservation Law requires that the MACC encourage political subdivisions to handle air pollution control problems within their respective jurisdictions to the extent possible and practicable. Section 643.140 provides the mechanism for local political subdivisions to participate in plan development, while maintaining oversight of local programs within the MACC. The MDNR's Air Pollution Control Program has signed State and Local Agreements with the air agencies with St. Louis City, St. Louis County, Kansas City and Springfield/Greene County. In addition, the program participates in community meetings, consults with, and participates in, interagency consultation groups such as the Metropolitan Planning Organizations in both Kansas City and St. Louis. In Kansas City, MDNR works with the Mid-America Regional Council and in St. Louis, MDNR works with East-West Gateway Coordinating Council of Governments.

Therefore, EPA believes that Missouri has the adequate infrastructure needed to address Section 110(a)(2)(M) for the 1997 8-hour ozone NAAQS.

## IV. What action is EPA proposing?

EPA proposes to approve the State Implementation Plan (SIP) submittal from the state of Missouri which addresses the requirements of Clean Air Act section 110 (a)(2) for the 1997 revisions to the National Ambient Air Quality Standards (NAAQS) for ozone. As described above, EPA believes that Missouri has the required infrastructure to address all elements of section 110(a)(2) to ensure that the revised ozone standards are implemented in the state.

We are hereby soliciting comment on this proposed action. Final rulemaking will occur after consideration of any comments.

## V. Statutory and Executive Order Review

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 CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this 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 CAA; and

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

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

### Statutory Authority

The statutory authority for this action is provided by Section 110 of the CAA, as amended (42 U.S.C. 7410).

### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Ozone.

Dated: March 23, 2011.

**Karl Brooks,**

*Regional Administrator, Region 7.*

[FR Doc. 2011–7470 Filed 3–29–11; 8:45 am]

**BILLING CODE 6560–50–P**

---

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R07–OAR–2011–0310; FRL–9287–8]**

## Approval and Promulgation of Implementation Plans; State of Nebraska

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve the State Implementation Plan (SIP) submittal from the state of Nebraska addressing the requirements of Clean Air Act (CAA) sections 110(a)(1) and (2) for the 1997 revisions to the National Ambient Air Quality Standards (NAAQS) for ozone. Section 110(a)(1) requires that each state adopt and submit a SIP to support implementation of each new or revised NAAQS promulgated by the EPA and these SIPs are commonly referred to as "infrastructure" SIPs. EPA believes that Nebraska's infrastructure SIP adequately addresses the elements described in section 110(a)(2) and further described in the October 2, 2007 guidance for infrastructure SIPs issued by the EPA Office of Air Quality Planning and Standards. However, because EPA already approved the portion of Nebraska's SIP submittal relating to the interstate transport infrastructure element, section 110(a)(2)(D)(i), this proposed rulemaking does not address the interstate transport element, nor does this proposal reopen any aspect of EPA's prior action on the interstate transport element. Furthermore, this action does not address infrastructure requirements with respect to the 1997 $PM_{2.5}$ NAAQS or the 2006 revisions to the NAAQS. Those requirements will be addressed in future rulemaking.

**DATES:** Comments must be received on or before April 29, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R07–OAR–2011–0310 by one of the following methods:

1. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
2. *E-mail: kramer.elizabeth@epa.gov.*
3. *Mail:* Ms. Elizabeth Kramer, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, Air and Waste Management Division, 901 North 5th Street, Kansas City, Kansas 66101.
4. *Hand Delivery or Courier:* Deliver your comments to Ms. Elizabeth Kramer, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, Air and Waste Management Division, 901 North 5th Street, Kansas City, Kansas 66101.

*Instructions:* Direct your comments to Docket ID No. EPA–R07–OAR–2011–0310. 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 should 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, 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 U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101, from 8 a.m. until 4:30 p.m., Monday through Friday, excluding legal holidays. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

**FOR FURTHER INFORMATION CONTACT:** Ms. Elizabeth Kramer, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101; *telephone number:* (913) 551–7186; *fax number:* (913) 551–7844; *e-mail address: kramer.elizabeth@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever "we," "us," or "our" is used, we refer to EPA. This section provides additional

information by addressing the following questions:

I. What is a section 110(a)(1) and (2) infrastructure SIP?
II. What elements are applicable under section 110(a)(1) and (2)?
III. What is EPA's evaluation of how the state addressed the relevant elements of section 110(a)(1) and (2)?
IV. What action is EPA proposing?
V. Statutory and Executive Order Reviews

## I. What is a section 110(a)(1) and (2) infrastructure SIP?

Section 110(a)(1) and (2) of the CAA require, in part, that states submit to EPA plans to implement, maintain and enforce each of the NAAQS promulgated by EPA. These provisions require states to address basic SIP requirements including, for example, adequate provisions for emission inventory development, monitoring, and modeling to assure attainment and maintenance of the applicable standards. By statute, SIPs meeting the requirements of section 110(a)(1) and (2) are to be submitted by States within three years after promulgation of a new or revised standard. These SIPs are commonly referred to as "infrastructure" SIPs.

## II. What elements are applicable under section 110(a)(1) and (2)?

On October 2, 2007, EPA issued guidance to address infrastructure SIP elements required under section 110(a)(1) and (2) for the 1997 8-hour ozone and PM2.5 NAAQS.[1] EPA will address these elements below under the following headings: (A) Emission limits and other control measures; (B) Ambient air quality monitoring/data system; (C) Program for enforcement of control measures (PSD, New Source Review for nonattainment areas, and construction and modification of all stationary sources); (D) Interstate and international transport; (E) Adequate authority, resources, implementation, and oversight; (F) Stationary source monitoring system; (G) Emergency authority; (H) Future SIP revisions; (I) Nonattainment areas;[2] (J) Consultation with government officials, public notification, prevention of significant deterioration (PSD), and visibility protection;[3] (K) Air quality and modeling/data; (L) Permitting fees; and (M) Consultation/participation by affected local entities.[4]

## III. What is EPA's evaluation of how the state addressed the relevant elements of section 110(a)(1) and (2)?

On July 18, 1997, EPA promulgated new 8-hour ozone and new fine particulate matter primary and secondary NAAQS. (62 FR 38894; 62 FR 38711). On December 7, 2007, EPA Region 7 received the state of Nebraska's ozone infrastructure SIP submittal. EPA has reviewed the state's formal submission and the relevant statutory and regulatory authorities and provisions generally referenced in the submittal from Nebraska.

As described below, today's proposed action only pertains to the 1997 ozone standard; it does not pertain to EPA's 1997 promulgation of the $PM_{2.5}$ standards. In addition, it does not address issues relating to interstate transport under section 110(a)(2)(D)(i), which have already been addressed for the 1997 ozone and $PM_{2.5}$ NAAQS in prior rulemaking (72 FR 71245).

Nebraska's SIP submittal addresses the provisions of section 110(a)(1) and (2) as described below. EPA believes that Nebraska has the adequate infrastructure needed to address all applicable elements of section 110(a)(1) and (2) for the 1997 8-hour ozone NAAQS.

(A) *Emission limits and other control measures:* Section 110(a)(2)(A) requires SIPs to include enforceable emission limits and other control measures, means or techniques, schedules for compliance and other related matters as needed to implement, maintain and enforce each NAAQS.

The state of Nebraska's statutes and Air Quality Regulations authorize the Nebraska Department of Environmental Quality (NDEQ) to regulate air quality and implement air quality control regulations. Section 81–1504 of the Nebraska Revised Statutes authorizes NDEQ to act, among other things, as the state air pollution control agency for all purposes of the CAA and to develop comprehensive programs for the prevention, control and abatement of new or existing pollution to the air of the state. Air pollution is defined in Section 81–1502 of the Nebraska Revised Statutes as the presence in the outdoor atmosphere of one or more air contaminants or combinations thereof in such quantities and of such duration as are or may tend to be injurious to human, plant, or animal life, property, or the conduct of business.

Section 81–1505(1) of the Nebraska Revised Statutes authorizes the Nebraska Environmental Quality Council (EQC) to adopt and promulgate rules which set air standards that will protect public health and welfare. The EQC is also authorized to classify air contaminant sources according to levels and types of discharges, emissions or other characteristics.

Chapter 4, Section *005* of Title 129 of the Nebraska Administrative Code (NAC) ("Ambient Air Quality Standards") adopts the 1997 ozone standards promulgated by EPA (*i.e.,* 0.08 parts per million). In addition, the Nebraska rules incorporate, by reference, Appendix I in 40 CFR Part 50 for determining whether the ozone standards have been attained. Therefore, ozone is an air contaminant which may be regulated under Nebraska law.

EPA notes that Chapter 35, Section *001* of the NAC provides that sources may submit information relating to excess emissions during a startup, shutdown or malfunction (SSM) events. Nevertheless, notwithstanding this provision, the regulations expressly give the Director of NDEQ the ability to take appropriate enforcement action. See chapter 35, Sections *001, 006,* and *008* of the NAC. In today's proposed rulemaking, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during a SSM of operations at a facility. EPA believes that a number of states have SSM provisions that are contrary to the Clean Air Act and existing EPA guidance,[5] and the Agency plans to address such state regulations in the future. In the meantime, EPA encourages any state having a deficient SSM provision to take steps to correct it as soon as possible.

EPA notes that the Section 81–1513 of the Nebraska Revised Statutes contain provisions that give the Director of NDEQ the authority, under certain circumstances, to grant variances from rules and regulations established

[1] William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards. "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards." Memorandum to EPA Air Division Directors, Regions I–X, October 2, 2007.

[2] As discussed in further detail below, subsection 110(a)(2)(I) is not applicable for the infrastructure SIP approval process and therefore EPA will take action on the requirements of part D attainment plans separately.

[3] As discussed in further detail below, subsection 110(a)(2)(J), as it relates to visibility protection, is also not applicable for the infrastructure SIP approval process, and therefore EPA is not addressing it in today's proposed rulemaking.

[4] This action also does not address infrastructure requirements with respect to the 1997 $PM_{2.5}$ NAAQS or the 2006 revisions to the NAAQS. Those requirements will be addressed in future rulemaking.

[5] Steven Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation. "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown." Memorandum to EPA Air Division Directors, September 20, 1999.

pursuant to the Clean Air Act.[6] EPA also notes that the Nebraska regulations contain provisions which allow the Director of NDEQ the discretion to approve alternatives to the Nebraska regulations (see, *e.g.,* chapter 6, Section *004* of the NAC, which allows the Director to approve alternate test methods and procedures for use in determining actual emissions). In this action, EPA is not proposing to approve or disapprove any existing state rules with regard to such "variance" or "Director's discretion" provisions. EPA believes that a number of states have such provisions that are contrary to the Clean Air Act and existing EPA guidance[7], and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a "variance" or "Director's discretion" provision that is contrary to the Clean Air Act and EPA guidance to take steps to correct the deficiency as soon as possible.

EPA believes that Nebraska has statutory and regulatory authority to establish additional emissions limitations and other measures, as necessary to address attainment and maintenance of the ozone standards. Therefore, EPA believes that the Nebraska SIP adequately addresses the requirements of section 110(a)(2)(A) for the 1997 8-hour ozone NAAQS.

(B) *Ambient air quality monitoring/data system:* Section 110(a)(2)(B) requires SIPs to include provisions to provide for establishment and operation of ambient air quality monitors, collection and analysis of ambient air quality data, and making these data available to EPA upon request.

To address this element, section 81–1505(12)(o) of the Nebraska Revised Statutes provides the enabling authority necessary for Nebraska to fulfill the requirements of Section 110(a)(2)(B). This provision gives the EQC the authority to promulgate rules and regulations concerning the monitoring of emissions. The Air Quality Division within NDEQ implements these requirements. Along with their other duties, the monitoring program within NDEQ's Air Compliance & Enforcement Program collects air monitoring data, quality assures the results, and reports the data.

NDEQ submits annual monitoring network plans to EPA for approval, including plans for its ozone monitoring network, as required by 40 CFR 58.10. Prior to submission to EPA, Nebraska makes the plans available for public review on NDEQ's Web site. See, *http://www.deq.state.ne.us/Publica.nsf/a9f87abbcc29fa1f8625687700625436/3f5f30d938b93ef38625730800516a57?OpenDocument,* for NDEQ's 2009 Ambient Air Monitoring Network Plan. This Plan includes, among other things, the locations for the ozone monitoring network. On February 23, 2010, EPA approved Nebraska's 2009 ambient air network monitoring plan. According to this Plan (at page 15), NDEQ also plans to conduct five-year monitoring network assessments, including the ozone monitoring network, as required by 40 CFR 58.10(d). As mentioned previously under element (A), Title 129, Chapter 4, Section *005* of the NAC requires that attainment with the ozone standard be determined in accordance with the applicable Federal regulations in 40 CFR Part 50, App. I. Nebraska submits air quality data to EPA's Air Quality System (AQS) quarterly, pursuant to the provisions of work plans developed in conjunction with EPA grants to the state.

Based on the foregoing, EPA believes that the Nebraska SIP meets the requirements of section 110(a)(2)(B) for the 1997 8-hour ozone NAAQS.

*(C) Program for enforcement of control measures (PSD, New Source Review for nonattainment areas, and construction and modification of all stationary sources):* Section 110(a)(2)(C) requires states to include the following elements in the SIP: (1) A program providing for enforcement of all SIP measures described in Section 110(a)(2)(A); (2) a program for the regulation of the modification and construction of stationary sources as necessary to protect the applicable NAAQS; and (3) a permit program to meet the major source permitting requirements of the Act (including the program for areas designated as not attaining the NAAQS, and a program for the prevention of significant deterioration of air quality program in other areas). Note that all areas of Nebraska are currently in attainment with the NAAQS. In addition, as discussed in further detail below, this proposed infrastructure SIP rulemaking will not address the Nebraska program for nonattainment area-related provisions, since these submittals are not applicable for the infrastructure SIP approval process.

(1) With respect to enforcement of requirements of the SIP, Section 81–1504(1) of the Nebraska Revised Statutes provide authority for NDEQ to enforce the requirements of the Nebraska Environmental Protection Act, and any regulations, permits, or final compliance orders issued under the provisions of that law. In addition, Section 81–1504(7) authorizes NDEQ to issue orders prohibiting or abating discharges of waste into the air and requiring the modification, extension or adoption of remedial measures to prevent, control, or abate air pollution. Section 81–1507 authorizes NDEQ to commence an enforcement action for any violations of the Environmental Protection Act, any rules or regulations promulgated thereunder, or any orders issued by NDEQ. This enforcement action can not only seek civil penalties, but also require that the recipient take corrective action to address the violation. See Section 81–1508.02. Section 81–1508.01 provides for criminal penalties for knowing or willful violations of the statute, regulations or permit conditions, in addition to other acts described in that section.

(2) Section 110(a)(2)(C) also requires that the SIP include measures to regulate construction and modification of stationary sources to protect the NAAQS. Nebraska has a program under Title 129, Chapter 17 of the NAC that requires such sources to first obtain a construction permit from NDEQ. The permitting process is designed to ensure that new and modified sources will not interfere with NAAQS attainment. NDEQ has the authority to require the source applying for the permit to undergo an air quality impact analysis. If NDEQ determines that emissions from a constructed or modified source interfere with attainment of the NAAQS, it may deny the permit until the source makes the necessary changes to obviate the objections to the permit issuance. See Chapter 17, Sections *008* and *009* of the NAC.

EPA has determined that Nebraska's minor new source review (NSR) program adopted pursuant to section 110(a)(2)(C) of the Act regulates emissions of ozone and its precursors. EPA has also determined that certain provisions of the state's minor NSR program adopted pursuant to section 110(a)(2)(C) of the Act likely do not meet all the requirements found in EPA's regulations implementing that provision. See 40 CFR 51.160–51.164. EPA previously approved Nebraska's

[6] The statutory variance provisions are not included in the Nebraska SIP and are not recognized under federal law. In any event, a variance from an EPA-approved SIP requirement would not be recognized as a revision to the SIP unless approved by EPA under the CAA requirements for SIP revisions (*see,* 40 CFR 51.104(d)).

[7] J. Craig Potter, Assistant Administrator for Air and Radiation, Thomas L. Adams, Jr., Assistant Administrator for Enforcement and Compliance Monitoring, and Francis S. Blake, General Counsel, Office of General Counsel. "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency." Memorandum, September 23, 1987. *See also* 52 FR 45109 (November 24, 1987).

minor NSR program into the SIP, and at the time there was no objection to the provisions of this program. See 37 FR 10842 (May 31, 1972) and 60 FR 372 (January 4, 1995). Since then, the state and EPA have relied on the existing state minor NSR program to assure that new and modified sources not captured by the major NSR permitting programs do not interfere with attainment and maintenance of the NAAQS.

In this action, EPA is proposing to approve Nebraska's infrastructure SIP for ozone with respect to the general requirement in Section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. EPA is not proposing to approve or disapprove the state's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program. EPA believes that a number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of Section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and EPA believes it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

(3) Nebraska also has a program approved by EPA which meets the requirements of Part C, relating to prevention of significant deterioration of air quality. Nebraska's implementing rule, Title 129, Chapter 19, incorporates the relevant portions of the Federal rule, 40 CFR 52.21 (as of July 1, 2004), by reference. In this action, EPA is not proposing to approve or disapprove any state rules with regard to NSR reform requirements. EPA will act on NSR reform submittals through a separate rulemaking process. For Nebraska, we have previously approved Nebraska's NSR reform rules for attainment areas, and, as previously stated, Nebraska currently has no nonattainment areas. See 76 FR 15852, March 22, 2011.

The Nebraska SIP also contains a permitting program for major sources and modifications in nonattainment areas (see Title 129, Chapter 17, Section *013*). This section is currently not applicable to Nebraska because all areas of Nebraska are currently in attainment with the NAAQS. Even if it were applicable, the SIP's discussion of nonattainment areas is not addressed in this rulemaking (see discussion of the Section 110(a)(2)(I) requirements for nonattainment areas, below).

With respect to the PSD program, the Nebraska SIP provides that ozone precursors (volatile organic compounds—VOCs and oxides of nitrogen—NOx) are regulated. For example, a stationary source that is major for VOCs is also major for ozone, pursuant to Chapter 2, Section *005* of the NAC. In addition, a source that undergoes an emissions increase or a net emissions increase of 40 tons per year of VOCs also is considered to have undergone an emissions increase or net emissions increase of 40 tons per year of ozone under the state's prevention of significant deterioration of air quality program. See Chapter 19, Section *010.06* of the NAC. In addition, because Nebraska defines "regulated NSR pollutant" to include pollutants for which a NAAQS has been promulgated and any precursors for such pollutants that have been identified by EPA,[8] VOCs and NOx are therefore regulated by Nebraska as precursors for ozone.

Finally, EPA notes that on March 22, 2011, in a separate rulemaking, EPA approved the state of Nebraska's revisions to its SIP to regulate GHGs under the Nebraska New Source Review Prevention of Significant Deterioration program. 76 FR 15852. Thus, we have previously determined that the Nebraska SIP meets the PSD requirements with respect to GHGs.

On the basis of the foregoing, EPA believes that the Nebraska SIP and underlying statutory authority are adequate to meet the requirements of section 110(a)(2)(C) for the 1997 8-hour ozone NAAQS.

*(D) Interstate and international transport:* Section 110(a)(2)(D)(i) requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment in, or interfering with maintenance by, another state with respect to the NAAQS, or from interfering with measures required in another state to prevent significant deterioration of air quality or to protect visibility.

Nebraska addressed the provisions of Section 110(a)(2)(D)(i), as it relates to the 1997 ozone and PM standards, in the SIP submission received by EPA on May 18, 2007. EPA approved the portion of the Nebraska SIP submittal relating to Section 110(a)(2)(D)(i), on December 17, 2007 (72 FR 71245). Therefore, the proposed action addressed in this notice does not include the interstate transport elements, nor does this rulemaking reopen any aspect of EPA's prior action on the transport elements for Nebraska for the 1997 standards.

Section 110(a)(2)(D)(ii) requires that the SIP insure compliance with the applicable requirements of sections 126 and 115, relating to interstate and international pollution abatement.

Section 126(a) of the Act requires new or modified sources to notify neighboring states of potential impacts from sources within the state. Although Nebraska sources have not been identified by EPA as having any interstate or international impacts under Section 126 or Section 115 in any pending actions relating to the 1997 ozone standards, the Nebraska regulations address abatement of the effects of interstate pollution. Title 129, Chapter 14, Section *010.03* of the NAC requires NDEQ, after receiving a complete PSD permit application, to notify EPA, as well as officials and agencies having cognizance where the proposed construction is to occur. This includes state or local air pollution control agencies and the chief executives of the city and county where the source would be located; any comprehensive regional land use planning agency; and any state, Federal Land Manager, or Indian governing body whose lands may be affected by emissions from the source or modification. Finally, we believe that Nebraska could use the same statutory authorities previously discussed, primarily Section 81–1505 of the Nebraska Revised Statutes, to respond to any future findings with respect to the 1997 ozone standards.

Based on the foregoing, EPA believes that Nebraska has the adequate infrastructure needed to address Section 110(a)(2)(D)(ii) for the 1997 8-hour ozone NAAQS.

*(E) Adequate authority, resources, implementation, and oversight:* Section 110(a)(2)(E) requires that SIPs provide for the following: (1) Necessary assurances that the state (and other entities within the state responsible for implementing the SIP) have adequate personnel, funding, and authority under state or local law to implement the SIP, and that there are no legal impediments to such implementation;
(2) requirements that the state comply with the requirements relating to state boards, pursuant to Section 128 of the

[8] The regulations at 40 CFR 52.21(b)(50) specifically state that nitrogen oxides and VOCs are considered precursors for ozone.

Act; and (3) necessary assurances that the state has responsibility for implementation of any plan provision for which it relies on local governments or other entities to carry out that portion of the plan.

(1) With respect to adequate authority, we have previously discussed Nebraska's authority to implement the SIP for the 1997 ozone standards, primarily in the discussion of Section 110(a)(2)(A). Neither Nebraska nor EPA has identified any legal impediments to implementation of those standards.

With respect to adequate resources, NDEQ asserts that it has adequate personnel to implement the SIP. State statutes provide NDEQ the authority to establish bureaus, divisions and or sections to carry out the duties and powers granted by the Nebraska state law to address the control of air pollution, to be administered by full-time salaried, bureau, division or section chiefs. See Nebraska Revised Statutes Section 81–1504(14). NDEQ's Air Quality Division is currently divided into the Permitting Section, the Compliance Section, and the Program Planning and Development Unit.

With respect to funding, the Nebraska statutes require the EQC to establish various fees for sources, in order to fund the reasonable costs of implementing various air pollution control programs. For example, Section 81–1505(12)(e) of the Nebraska Revised Statutes requires the EQC to establish a requirement for sources to pay fees sufficient to pay the reasonable direct and indirect costs of developing and administering the air quality operating permit program. These costs include overhead charges for personnel, equipment, buildings and vehicles; enforcement costs; costs of emissions and ambient monitoring; and modeling analyses and demonstrations. See Nebraska Revised Statutes Section 81–1505.04(2)(b). Similarly, Section 81–1505(12)(a) requires the EQC to establish application fees for air contaminant sources seeking to obtain a permit prior to construction.

Section 81–1505.05 of the Nebraska Revised Statutes provides that all fees collected pursuant to Section 81–1505.04 be credited to the "Clean Air Title V Cash Fund" to be used solely to pay for the direct and indirect costs required to develop and administer the air quality permit program. Similarly, Section 81–1505.06 provides that all fees collected pursuant to Section 81–1505(12) be deposited in the "Air Quality Permit Cash Fund."

Nebraska uses funds in the non-Title V subaccounts, along with General Revenue funds and EPA grants under, for example, Sections 103 and 105 of the Act, to fund the programs. EPA conducts periodic program reviews to ensure that the state has adequate resources and funding to, among others, implement the SIP.

(2) Conflict of interest provisions—Section 128

Section 110(a)(2)(E) also provides that the state must meet the requirements of Section 128, relating to representation on state boards and conflicts of interest by members of such boards. We note that this particular provision is not related to promulgation or revision of any NAAQS, and we have not determined that Nebraska must show specifically that it meets this requirement with respect to the ozone infrastructure SIP for the 1997 standards. However, the following discussion shows how Nebraska generally meets the requirements of Section 128.

Section 128 requires that a SIP-implementing body which approves permits or enforcement orders under the Act must have at least a majority of members who represent the public interest and do not derive a "significant portion" of income from entities or individuals subject to permits and enforcement orders under the Act. In addition, Section 128 requires that members of such a body or the agency head with similar authorities adequately disclose any potential conflicts of interest.

Section *81–1503* of the Nebraska Revised Statutes generally tracks the language of Section 128 of the Act. It provides guidelines on the composition of the 17 members of the Environmental Quality Council. It also requires that the Director of NDEQ (who is the person responsible for issuing permits and enforcement orders in Nebraska), before he or she enters the duty of his or her office, attest that he or she does not receive a significant portion of his or her income from permit-holders or applicants for a permit. Furthermore, Title 116 of the NAC provides the Code of Ethics for NDEQ, which includes prohibitions on conflicts of interest for all employees (including officers, employees, and directors).

(3) With respect to assurances that the state has responsibility to implement the SIP when it authorizes local or other agencies to carry out portions of the plan, Section 81–1504(18) of the Nebraska Revised Statutes grants NDEQ the authority to encourage local units of government to handle air pollution problems within their own jurisdictions. NDEQ may delegate, by contract with governmental subdivisions which have adopted air pollution control programs, the enforcement of state-adopted air pollution control regulations within a specified region surrounding the jurisdictional area of the governmental subdivision. See Section 81–1504(23). However, the Nebraska statutes also retain authority in NDEQ to carry out the provisions of state air pollution control law. Section 81–1504(1) gives NDEQ "exclusive general supervision" of the administration and enforcement of the Nebraska Environmental Protection Act. In addition, Section 81–1504(4) designates NDEQ as the air pollution control agency for the purposes of the Clean Air Act.

The state of Nebraska relies on two local agencies for assistance in implementing portions of the air pollution control program: Lincoln/Lancaster County Health Department and Omaha Air Quality Control. NDEQ oversees the activities of these local agencies to ensure adequate implementation of the plan. NDEQ utilizes subgrants to the local agencies to provide adequate funding, and as an oversight mechanism. EPA conducts reviews of the local program activities in conjunction with its oversight of the state program. Based on the foregoing, EPA believes that Nebraska has the adequate infrastructure needed to address Section 110(a)(2)(E) for the 1997 8-hour ozone NAAQS.

*(F) Stationary source monitoring system:* Section 110(a)(2)(F) requires states to establish a system to monitor emissions from stationary sources and to submit periodic emission reports. That section also requires that the state correlate the source reports with emission limitations or standards established under the Act and make reports available for public inspection.

To address this element, Section 81–1505(12)(o) of the Nebraska Revised Statutes gives the EQC the authority to promulgate rules and regulations for air pollution control, including requirements for owner or operator testing and monitoring of emissions. It also gives the EQC the authority to promulgate similar rules and regulations for the periodic reporting of these emissions. See Section 81–1505(12)(l). Chapter 34, Section 002 of the NAC incorporates various EPA reference methods for testing source emissions, including methods for $NO_X$ and VOCs. The Federal test methods are in 40 CFR Part 60, App. A.

The Nebraska regulations also require that all Class I and Class II operating permits include requirements for monitoring of emissions. See Chapter 8, Sections *004.01* and *015* of the NAC. Furthermore, Chapter 34, Section *001* of the NAC allows NDEQ to order an emissions source to make or have tests

made to determine the rate of contaminant emissions from the source whenever NDEQ has reason to believe that the existing emissions from the source exceed the applicable emissions limits.

The Nebraska regulations also impose reporting requirements on sources subject to permitting requirements. See Chapter 6, Section *001;* Chapter 8, Sections *004.03* and *015* of the NAC. Nebraska makes all monitoring reports submitted as part of Class I or Class II permit a publicly available document. Although sources can submit a claim of confidentiality for some of the information submitted, Nebraska regulations specifically exclude emissions data from being entitled to confidential protection. See Chapter 7, Section *004* of the NAC. Nebraska uses this information to track progress towards maintaining the NAAQS, developing control and maintenance strategies, identifying sources and general emission levels, and determining compliance with emission regulations and additional EPA requirements.

EPA believes that Nebraska has the adequate infrastructure needed to address section 110(a)(2)(F) for the 1997 8-hour ozone NAAQS.

*(G) Emergency authority:* Section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health or welfare or the environment (comparable to the authorities provided in Section 303 of the Act), including contingency plans to implement the emergency authorities.

Section 81–1507 of the Nebraska Revised Statutes states that whenever the Director of NDEQ finds that an emergency exists requiring immediate action to protect the public health and welfare, he or she may issue an order requiring that such action be taken as the Director deems necessary to meet the emergency. Chapter 38, Section *003* of the NAC states that the conditions justifying the proclamation of an air pollution alert, air pollution warning, or air pollution emergency exist whenever the Director determines that the accumulation of air pollutants in any place is attaining or has attained levels which could, if such levels are sustained or exceeded, lead to a substantial threat to the health of persons. This regulation also establishes action levels for various air pollutants, including ozone. The action levels (which include "Air Pollution Alert," "Air Pollution Warning," and "Air Pollution Emergency") and associated contingency measures vary depending on the severity of the ozone concentrations. Appendix I to Title 129 of the NAC provides an Emergency Response Plan with actions to be taken under each of the severity levels. These steps are designed to prevent the excessive build-up of air pollutants to concentrations which can result in imminent and substantial danger to public health. Both the regulation at Chapter 38 and the Emergency Response Plan are contained in the federally approved SIP.

EPA believes that the Nebraska SIP adequately addresses section 110(a)(2)(G) for the 1997 8-hour ozone NAAQS.

*(H) Future SIP revisions:* Section 110(a)(2)(H) requires states to have the authority to revise their SIPs in response to changes in the NAAQS, availability of improved methods for attaining the NAAQS, or in response to an EPA finding that the SIP is substantially inadequate to attain the NAAQS.

As discussed previously, Section 81–1504 of the Nebraska Revised Statutes authorizes NDEQ to regulate air quality and implement air quality control regulations. It also authorizes NDEQ to act as the state air pollution control agency for all purposes of the Clean Air Act. Section 81–1505(1) gives the EQC the authority to adopt and promulgate rules which set air standards that will protect public health and welfare. This authority includes the authority to revise rules as necessary to respond to a revised NAAQS (see, for example, the discussion above regarding Nebraska's adoption of the 1997 ozone NAAQS).

EPA believes that Nebraska has the adequate authority to address section 110(a)(2)(H) for the 1997 8-hour ozone NAAQS.

*(I) Nonattainment areas:* Section 110(a)(2)(I) requires that in the case of a plan or plan revision for areas designated as nonattainment areas, states must meet applicable requirements of Part D of the Act, relating to SIP requirements for designated nonattainment areas.

This section is currently not applicable to Nebraska because all areas of Nebraska are currently in attainment with the NAAQS. Nevertheless, EPA notes that the Nebraska regulations have provisions in place which address construction or modification of sources in nonattainment areas. See Chapter 17, Section *013* of the NAC. These regulations are contained in the federally approved SIP.

EPA has not addressed section 110(a)(2)(I) in its recent infrastructure SIP guidance because Part D SIPs are due on a different schedule than the infrastructure SIP submittal schedule. (See, *e.g.,* the infrastructure SIP guidance for the revised lead standard, 73 FR 67034, n. 113, Nov. 12, 2008, and the infrastructure SIP guidance for the revised $NO_2$ standards, 75 FR 6523, n. 27, Feb. 9, 2010.) Therefore, this proposal does not address section 110(a)(2)(I). EPA will take action on any part D nonattainment plans through a separate rulemaking.

*(J) Consultation with government officials, Public Notification, PSD and visibility protection:* Section 110(a)(2)(J) requires SIPs to meet the applicable requirements of the following CAA provisions: (1) Section 121, relating to interagency consultation regarding certain CAA requirements; (2) Section 127, relating to public notification of NAAQS exceedances and related issues; and (3) Part C of the Act, relating to prevention of significant deterioration of air quality and visibility protection.

(1) With respect to interagency consultation, Section 81–1504(3) authorizes NDEQ to advise and consult and cooperate with other Nebraska state agencies, the Federal government, other states, interstate agencies, and with affected political subdivisions, for the purpose of implementing its air pollution control responsibilities. Nebraska also has appropriate interagency consultation provisions in its preconstruction permit program. See, *e.g.,* Chapter 14, Section *010* of the NAC (requiring NDEQ to send a copy of a notice of public comment on construction permit applications to any state or local air pollution control agency; the chief executives of the city and county in which the source would be located; any comprehensive regional land use planning agency; and any state, Federal Land Manager, or Indian governing body whose lands may be affected by emissions from the source or modification).

(2) With respect to the requirements for public notification in CAA Section 127, Chapter 38 of the NAC, discussed previously in connection with the state's authority to address emergency episodes, contains provisions for public notification of elevated ozone and other air pollutant levels. Appendix I to Title 129 of the NAC includes measures which can be taken by the public to reduce concentrations. In addition, information regarding air pollution and related issues, is provided on an NDEQ Web site, *http://www.deq.state.ne.us/NDEQSite.nsf/AirDivSecProg?OpenView&Start=1&ExpandView&Count=500*. NDEQ also prepares an annual report on air quality in the state which is available to the public on its Web site, at *http://www.deq.state.ne.us/Publica.nsf/c4afc76e4e077e1186256877*

*0059b73f/b278ea4efe68274 7862575e60050d633?OpenDocument*.

(3) With respect to the applicable requirements of Part C, relating to prevention of significant deterioration of air quality and visibility protection, we previously noted in the discussion of Section 110(a)(2)(C) (relating to enforcement of control measures) how the Nebraska SIP meets the PSD requirements, incorporating the Federal rule by reference. With respect to the visibility component of Section 110(a)(2)(J), we reiterate the statutory requirement providing, in relevant part, that each plan must meet the "applicable requirements" of Part C (of Title I of the Act) relating to visibility protection. We note that the other Part C requirements specified in section 110(a)(2)(J) (applicable requirements relating to prevention of significant deterioration of air quality), specifically relate to the 1997 and 2006 NAAQS (as well as other pollutants regulated under the CAA), and a state must be able to implement those requirements with respect to a new or revised NAAQS when promulgated. In contrast to the PSD program, the visibility protection requirements are not directly related to the promulgation of, or revision to, a NAAQS. While the SIP must independently meet the visibility protection requirements of Part C by virtue of the specific SIP requirements in sections 169A and 169B of the Act, EPA believes that the visibility protection requirements are not "applicable requirements" within the meaning of section 110(a)(2)(J) and that the infrastructure SIP is not required to be revised with respect to visibility protection merely due to promulgation of, or revision to, these 1997 ozone NAAQS.

For the reasons stated above, EPA believes that Nebraska has met the applicable requirements of Section 110(a)(2)(J) for the 1997 8-hour ozone NAAQS in the state.

*(K) Air quality and modeling/data:* Section 110(a)(2)(K) requires that SIPs provide for performing air quality modeling, as prescribed by EPA, to predict effects on ambient air quality of emissions of any NAAQS pollutant, and for submission of such data to EPA upon request.

Nebraska has authority to conduct air quality modeling and report the results of such modeling to EPA. Section 81–1504(5) provides NDEQ with the authority to encourage, participate in, or conduct studies, investigations, research and demonstrations relating to air pollution and its causes and effects. As an example of regulatory authority to perform modeling for purposes of determining NAAQS compliance, the regulations at Chapter 19, Section *019* provide for the use of EPA-approved air quality models (e.g., those found in 40 CFR Part 51, App. W) for construction permitting. If the use of these models is inappropriate, the model may be modified or an alternate model may be used with the approval of NDEQ and EPA.

The Nebraska regulations also give NDEQ the authority to require that modeling data be submitted for analysis. Chapter 19, Section *021.02* states that upon request by NDEQ, the owner or operator of a proposed source or modification must provide information on the air quality impact of the source or modification, including all meteorological and topographical data necessary to estimate such impact.

EPA believes that Nebraska has the adequate infrastructure needed to address Section 110(a)(2)(K) for the 1997 8-hour ozone NAAQS.

*(L) Permitting Fees:* Section 110(a)(2)(L) requires SIPs to require each major stationary source to pay permitting fees to the permitting authority to cover the cost of reviewing, approving, implementing and enforcing a permit. That section provides that the fee requirement applies until a fee program established by the state pursuant to Title V of the Act, relating to operating permits, is approved by EPA.

Section 81–1505 of the Nebraska Revised States provides authority for NDEQ to collect permit fees, including Title V fees. For example, Section 81–1505(e) requires that the EQC establish fees sufficient to pay the reasonable direct and indirect of developing and administering the air quality permit program. Nebraska's Title V program, including the fee program addressing the requirements of the Act and 40 CFR 70.9 relating to Title V fees, was approved by EPA on October 18, 1995 (60 FR 53872). Therefore, EPA believes that the requirements of Section 110(a)(2)(L) are met.

*(M) Consultation/participation by affected local entities:* Section 110(a)(2)(M) requires SIPs to provide for consultation and participation by local political subdivisions affected by the SIP.

Section 81–1504 of the Nebraska Revised Statutes gives NDEQ the authority to encourage local governments to handle air pollution problems within their respective jurisdictions and at the same time provide them with technical and consultative assistance. NDEQ is also authorized to delegate the enforcement of air pollution control regulations down to governmental subdivisions which have adopted air pollution control programs. As discussed previously, NDEQ currently relies on two local agencies for assistance in implementing portions of the air pollution control program: Lincoln/Lancaster County Health Department and Omaha Air Quality Control.

In addition, as previously noted in the discussion about Section 110(a)(2)(J), Nebraska's statutes and regulations require that NDEQ consult with local political subdivisions for the purposes of carrying out its air pollution control responsibilities.

Therefore, EPA believes that Nebraska has the adequate infrastructure needed to address Section 110(a)(2)(M) for the 1997 8-hour ozone NAAQS.

## IV. What action is EPA proposing?

EPA proposes to approve the State Implementation Plan (SIP) submittal from the state of Nebraska which addresses the requirements of Clean Air Act section 110(a)(2) for the 1997 revisions to the National Ambient Air Quality Standards (NAAQS) for ozone. As described above, EPA believes that Nebraska has the required infrastructure to address all elements of section 110(a)(2) to ensure that the revised ozone standards are implemented in the state.

We are hereby soliciting comment on this proposed action. Final rulemaking will occur after consideration of any comments.

## V. 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 CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this 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 CAA; and

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

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

**Statutory Authority**

The statutory authority for this action is provided by Section 110 of the CAA, as amended (42 U.S.C. 7410).

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

Environmental protection, Air pollution control, Intergovernmental relations, Ozone.

Dated: March 23, 2011.

**Karl Brooks,**

*Regional Administrator, Region 7.*

[FR Doc. 2011–7454 Filed 3–29–11; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R07–OAR–2011–0304 FRL–9288–1]**

## Approval and Promulgation of Implementation Plans; State of Kansas

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve the State Implementation Plan (SIP) submittal from the State of Kansas addressing the requirements of Clean Air Act (CAA) sections 110(a)(1) and (2) for the 1997 revisions to the National Ambient Air Quality Standards (NAAQS) for ozone. Section 110(a)(1) requires that each state adopt and submit a SIP to support implementation of each new or revised NAAQS promulgated by the EPA and these SIPs are commonly referred to as "infrastructure" SIPs. EPA believes that Kansas' infrastructure SIP adequately addresses the elements described in section 110(a)(2) and further described in the October 2, 2007 guidance for infrastructure SIPs issued by the EPA Office of Air Quality Planning and Standards. However, because EPA already approved the portion of Kansas' SIP submittal relating to the interstate transport infrastructure element, section 110(a)(2)(D)(i), this proposed rulemaking does not address the interstate transport element, nor does this proposal reopen any aspect of EPA's prior action on the interstate transport element. Furthermore, this action does not address infrastructure requirements with respect to the 1997 $PM_{2.5}$ NAAQS or the 2006 revisions to the NAAQS. Those requirements will be addressed in future rulemaking.

**DATES:** Comments must be received on or before April 29, 2011.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R07–OAR–2011–0304 by one of the following methods:

1. *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
2. *E-mail: kramer.elizabeth@epa.gov*.
3. *Mail:* Ms. Elizabeth Kramer, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, Air and Waste Management Division, 901 North 5th Street, Kansas City, Kansas 66101.
4. *Hand Delivery or Courier:* Deliver your comments to Ms. Elizabeth Kramer, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, Air and Waste Management Division, 901 North 5th Street, Kansas City, Kansas 66101.

*Instructions:* Direct your comments to Docket ID No. EPA–R07–OAR–2011–0304. 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 should 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, 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 U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101, from 8 a.m. until 4:30 p.m., Monday through Friday, excluding legal holidays. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

**FOR FURTHER INFORMATION CONTACT:** Ms. Elizabeth Kramer, Air Planning and Development Branch, U.S. Environmental Protection Agency, Region 7, 901 North 5th Street, Kansas City, Kansas 66101; *telephone number:* (913) 551–7186; *fax number:* (913) 551–7844; *e-mail address: kramer.elizabeth@epa.gov*.

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever "we," "us," or "our" is used, we refer to EPA. This section provides additional

information by addressing the following questions:

I. What is a section 110(a)(1) and (2) infrastructure SIP?
II. What elements are applicable under section 110(a)(1) and (2)?
III. What is EPA's evaluation of how the state addressed the relevant elements of section 110(a)(1) and (2)?
IV. What action is EPA proposing?
V. Statutory and Executive Order Reviews

## I. What is a section 110(a)(1) and (2) infrastructure SIP?

Section 110(a)(1) and (2) of the CAA require, in part, that states submit to EPA plans to implement, maintain and enforce each of the NAAQS promulgated by EPA. These provisions require states to address basic SIP requirements including, for example, adequate provisions for emission inventory development, monitoring, and modeling to assure attainment and maintenance of the applicable standards. By statute, SIPs meeting the requirements of section 110(a)(1) and (2) are to be submitted by States within three years after promulgation of a new or revised standard. These SIPs are commonly referred to as "infrastructure" SIPs.

## II. What elements are applicable under section 110(a)(1) and (2)?

On October 2, 2007, EPA issued guidance to address infrastructure SIP elements required under section 110(a)(1) and (2) for the 1997 8-hour ozone and $PM_{2.5}$ NAAQS.[1] EPA will address these elements below under the following headings: (A) Emission limits and other control measures; (B) Ambient air quality monitoring/data system; (C) Program for enforcement of control measures (PSD, New Source Review for nonattainment areas, and construction and modification of all stationary sources); (D) Interstate and international transport; (E) Adequate authority, resources, implementation, and oversight; (F) Stationary source monitoring system; (G) Emergency authority; (H) Future SIP revisions; (I) Nonattainment areas; [2] (J) Consultation with government officials, public notification, prevention of significant deterioration (PSD), and visibility protection; [3] (K) Air quality modeling/data; (L) Permitting fees; and (M) Consultation/participation by affected local entities.[4]

## III. What is EPA's evaluation of how the state addressed the relevant elements of section 110(a)(1) and (2)?

On July 18, 1997, EPA promulgated new 8-hour ozone and new fine particulate matter primary and secondary NAAQS. (62 FR 38894; 62 FR 38711). On January 8, 2008, EPA Region 7 received the state of Kansas' ozone infrastructure SIP submittal. In a letter dated July 20, 2009, Kansas provided additional clarification on this submittal. EPA has reviewed the state's formal submission and the relevant statutory and regulatory authorities and provisions generally referenced in the submittal from Kansas.

As described below, today's action only pertains to the 1997 ozone standard; it does not pertain to EPA's 1997 promulgation of the $PM_{2.5}$ standards. In addition, it does not address issues relating to interstate transport under section 110(a)(2)(D)(i), which have already been addressed for the 1997 ozone and $PM_{2.5}$ NAAQS in prior rulemaking (72 FR 10608).[5]

Kansas' SIP submittal addresses the provisions of section 110(a)(1) and (2) as described below. EPA believes that Kansas has the adequate infrastructure needed to address all applicable elements of section 110(a)(1) and (2) for the 1997 8-hour ozone NAAQS.

*(A) Emission limits and other control measures:* Section 110(a)(2)(A) requires SIPs to include enforceable emission limits and other control measures, means or techniques, schedules for compliance and other related matters as needed to implement, maintain and enforce each NAAQS.

The state of Kansas' statutes and regulations authorize Kansas Department of Health and Environment (KDHE) to regulate air quality and implement air quality control regulations. KDHE's statutory authority can be found in Chapter 65, Article 30 of the Kansas Statutes Annotated (KSA), otherwise known as the Kansas Air Quality Act. KSA Section 65–3003 places the responsibility for air quality conservation and control of air pollution with the Secretary of Health and Environment ("Secretary"). The Secretary in turn administers the Kansas Air Quality Act through the Division of Environment within KDHE. Air pollution is defined in KSA Section 65–3002(c) as the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as is, or tends significantly to be, injurious to human health or welfare, animal or plant life, or property, or would unreasonably interfere with the enjoyment of life or property, or would contribute to the formation of regional haze.

KSA Section 65–3005(a)(1) provides authority to the Secretary to adopt, amend and repeal rules and regulations implementing the Kansas Air Quality Act. It also gives the Secretary the authority to establish ambient air quality standards for the state of Kansas as a whole or for any part thereof. KSA Section 65–3005(a)(12). The Secretary also has the authority to establish emission control requirements as appropriate to facilitate the accomplishment of the purposes of the Kansas Air Quality Act. KSA Section 65–3010(a).

In its letters to EPA dated January 2, 2008, and July 20, 2009, transmitting its revisions to the Kansas SIP, KDHE stated that the revised SIP specifically addressed the revised NAAQS promulgated on July 18, 1997, for ozone. This assertion is consistent with previous SIP submissions, which EPA has approved for Kansas, implementing the 1997 ozone standards.[6] Therefore, EPA believes ozone is an air contaminant which may be regulated under Kansas law.

EPA notes that the Kansas Air Quality Regulations provide exemptions from the emission control requirements for malfunction breakdowns or necessary repairs, under certain conditions. *See,*

[1] William T. Harnett, Director, Air Quality Policy Division, Office of Air Quality Planning and Standards. "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards." Memorandum to EPA Air Division Directors, Regions I–X, October 2, 2007.

[2] As discussed in further detail below, subsection 110(a)(2)(I) is not applicable for the infrastructure SIP approval process and therefore EPA will take action on the requirements of part D attainment plans separately.

[3] As discussed in further detail below, subsection 110(a)(2)(J), as it relates to visibility protection, is also not applicable for the infrastructure SIP approval process, and therefore EPA is not addressing it in today's proposed rulemaking.

[4] This action does not address infrastructure requirements with respect to the 1997 $PM_{2.5}$ NAAQS or the 2006 revisions to the NAAQS. Those requirements will be addressed in future rulemaking.

[5] Subsequent to this approval, updated modeling in support of the proposed Transport Rule (75 FR 45210) has indicated that emissions from Kansas interfere with maintenance of the 1997 8-hour ozone NAAQS in downwind areas. Therefore, EPA believes that the previously approved Kansas SIP may no longer adequately address these emissions. Therefore, in a separate action, EPA has proposed to find that the SIP revision approved on March 9, 2007 is substantially inadequate pursuant to section 110(a)(2)(D)(i)(I). If EPA finalizes this proposed finding, Kansas would be required to revise its SIP to correct these deficiencies. *See* 76 FR 763 (January 6, 2011) for more details.

[6] For example, KDHE submitted its "Kansas City Eight-Hour Ozone Maintenance Plan" to EPA on May 23, 2007, which was approved by EPA on August 9, 2007. See 72 FR 44781. This plan specifically demonstrates how KDHE will maintain the 8-hour ozone standard promulgated in 1997, consistent with the requirements of section 110(a)(1) and implementing regulations at 40 CFR 51.905(a)(4). It also contains contingency plans to ensure that any violation of the 1997 ozone standard is promptly corrected.

*e.g.,* KAR 28–19–11. In today's proposed rulemaking, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during a startup, shutdown or malfunction (SSM) of operations at a facility. EPA believes that a number of states have SSM provisions that are contrary to the Clean Air Act and existing EPA guidance,[7] and the Agency plans to address such state regulations in the future. In the meantime, EPA encourages any state having a deficient SSM provision to take steps to correct it as soon as possible.

EPA also notes that the Kansas Air Quality Act contains provisions at KSA 65–3013 that give the Secretary the authority, under certain circumstances, to grant variances from rules and regulations established under the Clean Air Act.[8] Furthermore, the Kansas Air Quality Regulations contain provisions which allow the Secretary of KDHE to exercise his or her discretion to approve alternatives to the Kansas regulations (*see, e.g.,* KAR 28–19–19(l)(5), which allows for data reporting procedures that vary from those in the regulation; KAR 28–19–210(a), which allows KDHE to approve alternate methods for calculating actual emissions from an emissions unit or stationary source). In this action, EPA is not proposing to approve or disapprove any existing state rules with regard to such "variance" or "Secretary's discretion" provisions. EPA believes that a number of states have such provisions that are contrary to the Clean Air Act and existing EPA guidance,[9] and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a "variance" or "Secretary's (director's) discretion" provision that is contrary to the Clean Air Act and EPA guidance to take steps to correct the deficiency as soon as possible.

EPA believes that Kansas has statutory and regulatory authority to establish additional emissions limitations and other measures, as necessary to address attainment and maintenance of the ozone standards. Therefore, EPA believes that the Kansas SIP adequately addresses the requirements of section 110(a)(2)(A) for the 1997 8-hour ozone NAAQS.

*(B) Ambient air quality monitoring/data system:* Section 110(a)(2)(B) requires SIPs to include provisions to provide for establishment and operation of ambient air quality monitors, collection and analysis of ambient air quality data, and making these data available to EPA upon request.

To address this element, KSA Section 65–3007 provides the enabling authority necessary for Kansas to fulfill the requirements of section 110(a)(2)(B). This provision gives the Secretary the authority to classify air contaminant sources which, in his or her judgment, may cause or contribute to air pollution. Furthermore, the Secretary has the authority to require such air contaminant sources to monitor emissions, operating parameters, ambient impacts of any source emissions, and any other parameters deemed necessary. KSA Section 65–3007(b). The Secretary can also require these sources to keep records and make reports consistent with the Kansas Air Quality Act.

Kansas has an air quality monitoring network operated by KDHE and local air quality agencies that collects air quality data that are compiled, analyzed, and reported to EPA. KDHE's Web site contains up-to-date information about air quality monitoring, including a description of the network and information about the monitoring of ozone. *See http://www.kdheks.gov/bar/air-monitor/indexMon.html.* On February 23, 2010, EPA approved Kansas' 2009 ambient air monitoring network plan.

Within KDHE, the Bureau of Air and Radiation implements these requirements. Along with its other duties, the monitoring program collects air monitoring data, quality assures the results, and reports the data. The data are then used to develop the appropriate regulatory or outreach strategies to reduce air pollution.

KDHE submits a 5–Year Ambient Air Monitoring Network Assessment to EPA, including plans for its ozone monitoring network, as required by 40 CFR 58.10. The most recent 5-year network assessment was dated August 30, 2010. Kansas makes this plan available for public review on KDHE's Web site. *See, e.g., http://www.kdheks.gov/bar/air-monitor/2010_Kansas_5-year_Monitoring_Network_Assessment.pdf.* This Plan includes, among other things, the locations for the ozone monitoring network. Kansas submits air quality data from this network to EPA's Air Quality System (AQS), which EPA and KDHE use to determine if the network site monitors are in compliance with the NAAQS.

Based on the foregoing, EPA believes that the Kansas SIP meets the requirements of section 110(a)(2)(B) for the 1997 8-hour ozone NAAQS.

*(C) Program for enforcement of control measures (PSD, New Source Review for nonattainment areas, and construction and modification of all stationary sources):* Section 110(a)(2)(C) requires states to include the following elements in the SIP: (1) A program providing for enforcement of all SIP measures described in section 110(a)(2)(A); (2) a program for the regulation of the modification and construction of stationary sources as necessary to protect the applicable NAAQS; and (3) a permit program to meet the major source permitting requirements of the Act (including the program for areas designated as not attaining the NAAQS, and a program for the prevention of significant deterioration of air quality program in other areas). Note that all areas of Kansas are currently in attainment with the NAAQS. In addition, as discussed in further detail below, this proposed infrastructure SIP rulemaking will not address the Kansas program for nonattainment area-related provisions, since those are not applicable for the infrastructure SIP approval process.

(1) With respect to enforcement of requirements of the SIP, KSA Section 65–3005(a)(3) gives the Secretary the authority to issue orders, permits and approvals as may be necessary to effectuate the purposes of the Kansas Air Quality Act and enforce the Act by all appropriate administrative and judicial proceedings. Pursuant to KSA Section 65–3006, the Secretary also has the authority to publish and enforce rules, regulations and standards to implement the Act and to employ the professional, technical or other staff to effectuate the provisions of the Act. In addition, if the Secretary or the director of the Division of Environment finds that any person has violated any provision of any approval, permit or compliance plan or any provision of the Act or any rule or regulation promulgated under the Act, he or she may issue an order directing the person to take such action as necessary to

[7] Steven Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation. "State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown." Memorandum to EPA Air Division Directors, September 20, 1999.

[8] The statutory variance provisions are not included in the Kansas SIP and are not recognized under federal law. In any event, a variance from an EPA-approved SIP requirement would not be recognized as a revision to the SIP unless approved by EPA under the CAA requirements for SIP revisions (*see,* 40 CFR 51.104(d)).

[9] J. Craig Potter, Assistant Administrator for Air and Radiation, Thomas L. Adams, Jr., Assistant Administrator for Enforcement and Compliance Monitoring, and Francis S. Blake, General Counsel, Office of General Counsel. "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency." Memorandum, September 23, 1987. *See also* 52 FR 45109 (November 24, 1987).

correct the violation. KSA Section 65–3011.

KSA Section 65–3018 gives the Secretary the authority to impose a monetary penalty against any person who either violates any order or permit issued under the Kansas Air Quality Act, or violates any provision of the Act or rule or regulation promulgated thereunder. Section 65–3019 provides for criminal penalties for knowing violations.

(2) Section 110(a)(2)(C) also requires that the SIP include measures to regulate construction and modification of stationary sources to protect the NAAQS. Kansas has a program under KAR 28–19–300 that requires sources (which meet certain criteria listed in KAR 28–19–300(a)) to first obtain a construction permit from KDHE. The permitting process is designed to ensure, among other things, that new and modified sources will not interfere with NAAQS attainment. If KDHE determines that emissions from a constructed or modified source will interfere with attainment or maintenance of the NAAQS, it cannot issue the permit. See KAR 28–19–301(d).

Kansas also requires preconstruction permits for a second category of smaller sources that meet the criteria listed in KAR 28–19–300(b). Prior to commencing construction or modification, these sources must obtain an approval from KDHE. Again, if KDHE determines that emissions from a constructed or modified source will interfere with attainment or maintenance of the NAAQS, it cannot issue the approval.

The Kansas regulations give KDHE the authority to condition the permit or approval upon compliance by the owner or operator with any special restrictions that are deemed necessary to insure compliance with the Kansas Air Quality regulations or to otherwise prevent air pollution. KAR 28–19–301(e).

EPA has determined that Kansas' minor new source review (NSR) program adopted pursuant to section 110(a)(2)(C) of the Act regulates emissions of ozone and its precursors. EPA has also determined that certain provisions of the state's minor NSR program adopted pursuant to section 110(a)(2)(C) of the Act likely do not meet all the requirements found in EPA's regulations implementing that provision. See 40 CFR 51.160–51.164. EPA previously approved Kansas' minor NSR program into the SIP, and at the time there was no objection to the provisions of this program. See, 40 FR 15879 (April 8, 1975) and 60 FR 36361 (July 17, 1995). Since then, the state and EPA have relied on the existing state minor NSR program to assure that new and modified sources not captured by the major NSR permitting programs do not interfere with attainment and maintenance of the NAAQS.

In this action, EPA is proposing to approve Kansas' infrastructure SIP for ozone with respect to the general requirement in section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. EPA is not proposing to approve or disapprove the state's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program. EPA believes that a number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and EPA believes it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

(3) Kansas also has a program approved by EPA which meets the requirements of Part C, relating to prevention of significant deterioration of air quality. Kansas' implementing rule, KAR 28–19–350, incorporates the relevant portions of the federal rule, 40 CFR 52.21 (as of July 1, 2007), by reference, including the relevant portions of EPA's "NSR reform" rule promulgated by EPA on December 31, 2002. In this action, EPA is not proposing to approve or disapprove any state rules with regard to NSR reform requirements. EPA will act on NSR reform submittals through a separate rulemaking process. For Kansas, we have previously approved the relevant portions of Kansas' NSR reform rules for attainment areas, and as previously stated, Kansas currently has no nonattainment areas. See 72 FR 29429 (May 29, 2007).

The Kansas SIP also contains a permitting program for major sources and modifications in nonattainment areas (see KAR 28–19–16). This section is currently not applicable to Kansas because all areas of Kansas are currently in attainment with the NAAQS. Even if it were applicable, the SIP's discussion of nonattainment areas is not addressed in this rulemaking (*see* discussion of the section 110(a)(2)(I) requirements for nonattainment areas, below).

With respect to the PSD program, EPA notes that the Kansas SIP provides that ozone precursors (volatile organic compounds (VOCs) and nitrogen oxides) are regulated. For example, a stationary source that is major for VOCs is also major for ozone for purposes of permitting in nonattainment areas. KAR 28–19–16a(r). In addition, a source that undergoes a significant net emissions increase for VOCs is also considered to have undergone a significant net emissions increase for ozone for the purposes of the Kansas air quality regulations. KAR 28–19–200(eee)(6). EPA also notes that KAR 28–19–350 incorporates 40 CFR 52.21(b) as of 2007 by reference. The regulations at 40 CFR 52.21(b)(50) specifically state that nitrogen oxides and VOCs are considered precursors for ozone.

In further support of EPA's proposed determination regarding the state's authority to apply its PSD program to the 1997 ozone standard, EPA notes that KAR 28–19–350 also incorporates by reference the requirements of 40 CFR 52.21(k)(1). This provision requires that a permit applicant demonstrate that allowable emissions increases from a new source or modification will not cause or contribute to air pollution in violation of "[a]ny national ambient air quality standard." EPA believes that this provision is sufficiently open-ended to authorize KDHE to implement any NAAQS upon promulgation by EPA. This view is consistent with KDHE's assertion that it has adequate authority to meet all of the requirements of section 110(a)(2) with respect to the 1997 ozone standard (which includes implementation of the PSD program with respect to that standard).

Finally, we note that on February 22, 2011, in a separate rulemaking, EPA approved the state of Kansas' revisions to its SIP to regulate GHGs under the Kansas New Source Review Prevention of Significant Deterioration program. 76 FR 9658. Thus, we have previously determined that the Kansas SIP meets the PSD requirements with respect to GHGs.

On the basis of the foregoing, EPA believes that the Kansas SIP and underlying statutory authority are adequate to meet the requirements of section 110(a)(2)(C) for the 1997 8-hour ozone NAAQS.

*(D) Interstate and international transport:* Section 110(a)(2)(D)(i) requires SIPs to include provisions prohibiting any source or other type of

emissions activity in one state from contributing significantly to nonattainment in, or interfering with maintenance by, another state with respect to the NAAQS, or from interfering with measures required in another state to prevent significant deterioration of air quality or to protect visibility.

Kansas addressed the provisions of section 110(a)(2)(D)(i), as it relates to the 1997 ozone and PM standards, in a prior SIP submission. EPA approved the portion of the Kansas SIP submittal relating to section 110(a)(2)(D)(i), on March 9, 2007 (72 FR 10608).[10] Therefore, the proposed action addressed in this notice does not include the interstate transport elements, nor does this rulemaking reopen any aspect of EPA's prior action on the transport elements for Kansas for the 1997 standards.

Section 110(a)(2)(D)(ii) requires that the SIP insure compliance with the applicable requirements of sections 126 and 115, relating to interstate and international pollution abatement.

Section 126(a) of the Act requires new or modified sources to notify neighboring states of potential impacts from sources within the state. Although Kansas sources have not been identified by EPA as having any interstate or international impacts under section 126 or section 115 in any pending actions relating to the 1997 ozone standards, the Kansas regulations address abatement of the effects of interstate pollution. For example, KAR 28–19–350(k)(2) requires KDHE, prior to issuing any construction permit for a proposed new major source or major modification, to notify EPA, as well as: Any state or local air pollution control agency having jurisdiction in the air quality control region in which the new or modified installation will be located; the chief executives of the city and county where the source will be located; any comprehensive regional land use planning agency having jurisdiction where the source will be located; and any state, Federal land manager, or Indian governing body whose lands will be affected by emissions from the new source or modification. (KAR 28–19–16k(b) provides similar requirements for construction permits issued in nonattainment areas.) Finally, we believe that Kansas could use the same statutory authorities previously discussed, primarily KSA 65–3005(a), to respond to any future findings with respect to the 1997 ozone standards.

Based on the foregoing, EPA believes that Kansas has the adequate infrastructure needed to address section 110(a)(2)(D)(ii) for the 1997 8-hour ozone NAAQS.

*(E) Adequate authority, resources, implementation, and oversight:* Section 110(a)(2)(E) requires that SIPs provide for the following: (1) Necessary assurances that the state (and other entities within the state responsible for implementing the SIP) have adequate personnel, funding, and authority under state or local law to implement the SIP, and that there are no legal impediments to such implementation; (2) requirements that the state comply with the requirements relating to state boards, pursuant to section 128 of the Act; and (3) necessary assurances that the state has responsibility for implementation of any plan provision for which it relies on local governments or other entities to carry out that portion of the plan.

(1) With respect to adequate authority, we have previously discussed Kansas' authority to implement the SIP for the 1997 ozone standards, primarily in the discussion of section 110(a)(2)(A). Neither Kansas nor EPA has identified any legal impediments to implementation of those standards.

With respect to adequate resources, KDHE asserts that it has adequate personnel to implement the SIP. The Kansas statutes provide the Secretary the authority to employ technical, professional and other staff to effectuate the purposes of the Kansas Air Quality Act from funds appropriated and available for this purpose. See KSA Section 65–3006(b). Within KDHE, the Bureau of Air and Radiation implements the Kansas Air Quality Act. This Bureau is further divided into the Air Compliance & Enforcement Section, Air Operating Permit & Construction Section; the Monitoring & Planning Section; and the Radiation, Asbestos & Right to Know Section.

With respect to funding, the Kansas Legislature annually approves funding and personnel resources for KDHE to carry out the air program. The annual budget process provides a periodic update that enables KDHE and the local agencies to adjust funding and personnel needs. In addition, the Kansas statutes grant the Secretary authority to establish various fees for sources, to cover any and all parts of administering the provisions of the Kansas Air Quality Act. For example, KSA Section 65–3008(f) allows the Secretary to fix, charge, and collect fees for construction approvals and permits (and the renewals thereof). KSA Section 65–3024 grants the Secretary the authority to establish annual emissions fees. Fees from the construction permits and approvals are deposited into the Kansas state treasury, while emissions fees are deposited into an air quality fee fund. Moneys in the air quality fee fund can only be used for the purpose of administering the Kansas Air Quality Act.

Kansas also uses funds in the non-Title V subaccounts, along with General Revenue funds and EPA grants under, for example, sections 103 and 105 of the Act, to fund the programs. EPA conducts periodic program reviews to ensure that the state has adequate resources and funding to, among other things, implement the SIP.

(2) Conflict of interest provisions—Section 128

Section 110(a)(2)(E) also provides that the state must meet the requirements of section 128, relating to representation on state boards and conflicts of interest by members of such boards. We note that this particular provision is not related to promulgation or revision of any NAAQS, and we have not determined that Kansas must show specifically that it meets this requirement with respect to the ozone infrastructure SIP for the 1997 standards. However, the following discussion shows how Kansas generally meets the requirements of Section 128.

Section 128 requires that a SIP-implementing body which approves permits or enforcement orders under the Act must have at least a majority of members who represent the public interest and do not derive a "significant portion" of income from entities or individuals subject to permits and enforcement orders under the Act. In addition, section 128 requires that members of such a body or the agency head with similar authorities adequately disclose any potential conflicts of interest.

Chapter 46, Article 2 (State Governmental Ethics) of the KSA specifies ethics requirements for all state officers and employees, including members of KDHE's Bureau of Air and Radiation. These requirements address the requirements contained in section 128 of the CAA. For instance, KSA Section 46–235 states that no state officer or employee shall accept compensation for performance of official duties, other than that to which such person is entitled for such performance. KSA Section 46–236 states that no state officer or employee shall solicit any economic opportunity, gift, favor, service, etc. from any person known to have a special interest in influencing the performance of the official duties of such officer or employee. KSA Section 46–248 requires that state officers (such as the

[10] See footnote 5.

Secretary), employees and members of boards, councils and commissions under the jurisdiction of the head of any state agency must file "statements of substantial interest," disclosing the nature of any financial interest(s) he or she may have.

(3) With respect to assurances that the state has responsibility to implement the SIP when it authorizes local or other agencies to carry out portions of the plan, KSA Section 65–3005(a)(8) gives the Secretary the authority to encourage local units of government to handle air pollution problems within their own jurisdictions and to provide technical and consultative assistance therefor. The Secretary may enter into agreements with local units of government to administer all or part of the provisions of the Kansas Air Quality Act in the units' respective jurisdictions. In fact, KSA Section 65–3016 allows for cities and/or counties (or combinations thereof) to form local air quality conservation authorities which will then have the authority to enforce air quality rules and regulations adopted by the Secretary and adopt any additional rules, regulations and standards as needed to maintain satisfactory air quality within their jurisdictions.

However, the Kansas statutes also retain authority in the Secretary to carry out the provisions of state air pollution control law. KSA Section 65–3003 specifically places responsibility for air quality conservation and control of air pollution with the Secretary. The Secretary shall then administer the Kansas Air Quality Act through the Division of Environment. As an example of this retention of authority, KSA Section 65–3016 only allows for the formation of local air quality conservation authorities with the approval of the Secretary. In addition, although these authorities can adopt additional air quality rules, regulations and standards, they may only do so if those rules, regulations and standards are in compliance with those set by the Secretary. Currently, KDHE oversees the following local agencies that implement that Kansas Air Quality Act: The City of Wichita Department of Environmental Services, Johnson County Environmental Department, Shawnee County Health Agency, and Unified Government of Wyandotte County, Kansas City-Kansas Health Department.

Based on the foregoing, EPA believes that Kansas has the adequate infrastructure needed to address section 110(a)(2)(E) for the 1997 8-hour ozone NAAQS.

*(F) Stationary source monitoring system:* Section 110(a)(2)(F) requires states to establish a system to monitor emissions from stationary sources and to submit periodic emission reports. That section also requires that the state correlate the source reports with emission limitations or standards established under the Act and make reports available for public inspection.

To address this element, KSA Section 65–3007 gives the Secretary the authority to classify air contaminant sources which, in his or her judgment, may cause or contribute to air pollution. The Secretary shall require air contaminant emission sources to monitor emissions, operating parameters, ambient impact of any source emissions, and any other parameters deemed necessary. Furthermore, the Secretary may require these emissions sources to keep records and make reports consistent with the purposes of the Kansas Air Quality Act.

In addition, KAR 28–19–12(A) states that KDHE may make any person responsible for the operation of an emissions source to make or have tests made to determine the rate of contaminant emissions from the source whenever it has reason to believe that existing emissions exceed limitations. At the same time, KDHE may also conduct its own tests of emissions from any source. The Kansas regulations also require that all Class I operating permits include requirements for monitoring of emissions. See KAR 28–19–512(a)(9).

Kansas makes all monitoring reports (as well as compliance plans and compliance certifications) submitted as part of Class I or Class II permit application publicly available. See KSA Section 65–3015(a); KAR 28–19–204(c)(6). KDHE maintains a database with emissions data for more than 900 stationary source facilities in Kansas. *See http://www.kdheks.gov/emission/data.html.* KDHE uses this information to track progress towards maintaining the NAAQS, developing control and maintenance strategies, identifying sources and general emission levels, and determining compliance with emission regulations and additional EPA requirements. Although the Kansas statutes allow a person to request that some information that is reported to KDHE be regarded and treated as confidential on the grounds that it constitutes trade secrets, emissions data is specifically excluded from this protection. See KSA Section 65–3015(b).

EPA believes that Kansas has the adequate infrastructure needed to address section 110(a)(2)(F) for the 1997 8-hour ozone NAAQS.

*(G) Emergency authority:* Section 110(a)(2)(G) requires states to provide for authority to address activities causing imminent and substantial endangerment to public health or welfare or the environment (comparable to the authorities provided in Section 303 of the Act), including contingency plans to implement the emergency authorities.

KSA Section 65–3012(a) states that whenever the Secretary receives evidence that emissions from an air pollution source or combination of sources presents an imminent and substantial endangerment to public health or welfare or to the environment, he or she may issue a temporary order directing the owner or operator, or both, to take such steps as necessary to prevent the act or eliminate the practice. The Secretary may then follow this up by commencing an action in the district court to enjoin these acts or practices.

KAR 28–19–56 allows the director of the division of environment to proclaim an air pollution alert, air pollution warning, or air pollution emergency whenever he or she determines that the accumulation of air contaminants at any sampling location has attained levels which could, if such levels are sustained or exceeded, threaten the public health. KAR 28–19–57 imposes restrictions that apply to emission sources in the event one of these three air pollution episode statuses is declared. Any person responsible for the operation of a source of air contamination adjudged to be of major concern with respect to the possible implementation of air pollution emergency episode control procedures either because of the nature or the quantity of its emissions must, at the request of KDHE, prepare an emergency episode plan to be implemented in the event that such an episode is declared. KAR 28–19–58.

EPA believes that the Kansas SIP adequately addresses section 110(a)(2)(G) for the 1997 8-hour ozone NAAQS.

*(H) Future SIP revisions*: Section 110(a)(2)(H) requires states to have the authority to revise their SIPs in response to changes in the NAAQS, availability of improved methods for attaining the NAAQS, or in response to an EPA finding that the SIP is substantially inadequate to attain the NAAQS.

KSA Section 65–3005(b) specifically states that it is the policy of the state of Kansas to regulate the air quality of the state and implement laws and regulations that are applied equally and uniformly throughout the state and consistent with that of the Federal government. Therefore, the Secretary has the authority to promulgate rules and regulations to ensure that Kansas is and remains in compliance with the

provisions of the Federal CAA. KSA Section 65–3005(b)(1).

As discussed previously, KSA Section 65–3005(a)(1) provides authority to the Secretary to adopt, amend and repeal rules and regulations implementing the Kansas Air Quality Act. The Secretary also has the authority to establish ambient air quality standards for the state of Kansas. KSA Section 65–3005(a)(12). Therefore, as a whole, the Secretary has the authority to revise rules as necessary to respond to any necessary changes in the NAAQS.

EPA believes that Kansas has the adequate authority to address section 110(a)(2)(H) for the 1997 8-hour ozone NAAQS.

*(I) Nonattainment areas:* Section 110(a)(2)(I) requires that in the case of a plan or plan revision for areas designated as nonattainment areas, states must meet applicable requirements of Part D of the Act, relating to SIP requirements for designated nonattainment areas.

This section is currently not applicable to Kansas because all areas of Kansas are currently in attainment with the NAAQS. Kansas previously had one ozone nonattainment area in the Kansas portion of the Kansas City metropolitan area; however, it was later redesignated as being in attainment. Nevertheless, EPA notes that the Kansas regulations have provisions in place which address construction or modification of sources in nonattainment areas, and that it has regulations in place for control of VOC emissions in the former nonattainment area. See KAR Section 28–19–16 through 28–19–16m, and KAR 28–19–61 through 28–19–77. These regulations are contained in the Federally approved SIP.

EPA has not addressed section 110(a)(2)(I) in its recent infrastructure SIP guidance because Part D SIPs are due on a different schedule than the infrastructure SIP submittal schedule. (See, *e.g.,* the infrastructure SIP guidance for the revised lead standard, 73 FR 67034, n. 113, Nov. 12, 2008, and the infrastructure SIP guidance for the revised $NO_2$ standards, 75 FR 6523, n. 27, Feb. 9, 2010.) Therefore, this proposal does not address section 110(a)(2)(I). EPA will take action on any part D nonattainment plans through a separate rulemaking.

*(J) Consultation with government officials, Public Notification, PSD and visibility protection:* Section 110(a)(2)(J) requires SIPs to meet the applicable requirements of the following CAA provisions: (1) Section 121, relating to interagency consultation regarding certain CAA requirements; (2) section 127, relating to public notification of NAAQS exceedances and related issues; and (3) Part C of the Act, relating to prevention of significant deterioration of air quality and visibility protection.

(1) With respect to interagency consultation, KSA Section 65–3005(14) gives the Secretary the authority to advise, consult and cooperate with other agencies of the state, local governments, other states, interstate and interlocal agencies, and the Federal government. In addition, and as an example, the Kansas regulations require that KDHE consult with other agencies—such as the Kansas Department of Transportation, Wyandotte County (KS) Health Department, Johnson County (KS) Environmental Department Missouri Department of Natural Resources, Missouri Department of Transportation, the Federal Highway Administration of the U.S. Department of Transportation, among others—for all matters pertaining to transportation conformity determinations. KAR 28–19–801(d).[11] Furthermore, as noted in the discussion on section 110(a)(2)(D), Kansas' regulations require that whenever it receives a construction permit application for a new source or a modification, KDHE must notify state and local air pollution control agencies, as well as regional land use planning agencies and any state, Federal, or Indian land managers whose lands will be affected by emissions from the new source or modification. See KAR 28–19–350(k)(2).

(2) With respect to the requirements for public notification in CAA section 127, KAR 28–19–56 contains provisions that allow the director of the division of environment to proclaim an air pollution alert, air pollution warning, or air pollution emergency status whenever he or she determines that the accumulation of air contaminants at any sampling location has attained levels which could, if such levels are sustained or exceeded, threaten the public health. If this occurs, public notification will occur through local weather bureaus. However, any of these emergency situations can be declared even in the absence of issuance of a high air pollution potential advisory or equivalent advisory from a local weather bureau meteorologist, if deemed necessary to protect the public health.

In addition, information regarding air pollution and related issues, is provided on a KDHE Web site, *http://www.kdheks.gov/bar/.* KDHE also prepares an annual report on air quality in the state which is available to the public on its Web site, at *http://www.kdheks.gov/bar/air-monitor/index.html.* This link also provides information regarding the NAAQS, air pollution sources, and health effects of poor air quality, as well as access to live monitoring data.

(3) With respect to the applicable requirements of Part C, relating to prevention of significant deterioration of air quality and visibility protection, we previously noted in the discussion of section 110(a)(2)(C) (relating to enforcement of control measures) how the Kansas SIP meets the PSD requirements, incorporating the Federal rule by reference. With respect to the visibility component of section 110(a)(2)(J), we reiterate the statutory requirement providing, in relevant part, that each plan must meet the "applicable requirements" of Part C (of Title I of the Act) relating to visibility protection. We note that the other Part C requirements specified in section 110(a)(2)(J) (applicable requirements relating to prevention of significant deterioration of air quality), specifically relate to the 1997 and 2006 NAAQS (as well as other pollutants regulated under the CAA), and a state must be able to implement those requirements with respect to a new or revised NAAQS when promulgated. In contrast to the PSD program, the visibility protection requirements are not directly related to the promulgation of, or revision to, a NAAQS. While the SIP must independently meet the visibility protection requirements of Part C by virtue of the specific SIP requirements in sections 169A and 169B of the Act, EPA believes that the visibility protection requirements are not "applicable requirements" within the meaning of section 110(a)(2)(J) and that the infrastructure SIP is not required to be revised with respect to visibility protection merely due to promulgation of, or revision to, these 1997 ozone NAAQS.

For the reasons stated above, EPA believes that Kansas has met the applicable requirements of section 110(a)(2)(J) for the 1997 8-hour ozone NAAQS in the state.

*(K) Air quality and modeling/data*: Section 110(a)(2)(K) requires that SIPs provide for performing air quality modeling, as prescribed by EPA, to predict effects on ambient air quality of emissions of any NAAQS pollutant, and for submission of such data to EPA upon request.

Kansas has authority to conduct air quality modeling and report the results of such modeling to EPA. KSA Section 65–3005(a)(9) gives the Secretary the

[11] We note, however, that Kansas does not currently have any areas in the state subject to transportation conformity.

authority to encourage and conduct studies, investigations and research relating to air contamination and air pollution and their causes, effects, prevention, abatement and control. As an example of regulatory authority to perform modeling for purposes of determining NAAQS compliance, the regulations at KAR 28–19–350 incorporate the EPA modeling guidance in 40 CFR Part 51, App. W for the purposes of demonstrating compliance or non-compliance with an NAAQS.

The Kansas statutes and regulations also give KDHE the authority to require that modeling data be submitted for analysis. KSA Section 65–3007(b) gives the Secretary the authority to require air contaminant emission sources to monitor emissions, operating parameters ambient impact of any source emissions or any other parameters deemed necessary. The Secretary may also require these sources to keep records and make reports consistent with the purposes of the Kansas Air Quality Act. These reports could include information as may be required concerning the location, size, and height of contaminant outlets, processes employed, fuels used, and the nature and time periods or duration of emissions, and such information as is relevant to air pollution and available or reasonably capable of being assembled. KSA Section 65–3007(c).

EPA believes that Kansas has the adequate infrastructure needed to address section 110(a)(2)(K) for the 1997 8-hour ozone NAAQS.

*(L) Permitting Fees:* Section 110(a)(2)(L) requires SIPs to require each major stationary source to pay permitting fees to the permitting authority to cover the cost of reviewing, approving, implementing and enforcing a permit. That section provides that the fee requirement applies until a fee program established by the state pursuant to Title V of the Act, relating to operating permits, is approved by EPA.

KSA Section 65–3008(f) allows the Secretary to fix, charge, and collect fees for construction approvals and permits (and the renewals thereof). KSA Section 65–3024 grants the Secretary the authority to establish annual emissions fees. Fees from the construction permits and approvals are deposited into the Kansas state treasury, while emissions fees are deposited into an air quality fee fund. Moneys in the air quality fee fund can only be used for the purpose of administering the Kansas Air Quality Act.

Kansas' Title V program, found at KAR 28–19–500 to 28–19–564, including the fee program addressing the requirements of the Act and 40 CFR 70.9 relating to Title V fees, was approved by EPA on January 30, 1996 (61 FR 2938). Therefore, EPA believes that the requirements of section 110(a)(2)(L) are met.

*(M) Consultation/participation by affected local entities:* Section 110(a)(2)(M) requires SIPs to provide for consultation and participation by local political subdivisions affected by the SIP.

KSA Section 65–3005(a)(8)(A) gives the Secretary the authority to encourage local units of government to handle air pollution problems within their respective jurisdictions and on a cooperative basis and to provide technical and consultative assistance therefore. The Secretary may also enter into agreements with local units of government to administer all or part of the provisions on the Kansas Air Quality Act in the units' respective jurisdiction. The Secretary also has the authority to advise, consult, and cooperate with local governments. KSA Section 65–3005(a)(14). He or she may enter into contracts and agreements with local governments as is necessary to accomplish the goals of the Kansas Air Quality Act. KSA Section 65–3005(a)(16).

Currently, KDHE's Bureau of Air and Radiation has signed State and/or Local Agreements with the Department of Air Quality from the Unified Government of Wyandotte County—Kansas City, Kansas; the Wichita Department of Environmental Services; the Shawnee County Health Department, the Johnson County Environmental Department; and the Mid-America Regional Council. These agreements establish formal partnerships between the Bureau of Air and Radiation and these local agencies to work together to develop and annually update strategic goals, objectives and strategies for reducing emissions and improving air quality.

In addition, as previously noted in the discussion about section 110(a)(2)(J), Kansas' statutes and regulations require that KDHE consult with local political subdivisions for the purposes of carrying out its air pollution control responsibilities.

Therefore, EPA believes that Kansas has the adequate infrastructure needed to address section 110(a)(2)(M) for the 1997 8-hour ozone NAAQS.

## IV. What action is EPA proposing?

EPA proposes to approve the State Implementation Plan (SIP) submittal from the state of Kansas which addresses the requirements of Clean Air Act section 110(a)(2) for the 1997 revisions to the National Ambient Air Quality Standards (NAAQS) for ozone. As described above, EPA believes that Kansas has the required infrastructure to address all elements of section 110(a)(2) to ensure that the revised ozone standards are implemented in the state.

We are hereby soliciting comment on this proposed action. Final rulemaking will occur after consideration of any comments.

## V. 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 CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this 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 CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible

methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

**Statutory Authority**

The statutory authority for this action is provided by Section 110 of the CAA, as amended (42 U.S.C. 7410).

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

Environmental protection, Air pollution control, Intergovernmental relations, Ozone.

Dated: March 23, 2011.

**Karl Brooks,**

*Regional Administrator, Region 7.*

[FR Doc. 2011–7467 Filed 3–29–11; 8:45 am]

BILLING CODE 6560–50–P

---

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2011–0014; FRL–8867–2]**

## 40 CFR Parts 156 and 170

## Receipt of Request To Require Pesticide Products To Be Labeled in English and Spanish

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

**ACTION:** Notice of receipt of petition and request for comment.

**SUMMARY:** This notice is to advise the public that the Migrant Clinicians Network and other farm worker interest groups have petitioned EPA to require all pesticide labels be available in both English and Spanish. The Agency is taking public comment on the request before responding to the petitioners.

**DATES:** Comments must be received on or before June 28, 2011.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2011–0014, by one of the following methods:

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

• *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPP–2011–0014. EPA's policy is that all comments received will be included in the 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 regulations.gov or e-mail. The 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the 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 docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Katie Weyrauch, Pesticide Re-evaluation Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–0166; e-mail address: *weyrauch.katie@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including human health, farm worker, agricultural and environmental advocacy groups; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain fully why you agree or disagree; suggest alternatives and

substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used, as well as the sources of those data.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. Background

### *A. Summary of Petition*

In December 2009, the Agency received a letter from the Migrant Clinicians Network (MCN), Farmworker Justice, and other farm worker advocacy organizations requesting that EPA require labeling in Spanish, in addition to the current requirement for English, on pesticide products. While this letter focused on farm workers, people in several other types of occupations apply pesticides or are exposed to pesticides routinely, such as lawn and landscape maintenance workers, structural pest control technicians, and commercial and residential cleaning staff. People in these occupations and Spanish-speaking consumers who use pesticide products at home may also be affected by the availability of pesticide labels in Spanish. The Agency is therefore seeking comment on this request as it applies to all of these stakeholders.

Executive Order (EO) 13166 of August 11, 2000, orders federal agencies to improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency (LEP). The EO further states that, "(in) carrying out this order, agencies shall ensure that stakeholders such as LEP persons and their representative organizations, recipients, and other appropriate individuals or entities, have an adequate opportunity to provide input. This input from stakeholders will assist the agencies in developing an approach to ensuring meaningful access by LEP persons that is practical and effective, fiscally responsible, responsible to the particular circumstances of each agency, and can be readily implemented." EPA's goals for this **Federal Register** notice are consistent with EO 13166 in that EPA is seeking public comment on the request for EPA to require that pesticide labels be available in English and Spanish. Input from the public will inform EPA's decision whether a requirement for English and Spanish on pesticide products ensures meaningful access by LEP persons that meets the objectives of this EO.

EPA is treating this letter as a petition and is taking public comment on this request. The letter from the petitioners and EPA's response letter are located in docket EPA–HQ–OPP–2011–0014 associated with this **Federal Register** notice located at *http://www.regulations.gov*. The Agency would like the public to comment on the request for requiring labeling in Spanish, including information such as potential benefits, possible disadvantages, the potential scope of a bilingual labeling requirement, and costs. Specific questions the Agency would like the public to consider and respond to on this topic are included below in Section II.G.

### *B. Current EPA Provisions Relating to Pesticide Labeling in Spanish or Other Languages*

Several current EPA regulations and guidance documents contain provisions relevant to the issues raised by the petition. As stated in 40 CFR 156.10(a)(3), "All required label or labeling text shall appear in the English language. However, the Agency may require or the applicant may propose additional text in other languages as is considered necessary to protect the public. When additional text in another language is necessary, all labeling requirements will be applied equally to both the English and other-language versions of the labeling."

Currently, the Agency allows a pesticide registrant to add labeling in languages other than English. The Office of Pesticide Program's first statement of policy regarding bilingual labeling occurred in Pesticide Registration (PR) Notice 88–06. PR 88–06 was revised by PR 95–2 and PR 98–10. All PR Notices can be found at *http://www.epa.gov/PR_Notices/*. PR 98–10 states, "A registrant may provide bilingual labeling on any product without notification. The foreign text must be a true and accurate translation of the English text. **Note:** Both language versions of the labeling must appear on a container. Foreign text may be used on all or part of the labeling."

For pesticide products subject to the agricultural Worker Protection Standard (WPS) (40 CFR part 170), EPA requires that certain portions of the pesticide label contain words or phrases in Spanish. EPA regulations at 40 CFR 156.206(e) state:

> *Spanish warning statements.* If the product is classified as toxicity category I or toxicity category II according to the criteria in 156.62, the signal word shall appear in Spanish in addition to English followed by the statement, "Si usted no entiende la etiqueta, busque a alguien para que se la explique a usted en detalle. (If you do not understand the label, find someone to explain it to you in detail.)" The Spanish signal word "PELIGRO" shall be used for products in toxicity category I, and the Spanish signal word "AVISO" shall be used for products in toxicity category II. These statements shall appear on the label close to the English signal word.

Agricultural handlers are the agricultural employees responsible for mixing, loading, and applying pesticides. EPA requires that before the handler performs a handling activity, the handler employer ensures that the handler has either read the product labeling or has been informed, in a manner the handler can understand, of all labeling requirements related to safe use of the pesticide. EPA regulations at 40 CFR 170.232(a)(1) state:

> The handler employer shall assure that before the handler performs any handling activity, the handler either has read the product labeling or has been informed in a manner the handler can understand of all labeling requirements related to safe use of the pesticide, such as signal words, human hazard precautions, personal protective equipment requirements, first aid instructions, environmental precautions, and any additional precautions pertaining to the handling activity to be performed.

These requirements were established to better protect agricultural pesticide handlers covered by the WPS as they mix, load, and apply pesticides.

### *C. Languages Spoken in the United States and by Agricultural Handlers*

The Agency recognizes that residents of the United States speak many languages, with a significant proportion of the population being Spanish-speakers. A recently published U.S. Census Bureau American Community Survey report, Language Use in the United States: 2007, found that of the 281 million people in the United States aged 5 and over, 55.4 million people (20% of this population) spoke a language other than English at home. Of these 55.4 million people, 62% (34.5 million) spoke Spanish. For comparison, the second most frequently spoken language was Chinese, with 2.5 million speakers, or 4.5% of people who speak a language other than English at home. Of the 34.5 million people who speak Spanish at home, 52.6% reported that they speak English "very well,"

18.3% reported that they speak English "well," 18.4% reported that they speak English "not well," and 10.7% reported that they speak English "not at all" (Shin, Hyon B. and Robert A. Kominski. 2010. Language Use in the United States: 2007, American Community Survey Reports, ACS–12. U.S. Census Bureau, Washington, DC).

Data from the Department of Labor's National Agricultural Workers Survey (NAWS) show that many agricultural handlers (agricultural employees responsible for mixing, loading, and applying pesticides) have limited ability to read English. Over a three-year period, NAWS surveyors conducted nearly 6000 interviews across thirty-one states. Sixteen percent of the respondents identified themselves as "handlers," that is, crop workers who had mixed, loaded, or applied pesticides in the previous twelve months. Fifty-three percent of handlers report their dominant language as Spanish, and 46% of handlers said that their dominant language is English. Of the handlers whose dominant language was Spanish, 13% reported that they read English "well," 11% reported that they read English "somewhat," 33% reported that they read English "a little," and 43% reported that they read English "not at all." In contrast, 65% of handlers whose dominant language was Spanish reported that they read Spanish "well." (National Agricultural Workers Survey, public data for 1989–2009: *http://www.doleta.gov/agworker/naws.cfm*). There may be bias in these data, as it has been noted that self-reported estimates of reading skills may be biased towards the high-end, as people often overstate their abilities in interviews (Donaldson, Stewart I. Understanding Self-Report Bias in Organizational Behavior Research, Journal of Business and Psychology, Vol. 17, No. 2, Winter 2002).

The National Agricultural Workers Survey reports that the average highest grade of education for all handlers (both Spanish and English-speaking) was tenth grade. A 1994 study, published in the Journal of the American Optometric Association, found that an 11th grade cognitive reading level is required to understand a pesticide label. This suggests that although handlers may be relatively skilled Spanish readers, they may not be able to fully comprehend the label material.

*D. Current EPA Initiatives Focused on Environmental Justice as It Pertains to Spanish Speakers in the United States*

1. Consumer Protection

People apply pesticides in and around their homes to control a variety of pests. One type of product used is total release foggers, also known as "bug bombs." These pesticide products contain aerosol propellants and release their contents as a concentrated spray to fumigate an area. To ensure adequate protection of human health and the environment with respect to fogger use, EPA is working with stakeholders to make improvements to these product labels, including the use of plain language, the addition of pictograms and door hang-tags, and the provision that certain label statements appear in Spanish as well as English.

2. Agricultural Worker Protection

Agricultural workers can be exposed to pesticides through their work activities. These include farm workers, who cultivate and harvest crops treated with pesticides, and agricultural pesticide handlers, who mix, load and apply pesticides to protect crops. The WPS provides protections for both agricultural workers and handlers. For farm workers, who are exposed to pesticides through contact with treated crops but do not handle pesticides directly, the WPS establishes rules that agricultural employers must follow to minimize risks from pesticide exposure, such as those discussed in Section II B.

*E. Activities of Other Regulatory Entities*

The state of California reviews all marketed labels as they appear on the container, whereas EPA reviews a text-only version of the label that contains all approved information but not necessarily in the format in which it will be presented in the marketplace. Some marketed labels include full Spanish translations for home garden products or antimicrobial products, and all agricultural pesticides under the purview of the WPS include the required WPS Spanish statements (40 CFR 156.206(e)).

In Puerto Rico, restricted use pesticides (RUPs) and pesticides registered to meet Special Local Needs (SLNs) must include labeling in Spanish (Puerto Rico Pesticide Act Part II, Section 4(D)(6)(a) and Part II Section 4(G)(3)). The pesticide dealer is required to provide the supplemental Spanish labeling to the buyer. The following portions of the label are required to be translated into Spanish:

1. The precautionary statement, "Keep out of reach of children;"

2. Precautionary statements to prevent injury to humans, vertebrate animals, useful vegetation, and useful invertebrate animals, among others, and those statements required by the WPS, Endangered Species Act, and other statutes;

3. Directions for use; and

4. Pesticide use classification.

In Canada, all pesticide products produced or sold domestically require labels in both English and French.

*F. Potential Scope of This Initiative*

In considering this petition for bilingual labeling, the Agency is assessing the potential scope of such a requirement. EPA is considering whether the proposed bilingual labeling would improve safety and what potential effects it might have on industry and the enforcement community. Labels in English and Spanish could be required for all, or a subset of, pesticide products. Below are some potential options for bilingual labeling.

1. *Certain types of pesticide products:* Bilingual labeling could be required for agricultural pesticide products, consumer pesticide products, fumigant products, or some other classification of product.

2. *Certain use sites:* If it is determined that labeling in Spanish would be beneficial for a specific use site or commodity, products used on that use site could be required to have bilingual labeling.

3. *Products containing particular active ingredients:* Another option could be to require the products with certain active ingredients to have labeling in Spanish; therefore, all products containing chemical X could require bilingual labels.

4. *Products of particular acute toxicity categories:* Products with more toxic acute toxicity categories (Categories I or II) could require bilingual labeling.

5. *Either entire labels or portions of pesticide product labels could be required in English and Spanish.* For example, the Directions for Use section of the product labeling could be required to be bilingual, or labeling statements dealing with worker protection, such as the personal protective equipment labeling, could be required to be in both Spanish and English. Other portions of the label that could be required to be in both languages include the general labeling requirements, the ingredient statement, precautionary labeling, environmental hazards, physical/chemical hazards, labeling claims, and company name and address, among others.

The Agency acknowledges that there could be disadvantages or unintended consequences to a bilingual label recommendation or requirement, and invites public comment on the petition. The State FIFRA Issues Research and Evaluation Group (SFIREG) Pesticide Operations and Management (POM) committee submitted a letter to EPA in December 2010 outlining several concerns the committee has regarding the inclusion of labeling in Spanish on pesticide products. The December 2010 SFIREG POM letter is available in the docket. EPA is dedicated to working with SFIREG and all stakeholders to obtain information that will inform a decision on the petition for Spanish labeling of pesticide products.

*G. Questions for Public Comment*

EPA invites all members of the public to post comments on this Notice and the petition it addresses. Specifically, EPA would like the commenter to address the following questions. EPA also invites all interested parties to comment on any other aspects of this petition's proposal that are not directly addressed by a question below.

*For the General Public:*

1. *Language characteristics vary by culture, region, and other factors.* How could EPA ensure that Spanish text on pesticide product labels would be understood by all potential Spanish-speaking users?

2. *Labeling in Spanish could potentially be required for all pesticide products, for a subset of pesticide products, or for a portion of the product label as described in section II.F.* If the Agency concluded that translation of a portion or portions of the label were appropriate, which portions of the pesticide label would it be most beneficial to have in Spanish, and why? If the Agency were to limit the requirement for translation to only certain products, which products should be considered, and why? (**Note:** Please see the sample label in the docket to consider the different sections of a pesticide label.)

3. *Are there languages other than Spanish and English that EPA should consider for inclusion on pesticide labels?* Which languages? Please explain your reasoning for including a language other than Spanish or English on pesticide labels, and cite documents that would further bolster your suggestion.

*For People Exposed to Pesticides:*

Farm workers, lawn and landscape maintenance workers, structural pest control technicians, commercial and residential cleaning staff, residential users of pesticides, children, pregnant or nursing women, older adults, others and advocacy groups:

4. Please describe how having labels available in English and Spanish could increase or decrease pesticide user safety.

5. How do you currently obtain information in Spanish regarding a pesticide product?

6. Please describe how farm workers, their families, and others exposed to pesticides could benefit from this proposal.

7. Would this proposal affect your day-to-day work? If so, how?

8. Which parts of pesticide labeling, if any, would be most valuable to have translated into Spanish, and why? (**Note:** Please see the sample label in the docket to consider the different sections of a pesticide label.)

9. Would having a Spanish translation of labeling be more important for some types of products than for others? Please describe why this would be so. And if so, how should EPA select products that would bear bilingual labeling?

10. What effect would the availability of bilingual labeling have on users' understanding of label text?

11. Would pictograms or other non-language methods of communication be beneficial for communication of labeling requirements?

*For Industry:*

12. Do you currently sell or distribute any pesticides with Spanish labeling (other than as required by 40 CFR 156.206)? If so, why have you decided to do so and what effects has the use of Spanish labeling had on the marketing or safety of using these products? Can you quantify or give examples of any added costs or benefits that have resulted from providing your products' labels in English and Spanish?

13. What additional economic costs and/or benefits would you anticipate from having your products' labels available in Spanish as well as English? Costs might include translation, printing, or packaging. Benefits might include improved market penetration or improved customer good will. Besides any increased monetary costs, would there be other obstacles to printing bilingual labeling on your pesticide products?

14. How could electronic media be used to facilitate distribution of bilingual or multilingual labeling?

15. Apart from bilingual labeling, what past and current efforts have you made to communicate with customers or potential pesticide users who do not speak or read English fluently? What have you found to be effective or ineffective?

16. If you provide Spanish labeling, do you provide it on products nation-wide or only in targeted regions? Why?

17. How could EPA implement the petitioners' proposal or a version of it efficiently and equitably?

18. Please explain whether there are any portions of a product's labeling that would not need to appear in both languages.

*For the State Pesticide Regulatory Community and the Enforcement Community:*

19. Are there state or local laws that conflict with the proposed bilingual labeling?

20. What potential benefits or obstacles would a federal recommendation or requirement for bilingual labeling pose to the state regulation of pesticide products?

21. What potential benefits would bilingual labeling provide and what potential costs or obstacles would bilingual labeling pose to enforcement activities?

22. Do you know of any inspection or enforcement actions involving bilingually labeled products where the existence of two languages on the label has compromised bringing the action to closure?

23. Do you know of any enforcement actions that have been taken because of, or compromised by, inaccuracies in labeling translation?

24. Do you know of misuse incidents, poisonings, or other mishaps for which the lack of availability of bilingual labels may have been a contributing factor?

25. Would a requirement that pesticides bear bilingual labeling increase or decrease the ability of people to use pesticides safely and effectively? Why?

26. If pesticide products are required to carry labeling in Spanish, what effects, if any, would you anticipate on state pesticide applicator certification programs?

**List of Subjects**

Environmental justice, environmental protection.

Dated: March 17, 2011.

**Richard P. Keigwin, Jr.,**

*Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.*

[FR Doc. 2011–6884 Filed 3–29–11; 8:45 am]

**BILLING CODE 6560–50–P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 180**

**[EPA–HQ–OPP–2005–0253; FRL–8866–6]**

## Propylene Oxide; Proposed Pesticide Tolerance

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

**ACTION:** Proposed rule.

**SUMMARY:** This document proposes to amend the propylene oxide tolerance on "nut, tree, group 14" to "nutmeat, processed, except peanuts" to correct an error in a prior rulemaking.

**DATES:** Comments must be received on or before April 14, 2011.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2005–0253, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPP–2005–0253. EPA's policy is that all comments received will be included in the 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 regulations.gov or e-mail. The 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the 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 docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Heather Garvie, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave, NW., Washington, DC 20460–0001; *telephone number:* (703) 308–0034; *e-mail address: garvie.heather@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

### II. This Proposal

In this action, EPA is proposing to amend the propylene oxide tolerance

(40 CFR 180.491) on "nut, tree, group 14" to read "nutmeat, processed, except peanuts." A final rule published in the **Federal Register** of September 24, 2008 (73 FR 54954) (FRL–8382–2). EPA took the opposite action—amending the propylene oxide tolerance by replacing "nutmeat, processed, except peanuts" with "nut, tree, group 14." EPA explained that its 2008 action was taken to "conform" the commodity terms in the propylene oxide tolerances with "current Agency practice." A proposed rule was published in the **Federal Register** of June 4, 2008 (73 FR 31788, 317990) (FRL–8363–9). The Reregistration Eligibility Decision for propylene oxide further explained that although "no change to the current tolerance level is required for nutmeat (processed, except peanuts)," * * * "corrections need to be made to some of the existing commodity definitions" including changing the nutmeats tolerance to a tree nut group tolerance. EPA, published a notice, Reregistration Eligibility Decision for Propylene Oxide, in the **Federal Register** of August 9, 2006 (71 FR 45555) (FRL–8066–9).

Despite these explanations that the change to the nutmeats tolerance was a conforming technical correction without substantive effect, the changed tolerance terminology is significantly different than the commodity term it replaced. Crop Group 14 (tree nuts) applies to a specific list of raw nuts. On its face, "nutmeat, processed, except peanuts" applies to all processed nutmeats other than peanuts. Such a substantive change to the scope of a tolerance cannot be effected unless the Agency makes the necessary statutory findings under FFDCA section 408. Because no such findings were made, EPA considers the prior action to have been without effect and the pre-existing tolerance covering "nutmeat, processed, except peanuts" to define the scope of the propylene oxide tolerance as to nuts. Accordingly, EPA is proposing in this action to correct the propylene oxide tolerance in the CFR by returning to the status quo prior to rulemaking of September 24, 2008. Under this proposal, the nutmeat tolerance for propylene oxide would read "nutmeat, processed, except peanuts," which is exactly as it did prior to the September 24, 2008 rulemaking.

EPA requests comment on whether its proposed action adequately addresses the error included in its September 24, 2008 rulemaking.

## III. Shortened Comment Period

FFDCA section 408(e)(2) requires a comment period of not less than 60 days on EPA tolerance actions proposed on the Agency's initiative unless EPA "for good cause finds that a shorter comment period would be in the public interest * * *." EPA has determined that such good cause exists here. The September 2008 rulemaking was intended, among other things, to make a minor, routine change to one of the commodity terms in the propylene oxide tolerance for the purpose of conforming the propylene oxide tolerance to the standard list of commodity terms used by EPA. Due to its own mistake, EPA did not merely make a conforming change but substituted a new commodity term that was not co-extensive with the existing commodity term. This has led to confusion as to the scope of the propylene oxide tolerance and was unfair to propylene oxide registrants who relied on EPA assertions that it was making a technical conforming change. EPA is now proposing to return the CFR to the status quo prior to its error. It is in the public interest to remove the confusion arising from EPA's error with dispatch and thus EPA concludes there is good cause to limit the comment period to 15 days.

## IV. Statutory and Executive Order Reviews

This proposed rule amends a tolerance under section 408(d) of FFDCA. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this proposed rule has been exempted from review under Executive Order 12866 due to its lack of significance, this proposed rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This proposed rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Pursuant to the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency hereby certifies that this proposed action will not have significant negative economic impact on a substantial number of small entities. In fact, this rule will have no impact because it merely corrects an error in the propylene oxide tolerance regulation that was inserted in the regulation without proper authority and thus was without legal effect. In addition, the Agency has determined that this action will not have a substantial direct effect on 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, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." This proposed rule directly regulates growers, food processors, food handlers, and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of the FFDCA. For these same reasons, the Agency has determined that this proposed rule does not have any "tribal implications" as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000). Executive Order 3175, requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in the Executive order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and

responsibilities between the Federal Government and Indian tribes." This proposed rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this proposed rule.

**List of Subjects in 40 CFR Part 180**

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: March 21, 2011.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

Therefore, it is proposed that 40 CFR chapter I be amended as follows:

## PART 180—[AMENDED]

1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

2. Section 180.491 is amended by revising the "Nut, tree, group 14" commodity in the tables in paragraphs (a)(1) and (a)(2) to read as follows:

**§ 180.491 Propylene oxide; tolerances for residues.**

(a) *General.* (1) * * *

| Commodity | Parts per million |
|---|---|
| * * * * * | |
| Nutmeat, processed, except peanuts | 300 |
| * * * * * | |

(2) * * *

| Commodity | Parts per million |
|---|---|
| * * * * * | |
| Nutmeat, processed, except peanuts | 10.0 |
| * * * * * | |

* * * * *

[FR Doc. 2011–7462 Filed 3–29–11; 8:45 am]

BILLING CODE 6560–50–P

## FEDERAL COMMUNICATIONS COMMISSION

## 47 CFR Part 87

**[WT Docket No. 10–61; FCC 11–25]**

## Aviation Service Regulations

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This document considers a petition for rulemaking requesting comment on a petition for rulemaking filed by OCAS, Inc. (OCAS) regarding audio visual warning systems (AVWS). OCAS, Inc. installs such technology under the trademark OCAS®. AVWS are integrated air hazard notification systems that utilize radar frequencies and VHF voice frequencies to activate obstruction lighting and transmit audible warnings to aircraft on a potential collision course with obstacles such as power lines, wind turbines, bridges and towers. OCAS requests that we amend part 87 of the Commission's rules to permit AVWS stations to operate radar units, and to transmit audible warnings to pilots. We seek comment on operational, licensing, eligibility and equipment certification issues regarding AVWS stations and technology.

**DATES:** Submit comments on or before May 31, 2011 and reply comments are due June 28, 2011.

**ADDRESSES:** You may submit comments, identified by WT Docket No. 10–61; FCC 11–25, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Tim Maguire, Mobility Division, Wireless Telecommunications Bureau, (202) 418–2155.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Further Notice of Proposed Rulemaking* ("FNPRM") in WT Docket No. 10–61, FCC 11–25, adopted February 22, 2011, and released March 4, 2011. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room Cy–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov.* Alternative formats are available to persons with disabilities by sending an e-mail to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

### I. Procedural Matters

*A. Ex Parte Rules-Permit-but-Disclose Proceeding*

1. This is a permit-but-disclose notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules.

*B. Comment Dates*

2. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/* or the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the

Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

*C. Paperwork Reduction Act*

3. This *FNPRM* does not contain any proposed information collection(s) subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

**II. Initial Regulatory Flexibility Analysis**

4. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed and set forth in Appendix B. We requent written public comments on this IRFA which must be filed in accordance with the same filing deadlines as the comments on the rest of the *FNPRM*. The Commission shall send a copy of this *FNPRM*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, a copy of this *FNPRM* and IRFA (or summaries thereof) will also be published in the **Federal Register**.

**III. Ordering Clauses**

5. Pursuant to §§ 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, and 47 U.S.C. 154(i), 154(j), and 303(r), *notice is hereby given* of the proposed regulatory changes described in the *FNPRM*, and *comment is sought* on the proposed regulatory changes as set forth below.

6. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *FNPRM*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

**List of Subjects in 47 CFR Part 87**

Air transportation, Communications equipment, Radio.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

**Proposed Rule Changes**

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 87 as follows:

## PART 87—AVIATION SERVICES

1. The authority citation for part 87 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303 and 307(e), unless otherwise noted.

2. Section 87.171 is amended by revising the section heading and by adding "AVW—Audio visual warning systems" under the revised section heading to read as follows:

**§ 87.171 Class of station symbols.**

* * * * *

AVW—Audio visual warning systems

* * * * *

3. Section 87.173 is amended by revising the entries for "122.700 MHz," "122.725 MHz," "122.750 MHz," "122.800 MHz," "122.850 MHz," "122.900 MHz," "122.950 MHz," "122.975 MHz," "123.000 MHz," "123.025 MHz," "123.050 MHz," "123.075 MHz," "123.300 MHz," "123.500 MHz," in the table in paragraph (b) to read as follows:

**§ 87.173 Frequencies.**

* * * * *

(b) Frequency table:

| Frequency or frequency band | Subpart | Class of station | Remarks |
|---|---|---|---|
| * | * | * | * |
| 122.700 MHz | G, L, Q | MA, FAU, MOU, AVW | Unicom at airports with no control tower; Aeronautical utility stations. |
| 122.725 MHz | G, L, Q | MA, CAU, MOU, AVW | Unicom at airports with no control tower; Aeronautical utility stations. |
| 122.750 MHz | F, Q | MA2, AV | Private fixed wing aircraft air-to-air communications. |
| * | * | * | * |
| 122.800 MHz | G, L, Q | MA, FAU, MOU, AVW | Unicom at airports with no control tower; Aeronautical utility stations. |
| * | * | * | * |
| 122.850 MHz | H, K, Q | MA, FAM, FAS, AVW | |
| * | * | * | * |
| 122.900 MHz | F, H, L, M, Q | MA, FAR, FAM, MOU, AVW | |
| * | * | * | * |
| 122.950 MHz | G, L, Q | MA, FAU, MOU, AVW | Unicom at airports with control tower; Aeronautical utility stations. |
| 122.975 MHz | G, L, Q | MA, FAU, MOU, AVW | Unicom at airports with no control tower; Aeronautical utility stations. |
| 123.000 MHz | G, L, Q | MA, FAU, MOU, AVW | Unicom at airports with no control tower; Aeronautical utility stations. |

| Frequency or frequency band | Subpart | Class of station | Remarks |
|---|---|---|---|
| 123.025 MHz | F, Q | MA2, AVW | Helicopter air-to-air communications; Air traffic control operations. |
| 123.050 MHz | G, L, Q | MA, FAU, MOU, AVW | Unicom at airports with no control tower; Aeronautical utility stations. |
| 123.075 MHz | G, L, Q | MA, FAU, MOU, AVW | Unicom at airports with no control tower; Aeronautical utility stations. |
| * | * | * | * |
| 123.300 MHz | K, Q | MA, FAS, AVW | |
| * | * | * | * |
| 123.500 MHz | K, Q | MA, FAS, AVW | |
| * | * | * | * |

4. Section 87.483 is added under Subpart Q to read as follows:

**§ 87.483 Audio visual warning systems.**

An audio visual warning system (AVWS) is a radar-based obstacle avoidance system. AVWS activates obstruction lighting and transmits VHF audible warnings to alert pilots of potential collisions with land-based obstructions. The continuously operating radar calculates the location, direction and groundspeed of nearby aircraft that enter one of two warning zones reasonably established by the licensee. As aircraft enter the first warning zone, the AVWS activates obstruction lighting. If the aircraft continues toward the obstacle and enters the second warning zone, the VHF radio transmits an audible warning describing the obstacle.

(a) Radio determination (radar) frequencies. Frequencies authorized under § 87.475(b)(7) of this part are available for use by an AVWS. The frequency coordination requirements in § 87.475(a) of this part apply.

(b) VHF audible warning frequencies. Frequencies authorized under § 87.187(j), § 87.217(a), § 87.241(b) and § 87.323(b) (excluding 121.950 MHz) of this part are available for use by an AVWS. Multiple frequencies may be authorized for an individual station, depending on need and the use of frequencies assigned in the vicinity of a proposed AVWS facility. Use of these frequencies is subject to the following limitations:

(1) The output power shall not exceed − 3 dBm watts for each frequency authorized.

(2) The antenna used in transmitting the audible warnings must be omni directional with a maximum gain equal to or lower than a half-wave centerfed dipole above 30 degree elevation, and a maximum gain of +5 dBi from horizontal up to 30 degrees elevation.

(3) The audible warning shall not exceed two seconds in duration. No more than six audible warnings may be transmitted in a single warning cycle, which shall not exceed 12 seconds in duration. An interval of at lest twenty seconds must occur between transmit cycles.

* * * * *

[FR Doc. 2011–7382 Filed 3–29–11; 8:45 am]

BILLING CODE 6712–01–P

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

### Federal Motor Carrier Safety Administration

### 49 CFR Parts 177 and 392

**[Docket Numbers PHMSA–2010–0319 (HM–255) & FMCSA–2006–25660]**

**RIN 2137–AE69 & 2126–AB04**

## Highway-Rail Grade Crossing; Safe Clearance

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), and Federal Motor Carrier Safety Administration (FMCSA), U.S. Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM); reopening of comment period.

**SUMMARY:** On March 1, 2011, the Commercial Vehicle Safety Alliance (CVSA) requested that PHMSA and FMCSA extend the comment period for the Highway-Rail Grade Crossing; Safe Clearance Notice of Proposed Rulemaking, which was published on January 28, 2011, by 60 days. CVSA believes the extension is necessary to gain feedback from its members who will be attending the CVSA Spring Workshop Meeting from April 11–14, 2011. This notice reopens the public comment period for the NPRM from March 29, 2011, to April 29, 2011.

**DATES:** Comments on the NPRM are due by April 29, 2011.

**FOR FURTHER INFORMATION CONTACT:** *At FMCSA:* Mr. Thomas Yager, Driver and Carrier Operations; or MCPSD@dot.gov. Telephone (202) 366–4325. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays. *At PHMSA:* Mr. Ben Supko, Office of Hazardous Materials Standards, (202) 366–8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590 0001.

**SUPPLEMENTARY INFORMATION:**

On March 1, 2011, the Commercial Vehicle Safety Alliance (CVSA) requested that PHMSA and FMCSA extend the comment period for the Highway-Rail Grade Crossing; Safe Clearance Notice of Proposed Rulemaking, which was published on January 28, 2011 (76 FR 5120), by 60 days. CVSA believes the extension is necessary to gain feedback from its members who will be attending the CVSA Spring Workshop Meeting from April 11–14, 2011.

PHMSA and FMCSA believe that other potential commenters to this rulemaking will benefit from an extension as well, and that 30 days is sufficient time to allow CVSA to gain feedback from its members during its Spring Workshop and prepare its comments. Accordingly, PHMSA and FMCSA reopens the comment period for all comments on the NPRM and its related documents to April 29, 2011.

Issued in Washington, DC, on March 25, 2011, under authority delegated in 49 CFR part 1.

By the Federal Motor Carrier Safety Administration.

**William Bronrott,**

*Deputy Administrator.*

By the Pipeline and Hazardous Materials Safety Administration.

**Bizunesh Scott,**

*Chief Counsel.*

[FR Doc. 2011–7554 Filed 3–28–11; 11:15 am]

**BILLING CODE 4910–EX–P**

# Notices

Federal Register

Vol. 76, No. 61

Wednesday, March 30, 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–2008–0140]**

### Changes to Treatments for Citrus Fruit From Australia

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

**ACTION:** Notice of changes to phytosanitary treatments.

**SUMMARY:** We are advising the public that we are adding new approved phytosanitary treatment schedules to the Plant Protection and Quarantine Treatment Manual for certain species of citrus fruit imported from Australia into the United States. These new treatments will continue to prevent the introduction or interstate movement of quarantine pests in the United States.

**FOR FURTHER INFORMATION CONTACT:** Dr. Inder P.S. Gadh, Senior Risk Manager—Treatments, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 7340627.

**SUPPLEMENTARY INFORMATION:**

#### Background

The phytosanitary treatments regulations contained in 7 CFR part 305 (referred to below as the regulations) set out general requirements for conducting treatments indicated in the Plant Protection and Quarantine (PPQ) Treatment Manual [1] for fruits, vegetables, and articles to prevent the introduction or dissemination of plant pests or noxious weeds into or through the United States.

On October 19, 2009, we published in the **Federal Register** (74 FR 53424–53430, Docket No. APHIS–2008–0140) a proposal [2] to amend the regulations by adding new treatment schedules for sweet cherries and certain species of citrus fruit imported from Australia into the United States. We also proposed to establish an approved irradiation dose for Mediterranean fruit fly (Medfly) of 100 gray. Our analysis affirming the efficacy of all the proposed treatments was presented in a treatment evaluation document that was made available with the proposed rule.

We solicited comments concerning our proposal for 60 days ending December 18, 2009, and received five comments by that date. They were from a State plant protection official, a research entomologist, a foreign national plant protection organization representative, and two students. One commenter simply pointed out a misspelling. The remaining commenters either raised issues about sweet cherries and Medfly specifically or commented generally on the treatments for both sweet cherries and citrus fruit.

We considered those comments and, in a notice dated August 4, 2010 (75 FR 46901–46902, Docket No. APHIS 2008–0140), informed the public of our conclusion that none raised any issues sufficient to warrant changes to the proposed treatments for sweet cherries and Medfly. Accordingly, we announced that we were amending the PPQ Treatment Manual to include the new treatment schedules for sweet cherries and the revised irradiation dose for Medfly. Also, as none of the comments raised issues sufficient to warrant changes to the proposed treatments for certain species of citrus fruit, we noted that we would update treatment schedules for citrus fruit at a later date and would announce those changes through a notice.

Accordingly, in this current notice, we are announcing that we are amending the PPQ Treatment Manual to include the new treatment schedules for certain species of citrus fruit from Australia.

**Authority:** 7 U.S.C. 7701–7772 and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 21st day of March 2011.

**Kevin Shea,**

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

[FR Doc. 2011–7097 Filed 3–29–11; 8:45 am]

BILLING CODE 3410–34–P

[1] The PPQ Treatment Manual can be viewed on the Internet at *http://www.aphis.usda.gov/import_export/plants/manuals/ports/treatment.shtml.*

[2] To view the proposed rule, the notice, the comments we received, and the treatment evaluation document, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2008–0140.*

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2011–0017]**

### Multi-Agency Informational Meeting Concerning Compliance With the Federal Select Agent Program; Public Meeting

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

**ACTION:** Notice of public meeting.

**SUMMARY:** This is to notify all interested parties, including individuals and entities possessing, using, or transferring federally listed biological agents and toxins, that a meeting will be held to provide specific regulatory guidance related to the Federal Select Agent Program established under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002. The meeting is being organized by the U.S. Department of Agriculture's Animal and Plant Health Inspection Service, the Department of Health and Human Services' Centers for Disease Control and Prevention, and the Department of Justice's Federal Bureau of Investigation. Issues to be discussed include entity registration, security risk assessments, biosafety requirements, and security measures.

**DATES:** The meeting will be held on May 10, 2011, from 8 a.m. to 6 p.m. Persons who wish to attend the meeting must register by April 12, 2011.

**ADDRESSES:** The meeting will be held at the USDA Agricultural Research Service, National Centers for Animal Health Disease Center, Building 20, 1920 Dayton Avenue, Ames, IA.

**FOR FURTHER INFORMATION CONTACT:** *APHIS:* Ms. Sarah Kwiatkowski, Veterinary Program Assistant, APHIS Select Agent Program, APHIS, 4700 River Road Unit 2, Riverdale, MD 20737–1236; (301) 734–5960.

*CDC:* Dr. Eduardo O'Neill, Training & Outreach Officer, Division of Select

Agents and Toxins, CDC, 1600 Clifton Road MS A–46, Atlanta, GA 30333; (404) 718–2000.

**SUPPLEMENTARY INFORMATION:** Title II of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, "Enhancing Controls on Dangerous Biological Agents and Toxins" (sections 201 through 231), provides for the regulation of certain biological agents and toxins by the Department of Health and Human Services (subtitle A, sections 201–204) and the Department of Agriculture (subtitle B, sections 211–213), and provides for interagency coordination between the two Departments regarding overlap agents and toxins (subtitle C, section 221). For the Department of Health and Human Services, the Centers for Disease Control and Prevention (CDC) has been designated as the agency with primary responsibility for implementing the provisions of the Act; the Animal and Plant Health Inspection Service (APHIS) is the agency fulfilling that role for the Department of Agriculture. CDC and APHIS list select agents and toxins in 42 CFR 73.3 and 73.4 and in 7 CFR 331.3 and 9 CFR 121.3 and 121.4, respectively. The Federal Bureau of Investigation's (FBI) Criminal Justice Information Service conducts security risk assessments of all individuals and nongovernmental entities that request to possess, use, or transfer select agents and toxins.

The meeting announced here is an opportunity for the regulated community (*i.e.,* registered entity responsible officials, alternate responsible officials, and entity owners) and other interested individuals to obtain specific regulatory guidance and information on standards concerning biosafety and biosecurity issues related to the Federal Select Agent Program. CDC, APHIS, and FBI representatives will be present at the meeting to address questions and concerns. Entity registration, security risk assessments, biosafety requirements, and security measures are among the issues that will be discussed.

All attendees must register in advance of the meeting. To register all persons must complete a registration form online at *http://www.selectagents.gov* and submit it by April 12, 2011.

Travel directions to the National Centers for Animal Health Disease Center and hotel information are available on the Internet at *http://www.selectagents.gov.* In addition to the documents listed above, Government-issued picture identification is required to gain access to the parking area and the building.

If you require special accommodations, such as a sign language interpreter, please call or write one of the individuals listed under **FOR FURTHER INFORMATION CONTACT**.

Done in Washington, DC, this 24th day of March 2011.

**Gregory L. Parham,**

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

[FR Doc. 2011–7469 Filed 3–29–11; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Meeting of the Land Between The Lakes Advisory Board

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Land Between The Lakes Advisory Board will hold a meeting on April 21, 2011. Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App 2. The meeting agenda will focus on existing Environmental Education programs and improving engagement with regional school groups. The meeting is open to the public. Written comments are invited and should be sent to William P. Lisowsky, Area Supervisor, Land Between The Lakes, 100 Van Morgan Drive, Golden Pond, KY, 42211 and must be received by April 14, 2011 in order for copies to be provided to the members for this meeting. Board members will review written comments received, and at their request, oral clarification may be requested for a future meeting.

**DATES:** The meeting will be held Thursday, April 21, 2011 from 9 a.m. to approximately 4 p.m. CST.

**ADDRESSES:** The meeting will be held at the Kentucky Dam Village State Resort Park, 113 Administration Drive, Gilbertsville, KY 42044.

**FOR FURTHER INFORMATION CONTACT:** Linda L. Taylor, Advisory Board Liaison, Land Between The Lakes, 100 Van Morgan Drive, Golden Pond, KY 42211, 270–924–2002. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339. This service is available 7 days a week, 24 hours a day.

**SUPPLEMENTARY INFORMATION:** The meeting is open to the public. Board discussion is limited to Forest Service staff and Board members.

Dated: March 24, 2011.

**William P. Lisowsky,**

*Area Supervisor, Land Between The Lakes.*

[FR Doc. 2011–7424 Filed 3–29–11; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### South Mt. Baker-Snoqualmie Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The South Mt. Baker-Snoqualmie (MBS) Resource Advisory Committee (RAC) will meet in North Bend, Washington on May 11, 2011. The committee is meeting to review and rank 2012 Title II RAC proposals.

**DATES:** The meeting will be held on Wednesday, May 11, 2011, from 8 a.m. to 4 p.m.

**ADDRESSES:** The meeting will be held at the Snoqualmie Ranger District office located at 902 SE North Bend Way, Washington, 98045–9545.

**FOR FURTHER INFORMATION CONTACT:** Jim Franzel, District Ranger, Snoqualmie Ranger District, phone (425) 888–1421, e-mail *jfranzel@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The meeting is open to the public. More information will be posted on the Mt. Baker-Snoqualmie National Forest Web site at *http://www.fs.fed.us/r6/mbs/projects/rac.shtml.*

Comments may be sent via e-mail to *jfranzel@fs.fed.us* or via facsimile to (425) 888–1910. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Snoqualmie Ranger District office at 902 SE North Bend Way, during regular office hours (Monday through Friday 8 a.m.–4:30 p.m.).

Dated: March 23, 2011.

**Y. Robert Iwamoto,**

*Forest Supervisor.*

[FR Doc. 2011–7425 Filed 3–29–11; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Agency:* U.S. Census Bureau.

*Title:* 2008 Panel of the Survey of Income & Program Participation, Wave 10 Topical Modules.

*OMB Control Number:* 0607–0944.

*Form Number(s):* SIPP–281005(L) Director's Letter; SIPP/CAPI Automated Instrument; SIPP28003 Reminder Card.

*Type of Request:* Revision of a currently approved collection.

*Burden Hours:* 143,303.

*Number of Respondents:* 94,500.

*Average Hours per Response:* 30 minutes.

*Needs and Uses:* The U.S. Census Bureau requests authorization from the Office of Management and Budget (OMB) to conduct the Wave 10 interview for the 2008 Panel of the Survey of Income and Program Participation (SIPP). The core SIPP and reinterview instruments were cleared under Authorization No. 0607–0944.

The SIPP represents a source of information for a wide variety of topics and allows information for separate topics to be integrated to form a single and unified database so that the interaction between tax, transfer, and other government and private policies can be examined. Government domestic policy formulators depend heavily upon the SIPP information concerning the distribution of income received directly as money or indirectly as in-kind benefits and the effect of tax and transfer programs on this distribution. They also need improved and expanded data on the income and general economic and financial situation of the U.S. population. The SIPP has provided these kinds of data on a continuing basis since 1983, permitting levels of economic well-being and changes in these levels to be measured over time.

The survey is molded around a central "core" of labor force and income questions that remain fixed throughout the life of a panel. The core is supplemented with questions designed to answer specific needs, such as estimating eligibility for government programs, examining pension and health care coverage, and analyzing individual net worth. These supplemental questions are included with the core and are referred to as "topical modules."

The topical modules for the 2008 Panel Wave 10 are as follows: Assets and Liabilities; Real Estate, Dependent Care, and Vehicles; Child Well-Being; Medical Expenses and Utilization of Health Care (Adults and Children); 6 Asset Sections (Interest Earning Accounts, Rental Properties, Mortgages, Stocks and Mutual Funds, Value of Business, and Other Financial Assets); and Work-Related Expenses and Child Support Paid; (Attachment A). These topical modules were previously conducted in the SIPP 2004 Panel Wave 3 instrument, and the SIPP 2008 Panel Wave 4 and Wave 7 (except for Child Well-Being) instruments. Wave 10 interviews will be conducted from September 1, 2011 through December 31, 2011.

The SIPP is designed as a continuing series of national panels of interviewed households that are introduced every few years, with each panel having durations of approximately 3 to 6 years. The 2008 Panel is scheduled for approximately 6 years and includes seventeen waves which began September 1, 2008. All household members 15 years old or over are interviewed using regular proxy-respondent rules. They are interviewed a total of thirteen times (thirteen waves), at 4-month intervals, making the SIPP a longitudinal survey. Sample people (all household members present at the time of the first interview) who move within the country and reasonably close to a SIPP primary sampling unit (PSU) will be followed and interviewed at their new address. Individuals 15 years old or over who enter the household after Wave 1 will be interviewed; however, if these people move, they are not followed unless they happen to move along with a Wave 1 sample individual.

The OMB has established an Interagency Advisory Committee to provide guidance for the content and procedures for the SIPP. Interagency subcommittees were set up to recommend specific areas of inquiries for supplemental questions.

The Census Bureau developed the 2008 Panel Wave 9 topical modules through consultation with the SIPP OMB Interagency Subcommittee. The questions for the topical modules address major policy and program concerns as stated by this subcommittee and the SIPP Interagency Advisory Committee.

Data provided by the SIPP are being used by economic policymakers, the Congress, state and local governments, and federal agencies that administer social welfare or transfer payment programs, such as the Department of Health and Human Services and the Department of Agriculture.

*Affected Public:* Individuals or households.

*Frequency:* Every 4 months.

*Respondent's Obligation:* Voluntary.

*Legal Authority:* Title 13 U.S.C., Section 182.

*OMB Desk Officer:* Brian Harris-Kojetin, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer either by fax (202–395–7245) or e-mail (*bharrisk@omb.eop.gov*).

Dated: March, 24, 2011.

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011–7379 Filed 3–29–11; 8:45 am]

BILLING CODE 3510–07–P

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Agency:* U.S. Census Bureau.

*Title:* Housing Vacancy Survey (HVS).

*OMB Control Number:* 0607–0179.

*Form Number(s):* HVS–600, BC–1428RV, CPS–263(L).

*Type of Request:* Extension of a currently approved collection.

*Burden Hours:* 4,626.

*Number of Respondents:* 7,500.

*Average Hours per Response:* 3 minutes.

*Needs and Uses:* The purpose of this request for review is to obtain clearance for the collection of demographic information in the Housing Vacancy Survey (HVS) beginning in August 2011. The current clearance expires July 31, 2011. The HVS has been conducted since 1956 and serves a broad array of data users as described below.

The U.S. Census Bureau collects the HVS data for a sample of vacant housing units identified in the monthly Current

Population Survey (CPS) sample and provide the only quarterly statistics on rental vacancy rates, and home ownership rates for the United States, the four census regions, inside vs. outside metropolitan areas (MSAs), the 50 States, the District of Columbia, and the 75 largest MSAs. Private and public sector organizations use these rates extensively to gauge and analyze the housing market.

In addition, the rental vacancy rate is a component of the index of leading economic indicators published by the Department of Commerce. It is used by the Department of Housing and Urban Development (HUD), Bureau of Economic Analysis (BEA), National Association of Home Builders, Federal Reserve Board (FRB), Office of Management and Budget (OMB), Department of Treasury, and the White House Council of Economic Advisers (CEA).

Policy analysts, program managers, budget analysts, and Congressional staff use data obtained from the remaining questions that do not deal specifically with the vacancy rate to advise the executive and legislative branches of government with respect to number and characteristics of units available for occupancy and the suitability of housing initiatives.

*Affected Public:* Individuals or households.

*Frequency:* Monthly.

*Respondent's Obligation:* Voluntary.

*Legal Authority:* Title 13, United States Code, Section 182, and Title 29, U.S.C. Section 1.

*OMB Desk Officer:* Brian Harris-Kojetin, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dhynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin,

OMB Desk Officer either by fax (202–395–7245) or e-mail (*bharrisk@omb.eop.gov*).

Dated: March 24, 2011.

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011–7388 Filed 3–29–11; 8:45 am]

**BILLING CODE 3510–07–P**

## DEPARTMENT OF COMMERCE

### Bureau of the Census

### Census Advisory Committees

**AGENCY:** Bureau of the Census, Department of Commerce.

**ACTION:** Notice of public meeting.

**SUMMARY:** The Bureau of the Census (Census Bureau) is giving notice of a joint meeting of the Census Advisory Committees (CACs) on the African American Population, the American Indian and Alaska Native Populations, the Asian Population, the Hispanic Population, and the Native Hawaiian and Other Pacific Islander Populations. The Committees will address issues related to the American Community Survey, the 2010 Decennial Census, and early 2020 Census planning. The five Census Advisory Committees on Race and Ethnicity will meet in plenary and concurrent sessions on April 28–29, 2011. Last-minute changes to the schedule are possible, which could prevent giving advance public notice of schedule adjustments.

**DATES:** April 28–29, 2011. On April 28, the meeting will begin at approximately 8:30 a.m. and end at approximately 5 p.m. On April 29, the meeting will begin at approximately 8:30 a.m. and end at approximately 2:30 p.m.

**ADDRESSES:** The meeting will be held at the U.S. Census Bureau, 4600 Silver Hill Road, Suitland, Maryland 20746.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jeri Green, *Jeri.Green@census.gov,* Committee Liaison Officer, Department of Commerce, U.S. Census Bureau, Room 8H182, 4600 Silver Hill Road, Washington, DC 20233, telephone 301–763–6590. For TTY callers, please use the Federal Relay Service 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:** The CACs on the African American Population, the American Indian and Alaska Native Populations, the Asian Population, the Hispanic Population, and the Native Hawaiian and Other Pacific Islander Populations comprises of nine members each. The Committees provide an organized and continuing channel of communication between the representative race and ethnic populations and the Census Bureau. The Committees provide an outside-user perspective and advice on research and design plans for Decennial Census, the American Community Survey, and other related programs particularly as they pertain to an accurate count of these communities. The Committees also assist the Census Bureau on ways that census data can best be disseminated to diverse race and ethnic populations and other users. The Committees are established in accordance with the Federal Advisory Committee Act (Title 5, United States Code, Appendix 2, Section 10).

All meetings are open to the public. A brief period will be set aside at the meeting for public comment on April 29. However, individuals with extensive questions or statements must submit them in writing to Ms. Jeri Green at least three days before the meeting. If you plan to attend the meeting, please register by Monday, April 25, 2011. You may access the online registration form with the following link: *http://www.regonline.com/reac_spring2011_meeting.* Seating is available to the public on a first-come, first-served basis.

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Committee Liaison Officer as soon as possible, preferably two weeks prior to the meeting.

Due to increased security and for access to the meeting, please call (301) 763–9906 upon arrival at the Census Bureau on the day of the meeting. A photo ID must be presented in order to receive your visitor's badge. Visitors are not allowed beyond the first floor.

Dated: March 24, 2011.

**Robert M. Groves,**

*Director, Bureau of the Census.*

[FR Doc. 2011–7450 Filed 3–29–11; 8:45 am]

**BILLING CODE 3510–07–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### University of Colorado, et al.; Notice of Decision on Applications for Duty-Free Entry of Scientific Instruments

This is a decision pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Room 3720, U.S. Department of Commerce, 14th and Constitution Ave, NW., Washington, DC.

*Docket Number:* 10–034. *Applicant:* University of Colorado, Aurora, CO 80045. *Instrument:* Singer MSM System 300TSA. *Manufacturer:* Singer Instrument Co., Ltd., United Kingdom. *Intended Use: See* notice at 76 FR 11200, March 1, 2011. *Comments:* None

received. *Decision:* Approved. *Reasons:* This instrument is unique because it has a motorized stage, which can be programmed to automatically move to predetermined positions, and the joystick electronic. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as this is intended to be used, that was being manufactured in the United States at the time of its order.

*Docket Number:* 10–077. *Applicant:* University of Chicago LLC, Lemont, IL 60439. *Instrument:* Batch Furnace. *Manufacturer:* NGK Insulators Ltd., Japan. *Intended Use: See* notice at 76 FR 11200, March 1, 2011. *Comments:* None received. *Decision:* Approved. *Reasons:* This batch furnace includes high distribution of the sample (multiple trays), which allows for faster drying and greater uniformity than a conventional furnace. This batch furnace also has an oxygen control system that has a 10kg batch size. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as this is intended to be used, that was being manufactured in the United States at the time of its order.

*Docket Number:* 11–001. *Applicant:* Michigan State University, East Lansing, MI 48824–1226. *Instrument:* Diode Pumped High Speed Nd: YAG laser system. *Manufacturer:* Edgewave GmbH, Germany. *Intended Use:* See notice at 76 FR 11200, March 1, 2011. *Comments:* None received. *Decision:* Approved. *Reasons:* The main feature of the laser, which is particularly suited for the necessary application, is the beam profile ($M^2<2$) and energy stability over lengthy operation times, which is critical when quantifying combustion species using PLIF over different operation modes. This is the only laser that can do sub 10 ns pulses with all the different specifications. We know of no instruments of equivalent scientific value to the foreign instruments described below, for such purposes as this is intended to be used, that was being manufactured in the United States at the time of its order.

Dated: March 23, 2011.

**Gregory W. Campbell,**

*Director, Subsidies Enforcement Office, Import Administration.*

[FR Doc. 2011–7493 Filed 3–29–11; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Biotech Life Science Trade Mission to China

**AGENCY:** International Trade Administration, Department of Commerce.

**ACTION:** Notice.

### Mission Description

The United States Department of Commerce, International Trade Administration, U.S. and Foreign Commercial Service (CS) is organizing a Biotechnology Life Sciences trade mission to China on October 17–20, 2011. Led by a senior Department of Commerce official, the mission to China is intended to include representatives from a variety of U.S. biotechnology and life science firms and trade organizations. The mission will introduce mission participants to end-users, prospective partners, and investors whose needs and capabilities are targeted to the respective U.S. participant's strengths and needs. Participating in an official U.S. industry delegation, rather than traveling to China independently, will enhance the participants' ability to secure meetings in China. The mission will include site visits to biotech industrial parks, government meetings, and receptions in Beijing and Hong Kong. Trade mission participants will have the opportunity to interact with Commercial Service (CS) specialists and State Department officers covering intellectual property rights issues and biotechnology to discuss industry developments, opportunities, and sales strategies.

### Commercial Setting

U.S. biotech and life science firms often consider China the most important future market in terms of sales and clinical trial opportunities, and potential investment. China's enormous consumer base and impressive economic growth further reinforce the importance of the market for U.S. firms. However, China's legal and regulatory landscape often complicates market entrance for many U.S. firms. Since these trade policy issues are frequent topics of high-level bilateral discussions between the U.S. Government and the Chinese Government, a Trade Mission led by the U.S. Department of Commerce offers an attractive entrée for U.S. firms and associations in the Chinese market. With some 200 pharmaceutical companies operating in Hong Kong (with many involved in the fast-growing specialty of Chinese Traditional Medicine), which possesses excellent research facilities and business infrastructure, regulatory linkages into the mainland, and a strong venture capital community, Hong Kong offers an ideal complement to a policy-centered mission program in Beijing. Hong Kong is also a leading center for bio-medical clinical trials in Asia.

### The Biotech Life Science Sector

Despite the global financial crisis, China's GDP growth is widely expected to grow by approximately eight percent in 2011. While U.S. venture capital investment in biotech and life science companies has slowed, Chinese pharmaceutical and biotech industries are demonstrating a healthy appetite for funding novel, early-stage technologies. Major U.S. biotech firms have established licensing and partnering offices in China specifically to seek these opportunities.

Over 2,000 novel molecules have been patented in China, 96 are in clinical trials, and 27 new drugs have launched in the last five years, 20 of which are novel biologics. There are novel molecules at all stages of development in China, and Chinese companies and institutes are anxious to partner with Western companies for development and distribution of these valuable assets.

There are also over 300 clinical research organizations in China offering high quality services supporting drug discovery and development projects of major pharmaceutical and biotech companies worldwide. Many of these are willing to work on a risk sharing or collaborative basis with their sponsors.

### Mission Goals

The short term goals of the trade mission to China are to (1) introduce U.S. participants to potential customers and strategic partners, including investors, (2) introduce U.S. participants to industry and government officials in China to learn about various opportunities, and (3) to educate the participants about trade policy and regulatory matters involved in doing business in China.

### Mission Scenario

In Beijing, the U.S. mission members will be briefed by the U.S. Embassy's Counselor for Commercial Affairs, the Commercial Specialist for the biotechnology sector, and other key U.S. Government officials. Senior Embassy officials will host a networking event for the group with Chinese biotech and life science industry organizations and multipliers. In Hong Kong, U.S. participants will benefit from customized one-on-one matchmaking

with potential partners, a market briefing by the Commercial Specialist for the biotech life science sector at the U.S. Consulate, and networking activities. Site visits to Hong Kong's Science & Technology Park and leading research universities may be offered.

One week prior to the Trade Mission, it should also be noted that from October 12–13, there will be a BIO China (*http://www.bio.org/biochina*) trade event in Shanghai that will focus on the biotech sector. Though BIO China is not officially linked to the Commerce Department's Biotech Life Science Trade Mission to China, U.S. trade mission participants may opt to precede the October 17–20, 2011 Trade Mission by participating in this event.

Participation in the mission will include the following:

- Pre-travel briefings/webinar on subjects ranging from business practices in China to intellectual property rights;
- Pre-scheduled meetings with potential partners, distributors, end users, Clinical Research Organizations, or investors in Hong Kong;
- Transportation to and from airports in Beijing and Hong Kong;
- Meetings with Chinese Government officials;
- Participation in industry receptions in Beijing and Hong Kong;
- Meetings with CS China's biotech and life science industry specialists in Beijing and Hong Kong.

**Proposed Timetable**

Mission participants will be encouraged to arrive October 15 or 16, 2011 and the mission program will proceed from October 17 through October 20, 2011.

| | |
|---|---|
| October 17 | Beijing. |
| | Market briefings by U.S. Embassy Beijing officials. |
| | Meetings with Chinese Ministry of Health and State Food and Drug Administration officials. |
| | Networking reception. |
| October 18 | Beijing. |
| | Tour of Bio Parks and Research Facilities. |
| | Travel to Hong Kong. |
| | Business meetings. |
| October 19 | Hong Kong. |
| | One-on-one business matchmaking appointments |
| | Briefings from Hong Kong government, industry association, and American Chamber representatives. |
| | Tour of Science & Technology Parks. |
| | Networking reception |
| October 20 | Hong Kong. |
| | One-on-one business matchmaking appointments. |
| | Visits to Research Facilities (tbd). |

**Participation Requirements**

All parties interested in participating in the Biotech Life Science Trade Mission to China must complete and submit an application for consideration by the Department of Commerce. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. A minimum of 15 and a maximum of 20 participants will be selected for the mission from the applicant pool. U.S. companies and associations already involved with and/or doing business in China as well as U.S. companies and associations seeking exposure to the market for the first time are encouraged to apply.

**Fees and Expenses**

After a participant has been selected for the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee will be $3,270 for large firms and $2,327 for a small or medium-sized enterprise (SME) [1] or small trade organization, which will cover one representative. The fee for each additional firm representative (large firm or SME) is $500. Expenses for travel, lodging, most meals, and incidentals will be the responsibility of each mission participant.

**Conditions for Participation**

An applicant must submit a completed and signed mission application and supplemental application materials, including adequate information on the company's products and/or services, primary market objectives, and goals for participation. If the U.S. Department of Commerce receives an incomplete application, the Department may reject the application, request additional information, or take the lack of information into account when evaluating the applications.

- Each applicant must also certify that the products and services it seeks to export through the mission are either produced in the United States, or, if not, marketed under the name of a U.S. firm and have at least fifty-one percent U.S. content.

[1] An SME is defined as a firm with 500 or fewer employees or that otherwise qualifies as a small business under SBA regulations (*see http://www.sba.gov/services/contractingopportunities/sizestandardstopics/index.html*). Parent companies, affiliates, and subsidiaries will be considered when determining business size. The dual pricing reflects the Commercial Service's user fee schedule that became effective May 1, 2008 (*see http://www.export.gov/newsletter/march2008/initiatives.html* for additional information).

**Selection Criteria for Participation**

Selection will be based on the following criteria:

- Suitability of a company's products or services to the mission's goals;
- Applicant's potential for business in China, including likelihood of exports resulting from the trade mission;
- Consistency of the applicant's goals and objectives with the stated scope of the trade mission.

Referrals from political organizations and any documents containing references to partisan political activities (including political contributions) will be removed from an applicant's submission and not considered during the selection process.

**Timeframe for Recruitment and Applications**

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*http://export.gov/trademissions/*) and other Internet Web sites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment for the mission will begin immediately and conclude no later than 08/15/2011. The U.S. Department of Commerce will review all applications immediately after the deadline. We will inform applicants of selection decisions as soon as possible after 08/15/2011. Applications received after that date will be considered only if space and scheduling constraints permit.

**Contacts**

*U.S. Commercial Service Domestic Contact:* Douglas Wallace, Commercial Officer, 415–705–1765, *Douglas.Wallace@trade.gov.*

**Elnora Moye,**

*U.S. Department of Commerce, International Trade Administration.*

[FR Doc. 2011–7471 Filed 3–29–11; 8:45 am]

BILLING CODE 3510–FP–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

### U.S. Education Mission to India

**AGENCY:** International Trade Administration, Department of Commerce.

**ACTION:** Notice.

**Mission Description**

The United States Department of Commerce, International Trade Administration, U.S. Commercial Service is organizing an education industry trade mission to India (New Delhi, Chennai, and Mumbai) from October 10–15, 2011. This mission will include representatives from graduate programs, 4-year undergraduate programs and state study consortia whose members are appropriately accredited by one of the seven regional accrediting bodies. This mission will seek to connect United States education institutions to potential students, university/institution partners and education consultants in India. The mission will include one-on-one appointments with potential partners, embassy briefings, student fairs and networking events in New Delhi, Chennai and Mumbai, three of the top cities for recruiting Indian students to the United States.

**Commercial Setting**

There are several types of opportunities for U.S. universities and institutions of higher learning in India: (1) Attracting Indian students to the United States and (2) establishing a campus in India to offer courses and programs in India and (3) online training programs. The mission will be open to regionally accredited United States educational institutions at the 4-year undergraduate level and above that wish to either attract students to the United States or meet with potential partners for collaboration in India.

For the eighth consecutive year, Indian students constitute the largest group of international students studying in the United States, with a total Indian student population in the United States of 103,260, a 9.2% increase from 2008. Most Indian students seeking international education choose U.S. universities and the majority (72%) of Indian students in the United State are studying at the graduate level. However, we expect an increasing amount of undergraduate students due to the abundance of "international" primary and secondary schools throughout India and the influx of India-born parents who return to India with U.S.-educated children. India's huge youth population, estimated at 315 million between the ages of 10 and 24, will continue to create a large demand for higher education. There are approximately 9.5 million students enrolled in higher education in India compared to that of the United States, where 19.1 million U.S. citizens are enrolled. As the number of students enrolled in higher education institutions in India is projected to rise to 11 million over the next three years, there are increasing doubts that India will have enough purely domestic education institutions to meet this demand. The United States, with over 4,000 accredited institutions of higher learning, has the capacity to offer access to high quality education to students in a broad range of fields. Employers in India have stressed the importance of developing a workforce equipped with adequate technical, teamwork and communication skills.

India offers substantial education opportunities for U.S. universities and other institutions of higher learning to establish schools, programs and curriculum in India. The Government of India (GOI) introduced milestone legislation to Parliament last year titled, the Foreign Educational Institutions (Regulation of Entry and Operation) Bill 2010. Once passed the legislation should allow for foreign education providers to set up campuses in the country—independently and jointly—and offer degrees to Indian students. Experts estimate the Indian education market has a potential value of $28 billion.

The first stop on the mission itinerary is New Delhi, the capital city of India. This visit would give the delegates an opportunity to directly interact with officials from the Government of India regarding education policies. Many of the finest educational institutions of India are located in Delhi. There are 15 universities and nearly 85 colleges, 55 management institutes, 7 medical colleges, 10 engineering colleges, a large number of computer institutes, 314 higher secondary schools, hundreds of preparatory schools and a good number of other institutes spread across the city. The Delhi NCR (National Capital Region) is the hub for education in the northern India and would attract institutions from other cities in the north to come and meet with the U.S. institutions. New Delhi would offer the delegates briefings, one-on-one meetings and a student fair.

Then the group will travel to Chennai, a booming organized education center in India. Chennai, the capital of the state of Tamil Nadu, is India's 3rd largest metropolis and is gaining recognition as a dynamic trade and education destination for many U.S. universities. The mission participants will have the opportunity to participate in briefings, student recruitment fairs and one-on-one meetings. One of the largest "knowledge communities" in the Asia Pacific region, Chennai boasts 350 engineering colleges, 230 polytechnics and 12 deemed ("officially accredited") universities offering technical and medical education. Around 7,040 students went to the United States from the Chennai region to pursue higher education in 2009.

Finally, the delegation will visit Mumbai, the capital of the state of Maharashtra, to participate in matchmaking meetings and student recruitment fair. US&FCS Mumbai has been approached by several private equity companies, colleges and large companies interested in investing in the education sector and are seeking U.S. collaborations. Located near Mumbai, the city of Pune is ranked as the top destination for education in India. In addition, while Maharashtra possesses the highest percentage of universities in India (11.3%), it also has the highest number of student enrollments in India in higher education, around 1.5 million.

**Mission Goals**

The goals of the United States Education Mission to India are: (1) To gain market exposure and introduce participants to the vibrant Indian market in the three main metropolitan cities of New Delhi, Chennai and Mumbai; (2) assess current and future business prospects by establishing valuable contacts with prospective consultants, students and educational institutions, and (3) develop market knowledge and relationships leading to student recruitment and potential partnerships.

**Mission Scenario**

Participation in the mission will include the following:

- Pre-travel briefings/webinars;
- Embassy/consulate and industry briefings;
- Pre-scheduled meetings with university heads and educational consultants in New Delhi, Chennai, and Mumbai;
- Airport transfers in New Delhi, Chennai, and Mumbai;
- Site visit in New Delhi/Chennai.

The precise schedule will depend on the specific goals and objectives of the mission participants.

**Timetable**

| Day of week | Date | Activity |
|---|---|---|
| Sunday | October 9 | **Proposed Mission Schedule—October 10–15, 2011**<br>Arrive in New Delhi (evening arrival).<br>Check into hotel. |
| Monday | October 10, New Delhi | Mission Meetings Officially Start—October 10–11, 2011:<br>Embassy Briefing.<br>One-on-one matchmaking meetings.<br>Luncheon hosted by TBD.<br>Student fair.<br>Embassy reception. |
| Tuesday | October 11<br>Chennai | Arrive in Chennai on October 11 afternoon and check into hotel:<br>Half day site visit—to be finalized.<br>Late afternoon departure for Chennai.<br>One-on-one business appointments. |
| Wednesday | October 12<br>Chennai | One-on-one matchmaking meetings.<br>Luncheon hosted by TBD.<br>Student fair (4–8 pm). |
| Thursday | October 13 | Half day site visit—to be finalized.<br>Late afternoon depart for Mumbai.<br>Arrive in Mumbai and check into hotel. |
| Friday | October 14<br>Mumbai | One-on-one matchmaking meetings.<br>Luncheon hosted by TBD.<br>Student fair.<br>Departure to USA—evening. |

*Note: The final schedule and potential site visits will depend on the availability of local government and business officials, specific goals of mission participants, and air travel schedules.

**Participation Requirements**

All parties interested in participating in the Mission to India must complete and submit an application for consideration by the Department of Commerce. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. The mission will open on a first come first served basis to 20 regionally accredited U.S. universities as well as study consortia whose members are also regionally accredited.

**Fees and Expenses**

After a university or consortium has been selected to participate on the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee is $3420 for one principal representative from each regionally accredited educational institution. The fee for each additional representative is $750. Expenses for lodging, some meals, incidentals, and all travel (except for transportation to and from airports in-country, previously noted) will be the responsibility of each mission participant.

**Conditions for Participation**

- An applicant must submit a timely, completed and signed mission application and supplemental application materials, including adequate information on courses offerings, primary market objectives, and goals for participation.

**Selection Criteria for Participation**

- Consistency of the applicant's goals and objectives with the stated scope of the mission;
- Timeliness of signed application and participation agreement by institution;
- Applicant's potential for doing business in India, including likelihood of service exports (education)/ knowledge transfer resulting from the mission.

Referrals from political organizations and any documents containing references to partisan political activities (including political contributions) will be removed from an applicant's submission and not considered during the selection process.

**Timeline for Recruitment and Applications**

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*http://www.trade.gov/trade-missions*) and other Internet web sites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment for the mission will begin immediately and conclude no later than August 1, 2011. The mission will be open on a first come first served basis. Applications received after that date will be considered only if space and scheduling constraints permit.

*Contacts*

U.S. Commercial Service in India:

Sathya Prabha, Commercial Assistant, Hyderabad, Tel: (91–40) 2330 4025, *Sathya.prabha@trade.gov.*

U.S. Export Assistance Center:

Koreen Grube, International Trade Specialist, Tel: 414–217–8333, E-mail: *Koreen.Grube@trade.gov.*

Matt Baker, International Trade Specialist, Tel: 520–470–5809, E-mail: *Matt.Baker@trade.gov.*

**Elnora Moye,**

*U.S. Department of Commerce, International Trade Administration.*

[FR Doc. 2011–7472 Filed 3–29–11; 8:45 am]

BILLING CODE 3510–FP–P

* An SME is defined as a firm with 500 or fewer employees or that otherwise qualifies as a small business under SBA regulations (see *http://www.sba.gov/services/contractingopportunities/sizestandardstopics/index.html*). Parent companies, affiliates, and subsidiaries will be considered when determining business size. The dual pricing reflects the Commercial Service's user fee schedule that became effective May 1, 2008 (see *http://www.export.gov/newsletter/march2008/initiatives.html* for additional information).

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Proposed Information Collection; Comment Request; Emergency Beacon Registrations

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, 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.

**DATES:** Written comments must be submitted on or before May 31, 2011.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Stephen Roark, (301) 817–3896 or *Stephen.Roark@noaa.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Abstract

This request is for an extension of a currently approved information collection.

An international system exists to use satellites to detect and locate ships, aircraft, or individuals in distress if they are equipped with an emergency radio beacon. Persons purchasing a digital distress beacon, operating in the frequency range of 406.000 to 406.100 MHz, must register it with NOAA. These requirements are contained in Federal Communications Commission (FCC) regulations at 47 CFR 80.1061, 47 CFR 87.199 and 47 CFR 95.1402. The data provided by registration can assist in identifying who is in trouble and in suppressing false alarms.

#### II. Method of Collection

Paper and online registration is available.

#### III. Data

*OMB Control Number:* 0648–0295.

*Form Number:* None.

*Type of Review:* Regular submission (extension of a currently approved collection).

*Affected Public:* Individuals or households; business or other for-profit organizations; not-for-profit institutions; State, local, or tribal government.

*Estimated Number of Respondents:* 186,306.

*Estimated Time per Response:* 15 minutes.

*Estimated Total Annual Burden Hours:* 46,576.

*Estimated Total Annual Cost to Public:* $30,330 in recordkeeping/reporting costs.

#### IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 24, 2011.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2011–7391 Filed 3–29–11; 8:45 am]

BILLING CODE 3510–HR–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA334**

### Fisheries of the South Atlantic; Southeast Data, Assessment, and Review; Public Meeting

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

**ACTION:** Notice of Southeast Data and Review (SEDAR) 26 data webinar for Caribbean Silk snapper, Queen snapper, and Redtail parrotfish.

**SUMMARY:** The SEDAR 26 assessment of Caribbean Silk snapper, Queen snapper, and Redtail parrotfish will consist of a series of workshops and webinars: This notice is for a webinar associated with the Data portion of the SEDAR process. See **SUPPLEMENTARY INFORMATION**.

**DATES:** The SEDAR 26 data webinar will be held April 15, 2011 beginning at 1 p.m. and is expected to last approximately 2 hours. The established time may be adjusted as necessary to accommodate the timely completion of discussion relevant to the data workshop process. Such adjustments may result in the meeting being extended from, or completed prior to the time established by this notice.

**ADDRESSES:** The meetings will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julie A. Neer at SEDAR (*See* **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information.

*Council address:* South Atlantic Fishery Management Council, 4055 Faber Place, Suite 201, North Charleston, SC 29405.

**FOR FURTHER INFORMATION CONTACT:** Julie A. Neer, SEDAR Coordinator, 4055 Faber Place, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366; e-mail: *Julie.neer@safmc.net.*

**SUPPLEMENTARY INFORMATION:** The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the SEDAR process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop, (2) Assessment Process utilizing webinars and workshops (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting Panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and

Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and State and Federal agencies. SEDAR 26 Data webinar: Participants will present summary data, and discuss data needs and treatments.

**Special Accommodations**

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (*see* **ADDRESSES**) at least 3 business days prior to the meeting.

Dated: March 25, 2011.

**Tracey L. Thompson,**

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

[FR Doc. 2011–7478 Filed 3–29–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA336**

### New England Fishery Management Council; Public Meeting

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

**ACTION:** Notice of a public meeting.

**SUMMARY:** The New England Fishery Management Council's (Council) Groundfish Committee will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

**DATES:** The meeting will be held on Monday, April 18, 2011 at 9 a.m.

**ADDRESSES:** The meeting will be held at the Holiday Inn, 31 Hampshire Street, Mansfield, MA 02048; telephone: (508) 339–2200; fax: (508) 339–1040.

*Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

**FOR FURTHER INFORMATION CONTACT:** Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

**SUPPLEMENTARY INFORMATION:** The items of discussion in the committee's agenda are as follows:

1. The Groundfish Oversight Committee will review draft Framework Adjustment 46 to the Northeast Multispecies Fishery Management plan (FW 46). FW 46 will consider adjustments to the haddock catch cap for the herring fishery. The Committee may choose preferred alternatives for this action that will be recommended to the Council.

2. The Committee will continue planning for a workshop to be held this year that will review the first year of groundfish sector operations.

3. The Committee will discuss advantages and disadvantages of allowing trading allocations of stocks managed under the US/Canada Resource Sharing Understanding.

4. Amendment 17 to the Northeast Multispecies FMP is in preparation. This amendment will authorize NOAA-funded, state-operated permit banks. Subject to the availability of the draft amendment, the Committee will provide an opportunity for public comment and may develop a Committee recommendation for the Council's consideration.

5. The Committee may further discuss concerns over recent cod catches by recreational fishermen in southern New England, and will receive a brief update on the development of the MRIP recreation catch monitoring program.

6. Other business may be discussed.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

**Special Accommodations**

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (*see* **ADDRESSES**) at least 5 days prior to the meeting date.

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

Dated: March 25, 2011.

**Tracey L. Thompson,**

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

[FR Doc. 2011–7480 Filed 3–29–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### National Climate Assessment Development and Advisory Committee; Announcement of Time Change and Meeting Location

**AGENCY:** National Oceanic and Atmospheric Administration, Department of Commerce.

**ACTION:** National Climate Assessment Development and Advisory Committee; Notice of Public Meeting; Announcement of time change and meeting location.

**SUMMARY:** This notice announces a change in the start time and provides the location of the meeting of the National Climate Assessment Development and Advisory Committee (NCADAC). The start time of the meeting on April 4, 2011, is changed from 9 a.m. to 8 a.m. Please see the notice published in the **Federal Register** on March 2, 2011 (76 FR 4562, March 2, 2011) for background information on the meeting. The full details of the meeting times and location are provided below.

The National Climate Assessment Development and Advisory Committee meeting on Monday, April 4—Wednesday, April 6 will be held at the L'Enfant Plaza Hotel, Ballrooms C and D, 480 L'Enfant Plaza SW., Washington, DC 20024. The meeting will be held at the following times: April 4, 2011, from 8 a.m. to 6 p.m.; April 5, 2011, from 8 a.m. to 6 p.m.; and April 6, 2011, from 8 a.m. to 2 p.m. The meeting may have limited seating capacity; seats are available on a first come-first served basis. For more information about the meeting agenda, see *http://www.globalchange.gov.*

During this public meeting, the NCADAC will discuss initial plans for development of a first draft of the NCADAC's Report to Congress and the President, as well as advising on the development of the Assessment process.

*Public Comment Deadline:* Public comments are being accepted in advance of the meeting and must be received by the NCADAC Designated Federal Official (DFO) by 12 p.m. (EDT) on March 31, 2011, to provide sufficient time for distribution to the members prior to the meeting. Written comments received after 12 p.m. (EDT) on March 31, 2011, will be distributed to the NCADAC, but may not be reviewed prior to the meeting date.

*Special Accommodations:* These meetings are physically accessible to

people with disabilities. Requests for special accommodations may be directed no later than 12 p.m. on March 30, 2011, to Dr. Cynthia Decker, NCADAC Designated Federal Official (DFO), SSMC3, Room 11230, 1315 East-West Hwy., Silver Spring, MD 20910.

**ADDRESSES:** Any member of the public who wishes to submit oral or written comments should contact: Dr. Cynthia Decker, the NCADAC Designated Federal Official (DFO), SSMC3, Room 11230, 1315 East-West Hwy., Silver Spring, MD 20910. *Phone:* (301) 734–1156, *Fax:* (301) 713–1459. *E-mail: cynthia.decker@noaa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Dr. Cynthia Decker, NCADAC Designated Federal Official (DFO), SSMC3, Room 11230, 1315 East-West Hwy., Silver Spring, MD 20910. *Phone:* (301) 734–1156, *Fax:* (301) 713–1459. *E-mail: cynthia.decker@noaa.gov.*

**Jane Lubchenco,**

*Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator.*

[FR Doc. 2011–7429 Filed 3–29–11; 8:45 am]

**BILLING CODE 3510–EA–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XA335**

### Fisheries of the South Atlantic, Gulf of Mexico, and Caribbean; Southeastern Data, Assessment, and Review (SEDAR); Public Meeting

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

**ACTION:** Notice of SEDAR Steering Committee Meeting.

**SUMMARY:** The SEDAR Steering Committee will meet to discuss the SEDAR assessment schedule, budget, and the SEDAR process. *See* **SUPPLEMENTARY INFORMATION.**

**DATES:** The SEDAR Steering Committee will meet on Monday, May 2, 2011, from 9 a.m. to 4 p.m.

**ADDRESSES:** The meeting will be held at the Doubletree Guest Suites Charleston-Historic District, 181 Church Street, Charleston, SC 29401; telephone: (843) 414–1666.

*Council address:* South Atlantic Fishery Management Council, 4055 Faber Place, Suite 201, North Charleston, SC 29405.

**FOR FURTHER INFORMATION CONTACT:** John Carmichael, SEDAR Program Manager, SEDAR/SAFMC, 4055 Faber Place, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366 or toll free (866) SAFMC–10; fax: (843) 769–4520.

**SUPPLEMENTARY INFORMATION:** The South Atlantic, Gulf of Mexico, and Caribbean Fishery Management Councils; in conjunction with NOAA Fisheries, the Atlantic States Marine Fisheries Commission, and the Gulf States Marine Fisheries Commission; implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks. The SEDAR Steering Committee meets regularly to provide oversight of the SEDAR process, establish assessment priorities, and provide coordination between assessment efforts and management activities.

During this meeting the Steering Committee will receive reports on recent SEDAR activities, consider benchmark and update assessment scheduling for 2012–2016, and discuss the SEDAR budget and process.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

**Special Accommodations**

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the South Atlantic Fishery.

Management Council office at the address listed above at least 7 business days prior to the meeting.

Dated: March 25, 2011.

**Tracey L. Thompson,**

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

[FR Doc. 2011–7479 Filed 3–29–11; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

### Notice of Intent To Grant Exclusive Patent License; Quest Integrated, Inc.

**AGENCY:** Department of the Navy, DoD.

**ACTION:** Notice.

**SUMMARY:** The Department of the Navy hereby gives notice of its intent to grant to Quest Integrated, Inc. a revocable, nonassignable, exclusive license to practice in the fields of use of cable, guy wire and other structural wire rope inspections in the United States and its territories, for the Government-owned invention represented by U.S. Statutory Invention Registration No. 13/038,574 entitled, "Onboard Data Recorder for a Nondestructive Test Wire Rope Sensor Head" (Navy Case No. 100986).

**DATES:** Anyone wishing to object to the grant of this license must file written objections along with supporting evidence, if any, not later than April 14, 2011.

**ADDRESSES:** Written objections are to be filed with the NAVFAC–ESC, Code CI60, 1100 23rd Avenue, Port Hueneme, CA 93043–4370 attention Kurt Buehler.

**FOR FURTHER INFORMATION CONTACT:** Kurt Buehler, Technology Transfer Office, NAVFAC–ESC, Code CI60, 1100 23rd Avenue, Port Hueneme, CA 93043–4370, telephone: 805–982–1225. Due to U.S. Postal delays, please fax: 805–982–3481, e-mail: *kurt.buehler@navy.mil* or use courier delivery to expedite response.

(Authority: 35 U.S.C. 207, 37 CFR part 404.)

Dated: March 23, 2011.

**D.J. Werner,**

*Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.*

[FR Doc. 2011–7422 Filed 3–29–11; 8:45 am]

**BILLING CODE 3810–FF–P**

## DEFENSE NUCLEAR FACILITIES SAFETY BOARD

### Sunshine Act Meeting Postponed

**AGENCY:** Defense Nuclear Facilities Safety Board.

**ACTION:** Notice of public meeting postponement.

**SUMMARY:** The Defense Nuclear Facilities Safety Board (Board) published a document in the **Federal Register** of March 3, 2011 (76 FR 11764), concerning notice of a public hearing and meeting on March 31, 2011, with regard to the Department of Energy's and National Nuclear Security Administration's safety management and oversight of the contracts and contractors they rely upon to accomplish the mission assigned under the Atomic Energy Act of 1954, as amended, at defense nuclear facilities. The public hearing and meeting has

been postponed. The Board intends to reschedule the hearing and meeting and will publish a notice of the rescheduled date in the **Federal Register** when that date has been determined.

**FOR FURTHER INFORMATION CONTACT:** Brian Grosner, General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901, (800) 788–4016. This is a toll-free number.

Dated: March 28, 2011.

**Peter S. Winokur,**

*Chairman.*

[FR Doc. 2011–7612 Filed 3–28–11; 4:15 pm]

**BILLING CODE 3670–01–P**

## DEPARTMENT OF EDUCATION

### Notice of Submission for OMB Review

**AGENCY:** Department of Education.

**ACTION:** Comment request.

**SUMMARY:** The Director, Information Collection Clearance Division, Information Management and Privacy Services, Office of Management, invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

**DATES:** Interested persons are invited to submit comments on or before April 29, 2011.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov.* 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 the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: March 25, 2011.

**Darrin A. King,**

*Director, Information Collection Clearance Division, Information Management and Privacy Services, Office of Management.*

### Office of Postsecondary Education

*Type of Review:* Reinstatement.

*Title of Collection:* Application for Grants Under the Minority Science and Engineering Improvement Program.

*OMB Control Number:* 1840–0109.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* Annually.

*Affected Public:* Not-for-profit institutions; State, Local and Tribal Governments.

*Total Estimated Number of Annual Responses:* 200.

*Total Estimated Annual Burden Hours:* 8,000.

*Abstract:* The information on the applicant's eligibility form will be collected annually from applicants who desire to apply for awards under Title III, Part E—Minority Science and Engineering Improvement Program (MSEIP). Applicants for MSEIP include public and private, non-profit postsecondary institutions, non-profit science-oriented organizations, and professional scientific societies. Without the collection of this information, the Department cannot properly screen applicants for eligibility and therefore, cannot award new grants in accordance with the Congressional intent of this program. The program staff and peer reviewers will use the information collected to evaluate applications and make funding decisions.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1894–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 3954. 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 the Internet address *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. 2011–7476 Filed 3–29–11; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Notice of Submission for OMB Review

**AGENCY:** Department of Education.

**ACTION:** Comment request.

**SUMMARY:** The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

**DATES:** Interested persons are invited to submit comments on or before April 29, 2011.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov.* 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 the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The OMB is particularly interested in comments which: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the

burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Dated: March 24, 2011.

**Darrin A. King,**

*Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

**Office of Postsecondary Education**

*Type of Review:* New.

*Title of Collection:* Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP) Partnership and State Grants.

*OMB Control Number:* Pending.

*Agency Form Number(s):* N/A.

*Frequency of Responses:* Annually.

*Affected Public:* State, Local, or Tribal Government, State Educational Agencies or Local Educational Agencies.

*Total Estimated Number of Annual Responses:* 545.

*Total Estimated Annual Burden Hours:* 30,460.

*Abstract:* The purpose of this information collection is to allow Partnerships and States to apply for funding under the Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP) program. The information collected in the GEAR UP application packages allows the Department to make determinations as to whether potential applicants are eligible for GEAR UP funding and allows field readers to score and rank applications for the Department to make funding determinations.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1894–0006). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Copies of the information collection submission for OMB review may be accessed from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or from the Department's Web site at *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4492. 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 the Internet address *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. 2011–7492 Filed 3–29–11; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF EDUCATION

### Applications for New Awards; Transition to Teaching Grant Program

**AGENCY:** Office of Innovation and Improvement; Department of Education.

**ACTION:** Notice.

**Overview Information**

*Transition to Teaching Grant Program*

Notice inviting applications for new awards for fiscal year (FY) 2011.

*Catalog of Federal Domestic Assistance (CFDA) Number:* 84.350A, 84.350B, and 84.350C.

**DATES:**

*Applications Available:* March 30, 2011.

*Deadline for Notice of Intent to Apply:* April 29, 2011.

*Date of Pre-Application Meeting:* April 18, 2011.

*Deadline for Transmittal of Applications:* May 31, 2011.

*Deadline for Intergovernmental Review:* July 13, 2011.

**Full Text of Announcement**

**I. Funding Opportunity Description**

*Purpose of Program:* The Transition to Teaching program encourages (1) the development and expansion of alternative routes to full State teacher certification, as well as (2) the recruitment and retention of highly qualified mid-career professionals, recent college graduates, and highly qualified paraprofessionals as teachers in high-need schools operated by high-need local educational agencies (LEAs), including charter schools that operate as high-need LEAs.

*Priorities:* This notice contains two competitive preference priorities and one invitational priority that are explained in the following paragraphs.

*Competitive Preference Priorities:* Competitive Preference Priority 1 is from section 2313(c) of the Elementary and Secondary Education Act of 1965, as amended (ESEA) (20 U.S.C. 6683(c)). Competitive Preference Priority 2 is 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). 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 three points to an application that meets Competitive Preference Priority 1. Furthermore, we award up to an additional four points to an application that meets Competitive Preference Priority 2. These points are in addition to any points the application earns under the selection criteria. Addressing these priorities is optional and applicants may choose to respond to one or both of the competitive priorities for this competition.

These priorities are:

*Competitive Preference Priority 1—Partnerships or Consortia That Include a High-need LEA or High-need SEA.*

This priority supports projects that are designated and implemented in active partnerships or consortia that include at least one high-need LEA or high-need SEA.

*Competitive Preference Priority 2—Promoting Science, Technology, Engineering, and Mathematics (STEM) Education.*

Projects that are designed to address one or both of the following priority areas:

(a) Increasing the opportunities for high-quality preparation of, or professional development for, teachers or other educators of STEM subjects.

(b) Increasing the number of individuals from groups traditionally underrepresented in STEM, including minorities, individuals with disabilities, and women, who are teachers or educators of STEM subjects and have increased opportunities for high-quality preparation or professional development.

*Invitational Priority:* Under this competition, the Department is particularly interested in applications that address the following priority. For FY 2011 and any subsequent year in which we make awards based on 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:

Projects that develop and implement, enhance, or expand innovative projects that address teacher staffing needs in high-need schools in rural high-need LEAs, and in high-need schools in high-need LEAs that serve American Native or Alaska Native communities. Under this priority, eligible applicants are encouraged to submit applications under this program that reflect their efforts to—

(1) Identify the teacher staffing needs of high-need schools in rural high-need LEAs, or in high-need schools in high-need LEAs that serve American Native or Alaska Native communities, or both;

(2) Provide strategies for selecting, recruiting, and retaining talented individuals who are eligible participants under this program to teach in the target area;

(3) Develop a curriculum for teacher preparation that prepares recruited teachers to become certified to teach a high-need subject identified for the target area, and if the project would be in high-need LEAs that serve American Native or Alaska Native communities, is culturally relevant to the community; and

(4) Provide a comprehensive support system for teachers once they are placed in high-need schools in rural high-need LEAs, or in high-need schools in high-need LEAs that serve American Native or Alaska Native communities, that will focus on retaining the teachers for at least three years.

*Background:* On November 5, 2009, President Obama signed a memorandum requiring Federal agencies to conduct consultations with Tribal officials when developing policies that have implications for Tribal communities. In response to the President's memorandum, the Department conducted six consultations with Tribal officials during FY 2010. During these consultations, the Department received numerous comments regarding teacher recruitment and retention. Specifically, these comments described difficulties that LEAs located on or near Tribally controlled lands—which typically operate high-need schools—face in attracting and retaining highly qualified teachers due to their remote location and lack of funding.

Rural school districts face similar difficulties in recruiting and retaining a qualified teacher workforce. According to the U.S. Department of Education, Institute of Education Sciences, nearly one-quarter of American students attend a school in a rural area, and almost half of the Nation's school districts are located in rural communities. Research indicates that some potential factors in recruiting and retaining teachers include collegial isolation, low salaries, multiple grade or subject teaching assignments, and lack of familiarity with rural schools and communities. Together, these challenges can discourage teachers from accepting rural positions or cause them to leave rural settings after teaching there for only a short time. (Barley, Z. A., and Brigham, N. (2008). *Preparing teachers to teach in rural schools* (Issues & Answers Report, REL 2008–No.045). Washington, DC: U.S. Department of Education, Institute of Education Sciences, National Center for Education Evaluation and Regional Assistance, Regional Educational Laboratory Central. Retrieved from *http://ies.ed.gov/ncee/edlabs.*

In response to the unique challenges that rural communities, and communities that serve American Native and Alaska Native students face, the Department establishes this invitational priority to encourage applicants to propose projects that will meet the specific teaching needs of these communities.

**Program Authority:** 20 U.S.C. 6681–6684.

*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 priorities and requirements for this program published in the **Federal Register** on April 30, 2004 (69 FR 24002). (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 (IHEs) only.

## II. Award Information

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* The Administration's FY 2011 budget request included no funding for the Transition to Teaching program. In place of several, sometimes narrowly targeted programs that serve current and prospective teachers and school leaders, the Administration has proposed to create a broader Excellent Instructional Teams initiative through the reauthorization of the Elementary and Secondary Education Act of 1965. Strengthening teacher preparation—-including through high-quality alternative routes to certification or licensure—-will be a key component of this initiative.

We estimate that $12.6 million will be available for this competition. The actual level of funding, if any, depends on final congressional action.

The Department has established separate funding categories for projects of different scope. These categories are:

(1) Local projects (CFDA 84.350A) that serve one or more eligible high-need LEAs in a single area of a State;

(2) Statewide projects (CFDA 84.350B) that serve eligible high-need LEAs statewide or eligible high-need LEAs in more than one area of a State; and

(3) National/regional projects (CFDA 84.350C) that serve eligible high-need LEAs in more than one State.

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:* National/regional projects—$450,000–$750,000 per year; Statewide projects—$300,000–$650,000 per year; and Local projects—$150,000–$450,000 per year.

*Estimated Average Size of Awards:* National/regional projects—$600,000 per year; Statewide projects—$475,000 per year; and Local projects—$300,000 per year.

*Estimated Number of Awards:* National/regional projects—1–3; Statewide projects—3–5; and Local projects—5–16.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* Up to 60 months. We anticipate that initial awards under this competition will be made for a three-year (36 month) period. Contingent upon the availability of funds and each grantee's substantial progress towards accomplishing the goals and objectives of the project as described in its approved application, we may make continuation awards to grantees for the remaining 24 months of the program. Review of each grantee's progress may include consideration of evidence of promising practices and a strong evaluation design.

## III. Eligibility Information

1. *Eligible Applicants:* A State educational agency (SEA); a high-need LEA; a for-profit or nonprofit organization that has a proven record of effectively recruiting and retaining highly qualified teachers, in partnership with a high-need LEA or an SEA; an IHE in partnership with a high-need LEA or

an SEA; a regional consortium of SEAs; or a consortium of high-need LEAs.

Each application must identify participating LEAs that meet the definition of "high-need LEA" in section 2102(3) of the Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 6301 *et seq.*).

**Note:** Section 2102(3) of the ESEA defines a high-need LEA as an LEA—

(a) That serves not fewer than 10,000 children from families with incomes below the poverty line (as that term is defined in section 9101(33) of the ESEA), or for which not less than 20 percent of the children served by the LEA are from families with incomes below the poverty line; and

(b) For which there is (1) a high percentage of teachers not teaching in the academic subjects or grade levels that the teachers were trained to teach, or (2) a high percentage of teachers with emergency, provisional, or temporary certification or licensing.

The notice of final priorities and requirements (NFP) published in the **Federal Register** on April 30, 2004 (69 FR 24002) describes how applicants must demonstrate that a participating LEA meets the statutory definition of a "high-need LEA" (69 FR 24002, 24006). Additionally, as described in the NFP, a high-need SEA is defined as a SEA of a State that includes at least one high-need LEA (69 FR 24006). Pursuant to the NFP, we provide the following supplementary information regarding the data an applicant uses to demonstrate eligibility as a "high-need LEA" under this competition:

As described in the NFP, absent a showing of alternative LEA data that reliably show the number of children from families with incomes below the poverty line that are served by the LEA, the eligibility of an LEA as a "high-need LEA" under component (a) of the definition must be determined on the basis of the most recent U.S. Census Bureau data. The most recent U.S. Census Bureau data for 2009 can be found in the charts on the Internet at: *http://www.census.gov/hhes/www/saipe/district.html.* The Department examines the eligibility of any LEA not listed on these charts on a case-by-case basis.

As discussed in the NFP, with respect to component (b)(1) of the definition of "high-need LEA," whether an LEA has a "high percentage of teachers not teaching in the academic subjects or grade levels that the teachers were trained to teach" is determined on a case-by-case basis.

In addition, as discussed in the NFP, with respect to component (b)(2) of the definition of "high-need LEA," an LEA has a "high percentage" of teachers with emergency, provisional, or temporary certification or licensing if the percentage of teachers on waivers, as the LEA reported to the State for purposes of the State's latest report to the Secretary under section 207 of the Higher Education Act of 1965, as amended by the Higher Education Amendments of 1998 (HEA), was higher than the national average percentage of teachers on waivers of State certification for all LEAs. As discussed in the April 30, 2004 NFP, the Secretary determines the national average percentage of teachers on waivers based on data contained in the most currently available HEA section 207 State reports. At the time of publication of this notice, the latest and last waiver data collected are from 2007–2008 State reports, which are not yet published in a final report. These waiver data from the State 2007–2008 reports reveal a national average percentage of teachers on waivers of State certification for all LEAs of 1.36 percent. Thus, for purposes of component (b)(2) of the definition of "high-need LEA," an LEA has a "high percentage" of teachers with emergency, provisional, or temporary certification of licensing if the percentage of teachers on waivers, as the LEA reported to the State for purpose of the State's latest report to the Secretary under section 207 of the HEA is greater than 1.36 percent. The eligibility of LEAs not required to report these data, such as newly formed LEAs or BIE-funded schools, would be determined on a case-by-case basis based on the best available data the applicant includes with its application.

2. a. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

b. *Supplement-Not-Supplant:* This program includes supplement-not-supplant funding requirements. In accordance with section 2313(h)(2) of the ESEA, funds made available under this program must be used to supplement, and not supplant, State and local public funds expended for teacher recruitment and retention programs, including programs to recruit teachers through alternative routes to certification.

## IV. Application and Submission Information

1. *Address to Request Application Package:* Beatriz Ceja, U.S. Department of Education, 400 Maryland Avenue, SW., room 4C111, Washington, DC 20202–5960 or by e-mail: *transitiontoteaching@ed.gov.*

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

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

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 competition.

*Notice of Intent to Apply:* April 29, 2011. 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 Secretary requests that this e-mail notification be sent to Beatriz Ceja at: *TTTintent@ed.gov.*

Applicants that fail to provide this e-mail notification may still apply for funding.

*Page Limit:* The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We suggest you limit the application narrative Part III to the equivalent of no more than 50 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, except for titles, headings, footnotes, quotations, references, captions, 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, or letters of support.

3. *Submission Dates and Times:*

*Applications Available:* March 30, 2011.

*Deadline for Notice of Intent to Apply:* April 29, 2011.

*Date of Pre-Application Meeting:* April 18, 2011, from 2:30 p.m. to 4:30 p.m. in the LBJ Auditorium at the U.S. Department of Education headquarters, 400 Maryland Avenue, SW., Washington, DC. The Department is accessible by Metro on the Blue, Orange, Green, and Yellow lines at the 7th Street and Maryland Avenue exit of the L'Enfant Plaza Metro station. Please contact the U.S. Department of Education contact persons listed under **FOR FURTHER INFORMATION CONTACT** if you have any questions about the details of the pre-application meeting.

Individuals interested in attending this pre-application meeting are encouraged to pre-register by e-mailing their name, organization, and contact information to *transitiontoteaching@ed.gov.* There is no registration fee for this pre-application meeting. We encourage attendance from those who will be responsible for submitting the application or otherwise providing technical support for submitting the application electronically using the Department's Grants.gov Apply site (Grants.gov).

*Assistance to Individuals With Disabilities at the Pre-Application Meeting*

The meeting site is accessible to individuals with disabilities, and a sign language interpreter will be available. If you will need an auxiliary aid or service other than a sign language interpreter in order to participate in the meeting (*e.g.,* other interpreting service such as oral, cued speech, or tactile interpreter; assistive listening device; or materials in alternate format), notify the contact person listed in this notice at least two weeks before the scheduled meeting date. Although we will attempt to meet a request we receive after this date, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

*Deadline for Transmittal of Applications:* May 31, 2011.

Applications for grants under this competition must be submitted electronically using the Grant.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* in 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 in 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:* July 13, 2011.

4. *Intergovernmental Review:* This competition 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 competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section in this notice and in the April 30, 2004 NFP.

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 Transition to Teaching program, CFDA number 84.350A, 84.350B, and 84.350C 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 Transition to Teaching program at *http://www.Grants.gov.* You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (*e.g.,* search for 84.350, not 84.350A).

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 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 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 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 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 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 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: Beatriz Ceja, U.S. Department of Education, 400 Maryland Avenue, SW., room 4C111, Washington, DC 20202–5960. FAX: (202) 401–8466.

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 84.350A; 84.350B; 84.350C), 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 84.350A; 84.350B; 84.350C), 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 competition are from section 34 CFR 75.210 of EDGAR (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. In addressing each criterion, applicants are encouraged to make explicit connections to relevant aspects of responses to other selection criteria.

The notes we have included after each criterion are guidance to assist applicants in understanding the criterion as they prepare their applications and are not required by statute or regulation.

A. *Quality of the Project Design* (40 points). The Secretary considers the quality of the project design for the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(1) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(2) The extent to which the design for implementing and evaluating the proposed project will result in information to guide possible replication of project activities or strategies, including information about the effectiveness of the approach or strategies employed by the project.

(3) The extent to which the proposed activities constitute a coherent, sustained program of training in the field.

(4) 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.

(5) The extent to which the program project is part of a comprehensive effort to improve teaching and learning and support rigorous academic standards for students.

**Note:** The Secretary encourages applicants to address this criterion by discussing the overall project design and its key components, and the degree to which the design's key components are based on sound research and practice. Applicants are also encouraged to address this criterion by connecting the project design to the needs of the partner districts and identifying the specific teacher-shortage areas faced by the participating high-need LEAs on which their proposed project would focus. Applicants should understand that a project's strategy for helping participating high-need LEAs to identify and hire highly qualified individuals to fill teaching positions in high-need subjects may rely on existing alternative routes to certification, the expansion of alternative routes to certification into new areas, or the creation of wholly new alternative routes.

Additionally, applicants are encouraged to address such key components of project design related to the Transition to Teaching program as:

(1) Recruitment and selection, including by identifying the target group(s) on which the program will focus and why and how the project is designed to rigorously select participants with the requisite content knowledge, skills, and commitment to teach in high-need schools in high-need LEAs.

(2) Preparation, including how the project will provide a route to certification that is accelerated, integrates coursework and field experience, is adapted to participants' learning needs, and will yield effective teachers who are well prepared to teach in high-need schools in high-need LEAs.

(3) Teacher placement, including evidence that the proposed project will meet the needs of high-need LEAs, is being developed in coordination with appropriate partners, and will include a system of tracking to meet statutory requirements.

(4) Support services, including mentoring, that are designed to retain participants and meet their needs in terms of length, content, and means of delivery in order to be successful in high-need schools in high-need LEAs.

(5) Teacher certification, including consideration of how the timeline for achieving certification will meet the needs of participants, LEAs, and partners, as well as the "Highly Qualified Teacher" requirements established in section 9101(23) of the ESEA and 34 CFR 200.56.

In addition, applicants are encouraged to clarify the means by which the project's specified outcomes and benefits may be sustained once Federal funding has ended.

B. *Quality of the Project Evaluation* (20 points). The Secretary considers the quality of the evaluation to be conducted by the proposed project. In determining the quality of the evaluation to be conducted, the Secretary considers the following factors:

(1) 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.

(2) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

**Note:** The Secretary encourages applicants to address this criterion by including benchmarks to monitor progress toward specific and measurable program and project objectives, as well as performance measures to assess the impact on teaching and learning or other important outcomes for project participants. Applicants are also encouraged to consider the use of a logic model in determining intended short-term, intermediate, and long-term outcomes. (The specific performance measures the Department established for the overall Transition to Teaching program are discussed under *Performance Measures* in section VI of this notice.)

Moreover, with respect to the implementation of the project and monitoring progress toward achieving

project objectives, applicants are encouraged to describe the following: (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; (5) how the 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 and improve implementation of the funded project and to provide accountability information about project success. Additionally, applicants are encouraged to design an evaluation that provides data for annual as well as midpoint and final reporting. Applicants also are encouraged to devote an appropriate level of resources to project evaluation.

Finally, section 2314 of the ESEA also requires grantees to submit both an interim evaluation of the first three years of the grant and a final evaluation at the end of the grant. The Secretary encourages applicants to consider this reporting requirement when addressing the Quality of the Project Evaluation.

C. *Quality of Project Services* (20 points).

In determining the quality of the services to be provided by the proposed project, the Secretary considers the following factors:

(1) 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.

(2) The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services.

(3) 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.

(4) The extent to which the training or professional development services to be provided by the proposed project are likely to alleviate the personnel shortages that have been identified or are the focus of the proposed project.

(5) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services.

**Note:** The Secretary encourages applicants to address this criterion by discussing how the proposed project services will meet the needs of both the high-need LEAs identified in the application and the project participants they would recruit to become teachers. In describing the specific services to be delivered to recruit, prepare, and retain participants that will increase the number of highly qualified teachers in high-need schools in high-need LEAs, applicants are encouraged to consult the program statute for allowable uses of Transition to Teaching program funds (section 2313(g) of the ESEA). Applicants are also encouraged to describe how the proposed project will:

(1) Provide preparation that meets the learning needs of the participants and makes use of appropriate media (such as through face-to-face instruction, Web-based instruction, and distance learning) in order to provide them with the knowledge and skills needed to be highly qualified and effective teachers in the identified high-need subject areas and high-need schools in high-need LEAs.

(2) Support project participants' success in high-need schools in high-need LEAs during the period of their service obligation, through individual mentoring, support of participants as a group, use of technology, or other appropriate means.

(3) Encourage the participation of all project partners, including school leaders, in providing services related to the recruitment, preparation, and retention of project participants and ensuring lasting benefits or outcomes. Applicants are encouraged to clarify the roles of partners in each phase of the project and the extent of coordination that will occur with similar efforts at the State and district levels. In addition, applicants are encouraged to consider how they might demonstrate (*e.g.,* through narrative discussion, letters of support, or formal memoranda of understanding) the commitment of partners to the project and the partners' understanding of responsibilities they have agreed to assume in service delivery.

Applicants are encouraged to link their description of project services to be provided by the project to the overall project design described in the Quality of Project Design criterion.

D. *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 following factors:

(1) 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.

(2) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project.

(3) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

**Note:** Section 75.112 of EDGAR (34 CFR 75.112) requires an applicant for a multi-year grant to include a narrative that describes how and when, in each budget period of the project, the applicant plans to meet each project objective. The Secretary encourages applicants to address this criterion by including in this narrative a clear, well-thought-out implementation plan that includes annual timelines, key project milestones, and a schedule of activities with sufficient time for developing an adequate implementation plan, as well as specific timelines for providing project participants the direct support they need in their initial year(s) as teachers.

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. *Additional Factors:* Section 2313(f) of the ESEA provides that to the extent practicable, the Secretary shall ensure an equitable geographic distribution of grants under this program among the regions of the United States. Accordingly, the Secretary may take geographic distribution of awards into account in making grant awards under this competition.

4. *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 in this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section in 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:* The Secretary has established three performance measures to track the performance of this program. We will gather the data for these measures from each grantee. Therefore, when responding to the selection criteria grantees should address the following measures in the appropriate section.

*Measure One:* The percentage of all Transition to Teaching participants who become teachers of record in high-need schools in high-need LEAs. For this measure we will collect data on the number of participants and the number of teachers of record in high-need schools in high-need LEAs.

*Measure Two:* The percentage of Transition to Teaching participants who, within three years, receive the same State certification or licensure as teachers not participating in the alternative route program. For this measure, we will collect data on the number of participants who meet this measure.

*Measure Three:* The percentage of Transition to Teaching teachers of record who teach in high-need schools in high-need LEAs for three years. For this measure, we will collect data on the number of participants who become teachers of record who have been teaching in high-need schools in high-need LEAs for at least three years.

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 Contacts

**FOR FURTHER INFORMATION CONTACT:** Patricia Barrett, Beatriz Ceja, or Salimah Shabazz, U.S. Department of Education, 400 Maryland Avenue, SW., room 4C111, Washington, DC 20202–5960. Telephone: (202) 260–7350 (Patricia Barrett), (202) 205–5009 (Beatriz Ceja), or (202) 260–2434 (Salimah Shabazz), or by e-mail: *transitiontoteaching@ed.gov.*

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

## 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 in 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 now available via the Federal Digital System at *http://www.gpo.gov/fdsys.*

Dated: March 25, 2011.

**James H. Shelton, III,**

*Assistant Deputy Secretary for Innovation and Improvement.*

[FR Doc. 2011–7483 Filed 3–29–11; 8:45 am]

**BILLING CODE 4000–01–P**

# DEPARTMENT OF ENERGY

## Environmental Management Site-Specific Advisory Board, Paducah

**AGENCY:** Department of Energy (DOE).

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Paducah. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

**DATES:** Thursday, April 21, 2011; 6 p.m.

**ADDRESSES:** Barkley Centre, 111 Memorial Drive, Paducah, Kentucky 42001.

**FOR FURTHER INFORMATION CONTACT:** Reinhard Knerr, Deputy Designated Federal Officer, Department of Energy Paducah Site Office, Post Office Box 1410, MS–103, Paducah, Kentucky 42001, (270) 441–6825.

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management and related activities.

### Tentative Agenda

- Call to Order, Introductions, Review of Agenda.
- Administrative Issues.
  - Discuss Recommendation 11–2, Southwest Plume Proposed Plan.
  - Review Work Plan.
- Public Comments.
- Final Comments.
- Adjourn.

Breaks Taken as Appropriate.

*Public Participation:* The EM SSAB, Paducah, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you

require special accommodations due to a disability, please contact Reinhard Knerr as soon as possible in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Reinhard Knerr at the telephone number listed above. Requests must be received as soon as possible prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

*Minutes:* Minutes will be available by writing or calling Reinhard Knerr at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.pgdpcab.energy.gov/2011Meetings.html.*

Issued at Washington, DC, on March 24, 2011.

**LaTanya Butler,**

*Acting Deputy Committee Management Officer.*

[FR Doc. 2011–7442 Filed 3–29–11; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation

**AGENCY:** Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Oak Ridge Reservation. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

**DATES:** Wednesday, April 13, 2011, 6 p.m.

**ADDRESSES:** DOE Information Center, 475 Oak Ridge Turnpike, Oak Ridge, Tennessee 37830.

**FOR FURTHER INFORMATION CONTACT:** Patricia J. Halsey, Federal Coordinator, Department of Energy Oak Ridge Operations Office, P.O. Box 2001, EM–90, Oak Ridge, TN 37831. Phone (865) 576–4025; Fax (865) 576–2347 or e-mail: *halseypj@oro.doe.gov* or check the Web site at *http://www.oakridge.doe.gov/em/ssab.*

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

*Tentative Agenda:* The main meeting presentation will be an update on the DOE- EM Oak Ridge Fiscal Year 2013 budget request.

*Public Participation:* The EM SSAB, Oak Ridge, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Patricia J. Halsey at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to the agenda item should contact Patricia J. Halsey at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments. This notice is being published less than 15 days prior to the meeting date due to programmatic issues that had to be resolved prior to the meeting date.

*Minutes:* Minutes will be available by writing or calling Patricia J. Halsey at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.oakridge.doe.gov/em/ssab/minutes.htm.*

Issued at Washington, DC, on March 24, 2011.

**LaTanya Butler,**

*Acting Deputy Committee Management Officer.*

[FR Doc. 2011–7446 Filed 3–29–11; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Office of Energy Efficiency and Renewable Energy

**[Case No. CD–005]**

### Energy Conservation Program for Consumer Products: Decision and Order Granting a Waiver to Miele From the Department of Energy Residential Clothes Dryer Test Procedure (Case No. CD–005)

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Decision and order.

**SUMMARY:** The U.S. Department of Energy (DOE) gives notice of the decision and order (Case No. CD–005) that grants to Miele, Inc. (Miele) a waiver from the DOE clothes dryer test procedure. The waiver pertains to the specified models of condensing residential clothes dryers specified in Miele's petition. Condensing clothes dryers cannot be tested using the existing test procedure. Under today's decision and order, Miele shall be not be required to test and rate its specified models of residential condensing clothes dryer pursuant to the DOE test procedure.

**DATES:** This Decision and Order is effective March 30, 2011.

**FOR FURTHER INFORMATION CONTACT:** Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. *Telephone:* (202) 586–9611; *E-mail: AS_Waiver_Requests@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of General Counsel, Mail Stop GC–71, 1000 Independence Avenue, SW., Washington, DC 20585–0103, (202) 586–7796; *E-mail*: *Elizabeth.Kohl@hq.doe.gov*.

**SUPPLEMENTARY INFORMATION:** In accordance with Title 10 of the Code of Federal Regulations (10 CFR), Section 430.27(l), DOE gives notice of the issuance of its decision and order as set forth below. The decision and order grants Miele a waiver from the applicable residential clothes dryer test procedure at 10 CFR part 430 subpart B, appendix D, for the two models of condensing clothes dryers specified it its petition.

Issued in Washington, DC, on March 24, 2011.

**Kathleen Hogan,**

*Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.*

## Decision and Order

*In the Matter of:* Miele, Inc. (Case No. CD–005)

### *Background*

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA), Pub. L. 94–163 (42 U.S.C. 6291–6309, as codified) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, which includes the residential clothes washers that are the focus of this notice.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for clothes dryers is contained in 10 CFR part 430, subpart B, appendix D.

DOE's regulations contain provisions allowing a person to seek a waiver from the test procedure requirements for covered consumer products if at least one of the following conditions is met: (1) The petitioner's basic model contains one or more design characteristics that prevent testing according to the prescribed test procedure, or (2) when the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption characteristics. 10 CFR 430.27(b)(1)(iii).

The Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m).

The waiver process also allows any interested person who has submitted a petition for waiver to file an application for an interim waiver of the applicable test procedure requirements. 10 CFR 430.27(a)(2). The Assistant Secretary will grant an interim waiver request if it is determined that the applicant will experience economic hardship if the interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition for waiver. 10 CFR 430.27(g).

On November 3, 2010, Miele filed a petition for waiver from the test procedures applicable to its T8000 and T9000 product models of condensing clothes dryer. The applicable test procedures are contained in 10 CFR part 430, subpart B, appendix D–Uniform Test Method for Measuring the Energy Consumption of Clothes Dryers. Miele seeks a waiver from the applicable test procedures for its T8000 and T9000 basic product models because, Miele asserts, design characteristics of this model prevent testing according to the currently prescribed test procedures. DOE previously granted Miele a waiver from test procedures for two similar condenser clothes dryer models (T1565CA and T1570C). (60 FR 9330, Feb. 17, 1995). Miele claims that its condenser clothes dryers cannot be tested pursuant to the DOE procedure and requests that the same waiver granted to Miele in 1995 be granted for Miele's T8000 and T9000 models.

In support of its petition, Miele claims that the current clothes dryer test procedures apply only to vented clothes dryers because the test procedures require the use of an exhaust restrictor on the exhaust port of the clothes dryer during testing. Because condenser clothes dryers operate by blowing air through the wet clothes, condensing the water vapor in the airstream, and pumping the collected water into either a drain line or an in-unit container, these products do not use an exhaust port like a vented dryer does. Miele plans to market a condensing clothes dryer for situations in which a conventional vented clothes dryer cannot be used, such as high-rise apartments and condominiums, where construction does not permit the use of external venting.

### *Assertions and Determinations*

#### Miele's Petition for Waiver

On November 3, 2010, Miele filed a petition for waiver from the test procedure applicable to residential clothes dryers set forth in 10 CFR part 430, subpart B, appendix D for particular models of condensing clothes dryer. On February 1, 2011, DOE published Miele's petition for waiver and granted Miele an interim waiver from the current test procedure. 76 FR 5567. DOE did not receive any comments on the Miele petition.

DOE previously granted Miele a waiver from test procedures for condensing clothes dryers after determining that the company's condenser clothes dryers could not be tested according to the clothes dryer test procedure because of the lack of an exhaust port for mounting the required exhaust restrictor, which is an element of the test procedure. 60 FR 9332 (Feb. 17, 1995). Subsequently, DOE granted similar waivers to LG (73 FR 66641, Nov. 10, 2008), Whirlpool (74 FR 66334, December 15, 2009), and GE (75 FR 13122, Mar. 18, 2010).

Therefore, for the reasons discussed above, and in light of the previous waivers to Miele, LG, Whirlpool and GE, DOE grants Miele's petition for waiver from testing of its T8000 and T9000 condenser clothes dryers.

### *Consultations With Other Agencies*

DOE consulted with the Federal Trade Commission (FTC) staff concerning the Miele petition for waiver. The FTC staff did not have any objections to granting a waiver to Miele.

### *Conclusion*

After careful consideration of all the material that was submitted by Miele and consultation with the FTC staff, it is ordered that:

(1) The petition for waiver submitted by Miele, Inc. (Case No. CD–005) is hereby granted as set forth in the paragraphs below.

(2) Miele shall not be required to test or rate its T8000 and T9000 condensing clothes dryer models on the basis of the test procedures at 10 CFR part 430, subpart B, appendix D.

(3) This waiver shall remain in effect from the date this decision and order consistent with the provisions of 10 CFR 430.27(m).

(4) This waiver is issued on the condition that the statements, representations, and documentary materials provided by the petitioner are valid. DOE may revoke or modify this waiver at any time if it determines the

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

factual basis underlying the petition for waiver is incorrect.

(5) This waiver applies to only those models specifically set out in Miele's petition. Miele may submit a new or amended petition for waiver and request for grant of interim waiver, as appropriate, for additional models of clothes dryers for which it seeks a waiver from the DOE test procedure.

Issued in Washington, DC, on March 24, 2011.

Kathleen Hogan,
*Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.*

[FR Doc. 2011–7449 Filed 3–29–11; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Office of Energy Efficiency and Renewable Energy

**[Case No. DW–005]**

### Energy Conservation Program for Consumer Products: Notice of Petition for Waiver of BSH Corporation From the Department of Energy Residential Dishwasher Test Procedure, and Grant of Interim Waiver

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of petition for waiver, notice of grant of interim waiver, and request for comments.

**SUMMARY:** This notice announces receipt of and publishes the BSH Corporation (BSH) petition for waiver (hereafter, "petition") from specified portions of the U.S. Department of Energy (DOE) test procedure for determining the energy consumption of dishwashers. Today's notice also grants an interim waiver of the dishwasher test procedure. Through this notice, DOE also solicits comments with respect to the BSHpetition.

**DATES:** DOE will accept comments, data, and information with respect to the BSHpetition until, but no later than April 29, 2011.

**ADDRESSES:** You may submit comments, identified by case number DW–004, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: AS_Waiver_Requests@ee.doe.gov.* Include the case number [Case No. DW–005] in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Petition for Waiver Case No. DW–005, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

*Docket:* For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza, SW., (Resource Room of the Building Technologies Program), Washington, DC 20024; (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Available documents include the following items: (1) This notice; (2) public comments received; (3) the petition for waiver and application for interim waiver; and (4) prior DOE rulemakings and waivers regarding similar dish washers. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

**FOR FURTHER INFORMATION CONTACT:** Dr. Michael G. Raymond, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–9611. E-mail: *Michael.Raymond@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585–0103. Telephone: (202) 586–7796. E-mail: *Elizabeth.Kohl@hq.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309, as codified) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, which includes dishwashers.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for dishwashers is contained in 10 CFR part 430, subpart B, appendix C.

The regulations set forth in 10 CFR 430.27 contain provisions that enable a person to seek a waiver from the test procedure requirements for covered consumer products. A waiver will be granted by the Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) if it is determined that the basic model for which the petition for waiver was submitted contains one or more design characteristics that prevents testing of the basic model according to the prescribed test procedures, or if the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(l). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 430.27(b)(1)(iii). The Assistant Secretary may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m).

The waiver process also allows the Assistant Secretary to grant an interim waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. 10 CFR 430.27(a)(2) An interim waiver remains in effect for 180 days or until DOE issues its determination on the petition for waiver, whichever is sooner. An interim waiver may be extended for an additional 180 days. 10 CFR 430.27(h)

### II. Petition for Waiver

On January 11, 2011, BSH filed a petition for waiver and application for interim waiver from the test procedure applicable to dishwashers set forth in 10 CFR part 430, subpart B, appendix C. BSH states that "hard" water can reduce customer satisfaction with dishwasher performance resulting in increased pre-rinsing and/or hand washing as well as increased detergent and rinse agent usage. According to BSH, a dishwasher equipped with a water softener will minimize pre-rinsing and rewashing, and consumers will have less reason to periodically run their dishwasher through a clean-up cycle.

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

BSH also states that the amount of water consumed by the regeneration operation of a water softener in a dishwasher is very small, but that it varies significantly depending on the adjustment of the softener. The regeneration operation takes place infrequently, and the frequency is related to the level of water hardness. BSH included test results and calculations showing water and energy use very similar to that supplied by Whirlpool in its petition for waiver, which was granted by DOE. (75 FR 62127, Oct. 7, 2010). BSH states that the water used in the regeneration process is for the purpose of softening water rather than cleaning dishes. Therefore, according to BSH, this water and energy should not be included in the energy usage figures for washing dishes. BSH suggests a similar approach as used in EN 50242. EN 50242 does not include the water or energy used in the water softening process in the dishwasher energy consumption calculation.

**III. Application for Interim Waiver**

BSH also requests an interim waiver for particular basic models with integrated water softeners. An interim waiver may be granted if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. (10 CFR 430.27(g))

DOE determined that BSH's application for interim waiver does not provide sufficient market, equipment price, shipments, and other manufacturer impact information to permit DOE to evaluate the economic hardship BSH might experience absent a favorable determination on its application for interim waiver. DOE understands, however, that the current test procedure may not predict accurately the water and energy consumption of its line of dishwashers with a built-in water softener. Based on the information provided by BSH and Whirlpool, DOE determined that the test results may provide materially inaccurate comparative data.

BSH provided the European Standard EN 50242, "Electric Dishwashers for Household Use—Methods for Measuring the Performance," as an alternate test procedure. This standard excludes water use due to softener regeneration from its water use efficiency measure. Use of EN 50242 would provide repeatable results, but would underestimate the energy and water use of these models. If water consumption of a regeneration operation were apportioned across all cycles of operation, manufacturers would need to make calculations regarding average water hardness and average water consumptions due to regeneration operations that are not currently provided for in the test procedure. In lieu of these calculations, constant values could be used to approximate the energy and water use due to softener regeneration. In its petition, BSH estimated that, on average, 23.78 gallons/year of water and 4.04 kWh/year would be consumed in softener regeneration. These values are based on internal testing conducted by BSH, and are very close to Whirlpool's values of 23 gallons/year and 4 kWh/year. Therefore, in the interim waiver, DOE adds the same constant values as in the Whirlpool waiver to the energy and water consumption measured by appendix C.

DOE believes it is likely that BSH's petition for waiver will be granted because DOE granted a similar waiver to Whirlpool and it is in the public interest to have similar products tested and rated using the same test procedures, and because BSH provides approximate values for the energy and water use resulting from softener regeneration. As a result, DOE grants BSH's application for interim waiver. Therefore, BSH shall not be required to test its dishwasher models:

*Bosch brand:*

- *SHX68E05UC*
- *SHE68E05UC*
- *SHX68E15UC*
- *SHE68E15UC*
- *SHV68E13UC*
- *SGE63E0#UC*
- *SHX58E15UC*
- *SHV58E13UC*
- *SHX58E2#UC*

*Gaggenau brand:*

- *DF261760*
- *DF260760*

*Kenmore brand:*

- *630.13993.01#*
- *630.13023.01#*
- *630.13003.01#*

according to the existing DOE test procedure at 10 CFR 430, subpart B, appendix C, but shall be required to test and rate such products according to the alternate test procedure as set forth below.

Under appendix C, the water energy consumption, W or Wg, is calculated based on the water consumption as set forth in Section 4.3:

Section 4.3 *Water consumption.* Measure the water consumption, V, expressed as the number of gallons of water delivered to the machine during the entire test cycle, using a water meter as specified in section 3.3 of this Appendix.

Where the regeneration of the water softener depends on demand and water hardness, and does not take place on every cycle, BSH shall measure the water consumption of dishwashers having water softeners without including the water consumed by the dishwasher during softener regeneration. If a regeneration operation takes place within the test, the water consumed by the regeneration operation shall be disregarded when declaring water and energy consumption. Constant values of 23 gallons/year of water and 4 kWh/year of energy shall be added to the values measured by appendix C.

DOE makes decisions on waivers and interim waivers for only those models specifically set out in the petition, not future models that may be manufactured by the petitioner. BSH may submit a new or amended petition for waiver and request for grant of interim waiver, as appropriate, for additional models of dishwashers for which it seeks a waiver from the DOE test procedure. Grant of an interim waiver does not release a petitioner from the certification requirements set forth at 10 CFR 430.62.

**IV. Summary and Request for Comments**

Through today's notice, DOE announces receipt of BSH's petition for waiver from certain parts of the test procedure that apply to dishwashers. DOE is publishing BSH's petition for waiver in its entirety pursuant to 10 CFR 430.27(b)(1)(iv). The petition contains no confidential information. The petition includes a suggested alternate test procedure which is to measure the water consumption of dishwashers having water softeners without including the water consumed by the dishwasher during softener regeneration.

DOE solicits comments from interested parties on all aspects of the petition. Pursuant to 10 CFR 430.27(b)(1)(iv), any person submitting written comments to DOE must also send a copy of such comments to the petitioner. The contact information for the petitioner is Mike Edwards, Senior Engineer, Performance and Consumption, BSH Home Appliances Corporation (FNbG), 100 Bosch Blvd., Building 102, New Bern, NC 28562–6924. All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in Word Perfect,

Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

Issued in Washington, DC on March 24, 2011.

**Kathleen Hogan,**

*Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.*

January 11, 2011

The Honorable Catherine Zoi
Assistant Secretary, Energy Efficiency and Renewable Energy
U.S. Department of Energy
Mail Station EE–10
1000 Independence Avenue, SW
Washington, DC 20585

Via e-mail (*cathy.zoi@ee.doe.gov*) and overnight mail

**Re: Petition for Waiver and Application for Interim Waiver** concerning the measurement of water and energy used in the water softening regeneration process of Dishwasher having an Integrated Water Softener

Dear Assistant Secretary Zoi:

BSH Home Appliance Corporation ("BSH") hereby submits this Petition for Waiver and Application for Interim Waiver pursuant to 10 CFR 430.27, concerning the test procedure for measuring energy consumption of Dishwashers.

BSH is the manufacturer of household appliances bearing the brand names of Bosch, Thermador, and Gaggenau. Its appliances include dishwashers, washing machines, clothes dryers, refrigerator-freezers, ovens, and microwave ovens, and are sold worldwide, including in the United States. BSH's United States operations are headquartered in Huntington Beach, California. BSH's appliances are produced in the United States and Germany.

10 CFR 430.27(a)(1) provides that any interested person may submit a petition to waive for a particular basic model any requirement of Section 430.23, or of any appendix to this subpart, upon grounds that the basic model contains one or more design characteristics which either prevent testing of the basic model according to the prescribed test procedures, or the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics, or water consumption characteristics as to provide materially inaccurate comparative data. Additionally, 10 CFR 430.27 (b)(2) allows any applicant of a Petition of Waiver to also request an Interim Waiver if it can be demonstrated the likely success of the Petition for Waiver, while addressing the economic hardship and/or competitive disadvantage that is likely to result absent a favorable determination on the Application for Interim Waiver.

This request for Waiver is directed to Dishwashers containing a built-in or integrated water softener, specifically addressing the energy and water used in the regeneration process of the integrated water softener. This request for Waiver is similar to a request submitted by Whirlpool Corporation (Case No. DW–004). The Whirlpool Corporation Interim Waiver was granted on October 7, 2010.

BSH's Application for Interim Waiver will follow the same test methodology approved by DOE by its approval of the Whirlpool Corporation Application for Interim Waiver.

Based on the reasoning indicated herein, BSH submits that the testing of Dishwashers equipped with a water softener under the current DOE test procedure may lead to information that could be considered misleading to consumers.

*1. Identification of Basic Models.*

The basic Dishwasher models manufactured by BSH which contain an integrated water softener are as follows:

Bosch brand:
- SHX68E05UC
- SHE68E05UC
- SHX68E15UC
- SHE68E15UC
- SHV68E13UC
- SGE63E0#UC
- SHX58E15UC
- SHV58E13UC
- SHX58E2#UC

Gaggenau brand:
- DF261760
- DF260760

Kenmore brand:
- 630.13993.01#
- 630.13023.01#
- 630.13003.01#

*2. Background*

The design characteristic that is unique among the above listed models is an integrated water softener. The primary function of a water softener is to reduce the high mineral content of "hard" water. Hard water reduces the effectiveness of detergents leading to additional detergent usage. Hard water also causes increased water spots on dishware, resulting in the need to use more rinse aid to counterbalance this effect. "Hard" water can reduce customer satisfaction with Dishwasher performance resulting in increased pre-rinsing and/or hand washing as well as increased detergent and rinse agent usage.

The water softening process requires water usage for both the regeneration process and to flush the system. For purposes of this Waiver request, the term "regeneration" will include the water and energy used in both the flushing and regeneration process of the water softener. The water used in the regeneration process is in addition to the water used in the dish washing process. The water used in the regeneration process does not occur with each use of the Dishwasher. The frequency of the regeneration process is dependant upon an adjustable water softener setting that is controlled by the end user, and based on the home water hardness. Regeneration frequency will vary greatly depending upon the customer setting of the water softener. Data from the U.S. Geological Survey shows considerable variation in the water hardness within the U.S. and for many locations the use of a water softener is not necessary. Water hardness varies throughout the U.S. with the mean hardness of 217 mg/liter or 12.6 grains/gallon (based on information provided by the U.S. Geological Survey located at *http://water.usgs.gov/owq/hardness-alkalinity.html*).

**Calculations**

*Water Use*

- Based on the DOE Energy Test for Dishwashers, BSH Dishwashers with an internal water softener use an average of 5.89 liters of water per dish cleaning cycle.
- Based on an average U.S. water hardness of 12.6 grains/gallon, the internal BSH Dishwasher water softener system would be set on "4".
- Based on a BSH Dishwasher internal water softening system setting of "4" and the dishwasher using 5.89 liters of water per run, the water regeneration process would occur every 6th cycle.
- When using the Dishwasher 215 times per year (per DOE test procedure), the regeneration process would occur 35.8 times (36).
- The internal BSH water softening system uses 4.97 liters (5.0) per regeneration cycle.
- Many homes with hard water have the entire home water supply softened, negating the need for a Dishwasher specific water softener. Based on this data BSH further suggest that at least 50% of the homes with hard water that would purchase a high end dishwasher (any Dishwasher with an internal water softening system would be considered high end) would have entire home water softening systems. This would reduce the water consumption figures shown above by 50% or more.
  - $36 \times 5 \times 50\% = 90$ liters per year (23.78 gallons) or .42 liters (.11 gallons) each time the dishwasher is used.

*Energy Used in kWh*

- Formula $W = V \times T \times K$
  - V = Weighted Average Water Usage per DOE
  - T = Nominal water heater temperature rise of 39 °C
  - K = Specific heat of water 0.00115
- Calculated Energy use—$90 \times 39 \times .00115 = 4.04$ kWh/yr

*Summary*

- A Dishwasher built by BSH with an integrated water softener in a home with a 12.6 grain per gallon water hardness would be cycled through the water softening regeneration process approximately every 6 dish cleaning cycles. BSH estimates that 50% of homes with 12.6 grain per gallon hardness will have an entire home water softening system, negating the need for a Dishwasher specific internal water softener. When the water used in the water softener regeneration process is apportioned evenly over all dishwasher runs, the amount of energy and water usage per cycle is very low. Based on the assumptions provided, BSH estimates the typical water used in the internal Dishwasher water softener regeneration process at .42

liters (.11 gallons) per use; furthermore, using about 4.04 kWh per year to heat this water in the home hot water heater.

Note: Contrary to current DOE direction, the water used in the regeneration process has the separate and distinct purpose of softening water. It is BSH's opinion that this water and energy should not be included in the energy usage figures for washing dishes. BSH would suggest a similar approach as used in EN50242 for the Final Rule. EN 50242 does not include the water or energy used in the water softening process in the dishwasher energy consumption calculation.

*3. Requirements sought to be waived*

Dishwashers are subjected to test methods outlined in 10 CFR Part 430, Subpart B, App. C, Section 4.3, which specifies the method for the water energy calculation.

- To stay consistent with the recently approved Whirlpool waiver, BSH is requesting approval to estimate the water and energy used in the water softening process based on the design of the BSH Dishwasher and the calculations and assumptions outlined above.

*4. Grounds for Waiver and Interim Waiver*

10 CFR 430.27 (a) (1) provides that a Petition to waive a requirement of 430.23 may be submitted upon grounds that the basic model contains one or more design characteristics which either prevent testing of the basic model according to the prescribed test procedures, or the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data.

If a water softener regeneration process was to occur while running an energy test, the water usage would be overstated. In this case, the water energy usage would be unrepresentative of the product providing inaccurate data resulting in a competitive disadvantage to BSH.

Granting of an Interim Waiver in this case is justified since the prescribed test procedures would potentially evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. In addition, a similar Interim Waiver has been granted to Whirlpool Corporation.

5. Manufacturers of Similar Products and Affected Manufacturers

Web based research shows that at least two other manufacturers are currently selling dishwashers with an integrated water softener, Miele Inc. and Whirlpool Corporation (Waiver Granted).

Manufacturers selling dishwashers in the United States include AGA Marvel, Arcelik A.S., ASKO Appliances, Inc., Electrolux North America, Inc., Fagor America, Inc., Fisher & Paykel Appliances, GE Appliances and Lighting, Haier America, Indesit Company Sa, KuppersbuschUSA, LG Electronics USA, Miele, Inc., Samsung Electronics Co., Viking Range Corporation and Whirlpool Corporation.

BSH will notify all companies listed above (as well as AHAM), as required by the Department's rules, providing them with a copy of this Petition for Waiver and Interim Waiver.

*6. Conclusion*

BSH Home Appliances Corporation hereby requests approval of the Waiver petition and Interim Waiver. By granting said Waivers the Department of Energy will further ensure that water energy is measured in the same way by all Dishwasher Manufacturer's that have a integrated water softener. Further, BSH would request that these Waivers be in good standing until such time that the test procedure can be formally modified to account for integrated water softeners.

BSH Home Appliances certifies that all manufacturers of domestic Dishwashers as listed above have been notified by letter. Copies of these notifications are attached.

With Best Regards,

Mike Edwards
*Senior Engineer, Performance and Consumption*
*BSH Home Appliances Corporation (FNbG)*
*100 Bosch Blvd., Building 102*
*New Bern, NC 28562–6924*
*mike.edwards@bshg.com*
*www.boschappliances.com*
*Phone (252) 636–4334*
*Fax (252) 636–4450*

[FR Doc. 2011–7448 Filed 3–29–11; 8:45 am]

**BILLING CODE 6450–01–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:* EC11–54–000.
*Applicants:* Wildcat Power Holdings, LLC, Entegra Power Group LLC, Gila River Power, L.P.
*Description:* Joint Application for Authorization under section 203 of the Federal Power Act, Request for Waiver of Certain Commission Requirements, and Requests for Confidential Treatment and Expedited Treatment.
*Filed Date:* 03/22/2011.
*Accession Number:* 20110322–5163.
*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER10–1473–001; ER10–1474–001; ER10–1478–001; ER10–1451–001; ER10–1459–001; ER10–1458–001; ER10–1454–001; ER10–1453–001; ER10–2687–001; ER10–2688–003; ER10–2689–003; ER10–2727–001; ER10–2728–002; ER10–2729–002.
*Applicants:* Allegheny Energy Supply Company, LLC, Green Valley Hydro, LLC, FirstEnergy Generation Corp., Jersey Central Power & Light Co., Monongahela Power Company, Potomac Edison Company, FirstEnergy Nuclear Generation Corp., Buchanan Generation, LLC, FirstEnergy Solutions Corp., FirstEnergy Generation Mansfield Unit 1, Pennsylvania Power Company, West Penn Power Company, Firstenergy Operating Companies.
*Description:* Change-in-Status Report of FirstEnergy Generation Corp., et al. Regarding Merger of FirstEnergy Corp. and Allegheny Energy, Inc.
*Filed Date:* 03/21/2011.
*Accession Number:* 20110321–5194.
*Comment Date:* 5 p.m. Eastern Time on Monday, April 11, 2011.

*Docket Numbers:* ER10–1768–001.
*Applicants:* Public Service Electric and Gas Company.
*Description:* Public Service Electric and Gas Company submits tariff filing per 35: Compliance Filing pursuant to February 25, 2011 Order to be effective 3/22/2011.
*Filed Date:* 03/22/2011.
*Accession Number:* 20110322–5123.
*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER10–1770–001.
*Applicants:* PSEG Fossil LLC.
*Description:* PSEG Fossil LLC submits tariff filing per 35: Compliance Filing pursuant to February 25, 2011 Order to be effective 3/22/2011.
*Filed Date:* 03/22/2011.
*Accession Number:* 20110322–5119.
*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER10–1771–001.
*Applicants:* PSEG Nuclear LLC.
*Description:* PSEG Nuclear LLC submits tariff filing per 35: Compliance Filing pursuant to February 25, 2011 Order to be effective 3/22/2011.
*Filed Date:* 03/22/2011.
*Accession Number:* 20110322–5120.
*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER10–1789–002.
*Applicants:* PSEG Energy Resources & Trade LLC.
*Description:* PSEG Energy Resources & Trade LLC submits tariff filing per 35: Compliance Filing pursuant to February 25, 2011 Order to be effective 3/22/2011.
*Filed Date:* 03/22/2011.
*Accession Number:* 20110322–5118.
*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER10–1793–001.
*Applicants:* PSEG Power Connecticut LLC.
*Description:* PSEG Power Connecticut LLC submits tariff filing per 35: Compliance Filing pursuant to February

25, 2011 Order to be effective 3/22/2011.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5122.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER10–1891–001; *ER10–1896–001.*

*Applicants:* Citigroup Energy Canada ULC, Citigroup Energy Inc.

*Description:* Supplement to Notice of Non-Material Change in Status of Citigroup Energy Inc., et al.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5105.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER10–2497–003.

*Applicants:* Alliant Energy Corporate Services, Inc.

*Description:* Alliant Energy Corporate Services, Inc's Notice of Change in Status.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5106.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–2303–001.

*Applicants:* Southwest Power Pool, Inc.

*Description:* Southwest Power Pool, Inc. submits tariff filing per 35.17(b): Amendment to Attachment P Revisions to be effective 5/1/2011.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5110.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–2855–001.

*Applicants:* Avenal Park LLC.

*Description:* Avenal Park LLC submits tariff filing per 35.17(b): Amended Application for Market-Based Rate Authority to be effective 4/8/2011.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5140.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–2856–001.

*Applicants:* Sand Drag LLC.

*Description:* Sand Drag LLC submits tariff filing per 35.17(b): Amended Application for Market-Based Rate Authority to be effective 4/8/2011.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5139.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–2857–001.

*Applicants:* Sun City Project LLC.

*Description:* Sun City Project LLC submits tariff filing per 35.17(b): Amended Application for Market-Based Rate Authority to be effective 4/8/2011.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5138.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–3162–000.

*Applicants:* Public Service Company of New Mexico.

*Description:* Public Service Company of New Mexico submits tariff filing per 35.12: Service Agreement No. 372 TGP Granada 300 MW PTP Firm to be effective 1/1/2011.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5033.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–3163–000.

*Applicants:* Kansas Energy LLC.

*Description:* Kansas Energy LLC submits tariff filing per 35.1: Kansas Energy—Baseline eTariff 03222011 to be effective 3/22/2011.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5048.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–3164–000.

*Applicants:* Idaho Power Company.

*Description:* Idaho Power Company's OATT Refund Report.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5078.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–3165–000.

*Applicants:* Southern California Edison Company.

*Description:* Southern California Edison Company submits tariff filing per 35.13(a)(2)(iii): LGIA Amendment El Segundo Energy Center Project to be effective 3/23/2011.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5089.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–3166–000.

*Applicants:* AEP Texas Central Company.

*Description:* AEP Texas Central Company submits tariff filing per 35.15: 20110322 TCC–Laredo IA Cancellation to be effective 4/1/2011.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5090.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–3167–000.

*Applicants:* Alabama Power Company.

*Description:* Alabama Power Company submits tariff filing per 35.13(a)(2)(iii): Attachment S (GPCo) Filing to be effective 1/1/2011.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5101.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–3168–000.

*Applicants:* Xcel Energy Services Inc.

*Description:* Notice of Termination of Schedule C, Interruptible Power Service, to the Interconnection Agreement between Southwestern Public Service Company and Public Service Company of New Mexico, filed by Xcel Energy Services Inc.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5108.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–3169–000.

*Applicants:* Georgia Power Company.

*Description:* Georgia Power Company submits tariff filing per 35.13(a)(2)(iii): JEA Scherer Unit 4 TSA Updated Depreciation Rates Filing to be effective 1/1/2011.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5107.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–3170–000.

*Applicants:* Georgia Power Company.

*Description:* Georgia Power Company submits tariff filing per 35.13(a)(2)(iii): FP&L Scherer Unit 4 TSA Updated Depreciation Rates Filing to be effective 1/1/2011.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5109.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–3171–000.

*Applicants:* AEP Texas Central Company.

*Description:* AEP Texas Central Company submits tariff filing per 35.13(a)(2)(iii): 20110322 TCC–Magic Valley GIA to be effective 2/25/2011.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5130.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–3172–000.

*Applicants:* AEP Texas Central Company.

*Description:* AEP Texas Central Company submits tariff filing per 35.13(a)(2)(iii): 20110322 TCC–Los Vientos GIA to be effective 3/7/2011.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5141.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

*Docket Numbers:* ER11–3175–000.

*Applicants:* Entergy Services, Inc.

*Description:* Request of Entergy Services, Inc. for Clarifications or Waivers of Certain Affiliate Restrictions.

*Filed Date:* 03/22/2011.

*Accession Number:* 20110322–5162.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 12, 2011.

Take notice that the Commission received the following electric reliability filings:

*Docket Numbers:* RR08–4–000; *RR08–4–001; RR08–4–002; RR08–4–005.*

*Applicants:* North American Electric Reliability Corp.

*Description:* Supplemental Information to North American Electric Reliability Corporation Compliance Filing in Response to the Order on Violation Severity Levels Proposed by the ERO.

*Filed Date:* 03/21/2011.

*Accession Number:* 20110321–5138.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, April 05, 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.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

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: March 23, 2011.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. 2011–7419 Filed 3–29–11; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2011–0247; FRL–8868–8]**

## Pesticide Product; Registration Application

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

**ACTION:** Notice.

**SUMMARY:** EPA has received an application to register a pesticide product containing active ingredients not included in any previously registered pesticide products. Pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on this application.

**DATES:** Comments must be received on or before April 29, 2011.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2011–0247 by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPP–2011–0247. EPA's policy is that all comments received will be included in the 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 regulations.gov or e-mail. The 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the 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 docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket

Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Gina Casciano, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 605–0513; e-mail address: *casciano.gina@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

*A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. Registration Applications

EPA has received an application to register a pesticide product containing active ingredients not included in any previously registered pesticide products. Pursuant to the provisions of section 3(c)(4) of FIFRA, EPA is hereby providing notice of receipt and opportunity to comment on this application. Notice of receipt of this application does not imply a decision by the Agency on this application.

*File symbol:* 53575–UN. *Applicant:* Pacific Biocontrol Corporation, 14615 NE., Thirteenth Court, Suite A, Vancouver, WA 98685. *Product name:* Isomate-DWB. *Active ingredient:* Insecticides; (E,Z)-2,13–Octadecadien-1-yl Acetate and (E,Z)-2,13-Octadecdien-1-ol at 5.46% and 0.27%, respectively. *Proposed classification/Use:* Mating disruption of the dogwood borer *(Synanthedon scitula)* (G. Casciano).

## List of Subjects

Environmental protection, Pesticides and pest.

Dated: March 18, 2011.

**Keith A. Matthews,**

*Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.*

[FR Doc. 2011–7323 Filed 3–29–11; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2010–1021; FRL–8866–7]**

## Pesticide Products; Registration Applications

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

**ACTION:** Notice.

**SUMMARY:** EPA has received an application to register a pesticide product containing the active ingredient aldicarb. Pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on this application.

**DATES:** Comments must be received on or before April 29, 2011.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–1021, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions:* Direct your comments to docket ID number EPA–HQ–OPP–2010–1021. EPA's policy is that all comments received will be included in the 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 regulations.gov or e-mail. The 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the 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 docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility's telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Kimberly Nesci, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8059; e-mail address: *nesci.kimberly@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

### *B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. Registration Applications

EPA has received an application to register a pesticide product containing the active ingredient aldicarb. On August 16, 2010, shortly before this application for registration was filed, EPA and Bayer, the only current registrant of aldicarb, concluded a Memorandum of Agreement in which all uses of aldicarb would be cancelled. Pursuant to the provisions of section 3(c) (4) of FIFRA, EPA is hereby providing notice of receipt of the application to reinstate registrations of aldicarb, and an opportunity to comment on this application. Notice of receipt of this application does not imply a decision by the Agency on this application.

*File Symbol:* 87895–R. *Applicant:* Ag Logic LLC, 121 S. Estes Drive, Suite 101, Chapel Hill, NC 27514. *Product name:* Memik 15G. *Active ingredient:* Insecticide aldicarb at 15.0%. *Proposed classification/Use:* Food uses on the following use sites: Cotton, dry beans, peanuts, soybeans, sugar beets, and sweet potatoes. *Additional information:* The proposed application rate for cotton grown in California for side dress and split application is higher than the currently approved use rate on cotton. The proposed rate is 2.1 lbs. aldicarb/acre while the currently approved rate is 1.05 lbs. aldicarb/acre. Further, in contrast to the terms and conditions of the current time-limited aldicarb registration held by Bayer Corporation, Ag Logic LLC is seeking to obtain permanent registration for the uses cited in this unit.

## List of Subjects

Environmental protection, Pesticides and pest.

Dated: March 15, 2011.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

[FR Doc. 2011–6978 Filed 3–29–11; 8:45 am]

BILLING CODE 6560–50–P

---

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2011–0282: FRL–8868–9]**

## Registration Review; Pesticide Dockets Opened for Review and Comment and Other Docket Actions, and Availability of Updated Schedule

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

**ACTION:** Notice.

**SUMMARY:** EPA has established registration review dockets for the

pesticides listed in the table in Unit III.A. With this document, EPA is opening the public comment period for these registration reviews. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. Registration review dockets contain information that will assist the public in understanding the types of information and issues that the Agency may consider during the course of registration reviews. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment. This document also announces the Agency's intent not to open registration review dockets for alternaria destruens, 1,2-benzenedicarboxaldehyde, fenvalerate, triethylhexahydrotriazine, and zucchini yellow mosaic virus-weak strain. These pesticides currently do not have any actively registered pesticide products and, therefore, are not scheduled for review under the registration review program. EPA is also announcing the availability of an amended final work plan for the registration review of the pesticide diquat dibromide; this work plan has been amended to incorporate revisions to the data requirements. EPA is announcing the availability of an updated schedule for the pesticide registration review program which provides the timetable for opening dockets during the next 4 years of the program, from FY 2011 to 2014.

**DATES:** Comments must be received on or before May 31, 2011.

**ADDRESSES:** Submit your comments identified by the docket identification (ID) number for the specific pesticide of interest provided in the table in Unit III.A., by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail:* Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery:* OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions:* Direct your comments to the docket ID numbers listed in the table in Unit III.A. for the pesticides you are commenting on. EPA's policy is that all comments received will be included in the 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 regulations.gov or e-mail. The 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the 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 docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** *For pesticide specific information contact:* The Chemical Review Manager (CRM) or Regulatory Action Leader (RAL) identified in the table in Unit III.A. for the pesticide of interest.

*For general information contact:* Kevin Costello, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5026; fax number: (703) 308–8090; e-mail address: *costello.kevin @epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this action apply to me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farmworker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

### *B. What should I consider as I prepare my comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions

or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide(s) discussed in this document, compared to the general population.

## II. Authority

EPA is initiating its reviews of the pesticides identified in this document pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA, a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

The updated schedule for the registration review program is available as provided in 40 CFR 155.42(e) and 155.44 of the Procedural Regulations for Registration Review; Final Rule, document number EPA–HQ–OPP–2004–0404–0052 at regulations.gov.

## III. Registration Reviews

### *A. What action is the agency taking?*

As directed by FIFRA section 3(g), EPA is reviewing the pesticide registrations identified in the table in this unit to assure that they continue to satisfy the FIFRA standard for registration—that is, they can still be used without unreasonable adverse effects on human health or the environment. A pesticide's registration review begins when the Agency establishes a docket for the pesticide's registration review case and opens the docket for public review and comment. At present, EPA is opening registration review dockets for the cases identified in the following table.

TABLE—REGISTRATION REVIEW DOCKETS OPENING

| Registration review case name and number | Docket ID Number | CRM or RAL, telephone number, e-mail address |
|---|---|---|
| Asulam, 0265 | EPA–HQ–OPP–2010–0783 | Rusty Wasem, (703) 305–6979, *wasem.russell@epa.gov* |
| Carfentrazone-ethyl, 7422 | EPA–HQ–OPP–2010–0815 | Jose Gayoso, (703) 347–8652, *gayoso.jose@epa.gov* |
| Chlorhexidine derivatives, 3038 | EPA–HQ–OPP–2011–0069 | Rebecca von dem Hagen, (703) 305–6785, *vondem-hagen.rebecca@epa.gov* |
| Cryolite, 0087 | EPA–HQ–OPP–2011–0173 | Molly Clayton, (703) 603–0522, *clayton.molly@epa.gov* |
| Cyclanilide, 7018 | EPA–HQ–OPP–2011–0153 | Katherine St. Clair, (703) 347–8778, *stclair.katherine@epa.gov* |
| Ethalfluralin, 2260 | EPA–HQ–OPP–2011–0094 | Kelly Ballard, (703) 305–8126, *ballard.kelly@epa.gov* |
| Flufenacet, 7245 | EPA–HQ–OPP–2010–0863 | Wilhelmena Livingston, (703) 308–8025, *livingston.wilhelmena@epa.gov* |
| Lagenidium giganteum, 6068 | EPA–HQ–OPP–2011–0193 | Susanne Cerrelli, (703) 308–8077, *cerrelli.susanne@epa.gov* |
| Macleaya extract, 7024 | EPA–HQ–OPP–2011–0172 | Anne Overstreet, (703) 308–8068, *overstreet.anne@epa.gov* |
| Benzyladenine, 2040 | EPA–HQ–OPP–2011–0190 | Chris Pfeifer, (703) 308–0031, *pfeifer.chris@epa.gov* |
| p-Chloro-m-cresol, 3046 | EPA–HQ–OPP–2011–0071 | Seiichi Murasaki, (703) 347–0163, *murasaki.seiichi@epa.gov* |
| Sodium p-chloro-m-cresolate, 5011 | EPA–HQ–OPP–2011–0073 | Seiichi Murasaki, (703) 347–0163, *murasaki.seiichi@epa.gov* |
| Terbacil, 0039 | EPA–HQ–OPP–2011–0054 | Carissa Cyran, (703) 347–8781, *cyran.carissa@epa.gov* |
| Tetrakis(hydroxymethyl)phosphonium sulphate (THPS), 5034. | EPA–HQ–OPP–2011–0067 | Eliza Blair, (703) 308–7279, *blair.eliza@epa.gov* |
| Thifensulfuron, 7206 | EPA–HQ–OPP–2011–0171 | Kylie Rothwell, (703) 308–8055, *rothwell.kylie@epa.gov* |
| Tribenuron Methyl 7217 | EPA–HQ–OPP–2010–0626 | Kaitlin Keller, (703) 308–8172, *keller.kaitlin@epa.gov* |

EPA is also announcing that it will not be opening dockets for alternaria destruens, 1,2-benzenedicarboxaldehyde, fenvalerate, triethylhexahydrotriazine, and zucchini yellow mosaic virus-weak strain because these pesticides are not included in any products actively registered under FIFRA section 3. The Agency will take separate actions to cancel any remaining FIFRA section 24(c) Special Local Needs registrations with these active ingredients and to propose revocation of any affected tolerances that are not supported for import purposes only.

EPA is announcing the availability of an amended final work plan for the registration review of diquat dibromide. The work plan was revised to incorporate changes to the data requirements for registration review. The revised work plan clarifies which sediment toxicity studies are needed for diquat dibromide. Additionally, the amended work plan describes the need for three new ecological studies, in addition to the studies listed in the original final work plan. The diquat dibromide amended final work plan may be found in registration review docket EPA–OPP–2009–0846, which is available on-line at *http://regulations.gov.*

Lastly, EPA is announcing the availability of an updated registration review schedule which provides the timetable for opening dockets for the next 4 years of the program, from FY 2011 to FY 2014. EPA updates the registration review schedule at least once every year. The updated schedule and an explanation of the schedule are available on the Agency's Web site at *http://www.epa.gov/oppsrrd1/registration_review/schedule.htm.*

*B. Docket Content*

1. *Review dockets.* The registration review dockets contain information that the Agency may consider in the course of the registration review. The Agency may include information from its files including, but not limited to, the following information:

- An overview of the registration review case status.
- A list of current product registrations and registrants.
- **Federal Register** notices regarding any pending registration actions.
- **Federal Register** notices regarding current or pending tolerances.
- Risk assessments.
- Bibliographies concerning current registrations.
- Summaries of incident data.
- Any other pertinent data or information.

Each docket contains a document summarizing what the Agency currently knows about the pesticide case and a preliminary work plan for anticipated data and assessment needs. Additional documents provide more detailed information. During this public comment period, the Agency is asking that interested persons identify any additional information they believe the Agency should consider during the registration reviews of these pesticides. The Agency identifies in each docket the areas where public comment is specifically requested, though comment in any area is welcome.

2. *Other related information.* More information on these cases, including the active ingredients for each case, may be located in the registration review schedule on the Agency's Web site at *http://www.epa.gov/oppsrrd1/registration_review/schedule.htm.* Information on the Agency's registration review program and its implementing regulation may be seen at *http://www.epa.gov/oppsrrd1/registration_review.*

3. *Information submission requirements.* Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

- To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. The Agency may, at its discretion, consider data or information submitted at a later date.
- The data or information submitted must be presented in a legible and useable form. For example, an English translation must accompany any material that is not in English and a written transcript must accompany any information submitted as an audiographic or videographic record. Written material may be submitted in paper or electronic form.
- Submitters must clearly identify the source of any submitted data or information.
- Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.

As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed.

**List of Subjects**

Environmental protection, Pesticides and pests.

Dated: March 24, 2011.

**Peter Caulkin,**

*Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.*

[FR Doc. 2011–7321 Filed 3–29–11; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9288–2]**

## Science Advisory Board Staff Office; Request for Nominations; SAB Mercury Review Panel

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

**ACTION:** Notice.

**SUMMARY:** The EPA Science Advisory Board (SAB) Staff Office provides notice that the SAB will form a panel to conduct an independent review of EPA's Mercury Technical Support Document and is requesting additional public nominations of experts.

**DATES:** Nominations should be submitted by April 6, 2011 per instructions below.

**FOR FURTHER INFORMATION CONTACT:** Any member of the public wishing further information regarding this Notice and Request for Nominations may contact Dr. Angela Nugent, Designated Federal Officer (DFO), SAB Staff Office, by telephone/voice mail at (202) 564–2188; by fax at (202) 565–2098 or via e-mail at *nugent.angela@epa.gov,* General information concerning the EPA Science Advisory Board can be found at the EPA SAB Web site at *http://www.epa.gov/sab.*

**SUPPLEMENTARY INFORMATION:**

*Background:* The SAB was established pursuant to the Environmental Research, Development, and Demonstration Authorization Act (ERDAA), codified at 42 U.S.C. 4365, to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2.

On February 28, 2011 (76 FR 10896–10897) the EPA SAB Staff Office published a request for public nominations of experts to serve on a Clean Air Scientific Advisory Committee (CASAC) panel to conduct

an independent review of EPA's Mercury Technical Support Document. As described in that notice, the SAB Staff Office was responding to an EPA request for peer review of a March 2011 draft risk assessment for mercury, entitled *Technical Support Document: National-Scale Mercury Risk Assessment Supporting the Appropriate and Necessary Finding for Coal and Oil-Fired Electric Generating Unit.* This technical document was developed to support a proposed rule concerning regulation of hazardous air pollutants (HAPs) released from coal-burning electric generating units in the United States (U.S. EGUs) under Section 112(n)(1)(A) of the Clean Air Act (CAA). This regulation may potentially use a Maximally Achievable Control Device (MACT) approach to set a technology-based standard for reducing HAP emissions.

The SAB Staff Office has determined that the SAB, rather than CASAC, will conduct the review. Therefore, the new panel will be formed under the authority of the SAB. Nominations of experts in response to the February 28, 2011 **Federal Register** Notice will be considered for the new SAB panel and the period for nominations will be extended.

*Request for Nominations:* The SAB Staff Office is seeking nominations of nationally and internationally recognized experts with research experience and expertise in the following disciplines, particularly related to mercury: atmospheric fate, transport and modeling; aquatic fate, transport and modeling; bioaccumulation; human exposure; epidemiology; toxicology, including reproductive and neurotoxicology, biostatistics, and risk assessment.

*EPA contact for background information pertaining to this review:* For questions concerning the development of EPA's mercury assessment, on the Web site at *http://www.epa.gov/ttn/atw/utility/pro/hg_risk_tsd_3-17-11.pdf,* please contact Dr. Zachary Pekar at (919) 541–3704 or *pekar.zachary @epa.gov*.

*Process and Deadline for Submitting Nominations:* Any interested person or organization may nominate qualified individuals in the areas of expertise described above for possible service on this expert *ad hoc* Panel. Nominations should be submitted in electronic format (which is preferred over hard copy) following the instructions for "Nominating Experts to Advisory Panels and Ad Hoc Committees Being Formed" provided on the SAB Web site. The instructions can be accessed through the "Nomination of Experts" link on the blue navigational bar on the SAB Web site at *http://www.epa.gov/sab*. To receive full consideration, nominations should include all of the information requested.

EPA's SAB Staff Office requests: contact information about the person making the nomination; contact information about the nominee; the disciplinary and specific areas of expertise of the nominee; the nominee's curriculum vita; sources of recent grant and/or contract support; and a biographical sketch of the nominee indicating current position, educational background, research activities, and recent service on other national advisory committees or national professional organizations.

Persons having questions about the nomination procedures, or who are unable to submit nominations through the SAB Web site, should contact Dr. Angela Nugent, DFO, as indicated above in this notice. Nominations should be submitted in time to arrive no later than April 6, 2011. EPA values and welcomes diversity. In an effort to obtain nominations of diverse candidates, EPA encourages nominations of women and men of all racial and ethnic groups.

The EPA SAB Staff Office will acknowledge receipt of nominations. The names and biosketches of qualified nominees identified by respondents to this **Federal Register** notice, and additional experts identified by the SAB Staff, will be posted in a List of Candidates on the SAB Web site at *http://www.epa.gov/sab*. Public comments on this List of Candidates will be accepted for 21 calendar days. The public will be requested to provide relevant information or other documentation on nominees that the SAB Staff Office should consider in evaluating candidates.

For the EPA SAB Staff Office, a balanced subcommittee or review panel includes candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation), and the collective breadth of experience to adequately address the charge. In the SAB Mercury Technical Support Document Review Panel, the SAB Staff Office will consider public comments on the List of candidates, information provided by the candidates themselves, and background information independently gathered by the SAB Staff Office. Selection criteria to be used for Panel membership include: (a) Scientific and/or technical expertise, knowledge, and experience (primary factors); (b) availability and willingness to serve; (c) absence of financial conflicts of interest; (d) absence of an appearance of a lack of impartiality; and (e) skills working in committees, subcommittees and advisory panels; and, for the Panel as a whole, (f) diversity of expertise and viewpoints.

The SAB Staff Office's evaluation of an absence of financial conflicts of interest will include a review of the "Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency" (EPA Form 3110–48). This confidential form allows Government officials to determine whether there is a statutory conflict between that person's public responsibilities (which includes membership on an EPA Federal advisory committee) and private interests and activities, or the appearance of a lack of impartiality, as defined by Federal regulation. The form may be viewed and downloaded from the following URL address at *http://www.epa.gov/sab/pdf/epaform3110-48.pdf*.

The approved policy under which the EPA SAB Office selects subcommittees and review panels is described in the following document: *Overview of the Panel Formation Process at the Environmental Protection Agency Science Advisory Board* (EPA–SAB–EC–02–010), which is posted on the SAB Web site at *http://www.epa.gov/sab/pdf/ec02010.pdf*.

Dated: March 24, 2011.

**Anthony F. Maciorowski,**

*Deputy Director, EPA Science Advisory Board Staff Office.*

[FR Doc. 2011–7460 Filed 3–29–11; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Federal Communications Commission Recharters and Seeks Nominations for Membership on the Communications Security, Reliability, and Interoperability Council

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** The Federal Communications Commission (FCC or Commission) has rechartered and is seeking nominations and expressions of interest for membership on the Communications Security, Reliability, and Interoperability Council CSRIC or Council). The Council is a Federal Advisory Committee that provides guidance and expertise on best practices

and actions the Commission could take to ensure the optimal security, reliability and interoperability of communications systems (including telecommunications, public safety communications systems, and media) on key issues such as cybersecurity, Next General 9–1–1, next generation emergency alerting, and improvements to priority communications services.

**DATES:** Nominations and expressions of interest for membership must be submitted to the Federal Communications Commission no later than April 22, 2011.

**ADDRESSES:** Nominations should be sent to Lisa M. Fowlkes, Deputy Bureau Chief, Public Safety & Homeland Security Bureau, Federal Communications Commission, via e-mail at *lisa.fowlkes@fcc.gov;* via facsimile at 202–418–2817; or via U.S. mail at 445 12th Street, SW., Room 7–C753, Washington, DC 20554. Due to the extensive security screening of incoming U.S. mail, delivery of U.S. mail sent to the Commission may be delayed, and we encourage submission by e-mail or facsimile.

**FOR FURTHER INFORMATION CONTACT:** Lisa M. Fowlkes, Deputy Chief, Public Safety & Homeland Security Bureau, (202) 418–7452 (voice) or *lisa.fowlkes@fcc.gov* (e-mail) or Jeffery Goldthorp, Associate Chief for Cybersecurity and Communications Reliability, Public Safety & Homeland Security Bureau, (202) 418–1096 (voice) or *Jeffery.goldthorp@fcc.gov* (e-mail).

**SUPPLEMENTARY INFORMATION:** The FCC is seeking nominations and expressions of interest for membership on the Communications Security, Reliability, and Interoperability Council. The Council is a Federal Advisory Committee that provides guidance and expertise on best practices and actions the Commission could take to ensure the optimal security, reliability and interoperability of communications systems (including telecommunications, public safety communications systems, and media) on key issues such as cybersecurity, Next General 9–1–1, next generation emergency alerting, and improvements to priority communications services. On March 18, 2011, the FCC, pursuant to the Federal Advisory Committee Act (5 U.S.C. Appendix 2), renewed the charter for the CSRIC for a period of two years through March 18, 2013. Nominations and expressions of interest for membership must be submitted to the FCC no later than April 20, 2011. Procedures for submitting nominations and expressions of interest are set forth below.

**CSRIC's Mission**

Under its charter, CSRIC's duties may include:

- Developing and recommending best practices and actions the FCC can take that promote reliable 9–1–1, E9–1–1, and Next Generation 9–1–1 (NG9–1–1) service.
- Determining and making recommendations on whether and how NG9–1–1 can be extended to other N–1–1 services to ensure their reliability and cost-effective deployment.
- Identifying and recommending to the FCC a set of best practices to make communications networks, including broadband networks and VoIP systems, more secure, resilient, and defendable from Internet-based attacks.
- Developing recommendations for actions the FCC could consider to promote the development of a broadband-based, next generation alerting system that leverages advanced technologies and the Internet, including social media platforms, to distribute emergency alerts and warnings to the public.
- Identifying and recommending to the FCC actions to improve the functioning of the national security/emergency preparedness priority services programs: Government Emergency Telecommunications Service; Telecommunications Service Priority; and Wireless Priority Service.
- Making recommendations with respect to such additional topics as the FCC may specify.

**Membership**

The Commission seeks nominations and expressions of interest for membership on the Council. Members of the Council will be appointed from among Federal, State, tribal, and local government agencies and organizations; organizations representing users of communications systems, including the Internet; and other private-sector organizations to balance the expertise and viewpoints that are necessary to effectively address the issues to be considered. The Commission is particularly interested in receiving nominations and expressions of interest from individuals and organizations in the following categories:

- State, tribal, and/or local government agencies and organizations with expertise in communications issues;
- Federal government agencies with expertise in communications and/or homeland security matters;
- Communications service providers and organizations representing communications service providers, including wireline and wireless communications service providers, broadcast radio and television licensees, cable television operators and other multichannel video programming distributors, satellite communications service providers, interconnected Voice over Internet Protocol and other IP-enabled service providers, and Internet Service Providers.
- Online retailers, online technology service providers, Internet security companies, and other providers of online services.
- Organizations and other entities representing users of communications systems, such as organizations representing the business, finance, energy, education, health care, and similar sectors and consumer or community organizations, such as those representing people with disabilities, the elderly, those living in rural areas, and those representing populations that speak, as their primary language, languages other than English.
- Qualified representatives of other stakeholders and interested parties with relevant expertise.

Members of the CSRIC will be appointed either as Representatives or as Special Government Employees, as appropriate.

**Nominations/Expressions of Interest Procedures and Deadline**

Nominations should be received by the Commission as soon as possible, but no later than April 22, 2011. Nominations received after this date may not be considered. Organizations should nominate senior leadership level representatives, such as a Chief Executive Officer, Chief Technical Officer, or other senior-level staff or official. No specific nomination form is required. However, each nomination must include the following information:

- Name, title and organization of the nominee and a description of the sector or interest the nominee will represent;
- Nominee's mailing address, e-mail address, telephone number, and facsimile number; and
- A statement summarizing the nominee's qualifications and reasons why the nominee should be appointed to the CSRIC.
- A statement confirming that the nominee is not a registered federal lobbyist.

Please note this Notice is not intended to be the exclusive method by which the Commission will solicit nominations and expressions of interest to identify qualified candidates. However, all candidates for membership on the Council will be subject to the same evaluation criteria.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 2011–7474 Filed 3–29–11; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[WC Docket No. 05–337, CC Docket No. 96–45; DA 11–507]**

## Wireline Competition Bureau Seeks Comment on the Cellular South Licenses, Inc. and United States Cellular Corporation Joint Petition for Reconsideration of a High-Cost Universal Service Order

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice; solicitation of comments.

**SUMMARY:** In this document, the Wireline Competition Bureau seeks comment on a joint petition filed by Cellular South Licenses, Inc. and United States Cellular Corporation requesting that the Commission reconsider its decision amending a rule established by the *Interim Cap Order* to reclaim high-cost universal service support surrendered by a competitive eligible telecommunications carrier (ETC) when it relinquishes ETC status in a particular state.

**DATES:** Interested parties may file comments on the joint petition for reconsideration no later than April 14, 2011. Reply comments may be filed no later than April 25, 2011.

**ADDRESSES:** You may submit comments, identified by WC Docket No. 05–337 and CC Docket No. 96–45, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://fjallfoss.fcc.gov/ecfs2/*. Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: (202) 418–0530 or TTY: (202) 418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Kenneth Burnley, Telecommunications Access Policy Division, Wireline Competition Bureau, (202) 418–7400, TTY: (202) 418–0484.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Public Notice, DA 11–507 released on March 16, 2011. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, 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., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via the Internet at *http://www.bcpiweb.com*. It is also available on the Commission's Web site at *http://www.fcc.gov*.

The Wireline Competition Bureau invites interested parties to comment on a joint petition filed by Cellular South Licenses, Inc. and United States Cellular Corporation requesting that the Commission reconsider its decision amending its rules to reclaim high-cost universal service support surrendered by a competitive eligible telecommunications carrier (ETC) when it relinquishes ETC status in a particular state.

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121, May 1, 1998.

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the *ECFS: http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov*. Filers should follow the instructions provided on the Web site for submitting comments.
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

○ All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

○ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

○ U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

*In addition, one copy of each pleading must be sent to each of the following*:

- The Commission's duplicating contractor, Best Copy and Printing, Inc, 445 12th Street, SW., Room CY–B402, Washington, DC 20554; Web site: *http://www.bcpiweb.com*; phone: 1–800–378–3160; and
- Charles Tyler, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, SW., Room 5–A452, Washington, DC 20554; e-mail: *Charles.Tyler@fcc.gov*.

*People with Disabilities:* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *fcc504@fcc.gov*; phone: (202) 418–0530 or (202) 418–0432 (TTY).

Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC, 20554. Copies may also be purchased from the Commission's duplicating contractor, BCPI, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI through its Web site: *http://www.bcpiweb.com*, by e-mail at *fcc@bcpiweb.com*, by telephone at (202) 488–5300 or (800) 378–3160 (voice), (202) 488–5562 (TTY), or by facsimile at (202) 488–5563.

Federal Communications Commission.

**Trent Harkrader,**

*Division Chief, Telecommunications Access Policy Division.*

[FR Doc. 2011–7384 Filed 3–29–11; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL MARITIME COMMISSION

### Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

*Agreement No.:* 011929–003.

*Title:* Hapag-Lloyd/Zim Mediterranean Slot Exchange Agreement.

*Parties:* Hapag-Lloyd AG and Zim Integrated Shipping Services, Ltd.

*Filing Party:* Wayne Rohde, Esq.; Cozen O'Connor; 627 I Street, NW.; Suite 1100; Washington, DC 20006.

*Synopsis:* The amendment would convert the Agreement from slot exchange to a one-way space charter, delete the U.S. Gulf Coast from the scope of the Agreement, revise the arbitration provisions, and rename the Agreement as the Hapag-Lloyd/Zim Mediterranean Space Charter Agreement.

*Agreement No.:* 012070–002.

*Title:* CSCL/ELJSA Vessel Sharing Agreement-Asia and Mexico, US East Coast Service.

*Parties:* China Shipping Container Lines Co., Ltd.; China Shipping Container Lines (Hong Kong) Co., Ltd.; and Evergreen Lines Joint Service Agreement.

*Filing Party:* Tara L. Leiter, Esq.; Blank Rome, LLP; Watergate; 600 New Hampshire Avenue NW.; Washington, DC 20037.

*Synopsis:* The amendment adds United Arab Shipping Company S.A.G. as a party to the agreement.

*Agreement No.:* 012114–001.

*Title:* POS/TSL Vessel Sharing Agreement.

*Parties:* Hainan P O Shipping Co., Ltd., and T.S. Lines Ltd.

*Filing Party:* Neal A. Mayer, Esq.; Hoppel, Mayer, & Coleman; 1050 Connecticut Avenue, NW., 10th Floor; Washington, DC 20036.

*Synopsis:* The amendment adds South Korea to the geographic scope and increases the number of services under the agreement.

*Agreement No.:* 012121.

*Title:* Coscon/Hanjin/WHL/PIL Vessel Sharing Agreement.

*Parties:* COSCO Container Lines Company Ltd.; Hanjin Shipping Co., Ltd.; Pacific International Lines (PTE) Ltd.; and Wan Hai Lines Ltd.

*Filing Party:* Robert B. Yoshitomi, Esq.; Nixon Peabody LLP; Gas Company Tower; 555 West Fifth Street, 46th Floor; Los Angeles, CA 90013.

*Synopsis:* The agreement authorizes the parties to exchange slots and coordinate sailings in the trades between Japan, China, and the Pacific coast of the United States.

By Order of the Federal Maritime Commission.

Dated: March 25, 2011.

**Karen V. Gregory,**

*Secretary.*

[FR Doc. 2011–7486 Filed 3–29–11; 8:45 am]

**BILLING CODE 6730–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–9978–N4]**

### Public Meeting of the Consumer Operated and Oriented Plan (CO–OP) Advisory Board, April 15, 2011

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

**ACTION:** Notice of meeting.

**SUMMARY:** This notice announces the fourth meeting of an advisory committee to the Center for Consumer Information and Insurance Oversight (CCIIO) in accordance with the Federal Advisory Committee Act. The meeting is open to the public and will be conducted by telephone. The purpose of the meeting is to assist and advise the Secretary of the Department of Health and Human Services' through CCIIO strategy to foster the creation of qualified nonprofit consumer-operated health insurance issuers.

**DATES:** *Meeting Date:* April 15, 2011 at 1 p.m. (eastern daylight time (e.d.t.)). *Meeting Registration and Written Comments:* Anne Bollinger, Center for Consumer Information and Insurance Oversight, CMS, 200 Independence Avenue, SW., Washington, DC 20201, 301–492–4395, Fax: 301–492–4462, or contact by e-mail at *anne.bollinger@hhs.gov.* Written comments must be submitted in Word format. *Deadline for Requesting Special Accommodations:* April 12, 2011, 5 p.m., e.d.t.

**ADDRESSES:** *Meeting Phone Access:* Participants should dial into the toll free phone number (877) 917–7130, and provide the following code to the operator: HHS.

*Registration:* The meeting is open to the public and only available through the toll free number. Persons wishing to attend this meeting must register by contacting the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

**FOR FURTHER INFORMATION CONTACT:** Anne Bollinger, 301–492–4395. Press inquiries are handled through CCIIO's Press Office at (202) 690–6343.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

The purpose of the meeting is to assist and advise the Secretary of the Department of Health and Human Services (the Secretary) (the Department) through the Center for Consumer Information and Insurance Oversight (CCIIO) on the Department's strategy to foster the creation of qualified consumer-operated nonprofit health insurance issuers (CO–OPs). Specifically, the advisory committee (the Committee) will advise the Secretary concerning the award of grants and loans related to section 1322 of the Patient Protection and Affordable Care Act (the Affordable Care Act), entitled "Federal program to assist establishment and operation of nonprofit, member run health insurance issuers." In these matters, the Committee will consult with all components of the Department, other Federal entities, and non-Federal organizations, as appropriate; and examine relevant data sources to assess the grant and loan award strategy to provide recommendations to CCIIO.

#### II. Meeting Agenda

The Committee will present its proposed report and recommendations as agreed to in substance at the March 14, 2011 advisory committee meeting and will conduct a vote of the Committee on whether to approve the report as its recommendation to CCIIO concerning the grant and loan award strategy for CO–OPs. We intend to make background material available to the public no later than 2 business days prior to the meeting. If we are unable to post the background material on our Web site prior to the meeting, the background material will be posted on

the Web site after the meeting, at *http://cciio.cms.gov/.*

Individuals requiring special accommodations must contact the Designated Federal Official (DFO) via the contact information specified in the **FOR FURTHER INFORMATION CONTACT** section of this notice by the date listed in the **DATES** section of this notice.

We are committed to the orderly conduct of its advisory committee meetings. We refer readers to our Web site at *http://cciio.cms.gov/* for procedures on public conduct during advisory committee meetings.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: March 25, 2011.

**Donald M. Berwick,**

*Administrator, Centers for Medicare & Medicaid Services.*

[FR Doc. 2011–7484 Filed 3–29–11; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Proposed Information Collection Activity; Comment Request

*Title:* Work Participation and TANF/WIA Coordination Project.

*OMB No.:* New collection.

*Description:* The Administration for Children and Families (ACF) is proposing an information collection activity as part of the Work Participation and TANF/WIA Coordination Project. The proposed information collection consists of semi-structured interviews with key state Temporary Assistance for Needy Families (TANF) and Work Investment Act (WIA) respondents on questions of engagement in additional work activities and expenditures of other benefits and services as well as questions concerning TANF/WIA Coordination. 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. In addition, it will provide documentation of positive TANF/WIA coordination activities.

*Respondents:* State administrators responsible for the TANF and WIA Programs.

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: March 24, 2011.

**Steven M. Hanmer,**

*Reports Clearance Officer.*

[FR Doc. 2011–7338 Filed 3–29–11; 8:45 am]

**BILLING CODE 4184–09–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Comment Request

*Title:* Evaluation of Adolescent Pregnancy Prevention Approaches—First Follow-up Data Collection.

*OMB No.:* ICRAS: 0970–0360.

*Description:* The Administration for Children and Families (ACE), U.S. Department of Health and Human Services (HHS), is proposing a data collection activity as part of the Evaluation of Adolescent Pregnancy Prevention Approaches (PPA). PPA is a random assignment evaluation designed to result in rigorous evidence on effective ways to reduce teen pregnancy. The evaluation will document and test a range of pregnancy prevention approaches in up to eight program demonstration sites. The findings of the evaluation will be of interest to the general public, to policy makers, and to organizations interested in teen pregnancy prevention.

This request for comment follows on a 60-Day **Federal Register** Public Comment Request Notice, published on Monday, July 12, 2010, pp. 39695–39696, with the document identifier of OS–0990–New.

This proposed information collection activity focuses on collecting follow-up data from a self-administered questionnaire which will be analyzed to determine program effects. Through a survey instrument, respondents will be asked to answer questions about demographics and risk and protective factors related to teen pregnancy.

*Respondents:* The data will be collected through private, self-administered questionnaires completed by study participants, *i.e.* adolescents assigned to a select school or community teen pregnancy prevention program or to a control group. Surveys will be distributed and collected by trained professional staff.

ANNUAL BURDEN ESTIMATES

| Instrument | Annual number of respondents | Number of responses | Average burden per hours response | Total annual burden hours |
|---|---|---|---|---|
| First Follow-up Instrument | 3,060 | 1 | 0.5 | 1,530. |
| *Estimated Total Annual Burden Hours:* | | | | 1,530. |

*Additional Information:*

Copies of the proposed collection may be obtained 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. All requests should be identified by the title of the information collection. *E-mail address: OPREinfocollection@acf.hhs.gov.*

*OMB Comment:*

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following:

Office of Management and Budget, Paperwork Reduction Project, *Fax:* 202–395–6974, *Attn:* Desk Officer for the Administration for Children and Families.

Dated: March 24, 2011.

**Seth F. Chamberlain,**

*OPRE Reports Clearance Officer.*

[FR Doc. 2011–7337 Filed 3–29–11; 8:45 am]

**BILLING CODE 4184–07–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Proposed Information Collection Activity: Comment Request

*Title:* Personal Responsibility Education Program (PREP) Multi Component Evaluation—Design Survey.

*OMB No.:* New Collection.

*Description:* The Family and Youth Services Bureau (HHS/ACF/ACYF/FYSB) and the Office of Planning, Research, and Evaluation (HHS/ACF/OPRE) in the Administration for Children and Families (ACF) propose a data collection activity as part of the Personal Responsibility Education Program (PREP) Multi Component Evaluation.

In addition to other activities, the PREP Evaluation will document the design of the PREP State grant programs via data gathered from States and selected sub-awardees funded by PREP. The findings will be of interest to the general public, federal and state policy-makers, PREP sub-awardees, community-based organizations, and other organizations interested in teen pregnancy prevention.

The proposed activity involves the collection of information through telephone conversations or in-person interviews held with administrators and program staff at the State and sub awardee level. The data collection instrument will focus on information related to program context, administration, and design. This includes, but is not limited to: Program goals and strategy/approach, program setting, population characteristics, state-level requirements and processes, program monitoring, and training and technical assistance.

*Respondents:* State Level Coordinators; Program Directors; Program Staff; General Staff; Schools and Organizations; and Community-Based Organizations.

ANNUAL BURDEN ESTIMATES DESIGN SURVEY

| Instrument | Annual number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| Discussion Guide for use with State Level Coordinators and State-Level Staff | 120 | 1 | 1 | 120 |
| Discussion Guide for use with Program Staff; Schools and Organizations; and Community-Based Organizations | 120 | 1 | 1 | 120 |

Estimated Annual Burden Sub-total for Field Clearance: 240.

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: March 23, 2011.

**Seth F. Chamberlain,**

*Reports Clearance Officer.*

[FR Doc. 2011–7340 Filed 3–29–11; 8:45 am]

**BILLING CODE 4184–37–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2010–N–0492]**

### Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Medical Devices: Recommended Glossary and Educational Outreach To Support Use of Symbols on Labels and in Labeling of In Vitro Diagnostic Devices Intended for Professional Use

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Medical Devices: Recommended Glossary and Educational Outreach to Support Use of Symbols on Labels and in Labeling of In Vitro Diagnostic Devices Intended for Professional Use" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

**FOR FURTHER INFORMATION CONTACT:** Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov*.

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of January 7, 2011 (76 FR 1169), the Agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. 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. OMB has now approved the information collection and has assigned OMB control number 0910–0553. The approval expires on March 31, 2014. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

Dated: March 24, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–7387 Filed 3–29–11; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2010–N–0606]**

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Additional Listing Information for Medical Device Registration and Listing

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Fax written comments on the collection of information by April 29, 2011.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, *Attn:* FDA Desk Officer, *Fax:* 202–395–7285, or e-mailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0387. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *e-mail: Daniel.Gittleson@fda.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

#### Additional Listing Information for Medical Device Registration and Listing—(OMB Control Number 0910–0387)—Extension

The Food and Drug Administration Amendments Act of 2007 (FDAAA), enacted September 27, 2007, requires that device establishment registrations and listings under 21 U.S.C. 360(p) (including the submission of updated information) be submitted to the Secretary of Health and Human Services (the Secretary) by electronic means, unless the Secretary grants a request for waiver of the requirement, because the use of electronic means is not reasonable for the person requesting the waiver. The collections of information under sections 222, 223, and 224 of FDAAA have been approved under OMB control number 0910–0625. Registration by electronic means for device establishments replaced FDA Forms 2891 and 2891a, "Registration of Device Establishment," and FDA Form 2892, "Medical Device Listing," with FDA Form 3673, "Device Registration and Listing Module." The scope of this information collection addresses only the reporting and recordkeeping requirements by non-electronic means under § 807.31 (21 CFR 807.31).

Under § 807.31(a) through (d), each owner or operator is required to maintain an historical file containing the labeling and advertisements in use on the date of initial listing, and in use after October 10, 1978, but not before the date of initial listing. The owner or operator must maintain in the historical file any labeling or advertisements in which a material change has been made anytime after initial listing, but may discard labeling and advertisements from the file 3 years after the date of the last shipment of a discontinued device by an owner or operator. Section 807.31(e) requires that the owner or operator be prepared to submit to FDA copies of: (1) All device labeling, (2) all device labeling and representative advertising, or (3) only representative package inserts, depending upon whether the device is subject to the regulatory controls under sections 514 and 515 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360d and 360e), or restrictions imposed by 21 CFR 801.109 or otherwise by section 520(e) of the FD&C Act (21 U.S.C. 360j(e)).

The information collected under these provisions is used by FDA to identify: (1) Firms subject to FDA's regulations, (2) geographic distribution of firms in order to effectively allocate FDA's field resources for inspections, and (3) the class of the device that determines the frequency of inspection. As a result, when complications occur with a particular device or component, all manufacturers of similar or related devices can easily be identified.

The likely respondents to this information collection are domestic and foreign device establishments who must register and submit a device list to FDA, *e.g.,* establishments engaged in the manufacture, preparation, propagation, compounding, assembly, or processing of medical devices intended for human use and commercial distribution.

The annual respondent reporting burden for device establishment

registrations and listings for additional information is estimated to be 12,375 hours, and the annual respondent recordkeeping burden is estimated to be 45,000 hours. Therefore, the total burden hours for this collection are estimated to be 57,375. The estimates cited in tables 1 and 2 of this document are based primarily on fiscal year 2010 data from current systems and on conversations with industry and trade association representatives.

In the **Federal Register** of December 7, 2010 (75 FR 76008), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

| 21 CFR section | No. of respondents | No. of responses per respondent | Total annual respondents | Average burden per response (in hours) | Total hours |
|---|---|---|---|---|---|
| 807.31(d)(2) | 2,250 | 1 | 2,250 | 0.5 | 1,125 |
| 807.31(e) | 22,500 | 1 | 22,500 | 0.5 | 11,250 |
| Total | | | | | 12,375 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

| 21 CFR section | No. of record-keepers | No. of records per record-keeper | Total annual records | Average burden per recordkeeping (in hours) | Total hours |
|---|---|---|---|---|---|
| 807.31(a) to (c) | 22,500 | 4 | 90,000 | 0.5 | 45,000 |
| Total | | | | | 45,000 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: March 24, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–7389 Filed 3–29–11; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2011–N–0002]**

### Medical Device Epidemiology Network 2011: Second Annual Public Workshop

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of public workshop.

The Food and Drug Administration (FDA) is announcing a public workshop entitled "Medical Device Epidemiology Network (MDEpiNet) 2011: Second Annual Public Workshop." The purpose of the public workshop is to provide a public update on the development of MDEpiNet and to facilitate discussion among FDA and all stakeholders with expertise in epidemiology and health services research on issues related to the methodology for studying medical device performance.

**DATE AND TIME:** The public workshop will be held on April 25, 2011 from 8 a.m. to 5 p.m. Participants are encouraged to arrive early to ensure time for parking and security screening before the meeting. Registration will begin at 7 a.m.

**LOCATION:** The public workshop will be held at the FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31, Rm. 1503 (the Great Room), Silver Spring, MD 20993.

**CONTACTS:** Mary Beth Ritchey, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Avenue, Silver Spring, MD 20993, 301–796–6638, *e-mail: MaryElizabeth.Ritchey@fda.hhs.gov;* or Ellen Pinnow, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–6066, *e-mail: Ellen.Pinnow@fda.hhs.gov.*

*Registration:* Registration is available through April 15, 2011, at the following Web site: *http://fda-ws.s-3.net/EpiNetWSApr11/.* There is no fee to attend the workshop, but attendees must register in advance. Registration will be on a first-come, first-served basis and we ask that one person per institution be selected to represent the entity at the workshop. Non-U.S. citizens are subject to additional security screening, and they should register as soon as possible. If you need special accommodations because of a disability, please contact Mary Beth Ritchey (*see* **CONTACTS**) at least 7 days before the public workshop.

**SUPPLEMENTARY INFORMATION:**

#### I. Why are we holding this public workshop?

The purpose of the public workshop is to facilitate continuing discussion among FDA, the academic epidemiology and health services research community, and all stakeholders on issues related to the methodology of studies for medical device performance. We aim to describe and solicit feedback on the establishment of a network that works with FDA experts to determine the evidence gaps and questions, datasets and approaches for conducting robust analytic studies and improve our understanding of the performance of medical devices (including comparative effectiveness studies). We also aim to reach out to stakeholders to initiate development of scientific, methodology, and device-area priorities for MDEpiNet.

#### II. Who is the target audience for this public workshop? Who should attend this public workshop?

This workshop is open to all interested parties. The target audience is comprised of academic researchers with experience in epidemiology or health services research with an interest in medical device outcome and epidemiologic study methodology.

**III. What are the topics we intend to address at the public workshop?**

We intend to discuss a large number of issues at the workshop, including, but not limited to the following:

- Establishment of the MDEpiNet infrastructure,
- Gaps and challenges in medical device outcomes and epidemiologic studies,
- Opportunities for medical device epidemiologic research and partnerships between the Center for Devices and Radiological Health and academia.

**IV. Where can I find out more about this public workshop?**

Background information on the public workshop, registration information, the agenda, information about lodging, and other relevant information will be posted, as it becomes available, on the Internet at *http://fda-ws.s-3.net/EpiNetWSApr11/.*

Dated: March 25, 2011.

**Leslie Kux,**

*Acting Assistant Commissioner for Policy.*

[FR Doc. 2011–7434 Filed 3–29–11; 8:45 am]

**BILLING CODE 4160–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### National Forum for State and Territorial Chief Executives (National Forum) Program Cooperative Agreement

**AGENCY:** Health Resources and Services Administration (HRSA), HHS.

**ACTION:** Notice of Non-competitive One-Year Extension With Funds for the National Forum for State and Territorial Chief Executives (National Forum) Program Cooperative Agreement.

**SUMMARY:** HRSA will be providing a one-year extension with funds in the amount authorized in fiscal year (FY) 2010 to support activities that focus on cross-cutting publicly-funded health program integration and health access issues identified by the State and Territory governors and their senior health policy advisors, including addressing the needs of uninsured, underinsured and special needs populations, oral health, border health and health information technology as well as HRSA's overall strategic goals.

**SUPPLEMENTARY INFORMATION:**

*Cooperative Agreement Recipient of Record:* National Governors Association Center for Best Practices (NGA), Washington, DC.

*Original Period of Support:* April 1, 2008, to March 31, 2011.

*Amount of Supplement Award:* $160,000.

*Authority:* Sections 241 and 301 of the Public Health Service Act, as amended (42 U.S.C. 238J and 241 respectively).

*CFDA Number:* 93.224.

*Justification for the Exception to Competition*: The National Forum cooperative agreement provides a unique vehicle for HRSA to collaborate with the Nation's governors on their shared priorities, and provides opportunities through which governors can build on lessons others states have learned in addressing similar health policy challenges. A 1-year extension with funds will allow the National Forum to facilitate ongoing communication on emerging strategies addressing common priorities, public health policy, and governance issues affecting States and Territories thereby allowing HRSA to reevaluate the focus and implementation of this Program prior to the FY 2012 competition for the next 3-year project period. Further funding beyond March 31, 2012, will be competitively awarded in FY 2012.

**FOR FURTHER INFORMATION CONTACT:** Mark Pincus, Director, Office of Policy Analysis, HRSA, via *e-mail: mpincus@hrsa.gov* or via *telephone:* 301–443–5911.

Dated: March 23, 2011.

**Mary K. Wakefield,**

*Administrator.*

[FR Doc. 2011–7444 Filed 3–29–11; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK Central Repositories Non-Renewable Sample Access (X01)-Hepatitis C.

*Date:* April 26, 2011.

*Time:* 2 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call)

*Contact Person:* Najma Begum, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 749, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8894, *begumn@niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: March 24, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–7500 Filed 3–29–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Allergy and Infectious Diseases; 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:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; "Mouse Resource".

*Date:* April 20, 2011.

*Time:* 1 p.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call)

*Contact Person:* Gregory P. Jarosik, PhD, Scientific Review Administrator, Scientific

Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, (301) 496–0695, *gjarosik@niaid.nih.gov.*

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Immune Regulation and Tolerance.

*Date:* May 9–10, 2011.

*Time:* 11 a.m. to 6:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call)

*Contact Person:* Lakshmi Ramachandra, PhD, Scientific Review Officer, Scientific Review Program, DEA/NIAID/NIH/DHHS, 6700–B Rockledge Drive, MSC–7616, Room 3264, Bethesda, MD 20892–7616, 301–496–2550, *Ramachandral@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: March 24, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–7499 Filed 3–29–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel; Mentored Patient-Oriented Research Career Development Award.

*Date:* April 27, 2011 .

*Time:* 10 a.m. to 11:30 a.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852 (Telephone Conference).

*Contact Person:* Anne Krey, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6908, *kreya@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: March 24, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–7498 Filed 3–29–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel; NIH Summer Research Experience Program.

*Date:* April 20, 2011.

*Time:* 10 a.m. to 12 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852 (Telephone Conference).

*Contact Person:* Anne Krey, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6908, *kreya@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: March 24, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–7496 Filed 3–29–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Center for Complementary and Alternative Medicine Announcement of Stakeholder Roundtable

**ACTION:** Notice.

**SUMMARY:** The National Center for Complementary and Alternative Medicine (NCCAM) invites the public to a Stakeholder Roundtable. Attendees will meet the NCCAM Director and discuss the Center's new strategic plan, activities, and priorities. The Roundtable will take place: 8:30 a.m.–11 a.m., Tuesday, April 26, 2011, Building 31, 6C, Room 10, National Institutes of Health, 9000 Rockville Pike, Bethesda, MD.

To allow for meaningful interaction, space is limited. To attend, please RSVP by Friday, April 1, 2011, by contacting Carina May at 301–915–9763 or *cmay@thehillgroup.com.*

Representatives from professional medical societies as well as consumer organizations are particularly encouraged to attend.

*Background:* The National Center for Complementary and Alternative Medicine (NCCAM) was established in 1999. The mission of NCCAM is to define, through rigorous scientific investigation, the usefulness and safety of complementary and alternative medicine interventions and their roles in improving health and health care

To date, NCCAM's efforts to meet its mission have been guided by NCCAM's strategic plans located on the NCCAM Web site at *http://nccam.nih.gov/about/plans/.*

*Request for Participation:* Representatives of stakeholder organizations are invited to provide input into the NCCAM's priorities and activities at a Stakeholder Roundtable. This event will give NCCAM stakeholders an opportunity to voice their opinions regarding future directions for research, training, outreach, and integration in

complementary and alternative medicine (CAM). The Dialogue will be held: 8:30 a.m.–11 a.m., Tuesday, April 26, 2011, Building 31, 6C, Room 10, National Institutes of Health, 9000 Rockville Pike, Bethesda, MD.

NCCAM's director will provide an overview of NCCAM's history and current activities, followed by a discussion with attendees. Representatives from the complementary and alternative medicine community are particularly encouraged to attend. To allow for meaningful interaction, space is limited. To attend, please RSVP by Friday, April 1, 2011, by contacting Carina May at 301–915–9763 or *cmay@thehillgroup.com.*

**FOR FURTHER INFORMATION CONTACT:** To request more information, visit the NCCAM Web site at *http://nccam.nih.gov/,* or call 301–915–9763 or *cmay@thehillgroup.com.*

Dated: March 23, 2011.

**Christy Thomsen,**

*Director, Office of Communications and Public Liaison, National Center for Complementary and Alternative Medicine, National Institutes of Health.*

[FR Doc. 2011–7495 Filed 3–29–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Library of Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Library of Medicine Special Emphasis Panel; Conflicteds.

*Date:* May 31, 2011.

*Time:* 12 p.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Library of Medicine, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20817 (Telephone Conference Call).

*Contact Person:* Zoe H. Huang, MD, Scientific Review Officer, Extramural Programs, National Library of Medicine, NIH, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892–7968, 301–594–4937, *huangz@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: March 24, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–7494 Filed 3–29–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Mental Health; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Mental Health Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Advisory Mental Health Council.

*Date:* May 5–6, 2011.

*Closed:* May 5, 2011, 12 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications and review the activities of the NIMH Intramural Research Programs.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Conference Room C/D/E, Rockville, MD 20852.

*Open:* May 5, 2011, 4:15 p.m. to 5:15 p.m.

*Agenda:* Discussion of NIMH program and policy issues.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Conference Room C/D/E, Rockville, MD 20852.

*Open:* May 6, 2011, 8:30 a.m. to 12:30 p.m.

*Agenda:* Presentation of NIMH Director's report and discussion of NIMH program and policy issues.

*Place:* National Institutes of Health, Building 31, C Wing, 31 Center Drive, 6th Floor, Conference Room 10, Bethesda, MD 20892.

*Contact Person:* Jane A. Steinberg, PhD, Director, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6154, MSC 9609, Bethesda, MD 20892–9609, 301–443–5047.

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nimh.nih.gov/about/advisory-boards-and-groups/namhc/index.shtml,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: March 23, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–7491 Filed 3–29–11; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Mental Health Special Emphasis Panel; In-vivo ADMET Testing Services for Neurotherapeutics Development.

*Date:* April 26, 2011.

*Time:* 9 a.m. to 5 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* The Mandarin Oriental, 1330 Maryland Avenue, SW., Washnigton, DC 20024.

*Contact Person:* Vinod Charles, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6151, MSC 9606, Bethesda, MD 20892–9606, 301–443–1606, *charlesvi@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: March 23, 2011.

**Jennifer S. Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2011–7489 Filed 3–29–11; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5480–N–30]**

### Notice of Submission of Proposed Information Collection to OMB Public/Private Partnerships for the Mixed-Finance Development of Public Housing Units

**AGENCY:** Office of the Chief Information Officer, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

In 1998, the HUD Reform Act allowed Mixed-Finance public and affordable housing development. Mixed-Finance is the process where public housing funds are mixed with other government and non-government financing in order to encourage the development of mixed-income housing that includes public housing units. In addition, Public Housing Authorities (PHAs) may use other sources of financing to supplement their development or rehabilitation of public housing units. The form and agreements in this Information Collection pertain to the financial closing of a Mixed-Finance housing project's development or rehabilitation. They describe the ownership of, type, size and number of, construction period and permanent financing of, the restrictions on the usage of, and HUD and Federal Government rights to, the public, affordable and market rate rental housing units that are being developed or rehabilitated.

**DATES:** *Comments Due Date: April 29, 2011.*

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2577–Pending) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; *e-mail OIRA-Submission@omb.eop.gov; fax:* 202–395–5806.

**FOR FURTHER INFORMATION CONTACT:** Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

*Title of Proposal:* Public/Private Partnerships for the Mixed-Finance Development of Public Housing Units.

*OMB Approval Number:* 2577–Pending.

*Form Numbers:* HUD–50030, HUD–50029.

*Description of the Need For the Information and its Proposed Use:* In 1998, the HUD Reform Act allowed Mixed-Finance public and affordable housing development. Mixed-Finance is the process where public housing funds are mixed with other government and non-government financing in order to encourage the development of mixed-income housing that includes public housing units. In addition, Public Housing Authorities (PHAs) may use other sources of financing to supplement their development or rehabilitation of public housing units. The form and agreements in this Information Collection pertain to the financial closing of a Mixed-Finance housing project's development or rehabilitation. They describe the ownership of, type, size and number of, construction period and permanent financing of, the restrictions on the usage of, and HUD and Federal Government rights to, the public, affordable and market rate rental housing units that are being developed or rehabilitated.

*Frequency of Submission:* On occasion.

| | Number of respondents | Annual responses | × | Hours per response | = | Burden hours |
|---|---|---|---|---|---|---|
| Reporting Burden | 570 | 0.187 | | 27.654 | | 3,042 |

*Total Estimated Burden Hours:* 3,042.
*Status:* New collection.

**Authority:** Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: March 23, 2011.

**Colette Pollard,**

*Departmental Reports Management Officer, Office of the Chief Information Officer.*

[FR Doc. 2011–7401 Filed 3–29–11; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5480–N–29]**

## Notice of Submission of Proposed Information Collection to OMB Brownfields Economic Development Initiative (BEDI) Grant Application

**AGENCY:** Office of the Chief Information Officer, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

BEDU we designed to help local governments redevelop brownfields, defined in the NOFA as abandoned, idled, or underutilized real property, including industrial and commercial facilities, where expansion or redevelopment is complicated by the presence or potential presence of environmental contamination.

**DATES:** *Comments Due Date: April 29, 2011.*

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2506–0153) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail *OIRA–Submission@omb.eop.gov; fax:* 202–395–5806.

**FOR FURTHER INFORMATION CONTACT:** Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

*Title of Proposal:* Brownfields Economic Development Initiative (BEDI) Grant Application.

*OMB Approval Number:* 2506–0153.

*Form Numbers:* HUD—40122—State Certifications Related to Nonentitlement; HUD—40123—Brownfields Economic Development Application, SF 424—Application for Federal Assistance; SF 424Sup—Survey for Ensuring Equal Opportunities, SF LLL—Disclosure of Lobbying Activities, SF 424—A—Federal Financial Report; HUD 2880—Applicant/Recipient Disclosure Updated Report; HUD 2991—Certification of Consistency with Consolidated Plan; HUD 96010—Logic Mode;, SF 1199A—Direct Deposit Sign Up Form; HUD 27054—LOCCS Voice Response System Access Authorization; HUD 27054A—LOCCS Access Authorization Security Form; HUD 27061—Racial and Ethnic Data Reporting Form; HUD 60002—Economic Opportunity for Low- and Very Low-Income Persons In Connection with Assisted Projects; Federal Funding Accountability and Transparency Act (FFATA) Subrecipient Reporting; Federal Awardees Performance and Integrity information System Reporting (FAPIIS); Consolidated Annual Performance Evaluation Report (CAPER).

*Description of the Need For the Information and its Proposed Use:*

BEDU we designed to help local governments redevelop brownfields, defined in the NOFA as abandoned, idled, or underutilized real property, including industrial and commercial facilities, where expansion or redevelopment is complicated by the presence or potential presence of environmental contamination.

*Frequency of Submission:* On occasion, Semi-annually, Annually.

| | Number of respondents | Annual responses | × | Hours per response | = | Burden hours |
|---|---|---|---|---|---|---|
| Reporting Burden | 38 | 1 | | 33.157 | | 1,260 |

*Total Estimated Burden Hours:* 1,260.

*Status:* Extension of a currently approved collection.

**Authority:** Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: March 23, 2011.

**Colette Pollard,**

*Departmental Reports Management Officer, Office of the Chief Information Officer.*

[FR Doc. 2011–7402 Filed 3–29–11; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5480–N–27]**

## Notice of Submission of Proposed Information Collection to OMB Application for the Resident Opportunities and Self Sufficiency (ROSS) Program

**AGENCY:** Office of the Chief Information Officer, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Application for the ROSS grant program: Service Coordinators Program and Family Self-Sufficiency for Public Housing. Eligible applicants are PHAs, Tribes/TDHEs, Non-Profits and Resident Associations. Information collected will be used to evaluate applications and award grants through the HUD SuperNOFA process.

**DATES:** *Comments Due Date: April 29, 2011.*

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2577–0229) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail *OIRA-Submission@omb.eop.gov; fax:* 202–395–5806.

**FOR FURTHER INFORMATION CONTACT:** Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

*This notice also lists the following information:*

*Title of Proposal:* Application for the Resident Opportunities and Self Sufficiency (ROSS) program.

*OMB Approval Number:* 2577–0229.

*Form Numbers:* HUD–52752, HUD–52753, HUD–52754, HUD–52755, HUD–52767, HUD–52768, HUD–52769, HUD–96010, SF–424, HUD–2880, HUD–2990, HUD–2991, SF–LLL, HUD–2993, HUD–2994–A.

*Description of the Need For the Information and Its Proposed Use:*

*Application for the ROSS grant program:* Service Coordinators Program and Family Self-Sufficiency for Public Housing. Eligible applicants are PHAs, Tribes/TDHEs, Non-Profits and Resident Associations. Information collected will be used to evaluate applications and award grants through the HUD SuperNOFA process.

*Frequency of Submission:* On occasion, Annually.

| | Number of respondents | Annual responses | × | Hours per response | = | Burden hours |
|---|---|---|---|---|---|---|
| Reporting Burden | 650 | 1 | | 6.193 | | 4,026 |

*Total Estimated Burden Hours:* 4,026.

*Status:* Extension of a currently approved collection.

*Authority:* Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: March 23, 2011.

**Colette Pollard,**

*Departmental Reports Management Officer.*

[FR Doc. 2011–7406 Filed 3–29–11; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5480–N–28]**

## Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request; Certification of Consistency and Nexus Between Activities Proposed by the Applicant With Livability Principles Advanced in Preferred Sustainability Status Communities

**AGENCY:** Office of the Chief Information Officer, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The proposed form, an attachment to HUD Federal Financial Assistance applications, requests applicants to obtain a certification from the Designated Point of Contact for designated Preferred Sustainability Status Community using form HUD–2995 which verifies that the applicant has met the above criteria. The form will certify the nexus between the proposed activities of the applicant and the Livability Principles as they are being advanced in the Preferred Sustainability

Status Communities. If the applicant is from the agency that holds Point of Contact status in a particular Preferred Sustainability Status Community, it must be certified by the appropriate HUD Regional Administrator in consultation with field staff.

**DATES:** *Comments Due Date: April 29, 2011.*

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal.

Comments should refer to the proposal by name and/or OMB approval Number (2535–Pending) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail *OIRA–Submission@omb.eop.gov;* fax: 202–395–5806.

**FOR FURTHER INFORMATION CONTACT:** Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the

Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

*This notice also lists the following information:*

*Title of Proposal:* Certification of Consistency and Nexus between Activities Proposed by the Applicant with Livability Principles Advanced in Preferred Sustainability Status Communities.

*OMB Approval Number:* 2535–Pending.

*Form Numbers:* HUD–2995.

*Description of the Need for the Information and its Proposed Use:*

The proposed form, an attachment to HUD Federal Financial Assistance applications, requests applicants to obtain a certification from the Designated Point of Contact for designated Preferred Sustainability Status Community using form HUD–2995 which verifies that the applicant has met the above criteria. The form will certify the nexus between the proposed activities of the applicant and the Livability Principles as they are being advanced in the Preferred Sustainability Status Communities. If the applicant is from the agency that holds Point of Contact status in a particular Preferred Sustainability Status Community, it must be certified by the appropriate HUD Regional Administrator in consultation with field staff.

*Frequency of Submission:* Other Upon submission of grant application.

| | Number of respondents | Annual responses | × | Hours per response | = | Burden hours |
|---|---|---|---|---|---|---|
| Reporting Burden | 11,000 | 1 | | 0.1 | | 1,100 |

*Total Estimated Burden Hours:* 1,100.

*Status:* New Collection.

**Authority:** Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: March 23, 2011.

**Colette Pollard,**

*Departmental Reports Management Officer, Office of the Chief Information Officer.*

[FR Doc. 2011–7404 Filed 3–29–11; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R8–ES–2011–N038; 1112–0000–81440–F2]**

### Endangered and Threatened Wildlife and Plants; Permits, City of Scotts Valley and Santa Cruz County, CA

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), have received applications from the County of Santa Cruz (County) and the City of Scotts Valley (City) (applicants) for incidental take permits under section the Endangered Species Act of 1973, as amended (Act). We are considering issuing permits that would authorize the applicants' take of the Federally endangered Mount Hermon June beetle (*Polyphylla barbata*) incidental to otherwise lawful activities that would result in the permanent loss of 139 acres of habitat for the species in Santa Cruz County, California. The permits would also include the Federally endangered Ben Lomond spineflower (*Chorizanthe pungens var. hartwegiana*) as a covered species. We invite comments from the public on the applications, which include an Interim Programmatic Habitat Conservation Plan (IPHCP) and an Implementing Agreement (IA) that describe the proposed project and measures the applicants would undertake to minimize and mitigate anticipated take of the species. We also invite comments from the public on the draft environmental assessment (EA) prepared to comply with the National Environmental Policy Act (NEPA).

**DATES:** Please send your written comments by May 31, 2011.

**ADDRESSES:** Please address written comments to Diane K. Noda, Field Supervisor, Ventura Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, CA 93003. You may alternatively send comments by facsimile to (805) 644–3958.

**FOR FURTHER INFORMATION CONTACT:** Jen Lechuga, HCP Coordinator, 2493 Portola Road, Suite B, Ventura, CA 93003, or by telephone at (805) 644–1766, extension 224.

**SUPPLEMENTARY INFORMATION:**

#### Availability of Documents

You may download a copy of the IPHCP, IAs and related documents on the Internet at *http://www.fws.gov/ventura/*, or you may request documents

by U.S. mail or phone. Individuals wishing copies of the Draft IPHCP, Draft EA, and/or Draft IAs, should contact the Service by telephone (*see* **FOR FURTHER INFORMATION CONTACT**).

**Background**

The Service designated the Ben Lomond spineflower and Mount Hermon June beetle as Federally endangered in 1994 and 1997, respectively, under the Act (59 FR 5499, February 4, 1994; 62 FR 3616, January 24, 1997). Section 9 of the Act (16 U.S.C. 1531 *et seq.*) and our implementing Federal regulations in the Code of Federal Regulations (CFR) at 50 CFR part 17 prohibit the "take" of fish or wildlife species listed as endangered or threatened. Take of listed fish or wildlife is defined under the Act as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" (16 U.S.C. 1532). However, under limited circumstances, we issue permits to authorize incidental take (*i.e.,* take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity). Regulations governing incidental take permits for threatened and endangered species are at 50 CFR 17.32 and 17.22, respectively. The Act's take prohibitions do not apply to Federally listed plants on private lands. In addition to meeting other permit issuance criteria, the applicant's proposed covered activities must not jeopardize the existence of Federally listed fish, wildlife, or plants.

**Project Location**

The Project is located on soils known as Zayante sands. These soils support the Zayante sandhills ecosystem, which occurs exclusively in the Santa Cruz Mountains near the City of Scotts Valley and the communities of Ben Lomond, Mount Hermon, Felton, Olympia, Corralitos, and Bonny Doon. The Mount Hermon June beetle is restricted to Zayante sands soils in the Scotts Valley–Mount Hermon–Felton–Ben Lomond area and is found in association with vegetation of the Zayante sandhills, which is characterized by a mosaic of ponderosa pines (*Pinus ponderosa*), silverleaf manzanita (*Arctostaphylos silvicola*), and areas that are sparsely vegetated with grasses and herbs.

**Project Information**

In the Zayante Sandhills region, numerous private landowners within the City or County are interested in applying for ITPs to allow for the take of the Mount Hermon June beetle incidental to small development projects (*e.g.,* single-family dwelling, garage, house remodel, deck, *etc.*) on private parcels and to address associated impacts to Ben Lomond spineflower. The Service recommended that the City and County coordinate ITP applications and develop a regional programmatic habitat conservation plan (HCP) for the Sandhills. Completion and implementation of a regional HCP would provide conservation benefits for these and other rare species associated with this habitat and would streamline the process for landowners to comply with the Act and local and State permits.

The City and County propose to extend their take authorization issued by the Service to project proponents through a certificate of inclusion. Individual projects on private land would be eligible for ITP coverage if the project meets specific criteria. Landowners would determine if their proposed project is eligible for ITP coverage (that is, whether their project is a Covered Activity under the ITP) based on a set of criteria and a checklist of eligibility requirements. These determinations by landowners would be reviewed by the City or County. The City or County would review individual projects based on the following criteria:

- Project is residential.
- Project is located on a parcel that is 1.5 acres or less in size.
- Project would result in ground disturbance of Zayante soils.
- Development envelope for the project, when combined with the development envelope for any project previously implemented on the same parcel using the proposed IPHCP and the relevant ITP, will not exceed 15,000 square feet (0.34 acre).
- Proposed development is one or more of the following project types that requires a City or County discretionary or building permit that involves ground disturbance. Examples include: (1) Single-family dwelling; (2) guest cottage (or accessory dwelling unit); (3) attached or detached garage, shed, storage building; (4) room addition; (5) remodels that involve ground disturbance; and (6) septic system installations and upgrades that involve new ground disturbance.
- On a case-by-case basis, the Service and the appropriate local jurisdiction may also approve for coverage under the proposed IPHCP and ITPs other similar development projects that meet the eligibility requirements listed in the proposed IPHCP.

Ten Project Units (Designated group of land parcels) within the IPHCP boundary were identified within the communities of Ben Lomond, Felton, Mount Hermon, and Scotts Valley. These Project Units range in size from 3.2 to 373 acres and encompass a total of 1,693.2 acres, including roads, common areas, and substantial areas containing prior development. Within these Project Units, a maximum of 139 acres of Sandhills habitat may be developed or otherwise disturbed under the proposed IPHCP as a result of Covered Activities. According to the proposed IPHCP, this acreage represents 5 percent of the estimated total amount (2,800 acres) of Sandhills habitat with documented occurrences of the Mount Hermon June beetle as of 2004.

The IPHCP proposes to provide a process under which landowners may proceed with small development projects in areas where on-site avoidance of habitat for the Mount Hermon June beetle and Ben Lomond spineflower is not feasible. In such cases, landowners will first be required to minimize habitat loss and disturbance via the implementation of the following required minimization measures (see the IPHCP for additional details about these measures):

- Impacts to plants that are native to the Sandhills must be avoided to the greatest extent feasible, consistent with the purpose of the Covered Activity.
- Ground-disturbing activities associated with construction (*e.g.,* vegetation clearance, grading, digging, *etc.*) must be minimized between May 15 and August 15 within the development envelope.
- If construction-related ground disturbance associated with Covered Activities cannot be scheduled to avoid the May 15 to August 15 timeframe, participating landowners must ensure that areas that have been disturbed by construction activities during this timeframe are covered each evening during this timeframe with tarps, landscape fabric, or other similar material. Only the immediate areas that have been recently disturbed (*i.e.,* with exposed dirt just before the species flight season) must be covered in this manner between May 15 and August 15.
- Landscaping elements that degrade habitat must be minimized to the greatest extent feasible, as determined by the City or County, and consistent with the purpose of the Covered Activity.
- Indirect impacts to the Mount Hermon June beetle from project lighting must be minimized to the greatest extent feasible.

In addition to the above minimization measures, the impacts of Covered Activities must be mitigated and compensated for through the

implementation of the following mitigation measures (*see* the IPHCP for additional details about these measures):

• To the maximum extent feasible, the City and County will require that any revegetation or landscaping activities associated with Covered Activities are conducted using locally derived source material (*i.e.,* seeds or cuttings) of plant species native to the Sandhills, with particular emphasis on the plant species identified in Appendix F of the IPHCP.

• Prior to beginning any ground-disturbing activities, the impacts of Covered Activities must be mitigated in one of the following ways: (1) The landowner must secure conservation credits for the Mount Hermon June beetle at a ratio of 1:1 in terms of acres of disturbance to numbers of credits (*e.g.,* a project with a 0.1-acre disturbance envelope will mitigate by securing 0.1 acre of conservation credits for the Mount Hermon June beetle) at the Zayante Sandhills Conservation Bank; or (2) The landowner must secure conservation credits for the Mount Hermon June beetle at a ratio of 1:1 in terms of acres of disturbance to numbers of credits (*e.g.,* a project with a 0.1-acre disturbance envelope will mitigate by securing 0.1 acre of conservation credits for the Mount Hermon June beetle) at another Service-approved conservation bank; this bank must also have an Operating Agreement with the County if the parcel is within the County's jurisdiction.

**Environmental Assessment (EA)**

The Draft EA considers the effects on the human environment of: (1) Our proposed action of issuing ITPs to the City and County based on the IPHCP, (2) a Reduced-Take Alternative to the proposed action, and (3) No Action Alternative. Under the Reduced-Take Alternative, we would propose to issue ITPs to the City and County where the total amount of development that would be covered under the IPHCP and related ITPs would be 100 acres, instead of 139 acres as is currently proposed. The maximum disturbance footprint would remain at 15,000 square feet (0.34 acre) per parcel. The boundaries of the 10 project units would remain unchanged as would the minimization and mitigation measures of the IPHCP's operating conservation plan. Under the No Action Alternative, the Service would not issue ITPs for the Mount Hermon June beetle to the City and County; thus, private landowners within the IPHCP area would have to apply to the Service individually to obtain an ITP.

**Request for Comments**

We are requesting comments on our preliminary determination that the proposed project will not have significant effects on the environment, and suggestions for issues we should consider in our analysis. The Service will use the EA to determine whether its decision can result in a Finding of No Significant Impact (FONSI) or if an Environmental Impact Statement (EIS) must be prepared.

Based on our review of public comments that we receive in response to this notice, we may revise this preliminary determination.

**Public Availability of Comments**

Please direct any comments to the Service contact listed above in the **ADDRESSES** section, and any questions to the Service contact listed in the **FOR FURTHER INFORMATION CONTACT** section. All comments and materials we receive, including names and addresses, will become part of the administrative record and may be released to the public. 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.

**Next Steps**

We will evaluate the IPHCP and comments we receive to determine whether the permit applications meet the requirements of section 10(a) of the Act (16 U.S.C. 1531 *et seq.*) and complete our compliance with NEPA. If we determine that the applications meet these requirements, we will issue the permits for incidental take of the Mount Hermon June beetle. We will also evaluate whether issuance of section 10(a)(1)(B) permits would comply with section 7 of the Act by conducting an intra-Service section 7 consultation. We will use the results of this consultation, in combination with the above findings, in our final analysis to determine whether or not to issue a permit. If the requirements are met, we will issue the permits to the applicants.

**Authority**

We provide this notice under section 10 of the Act (U.S.C. 1531 *et seq.*) and NEPA regulations (40 CFR 1506.6).

Dated: March 24, 2011.

**Paul B McKim,**

*Acting Deputy Regional Director, Pacific Southwest Region, Sacramento, CA.*

[FR Doc. 2011–7426 Filed 3–29–11; 8:45 am]

**BILLING CODE 4310–55–P**

---

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R8–ES–2011–N010; 1112–0000–80221–F2]**

### Endangered and Threatened Wildlife and Plants; Permits; Joint Supplemental Environmental Impact Report/Environmental Impact Statement, Riverside County, CA

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of intent.

**SUMMARY:** We, the Fish and Wildlife Service (Service), in coordination with the Coachella Valley Conservation Commission (CVCC), are gathering information necessary for the preparation of a joint Supplemental Environmental Impact Report/Environmental Impact Statement (Supplemental EIR/EIS) under the National Environmental Policy Act (NEPA). This is a Supplemental EIR/EIS to the approved and certified September 2007 Final Recirculated EIR/EIS for the Coachella Valley Multiple Species Habitat Conservation Plan (Plan, or CVMSHCP). The Supplemental EIR/EIS will consider the environmental effects associated with the issuance of an amended permit for the CVMSHCP, adding the City of Desert Hot Springs (City) and Mission Springs Water District (MSWD) as permittees under the Endangered Species Act of 1973 (Act), as amended.We are furnishing this notice to announce the initiation of a public scoping period, during which we invite other agencies, Tribes, and interested persons to provide comments to identify and discuss the scope of issues and alternatives that should be addressed in the Supplemental EIR/EIS.

**DATES:** Written comments must be received by 5 p.m. on April 29, 2011.

**ADDRESSES:** Send comments to Mr. Jim A. Bartel, Field Supervisor, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011. Alternatively, you may submit comments by facsimile to (760) 918–0638.

**FOR FURTHER INFORMATION CONTACT:** Carol Roberts, Division Chief, Coachella and Imperial Valleys (*see* **ADDRESSES**), telephone (760) 431–9440.

**SUPPLEMENTARY INFORMATION:**

## Background

In accordance with section 10(a)(2)(A) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), the Coachella Valley Conservation Commission (CVCC) is preparing a proposed habitat conservation plan (HCP) in support of an application for an amended permit from the Service to incidentally take listed species. Section 9 of the Act (16 U.S.C. 1538) and its implementing regulations prohibit the take of animal species listed as endangered or threatened. The term "take" is defined under the ESA (16 U.S.C. 1532) as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in such conduct. "Harm" is defined in the Code of Federal Regulations (CFR) by Service regulations at 50 CFR 17.3 to include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering. In certain circumstances, under section 10(a)(1)(B) of the ESA, we may issue permits to authorize "incidental take" of listed species. "Incidental take" is defined by the ESA as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Regulations governing permits for threatened and endangered species are found at 50 CFR 17.32 and 50 CFR 17.22, respectively. Take of listed plant species on non-Federal lands is not prohibited under the ESA, and authorization under an ESA section 10 permit is not required. However, plant species may be included on a permit in recognition of the conservation benefits provided for them under the HCP. If the permit is issued, the CVCC would receive assurances for all species included on the incidental take permit under the Service's "No Surprises" regulations (50 CFR 17.22 (b)(5) and 17.32 (b)(5)).

Section 10 of the ESA specifies the requirements for the issuance of incidental take permits to non-Federal entities. Any proposed take must be incidental to otherwise lawful activities and must not appreciably reduce the likelihood of the survival and recovery of the species in the wild. The impacts of such take must also be minimized and mitigated to the maximum extent practicable. To obtain an incidental take permit, an applicant must prepare a HCP describing the impact that would likely result from the proposed taking, the measures for minimizing and mitigating the take, the funding available to implement such measures, alternatives to the taking, and the reason why such alternatives are not being implemented.

In February 2006, the Final CVMSHCP and associated Final EIR/EIS were released for review and approval by the participating jurisdictions and agencies as part of the application process to support the issuance of take authorizations by the Service (April 1, 2006, 71 FR 20719). However, in June 2006, the City voted not to approve the Plan. Subsequently, the Coachella Valley Association of Governments (CVAG) Executive Committee rescinded its approval of the Plan and directed that Desert Hot Springs be removed as a Permittee. The CVAG prepared and recirculated a revised Plan and associated EIR/EIS, which removed the City and made other modifications consistent with direction from the CVAG Executive Committee (March 30, 2007, 72 FR 15148).

The revised and recirculated CVMSHCP was approved and the associated Final Recirculated EIR/EIS was certified by CVAG and the CVCC in September 2007 and subsequently by all local Permittees by the end of October 2007. The State Permittees (Caltrans, CVMC, and California State Parks) approved the Plan and signed the Implementing Agreement as of March 2008. The Final Recirculated CVMSHCP, which did not include the City, received final State and Federal permits on September 9 and October 1, 2008, respectively.

However, in a reversal of their June 2006 decision to optout of the Plan, the City Council reconsidered their decision and unanimously approved a Memorandum of Understanding (MOU) in October 2007, stating the parties' mutual intent to enter into negotiations for the City to join the CVMSHCP as a Permittee. The MOU was subsequently approved by the CVCC, CVAG, and the County of Riverside as of February 2008. Subsequent to the City's decision, the MSWD has also made the decision to join the CVMSHCP as a Permittee, and the addition of both entities as Permittees will be evaluated in the Supplemental EIR/EIS.

The Amendment to reinstate the City proposes that the Plan provisions and boundaries will be based on the February 2006 CVMSHCP, with modifications as described in the September 2007 Final Recirculated CVMSHCP to provide for the Riverside County Flood Control and Water Conservation District's future flood control facility. The current Plan boundaries would be amended to include all of the private lands within the City limits and restore the original boundaries of the Upper Mission Creek/Big Morongo Canyon and Whitewater Canyon Conservation Areas within City limits. Adding the City as a Permittee requires a Major Amendment to the CVMSHCP in accordance with the requirements outlined in Section 6.12.4 of the Plan. The procedures outlined in Section 6.12.4 state that Major Amendments require the same process to be followed as for the original CVMSHCP approval, including California Environmental Quality Act and NEPA compliance. In addition, MSWD, not previously a participating agency, has also opted to join the CVMSHCP as a Permittee. MSWD and the City have proposed that a number of infrastructure projects be included as Covered Activities under the Plan. Covered Activities include certain activities carried out or conducted by Permittees, which receive take authorization under an USFWS section 10(a)(1)(B) permit and a State Natural Community Conservation Planning Permit, provided these activities are otherwise lawful. Details of the proposed Covered Activities for an amended permit will be provided in the amended CVMHCP and Supplemental EIR/EIS.

## Environmental Impact Statement

Prior to issuing an amendment to the permit, we will prepare a draft Supplemental EIR/EIS to analyze the environmental impacts associated with the issuance of the requested permit amendment and the implementation of the amended CVMSHCP by the City and the MSWD. The Fish and Wildlife Service is the NEPA lead for the Supplemental EIR/EIS, and we are responsible for the scope and content of the document. The Supplemental EIR/EIS will consider the proposed action, the issuance of a section 10(a)(1)(B) permit amendment under the ESA, No Action (no permit amendment), and a reasonable range of alternatives. A detailed description of the impacts of the proposed action and each alternative will be included in the Supplemental EIR/EIS.

The proposed action and alternatives will be evaluated against the No Action alternative, which assumes that no permit amendment will be issued. A range of alternatives will be considered and analyzed, representing varying levels of conservation and impacts. The alternatives to be considered for analysis in the Supplemental EIR/EIS may include: Variations in the scope of covered activities; variations in the location, amount, and type of conservation; variations in permit duration; or a combination of these

elements. The Supplemental EIR/EIS will also identify potentially significant direct, indirect, and cumulative impacts on biological resources, land use, air quality, water quality, water resources, and socioeconomics, along with other environmental issues that could occur with the implementation of the proposed actions and alternatives. For all potentially significant impacts, the Supplemental EIR/EIS will identify avoidance, minimization, and mitigation measures to reduce these impacts, where feasible, to a level below significance.

**Public Comments**

Please direct any comments to the Service contact listed above in the **ADDRESSES** section, and any questions to the Service contact listed in the **FOR FURTHER INFORMATION CONTACT** section. All comments and materials received, including names and addresses, will become part of the administrative record and may be released to the public. 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.

**Authority:** This notice is provided under section 10(a) of the ESA and Service regulations for implementing NEPA (40 CFR 1506.6).

Dated: March 24, 2011.

**Paul McKim,**

*Acting Deputy Regional Director, Pacific Southwest Region, Sacramento, California.*

[FR Doc. 2011–7420 Filed 3–29–11; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[L51010000–FX0000–LVRWA09A2590–LLAZC02000; AZA34666]**

### Notice of Intent To Prepare a Possible Land Use Plan Amendment in Conjunction With the Proposed Quartzsite Solar Energy Project, La Paz County, AZ

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of intent.

**SUMMARY:** In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM), Yuma Field Office, Yuma, Arizona, proposes to amend the Yuma Resource Management Plan (RMP), in conjunction with the Quartzsite Solar Energy Project (QSEP), and by this notice is announcing the beginning of the scoping process to solicit public comments and identify issues associated with the proposed RMP amendment.

**DATES:** This notice initiates the public scoping process for the proposed amendment. To be fully considered in the planning process, comments must be submitted in writing by April 29, 2011. The date(s) and location(s) of all scoping meetings will be announced at least 15 days in advance of the meeting(s) through local media and the following BLM Web site at: *http://www.blm.gov/az/st/en.html.* The BLM will provide additional opportunities for public participation upon publication of the draft planning document.

**ADDRESSES:** You may submit comments related to the plan amendment proposal by any of the following methods:

- *Web site: http://www.blm.gov/az/st/en.html.*
- *E-mail: Quartzsite_Solar@blm.gov.*
- *Fax:* 928–317–3250.
- *Mail:* Quartzsite Solar Energy Project, BLM, Yuma Field Office, Attention: Eddie Arreola, Supervisory Project Manager, 2555 East Gila Ridge Road, Yuma, Arizona 85365.

**FOR FURTHER INFORMATION CONTACT:** Eddie Arreola, Supervisory Project Manager, telephone 602–417–9505; e-mail *eddie_arreola@blm.gov;* address One North Central Avenue, Suite 800, Phoenix, Arizona 85004.

**SUPPLEMENTARY INFORMATION:** Quartzsite Solar Energy LLC (QSE), a wholly owned subsidiary of Solar Reserve LLC, has requested a right-of-way authorization from the BLM to construct, operate, and maintain a 100-megawatt solar energy generation facility on 1,450 acres using concentrated solar power tower technology and has also applied for the approval of the Western Area Power Administration (WAPA) to interconnect the facility's electric grid system into WAPA's existing 230 kilovolt transmission line paralleling State Route 95. QSE's proposed project is approximately 10 miles north of the Town of Quartzsite and approximately 1 mile to the east of State Route 95. WAPA, as the lead agency under NEPA for the project, published a Notice of Intent to prepare an environmental impact statement (EIS) for the proposed project in the **Federal Register** on January 14, 2010 (75 FR 2133). Public scoping meetings on the QSE project EIS were held on January 26, 2010, in Yuma, Arizona; January 27, 2010, in Parker, Arizona; and January 28, 2010, in Quartzsite, Arizona. The BLM is a cooperating agency for this EIS.

Preliminary environmental analysis by the BLM has determined that QSE's proposed project tower is in non-conformance with the Yuma RMP's Visual Resources Management (VRM) Class III management objectives. Authorization of the solar facility may therefore require an amendment to the Yuma RMP.

By this notice, the BLM is complying with requirements in 43 CFR 1610.2(c) to notify the public of potential amendments to land use plans, predicated on the findings of the NEPA analysis. The BLM will coordinate the RMP commenting process to satisfy the public involvement process under Section 106 of the National Historic Preservation Act (16 U.S.C. 470(f)), as provided for in 36 CFR 800.2(d)(3). Native American tribal consultations will be conducted in accordance with policy, and tribal concerns, including impacts on Indian trust assets, will be given due consideration.

The purpose of this public scoping process is to determine relevant issues that will influence the scope of the environmental analysis as it relates to the potential RMP amendment, including alternatives, and guide the process for developing the relevant NEPA analyses. At present, the BLM has identified the following preliminary issues, among others: Air quality, geologic resources, soils, water resources, threatened and endangered species, wildlife habitats, cultural and historical resources, paleontological resources, visual resources, land use, recreational resources, and public health and safety. Federal, State, and local agencies, along with other stakeholders that may be interested or affected by the BLM's decision on this project, are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate as a cooperating agency for the development of the RMP amendment.

The NEPA document analyzing the RMP amendment will consider the impacts of the proposed action, alternatives, and the no action alternative. The BLM, as a cooperating agency for the project EIS, will work to coordinate the analysis associated with the RMP amendment with the project EIS. The public is invited to submit comments on the possible amendment

of the Yuma RMP to address VRM issues. Previously submitted comments, issues and concerns related to QSE's proposed solar facility do not need to be resubmitted. Public comments will aid the BLM in identifying planning alternatives and mitigating measures and will help assure all relevant issues associated with the proposed RMP amendment are considered in the NEPA document for the RMP. This document may be the on-going project EIS or a stand-alone NEPA document, as appropriate.

Please note that public comments and information submitted—including names, street addresses, and e-mail addresses of persons who submit comments—will be available for public review and disclosure at the above address during regular business hours (8 a.m. to 4 p.m.), Monday through Friday, except holidays.

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 public at any time. While you may request that your personal identifying information be withheld from public review, we cannot guarantee that we will be able to withhold such information.

**Authority:** 43 CFR 1610.2; 43 CFR 2800; 40 CFR 1501.7.

**Raymond Suazo,**

*Arizona Associate State Director.*

[FR Doc. 2011–7413 Filed 3–29–11; 8:45 am]

**BILLING CODE 4310–32–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLOR957000–L631000000–HD000: HAG11–0174]**

### Filing of Plats of Survey: Oregon/Washington

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** The plats of survey of the following described lands are scheduled to be officially filed in the Bureau of Land Management Oregon/Washington State Office, Portland, Oregon, 30 days from the date of this publication.

**Willamette Meridian**

Oregon

T. 20 S., R. 4 W., accepted March 1, 2011.
T. 19 S., R. 1 E., accepted March 1, 2011.
T. 29 S., R. 8 W., accepted March 1, 2011.
T. 29 S., R. 6 W., accepted March 2, 2011.
T. 28 S., R. 8 W., accepted March 2, 2011.
T. 28 S., R. 8 W., accepted March 17, 2011.
T. 30 S., R. 7 W., accepted March 17, 2011.
T. 28 S., R. 3 W., accepted March 17, 2011.
T. 26 S., R. 7 W., accepted March 18, 2011.
T. 26 S., R. 7 W., accepted March 18, 2011.

Washington

T. 29 N., R. 37 E., accepted March 1, 2011.

**ADDRESSES:** A copy of the plats may be obtained from the Land Office at the Bureau of Land Management, Oregon/Washington State Office, 333 SW. 1st Avenue, Portland, Oregon 97204, upon required payment. A person or party who wishes to protest against a survey must file a notice that they wish to protest (at the above address) with the Oregon/Washington State Director, Bureau of Land Management, Portland, Oregon.

**FOR FURTHER INFORMATION CONTACT:** Kyle Hensley, (503) 808–6124, Branch of Geographic Sciences, Bureau of Land Management, 333 SW. 1st Avenue, Portland, Oregon 97204.

**Fred O'Ferrall,**

*Chief, Branch of Land, Mineral, and Energy Resources.*

[FR Doc. 2011–7423 Filed 3–29–11; 8:45 am]

**BILLING CODE 4310–33–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLORB07000. L17110000. MO0000. L.X. SS.020H0000; HAG 11–0170]**

### Notice of Public Meeting, Steens Mountain Advisory Council

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of public meetings.

**SUMMARY:** In accordance with the Steens Mountain Cooperative Management and Protection Act of 2000, the Federal Land Policy and Management Act, and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management, Steens Mountain Advisory Council will meet as indicated below:

**DATES:** The Steens Mountain Advisory Council will meet at the Harney County Community Center, 484 N. Broadway, Burns, Oregon, 97720 on April 4 and 5, 2011. A meeting in Bend, Oregon, at the Phoenix Inn and Suites, 300 NW. Franklin Ave, will be held November 17 and 18, 2011; and a meeting June 9 and 10, 2011 and September 22 and 23, 2011, will be held at the Frenchglen School, Frenchglen, Oregon. All meeting sessions will begin at 8 a.m. local time, and will end at approximately 4:30 p.m., local time.

**FOR FURTHER INFORMATION CONTACT:** Christi West, Staff Assistant, BLM Burns District Office, 28910 Highway 20 West, Hines, Oregon, 97738, (541) 573–4541 or e-mail *christi_west@blm.gov*.

**SUPPLEMENTARY INFORMATION:** The Steens Mountain Advisory Council was appointed by the Secretary of the Interior on August 14, 2001, pursuant to the Steens Mountain Cooperative Management and Protection Act of 2000 (Pub. L. 106–399) and most recently re-chartered in December 2009. The Steens Mountain Advisory Council's purpose is to provide representative counsel and advice to the Bureau of Land Management regarding new and unique approaches to management of the land within the bounds of the Steens Mountain Cooperative Management and Protection Area; cooperative programs and incentives for landscape management that meet human needs, maintenance and improvement of the ecological and economic integrity of the area; and preparation and implementation of a management plan for the Steens Mountain Cooperative Management and Protection Area.

Topics to be discussed by the Steens Mountain Advisory Council at these meetings include the Steens Mountain Comprehensive Recreation Plan; North Steens Ecosystem Restoration Project implementation; Science Strategy; South Steens Water Development Project Environmental Assessment; easements and acquisitions; In-holder Access Environmental Assessment; and categories of interest such as wildlife, special designated areas, partnerships/programs, cultural resources, education/interpretation, volunteer-based information, adaptive management and socioeconomics; and other matters that may reasonably come before the Steens Mountain Advisory Council.

All meetings are open to the public in their entirety. Information to be distributed to the Steens Mountain Advisory Council is requested prior to the start of each Steens Mountain Advisory Council meeting. Public comment is generally scheduled for 11 a.m. to 11:30 a.m., local time, both days of each meeting session. The amount of time scheduled for public presentations and meeting times may be extended when the authorized representative considers it necessary to accommodate all who seek to be heard regarding matters on the agenda.

Under the Federal Advisory Committee Act management regulations (41 CFR 102–3.15(b)), in exceptional circumstances an agency may give less than 15-day notice of committee meeting notices published in the

**Federal Register**. In this case, this notice is being published less than 15 days prior to the meeting due to the urgent need to meet legal requirements for completion of the Steens Mountain Travel Management Plan/Environmental Assessment.

**Kenny McDaniel,**

*Burns District Manager.*

[FR Doc. 2011–7421 Filed 3–29–11; 8:45 am]

**BILLING CODE 4310–33–P**

## DEPARTMENT OF THE INTERIOR

## National Park Service

**[NPS–WASO–NRNHL–0311–6957; 2280–665]**

## National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before March 12, 2011. Pursuant to § 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St., NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service,1201 Eye St., NW., 8th floor, Washington DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by April 14, 2011. 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.

**J. Paul Loether,**

*Chief, National Register of Historic Places/National Historic Landmarks Program.*

**ARIZONA**

**Gila County**

La Santa Cruz de Globe, Hilltop in Ruiz Canyon, E of Navarro Dr and W of Side Canyon, Globe, 11000205

**Maricopa County**

Eisendrath, Rose, House, 1400 N College Ave, Tempe, 11000206

**CALIFORNIA**

**Sonoma County**

Healdsburg Memorial Bridge, (Highway Bridges of California MPS) Healdsburg Ave, junction of Front St, Healdsburg, 11000214

**MICHIGAN**

**Marquette County**

Sundberg Block, 517–523 Iron St, Negaunee, 11000196

**MISSOURI**

**Jackson County**

Lee's Summit Christian Church Building, SE Douglas and SE Fourth Sts, Lee's Summit, 11000213

Southeast Grand Ave and Fifth St Residential Historic District, (Lee's Summit, Missouri MPS) Roughly comprised of E side of SE Grand between SE 4th and SE 5th and N side of SE 5th between SE Grand and SE Howard, Lee's Summit, 11000216

**McDonald County**

Powell Bridge, .04 mi SW of Powell on Cowan Ridge Rd off HWY E, Powell, 11000215

**NEVADA**

**Clark County**

B–29 Serial No. 45–21847, (Heavy Bomber), Lake Mead National Recreation Area, Overton, 11000212

**NORTH CAROLINA**

**Guilford County**

Model Farm, 2058 Brentwood St, High Point, 11000208

**Halifax County**

St. Alban's Episcopal Church, 300 Mosby Ave, NC, 11000209

**Randolph County**

Sunset Theater, 232, 234, 236 Sunset Ave, Asheboro, 11000210

**PENNSYLVANIA**

**Allegheny County**

McCook Family Estate, 5105 Fifth Ave, 925 Amberson Ave, Pittsburg City, 11000197

Wilpen Hall, 889–895 Blackburn Rd; 201 Scaife Rd, Sewickley Heights, 11000201

**Bucks County**

Quakertown Historic District, Roughly bounded by Main and Broad Sts, Hellertown, Tichikon, and Park Aves, Quakertown, 11000200

**Huntingdon County**

Robb Farm, 11023 Hartslog Valley Rd (SR 3039), Walker Township, 11000202

**Lebanon County**

Alden Villa, 1012 Alden Way, Cornwall Borough, 11000203

**Philadelphia County**

Anderson, Marian, House, 762 S Martin St, Philadelphia, 11000198

Tindley Temple United Methodist Church, (African American Churches of Philadelphia 1787–1949 MPS) 750–762 S Broad St, Philadelphia, 11000199

**RHODE ISLAND**

**Kent County**

Spencer—Shippee—Lillbridge House, 12 Middle Rd, East Greenwich, 11000207

**TEXAS**

**Travis County**

Federal Office Building, 300 E 8th St, Austin, 11000211

**WISCONSIN**

**Winnebago County**

Whiting, Frank, Boathouse, 98 Fifth St, Neenah, 11000204

**OTHER ACTIONS**

Request for REMOVAL has been made for the following resources:

**OREGON**

**Linn County**

Angell-Brewster House, 34191 Brewster Rd, Lebanon, 92001330

**TENNESSEE**

**Washington County**

Memorial Stadium, Intersection of E Main St and Lonnie Lowe Ln, Johnson City, 10000472

[FR Doc. 2011–7392 Filed 3–29–11; 8:45 am]

**BILLING CODE 4312–51–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–615]**

## In the Matter of Certain Ground Fault Circuit Interrupters and Products Containing Same; Notice of Commission Determination To Rescind in Part and Modify Remedial Orders Against Certain Respondents

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to rescind in part and modify remedial orders issued in the above-captioned investigation with respect to respondents General Protecht Group, Inc. ("GPG") of Zhejiang, China; Wenzhou Trimone Company ("Trimone") of Zhejiang, China; Shanghai ELE Manufacturing Corporation ("ELE") of Shanghai, China; as well as Cheetah USA Corp. of Sandy, Utah; Nicor Inc. of Albuquerque, New Mexico; Orbit Industries, Inc. of Los Angeles, California; and Colacino Electric Supply, Inc. of Newark, New York (collectively "&").

**FOR FURTHER INFORMATION CONTACT:** Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–2301. 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:** This investigation was instituted on September 18, 2007, based on a complaint filed by Pass & Seymour, Inc. ("P&S") of Syracuse, New York. The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain ground fault circuit interrupters and products containing the same by reason of infringement of certain claims of U.S. Patent Nos. 5,594,398 ("the '398 patent"); RE38,293; 7,154,718 ("the '718 patent"); 7,164,564 ("the '564 patent"); 7,212,386; and 7,256,973. The complaint named various respondents, including GPG, Trimone, ELE, and ELE's distributors. The complaint and notice of investigation were subsequently amended as to the patents and claims asserted, and several initially named respondents were terminated from the investigation. U.S. Patent No. 7,283,340 ("the '340 patent") was later added to the investigation.

On March 9, 2009, the Commission terminated this investigation with a finding of violation of Section 337 by reason of infringement of one or more of claims 1, 7, and 8 of the '398 patent, claims 14, 18, and 30 of the '340 patent, claim 52 of the '718 patent, and claims 1 and 15 of the '564 patent. The Commission issued remedial orders, including a limited exclusion order ("LEO") directed, *inter alia,* toward GPG with respect to the '340 and '398 patents, toward Trimone with respect to the '340 patent, and toward ELE and ELE's distributors with respect to the '340, '398, and '564 patents. The Commission also issued cease and desist orders against ELE's distributors. Respondents GPG, Trimone, and ELE subsequently appealed the Commission's final determination of violation of Section 337 to the United States Court of Appeals for the Federal Circuit.

On August 27, 2010, the Court issued an opinion reversing the Commission's findings of infringement as to GPG and Trimone and thus, the Commission's determination of violation as to those respondents. *See General Protecht Group, Inc.* v. *ITC,* 619 F.3d 1303 (Fed. Cir. 2010), *reh'g denied,* (Fed. Cir. Dec. 14, 2010), *mandate issued* (Fed. Cir. Dec. 21, 2010). The Court also reversed the Commission's findings of infringement under the '340 patent as to ELE, thus reversing in part the Commission's determination of violation as to ELE.

On January 6, 2011, respondents GPG and Trimone (but not ELE) petitioned the Commission pursuant to Commission Rule 210.76(a)(1) (19 CFR 210.76(a)(1)) to rescind in part the LEO as to them. No responses to the petition were filed.

Having reviewed the parties' submission and considering the mandate of the Federal Circuit, the Commission has determined that the petition satisfies the requirement of Commission Rule 210.76 (a)(1) (19 CFR 210.76(a)(1)) that there be changed conditions of fact or law and that the remedial orders should be rescinded in part and modified. The Commission therefore has issued an order rescinding in part the LEO previously issued in this investigation with respect to respondents GPG and Trimone, modifying the LEO with respect to ELE and ELE's distributors, and modifying the cease and desist orders directed to ELE's distributors.

The authority for the Commission's determination is contained in Section 337(k) of the Tariff Act of 1930, as amended (19 U.S.C. 1337(k)), and in section 210.76(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.76(b)).

By order of the Commission.

Issued: March 24, 2011.

**James R. Holbein,**

*Acting Secretary to the Commission.*

[FR Doc. 2011–7412 Filed 3–29–11; 8:45 am]

BILLING CODE 7020–02–P

## DEPARTMENT OF JUSTICE

### Notice of Proposed Consent Decree Under the Clean Air Act

Notice is hereby given that on March 21, 2011, a proposed Consent Decree in *United States* v. *Mariana Acquisition Corp.,* Civil Action No. CV 11–0006, was lodged with the United States District Court for the Northern Marianas Islands.

The Consent Decree in this Clean Air Act enforcement action resolves allegations by the Environmental Protection Agency, asserted in a complaint filed together with the Consent Decree, under Section 113(b) of the Clean Air Act, 42 U.S.C. 7413(b), for alleged environmental violations at Mariana Acquisition Corporation's bulk gasoline terminal in Saipan, Northern Marianas Islands. The violations include failing to install a vapor collection system for collecting total volatile organic compounds ("VOCs") displaced from tank trucks during product loading, as required by regulations promulgated under the New Source Performance Standards of the Clean Air Act, 42 U.S.C. 7411(b)(1)(B), and VOC emissions exceeding those permitted by the regulations. The proposed Consent Decree would require defendant to install the required vapor collection system, limit emissions of volatile organic compounds, and pay $826,000 in civil penalties to the United States.

The Department of Justice will receive comments relating to the proposed Consent Decrees for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to the matter as *United States* v. *Mariana Acquisition Corp.,* DOJ Ref. No. 90–5–2–1–09869.

The proposed Consent Decree may be examined at the following Regional Office of the United States Environmental Protection Agency: Region 9, 75 Hawthorne Street, San Francisco, California, 94105. The Consent Decree may also be examined at the Office of the United States Attorney, Sirena Plaza, Suite 500, 108 Hernan Cortez Avenue, Hagatna, Guam 96910, and also at 3rd Floor, Horiguchi Building, P.O. Box 500377, Saipan, MP 96950.

During the public comment period, the proposed agreements may also be

examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* Copies of the proposed agreements may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting from the Consent Decree Library a copy of the consent decree for *United States* v. *Mariana Acquisition Corp.,* Civil Action No. CV 11–0006 (D. Northern Marianas), please enclose a check in the amount of $7.50 (25 cents per page reproduction cost) payable to the U.S. Treasury.

**Henry Friedman,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2011–7399 Filed 3–29–11; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF JUSTICE

## Drug Enforcement Administration

**[Docket No. 10–64]**

## Alfred E. Boyce, M.D.; Decision and Order

On August 12, 2010, Administrative Law Judge (ALJ) John J. Mulrooney, II, issued the attached recommended decision. The Respondent did not file exceptions to the decision.

Having reviewed the record in its entirety including the ALJ's recommended decision, I have decided to adopt the ALJ's rulings, findings of fact, conclusions of law, and recommended Order.

### Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b) and 0.104, I order that DEA Certificate of Registration, FB0003943, issued to Alfred E. Boyce, M.D., be, and it hereby is, revoked. I further order that any pending application of Alfred E. Boyce, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective immediately.

Dated: March 18, 2011.

**Michele M. Leonhart,**

*Administrator.*

*James Hambuechen, Esq.,* for the Government;

*Bradford M. Cohen, Esq.,* for the Respondent

### Order Granting Government Motion for Summary Disposition and Recommended Decision

John J. Mulrooney, Administrative Law Judge. The Deputy Assistant Administrator, Drug Enforcement Administration (DEA or Government), issued an Order to Show Cause (OSC), dated May 13, 2010, proposing to revoke the DEA Certificate of Registration (COR), Number FB0003943, of Alfred E. Boyce, D.O. (Respondent), pursuant to 21 U.S.C. 824(a)(3) and (4), and deny any pending applications for renewal or modification of the COR, pursuant to 21 U.S.C. 823(f), because the Respondent's continued registration is inconsistent with the public interest as that term is used in 21 U.S.C. 823(f). In the OSC, the Government alleges that the Respondent is, *inter alia,* "without authority to handle controlled substances in the state of Florida" as grounds for revocation of Respondent's DEA registration.

On July 22, 2010, the DEA Office of Administrative Law Judges (OALJ) received two separate documents from Respondent's counsel, each dated July 19, 2010, reflecting a notice of attorney appearance and a timely [1] request for hearing.[2]

On July 27, 2010, an order issued which directed, *inter alia,* that the Government provide evidence to support its allegation that Respondent lacks state authority in the state in which he is registered with DEA to handle controlled substances. A briefing schedule was also provided in the order fixing dates for the requesting filings, any Government motions for summary judgment or termination of proceedings based thereon, and any reply thereto by the Respondent.

On July 28, 2010, the Government timely filed a document styled "Government's Motion for Stay of Proceedings and Summary Disposition" (Government's Motion) wherein it seeks relief in the form of summary disposition based on its assertion that the Respondent "is not duly authorized to possess, dispense, or otherwise handle controlled substances in the State of Florida, the jurisdiction in which the Respondent engages in the practice of medicine." Govt. Mot. at 1. Attached to the Government's Motion was a copy of an Order of Emergency Suspension of License (Emergency Suspension Order) issued by the State of Florida Department of Health (Florida DOH) on April 28, 2010. Govt. Mot. at Attach. 1 [3] (Florida DOH Order of Emergency Suspension of License dated April 28, 2010). The Emergency Suspension Order reflects the immediate suspension of the Respondent's license to practice as an osteopathic physician in the state, pending further proceedings. The Florida DOH action is not based upon pending DEA proceedings, but based upon on its own factual findings that the Respondent violated numerous Florida statutes and administrative code provisions related to the prescribing of controlled substances, and its determination that the Respondent's "continued practice as an osteopathic physician constitutes an immediate serious danger to the health, safety, or welfare of the public." *Id.* In its motion, the Government correctly contends that state authority is a necessary condition precedent for the acquisition or maintenance of a DEA registration, and the suspension of the Respondent's state practitioner's license precludes the continued maintenance of his DEA COR, thus requiring revocation. Govt. Mot. at 2; *see id.* at Attach. 1.

The Respondent filed an opposition on August 10, 2010, asserting, in essence, that the CSA does not strictly require COR revocation pursuant to 21 U.S.C. 824(a)(3) where a registrant's state license has been suspended and the registrant has lost state authorization to dispense controlled substances. The Respondent argues that sanctions provided for under the CSA that are lesser than revocation are appropriate, such as suspension of his COR,[4] or limiting the suspension or revocation of his COR only "to the particular controlled substance [] with respect to which grounds for revocation or suspension exist." 21 U.S.C. 824(b). As a mitigating basis for a sanction recommendation lesser than revocation, the Respondent points out that the cases cited by the Government in its summary disposition motion involve DEA COR revocations based on conduct other than

[1] Because the initial record contained no indication about the actual service date of the OSC or other information allowing for an evaluation of whether the Respondent's hearing request was timely made pursuant to 21 CFR 1301.43, an order issued on July 27, 2010 wherein the Government was directed to provide evidence of the date of OSC service. After review of the submissions of the parties, it appears that the Respondent's hearing request was timely filed.

[2] The Respondent's request for a hearing "*in the matter of: Department of Health* v. *Alfred Eversley Boyce, D.O., Case No. 10–3167PL*" (emphasis supplied), *i.e.* the state administrative action in Florida, that was filed on OALJ is herein deemed to constitute a sufficient request for hearing relative to these proceedings.

[3] The Government's attachment will be included in the record as Government Exhibit 1.

[4] *See* 21 U.S.C. 824(a) ("A registration * * * may be *suspended* or revoked * * *." (emphasis supplied)).

a temporary suspension of a state medical license. For that reason, the Respondent argues that a summary disposition in these DEA proceedings, based on the suspension of his state licensure, "would be inconsistent with [the Agency's] previous rulings and would create a manifest injustice to Respondent." While the Respondent's position is not without some level of facial appeal, it is unsupported by the applicable statutes, regulations and precedent emanating from both the courts and the Agency.

The Controlled Substances Act (CSA) requires that a practitioner must be currently authorized to handle controlled substances in "the jurisdiction in which he practices" in order to maintain a DEA registration. *See* 21 U.S.C. 802(21) ("[t]he term 'practitioner' means a physician * * * licensed, registered, or otherwise permitted, by * * * the jurisdiction in which he practices * * * to distribute, dispense, [or] administer * * * a controlled substance in the course of professional practice"); *see also id.* § 823(f) ("The Attorney General shall register practitioners * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices."). Therefore, because "possessing authority under state law to handle controlled substances is an essential condition for holding a DEA registration," this Agency has consistently held that "the CSA *requires* the revocation of a registration issued to a practitioner who lacks [such authority]" (emphasis supplied). *Roy Chi Lung,* 74 FR 20346, 20347 (2009); *Scott Sandarg, D.M.D.,* 74 FR 17528, 174529 (2009); *John B. Freitas, D.O.,* 74 FR 17524, 17525 (2009); *Roger A. Rodriguez, M.D.,* 70 FR 33206, 33207 (2005); *Stephen J. Graham, M.D.,* 69 FR 11661 (2004); *Dominick A. Ricci, M.D.,* 58 FR 51104 (1993); *Abraham A. Chaplan, M.D.,* 57 FR 55280 (1992); *Bobby Watts, M.D.,* 53 FR 11919 (1988).

Denial of an application or revocation of a registration via a summary disposition procedure is also warranted if the period of a suspension is temporary, or if there exists the potential that Respondent's state controlled substances privileges will be reinstated, because "revocation is also appropriate when a state license has been suspended, but with the possibility of future reinstatement," *Rodriguez,* 70 FR at 33207 (citations omitted), and even where there is a judicial challenge to the state medical board action actively pending in the state courts. *Michael G. Dolin, M.D.,* 65 FR 5661, 5662 (2000).

In order to revoke a registrant's DEA registration, the DEA has the burden of proving that the requirements for revocation are satisfied. 21 CFR 1301.44(e). Once DEA has made its *prima facie* case for revocation of the registrant's DEA COR, the burden of production then shifts to the Respondent to show that, given the totality of the facts and circumstances in the record, revoking the registrant's registration would not be appropriate. *Morall* v. *DEA,* 412 F.3d 165, 174 (DC Cir. 2005); *Humphreys* v. *DEA,* 96 F.3d 658, 661 (3d Cir. 1996); *Shatz* v. *U.S. Dept. of Justice,* 873 F.2d 1089, 1091 (8th Cir. 1989); *Thomas E. Johnston,* 45 FR 72311 (1980).

Regarding the Government's request for summary disposition of the present case, it is well-settled that where no genuine question of fact is involved, or when the material facts are agreed upon, a plenary, adversarial administrative proceeding is not required, *see Jesus R. Juarez, M.D.,* 62 FR 14945 (1997); *Dominick A. Ricci, M.D.,* 58 FR 51104 (1993), under the rationale that Congress does not intend for administrative agencies to perform meaningless tasks. *See Philip E. Kirk, M.D.,* 48 FR 32887 (1983), *aff'd sub nom. Kirk* v. *Mullen,* 749 F.2d 297 (6th Cir. 1984); *see also Puerto Rico Aqueduct & Sewer Auth.* v. *EPA,* 35 F.3d 600, 605 (1st Cir. 1994); *NLRB* v. *Int'l Assoc. of Bridge, Structural & Ornamental Ironworkers, AFL–CIO,* 549 F.2d 634 (9th Cir. 1977); *United States* v. *Consol. Mines & Smelting Co.,* 455 F.2d 432, 453 (9th Cir. 1971).

The record evidence in the instant case clearly demonstrates that no genuine dispute exists over the established material fact that Respondent currently lacks state authority to handle controlled substances in Florida, his state of registration with the DEA, since his state osteopathic medical practitioner's license was suspended on April 28, 2010. Notwithstanding the Respondent's attempts to distinguish the rationale for revocation in the cases cited by the Government as factually dissimilar to his own circumstances, the dispositive consideration here is that because the Respondent presently lacks state authority, both the plain language of the applicable federal statutory provisions and Agency interpretive precedent set forth herein dictate that the Respondent is not entitled to maintain his DEA registration, and therefore a registration action less than revocation is not appropriate. Simply put, there is no contested factual matter adducible at a hearing that can provide the Agency with authority to continue (or *a fortiori* for me to recommend) his entitlement to a COR under the circumstances and further delay in ruling on the Government's motion for summary disposition is not warranted.

Accordingly, the Government's Motion for Summary Disposition is hereby *granted,* its Motion for Stay of Proceedings is *denied* as moot, and in view of the presently uncontroverted fact that the Respondent lacks state authority to handle controlled substances, it is herein recommended that the Respondent's DEA registration be *revoked* forthwith and any pending applications for renewal be denied.

Dated: August 12, 2010.

**John J. Mulrooney, II,**

*U.S. Administrative Law Judge.*

[FR Doc. 2011–7390 Filed 3–29–11; 8:45 am]

BILLING CODE 4410–09–P

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

**[Docket No. 09–12]**

### Bienvenido Tan, M.D.; Denial of Application

On October 31, 2008, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Bienvenido Tan, M.D. (Respondent), of Newhall, California. The Show Cause Order proposed the denial of Respondent's application for a DEA Certificate of Registration as a practitioner, on the ground that "his registration is inconsistent with the public interest." ALJ Ex. 1, at 1.

More specifically, the Show Cause Order alleged that on April 12, 2007, Respondent "voluntarily surrendered [his] controlled substances privileges" when he was under investigation for illegally distributing controlled substances, and that in February 2008, he had applied for a new registration. *Id.* The Order alleged that "[l]aw enforcement personnel conducted at least eleven (11) undercover visits" to Respondent's office between October 2006 and March 2007 and that on several occasions, he had prescribed Lorcet and Vicodin, schedule III controlled substances which contain hydrocodone, as well as alprazolam, a schedule IV controlled substance, to them "with cursory or no medical examinations, and without a legitimate medical purpose." *Id.* (citing 21 CFR 1306.04).

The Show Cause Order further alleged that a medical expert had reviewed Respondent's files and "found 'strong

evidence for inappropriate prescribing of controlled [substances]" and that his "prescribing was 'an extreme departure from the standard of care expected of a licensed practicing physician.' " *Id.* at 2. The Order also alleged that Respondent had admitted to investigators that he "authorized an employee to dispense controlled substances to [his] patients in violation of state law." *Id.* at 1 (citing Cal. Bus. & Prof. Code § 4170).

By letter of November 4, 2008, Respondent timely requested a hearing and the matter was placed on the docket of the Agency's Administrative Law Judges (ALJs). Following pre-hearing procedures, an ALJ conducted a hearing from March 24 through March 26, 2009 in Los Angeles, California. At the hearing, both parties called witnesses to testify and submitted documentary evidence. Thereafter, both parties filed post-hearing briefs.

On January 8, 2010, the ALJ issued her recommended decision (also ALJ). Therein, the ALJ considered the evidence relevant to the five public interest factors. *See* 21 U.S.C. 823(f).

As to factor one—the recommendation of the appropriate State licensing board—the ALJ found that the Medical Board of California ("the Board") had not made a recommendation in this matter. ALJ at 34. The ALJ then noted that the Board had brought a proceeding against Respondent based on its review of three patient files (which are not at issue in this proceeding), but had found that "cause did not exist to discipline the Respondent's medical license 'for prescribing without a good faith examination and medical indication, as to all three patients.' " *Id.* The ALJ noted, however, that the Board found that "cause did exist to discipline Respondent's medical license 'for maintaining inadequate records' for one of the three patients" and that the Board "publicly reprimanded the Respondent 'for his departures from the standard of care regarding his medical record keeping' of that specific patient." *Id.* at 34. The ALJ did not make a finding as to whether this factor weighed for or against a finding that Respondent's registration was inconsistent with the public interest. *See id.*

The ALJ then considered factors two and four—the applicant's experience in dispensing controlled substances and his compliance with applicable Federal, State, or local laws related to controlled substances—together. Under these factors, the ALJ considered evidence pertaining to various undercover visits by a Special Agent (SA) and Confidential Informant (CI), Respondent's dispensing practices, his office procedures, and his recordkeeping. *Id.* at 35–39.

With respect to the undercover visits, the ALJ did not make findings as to whether the prescriptions Respondent issued to the SA or CI violated the CSA's prescription requirement. *Id.* at 36–37. Instead, the ALJ observed that "[t]he primary concern regarding the Respondent is his dispensing practices." *Id.* Noting that the evidence showed that "Respondent is dispensing multiple times more dosage units than the patient should consume, if taking the medication as prescribed," the ALJ explained that "either the patient is at risk of taking an overdose of the controlled substances, or the patient is diverting the controlled substances to the illicit market." *Id.* at 37. "Based on this factor alone," the ALJ concluded that "the Government has established a prima facie basis for denying * * * Respondent's application for a DEA registration." *Id.* at 38.

The ALJ further found that Respondent "is allowing unlicensed office staff to fill and dispense controlled substances." *Id.* She also found that Respondent did not require his pain patients to undergo urine or blood screens to determine whether they were actually using the drugs he prescribed and to determine whether they were taking drugs obtained either from other doctors or on the street. *Id.* The ALJ concluded that this "allows diversion of such medications without detection by * * * Respondent." *Id.*

The ALJ also found relevant Respondent's continuing to prescribe controlled substances without obtaining his patient's medical records. *Id.* She further noted that Respondent increased dosages without performing physical examinations, and that in some cases, he continued to prescribe controlled substances to patients for "almost a year" without seeing them. *Id.* at 38–39. Finally, she noted that while in some cases, he had indicated "his desire to decrease the dosage units of controlled substances," he would "oftentimes without even seeing the patient * * * return to the higher dosage without recording his treatment plan or otherwise explaining the higher dosage in the patient's records." *Id.* at 39. The ALJ, therefore, concluded that these factors support a finding that Respondent's registration is inconsistent with the public interest.[1]

Turning to factor five—such other conduct which may threaten the public health and safety—the ALJ reviewed the reports of each party's experts (who had examined various patient records) regarding the standard of care for prescribing controlled substances. *Id.* at 39–43. The ALJ noted that she had "a problem with the conclusions of both expert witnesses." *Id.* According to the ALJ, this was so because the Government's expert had opined that Respondent's care was "markedly below the accepted standards of licensed physicians in the United States today," thus suggesting that he had not applied the standard applicable under California law, *id.* at 40–41, and Respondent's expert had opined that he should be compared against "physicians of similar age, training, and background," which "is not the standard followed in California." *Id.* at 41.

The ALJ noted, however, that in preparing his report, the Government's Expert had relied on the Medical Board of California's "Guidelines for Prescribing Controlled Substances for Pain." *Id.* at 42. Because the Government's Expert's conclusions were "more consistent with the California requirements for determining the standard of care," she found persuasive his findings that Respondent's charting practices were "extremely deficient," that there were "inadequate records of consultation requests for further medical evaluations," and that "it would not be safe [for a patient] to ingest the quantity of controlled substances received in that short of a period of time" as occurred between the dates on which Respondent dispensed controlled substances to the various patients. *Id.* at 40, 43. The ALJ thus found that this "factor * * * weighs in favor of denying the Respondent's application," and that "[i]n total * * * the Government has met its burden of proof in presenting a prima facie case for denying the Respondent's application for a DEA registration." *Id.* at 43.

The ALJ then discussed various facts she deemed favorable to Respondent. These included that he "was not dispensing controlled substances for monetary gain," that he "refused to prescribe Oxycontin because of its addictive properties," that he "refused to prescribe controlled substances for recreational purposes," and that because he had a major increase in patients, he did not see them as often as necessary and did not keep careful track of his refills. *Id.* at 43–44. The ALJ further noted that "Respondent credibly testified that, if given a DEA registration, he would use the CURES

[1] With respect to factor three—Respondent's record of convictions for offenses related to the dispensing or distribution of controlled substances—the ALJ noted that there is no evidence that he has been convicted of an offense within this factor. ALJ at 39.

database[2] and he would limit his prescribing of controlled substances to the PDR[3]-defined limits." *Id.* at 44. The ALJ nonetheless concluded that "this does not go far enough" because Respondent had failed "to address his use of unlicensed individuals to dispense controlled substances," as well as what "procedures he would put in place to monitor his patients to ensure they were consuming the controlled substances as prescribed." *Id.* at 44–45. Thus, the ALJ recommended that "Respondent's application for a DEA registration * * * be denied at this time." *Id.* at 45.

On January 28, 2010, Respondent filed Exceptions to the ALJ's Decision; these Exceptions have been considered and are discussed throughout this decision. Respondent also requested that the ALJ reopen the record and admit his Exhibit A, which is a sworn statement signed by him and dated January 27, 2010, addressing the ALJ's findings that he had failed to address several critical deficiencies identified in the proceedings. Resp. Exceptions at 10.

On February 16, 2010, the ALJ denied Respondent's request, noting that Respondent should have been aware of "the Agency's longstanding rule" that where "'the Government has made out a prima facie case that a practitioner has committed acts which render his registration inconsistent with the public interest, the relevant inquiry is whether a practitioner has put forward 'sufficient mitigating evidence to assure the Administrator that he can be entrusted with the responsibility carried by such a registration.' " Order Denying Respondent's Request to Reopen the Record and Include "Exhibit A," at 2 (citations omitted). The ALJ further explained that "this inquiry looks to whether the registrant has accepted responsibility for his misconduct and undertaken corrective measures to prevent the re-occurrence of similar acts." *Id.* While noting that "[t]he evidence might have proven material when considering whether or not Respondent's continued registration would be a threat to the public interest," the ALJ noted that the evidence was available at the time of the hearing and that Respondent had the "burden of persuasion" on the issue. *Id.* at 4. She therefore denied Respondent's request to reopen the record. *Id.* Finding no error, I adopt the ALJ's ruling denying Respondent's request to reopen the record.

Thereafter, on February 18, 2010, the ALJ forwarded the record to me for final agency action. Having reviewed the record in its entirety and considered Respondent's Exceptions, I adopt the ALJ's findings except as expressly noted herein. I also adopt her recommendation that I deny Respondent's application. As the ultimate finder of fact, I make the following findings.

## Findings

Respondent has been a licensed physician and surgeon in the State of California since 1959; he was 83 years old at the time of the hearing. ALJ Ex. 3, at 1; Tr. 553. Respondent previously held a DEA Certificate of Registration, which authorized him to dispense controlled substances in schedules II through V. GX 2. However, on April 12, 2007, Respondent voluntarily surrendered his registration. *Id.* On February 29, 2008, Respondent applied for a new registration; this application is at issue in this proceeding. ALJ Ex. 3, at 2; GX 1.

Until 1998, Respondent primarily practiced as a surgeon. During this period, he also had a family practice with four offices and operated a dispensary on the premises of his practice for thirty to forty years. Tr. 562, 570, 598. From 1968 through 1998, he owned and operated Newhall Community Hospital, where he was the Medical Director and also a staff surgeon. *Id.* at 599, 602. During the course of his surgical career, Respondent had occasion to prescribe pain medications; while running the hospital he often had discussions with colleagues on pain medicine issues. *Id.* at 597, 602.[4]

In 1998, Respondent opened his current family practice. Tr. 563. While he is not formally trained in pain management, in 2003 he attended a 5-day course on pain management. *Id.* at 564, 638. At that course, he learned about Pain Management Agreements and Patient Comfort Assessment Guide tools, which he began to utilize in his practice. *Id.* at 307–09.

## The State Board Proceeding

On June 20, 2006, the Medical Board of California (the Board) filed a seventeen-count accusation against Respondent's medical license based on his treatment of patients P.P., D.F., and K.Z. RX A, at 2; RX V. The allegations included, *inter alia,* that Respondent had prescribed various drugs without performing adequate physical examinations and taking adequate histories, that he had committed negligent and incompetent acts, and that he had failed to maintain adequate records. RX V.

On April 2, 2007, a State ALJ rejected all of the allegations except for that which alleged that Respondent's recordkeeping with respect to K.Z. was inadequate. RX A, at 18. The State ALJ thus recommended that Respondent be "publicly reprimanded * * * for his departures from the standard of care regarding his medical record keeping of patient K.Z." *Id.* at 22. On May 4, 2007, the Board adopted the State ALJ's decision. *Id.* at 1. Of note, in this proceeding, the Government does not rely on Respondent's treatment of any of these three patients.[5]

## The DEA Investigation

In either August or September 2006, DEA's Los Angeles Field Division received information from a confidential source that Respondent was

[2] CURES is a database maintained by the State of California, Bureau of Narcotics Enforcement, from which doctors may obtain Patient Activity Reports (PARs) showing a patient's controlled substance prescriptions and who prescribed them. GX 39; Tr. 104. Dispensers of controlled substances, including pharmacies and physicians who dispense, must report to CURES. *Id.* Thus, the PARs allow a physician to determine whether a patient is receiving controlled substances from other doctors and is thus engaged in doctor shopping. *Id.* at 103.

[3] The PDR, or *Physician's Desk Reference,* contains manufacturers' recommendations as to the dosing of drug products. RX D, at 3.

[4] Respondent excepted to the ALJ's Decision arguing that it "neglect[ed] to recognize Respondent's medical training as a surgeon and his years of experience with pain management as a surgeon and as the chair of the Newhall Community Hospital and as a participant in hospital peer review proceedings dealing with pain management." Resp. Exc., at 4.

[5] In his decision, the State ALJ found that Respondent had told patient K.Z. that he could take Vicodin at the rate of up to twelve tablets per day. RX A, at 6. The ALJ also found that one of the Board's experts had observed that at one point, K.Z. would have been consuming "approximately nine grams of Acetaminophen" per day and that the expert "considered any quantity over four grams of Acetaminophen [per day] troubling." *Id.* at 10. While the State ALJ found that the *Physician's Desk Reference* ("PDR") states that "'[t]he total 24 hour dose [of Vicodin] should not exceed five tablets,'" *id.* at 13, he did not make any further finding as to whether there is an appropriate maximum dose of drugs containing acetaminophen such as Vicodin and simply concluded that the Board had failed to show that Respondent's "off-label dosage instructions departed from the standard of care." *Id.* at 20. This is not the same as saying—as Respondent testified—that the Board found that the maximum safe dosage of Vicodin ES is twelve tablets per day, and of Lorcet, eighteen tablets per day. Tr. 299–300. Indeed, according to one of the findings of the State ALJ's decision, "[a]cetaminophen is potentially toxic if between 7.5 to 10 grams are consumed daily for one to two days." RX A, at 14 (citation omitted).

However, for the purpose of resolving this proceeding, I accept the premise that Respondent had a good faith belief that a patient can safely consume up to 9 to 10 grams per day of acetaminophen. However, even accepting this, there was ample other evidence including an expert's report establishing the need to perform regular blood tests to determine how ingesting this much of the drug is affecting a patient's liver function.

unnecessarily prescribing hydrocodone to the "younger, mid-twenties population." Tr. 24. Thereafter, a DEA Diversion Investigator (DI) obtained reports from the Controlled Substance Utilization Review and Evaluation System (CURES), the State's prescription monitoring program showing prescriptions issued for schedule II through IV controlled substances, as well as ARCOS, a DEA database which monitors the sale of Schedule III and IV controlled substances from manufacturers and distributors. *Id.* at 25–27; GX 39. While the CURES report showed "minimal activit[y]," Tr. 26, the ARCOS report showed that between 2004 and 2006, Respondent's purchases of hydrocodone had increased from 63,600 tablets to 388,000, and that between January 1 and April 11, 2007, Respondent purchased 221,000 such tablets. *Id.* at 26–27; GX 4.[6] According to the DI, such large hydrocodone purchases were not consistent with a family practice or even with the operation of a typical family pharmacy, which he estimated might purchase 100,000 hydrocodone tablets per year. Tr. 44. Among physician purchasers of hydrocodone in the Los Angeles area, Respondent ranked second; the ARCOS database could not be queried, however, as to a ranking for physicians who also operate their own dispensaries. *Id.* at 28–30, 34, 43–44.

During the investigation, the DEA sent an undercover special agent (SA) using the name of "Kim Jackson" to Respondent in an attempt to obtain controlled substances. Tr. 51. The SA wore a wire and was monitored by a DI. *Id.* at 52.

At the SA's first undercover visit with Respondent on October 3, 2006, she told Respondent that she had just moved from Montana and had been getting Vicodin, a Schedule III controlled substance which contains hydrocodone and acetaminophen, from a physician there. Tr. 187, 192 (playing of GX 47 in hearing); GX 47; RX AA, at 1 (transcript of visit); *see* 21 CFR 1308.13(e). When Respondent asked her why she was taking the Vicodin, she responded, "It just made me feel better." Tr. 193; GX 47; RX AA, at 1. Respondent then said, "No, you know, I don't prescribe Vicodin for recreational purposes or to feel better * * * because Vicodin is a controlled drug and it is specifically for specific pains, you know?" Tr. 193–94; GX 47; RX AA, at 1. The SA then inquired whether "if [her] back hurt" would "be a way to get" the drug. Tr. 194; GX 47; RX AA, at 1. Respondent replied: "Yeah, what happened to your back?" Tr. 194; GX 47; RX AA, at 1. The SA answered: "I don't really specifically remember anything happening to it. But if it hurt, would Vicodin help it?" Tr. 194; GX 47; RX AA, at 1. Respondent answered in the affirmative.

Respondent then inquired about the doctor in Montana who had prescribed the Vicodin and whether that physician had obtained additional studies given her report of back pain. Tr. 194–95; GX 47; RX AA, at 1–2. The SA indicated that the doctor in Montana performed a physical examination but did not take x-rays or order any other tests. Tr. 195; GX 47; RX AA, at 2. Respondent then noted that it was "unusual" for someone as "young" as the SA to be having back pain, and asked: "where in your back are you having the pains?" Tr. 195; GX 47; RX AA, at 2. The SA answered: "I don't specifically have it, I was just asking you if that would be a reason someone would have it?" Tr. 195; GX 47; RX AA, at 2. Respondent next stated, "well you know, if it is for that reason for now * * * I can give you a prescription * * * which Vicodin are you using? Extra strength?" Tr. 196; GX 47; RX AA, at 2. The SA told Respondent that she was getting 10 mg. strength. Tr. 196.

Shortly thereafter, Respondent then asked, "Which part of your back are you hurting * * * show me where?" Tr. 196; GX 47; RX AA, at 2. The SA responded, "Here." Tr. 196; GX 47; RX AA, at 2. She then elaborated, "it's not really sensitive." Tr. 196; GX 47; RX AA, at 2. When Respondent asked her how long she had been having the pain, the SA replied, "A couple years I guess." Tr. 196; GX 47; RX AA, at 2. Respondent indicated that he would write for thirty tablets of 10 mg. Vicodin (Vicodin ES) but that "we have to have more documentation as to * * * why this [sic] controlled drugs * * * are being prescribed for you, you know?" Tr. 196; GX 47; RX AA, at 2.

Regarding her having pointed to her lower back and her statement that she had had pain for a "couple years I guess," the SA testified that she had told Respondent several times that she "was not in pain" and that she wanted Vicodin "because it made me feel good." Tr. 216. The SA further testified that Respondent was trying to provide her "with a story—oh, okay, yes, that works—back pain." *Id.* The SA also testified that Respondent did not appear to be hard of hearing as she was never asked to repeat herself. *Id.* While the SA acknowledged that Respondent may have been skeptical of whether she had pain, she testified that "right after that, he agreed to give me the Vicodin without further examination or questions." *Id.* at 217.

Respondent then indicated that he could either give her a prescription or that she could buy the medication from his dispensary. Tr. 197; GX 47; RX AA, at 3. The SA opted to buy her Vicodin from the dispensary. Tr. 197; GX 47; RX AA, at 3. Respondent instructed her to take the Vicodin as one tablet every eight hours. Tr. 198; GX 47; RX AA, at 3. The SA's visit with Respondent lasted approximately six minutes. Tr. 192, 199.

The SA received a paper bag containing Vicodin from the receptionist. Tr. 201. According to the SA, she did not receive anything in writing from Respondent notifying her that she had the option of obtaining the medication either with a prescription from a pharmacy or from his dispensary. *Id.* at 201. When the DIs later counted the pills, there were thirty-five tablets, not thirty. *Id.* at 202.

According to the patient record, Respondent observed a "muscle spasm." GX 14, at 4. In her testimony, the SA stated that Respondent examined her back "for maybe five seconds, at which time he touched me two to three times, lightly." Tr. 200. She also testified that Respondent never mentioned back spasms to her and that she never mentioned that she had back spasms to him. *Id.* The SA further testified that in examining her, Respondent never saw her skin as he did not lift the garment covering her back. *Id.* at 213.

In his testimony, Respondent asserted that when he touched the SA's back, he noticed muscle spasms, which confirmed his "impression that she did [have] back pain." Tr. 404. Respondent also testified that usually when he detects muscle spasms in a pain patient, he does not mention it to the patient but only notes it in the patient record as the observation is a "confirmation for [his] own information." *Id.* at 319. According to Respondent, a physical examination of the back largely "is by palpation of the back muscles." *Id.* at 486. He further maintained that, in checking for muscle spasms, it is preferable to touch through light clothing rather than to touch skin directly so as to avoid cold hands triggering a muscle spasm. *Id.* at 320.

[6] Respondent testified that during these years, his practice was growing. Tr. 282. In 2004, he had 1,740 patients; in 2005, he had 1,970 patients; in 2006, he had 2,320 patients; and in 2007, he had 2,353 patients. *Id.* He indicated that the reason for this increase was that prior to his heart surgery in 2003, he had retained a physician's assistant at his practice. *Id.* at 283. However, on losing patients after the heart surgery, he had dismissed the physician's assistant. *Id.* He attributed the subsequent growth of his practice to the fact that the patients were able to see him instead of just a physician's assistant. *Id.* at 284. Respondent further testified that with the increase in patients, he also experienced an increase in pain patients and therefore increased his purchases of Vicodin and other opioids. *Id.* The ALJ "generally f[ou]nd the Respondent's testimony credible." ALJ at 10 n.4.

Regarding the SA's visit, Respondent testified that in almost fifty years of practicing medicine he had never had a patient claim to not have pain yet request pain medication; nor had a patient who initially claimed to not have pain later claim to have pain. *Id.* at 404–05. According to Respondent, "I don't believe, nor do I remember, that she told me that she did not have any back pain." *Id.* at 405.

The ALJ found that "Respondent credibly testified that he believed she was suffering from back pain for the past two years. He believed he saw muscle spasms, which would be consistent with back pain." ALJ at 7. The ALJ did not explain how Respondent would have seen muscle spasms given the SA's testimony that he did not lift the garment that was covering her back. Nor did she reconcile her credibility findings with the actual conversation which was recorded during the visit which shows that Respondent had agreed to provide the Vicodin before the Agent had made any representation that she had back pain.

If taken as instructed, the thirty pills that the SA should have received would have lasted a minimum of ten days. On October 19, the SA phoned Respondent's office and requested a refill of Vicodin and asked for sixty pills instead of the thirty of her initial prescription. Tr. 202. The receptionist told her to call back after 3:00 to confirm whether the refill was approved. *Id.* When the SA called back, she was told that the refill had been approved; the SA picked up the prescription the following day. *Id.* at 203.

If taken as prescribed, the refill should have lasted a minimum of twenty days. Eighteen days later, on November 7, the SA called for another refill and asked for 120 Vicodin because she was going out of town. *Id.* This time, the SA was not told to call back to verify whether the refill had been approved. *Id.* Two days later, the SA obtained the drugs. *Id.*

At an appointment on December 1, 2006, the SA told Respondent that Vicodin made her nauseous and requested OxyContin. Tr. 203–04; RX Z, at 2. Respondent stated that OxyContin had worse side effects and that he would give her Lorcet (another hydrocodone drug) instead. Tr. 204; RX Z, at 3. He also recommended that she get massaged with warm olive oil and use a heating pad on her back. RX Z, at 3–4. The SA received 120 Lorcet from Respondent's staff on that day. Tr. 204. The SA also testified that although she had been asked to bring her medical records during the phone call in which she made her initial appointment, she never did and was never again asked to bring them. *Id.* at 205. On cross-examination, the SA testified that she did not receive early refills. *Id.* at 226.

R.E., who had reported Respondent to the DI, also agreed to wear a wire and visit Respondent; a portion of the recording of his initial visit was played at the hearing. Tr. 55; GX 47. On October 13, 2006, R.E. visited Respondent. GX 12, at 3. R.E. complained of stiffness in his neck which he had had for "a couple of years" duration and said that he had been taking Norco, a drug which contains 10 mg. hydrocodone and 325 mg. acetaminophen. Tr. 60–61, 68; GX 12, at 3, GX 47. R.E. also indicated that he had tried acupuncture and "[a] little yoga." Tr. 63. He also complained that it was hard for him to fall asleep. *Id.* at 64.

During the visit, Respondent touched R.E. lightly on the neck a couple of times. While Respondent noted the presence of muscle spasms in R.E.'s patient record, the recording of the visit contains no comment by Respondent which indicates that he had found that R.E. had a muscle spasm. GX 12, at 3; Tr. 60–67. The DI also testified that when he interviewed R.E. after the visit, R.E. never mentioned that Respondent had said that he had muscle spasms. Tr. 122. Respondent advised R.E. to use a heating pad and to get someone to massage the muscles for him. *Id.* at 63. Respondent also told R.E. he could either provide, or write a prescription for, 60 Vicodin ES, as well as 60 Xanax (alprazolam) to help him sleep. *Id.* at 64. R.E. opted to buy the drugs from Respondent's dispensary and Respondent instructed him to take one Vicodin ES every eight hours and one Xanax at night for sleep and another during the day "if you need it." *Id.* at 65, 174; GX 12, at 3.

If taken as directed, the Vicodin ES thus should have lasted twenty days; the Xanax should have lasted thirty days. On October 20, one week later, R.E. obtained a refill of 120 Vicodin ES. GX 12, at 5. According to R.E.'s patient record, on November 9, R.E. did a follow-up appointment with Respondent at which time Respondent switched him to Lorcet and dispensed to him 120 tablets, with the instruction to take one tablet every six hours. GX 12, at 5.

While this quantity would have provided a thirty-day supply if taken as directed, on December 1 (twenty-two days later), R.E. obtained a refill of 150 Lorcet, 30 tablets more than the previous refill. While if taken as directed, this refill would have lasted thirty-seven days, only six days later on December 7, Respondent approved refills for another 150 Lorcet with the same dosing instructions, as well as for 60 Xanax. *Id.* at 6.

On February 27, 2007, R.E. received refills for 150 Lorcet (again a thirty seven-day supply) and 60 Xanax, with the same dosing instructions. *Id.* On March 13, R.E. obtained another refill for 150 Lorcet and Respondent changed the dosing instruction to one tablet every four hours. *Id.* However, there are no notes indicating that Respondent had talked with R.E. and learned of any change in his condition that would support an increase in the dosing. Beside Respondent's initials on the phone message requesting the refill is the message: "Need visit & agreement." *Id.* at 9. A note saying "No Refill" three times in a row followed by "NEEDS TO BE SEEN," dated March 19, 2007 appears in R.E.'s patient record. *Id.* at 7.

A CURES Patient Activity Report (PAR) indicates that R.E. received hydrocodone/apap 7.5 mg./300 mg. from another doctor on November 8, 2006; Vicodin ES the following day from another doctor; and Suboxone [7] from another doctor on November 22. GX 44, at 2. On December 6, 2006, R.E. received more hydrocodone/apap 7.5 mg./300 mg., as well as diazepam, from yet another doctor; on February 13 and March 5, 2007, he received Suboxone from the same physician who had issued the prescription filled on November 22. *Id.*

R.E. had disclosed to DEA Investigators his consumption of Suboxone. Tr. 126. The DI testified that during the time that R.E. worked as a confidential informant, he had no reason to believe that R.E. was improperly consuming controlled substances.[8] *Id.* at 179.

The investigators subsequently obtained warrants to search Respondent's office and residence. *Id.* at 70. On April 12, 2007, the warrants were executed and the authorities seized approximately one hundred patient records which were selected based on these persons having received large quantities of hydrocodone, Xanax, and Valium; the DIs also seized the patient files for the SA and CI. *Id.* at 90–91. During the search of Respondent's residence, the DIs interviewed him. *Id.* at 71.

[7] Suboxone is a drug which is used to detoxify addicts from narcotics. Tr. 111.

[8] The record does not indicate at what point DEA became aware that R.E. was obtaining controlled substance prescriptions from other doctors or what course of action investigators took as a result. Because my findings regarding Respondent's prescribing to R.E. are based on the recording of his visit (which was played into the record) and his patient file, R.E.'s credibility is not in issue.

In the interview, Respondent indicated that he had approximately two thousand patients, including approximately fifty pain patients for whom he either wrote prescriptions or dispensed medication. *Id.* at 72. Respondent related that he took primarily cash patients and some MediCal patients but he did not take patients with private insurance. *Id.* at 90.

Respondent further stated that an employee, H.C., filled the prescriptions at his dispensary. *Id.* at 73. According to the DI, H.C. was not licensed in California to dispense drugs. *Id.* Respondent told the DIs that those patients who wanted refills would call his office, that he reviewed the requests, and that where appropriate, he approved a refill. *Id.* He further stated that he would authorize a refill approximately once a month. *Id.* The DI testified that Respondent's statement as to the frequency of his authorizing of refills was not consistent with what he observed in the patient files. *Id.* at 73–74.

As discussed below, the various patient records include slips memorializing the refill requests his patients phoned in. Respondent testified that upon reviewing these slips, he would instruct his staff to note on the slip when the patient had last received a refill (indicated by "LR") and/or the date when he/she had last been seen (indicated by "LS"). *Id.* at 337–38. He further testified that he used follow-up visits to obtain "information as to how that patient is doing at the particular moment" which he would use "either to keep the medications the same, lower it, or increase it." *Id.* at 337.

Respondent further testified that H.C. repackages pain medications into smaller bottles and labels them with pre-labeled dosing instructions. *Id.* at 306, 328. H.C. then brings the pain medication to "the girl in front who in turn gives them to the patient who pays [for the drug] up front." *Id.* at 328.[9]

Respondent admitted, however, that he did not personally supervise the receptionist as she delivered the controlled substances to his patients. *Id.* at 593. He also testified that his pharmacy, including his manner of dispensing medication to patients, was inspected by the Medical Board on two separate occasions and that he was not cited for any infractions. *Id.* at 328–29. Respondent was not present during one of the inspections. *Id.* at 329.

The DI also obtained additional PARs from CURES. These reports showed that four additional patients whose prescriptions were at issue in the proceeding obtained controlled substances from other physicians during the same period in which they obtained controlled substances from Respondent. *Id.* at 108–11; GXs 41, 42, 44, 45. California authorizes a licensed physician to obtain PARs "so that well-informed practitioners can and will use their professional expertise to evaluate their patients' care and assist patients who may be abusing controlled substances." GX 39, at 2.

Respondent testified that he was unaware of the availability of PARs until he saw the documents the Government was presenting in this proceeding. Tr. 343. He testified that, should his registration be restored, he would use the database when a patient is requesting refills too quickly, when a patient reports at his initial visit that he has already been on controlled substances, as well as thirty days after having prescribed controlled substances to a patient. *Id.* at 344, 557–58.

**The Expert Reports on the Standard of Care and Usual Course of Professional Practice**

At the hearing, neither party offered the testimony of an expert witness. However, each party submitted into evidence a report from a physician who had reviewed at least some of the patient files in question. GX 6; RX D. While neither party's witness was formally qualified as an expert (as would likely be the case if they had been called to testify), both parties referred to the physicians as experts and the ALJ treated them as such, as do I.

The Government's Expert was Rick Chavez, M.D. Dr. Chavez, who holds a B.A. from Stanford University and obtained his M.D. from the U.C.L.A. School of Medicine, is the founder and Medical Director of The P.A.I.N. Institute and is an Assistant Clinical Professor of family medicine at the U.C.L.A. School of Medicine. GX 6, at 33; GX 5. Dr. Chavez holds board certifications in family practice, pain management, and addiction medicine. GX 5, at 1. He is a member of the American Academy of Pain Management, the Society for Pain Management, the American Society of Interventional Pain Physicians, the American Pain Society, and the American Academy of Addiction Psychiatry. *Id.* at 8.

In addition to his medical practice, since 2001 Dr. Chavez has served as a Consultant/Physician Reviewer for the California Board of Medical Quality Assurance. *Id.* In this capacity, he reviews cases involving pain management, family medicine, addiction medicine, and general medical quality.[10] *Id.*

Respondent's Expert was William A. Norcross, M.D. Dr. Norcross received a B.S. from Ursinus College and his M.D. from the Duke University School of Medicine and holds board certification in family practice and geriatric medicine. RX D, at 5. At the time of the hearing, he was the Director of the University of California—San Diego's Physician Assessment and Clinical Education (PACE) Program and a Professor of Clinical Family Medicine at the University's School of Medicine. *Id.* at 6. However, Dr. Norcross is not board-certified in pain management.

In their respective reports, Dr. Chavez reviewed fifteen patient files;[11] Dr. Norcross reviewed four patient files. *See* GX 6; RX D. In their reports, both Dr. Chavez and Dr. Norcross opined as to whether Respondent had met the standard of care. However, Dr. Chavez provided an extensive discussion of what steps Respondent was required to take in order to meet the standard of care and discussed the Medical Board of California's *Guidelines for Prescribing Controlled Substances for Pain* (*Guidelines*), which were first adopted in 1994.[12] GX 6, at 16. By contrast, Dr.

[9] Respondent later identified this individual as the receptionist, who first takes a patient's payment. Tr. 592.

[10] Dr. Chavez also has extensive experience in conducting utilization review and case management, which involves monitoring the activities of primary care physicians for excessive or unwarranted use of services in pain management, neurosurgery, plastic surgery, orthopedics, podiatry, and general surgery. GX 5, at 3–4. He has also "developed guidelines for surgical, orthopedic, plastic surgery and pain management procedures to ensure appropriate utilization and quality of care." *Id.* at 4.

[11] Dr. Chavez reviewed the patient records of W.C., J.D., R.A., M.T., B.W., S.M., M.H., D.M., "Kim Jackson," R.E., E.A., J.N., M.D., J.W., and S.R. GX 6, at 2. Dr. Norcross reviewed the patient files of W.C., J.D., R.A., and M.T.; these files include three of the patients who, according to the PARs obtained by the Government, had obtained controlled substances from other physicians during the period in which Respondent prescribed to them. RX D, at 1; GX 41–43.

[12] In his discussion of the standard of care, Dr. Chavez noted that the Board has promulgated *Guidelines for Prescribing Controlled Substances for Pain,* a copy of which was attached to the Government's Post-Hearing Brief. Gov't Post. Hrng. Br., App. E. These were adopted by the Board in 1994, GX 6, at 16, and were subsequently revised in 2003. *Id.* at 16; App. E, at 1. I take official notice of the fact that the Board adopted the revised *Guidelines* on August 1, 2003. The *Guidelines* are intended "to improve effective pain management in California, by avoiding under treatment, over treatment, or other inappropriate treatment of a patient's pain and by clarifying *the principles of professional practice that are endorsed by the Medical Board* so that physicians have a higher level of comfort in using controlled substances, including opioids, in the treatment of pain." *Id.* at 1 (emphasis added).

Norcross's report discussed only whether he believed Respondent's "charting and clinical decision making," as well as his prescribing of drugs beyond the maximum recommended daily dosage listed in the *Physician Desk Reference,* met the standard of care. RX D.

According to Dr. Chavez, "[a]ccepted standards of medical practice require that physicians obtain a sufficient history and perform a focused physical exam when evaluating patients in chronic pain." GX 6, at 17. Furthermore, "[b]efore prescribing narcotic analgesic medications[,] the physician should have an understanding as to the probable diagnosis and a picture of the overall general health of the patient." *Id.*

Dr. Chavez explained that a physician must obtain a history of the condition, which includes determining the onset of the pain, the "[e]xact location and character of pain" and use either "a visual analogue" or a "1–10 scale" to measure the pain level. *Id.* The physician must assess the degree of the patient's functional and physical impairment, which includes the patient's physical and psychological function, documentation of the presence of recognized medical indications for the use of controlled substances, and a substance abuse history with the latter being "a basic requirement." *Id.* at 17–18. In addition, the physician should do a review of prior pain treatment and medications and determine the patient's "response to previous treatment," as well as review the patient's medical records and test results from prior treatment. *Id.* Moreover, the physician must determine whether the patient has any coexisting or underlying conditions. *Id.* at 18.

Dr. Chavez further explained that "[b]ased on the patient's complaints, the physician must determine the most likely reasons for the patient's pain complaint" and that "[d]etermining the exact Pain Generator or source of pain requires a thorough focused exam which correlates with historical data." *Id.* Continuing, Dr. Chavez observed that "[h]alf of all patients in chronic pain suffer from 1 or more other medical conditions and thus, may have multiple different diagnoses. Therefore, assessment of cardiac, renal, hepatic, GI, pulmonary, and psychiatric status are imperative before prescribing opiate analgesics and other medication which may not be indicated in particular medical conditions, or which may affect end-organ function." *Id.* Moreover, "[i]t is of utmost importance that the physician keep an accurate and complete medical record with thorough documentation at every visit for each chronic pain patient." *Id.* Dr. Chavez also explained that a patient may require further testing to verify a presumed diagnosis and to assess major organ systems because prescribing certain drugs, including those containing Tylenol (acetaminophen), "in a patient who may develop end organ damage may be contraindicated." *Id.* at 19.

In this regard, Dr. Chavez further observed that "[p]atients on large doses of medications which might cause serious side effects must have regular blood chemistries drawn in order to assess end-organ function and a baseline measurement of function. It is crucial for the treating physician to recognize early on whether any evidence of medication induced organ dysfunction is present." *Id.* at 29.

According to Dr. Chavez, once the physician makes a diagnosis, a treatment plan should be created which lists, *inter alia,* the objectives of treatment, how the success of the treatment plan will be evaluated, and whether any further tests or consultations with specialists are required. *Id.* at 20–21. In addition, "the prescribing physician should have discussed the risks and benefits of the use of controlled substances with the patient and have [obtained] a signed medication agreement with the patient, within the first [three] visits, which spells out the requirement for continued opioid therapy." *Id.* at 20–21. Dr. Chavez further noted that "[c]hronic pain treatment requires more than the use of opiate analgesic medications." *Id.* at 30.

Dr. Chavez observed that "[i]t is not considered good medical practice to allow refills on addictive medications in pain patients unless they have been under the care of the physician for [a] long-term and/or are well-known to the prescribing physician." *Id.* at 20. Continuing, he explained that "[f]requent visits and re-evaluation of the situation are necessary" and that "[i]t is prudent to see the opiate treated chronic pain patient once every 1 to 3 months." *Id.* He also explained that a "[p]eriod of titration of medication and physician follow-up is necessary to determine [the] effectiveness of therapy or [to] re-evaluate whether the presumed diagnosis is correct." *Id.* at 22.

In his review of the patient files, Dr. Chavez found that "for each patient receiving opiate analgesic(s), anti-anxiety, muscle relaxant(s), or sleep agents for chronic pain therapy," Respondent's "charts did not exhibit [the] clear presence of" "[a] thorough history," "[a] thorough focused physical exam," and "[a] thorough past historical review." *Id.* at 30. Moreover, not one of the charts had evidence that Respondent had "[b]egun a diagnostic work-up or thoughtful discussion to verify the presumed diagnosis and probable pain generator(s),"[13] or that the patients had "been placed on a multi-modality pain treatment and management program with appropriate use of other non-addictive medications" and consideration of other treatment modalities. *Id.*

According to Dr. Chavez, "[c]hronic pain treatment requires more than use of opiate analgesic medication and, therefore, on chart review, one should see evidence of discussion of other therapies and offer recommendations regarding behavioral therapy, psychological therapy and support, physical therapy, exercise, weight loss, and other modalities." *Id.* There should also "be plans for appropriate specialty consultation, diagnostic studies * * * and drug screens to rule out illicit drug use or diversion," as well as "medication contracts or agreements." *Id.*

Dr. Chavez observed that "the patient medication agreement that [Respondent] did have in the chart did not seem to be followed like it should have been." *Id.* at 30. More specifically, the terms of Respondent's pain management agreement included that the patient "will submit to a blood or urine test if requested by my doctor to determine my compliance with my program of pain control medicine," and that the patient "will use [his] medicine at a rate no greater than the prescribed rate and that use of * * * medicine at a greater rate will result in * * * being without medication for a period of time." GX 7 at 10.

Dr. Chavez noted, however, "that there is no consistent refill rate" in the charts, and that "[s]ome refills occurred within two days of the last refill which would mean that large quantities of opiates had * * * been ingested during that time." GX 6, at 30. He also observed that "not one of the patients had a urine

The *Guidelines* state that "[t]he Medical Board expects physicians and surgeons to follow the standard of care in managing patients." *Id.* Under the heading "History/Physical Examination," it provides that "[a] medical history and physical examination *must* be accomplished. This includes an assessment of the pain, physical and psychological function; a substance abuse history; history of prior pain treatment; an assessment of underlying or coexisting diseases or conditions; and the documentation of the presence of a recognized medical indication for the use of a controlled substance." *Id.* at 2 (emphasis added).

[13] Dr. Chavez stated that while it is not expected that a physician can conduct all the "recommended evaluations on the first visit," "by the 2nd, 3rd, or 4th visit patient charts should have many of the basic standards of care during the course of treatment." GX 6, at 30.

drug screen done to verify that they were indeed ingesting the medication as opposed to diverting it." *Id.* at 30–31. He also further found that Respondent "did not do any significant medical workup on any of the patients." *Id.* at 31.

Dr. Chavez also noted that while under the California guidelines "there is no maximum or minimum of medication limitations as long as [the] amounts provided match a safe dosing schedule," he further opined that "if the maximum exceeds the manufacturer's (pharmaceutical company; PDR) recommendations, then, generally, one may conclude that misuse or diversion of opiates or other addictive drugs may be occurring." *Id.* at 31–32. Dr. Chavez then explained that "the normal maximum dosage of Norco would be two tablets every four hours or a maximum of 12 tablets per day, and for Vicodin ES 7.7/750[,] a maximum of 4–6 per day because of the amount of Tylenol [acetaminophen] involved," which "generally should not exceed 4000 milligrams per day." *Id.* at 32.

According to Dr. Chavez, while "most of the quantities [Respondent] prescribed" would be "reasonable and appropriate" if "given on a monthly interval," he noted that "[m]any of the refills occurred within 2 to 7 days of the last refill" and that "[i]n many cases, it would have been impossible * * * to use this quantity of controlled medications within that short of period of time." *Id.* at 32. In Dr. Chavez's opinion, "[t]his should have been a red flag for possible drug diversion and/or abuse." *Id.*

Dr. Chavez opined that "[b]ased on the types and quantities of medications prescribed, the younger age range of many of [Respondent's] patients,[14] the frequency of prescriptions, the excessive quantities of medications, and irregular refill dates, there is substantial evidence to indicate the probability of abuse or diversion of opiate medications in the majority of the patient charts reviewed." *Id.* at 31. He also opined that "[t]he fact that [Respondent] so freely prescribed these drugs without a thorough evaluation of these patients is not an acceptable approach to pain management." *Id.*

Continuing, Dr. Chavez noted that "[n]ot one chart had evidence of the physician undertaking a workup in evaluation of the underlying medical problem" and "[t]he 15 charts reviewed lacked any objective evidence or chart notes justifying the use of opiate therapy to the level exhibited on the charts evaluated." *Id.* at 32. Dr. Chavez also observed that the charts demonstrated no "effort to try nonaddictive medications or offer alternative modalities of treatment." *Id.* Dr. Chavez then opined that "[t]he medical care and treatment provided by [Respondent] are markedly below the accepted standards of treatment for licensed physicians in the United States today. The represents an EXTREME DEPARTURE from the standard of care expected of a licensed practicing physician in the U.S. today." *Id.* at 33 (caps in original).

In addition to the four patient records indicated above, Dr. Norcross reviewed Dr. Chavez's report on Respondent and the Board's decision referenced above. RX D, at 1. Dr. Norcross indicated he had formed certain opinions based on these materials and also on his "personal knowledge" of Respondent in that he had known Respondent "for almost 4 years in [Dr. Norcross's] capacity as a teacher, helping [Respondent] to improve the quality of his prescribing and record-keeping." *Id.* Further, Dr. Norcross had "also served as a witness in [Respondent's] Medical Board of California matter." *Id.*

Dr. Norcross concurred with Dr. Chavez that Respondent's "medical record-keeping still has room for improvement" and that his "charting of the patient history and physical examination would not be 'thorough' by the standards Dr. Chavez cite[d]." *Id.* at 2. However, he then asserted that Respondent should be "judge[d] * * * against the standard of care defined by 'the community of licensees,' and within that group, against physicians of similar age, culture, experience, training background, and clinical environment." *Id.* at 2. Continuing, Dr. Norcross opined that "if compared to other older generation general practitioners who were not the beneficiaries of a full 3-year residency training program and were providing care to an underserved patient population, I believe [Respondent's] charting and clinical decision making are well within the middle of that Bell Curve." *Id.*

Dr. Norcross further opined that as to the four patients whose medical records he reviewed, "there was a plausible source of pain, and [Respondent] provided enough history and enough examination, that the diagnosis was clear in all cases." *Id.* With respect to Dr. Chavez's criticism as to the lack of "laboratory tests and imaging studies" as well as consultations with specialists, Dr. Norcross explained that he understood the costs of these were a "deterrent[] * * * for a significant portion of [Respondent's] patient population" because they do not have insurance. *Id.*

Respondent, however, produced no credible evidence that any of the specific patients whose files were reviewed by Dr. Chavez lacked the financial resources to pay for these tests and/or consultations.[15] Moreover, given that some of these patients had the ability to purchase more drugs (and sometimes multiple drugs) on numerous occasions within a month, it seems likely that they had the ability to pay for some tests and/or consultations.

Dr. Norcross did, however, agree with Dr. Chavez's "point that physicians should, as a general rule, limit their prescribing habits, for all drugs, not just opiates, to the manufacturer's prescribing limits, even though responsible physicians can, and do, prescribe medications, including pain medications, 'off label' in appropriate cases." *Id.* at 3. Dr. Norcross further noted that he had advised Respondent that "it was [his] strong recommendation [to] limit his prescribing to the * * * recommended daily maximum dosage, even though other reasonable physicians do engage in 'off label' prescribing in appropriate cases" and that "there are epidemiological studies regarding liver toxicity supporting the PDR dosage recommendations." *Id.* According to Dr. Norcross' report, he had "reviewed this" with Respondent, who had "committed himself to doing this henceforth, notwithstanding the 'off label,' dosage levels discussed in the [Board's] decision." *Id.*

While the ALJ "ha[d] a problem with the conclusions of both of the expert[s]," she held that Dr. Chavez's findings were entitled to more weight because "they are more consistent with the California requirements for determining the standard of care to be levied against the Respondent's practices." ALJ at 43. I agree with the ALJ's conclusion although I disagree with her reasoning to the extent it suggests that Dr. Chavez erroneously "seemed to infer that there

[14] According to Dr. Chavez, "[p]atients between the ages of 21 and 39 who suffer with chronic pain and who are on chronic opiate therapy are not that prevalent, even in a busy 'Pain Practice.' " GX 6, at 32. Moreover, the majority of patients "in this age group can be treated with non-opiate and non-addictive medications for the most part." *Id.*

[15] On this issue, Respondent's testimony was generally vague. With respect to patient M.T. (GX 19), who complained of lower back pain, Respondent stated that he did not do any additional diagnostic studies because "actually in talking to him it sounds like he's a patient of very limited means and to get the x-rays and all of the other studies would cost him a lot of money which he cannot afford." Tr. 384. Yet M.T.'s record contains no indication that Respondent discussed this issue with him. *See generally* GX 19. With respect to M.H. (GX 13), who complained of migraines, Respondent acknowledged that "there could have been a lot more studies" but the patient "would have to incur considerable expense." Tr. 397. Here again, there is no evidence in M.H.'s record that Respondent discussed the issue with him.

is a national standard of care." *Id.* at 40; *see also id.* (noting that "[i]n California * * * a doctor is held to the standard of skill or care prevailing in the medical profession in the locality in which he practices") (citing *Inouye* v. *Black,* 238 Cal.App.2d 31, 33 (Cal. Ct. App. 1965)).

In his Exceptions, Respondent contends that the ALJ "completely ignore[d] the standard of care set by the California Supreme Court and ratified by the California Medical Board" that "'a physician is required to possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other members of his profession *in similar circumstances.'*" Resp. Exceptions at 7 (quoting *Landeros* v. *Flood,* 17 Cal. 3d 399, 408 (1976)). According to Respondent, the standard applied by the ALJ "has long been repudiated * * * in favor of the 'similar circumstances' standard articulated by" his expert. *Id.* at 7–8.

Both the ALJ's reasoning and Respondent's contention ignore, however, that the standard applicable under Federal law is whether the prescriptions were "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 CFR 1306.04(a). In *United States* v. *Moore,* 423 U.S. 122, 138–39 (1975), the Supreme Court upheld the conviction of a physician for unlawful distribution of methadone based on a jury instruction that allowed the jury to find him guilty if he dispensed the drug "other than in good faith for detoxification in the usual course of a professional practice and *in accordance with a standard of medical practice generally recognized and accepted in the United States.*" (emphasis added).

Moreover, even after *Gonzalez* v. *Oregon,* 546 U.S. 243 (2006), several courts of appeals "have applied a general-practice standard when determining whether the practitioner acted in the 'usual course of professional practice.'" *See United States* v. *Smith,* 573 F.3d 639, 647–48 (8th Cir. 2009); *see also id.* at 648 (discussing *Moore;* "Thus informed by the Supreme Court and other controlling and persuasive precedent, we believe that it was not improper to measure the 'usual course of professional practice' under § 841(a)(1) and [21 CFR] 1306.04 with reference *to generally recognized and accepted medical practices.* * * * "); *see also United States* v. *Merrill,* 513 F.3d 1293, 1306 (11th Cir. 2008) (quoting *Moore,* 423 U.S. at 139) ("The appropriate focus is not on the subjective intent of the doctor, but rather it rests upon whether the physician prescribes medicine 'in accordance with *a standard of medical practice generally recognized and accepted in the United States.'*").

Of further significance, post-*Gonzales,* the Ninth Circuit has expressly recognized that "both the Supreme Court and this Circuit have previously approved jury instructions that refer to a national standard of care." *United States* v. *Feingold,* 454 F.3d 1001, 1009 (9th Cir. 2006).— As these cases make clear, the opinion of the Government's Expert that Respondent's treatment of the patients whose files he reviewed was "markedly below the accepted standards of treatment for licensed physicians in the United States today" and "represents an EXTREME DEPARTURE from the standard of care expected of a licensed practicing physician in the U.S. today" is clearly admissible and probative of whether Respondent's prescriptions were "issued for a legitimate medical purpose" and whether he acted "within the usual course of professional practice." 21 CFR 1306.04(a).[16]

In any event, the record establishes that Dr. Chavez serves as a consultant/physician reviewer to the California Board on pain management and is thus clearly familiar with the standards of medical practice related to prescribing controlled substances to treat chronic pain patients in California. Moreover, in his report, Dr. Chavez made clear that he had analyzed Respondent's prescribing pursuant to the California guidelines.[17] *See* GX 6, at 31.

Most importantly, in his report, Dr. Chavez provided an extensive discussion of the accepted standards of medical practice for diagnosing, treating, and monitoring chronic pain patients. By contrast, Dr. Norcross is not even board certified in pain management. With the exception of his conclusory assertion that Respondent had done enough of a history and examination so that his diagnosis was clear with respect to the four patient files he reviewed (in contrast to the fifteen files Dr. Chavez reviewed), he did not otherwise identify how Dr. Chavez had misstated the accepted standards of medical practice. Indeed, Dr. Norcross apparently agreed with Dr. Chavez's opinion regarding the inappropriateness of prescribing controlled substances containing acetaminophen in quantities exceeding the manufacturer's recommended limits, as well as Dr. Chavez's opinion as to the inadequacy of Respondent's medical records. Finally, Dr. Norcross failed to address numerous other deficiencies identified by Dr. Chavez such as Respondent's failure to do blood chemistries to assess organ function, his failure to discuss the risks and benefits of taking controlled substances, his failure to create treatment plans, his failure to recommend other treatment modalities, his failure to require frequent visits to re-evaluate his patients and the efficacy of the therapy, his failure to take substance abuse histories, the frequency of his refills, and his failure to enforce his pain management agreements. Thus, I conclude that Dr. Chavez's report is entitled to significant weight and Dr. Norcross's report is entitled to little weight.

**The Patient Files and Respondent's Testimony Regarding Them**

Before discussing the patient file evidence, several issues must be resolved. The ALJ found that "Respondent expects his patients to rely upon his verbal dosing information, [and] not the instructions found on the prescription labels on the bottle, for controlled substances." ALJ at 12. The ALJ further that Respondent "credibly testified that ten grams of acetaminophen is the safe limit for daily intake" and presumably credited his testimony that "the maximum safe dose of Vicodin-ES [which contains 750 mg. of acetaminophen] is 12 tablets per day" and that the maximum safe dose of Lorcet, which contains 500 mg. of acetaminophen,[18] "18–20 tablets per day." *Id.*

[16] State Board regulations and/or guidelines are, of course, relevant in determining what practices are necessary for a physician to act in the usual course of professional practice. *See Volkman* v. *DEA,* 567 F.3d 215 (6th Cir. 2009). This, however, is not a case where a State rule or guideline expressly allows a physician to act in a manner which is in conflict with the accepted standards of medical practice throughout the country. Nor is it a case in which the Attorney General seeks to declare illegal conduct which is clearly permitted under State law. *See Gonzalez,* 546 U.S. at 258.

[17] While Respondent argues that the *Guidelines* do not have the "force of law," Exceptions at 5, they are nonetheless relevant in assessing what practices are necessary to dispense controlled substances for a legitimate medical purpose and in the usual course of professional practice. Moreover, Federal courts have repeatedly upheld convictions under 21 U.S.C. 841 based on expert testimony as to the accepted standards of professional practice even though these standards may not have been promulgated in State board regulations. I thus reject Respondent's exception.

[18] While in his testimony, Respondent asserted that Lorcet contains only 500 mg. of acetaminophen per tablet, Tr. 301–02, the Government attached to its post-hearing brief a copy of the PDR listing for the drug which shows that each tablet contains 650 mg. of acetaminophen. Gov. Br. at Appendix A. In his Reply Brief, Respondent conceded that "Lorcet contains 650 mg. of acetaminophen." Resp. Reply Br. at 7. For the purpose of this decision, I assume that Respondent had a good faith but mistaken

Continued

In his testimony, Respondent maintained that, notwithstanding the dosing instructions for the prescriptions which were on the bottles and presumably recorded in his patient files, he actually expected his patients to take more than this because they would develop tolerance and require more of the drug to achieve pain relief. Tr. 310, 567. According to Respondent, the dosing instruction written on the bottle was "the least number of pills * * * that [his patients are] supposed to take," and he expected his patients to rely on what he told them they could safely take, which was up to nine to ten grams of acetaminophen per day, an amount which equates to twelve Vicodin ES tablets (a tablet containing 750 mg. of acetaminophen) and 18–20 tablets of Lorcet (a tablet containing 500 mg. of acetaminophen). *Id.* at 298–302, 305, 569. However, when asked why he did not just put his oral instruction on the prescription vials, he gave the rather evasive answer that it was because he did not "know what is the effect of tolerance in all that." *Id.* at 568.

It is not clear whether the ALJ found this specific testimony credible.[19] On the one hand, as noted above, the ALJ found that "Respondent expect[ed] his patients to rely upon his verbal dosing information" and not the instructions on the label of the bottle containing the drugs he dispensed. ALJ at 12. She also found credible his testimony "that ten grams of acetaminophen is the safe limit for daily intake," and apparently, also his testimony as to the maximum daily amount of Lorcet (18–20 tablets) and Vicodin-ES (12 tablets) which can be safely taken. *Id.*

On the other hand, the ALJ devoted an extensive portion of her decision to analyzing the quantities of drugs Respondent dispensed to specific patients, how long these drugs should have lasted "if taken as instructed" or if "taken as prescribed." *See, e.g.,* ALJ at 13–14 ("The Respondent instructed [R.A.] to take one pill every four hours. If taken as instructed, this amount of pills [2,850 dosage units of Vicodin ES] would have lasted 475 days. Therefore, 475 days worth of medication was distributed over 267 days."). Apparently, the ALJ based her finding that "Respondent instructed [R.A.] to take one pill every four hours" on the notations in R.A.'s chart. *See* GX 8, at 10. It also appears that she relied on the dosing information contained in the charts for the other patient files she analyzed and for which she concluded that Respondent had dispensed controlled substances in quantities that far exceeded the amounts which he prescribed to them. *See* ALJ at 37 ("when data is compiled concerning investigated patients, the Respondent is dispensing multiple times more dosage units than the patient should consume, if taking the medication as prescribed.").

Respondent excepts to these findings, noting that the ALJ found that he "'credibly testified' that ten grams of acetaminophen is the maximum daily safe dosage" and thus the maximum safe daily dosage of Vicodin ES "should be corrected to 12 * * * rather than 5" tablets; he further argues that the ALJ failed to acknowledge his testimony "that he did not expect the patients to follow the label directions, but to consume the medication dispensed over the period of time between refills" and that it is therefore "not fair to characterize the[] labels as "'instructions to patients.'" *Id.* at 2–4.

Respondent is correct that there is an inconsistency between the ALJ's finding regarding the amounts of Lorcet and Vicodin he told his patients they could take and her analysis of Respondent's dispensings. I conclude, however, that it is not necessary to resolve the issue because even assuming that Respondent's testimony regarding his instructions to the patients was credible,[20] he offered no similar testimony with respect to his prescribing of Xanax and Valium (*i.e.,* that he told them they could take more than what he prescribed). Thus, in determining whether he was dispensing excessive amounts of Xanax and Valium, I base my findings on the dosing regime which he noted in the respective patient's chart. Moreover, even with respect to his dispensing of Lorcet and/or Vicodin, there is still evidence that he failed to properly monitor the amount of these drugs his patients were receiving.

**E.A.**

E.A. was a food server and plumber who complained of back pain. Tr. 497; GX 7, at 3. He was twenty-two years old at the start of his treatment with Respondent. GX 7, at 2. The patient record bears no indication that Respondent took a substance abuse history. *See id.* Beginning on September 15, 2005, E.A. saw Respondent eight times at roughly monthly intervals. Tr. 503;[21] GX 7, at 3, 5, 13, 27, 29, 32, 33, 34.

At the initial appointment, Respondent noted that E.A. had fallen about one year earlier and that he had no x-rays or other studies from that time. GX 7, at 3. Respondent observed "lumbar area muscle spasms and tenderness" and jotted down "chronic back pain? intractable?" *Id.* He prescribed Lorcet, to be taken once every four hours, and dispensed 90 tablets, a fifteen-day supply if taken in accordance with the dosing instruction recorded in the patient file. *Id.* Respondent testified that at the exam the following month, E.A.'s condition remained unchanged and that this "fortifie[d]" his earlier assessment that the pain was "intractable" and "chronic." Tr. 504.

Respondent testified that he advised E.A. to use a heating pad and also to lose weight. Tr. 505, 510. He did not, however, document this in E.A.'s chart. *See generally* GX 7. He also testified that while other tests could have been administered to E.A., they probably would not have yielded information that would have altered his treatment of the patient. Tr. 618.

On September 19, only four days after E.A.'s initial visit, Respondent provided a refill for 90 Lorcet. GX 7, at 3. If taken according to the instructions in E.A.'s chart, the initial prescription should have lasted fifteen days. If, however, E.A. actually took eighteen to twenty tablets per day, the initial prescription would have lasted four to five days.

E.A. received refills of 120 Lorcet with the same dosing instruction on September 26, October 4, 14, 21 and 28; November 23; December 1, 8, 15, 22 and 29; January 5, 12, 18 and 26; and February 2 and 7, 2006. GX 7, at 5, 31–34. Yet, throughout this period, there is no evidence that Respondent ever performed tests on E.A. to determine whether the high amount of acetaminophen he was supposedly consuming was affecting his liver function.

On November 23, 2005, E.A. signed a Pain Management Agreement. *Id.* at 9–

belief that a Lorcet tablet contains 500 mg. of acetaminophen.

[19] It is noted that the ALJ "generally f[ound] the Respondent's testimony credible." ALJ at 10 n.4.

[20] There is reason to question the credibility of Respondent's testimony regarding the amounts of drugs he told his patients they could take. During the Special Agent's undercover visit, Respondent told her to take one Vicodin ES "every eight hours." Tr. 198. When the Agent repeated this instruction, Respondent replied: "Yeah. Take one every eight hours, if necessary." *Id.* At no time did he tell her that she could safely take up to twelve tablets. *See id.* Likewise, the recording of R.E.'s visit indicates that Respondent told him to take one tablet of the Vicodin "every eight hours." *Id.* at 65. Here again, there is no indication that Respondent told R.E. that he could take up to twelve tablets.

[21] Respondent testified that there were five monthly examinations; the chart however indicates that there were eight: on September 15, October 14, November 23, and December 22, 2005, as well as on January 18, February 27, April 17, 2006, and one on which the date is undecipherable. GX7, at 3, 5, 13, 27, 29, 32, 33, 34.

10. Also, at some unknown date, E.A. completed a Patient Comfort Assessment Guide in which he indicated that Lorcet gave him complete relief of his pain. *Id.* at 7. He further indicated that he was at that time experiencing pain of 9 on a scale of 1 to 10, that Lorcet relieved his pain, and that not taking Lorcet exacerbated his pain. *Id.*

On February 2, 2006, E.A. received a refill for 150 Lorcet, an increase in the quantity with the same dosage noted in his file of one tablet every four hours. *Id.* at 31. Based on Respondent's claim that he expected his patients to take up to 18–20 tablets per day in accordance with his oral instructions, the refill would have lasted a minimum of seven days. E.A. obtained additional refills for 150 Lorcet on February 7 and 13. *Id.* Yet E.A. did not obtain another refill until February 27, two weeks later, which suggests that E.A. was not consuming 18–20 Lorcet per day. *Id.* His next refill of 150 Lorcet (7.5 to 8 ⅓-day supply) came ten days later on March 6. *Id.*

On March 13, in addition to dispensing 150 Lorcet, Respondent dispensed 60 Valium, a thirty-day supply based on the dosing noted in the chart of one tablet every twelve hours. Respondent did not see E.A. on this day and the medical record contains no indication of Respondent's medical justification for dispensing Valium.

At approximately weekly intervals through mid-April, E.A. obtained 150 Lorcet.[22] On April 17, E.A. had an appointment with Respondent, who noted in his chart that he "Need[s] reduction in the amount of meds." *Id.* at 27. On that date, Respondent dispensed only 60 Lorcet to E.A. with the usual dosage instruction of one every four hours. *Id.*

There is no record of a further appointment or refill until December 8, 2006, nearly eight months later. On this date, E.A. obtained 150 Lorcet, to be taken once every six hours (a decrease in dosage from the previous refill; however, a 7.5 to 8-day supply based on Respondent's testimony of the maximum daily safe amount), as well as 120 Valium (a sixty-day supply). *Id.* at 17. Through January 22, 2007, E.A. obtained refills of each of these drugs in the same amounts at 3–4 day intervals for a total of twelve refills of each.[23] *Id.* at 15–17. These refills were clearly early, especially in the case of the Valium, with a sixty-day supply being obtained every three to four days. E.A. was therefore consuming hydrocodone and Valium in amounts far in excess of the maximum daily dosage, or he was diverting a substantial portion, if not all of the medication.

On January 25, Respondent dispensed a refill of 150 Lorcet but no Valium. On both January 29 and February 2, Respondent dispensed refills for 150 Lorcet and 80 Valium; and on February 5, he dispensed another 150 Lorcet. *Id.* at 14, 16. An entry in the chart for February 8, 2007 reads: "Refill Refused per [Respondent], Lorcet #150 * * * available 2/19/07." *Id.* at 14.

Notwithstanding the note in the chart, on February 16, E.A. again received another 150 Lorcet (7.5 to 8 ⅓-day supply) and 30 Valium (a fifteen-day supply). *Id.* E.A. apparently attempted to obtain more Lorcet on February 20, as a note in the chart reads "Too soon Per [Respondent]." *Id.* Three days later, one week from his last Valium refill, he obtained another 30 Valium, thus receiving the refill one week early. *Id.* at 11.

On March 20, E.A. obtained another 150 Lorcet, this time at the dosage of two tablets every four hours. *Id.* The chart does not indicate any reason for the increase in the dosage. E.A. obtained additional refills of 150 Lorcet on March 29 and April 2. *Id.* On April 6, he obtained a further 120 Lorcet (six-day supply), and on April 9, another 150 Lorcet, at which point the prescribing record ends. *Id.* at 12.

In his testimony, Respondent conceded that E.A. received early refills on April 2, 6, and 9. Tr. 524. However, as the above indicates, even assuming that E.A. consumed the Lorcet at the rate of 18 to 20 tablets a day, E.A.'s record is replete with instances of early refills. Although at times Respondent limited the refills (mostly during the period leading up to the MBC proceeding), Respondent repeatedly dispensed Lorcet in amounts that were well in excess of what he stated was the maximum safe daily dose and Valium in amounts that were well in excess of his dosing regime.

Of ninety-eight refills E.A. ordered by telephone, only eleven bore any notation suggesting that Respondent had actually checked to see when E.A. had last been seen or when he had last obtained a refill. GX 7, at 37–53. Moreover, there is no evidence that Respondent ever required E.A. to submit to a urine or blood test to ensure that he was consuming the medication prescribed for him. Nor is there evidence that Respondent ever tested E.A. to ensure that the drugs were not damaging his liver.

**M.D.**

M.D., who was then twenty years old, first consulted with Respondent on June 29, 2006, complaining of back and ear pain. Tr. 440–41; GX 10, at 7. M.D. had worked in the film industry as a fighter and at some point had been kicked in the left ear. Tr. 440–441; GX 10, at 7. Respondent diagnosed M.D. as having "chronic back pain intractable and otitis external." Tr. 441; GX 10, at 7. According to the patient record, M.D. had previously taken Lorcet for pain relief. Tr. 440–41; GX 10, at 7. The patient history contains no indication that Respondent took a substance abuse history. *See generally* GX 10.

Respondent dispensed 90 Lorcet to be taken once every four hours and advised M.D. to have his left ear canal irrigated. *See id.* at 7. According to Respondent's testimony, the Lorcet was for relief of the "chronic back pain which was intractable." Tr. 441. M.D. did not see Respondent again until sometime in mid-February 2007, more than eight months later.[24] GX 10, at 15. However, he received refills of Lorcet throughout this period. *Id.* at 9–16.

By August 1, 2006, Respondent had increased the quantities of the refills from 90 to 120 tablets, and shortly thereafter, a clear pattern of early refills indicative of diversion or abuse/overconsumption developed. *Id.* at 9. Under Respondent's assumption that a patient could safely take eighteen to twenty Lorcet per day, the refill of 120 Lorcet should have lasted at least six days. However, on both August 4 and 7, M.D. sought and obtained refills. *Id.* at 9–10. While M.D. then obtained three refills at roughly one-week intervals, beginning in September, he obtained refills on September 1, 5, 11, 15, 19, 22, and 26; October 6, 10, 16, 19, 24, 27, and 31; and November 3, 7, and 10. GX 10, at 10–12 & 14.

Although M.D. obtained his next two refills at a slower rate (on November 17 and 27), he then obtained refills on December 1, 5, 8, 12, 15, 18 and 21. GX 10, at 13–14. After two refills at approximately a weekly interval over the Christmas and New Year's period (on December 28 and January 5, 2007), [25] he then obtained refills on January 9, 12, 15, 18, 22, 23, 25, and 29; as well as on February 5 and 8. GX 10, at 16.

Then, on some date prior to February 19 (likely February 15, but which is not

[22] The dates of these refills were March 20 and 27; April 3 and 10, 2006. GX 7, at 27 & 30.

[23] The dates of these refills were December 11, 15, 18, 19, 26, and 29; January 2, 8, 12, 15, 19, and 22. GX 7, at 15–17.

[24] *See* GX 10, at 17. The date of this appointment is not decipherable.

[25] The dates of these refills were December 28 and January 5, 2007. GX 10, at 13.

clear from the record,[26]) E.A. came in for an examination and received his usual 120 Lorcet, as well as 60 Xanax, with one tablet to be taken twice a day (and thus a thirty-day supply). *Id.* at 6. In the Pain Management Agreement he signed on February 15, M.D. agreed to submit to urine or blood testing. *Id.* at 5–6.

On February 19, M.D. obtained 120 Lorcet and 60 Xanax (a thirty-day supply based on the dosing of one tablet every twelve hours) from Respondent. And on March 1 and 9, M.D. received 120 Lorcet and 90 Xanax (a forty five-day supply based on the same dosing). *Id.* at 17.

M.D.'s file contains a phone message date March 13, which states: "Deputy Drake, regarding [M.D.], 3–10–07, was detain[ed] [with] large amount of pain meds." *Id.* at 19. On the same date, under Respondent's initials is a note written out on a prescription form: "Per Deputy Drake= Narcotics detective will be calling—what [M.D.] had was legally dispensed/given to him. May last 10 days supply." *Id.* From this note, it is clear that Respondent did not believe that M.D. was consuming eighteen to twenty Lorcet per day, but rather only twelve tablets, thus making the early refills even more pronounced.

Neither the phone message nor the note makes mention of Xanax, which M.D. had also obtained at a frequent rate. In his testimony, Respondent indicated that he could not remember what the maximum daily dosage for Xanax was. Tr. 578.

Of fifty-five refill requests M.D. called in, only twelve of the messages bore any information suggesting that Respondent had bothered to check either the last time he had seen M.D. or the last time he had approved a refill for him. GX 10, at 20–29. Nor is there any evidence that Respondent ever requested a urine or blood test from M.D. to confirm whether he was consuming his medication or to check his liver function.

**S.M.**

S.M., who was then twenty-three years old, first saw Respondent on July 21, 2006, complaining of neck and shoulder pain and indicating a history of concussion. Tr. 525–26; GX 15, at 2. Respondent diagnosed him as having arthropathy of the left shoulder, cervical muscle spasm with pain, possible whiplash, and anxiety. Tr. 527; GX 15, at 2. The patient record bears no indication that Respondent's patient history took a substance abuse history. *See generally* GX 15.

At the initial visit, Respondent dispensed 90 Lorcet to be taken once every six hours and 60 Xanax, 1 mg., one tablet to be taken twice a day. *Id.* at 2. S.M. obtained refills of 90 Lorcet on July 27, as well as on August 1 and 7. *Id.* at 25.

S.M. provided records from prior physicians indicating whiplash and a concussion in 1995 and neck and back pain going back to 2002 along with treatment with Vicodin. *Id.* at 9, 13, 23.

On August 11, S.M. saw Respondent again and Respondent dispensed 120 Lorcet. *Id.* at 25. From August 2006 through February 2007, S.M. did not display a pattern of receiving early refills (if the length of time a refill should last is calculated based on Respondent's oral instruction that a patient could take eighteen to twenty Lorcet per day). *See id.* at 26–29. However, a different picture emerges after S.M.'s appointment of February 16, 2007.

On that day, S.M. signed a Pain Management Agreement and completed a Patient Comfort Assessment Guide. *Id.* at 4–7. In his Patient Comfort Assessment Guide, S.M. indicated that he obtained "Complete Relief" from pain with the Lorcet. *Id.* at 4. At this visit, Respondent dispensed 120 Lorcet but with a written dosing instruction of one every four hours instead of one every six hours. *Id.* at 29.

S.M. did not obtain a refill for nearly another two weeks, on March 1. *Id.* at 30. However, he obtained his next eleven refills on March 5, 9, 12, 16, 19, 23, 26, and 30; and April 2, 6, and 9. GX 15, at 30–31. There is no evidence that Respondent ever requested that S.M. undergo a urine or blood test to determine whether he was consuming the controlled substances or to assess whether the medication was affecting his liver function.

In his testimony, Respondent admitted that this patient chart exhibited early refills. Tr. 542. Of forty-five telephonic requests for refills, only sixteen message slips bore any notation related to the last time the patient had been seen or the last time the patient had received a refill. GX 15, at 32–42.

**D.M.**

D.M., who was then twenty-two years old, first saw Respondent on July 7, 2005. GX 16, at 3. D.M. complained of pain in his left knee caused by a torn meniscus and reported that he had taken Vicodin for it. *Id.;* Tr. 412. It is not clear from the chart whether D.M. had undergone surgery. GX 16, at 3. Respondent testified that he was not sure whether D.M. had had surgery on the knee and that it could have been repaired surgically. Tr. 415.[27] D.M. also reported insomnia. Tr. 413; GX 16, at 3. Again, the patient history bears no indication that Respondent took a substance abuse history. *See generally id.*

At the initial visit, Respondent dispensed 60 Vicodin ES, one tablet to be taken every six hours, and 30 Xanax, 1 mg., to be taken twice a day. GX 16, at 3. Based on Respondent's testimony that twelve tablets of Vicodin ES was the maximum safe dose and assuming that D.M. consumed them at this rate, the Vicodin ES prescription would have lasted a minimum of five days.

On July 11 (four days later) D.M. returned for a second examination and reported that the Vicodin ES was causing abdominal pain. *Id.* Respondent switched him to Lorcet and dispensed 120 tablets with the dosing instruction to take one tablet every six hours. *Id.* D.M. also obtained a refill of his Xanax prescription, even though the previous prescription should have lasted for another eleven days. *Id.* Respondent dispensed additional refills of 30 Xanax to D.M. on July 15, 22, and 29; August 4, 11, 16, 22, and 26; and September 1. *Id.* at 16, 23. Beginning on September 6, Respondent doubled the quantity of the Xanax refills to 60 tablets; however, he did not change the dosing of one tablet twice per day and thus this refill should have lasted thirty days. *Id.* at 24. Nonetheless, Respondent dispensed 60-tablet refills to D.M. on September 12, 19, and 26. *Id.* at 21, 24. This was followed by refills for 90 tablets on October 3, and refills for 60 tablets on October 10, 17, and 24. *Id.* at 21–22.

On October 13, D.M. requested more Lorcet, claiming he had broken a toe. GX 16, at 53. While initially Respondent wrote "too soon," he ultimately approved the refill. *Id.* Respondent did not, however, order x-rays or require that D.M. come in for a visit to confirm that he had, in fact, broken his toe.

On November 7, 2005, D.M. received a refill for 120 Lorcet at the increased dosage of two tablets to be taken every four hours. *Id.* at 20. However, Respondent did not examine D.M., and no reason was documented in the record to support the increase in dosage. *Id.*

[26] On this date, E.A. signed a Pain Management Agreement. GX 10, at 6.

[27] A telephonic refill request indicates that D.M. had knee surgery; Respondent wrote "Need copy of knee surgery 1½; years ago done in San Diego." GX 16, at 56. However, the patient file contains no indication that this information was ever received. Respondent excepted to the ALJ's finding that Respondent was unclear on this point, maintaining that it was "unfair to characterize this testimony as indicating uncertainty that surgery had occurred" in view of "Respondent's acknowledged hearing difficulties." Resp. Exc., at 4–5. I find no reason to disturb the ALJ's finding as his testimony is clear on this point. *See* Tr. 415.

D.M. also received 60 Valium, to be taken twice a day, instead of Xanax. *Id.* The phone message from this date indicates that "Xanax hurts his stomach." *Id.* at 54. D.M. continued to receive refills of the Lorcet and Valium at approximately weekly intervals through his next two examinations which occurred on November 17, 2005 and January 4, 2006. *Id.* at 18–20.

According to D.M.'s record, he received 60 Valium on November 17, 23, and 29, as well as on December 6, 13, 22, and 27. *Id.* at 19–20. Respondent testified that he dispensed only the 10 mg. strength of Valium and that the maximum daily dosage of this strength is two tablets per day. Tr. 579. D.M. was obtaining refills for a thirty-day supply of Valium at approximately weekly intervals.[28]

D.M. obtained more refills of 120 Lorcet and 60 Valium on January 10, 16, 23, and 30; February 6, 13, 20, and 27; March 7, 13, 20, 27, and 31; and April 4 and 7, 2006.[29] GX 16, at 17–18, 25. Even crediting Respondent's testimony regarding his instructions to his patients as to the maximum daily dosage of Lorcet, D.M. still received numerous refills of Valium which were weeks early.

On April 14, 2006, Respondent examined D.M.[30] *Id.* at 25. Respondent recorded "left knee pain on flexion extension" and a diagnosis of "[h]ypertension" and "arthropathy" of the left knee. *Id.* Respondent additionally noted, "Reduce pain med dosage," and dispensed only 60 Lorcet to be taken once every six to eight hours as well as the usual 60 Valium to be taken twice per day. *Id.*

On April 20 and 27, D.M. obtained refills of 60 Lorcet and 60 Valium. *Id.* at 28. Moreover, on May 5, 11, 18, 19, and 23, D.M. obtained 120 Lorcet, suggesting that Respondent had already ended his plan to reduce the amount of Lorcet that D.M. was to take; D.M. also received 60 Valium tablets on each of these dates. *Id.* Here again, even ignoring the Lorcet refills, it is clear that the Valium refills were weeks early.

Respondent dispensed more refills for Lorcet (120 tablets) and Valium (60 to 90 tablets) to D.M. on June 9, 15, 23, 27, and 30; and July 5, 7, 11, 14, 18, 21, 25, 28, and 31. *Id.* at 29–30, 40.[31] Notably, each of the Valium refills from June 30 through July 28 was for 90 tablets, and thus each refill provided a 45-day supply. *Id.*

On August 8,[32] D.M. obtained 120 Lorcet but no Valium, and on August 12, he obtained 150 Lorcet.[33] *Id.* at 40. On August 21, he obtained only 120 Lorcet, and the following day, 60 Valium. *Id.* On August 24 and 29, as well as on September 5, he obtained refills of 120 Lorcet, but no Valium. *Id.*

On September 7, D.M. received refills of both Valium (twelve days early based on the last refill) and Lorcet, the latter being only two days after his previous Lorcet refill.[34] *Id.* at 39. This was followed by refills of 120 Lorcet on September 11 and 14; on the latter date, he also received 60 Valium even though he had received his previous refill only seven days earlier. *Id.*

On both September 18 and 21, D.M. obtained 150 Lorcet; instead of Valium, he obtained 60 Xanax.[35] *Id.* D.M.'s file contains no evidence pertaining to the shift from Valium to Xanax, which he had previously complained hurt his stomach. On September 22, D.M. obtained 120 Lorcet; on September 25, he obtained 150 Lorcet as well as 60 Valium. *Id.*

D.M. received further refills of 120 Lorcet on October 2, 5, and 9; on the latter date, he also obtained 60 Valium. *Id.* at 38. Yet only three days later on October 12, he obtained another 150 Lorcet and 60 Valium. *Id.*

While the dates of the next two dispensings are indecipherable, they appeared to have occurred sometime before October 23. On these occasions, D.M. obtained 120 Lorcet and 60 Valium and 150 Lorcet and 60 Valium. *Id.* Thereafter, D.M. did not obtain another Valium prescription until January 2007. *Id.* at 33. However, in this period, he obtained refills of either 150 Lorcet or 120 Lorcet at largely three to four-day intervals.[36]

On January 18, 2007, D.M. obtained another 150 Lorcet and 30 Valium (fifteen-day supply). *Id.* at 33. Seven days later, on January 25, he again obtained refills of 150 Lorcet and 30 Valium. *Id.* This was followed by refills for 120 Lorcet on January 29, February 1 and 5, as well as refills of 30 Valium on both January 29 and February 5. *Id.*

Only three days later on February 8, he obtained 150 Lorcet, and on February 15, he obtained 90 Lorcet and another 30 Valium. *Id.* The next day, Respondent dispensed 30 Xanax to D.M., to be taken twice a day. *Id.* at 13.

On February 27, D.M. obtained another 90 Lorcet. *Id.* On March 5, D.M. received a refill for 60 Xanax (thirty-day supply) and the next day, another 90 Lorcet. *Id.* On March 12, he obtained another 120 Lorcet, with the new dosing instruction to take two tablets every four hours. *Id.* This was followed by additional refills on March16 for 90 Lorcet; on March 20, 23, and 30 for 120 Lorcet; on April 2 for 150 Lorcet; and on April 5 and 9, for 120 Lorcet. *Id.* at 13–14.

In all, D.M. phoned in for refills 146 times. On only twenty message slips is there a notation regarding the last time D.M. had been seen or had received a refill. GX 16, at 41–63. Although on rare occasions, Respondent denied D.M.'s request for a refill, there is no evidence that he ever required D.M. to undergo a urine or blood test.

The CURES Report for D.M. indicates that he received controlled substances and Suboxone from other prescribing physicians while he was treated by Respondent. Specifically, on October 10, November 11 and 27, December 12, 2006, and January 8, 2007, D.M. obtained Suboxone from three different prescribing physicians. GX 45. Moreover, on February 12 and 15, 2007, he obtained hydrocodone/apap from yet another physician. *Id.* However, Dr. Chavez did not offer any opinion as to whether (or under what circumstances) checking the CURES database is required to meet the accepted standard of medical practice.

[28] Respondent excepted to the use of two tablets of Valium per day as the maximum daily dosage, based on two occasions in the hearing where Respondent indicated that a patient could actually take more than two per day. Resp. Exc., at 4. However, I reject the exception because Respondent did not testify that he told his patients that they could take more Valium than what he noted as his dosing instruction.

[29] The message slip for March 31, however, indicates that D.M. reported his medication as stolen. GX 16, at 42. I note that there is no indication that Respondent requested that D.M. present a police report in confirmation of this allegation.

[30] D.M. apparently called in for another refill on this date, and Respondent refused it with the note, "No—I want to talk to him." GX 16, at 43.

[31] According to a phone message, D.M. also requested a refill on June 19, which was denied as "[t]oo soon." GX 16, at 57.

[32] This follows on a request for a refill on an unidentified date, where Respondent wrote that it was "[t]oo soon for refill" but "ok for Monday 8/7." GX 16, at 44.

[33] D.M. apparently requested a refill on August 10, which Respondent refused, saying that August 14 would be okay. GX 16, at 45.

[34] D.M. apparently requested a refill on September 1, but Respondent indicated, "No. Too soon for refill ok on 9/5 Tues." GX 16, at 45.

[35] The record of phone requests indicates that D.M. requested a refill on September 20 but that Respondent refused, because it was too early. GX 16, at 50. On September 22, just two days later and one day after receiving a refill, D.M. phoned in another request indicating that he "[h]a[d] no more meds." *Id.* Respondent approved that request although no explanation was provided as to why D.M. had run out of medication. *Id.*

[36] D.M. obtained these refills on October 23 (120 tablets), 26 (150), and 30 (120); November 2 (150), 6 (120), 9 (150), 13 (120 plus 60 Xanax), 20 (120), 22 (120), and 30 (150); December 3 (120), 7 (150), 11 (120), 14 (150), 18 (150), 21 (150), and 28 (150); January 2 (120), 8 (120), 11 (150), and 15 (120). GX 16, at 33, 35, 37–38.

**J.N.**

J.N., who was then twenty-four, first saw Respondent on May 18, 2006. GX 17, at 3. J.N. complained of lower back pain radiating down into his thigh. Tr. 484; GX 17, at 3. Although he had no history of trauma, he also indicated that he had taken Lorcet for his back in the past. Tr. 484; GX 17, at 3. Upon physical examination, Respondent observed muscle spasms and diagnosed J.N. as having a "muscular ligament strain lumbar back muscles." Tr. 484; GX 17, at 3. He also noted that J.N. was "overweight" and testified that being overweight commonly contributes to lumbar strain.[37] Tr. 488; GX 17, at 3. J.N.'s patient record contains no indication that Respondent obtained a substance abuse history. *See* GX 17. Respondent dispensed 60 Lorcet, with one tablet to be taken once every six hours, a fifteen-day supply if taken in accordance with the dosing instruction recorded in J.N.'s chart, but only a three-day supply if taken according to his oral instructions. GX 17, at 3.

Four days later on May 22, J.N. obtained a refill of 90 Lorcet, with one tablet to be taken once every four hours, and on both May 29 and June 5, he received refills of 120 Lorcet. *Id.* On the latter date, Respondent also dispensed 30 Xanax to him, with one tablet to be taken twice a day. *Id.* However, J.N.'s patient file has no indication as to why Respondent added the Xanax.

On September 12, Respondent dispensed 150 Lorcet to J.N., as well as 30 Valium, with one tablet to be taken twice a day. *Id.* at 15. Respondent did not document in the file why he had changed J.N. to Valium from Xanax. Thereafter, there was a gap of two months between refills. *See id.* at 9–15.

On November 2 and 7, J.N. obtained refills of 180 Lorcet; on November 13 and 17, he received refills of 150 Lorcet; and on November 27 and December 7, he received further refills for 180 Lorcet. *Id.* at 9. On the latter date, he also obtained 30 Valium, his first Valium refill since September but with no indication provided in the medical record as to why the drug was medically necessary.[38] *Id.* Moreover, although the December 7 Lorcet refill should have lasted at least nine days, just four days later on December 11, J.N. obtained another 180 Lorcet. *Id.*

On December 19, J.N. obtained another 180 Lorcet and 60 Valium, the latter providing a thirty-day supply. *Id.* at 8. On January 4, 2007, J.N. obtained refills for 180 Lorcet and 30 Valium, the latter refill occurring two weeks early. *Id.* On both January 9 and 12, 2007, J.N. obtained additional refills for both 180 Lorcet and 30 Valium. *Id.*

On January 18, J.N. obtained refills for both 180 Lorcet and 30 Valium; on this date, he also obtained 60 Xanax (a thirty-day supply based on the dosing instruction). *Id.* at 10. Yet there is no indication in J.N.'s patient file as to why Respondent authorized the simultaneous dispensing of Xanax and Valium. *Id.*

Just four days later on January 22, J.N. obtained another 180 Lorcet and 30 Valium. *Id.* Thereafter, J.N. obtained refills for 180 Lorcet and 90 Valium (a forty-five day supply) on January 25 and 29, as well as on February 1. *Id.*

Only four days later on February 5, J.N. obtained a further 180 Lorcet and 120 Valium (a sixty-day supply). *Id.* On February 19, J.N. obtained refills of both 180 Lorcet and another 120 Valium. *Id.* at 11. J.N.'s record ends three days later with an entry of "cancel," which is initialed by Respondent. *Id.*

On cross-examination, Government counsel asked Respondent about the numerous refills he dispensed to J.N. for Valium. Tr. 580–84. Noting Respondent's testimony that the maximum daily dosage of Valium was two tablets per day and that where there was a refill of ninety tablets after just four days, J.N. must have been consuming twenty Valium tablets per day, Government counsel asked Respondent whether "a person can function on 20 Valium a day?" *Id.* at 581–82. Respondent answered, "[n]o," and that taking this much would cause "[s]omnolence and disorientation." *Id.*

Although Respondent testified that it was best to see pain patients at least every six months, in the nine-month period in which he dispensed controlled substances to J.N., Respondent examined him only at his initial visit. Tr. 434; *cf.* GX 17, 1–23. On redirect, Respondent testified that J.N. had developed a tolerance to Valium and that he never observed J.N. having side effects like somnolence. Tr. 616. However, this seems rather unlikely given that Respondent only examined J.N. once.

While J.N. called in refill requests forty-six times, on only thirteen occasions did Respondent note either the last time he had been seen or when he had last obtained a refill. GX 17, at 16–23. There is also no evidence that Respondent ever requested a urine or blood test to confirm whether Respondent was consuming the medication and to check his liver function.

**S.R.**

S.R., who was twenty-four, first saw Respondent on June 1, 2006. GX 18, at 3. She reported that she had back pain as a result of a car accident one year earlier; she also indicated that she had tried Motrin for the pain but that it had not worked. Tr. 431, GX 18, at 3. Respondent diagnosed a "muscular ligament strain [of the] lumbar back muscles" and dispensed 60 Lorcet, to be taken once every six hours. Tr. 433; GX 18, at 3. The patient record, however, contains no indication that Respondent took a substance abuse history. *See* GX 18.

On June 8, S.R. obtained a refill for 90 Lorcet, as well as a prescription for 30 Xanax, the latter being a fifteen-day supply under the dosing instruction of one tablet every twelve hours. *Id.* at 3. S.R's record, however, contains no indication of Respondent's medical reason for adding the Xanax. *Id.*

Only five days later on June 13, S.R. obtained refills for 120 Lorcet and another 30 Xanax. *Id.* at 5. Just six days later on June 19, S.N. obtained 150 Lorcet, 30 Xanax, as well as 30 Valium, with both the Xanax and Valium to be taken twice a day (and therefore a fifteen-day supply of each). *Id.* The file, however, bears no indication as to Respondent's medical justification for prescribing the Valium.

Just four days later on June 23, S.R. obtained another 150 Lorcet and another 60 Valium, a thirty-day supply of the latter. *Id.* On June 27, after just another four days, S.R. obtained another 150 Lorcet and 30 Xanax. *Id.*

On July 13, S.R. received a refill of 150 Lorcet, and on July 17, 120 Lorcet. *Id.* at 6. This was followed by refills for 150 Lorcet on July 20, 25, and 28. *Id.*

On August 1, S.R. obtained refills of only 90 Lorcet and 30 Xanax. *Id.* On August 4, S.R. sought additional refills for Lorcet and Valium but was turned down as "too soon." *Id.* at 20. However, a phone message slip states that the refills would be "Ok by 08/7/6." *Id.* On August 7, she obtained another 90 Lorcet. *Id.*

An undated phone message indicates that S.R. sought refills of 120 Lorcet, 30 Xanax and 30 Valium. *Id.* at 19. While Respondent turned down the refills as "too soon," he indicated that refills were "ok for 8/14/06." *Id.*

On August 15, S.R. obtained 150 Lorcet, as well as 30 Valium. *Id.* at 8. She obtained additional refills of 150 Lorcet on August 21 and 25, as well as on September 1, 7, and 11. *Id.* Moreover, in September 7, she obtained an

[37] With respect to patient E.A., Respondent also testified that he always advises about weight loss when appropriate. Tr. 510.

[38] Respondent conceded on cross-examination that he prescribed the Valium without doing a physical examination. Tr. 580.

additional 30 Valium (a fifteen-day supply), and on September 11, she also obtained 30 Xanax (a fifteen-day supply). *Id.*

On September 26, S.R. obtained another 150 Lorcet as well as 60 Xanax. *Id.* This was followed by refills for 150 Lorcet on October 2, 10, 16, 20, 24, and 30, as well as November 6, 10, 17, and 22. *Id.* at 7–9. In addition, on November 22, S.R. obtained 60 tablets of both Xanax and Valium, each refill being a thirty-day supply based on the dosing instructions. *Id.* at 9.

While on November 27, when S.R. received a further 180 Lorcet, she did not obtain a refill of either the Xanax or Valium, on both December 4 and 8, she received refills of both 180 Lorcet and 30 Valium (fifteen-day supply). *Id.* Thus, the December 8 refills were early as to both the Lorcet and Valium.

On December 14, S.R. obtained another refill of 180 Lorcet. *Id.* Only four days later on December 18, S.R. obtained another 180 Lorcet, as well as both 60 Xanax (a thirty-day supply) and 60 Valium (also a thirty-day supply), the latter refill being weeks early. *Id.* Only three days later on December 21, S.R. obtained another 180 Lorcet and 30 Valium. *Id.* at 12. S.R. obtained additional refills for both 180 Lorcet and 30 Valium on December 26, as well as on January 2, 12, 16, and 19, 2007. *Id.*

On January 22, S.R. obtained refills of 180 Lorcet, 60 Xanax, and 30 Valium. *Id.* at 11. Only three days later on January 25, she obtained a further 180 Lorcet and 60 Valium, and on January 29, 180 Lorcet and 90 Valium. *Id.* And just three days later on February 1, 2007, she obtained another 180 Lorcet. *Id.*

One week later, a note dated February 8, 2007 states: "[s]hould reduce Lorcet #90 q 2 wks. Needs visit." *Id.* However, on February 15, S.R. obtained another 90 Lorcet and 30 Valium; there is, however, no documentation in her file that she was examined by Respondent prior to the dispensings. *Id.* Only five days later on February 20, 2007, S.R. obtained 120 Lorcet (again with no indication of a visit with Respondent) and 120 tablets of Valium, her largest refill of this drug. *Id.* at 13. The patient record concludes at this point.

Respondent treated S.R. for eight months but examined her only at the initial visit. Of fifty-one refill requests S.R. phoned in, only eleven phone messages contain any notation suggesting that the dates of her previous refills had been checked. *Id.* at 15–23. There is no indication that Respondent ever had S.R. complete a Pain Medication Agreement or that he performed blood or urine tests either to determine whether she was taking the medication and/or to check her liver function.

**B.W.**

B.W., who was then thirty-four, first saw Respondent on February 21, 2006. GX 20, at 8. He complained of pain in his lower back from lifting heavy building materials while working on his home patio. *Id.;* Tr. 543. In the physical examination, Respondent observed "muscle spasms," and he diagnosed the cause of Respondent's pain as "acute musculo-lig[ament] strain lumbar back muscles." GX 20, at 8; Tr. 547. Respondent dispensed 60 Vicodin ES, to be taken once every six hours. GX 20, at 8. The patient record bears no indication that Respondent took a substance abuse history. *See id.*

B.W. did not see Respondent again until August 25, 2006, and during this period, he did not obtain any refills. *Id.* On this date, B.W. told Respondent that he had hurt his back the day before while lifting a couch. *Id.;* Tr. 549. Respondent again noted that he had observed muscle spasms in B.W.'s lumbar region and he diagnosed the cause of B.W.'s pain as "[a]cute M/L strain lumbar back muscles." GX 20, at 8. Respondent again dispensed 60 Vicodin ES, with one tablet to be taken every six hours. *Id.* On August 29, B.W. called requesting a refill "claim[ing] his housekeeper threw away his meds." *Id.* at 9.

As noted above, the ALJ credited Respondent's testimony that he told his patients they could safely take up to twelve Vicodin ES per day; each refill of 60 Vicodin ES would therefore have lasted a minimum of five days. On this assumption, B.W.'s patient chart thus does not record a pattern of early refills until November 2006. *See Id.* at 9–10. However, on November 3, 6, and 9, B.W. obtained refills of 60 Vicodin ES. *Id.* at 10. On November 13, he obtained a refill of 120 Vicodin ES (a ten-day supply but with the dosing noted in the chart as one tablet every six hours), which he refilled only four days later on November 17.[39] *Id.* While B.W. did not obtain a refill until November 27, he then obtained additional refills of 120 Vicodin ES on December 1, 7, 11, and 15. *Id.* Although B.W. did not obtain another refill until December 26, he then obtained more refills of 120 Vicodin ES on December 29, as well as on January 2, 4, 8, 11, 15, 18, 22, and 25; and February 5, 8, and 12, 2007. *Id.* at 11–12. *Id.* at 13.

The phone message for the latter refill request states that B.W. "[n]eed[ed] [a] visit." *Id.* at 18. However, on February 15, 19, and 22, B.W. received more refills of 90 Vicodin ES without appearing for a visit. *Id.* at 13.

On March 6, B.W. was examined by Respondent, who dispensed 90 Vicodin ES with the dosing instruction of one tablet every four to six hours as needed. *Id.* at 15. B.W. obtained more refills for 90 Vicodin ES on March 12, 15, and 19, and for 120 Vicodin on March 22 and 30, as well as on April 3, 6, and 10, 2007, when the patient file ends. *Id.* at 14–15.

In his testimony, Respondent conceded that the refills between March 15 and April 10 were early.[40] Tr. 557. However, numerous other refills were also early.

B.W. called in requests for refills forty-nine times. Yet on only twelve of the forms documenting these requests was the date of B.W.'s last visit and/or refill noted. GX 20, at 16–26. Nor is there any evidence that Respondent ever did blood or urine tests on B.W. to confirm whether he was taking the medication and/or to check his liver function.[41]

**J.W.**

J.W., who was then twenty-four, first saw Respondent on March 6, 2006, complaining of back pain. GX 21, at 12. According to Respondent, J.W. had neck and back spasms. *Id.;* Tr. 435–36. J.W.'s record contains medical records documenting his treatment for neck and back pain by two other physicians as well as a chiropractor, which included prescriptions for Norco (hydrocodone 10mg./apap 325 mg.) and Xanax.[42] GX 21, at 4–10; Tr. 435. J.W. was still being treated by an orthopedist and a chiropractor. Tr. 436–37. J.W.'s patient record contains no indication that Respondent took a substance abuse history. *See* GX 21, at 12.

At that first visit, Respondent dispensed 90 Lortab (noting in J.W.'s record that one tablet was to be taken

[39] However, Respondent's note on the phone message for this refill indicates that it should not be picked up until November 20. GX 20, at 22.

[40] According to a Patient Activity Report obtained from CURES, from the time of B.W.'s August 2006 appointment with Respondent through the April 10, 2007 refill, B.W. was obtaining hydrocodone/apap 5 mg./500 mg. and 7.5 mg./750 mg. from ten other physicians. GX 46, at 7–8. Moreover, during the period prior to B.W.'s August 2005 visit, he obtained the same drugs from at least seven different physicians. *Id.* at 5–6.

[41] On B.W.'s March 6, 2007 visit, Respondent obtained a signed Pain Management Agreement and B.W. completed a Patient Comfort Assessment Guide. GX 20, at 3–6.

[42] Norco contains 10 mgs. hydrocodone and 325 mgs. acetaminophen. Tr. 68.

every four to six hours), as well as 90 Xanax, one tablet to be taken twice per day and thus a 45-day supply. *Id.* On March 16, J.W. obtained both 90 Lorcet and 60 Xanax, the latter being more than a month early. *Id.* at 17. Just five days later on March 21, J.W. received 90 more Lorcet and another 30 Xanax. *Id.*

Six days later on March 27, J.W. received 120 Lorcet and another 30 Xanax. *Id.* He received refills for 120 Lorcet on April 6, 21, and 27; May 11, 19, and 29; as well as June 8 and 23; he also received 30 Xanax on each of these dates except for on May 11 and 19, when he received 90 tablets on each date, and on June 23, when he obtained 60 tablets. *See id.* at 14–15, 17.

J.W. received 180 Lorcet and 90 Xanax from Respondent on July 5, 13, 24, and 31, and August 7. *Id.* at 14. Thereafter, J.W. obtained 180 Lorcet from Respondent on August 21 and 28; September 7, 12, 19, and 28; October 3, 10, 12, 16, 23, and 30; November 2, 6, 10,[43] 21, 27, and 30; and December 4, 7, 12, and 26 (but only 90 tablets this date) and 28. *Id.* at 14, 18–19.

As for the Xanax, on August 21, J.W. obtained only 30 tablets. *Id.* at 14. Thereafter, he obtained the Xanax in the following quantities by date: August 28 (120); September 7 (60), 12 (120), 19 (120), and 28 (120); October 3 (120), 10 (180), 12 (90), 16 (180), 23 (180), and 30 (180); November 2 (120), 6 (180), 10 (120), 21 (90), 27 (90), and 30 (90); and December 4 (90), 7 (60), 12 (60), 26 (180), and 28 (60). *Id.* at 18–21. In each entry, the Xanax dosing was noted as one tablet every twelve hours. *See id.*

During 2007, J.W. continued to receive early refills of both Lorcet and Xanax. With respect to Lorcet, he obtained 90 tablets on January 2 and 9; 180 tablets on January 15; another 90 tablets on January 18; followed by 180 tablets on January 22, 25, 29; as well as on February 1 and 5. *Id.* at 20 & 22. As for Xanax, J.W. obtained 60 tablets on January 2; 180 tablets on January 9; 30 tablets on January 15; 60 tablets on January 18, 22, and 25; 90 tablets on January 29; 120 tablets on February 1; and 30 tablets on February 5. *Id.*

The patient record ends with an entry dated February 8, 2007, which reads, "Pt. requests too much meds—Needs visit to discuss lowering amounts." GX 21, at 22. When asked whether J.W.'s not coming in for the needed visit indicated that he had been abusing the drugs, Respondent answered, "Not necessarily." Tr. 439. Respondent testified that "what [he] was thinking * * * is that [J.W] probably had gone back to the orthopedic consultant who is also trying to treat him for the same type of pain." *Id.*

During the eleven-month period in which Respondent dispensed controlled substances to J.W., Respondent examined him only once. While J.W. called in refill requests fifty-one times, in only nine instances is there evidence that Respondent checked either the last time J.W. had been seen or the date of his last refill. *Id.* at 24–32. J.W. never entered a Pain Medication Agreement with Respondent. Nor did Respondent ever test J.W.'s urine or blood.

**Summary**

As Dr. Chavez noted, none of the patients files reviewed above documents that Respondent had discussed with the patient the risks and benefits of taking the controlled substances he dispensed to them. Similarly, none of the files contains a treatment plan with stated objectives for assessing the efficacy of the treatment. While some of the files contained signed Pain Medication Agreements, there is no evidence that Respondent ever enforced them by requiring his patients to undergo urine or blood testing. Moreover, while Respondent dispensed large quantities of opiate medications containing acetaminophen, he never performed tests to assess what effect the medication was having on his patients' liver function.[44]

Respondent regularly dispensed refills without regard to when he had last dispensed the drugs to a patient. While he also testified as to the importance of follow-up visits to monitor how his patients were doing and to adjust their medication regime, he dispensed numerous refills to the above patients and did so for months on end without conducting follow-up examinations. Indeed, he dispensed numerous refills to patients (J.N., S.R., and J.W.) for an extensive period of time (9 months, 8 months, and 11 months, respectively) even though they never returned for a second examination. *See* GXs 17, 18, 21.

**Discussion**

Section 303(f) of the Controlled Substances Act (CSA) provides that the Attorney General "shall register practitioners * * * to dispense * * * controlled substances in schedule II, III, IV, or V, if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices." 21 U.S.C. 823(f). However, the statute also provides that the Attorney General "may deny an application for such registration if he determines that the issuance of such a registration is inconsistent with the public interest." *Id.* In determining consistency with the public interest, the statute requires that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

*Id.*

"These factors are considered in the disjunctive." *Robert A. Leslie,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors and may give each factor the weight I deem appropriate in determining whether to deny an application for a registration. *Id.* Moreover, I am "not required to make findings as to all of the factors." *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (DC Cir. 2005).

The Government has the burden of proof. 21 CFR 1301.44(e). However, where the Government makes out a *prima facie* case to deny an application, the burden shifts to the Respondent to show why granting its application would be consistent with the public interest. *See Steven M. Abbadessa,* 74 FR 10077, 10081 (2009); *Arthur Sklar,* 54 FR 34623, 34627 (1989).

**Factor One—the Recommendation of the State Licensing Board**

As the ALJ noted, the State Board has not made a recommendation in this matter. ALJ at 34. The ALJ further noted that in a proceeding involving Respondent's treatment of three patients who are not at issue here, the Board concluded that cause did not exist to find that he prescribed without a good faith examination and medical indication for each of the three patients. *Id.* The Board found, however, that Respondent had failed to maintain adequate medical records with respect to one of the patients and issued a public reprimand.

Ultimately, I conclude that this factor neither supports nor refutes a finding

[43] There are actually two entries for November 10; both of which indicate that J.W. received 180 Lorcet and 120 Xanax.

[44] There is also no evidence that Respondent attempted to coordinate his prescribing activities with other physicians who were still treating his patients and might be prescribing controlled substances to them.

that issuing Respondent a new registration would be inconsistent with the public interest. While possessing a State license is a statutory prerequisite for holding a registration under the CSA, *see* 21 U.S.C. § 823(f), DEA has long held that a practitioner's possession of State authority to dispense controlled substances is not dispositive of the public interest inquiry. *See Mortimer B. Levin,* 55 FR 8209, 8210 (1990) ("DEA maintains a separate oversight responsibility with respect to the handling of controlled substances and has a statutory obligation to make its independent determination as to whether the granting of [an application] would be in the public interest."); *see also Jayam Krishna-Iyer,* 74 FR 459, 461 (2009).

**Factors Two and Four—The Applicant's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances**

Under a longstanding DEA regulation, a prescription for a controlled substance is not "effective" unless it is "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 CFR 1306.04(a). This regulation further provides that "[a]n order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of [21 U.S.C. § 829] and * * * the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances." *Id.*

As the Supreme Court recently explained, "the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses." *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135 (1975)).

While many cases under the public interest standard involve practitioners who intentionally or knowingly violated the CSA's prescription requirement, the Agency's authority to deny an application (or to revoke an existing registration) is not limited to those instances in which a practitioner intentionally diverts a controlled substance. *See Paul J. Caragine, Jr.,* 63 FR 51592, 51601 (1998). As my predecessor explained in *Caragine:* "[j]ust because misconduct is unintentional, innocent or devoid of improper motivation, [it] does not preclude revocation or denial. Careless or negligent handling of controlled substances creates the opportunity for diversion and [can] justify" the revocation of an existing registration or the denial of an application for a registration. 63 FR at 51601. Accordingly, a practitioner's failure to properly supervise his patients to prevent them from personally abusing controlled substances or selling them to others constitutes conduct "inconsistent with the public interest" and can support the denial of an application for registration, or the revocation of an existing registration. *Id.; see also Gonzales,* 546 U.S. at 274.

In her decision, the ALJ did not address whether the prescriptions Respondent wrote during the undercover visits of the Special Agent and informant were issued in the usual course of professional practice and for a legitimate medical purpose. *See* ALJ at 35. *Id.*

With respect to the Special Agent's visit, from the beginning of the encounter, Respondent knew that she was not seeking Vicodin to treat a legitimate medical condition as, after the Agent told him that she took the drug because "[it] just made me feel better," he replied: "I don't prescribe Vicodin for recreational purposes or to feel better * * * because Vicodin is a controlled drug and it is specifically for specific pains, you know?" Moreover, when the Agent asked him whether if her "back hurt" would justify a prescription, and he asked "what happened to your back," the Agent replied that nothing had really happened to it. When Respondent then asked her "where in your back are you having the pains," the Agent again replied: "I don't specifically have it, I was just asking you if that would be a reason someone would have it?" Even though at this point the Agent had made no representation that she had pain, Respondent stated that "if it is for that reason, for now * * * I can give you a prescription" and asked "which Vicodin are you using?"

It is true that Respondent then asked the Agent to show him which part of her back was hurting and the Agent pointed to her lower back; however, she then added that "it's not really sensitive." It is also true that Respondent then asked the Agent how long she had the back pain, to which she answered: "A couple of years I guess." Yet Respondent undertook no further inquiry as to the origin and cause of the pain, what activities made it worse, how intense it was, and if it was affecting her ability to function. He did not take a substance abuse history even though the Agent had indicated that she had previously been on Vicodin and that she took the drugs because they made her feel better. As the Agent testified, she believed that Respondent was trying to provide her with what he needed to hear to justify prescribing the Vicodin.

The physical exam Respondent performed was superficial, lasting all of five seconds, and was limited to touching the SA's back a few times without even lifting up her clothing.[45] Respondent's subsequent statement—after indicating that he would give the Agent a prescription for 30 Vicodin ES—that "we have to have more documentation as to why these controlled drugs are being prescribed for you" further suggests that he knew full well that he did not have a legitimate medical purpose for issuing the prescription.

In addition, while in his testimony, Respondent maintained that he diagnosed the Agent as having back spasms and wrote this on the progress note he prepared, he never communicated this to the Agent. It is strange that a physician would not discuss his diagnosis with his patient. Likewise, he did not discuss the risks and benefits of taking Vicodin with the Agent. Finally, Dr. Chavez concluded that Respondent's treatment of each of the fifteen patients whose files he reviewed constituted "an EXTREME DEPARTURE from the standard of care expected of a licensed practicing physician in the U.S. today." GX 6, at 33.

Based on the above, I conclude that Respondent lacked a legitimate medical purpose and acted outside of the usual

[45] The ALJ found credible Respondent's testimony that "he believed he saw muscle spasms, which would be consistent with back pain." ALJ at 7. I reject the ALJ's finding because she did not reconcile this testimony with the Agent's testimony that he did not even lift the garment that was covering her back.

The ALJ also found that Respondent "credibly testified that he believed [the Agent] was suffering from back pain for the past two years." *Id.* at 7. However, the Agent had previously stated several times that she did not have pain and Respondent agreed to give her a prescription immediately after she stated: "I don't specifically have it." Moreover, even after this, the Agent said her back was "not really sensitive" and her answer that she had pain "a couple of years I guess" was equivocal at best. This was then followed by Respondent's statement that "we" need to have more documentation to justify prescribing Vicodin. As the Agent testified, she believed that Respondent needed her to indicate that she had back pain to justify his prescribing of Vicodin. The nature of the conversation and Respondent's failure to comply with the accepted standards of medical practice for evaluating his patient establish that Respondent was not practicing medicine in good faith, but rather, that this was prescribing with a wink and a nod. I therefore reject the ALJ's finding.

course when he prescribed Vicodin to the Agent. He therefore violated the prescription requirement of Federal law. 21 CFR 1306.04(a).

By contrast, at R.E.'s initial visit, he complained that he suffered neck pain and had for a couple of years; he also complained of difficulty sleeping. Respondent's questioning of R.E. regarding his condition was somewhat more detailed (although still lacking according to Dr. Chavez) than it was with the Agent and at no point in the encounter did R.E. suggest that he did not have pain. Moreover, while the record suggests that Respondent did only a superficial physical exam, and again, he did not discuss his diagnosis with R.E., he did recommend alternative treatments.

I need not decide whether the prescriptions Respondent gave R.E. at the initial visit violated 21 CFR 1306.04(a) because it is clear that the subsequent Lorcet refills which Respondent authorized far exceeded what he had determined was medically necessary to treat R.E.'s condition. More specifically, Respondent's initial dispensing of 60 Vicodin should have lasted twenty days if taken at the prescribed dosage of one tablet every eight hours.[46] Yet only one week later on October 20, R.E. obtained a refill for 120 tablets; this prescription should have lasted forty days (or until November 29) as Respondent did not change the dosing. However, on November 9, which was nearly three weeks early, Respondent dispensed to R.E. 120 Lorcet, which was a different drug.

Respondent changed the dosing of the Lorcet to one tablet every six hours; thus, this dispensing provided a thirty-day supply. However, on December 1, more than a week early, Respondent dispensed an even larger refill, increasing the amount to 150 tablets. And while this refill should have thirty-seven days (or until January 7), on December 7, Respondent dispensed another refill for 150 tablets.

None of these refills was supported by documentation of a plausible reason for it in the patient file. Given that R.E.'s requests were not merely days but weeks early, there was substantial reason to believe that he was either abusing the drugs or diverting them. Indeed, this should have been apparent by, if not the first, then R.E.'s second refill request. Yet Respondent did not recognize this problem until several months later.[47] I therefore conclude that Respondent acted outside of the usual course of professional practice and lacked a legitimate medical purpose when he dispensed the Vicodin and Lorcet refills to R.E. and therefore violated Federal law. 21 CFR 1306.04(a).

The record also supports the conclusion that Respondent's dispensings of controlled substances to the other patients lacked a legitimate medical purpose and were issued outside of the usual course of professional practice. *Id.* As Dr. Chavez noted, none of the charts he reviewed contained sufficient documentation to "justify[] the use of opiate therapy to the level exhibited on the charts."

While Respondent testified that he had told his patients that they could take Lorcet and Vicodin ES in quantities amounting to nine to ten grams per day of acetaminophen, in his report, Dr. Chavez noted the potential toxicity of patients consuming in excess of four grams per day of acetaminophen and that blood chemistries must be regularly performed in order to monitor liver function. Yet in none of the files Dr. Chavez reviewed (and which are discussed above) is there evidence that Respondent performed blood tests to assess a patient's liver function and to determine whether the large quantities the patient was purportedly consuming were causing liver damage. Moreover, in none of the files is there evidence that the patients were referred for consultations with specialists and/or additional diagnostic testing. He did not take substance abuse histories. Nor did he ever require his patients to provide a urine sample.

With respect to many of the patients, Respondent authorized refills for them for months on end without requiring that they appear for a followup visit. As Dr. Chavez noted, many of the refills Respondent dispensed occurred at such rapid intervals that "[i]n many cases, it would have been impossible * * * to use this quantity of controlled medications within that short of period of time." GX 6, at 32.

Thus, even crediting Respondent's dubious testimony regarding his dosing instruction for Lorcet and Vicodin, there is still ample evidence that he dispensed refills for both of these drugs, as well as Xanax and Valium, that were excessive and were not justified by a legitimate medical purpose. For example, on December 8, 2006, E.A. received 120 Valium tablets, which, according to the dosing noted in E.A.'s file, should have lasted sixty days. Yet Respondent proceeded to dispense an additional 120 Valium to E.A. on December 11, 15, 18, 19, 26, and 29; as well as on January 2, 8, 12, 15, 19, and 22, 2007. Moreover, on January 29 and February 2, Respondent dispensed additional refills of 80 Valium; he also dispensed an additional thirty tablets on both February 16 and 23. Thus, between December 8, 2006 and February 8, 2007, Respondent dispensed to E.A. more than thirteen times the amount of Valium which he had concluded was medically necessary. These amounts suggest that E.A. was selling the Valium.

During the same period, Respondent dispensed refills for 150 Lorcet to E.A. on December 8, 11, 15, 18, 19, 26, and 29; January 2, 8, 12, 15, 19, 22, 25, and 29; and February 2 and 5. Even crediting Respondent's testimony that he told his patients that they could safely take up to 20 tablets of Lorcet per day, during the 8.5-week period between December 8 and February 5, E.A. had a medical need for 1,200 tablets. Yet Respondent dispensed 2,550 tablets to him. Moreover, notwithstanding the extraordinary quantities of Lorcet Respondent was dispensing to E.A., he never did a blood test.

It is acknowledged that E.A.'s record contains two notes during the month of February indicating that Respondent had refused refills as too early. However, given the frequency and quantities of these refills, especially for the Valium which provided a 60-day supply, it should have been obvious well before this point that E.A. was either abusing and/or selling the drugs. And even after this, Respondent provided E.A. with additional refills, which even he conceded were early. Moreover, Respondent rarely, if ever, reviewed E.A.'s record to determine when he had last authorized a refill and/or seen him. In short, Respondent's dispensings to E.A. manifest an egregious failure to properly monitor his patient to ensure that he was not abusing the drugs or selling them.

M.D. repeatedly obtained early Lorcet refills from Respondent. For example, in the winter of 2006–2007, M.D. obtained refills for 120 Lorcet on December 1, 5, 8, 12, 15, 18, 21, and 28; January 5, 9, 12, 15, 18, 22, 23, 25, and 29; as well as February 5 and 8. Even assuming that Respondent told M.D. that he could take 20 tablets per day—a questionable assumption in light of the note Respondent made following M.D.'s

[46] As found above, the recording of the visit contains no indication that Respondent told R.E. he could take more than the prescribed amount.

[47] R.E. apparently did not seek a refill from Respondent between December 7, 2006, and February 27, 2007. Notwithstanding this nearly three-month hiatus, Respondent resumed dispensing to him on the latter date without examining him (providing another 150 Lorcet, also a thirty-seven day supply) and did so again only two weeks later, at which time he increased the dosing to one tablet every four hours without examining him.

arrest that a narcotics detective would be calling and that the 120 tablets that had been recently dispensed to him was a ten-day supply—these nineteen refills should have lasted 114 days rather than a little more than two months. Indeed, based on Respondent's note, the supply should have lasted 190 days or slightly more than six months.

M.D. also obtained unwarranted refills of Xanax from Respondent. On February 15, 2007, Respondent dispensed 60 Xanax to him.[48] Four days later, Respondent dispensed another 60 Xanax, a thirty-day supply based on the dosing noted in the record of one tablet every twelve hours. This was followed by additional dispensings of 90 tablets on March 1 and 9, with the same dosing instruction of one tablet every twelve hours.

Here again, Respondent dispensed controlled substances in quantities which far exceeded the amount he had determined was medically necessary to treat a patient's condition. And once again, it is clear that Respondent failed to properly monitor his patient to ensure that the patient was not abusing or selling the drugs.[49]

While S.M. did not seek early refills of Lorcet (at least if it is assumed that he took twenty tablets per day) during the initial seven months of his seeing Respondent, beginning in March of 2007, he did. More specifically, Respondent dispensed 120 Lorcet to him on March 1, 5, 9, 12, 16, 19, 23, 26, and 30; as well as on April 2, 6, and 9, 2007. These dispensings totaled 1,440 tablets in a forty-day period, and were enough to provide 72 days worth of medication if they were taken at a rate of 20 tablets per day.

At the hearing, Respondent admitted that some of these refills were too early. Again, Respondent failed to properly monitor his patient to ensure that he was not abusing drugs and/or selling them.

D.M. received numerous refills for both Xanax and Valium that were typically weeks early. Respondent dispensed 30 Xanax, which provided a fifteen-day supply based on the dosing instruction, to D.M. on July 7, 11, 15, 22, and 29; August 4, 11, 16, 22, and 26; and September 1. Then, with no change in the dosing, he dispensed 60 tablets (a thirty-day supply) to D.M. on September 6, 12, 19, and 26; as well as on October 10, 17, and 24; and 90 tablets on October 3. In just this period, which was not even four months long, Respondent dispensed 840 tablets to D.M., a quantity which was enough to treat him for nearly fourteen months.

Respondent then switched to Valium, dispensing 60 tablets, with a dosing of one tablet to be taken every twelve 12 hours (a thirty-day supply), to D.M. on November 7, 17, 23, and 29; December 6, 13, 22, and 27 (all in 2005); January 10, 16, 23, and 30; February 6, 13, 20, and 27; March 7, 13, 20, 27, and 31; April 4, 7, 14, 20, and 27; May 5, 11, 18, 19, and 23; June 9, 15, 23, and 27; and July 5, 7, 11, 14, 18, 21, 25, 28, and 31 (on both July 7 and 28, the refills were for 90 tablets). Most of Respondent's dispensings of a thirty-day day supply were more than three weeks early; the dispensings of 90 tablets were even earlier. Moreover, the dispensings totaled 2,640 tablets and provided 1,320 days worth of medication in a nine-month (approximately 270-day) period.

In September 2006, D.M. also began obtaining clearly excessive refills for Lorcet. Specifically, he obtained refills for 120 or 150 Lorcet on September 5 (120), 7 (120), 11 (120), 14 (120), 18 (150 tablets), 22 (120), and 25 (150); October 2 (120), 5 (120), 9 (120), 12 (150), date undecipherable (120), date undecipherable (150), 23 (120), 26 (150), and 30 (120); November 2 (150), 6 (120), 9 (150), 13 (120), 20 (120), 22 (120), and 30 (150); December 3 (120), 7 (150), 11 (120), 14 (150), 18 (150), 21 (150), and 28 (150). In each of these months, Respondent dispensed between 300 and nearly 600 more tablets than the amount which Respondent claimed he told his patients they could safely take (600 to 620 a month).

As the evidence shows, even in the initial months of Respondent's relationship with D.M., there was ample reason to believe that D.M. was either abusing the Xanax or selling it to others. Indeed, although D.M.'s refill requests became even more brazen in their frequency, Respondent rarely rejected any of his 146 refill requests and continued to dispense controlled substances to him until he surrendered his registration. Respondent's dispensings to D.M. manifest a complete abdication of his obligation to properly supervise his patient "to prevent addiction and recreational abuse." *Gonzalez,* 546 U.S. at 274. It is clear that these prescriptions lacked a legitimate medical purpose and were issued outside of the usual course of professional practice and thus violated Federal law. 21 CFR 1306.04(a).

J.N. also received excessive refills of both Lorcet and Valium. Between November 2, 2006 and February 19, 2007, Respondent dispensed sixteen refills for 180 Lorcet and 2 refills for 150 Lorcet for a total of 3,180 tablets, with most of the refills being dispensed within three to five days of the previous refill. Even if Respondent told J.N. that he could take up to twenty tablets of Lorcet per day, the quantity he dispensed in this period would have provided enough medication for 159 days and was thus well in excess of what Respondent's dosage recommendation required.

Moreover, on twelve occasions beginning on December 7, 2006 and ending on February 19, 2007, Respondent dispensed a total of 750 Valium tablets to J.N. According to the dosing instruction of one tablet every twelve hours, the dispensings would have provided 375 days of medication and thus provided nearly five times the amount of Valium which Respondent had determined was medically necessary. Moreover, on January 18, Respondent dispensed not only 30 Valium but also 60 Xanax to J.N.; J.N.'s record, however, contains no explanation as to why both drugs, which are benzodiazepines and schedule IV depressants, were medically necessary. *See* 21 CFR 1308.14(c).

Here again, it is clear that Respondent failed to properly monitor the amount of controlled substances his patient was seeking. It also clear that Respondent acted outside of the usual course of professional practice and lacked a legitimate medical purpose in dispensing controlled substances to J.N. 21 CFR 1306.04(a).

From the beginning of his relationship with S.R., Respondent dispensed Lorcet, Xanax, and Valium in amounts that substantially exceeded what his dosing regime called for. For example, in the first two months Respondent dispensed 720 tablets of Lorcet, 120 tablets more than was necessary based on the twenty tablets per day maximum dose. He dispensed 30 Xanax to S.R at her second visit, a fifteen-day supply based on his dosing instruction, only to do so again four days later and a third time, six days after the second dispensing. On the same day as the third Xanax dispensing, he also dispensed 30 Valium (also a fifteen-day supply), and only four days later, he dispensed another 60 Valium. Notably, Respondent did not note in the patient record a medical reason for prescribing either the Xanax or the Valium.

While S.R.'s file indicates that during August, Respondent turned down two

[48] It is not clear what the dosing was for this prescription.

[49] Only twelve of some fifty-five telephone requests for refills indicated that Respondent had checked the date of M.D.'s previous refill or last office visit.

refill requests,[50] beginning in October, S.R. successfully escalated her requests. In this month, S.R. obtained Lorcet refills totaling 900 tablets, nearly 300 tablets more than was required if she was taking 20 tablets per day; in November, she obtained 780 Lorcet, 180 tablets more than was necessary to provide the maximum dose. More striking, in December, she obtained 1,080 tablets (480 more than needed), and in January, she obtained 1,260, more than double what was needed.

Moreover, between November 22 and January 29, Respondent dispensed fourteen refills of Valium to S.R. for a total of 570 tablets, a quantity sufficient for 285 days. On three separate dates during this period, Respondent also dispensed refills of 60 Xanax for a total of 180 tablets (a 90-day supply). Notably, many of these Lorcet and Xanax refills occurred only three to four days after a previous refill.

As noted above, S.R.'s file indicates that he twice rejected refill requests. However, in each instance, he subsequently approved refills only a few days later and apparently never asked why his patient was seeking refills so early. During the eight months in which he dispensed drugs to her, he saw her only at the initial visit. Once again, the evidence is clear that Respondent failed to properly monitor his patient to ensure that she was not abusing the drugs or selling them. Again, I hold that Respondent repeatedly acted outside of the usual course of professional practice and lacked a legitimate medical purpose when he dispensed Lorcet, Xanax, and Valium to S.R. 21 CFR 1306.04(a).

B.W. sought an early refill four days after obtaining a Vicodin prescription, claiming that his housekeeper had thrown away his medication. B.W. did not otherwise begin to demonstrate a pattern of seeking early refills until several months later when, in November 2006, Respondent dispensed to him six refills totaling 540 tablets of Vicodin ES, an amount which based on the testimony that twelve tablets was the maximum safe daily dose, was 200 tablets more than was medically necessary to treat him for that month.[51] In December, Respondent dispensed to B.W. six more refills, each for 120 tablets, for a total of 720 tablets, an amount which was nearly double the monthly number of tablets (372) that Respondent testified could be safely taken.

In January 2007, Respondent dispensed eight more 120 tablet refills for a total of 960 tablets, an amount which was nearly 600 tablets more than could be safely taken (372). This was followed by six dispensings for a total of 510 tablets in February, providing approximately 170 tablets beyond what could be safely taken (336), and six dispensings in March for a total of 600 tablets, approximately 230 tablets more than necessary (372). Finally, in the first ten days of April 2007, Respondent dispensed three refills for a total of 360 tablets, the last refill occurring two days before Respondent surrendered his registration.

At no time did Respondent perform blood tests to determine how the medication was affecting B.W.'s liver function. Moreover, beginning in November 2006, B.W. had clearly escalated his refill requests and yet Respondent authorized doubling the quantity of the refills to 120 tablets. Respondent did so without doing a follow-up evaluation and continued to dispense to B.W. for several months thereafter before concluding in February 2007 that B.W. needed to be seen. Even then, he dispensed additional refills until early March, when he finally saw B.W.

In his testimony, Respondent conceded that the refills that occurred between March 15 and April 10, 2007 were early. However, in fact, nearly all of the refills between November 2006 and April 10, 2007 were early. Notably, during this period, B.W. was obtaining hydrocodone drugs from ten other physicians.

Here again, the quantities of Vicodin ES which B.W. sought and obtained from Respondent were indicative of self-abuse and/or selling to others. Once again, I conclude that Respondent failed to properly supervise his patient and that he lacked a legitimate medical purpose and acted outside of the usual course of professional practice in dispensing the refills. 21 CFR 1306.04(a).

Respondent examined J.W. only at his initial visit of March 6, 2006, yet dispensed refills to him for eleven months before finally concluding that he was requesting "too much meds" and that a second visit was needed "to discuss lowering [the] amounts." While J.W.'s Lorcet refills were not initially problematic (based on the twenty tablet per day max), from the outset the Xanax refills were excessive.

At the first visit, Respondent dispensed to J.W. 90 Xanax, a forty five-day supply based on the dosing instruction of one tablet every twelve hours. Yet only ten days later, Respondent dispensed another 60 tablets to him (a thirty-day supply); this was followed by two more refills, each for 30 tablets during the month. In March 2006 alone, Respondent dispensed 210 Xanax to J.W., an amount which provided 105 days' worth of the drug.

During the course of Respondent's dispensing, his dosing instruction remained unchanged. Yet each month Respondent dispensed to J.W. quantities of Xanax far in excess of what his dosing instructions established was medically necessary (assuming he actually had a condition warranting the drug). In April, he dispensed 180 tablets; in May and June, 150 (each month); in July, 360; in August, 150; in September, 420; in October, 810; in November, 690; in December, 450; in January 2007, 540; and in February, 150 (although J.W. made only two refills requests in this month). Thus, from the outset, J.W. sought and obtained 2.5 to 3 times the monthly amount of Xanax which was medically necessary. And even after J.W. had become increasingly brazen and sought first seven, and then fourteen times the monthly amount of drug that Respondent's dosing regime required, Respondent continued to dispense grossly excessive quantities to him and did so for months.

Likewise, by October, J.W.'s requests for Lorcet refills had become increasingly brazen, with some requests occurring within two to four days of a previous refill. In October, Respondent dispensed 1,080 Lorcet tablets to J.W., an amount which was 460 tablets more than necessary if J.W. actually needed the maximum 20 tablets per day to treat a legitimate medical condition. In November, Respondent dispensed to J.W. another 1,080 tablets; in December, 810; in January, 990; and in the first five days of February, 360. Again, Respondent approved multiple refills within only a few days after approving a previous refill. And again, at no time during the course of his dispensing Lorcet to J.W., did Respondent do blood tests.

Given the frequency of the refills and quantities that he dispensed, it is incredible that it took Respondent eleven months to finally recognize that something was amiss and require that J.W. appear for a second visit. Once again, Respondent failed to properly monitor his patient. Moreover, even assuming that Respondent's evaluation of J.W. was adequate to support the initial prescriptions of Xanax and Lorcet, it is clear that most of the refills

[50] One of these was only three days after a prior refill, thus begging the question of what use S.R. was making of the drugs she was seeking.

[51] The first November refill occurred on November 3; B.W. had obtained a refill for 60 tablets on October 31. The first three November refills were for 60 tablets each; beginning on November 13, Respondent doubled the quantity to 120 tablets.

he dispensed were not medically necessary and therefore lacked a legitimate medical purpose and were issued outside of the usual course of professional practice. 21 CFR 1306.04(a).

The record here thus manifests an egregious failure by Respondent to properly supervise his patients to ensure that they were not abusing the drugs and/or selling them to others. *See Gonzales,* 546 U.S. at 274. In short, Respondent completely abdicated his role as a physician. I further hold that the Government has clearly met its *prima facie* burden of showing that Respondent's registration would be inconsistent with the public interest.[52]

**Sanction**

Under longstanding Agency precedent, where, as here, "the Government has proved that a registrant has committed acts inconsistent with the public interest, a registrant must 'present sufficient mitigating evidence to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration.' " *Medicine Shoppe-Jonesborough,* 73 FR 363, 387 (2008), *aff'd,* 3000 Fed. Appx. 409 (6th Cir. 2008) (quoting *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988))). "Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir.1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct." *Medicine Shoppe,* 73 FR at 387; *see also Jackson,* 72 FR at 23853; *John H. Kennedy,* 71 FR 35705, 35709 (2006); *Prince George Daniels,* 60 FR 62884, 62887 (1995). *See also Hoxie* v. *DEA,* 419 F.3d at 483 ("admitting fault" is "properly consider[ed]" by DEA to be an "important factor[]" in the public interest determination).[53]

Finally, an applicant/registrant is required not only to accept responsibility for his misconduct, but also to demonstrate what corrective measures he has undertaken to prevent the re-occurrence of similar acts. *Jayam Krishna-Iyer,* 74 FR 459, 464 (2009). Both conditions are essential requirements for rebutting the Government's *prima facie* showing that granting an application or continuing an existing registration would be "inconsistent with the public interest." 21 U.S.C. 823(f).

In her decision, the ALJ noted various facts which she deemed favorable to Respondent even though she ultimately concluded that he had not rebutted the Government's *prima facie* case. Several of these facts are not even supported by the record; others are insubstantial and do little to minimize the egregious nature of Respondent's misconduct.

First, the ALJ asserted that "Respondent was not dispensing controlled substances for monetary gain." ALJ at 48. As support for this finding, the ALJ cited the testimony of the DI that he did not find significant amounts of money in Respondent's home or office and found no indication of abnormally large cash transfers or other evidence of trafficking. *Id.* Respondent did, however, charge for the pills he dispensed even if he did not charge the street price for drugs;[54] in any event, the price he charged is of little relevance in determining whether the refills were issued in the usual course of professional practice and lacked a legitimate medical purpose. Even if Respondent had charged nothing for a prescription (or given a patient a free manufacturer's sample), if he acted outside of the usual course of professional practice and lacked a legitimate medical purpose in doing so, the dispensing would still be unlawful.

Next, the ALJ found that Respondent had refused to prescribe OxyContin because of its addictive properties. ALJ at 43. However, given the extensive scope of the early and unwarranted refills he authorized for such highly abused drugs as Lorcet, Vicodin, Xanax, and Valium, the ALJ's finding does not mitigate the egregiousness of his misconduct.

Based on the initial conversation between the Special Agent and Respondent, the ALJ found that he "refused to prescribe controlled substances for recreational purposes." ALJ at 43. Yet, within a minute or so of his claiming that he did not prescribe for recreational purposes, he agreed to write a prescription to the Special Agent for Vicodin even though the Agent had yet to make any representation that she had pain. Thus, he was willing to prescribe for recreational purposes provided the Agent eventually said the magic words.

The ALJ also found that Respondent "stopped dispensing refills when a patient failed to keep a scheduled appointment" and that he "often times refused to dispense early refills." *Id.* As to the first assertion, the evidence showed, however, that Respondent rarely required his patients to appear for follow-up visits and that he authorized refills for months on end (frequently on a weekly or shorter basis) without requiring a visit. And contrary to the ALJ's second assertion, Respondent rarely refused a refill request, and even when he initially did so, he frequently approved it within a few days.

The ALJ noted that "in multiple cases * * * Respondent actually dispensed controlled substances at the rate he directed his patients to consume them." *Id.* Beyond the fact that one would

[52] The Government also proved that Respondent violated California law by allowing unlicensed employees to dispense the controlled substances to his patients. *See* Cal. Bus. & Prof. Code § 4170(a). Respondent admitted to the DI that one of his employees repackaged the controlled substances into vials which she labeled and that his receptionist would then deliver the controlled substances to his patients. He also admitted that he did not personally supervise his receptionist deliver the drugs to the patients. Tr. 593.

Section 4170 of the California Business and Profession Code provides in relevant part that "[n]o prescriber shall dispense drugs * * * to patients in his or her office or place of practice unless * * * [t]he dangerous drugs * * * are dispensed to the prescriber's own patient, and the drugs * * * are not furnished by a nurse or physician attendant." *Id.* § (a)(1); *see also id.* § (a)(5) (requiring prescriber to "personally dispense[] the dangerous drugs * * * to the patient"). While the statute allows a certified nurse-midwife, a nurse practitioner, a physician assistant or a naturopathic doctor to "hand to a patient of the supervising physician * * * a properly labeled prescription drug prepackaged by a physician," *id.* § (a)(8), neither H.C. nor the receptionist hold any of these licenses.

While Respondent contended that the Medical Board had inspected his pharmacy twice and found no violations, Respondent was not present during one of the inspections, and the record does not establish, whether at either inspection, the inspectors observed the actual manner in which Respondent dispensed the drugs. Moreover, the Government cited two Medical Board decisions holding physicians in violation of section 4170 because they allowed either unlicensed office staff (or employees who did not fall within the exceptions of subsection (a)(8)) to dispense drugs to their patients. *See Tan Shin Lee, M.D.,* Stipulated Surrender of License and Order, Ex. A, at 4, 17–18; *adopted by Tan Shin Lee, M.D.,* Decision (Med. Bd. Cal. 2008) (Gov. Br., at app. H); *Albert Peter Giannini, Jr., M.D.,* Stipulation in Settlement and Order, at 3 (Med. Bd. Cal. 2001); *adopted by Albert Peter Giannini, Jr., M.D.,* Decision (Med. Bd. Cal. 2001) (Gov. Br., at app. G). I thus conclude that Respondent violated California law when he allowed unlicensed personnel to dispense controlled substances to his patients.

[53] Relatedly, an applicant's/registrant's lack of candor is an important and typically dispositive consideration in determining whether he has accepted responsibility for her misconduct. *See Hoxie,* 419 F.3d at 483 ("Candor during DEA investigations, regardless of the severity of the violations alleged, is considered by the DEA to be an important factor when assessing whether a physician's registration is consistent with the public interest" and noting that physician's "lack of candor and failure to take responsibility for his past legal troubles * * * provide substantial evidence that his registration is inconsistent with the public interest."). *See also Craig H. Bammer,* 73 FR 34327, 34328 (2008); *Prince George Daniels,* 60 FR 62884, 62887 (1995).

[54] There was testimony that in the Los Angeles area, Vicodin sold on the street for up to $5 per tablet. Tr. 141.

expect a practitioner who is properly supervising his patients to rarely, if ever, do otherwise, the record establishes numerous instances in which Respondent dispensed both hydrocodone drugs and schedule IV depressants (Xanax and Valium) in quantities which far exceeded his dosing instructions. Indeed, the ALJ's assertion is refuted repeatedly by her own findings which show that the quantities of the various drugs he dispensed greatly exceeded what the patients required in the course of legitimate medical treatment.

Next, the ALJ noted that "Respondent seemed to understand the need for a pain management contract, even though he had not implemented any procedures to verify compliance with that agreement." *Id.* at 44. This, however, does not mitigate his misconduct because, as the latter part of this finding make plain, Respondent's pain management contracts were not worth the paper they were written on as he never enforced them.[55]

Finally, the ALJ noted that Respondent had acknowledged that "he had a problem" because "between February and March of 2007, he was preparing for the Board's proceeding, and after that, he had a major increase of his patients" thus leading "to his failure to keep careful track of the frequency and quantities" of his refills. ALJ at 44. However, Respondent's failure to properly monitor his patients was not limited to the February–March 2007 time frame, as he issued many refills, which were clearly unwarranted, well before then. Indeed, most of the evidence discussed above involved his dispensings prior to this period and he admitted to only a few instances of early refills.[56] I thus conclude that Respondent has not fully accepted responsibility for his misconduct.

It is acknowledged that Respondent testified that, if granted a new registration, he would use the CURES database if he "feel[s]" that a patient is requesting refills "too frequently" and that he would limit his prescribing of drugs to the PDR limits.[57] Tr. 344–45. He also claimed that he would hire additional help and instruct his staff to keep better track of his patients' refill requests. Yet it is entirely unclear at what point he would "feel" that a patient's refill requests were being made "too frequently." As for his promise to not exceed the PDR limits, the record shows that he repeatedly issued refills which were excessive even when evaluated under his own understanding as to a drug's maximum daily safe dosing limit.

Thus, while I have considered Respondent's proposed reforms, the record here does not inspire confidence in his ability or willingness to properly implement them. Indeed, even ignoring the illegality of the prescription he issued to the Special Agent, the record amply demonstrates that Respondent acted with reckless disregard for his obligation to properly supervise his patients to ensure that they were not abusing and/or selling to others the controlled substances he dispensed. His conduct was egregious and likely caused great harm to public health and safety. Accordingly, I hold that Respondent has not rebutted the Government's *prima facie* case. Respondent's application will therefore be denied.[58]

[55] The ALJ also noted that Dr. Norcross stated that Respondent "met the standard of care for a physician of his age and training." ALJ at 44. However, as explained above, the issue is whether Respondent acted in the usual course of professional practice and had a legitimate medical purpose in issuing the prescriptions. *See* 21 CFR 1306.04(a). Moreover, Dr. Chavez provided an extensive explanation for his opinion that Respondent's prescribing practices represented an extreme departure from the accepted standards of medical practice and of medication prescribing.

[56] While Respondent conceded that he dispensed a limited number of early refills to E.A. and S.M., this was only a small portion of the early refills he issued to these two persons. Most significantly, he also failed to accept responsibility for numerous early and unwarranted refills he dispensed to other patients.

[57] While I note this, I agree with Respondent that the record in this matter does not establish that the accepted standard of medical practice requires a physician who prescribes controlled substances to check his patient in a prescription monitoring program database to determine whether he/she is a doctor shopper. *See* Resp. Prop. Findings, at 8–9.

[58] Respondent also contends that the public interest analysis requires the Agency to "balance the need to prevent possible abuse by a few isolated patients against the public harm caused by denying * * * DEA registration privileges to an important provider of healthcare (and pain management) services in a poor, mostly indigent community." Resp. Reply Br. at 2. DEA has previously rejected this contention as unworkable and lacking any support in the statutory factors. *See Gregory D. Owens,* 74 FR 36751, 36757 & n.22 (2009) ("The residents of this Nation's poorer areas are as deserving of protection from diverters as are the citizens of its wealthier communities, and there is no legitimate reason why practitioners should be treated any differently because of where they practice or the socioeconomic status of their patients.").

In his Reply Brief, Respondent also asserts "that the few patients who receive[d] slightly excessive amounts of pain medication were not representative of a larger number, and were a minuscule portion of [his] practice." Resp. Reply Br. at 7. Beyond the fact that Respondent mischaracterizes the evidence regarding the amounts of pain medication he dispensed and entirely ignores the extraordinary number of unlawful Valium and Xanax refills he dispensed, DEA has repeatedly rejected the argument that revocation of a registration or denial of an application is unwarranted where a practitioner's misconduct only involves a small number of patients. *See Jayam Krishna-Iyer,* 74 FR 459, 463 (2009). DEA has revoked a practitioner's registration based on a physician's simultaneous presentation of two fraudulent prescriptions to a pharmacist, *see Alan H. Olefsky,* 57 FR 928, 928–29 (1992), and DEA can revoke based on a single act of diversion. In short, Respondent's misconduct is egregious and he has not rebutted the Government's *prima facie* case.

## Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b) and 0.104, I hereby order that the application of Bienvenido Tan, M.D., for a DEA Certificate of Registration be, and it hereby is, denied. This order is effective April 29, 2011.

Dated: March 22, 2011.

**Michele M. Leonhart,**

*Administrator.*

[FR Doc. 2011–7394 Filed 3–29–11; 8:45 am]

**BILLING CODE 4410–09–P**

---

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

**[Docket No. 09–40]**

### Scott C. Bickman, M.D.; Revocation of Registration

On March 27, 2009, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Scott C. Bickman, M.D. (Respondent), of Anaheim Hills, California. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, BB3698632, as well as the denial of any pending applications to renew or modify his registration, on the ground that his "continued registration is inconsistent with the public interest." ALJ Ex. 1, at 1.

The Show Cause Order specifically alleged that "[f]rom December 2007 through October 2008," Respondent allowed his "DEA registration to be used to purchase at least 281,500 dosage units of hydrocodone combination products, in exchange for $2,000 per month," in violation of 21 U.S.C. 843(a)(2) and (3). *Id.* The Show Cause Order also alleged that Respondent had materially falsified his July 25, 2008 application to renew his registration because he failed to disclose that the Medical Board of California had "placed limits on [his] practice and placed [him] on probation for a period of thirty-five (35 months), effective September 18, 2006." *Id.* at 1–2 (citing 21 U.S.C. 824(a)(1)).

Respondent timely requested a hearing on the allegations and the matter was placed on the docket of the

Office of Administrative Law Judges (ALJ). Following pre-hearing procedures, an ALJ conducted a hearing in Los Angeles, California on January 26–27, 2010. At the hearing, both parties introduced documentary evidence and called witnesses to testify. Thereafter, both parties submitted briefs containing their proposed findings of fact, conclusions of law, and arguments.

On May 28, 2010, the ALJ issued her recommended decision (also ALJ). Therein, the ALJ found that Respondent had materially falsified his July 2008 renewal application. ALJ at 31. Based on "Respondent's inconsistent testimony about how the misstatement occurred and his failure to take responsibility for it," the ALJ further found that Respondent had not shown that "the omission was unintentional and that there was no intent to deceive." *Id.* The ALJ thus concluded that this act "constitutes grounds for revoking [Respondent's] registration." *Id.*

The ALJ then turned to whether Respondent had committed acts rendering his registration inconsistent with the public interest. *Id.* (discussing 21 U.S.C. 823(f)). With respect to the first factor—the recommendation of the State licensing authority—the ALJ noted that Respondent's State medical license "is unrestricted and that he is authorized to handle controlled substances in" the State. *Id.* The ALJ thus found that this factor supports a finding that Respondent's "continued registration would be in the public interest." *Id.* at 31–32. However, the ALJ further noted that this factor is not dispositive.

Turning to the second factor—Respondent's experience in dispensing controlled substances—the ALJ noted that this factor was "not at issue in th[e] proceeding." *Id.* at 32. With respect to the third factor—Respondent's record of convictions for offenses related to the manufacture, distribution or dispensing of controlled substances—the ALJ noted that there was no evidence that Respondent has been convicted of such an offense. *Id.* However, the ALJ noted that this factor was also not dispositive. *Id.*

Addressing the fourth factor—Respondent's compliance with applicable Federal and State laws related to controlled substances—the ALJ found that "between December 2007 and October 2008[,] some 120,000 dosage units of hydrocodone were ordered [by another physician who was allowed to use his registration] and shipped from Harvard Drug using Respondent's DEA registration number" and that "Respondent does not deny that this happened, but urges that these orders were made without his authorization or knowledge." *Id.* The ALJ further found that while "[t]he record does not establish that Respondent had actual knowledge of every order placed with Harvard Drug using his DEA number[,] [it] conclusively establishes * * * that [he] had ample reason to suspect that his registration was being misused and that he chose not to act on those suspicions." *Id.* Further finding Respondent's various explanations of his conduct implausible, the ALJ concluded that he "knew or should have known that" his registration was being used "to order controlled substances that were likely to be diverted." *Id.* at 33. The ALJ thus concluded that, by allowing another doctor to use his DEA registration "to order controlled substances," Respondent had unlawfully distributed controlled substances in violation of 21 U.S.C. 841(a) and that this factor supported a finding that his "continued registration would be inconsistent with the public interest." *Id.*

Turning to the fifth factor—other conduct which may threaten public health or safety—that ALJ found it "abundantly clear from Respondent's testimony and his letters to [a DEA Investigator that he] does not admit to any wrongdoing or accept any responsibility for the 120,000 dosage units of hydrocodone that were ordered * * * using his DEA registration number." *Id.* at 33. Concluding "that Respondent's refusal to acknowledge his wrongdoing offers little hope for the prospect that if he retains his DEA registration he will act more responsibly in the future," the ALJ found that this factor also supported a finding that his continued registration would be inconsistent "with the public interest." *Id.* at 34.

The ALJ thus concluded that Respondent had "at least constructively engaged in [the] unlawful distribution of hydrocodone and that he is unwilling or unable to accept the responsibilities inherent in a DEA registration." *Id.* The ALJ thus recommended that Respondent's "registration be revoked and that any pending applications be denied." *Id.*

Thereafter, Respondent filed exceptions to the ALJ's decision. The record was then forwarded to me for final agency action.

Having considered the entire record in this matter, including Respondent's exceptions, I reject the ALJ's legal conclusion that Respondent materially falsified his application. I agree, however, with the ALJ's finding that Respondent has committed acts which render his registration inconsistent with the public interest because he either knew or had reason to know that his registration was being misused and yet did nothing to prevent it. I further agree with the ALJ that Respondent has failed to accept responsibility for his misconduct. Accordingly, I will adopt the ALJ's recommendation that his registration be revoked and pending application be denied. As ultimate fact finder I make the following findings.

**Findings**

Respondent is an anesthesiologist who holds a physician and surgeon license issued by the Medical Board of California (MBC). GX 7, at 1. Pursuant to a Stipulated Settlement and Disciplinary Order (State Order), which became effective on September 18, 2006, the MBC revoked Respondent's license but then stayed the revocation and placed him on probation for a period of thirty-five months subject to various conditions. *Id.* at 2–3. The State Order resolved an Accusation that Respondent had committed acts of gross negligence, negligence, incompetence, and had failed to maintain adequate and accurate records, based on his provision of epidural anesthesia to a patient. *Id.* at 21–25. Notably, the Board did not place any restriction on Respondent's authority to administer, prescribe or dispense controlled substances. *See id.* at 5–15. It was undisputed that Respondent has satisfactorily completed the probation.

Respondent is also the holder of a DEA Certificate of Registration, which authorizes him to dispense controlled substances in schedules II through V as a practitioner. GX 1. Respondent's registration was to expire on July 31, 2008; however, on July 28, 2008, Respondent submitted a renewal application. GX 6, at 3. On the application, Respondent was required to answer the following question: "Has the applicant ever had a state professional license or controlled substance registration revoked, suspended, restricted, or placed on probation, or is any such action pending?" GX 5, at 1. Respondent answered: "No." *Id.*

On September 28, 2005, when Respondent previously renewed his registration, he gave as his registered location his residence on Wilshire Boulevard in Los Angeles, California. GX 6, at 3–4. However, on August 22, 2007, an application was submitted through DEA's registration Web site which changed his registered address from his residence to 145 S. Chaparral Court, Suite 101, Anaheim Hills, California. GX 6, at 3. This address was the location of an outpatient surgery

center which was owned by Dr. Harrell E. Robinson, a plastic surgeon.

According to Respondent, he first met Robinson in 2005 when the latter performed surgery at a surgery center in Beverly Hills. Tr. 471. On some date in either late 2006 or April/May 2007, Robinson began performing outpatient surgery at the Chaparral Court surgery center. *Id.* at 475–76. Robinson told Respondent that he was going to take over the center and asked him if he would be interested in providing anesthesia to the patients who underwent procedures there. *Id.* at 476. Respondent agreed to do so, and Robinson agreed to provide the controlled substances (among them fentanyl and midazolam) that were used to anesthetize the patients. *Id.* at 476–77. Respondent did not order the controlled substances but would tell the clinic's nurse when the supplies were running low, who would then order more. *Id.* at 477–78. Respondent administered anesthesia to patients at the center until sometime in late November 2007. *Id.* at 480, 587.

According to Respondent, the accreditation of Robinson's surgery center, which was issued by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), was due to expire at the end of November 2007 and Robinson had no plans to re-accredit the center. *Id.* at 480. Respondent maintained that he stopped performing anesthesia at the center after its accreditation expired because the State Order prohibited him from practicing at an unaccredited facility and that he had stopped going there.[1] *Id.* at 481.

In mid-November 2007, Robinson asked Respondent to become the center's medical director. *Id.* Respondent declined Robinson's offer. *Id.* at 482. However, because Respondent knew a nurse anesthetist who had previously assisted other surgery centers in obtaining accreditation and who would provide him with the templates necessary to prepare the documents required to do so, as well as because upon the center's obtaining a new accreditation, he would then be able to work there, Respondent offered to help Robinson get the center re-accredited for a fee of $16,000.[2] *Id.* at 482–83; *see also id.* at 347–48. Robinson agreed. *Id.* at 482–83.

Respondent maintained that in addition to preparing the necessary documents, he agreed to allow Robinson to use his DEA registration to order necessary supplies and medications for performing "peri-operative anesthesia services," which he maintained were necessary "to get the center up and running to be accredited." Tr. 496. According to Respondent, this included "gloves, syringes, needles, IVs, IV bags, Bovies and drapes," as well as the drugs used prior to surgery (such as midazolam), during surgery (fentanyl) and post-surgery (Dilaudid and fentanyl). *Id.* at 496–97. Dilaudid (hydromorphone) and fentanyl are schedule II controlled substances, *see* 21 CFR 1308.12(b)(1) & (c); midazolam is a schedule IV controlled substance. *See id.* 1308.14(c).

Respondent also submitted into evidence a November 19, 2007 letter which he asserted he had written to Robinson stating the terms of his agreement for assisting Robinson with getting the center re-accredited. RX DD. According to the letter (which is not signed by either him or Robinson), Respondent agreed to "provide use of my DEA certificate and DEA license for use of supplies and medications related to Peri-operative Anesthesia services." *Id.* The letter further states that "[t]his authorization does not extend to clinic and post-operative services or oral analgesics," and that, "[i]f at any time my * * * DEA is used for other then the narrow range specific [sic] in this letter of understanding then this letter of understanding is nil [sic] and void." *Id.*

Respondent testified that he prepared the letter because he knew that Robinson had started dispensing hydrocodone from his office and he "just wanted to cover [him]self to make sure that [his] DEA in the future was not used for that purpose." Tr. 648. Respondent further denied having written the letter after the fact. *Id.* at 652. However, on either October 19 or 22, 2008, Respondent was interviewed by both a DEA Diversion Investigator (DI) and a DEA Special Agent (S/A) and did not mention the letter. *Id.* at 225, 656–57; GX 23, at 1. Moreover, while Respondent submitted a lengthy written statement to the DI following the interview (as well as two other statements), he did not mention the letter in any of the statements and admitted that he never provided it to the DI.[3] *Id.* at 652, 654, 656–57; *see also* GX 23.

Respondent further maintained that he did not authorize Robinson to use his DEA registration to order oral analgesics such as Vicodin or other controlled substances containing hydrocodone. *Id.* at 644–45. While Respondent testified that Robinson needed his DEA number to order both non-drug supplies and controlled substances from a distributor, *id.* at 496, Samir Shah, Vice-President of Regulatory Affairs for the Harvard Drug Group (hereinafter, either Harvard or HDG), a registered distributor, testified that his company only required a DEA registration if a customer sought to purchase controlled substances. *Id.* at 20–21. The record does not establish whose registration was used by Robinson's clinic to obtain the controlled substances that were needed to anesthetize patients who underwent surgery there in the period prior to the date on which Respondent authorized Robinson to use his registration for this purpose and why Respondent's registration was subsequently required to order the drugs.[4]

According to B.C., who was the front office manager at Robinson's clinic from July through December 3, 2007, when Robinson fired the entire staff, *id.* 410–11, 413–14; in the summer of 2007, she observed Robinson's wife Alinka change Respondent's registered address through the DEA Web site. *Id.* at 416–17. B.C. testified that she asked Alinka Robinson whether Respondent "knew that she was changing his address"; Ms. Robinson stated that Respondent had told her husband that "it was okay." *Id.* at 417. Respondent subsequently denied having authorized this and maintained that he did not become aware that his address had been changed until he attempted to renew his registration in July 2008. *Id.* at 508, 636–40.

In a declaration, B.C. testified that Alinka Robinson had used Respondent's registration to open an account with Ready Rx, another drug distributor, and did so without Respondent's knowledge and consent.[5] RX X. The evidence

[1] However, the State Order contains no such prohibition. *See* GX 7, at 5–16.

[2] According to Respondent, the nurse anesthetist recommended that the center seek accreditation from a different entity, the Institute for Medical Quality (IMQ).

[3] Respondent also submitted a lengthy document, which was a draft of a Policy and Procedure Manual he prepared for Robinson because the Chaparral Court clinic would need it to obtain accreditation. *See* RX E; Tr. 485, 492. Respondent further admitted that this document was only "a draft * * * a rough copy," and was "not intended to be sent in time for approval, or even to request somebody to come [to] the center." Tr. 674. Respondent then explained: "It's a rough draft, as a skeleton, so to speak, for him to have in place something that when he decided * * * then that was not for me to even know that he was going to get it ready. Then he had a rough draft that would have been cleaned up as it needed to be." *Id.* at 674–75. To similar effect, Respondent's fiancé, who helped prepare the document, acknowledged that the document was not final "in any way, shape or form," but rather was "a work in progress." Tr. 376.

[4] While B.C. testified that Robinson would place requests for various controlled substances which she would then order, Tr. 415, it is not clear whether the drugs were ordered under Robinson's, Respondent's, or someone else's registration.

[5] The Government submitted a report it compiled from DEA's ARCOS database of hydrocodone

shows that Alinka and Harrell Robinson used the account to order oral controlled substances such as Vicodin. Tr. 433, 506, 548–49. While B.C. testified that she did not tell Respondent about the account "at the time that [it] was set up," she further stated that after she was laid off she called Respondent to "let him know everything that was going on." *Id.* at 445. According to B.C., Respondent "seemed very shocked when I told him." *Id.* Respondent maintained, however, that while he knew in November 2007, "before [he] left the center that [Robinson] had actually been dispensing medicines out of the office," he had "never even heard of [Ready Rx] until today." *Id.* at 506. He also testified that he was never told by anyone at "Robinson's office that oral controlled substances had been ordered using [his] DEA" registration. *Id.* at 548.

The ALJ did not specifically address this factual dispute. However, as ultimate fact finder, I find that B.C., who was called as Respondent's witness, had no reason to testify falsely as to her having told Respondent about the Ready Rx account following her termination in early December 2007.[6] I therefore credit this testimony.

In December 2007, Dr. Robinson, who had previously purchased controlled substances from HDG for a clinic he owned in Santa Ana, California, contacted the company to set up an account and obtain controlled substances for the Anaheim Hills clinic. Tr. 21. Robinson represented to HDG that Respondent was the medical director of the Anaheim Hills clinic. *Id.* at 22; GX 10, at 1 (Jan. 25, 2008 memorandum from Harrell Robinson to HDG).

According to Mr. Shah, HDG required three documents to open up an account in Respondent's name and to ship controlled substances to the Anaheim Hills clinic: 1) a copy of his medical license, 2) a copy of his DEA registration, and 3) a document, which Mr. Shah called "the DEA affidavit," a copy of which was submitted into evidence.[7] Tr. 29–30; *see also* GX 11. The affidavit reads as follows:

(1) This is to attest that *BICKMAN, SCOTT COLEMAN MD,* located at *145 S. CHAPARRAL COURT, ANAHEIM HILLS, CA 92808,* is not engaged in, nor has ever engaged in conducting business as an internet pharmacy or internet pharmacy supplier of controlled substances, nor do we dispense prescriptions by mail to patients.

(2) DEA# is *BB3698632.*

(3) *BICKMAN, SCOTT COLEMAN MD* Harvard Drug Group/Major Pharmaceuticals Acct.# is *P4840.*

(4) *BICKMAN, SCOTT COLEMAN MD* is located in an area that is accessible to the public and walk-in customers are welcomed.

GX 11, at 1.

According to Respondent, Robinson faxed him the affidavit and asked him to sign it and return it to HDG. Tr. 527. Upon reviewing the affidavit, Respondent discussed it with Mr. Shah because he wanted to know why he was being asked to sign it. Tr. 34. Mr. Shah told Respondent that HDG was doing "due diligence to make sure that [the] pharmaceuticals [it sold were] not being dispensed through [an] internet pharmacy." *Id.* In his testimony, Respondent maintained that he interpreted the language—"This is to attest that *BICKMAN, SCOTT COLEMAN MD,* located at *145 S. CHAPARRAL COURT, ANAHEIM HILLS, CA 92808*"—to mean he was "credentialed there, I'm located there," but not to mean that it was "my clinic that I'm doing business out of." *Id.* at 531.

It is undisputed that Respondent signed the affidavit and wrote that his title was "Practitioner"; he also signed the accompanying California Jurat with Affiant Statement, which was sworn to by him on January 15, 2008. GX 11, at 2; Tr. 529, 585. It is undisputed that the affidavit was faxed to HDG after Respondent's conversation with Mr. Shah. Tr. 35.

However, on the same day that Respondent signed the affidavit, he sent a letter to HDG which stated: "This letter is to prohibit further use of my DEA license number unless there is a verbal confirmation from myself, Scott, Coleman Bickman, M.D. I can be reached at the following numbers[,]" and listed two phone numbers and a fax number. GX 12, at 1; Tr. 532–33. According to Respondent, he sent the letter because he "was bothered by the openness of the located question and the internet pharmacy business" and he "wanted to be very clear in [his] wording to Harvard that anything that was going to be ordered under [his] DEA license, [he] wanted to be notified to give confirmation, so that there was going to be a check and balance system in place." Tr. 533.

However, the HDG invoices show that by the date Respondent signed the affidavit, HDG had already shipped 34,500 dosage units of various hydrocodone combination drugs to the Anaheim Hills Clinic listing his registration number as the "Customer DEA." GX 17, at 1–13. According to Respondent, he "had no idea that anything had ever been ordered by any[one] via my DEA besides myself," and if he had known he would have terminated his relationship with Robinson and "turned him in." Tr. 534.

On January 24, 2008, Robinson prepared a credit application for HDG, which listed "Physicians and Surgeons d/b/a Scott Bickman" as both the legal name of the business and the buyer's name. RX G, at 5. While the document listed Robinson as the owner, it then listed Respondent as the Guarantor of the account. *Id.* Robinson called Respondent and asked him to sign the application which he then faxed to him. Tr. 521. Respondent, however, did not sign the document because it listed three trade references with whom he had no relationship. *Id.* at 521–22.

The same day, Robinson then completed a new credit application in which he listed the legal name and buyer's name as "Physicians & Surgeons of O.C., d/b/a Harrell E. Robinson." GX 9, at 1. Robinson signed the application as Guarantor and faxed it to HDG the next day. *Id.* Robinson also faxed a memo to HDG which stated that he was the "owner of Physicians and Surgeons of Orange County Inc."; and that he had

purchases made in 2007 using Respondent's registration and which were shipped to Robinson's Anaheim Hills clinic. GX 18; *see also* 21 CFR 1304.33(a). While this report does not list any purchases as having been made from a firm named Ready RX, the report does list multiple distributions of hydrocodone by Top RX, Inc., which occurred between October 8 and November 19, 2007. GX 18, at 8–9. These distributions totaled 38,000 tablets. *See id.*

Respondent also submitted various documents including a Top Rx credit application (which listed Respondent's DEA registration number and listed "Bickman, Coleman Scott MD" as the "legal name" and "Orange County Surg." as the "trade name") and a Top Rx "DISPENSING PHYSICIAN QUESTIONNAIRE." RX LL, at 1, 2–4. The latter document is dated as having been completed on "9/20/07." *Id.* at 2. The DI acknowledged that the signature on the documents did not look like Respondent's, Tr. 249, and conceded that the documents were a fraudulent application. *Id.* at 255.

[6] B.C. also testified that twice a week, she would be told by one of the Robinsons not to come to the clinic because one Maggie Annan would be coming in. Tr. 426. B.C. further testified that Annan would pay Alinka Robinson between $9,000 and $10,000 in cash each month to use the clinic. *Id.* at 427–28.

[7] Invoices show, however, that HDG commenced filling orders for combination hydrocodone drugs using Respondent's DEA registration as early as December 18, 2007, nearly a month before Respondent executed the affidavit. GX 17, at 1. The invoices also listed Respondent and the Anaheim Hills office in the "ship to" block. *Id.* According to Mr. Shah, HDG did not require a customer to submit a credit application before it shipped controlled substances; HDG also allowed a customer a grace period of "two to three weeks for providing" the affidavit. Tr. 82. Thus, HDG actually only required a copy of a customer's State license and DEA registration before it would ship. *Id.* at 82–83, 87.

two clinics, one in Santa Ana and the other at 145 S. Chaparral Ct., Suite 101, in Anaheim Hills. GX 10, at 1. The memo also stated that "Dr. Bickman, MD, serves at [sic] my Medical Director at the Anaheim Hills' office[,]" that "our accounts payable office Dept covers both offices," and that the invoices should "go through the channels originally set up." *Id.*

On February 7, 2008, Respondent faxed a letter (which was dated January 30, 2008) to HDG. GX 13. Respondent wrote that "[t]his letter is to authorize the Physicians and Surgeons of Orange County dba Harrell Robinson, MD to order the necessary supplies for the center without having The Harvard Drug Group notify me for approval only for the next sixty days." *Id.* According to Respondent, he wrote this letter because Robinson had called him and said that "it was too difficult" to order the supplies this way. Tr. 537. Respondent maintained that he wrote the letter "not to undo my previous order, but to say, okay, they [HDG] don't have to contact me for supplies * * * not for the necessary supplies for the center," which he deemed to include syringes, needles, and gloves but "absolutely not" controlled substances. *Id.* at 538.

Mr. Shah testified, however, that after HDG received the letter, he asked G.B., a salesperson, "to contact [Respondent] and notify him that we intend[ed] to close the account as our system [was] not capable of handling his request for [the] next 60 days for holding all orders." *Id.* at 45. The salesperson called Respondent, who, upon being told that HDG "would be closing the account," asked to speak to Mr. Shah. *Id.* at 46–47. The salesperson then transferred the call to Mr. Shah. *Id.* at 48.

Mr. Shah testified that during the call, he explained to Respondent that HDG would "not be able to handle [his] request" because its system lacked the capability of "holding orders" for a "certain time period." *Id.* Mr. Shah further told Respondent that HDG could either "continue to ship or not ship." *Id.* Respondent then told Mr. Shah to "reinstate the account" and Shah stated that he could not do so until he received "a written confirmation from" Respondent. *Id.*

According to Mr. Shah, during the conversation Respondent asked "what kind of products" were being shipped. *Id.* Shah testified that he told Respondent that "we are shipping hydrocodone products." *Id.* Shah further testified that Respondent appeared "shocked" by this information and asked: "Oh is that right? We are ordering hydrocodone from you?" *Id.* at 49. Shah replied: "That is correct." [8] *Id.*

In his testimony, Respondent acknowledged that he had spoken to Mr. Shah and that Shah had said that "he couldn't conduct business like this" and that "he wasn't going to call [him] every time" because HDG's system was not "set up * * * to handle verbally notify[ing] me about my DEA usage." [9] *Id.* at 544. However, Respondent maintained Mr. Shah did not "mention one item of any drugs being ordered from [HDG] on my DEA." *Id.* Respondent also stated that he did not "understand why [Shah] was so adamantly violently yelling at [him] on the phone" and that he "really was taken aback." *Id.* at 545. Respondent further testified that he never asked Shah (or Ms. B., the HDG sales rep.) what was

[8] On cross-examination, Respondent's counsel asked Shah whether he had ever contacted Respondent to "tell him that a very large quantity of hydrocodone was being ordered." Tr. 88. Shah responded: "I don't recollect having a conversation with [Respondent] that the orders that we have been shipping has [sic] hydrocodone in it that is being shipped. I don't remember anything else other than what quantity and so forth." *Id.* Shah further testified that he did not document the conversation in which he told Respondent that HDG was shipping hydrocodone because "we did receive a confirmation on February 27, 2008 signed by Dr. Bickman [to] disregard all previous instructions and communications." *Id.* at 93.

Respondent contends that Shah's testimony on cross-examination is inconsistent with his testimony on direct. Resp. Br. 24. However, Shah was asked two different questions; on direct, he testified that Ms. Brooks had initially contacted Respondent to notify him that HDG could not "continue shipping products based on his instructions," that Respondent asked to speak with him, and that during the ensuing conversation, Respondent asked what HDG was shipping and Shah told him hydrocodone. Tr. 45–48. On direct examination, Shah did not maintain that he had contacted Respondent to tell him that his registration was being used to order a large quantity of hydrocodone, but rather to tell him that HDG would not comply with his instructions. Moreover, on cross-examination, Shah maintained that he had two conversations with Respondent, one in which HDG's "DEA affidavit" was discussed and the second one in which he told Respondent that HDG was going to close the account. Tr. 89–90.

In his Exceptions, Respondent notes that on June 15, 2010, DEA immediately suspended HDG's registration based on its distributions of oxycodone products over a two year period. Resp. Exc. at 1. Respondent argues that Shah's testimony is tainted because the Government knew and concealed from him that "HDG was under investigation for massive diversion of millions of doses of controlled oral drugs," and that the Government "posited that one of the reasons [R]espondent should have knew [sic] or should have know [sic] of the hydrocodone purchases is because HDG was a responsible drug wholesaler." Exc. at 3. Respondent further argues that because he did not have "the benefit of knowing that he [Shah] and HDG conducted an unlawful business," he was denied "an opportunity for impeachment." *Id.* Respondent thus contends that Shah's testimony should be stricken; he also argues that "[t]he concealment of the investigation, and the offering of Mr. Shah's testimony may also represent the equivalent misconduct so contumacious in degree that dismissal of the section 841(a) charge would be an appropriate remedy." *Id.*

I reject Respondent's Exceptions for the reasons stated in the ALJ's ruling. I further note that there is no support in the record for Respondent's contention that the Government's theory was that he should have known about the hydrocodone purchases because HDG "was a responsible drug wholesaler." While the Government's case was based in part on Shah's testimony that he told Respondent that HDG was shipping hydrocodone, the Government also relied, *inter alia,* on the various letters Respondent sent to HDG, as well as the material inconsistencies in his testimony and written statements. I also note that Respondent had ample opportunity to cross-examine Shah, who admitted that HDG shipped large quantities of hydrocodone even though it was "very unusual" to get a letter (such as Respondent's Jan. 15, 2008 one) telling HDG not to ship without first getting verbal confirmation and that this was "all the more reason" why HDG should have then contacted Respondent. Tr. 96–97. I further note that while Shah testified that a customer had only two to three weeks to submit the affidavit HDG required, HDG had been shipping controlled substances to the Chaparral Court clinic for nearly four weeks before it obtained the affidavit from Respondent and had already shipped more than 34,000 dosage units. Respondent thus demonstrated several ways in which HDG did not act in a responsible manner, and I have considered this in making my findings.

[9] At the time of the conversation, Respondent was attending the Physician Assessment and Clinical Education (PACE) Program at the University of San Diego pursuant to the probation imposed by the State Board. Tr. 542–43; GX 7, at 9.

In a letter Respondent wrote to the DI, he maintained that while attending the PACE program, he received a phone call from both Dr. Robinson and Harvard during which "[t]hey both complained that they could not do business with all of this notification." GX 23, at 8. Respondent further asserted that he "was extremely preoccupied at the time and again Dr. Robinson pleaded with me that he could not get orders filled for the operating room and that he would have to cancel surgeries as a result." *Id.* Continuing, Respondent wrote: "[a]gain, I trusted Dr. Robinson that he was just ordering supplies and anesthesia drugs and wrote the second letter to Harvard[.]" *Id.*

Yet earlier in the same letter, Respondent wrote that he "was unaware of whether or not Harvard had knowledge that they were sending drugs to a center that was unaccredited and not legally performing surgery. In no way did it even occur to me that my allowing Dr. Robinson to order his supplies and anesthesia related drugs could lead to this deception because any law abiding company would have confirmed the status of Dr. Robinson's center and questioned why they were using my DEA to supply an unaccredited center not performing surgery and therefore having no need for the quantities of narcotics they were shipping to Dr. Robinson." *Id.* at 7.

On cross-examination, the Government asked Respondent why he had written the letter "authorizing Dr. Robinson to place orders as needed so he wouldn't have to cancel his surgeries at the unaccredited center?" Tr. 625. Respondent replied that he had not said in the letter that the center was unaccredited. *Id.* The Government then asked Respondent if "the center was unaccredited?" *Id.* Respondent answered: "for all I know, he took the supplies with him to the place next door that was accredited. I have no idea. But I did not give him authorization for him to order supplies to do surgery in an unaccredited surgery center. I don't know [what] he did with the supplies. He could have taken them down * * * the street and used them." *Id.* at 625–26.

being ordered on the account. *Id.* at 571–72.

The ALJ did not resolve the factual dispute as to whether Mr. Shah told Respondent that hydrocodone or other drugs were being ordered with his registration. However, I credit Shah's testimony given that Respondent admitted that the conversation concerned his "DEA usage," and it seems strange that Respondent would not have asked what type of drugs were being ordered.

In addition, the ALJ generally found Respondent to be a less than credible witness. ALJ at 34. For example, while Respondent testified that he did not give Robinson authorization "to order supplies to do surgery in an unaccredited surgery center," Tr. 625–26, he had previously written to the DI that the reason he told HDG to reinstate the account was because Robinson "pleaded with me that he could not get orders filled for the operating room and that he would have to cancel surgeries as a result." GX 23, at 8. Likewise, Respondent denied that he had ever been told that his registration was being used to order controlled substances, Tr. 534, a statement which was contradicted by B.C., who was his own witness, and who had no reason to testify falsely.

After the conversation, Respondent wrote a new letter [10] which he apparently faxed to Robinson, who then faxed it to HDG. *See* GX 15; Tr. 50. This letter, which is dated February 27, 2008, and which is on stationary of the University of California San Diego Medical Center reads: "Please Disregard *All* Previous Faxes Regarding Management of My Account and Allow Dr. Robinson's Office to Place Orders as Needed. Thank You for Reinstating the Account At This Time." GX 15. Respondent testified that he "had no problem writing this" because "no one had told me that there was any problem from the ordering standpoint, that they [the Robinsons] were ordering anything" with his DEA registration.[11] Tr. 545.

In his testimony Respondent also maintained that until he was interviewed by a DEA Diversion Investigator,[12] he was unaware that "some inordinate amount of Vicodin had been ordered on my DEA through the Harvard Drug Group," that this was "absolutely quite shocking" because "no one had ever said to me, 'Is this okay,' when I had actually put everything in place along the way for that not to happen." *Id.* at 546. Respondent further testified that during the relevant time period, he never "dispensed Vicodin to a patient," and that the last time he had been to the Anaheim Hills clinic was in "later November of 07." *Id.* at 547. As noted above, Respondent also testified that he was unaware that his registration was being used to order oral controlled substances from other companies. *Id.* at 548. However, the ALJ found that Respondent knew or had reason to know that his registration was being misused. ALJ at 34.

Regarding the events surrounding the submission of his renewal application, Respondent testified that he knew his registration was about to expire because several of the surgery centers where he worked (and which required that he submit his credentials) had told him so. *Id.* at 550–51. Respondent added that because he procrastinated in renewing his registration, he asked A.R., his fiancé, to go online and fill out the form. *Id.* at 551. Respondent's fiancé made several unsuccessful attempts to access the Web page (apparently because she inputted the zip code of Respondent's registered address before it was changed by Alinka Robinson,[13] *see id.* at 382–83) at which the renewal application is submitted. *Id.* at 379; 552.

Both Respondent and his fiancé testified that the impending expiration of Respondent's registration prompted several phone calls from Alinka Robinson. *Id.* at 380 (testimony of A.R; "Alinka Robinson started calling * * * and saying that his DEA license is going to expire, his DEA license is going to expire"). According to Respondent, "we had Alinka Robinson, Harrell Robinson calling incessantly asking why it hadn't been renewed * * * It became * * * a state of almost * * * panic for us to get it done." *Id.* at 552; *see also id.* at 640 ("Alinka was blowing up the phone night and day, 'Where's my renewal?'"). When asked whether it concerned him that Alinka Robinson "was in a state of panic," Respondent replied that he was "very busy" doing anesthesia and did not think twice about it. *Id.* at 644.

Respondent maintained that he trusted A.R. "to be very diligent" in completing the on-screen application and that while he did "check it over for a second before [he] sent it," he "didn't catch" the false answer to the question about whether his State license had been sanctioned. *Id.* at 564. Respondent further testified that he was "[a]bsolutely not" trying "to deceive anybody." *Id.*

As noted above, Respondent maintained that he did not learn that his registered address had been changed until July 2008, when he renewed his registration. *Id.* at 640. While Respondent maintained that his registered address had been changed without consent, he admitted that he did not report this to DEA, *id.* at 641, even though "it was unfathomable to" him. *Id.* at 642. Nor, according to his own testimony, did he visit the Anaheim Hills clinic after he authorized Robinson to use his registration, to see what was going on there. *Id.* at 643.

Respondent also admitted that at the time he agreed to allow Respondent to use his DEA number, he "absolutely" knew that Harrell Robinson had been accused of being involved in million dollar insurance fraud ring. *Id.* at 628. *See also* GX 23, at 5 (Respondent's Oct. 27, 2008 letter to DI; "[A]ll I knew about him was some information that I came across on the Internet. Specifically, allegedly Dr. Robinson was involved in some major insurance fraud ring and received more than one million dollars illegally. However, according to the article, Dr. Robinson has never been found guilty due to his non cooperation and evasion of prosecutors."). According to Respondent, he did not ask Robinson "about his fraud and all the stuff related to it" because it did not "concern [him] when [he] did anesthesia for him." Tr. 656.

According to a report obtained from DEA's ARCOS system,[14] approximately

[10] The record also contains a February 21, 2008 letter which Respondent faxed to HDG the same day. *See* GX 14, at 2; Tr. 541. Therein, Respondent wrote: "Please change the previous ordering arrangement for my account to holding all orders until I have been notified and give verbal authorization for them to be honored by The Harvard Group." GX 14, at 2. According to Respondent, he wrote the letter because Robinson "had skipped a month in paying me" and he "wasn't willing to continue any sort of a relationship at all with him in any capacity until he was going to go ahead and honor * * * what I was working for him for. So I wasn't going to extend the courtesy of trying to get his center accredited with him using my DEA * * * to get any supplies or anything without using me to accreditate him." Tr. 541.

[11] In his October 27, 2008 letter to the DI, Respondent stated that he wrote the February 27 letter because both HDG and Robinson "complained that they could not do business with all of this notification. I was extremely preoccupied at the time and again Dr. Robinson pleaded with me that he could not get orders filled for the operating room and that he would have to cancel surgeries as a result. Again, I trusted Dr. Robinson that he was just ordering anesthesia drugs and wrote the * * * letter to Harvard." GX 23, at 8.

[12] According to a DEA DI, the interview occurred on October 22, 2008. Tr. 225.

[13] The Chief of the DEA Registration Unit testified that in order to log in and complete a renewal application, an applicant must type in seven items of information including the zip code of the registered address which must match exactly the information in the registration database. Tr. 129–30.

[14] Pursuant to Federal Regulations, all registered manufacturers and distributors of various

Continued

250,000 dosage units of hydrocodone drugs were purchased under Respondent's registration and distributed to the Anaheim Hills location during 2007 and 2008. *See* GX 18, at 1 & 3 (showing 193,500 units in 2008 and 53,800 in 2007); *see also* Tr. 194. The ARCOS report further shows that while most of the drugs were obtained from HDG, 20,000 dosages units were purchased from A.F. Hauser, Inc., and 38,500 units were purchased from Top Rx. *See* GX 18, at 5–9; *see also* GX 8 (Top Rx invoices) and GX 20 (A.F. Hauser, Inc. Invoices). Most of the drugs were purchased after Respondent was told by B.C. that his registration was being used to order controlled substances. *See id.* Moreover, numerous purchases were made even after the February 2008 phone call during which Mr. Shah told Respondent that the clinic was ordering hydrocodone from HDG. *See id.* at 6–8; *see also* GX 17, at 22–52. The purchases continued even after July 2008, when Respondent became aware that his registered address had been changed without his consent and Alinka Robinson was "in a state of panic" because he had not renewed his registration. GX 17, at 40–52; GX 18, at 8.

As part of his investigation, the DI obtained delivery information from HDG and conducted surveillance of several deliveries that were made to the Anaheim Hills office. Tr. 215–16. On three occasions, the DI observed the deliveries being made, and several hours later, either Robinson or his wife remove the packages from the office and take them either to their home or to a parking lot. *Id.* at 218. According to the DI, the drugs were eventually delivered to Maggie Annan, who was previously identified by B.C. as an associate of the Robinsons. *Id.* at 426–27.

Thereafter, search warrants were obtained and executed at five premises including Robinson's Santa Ana clinic, the Anaheim Hills clinic, Robinson's residence in Yorba Linda, and Ms. Annan's residence in Santa Ana. *Id.* at 219. While during the search of the Anaheim Hills clinic, 6,000 hydrocodone tablets were delivered from HDG, no other hydrocodone was found in the office and there were no records such as invoices or a dispensing log. *Id.* at 220–21. However, at Ms. Annan's house, the search party found six to ten invoices for hydrocodone purchases of about "6,000 pills each," "as well as 6,000 tablets of hydrocodone."[15] *Id.* at 221–22. With respect to the disposition of the drugs, the DI testified that while Robinson had claimed that Annan asked him to order the drugs to give to poor people in Mexico, there were no records to support this claim and the DI had no idea what Ms. Annan did with the drugs. *Id.* at 223.

The DI further testified that he had interviewed Harrell Robinson, who told him that Annan had "asked him to obtain a second registration to order these drugs," and that "he contacted Dr. Bickman and asked him to allow him to use the registration to order drugs and supplies for the office and [that] he would pay [Bickman] $2,000 a month to do this." *Id.* at 224. However, when asked by the Government whether Robinson had talked to Respondent "about using his DEA registration for ordering controlled substances," the DI replied: "Yes. During the interview it was based upon Dr. Robinson being asked by Maggie [Annan] to order more hydrocodone products in order to get more purchase[s] made other than the one registration so [Respondent's] license was needed for that purpose." *Id.* Beyond the fact that Robinson's hearsay statement is of dubious reliability, I find that the DI's testimony is too vague to conclude that Respondent had knowledge that Robinson's purpose in initially obtaining his registration was to enable Annan to obtain more drugs.

Regarding the Robinsons' use of his registration, Respondent testified that he was not "okay with it" and that he felt "that the numbers that it escalated to could have been totally avoided had I been notified even up front as early as when * * * the relationship started with Harvard." Tr. 565. He further testified that "it's so irresponsible to have let that happen * * * for people that knew," and that with the amounts that were being ordered, he would have thought that there would have been "a check and balance * * * from Shamir[sic] Shah or whoever in a compliance role," who would "have called to verify * * * that these amounts [were] being ordered." *Id.* at 566–67. He further asked: "Where am I supposed to get the information from, when the companies [and DEA] aren't telling me?" *Id.* at 567. *See also* GX 23, at 6 (Resp. Ltr. to DI; "There was no mention by either Dr. Robinson or Harvard Group about consenting for Dr. Robinson or Alinka Robinson to knowingly order excessive quantities of oral pain medication on a regular basis with my DEA. Furthermore, it is incomprehensible that Harvard Drug Group would not have notified me that another person was using my DEA in a reckless and illegal manner.").

Respondent further maintained that he told HDG that he "wanted to be notified" of the orders, but that HDG "didn't notify me" and asked "what else are you supposed to do?" *Id.* Yet on cross-examination, Respondent testified that he did not ask either Shah or Ms. B., the HDG sales rep., what Robinson was ordering with his registration. *Id.* at 571–72.

Finally, the Government asked Respondent whether he had designated anyone to maintain records of Dr. Robinson's purchases. *Id.* at 580. Respondent stated that he "did not," but that he assumed that Robinson would be doing it because "he owns a surgical center and knows the rules and regulations about how controlled substances * * * need to be logged and receipts need to be kept for a certain amount of time." *Id.*

**Discussion**

Section 304(a) of the CSA provides that a "registration pursuant to section 823 of this title to * * * dispense a controlled substance * * * may be suspended or revoked by the Attorney General upon a finding that the registrant * * * has materially falsified any application filed pursuant to or required by this subchapter," or "has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section." 21 U.S.C. 824(a)(1) & (4). With respect to the latter inquiry, Congress directed that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(f).

"[T]hese factors are considered in the disjunctive." *Robert A. Leslie,* 68 FR

controlled substances including schedule III narcotics such as combination hydrocodone drugs are required to report their distributions on a quarterly basis to DEA. 21 CFR 1304.33.

[15] According to the DI, "[a]t Ms. Annan's house we found about 6,000 tablets of hydrocodone. At Ms. Annan's house we found about 10 bottles of hydrocodone in her garage." Tr. 222. The DI then explained that each bottle contained about 500 tablets. *Id.* It is not clear, however, whether the drugs found in the garage were all of the total found in Ms. Annan's home or were in addition to those found in her house.

15227, 15230 (2003). I may rely on any one or a combination of factors and may give each factor the weight I deem appropriate in determining whether to revoke an existing registration or to deny an application for a registration. *Id.* Moreover, I am "not required to make findings as to all of the factors." *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (DC Cir. 2005).

The Government has "the burden of proving that the requirements for * * * revocation or suspension pursuant to section 304(a) * * * are satisfied." 21 CFR 1301.44(e); *see also* 21 CFR 1301.44(d) (Government has "the burden of proving that the requirement for [a] registration pursuant to section 303 * * * are not satisfied"). However, where the Government satisfies its *prima facie* burden, the burden then shifts to the registrant to demonstrate why he can be entrusted with a new registration. *Medicine Shoppe-Jonesborough,* 73 FR 363, 380 (2008).

**The Material Falsification Allegation**

The Government argues, and the ALJ found, that Respondent materially falsified his 2008 renewal application because he provided a "no" answer to the question: "[h]as the applicant ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation, or is any such action pending?" Gov. Br. 24; ALJ at 31. It is undisputed that this answer was false because Respondent's State medical license had previously been placed on probation based on what was, in essence, a case of malpractice. The ALJ further concluded that Respondent's false answer was material, reasoning that " '[a]nswers to the liability question[s] are always material because DEA relies on the answers to these questions to determine whether it is necessary to conduct an investigation prior to granting an application.' " ALJ at 31 (quoting *Theodore Neujahr, D.V.M.,* 65 FR 5680, 5681 (2000); other citations omitted). Contrary to the ALJ's understanding, the Supreme Court (and this Agency) have held otherwise.

"The most common formulation" of the concept of materiality is that "a concealment or misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed." *Kungys* v. *United States,* 485 U.S. 759, 770 (1988) (quoting *Weinstock* v. *United States,* 231 F.2d 699, 701 (DC Cir. 1956) (other citation omitted)) (quoted in *Samuel S. Jackson,* 72 FR 23848, 23852 (2007)); *see also United States* v. *Wells,* 519 U.S. 482, 489 (1997) (quoting *Kungys,* 485 U.S. at 770). Most significantly for this proceeding, the Supreme Court has explained that "[i]t has never been the test of materiality that the misrepresentation or concealment would more likely than not have produced an erroneous decision, *or even that it would more likely than not have triggered an investigation.*" *Kungys,* 485 U.S. at 771 (emphasis added). Rather, the test is "whether the misrepresentation or concealment was predictably capable of affecting, *i.e.,* had a natural tendency to affect, the official decision." *Id.* " '[T]he ultimate finding of materiality turns on an interpretation of substantive law,' " *id.* at 772 (int. quotations and other citation omitted), and must be met "by evidence that is clear, unequivocal, and convincing." [16] *Id.*

As the above makes clear, the relevant decision for assessing whether a false statement is material is not the decision to conduct an investigation, but rather the decision as to whether an applicant is entitled to be registered. The Government's evidence does not, however, establish that Respondent's failure to disclose that the State Board had placed him on probation was capable of influencing the decision to grant his renewal application.

Notably, at the time he submitted the application, Respondent had a current State medical license and was authorized under California law to dispense controlled substances; he thus met the CSA's statutory requirement for holding a registration that he be "authorized to dispense * * * controlled substances under the laws of the State in which he practices." 21 U.S.C. 823(f); *see also id.* § 824(a)(3) (authorizing the suspension or revocation of a registration upon a finding that "the registrant * * * has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the * * * dispensing of controlled substances"). Nor had the State Board recommended that his State or Federal controlled substance authority be suspended or revoked. *Id.* § 823(f)(1).

Moreover, the conduct which was the basis of the State Board's order does not implicate any of the other grounds provided for in the CSA for revoking a registration or denying an application. More specifically, the Board Order was not based on Respondent's having been convicted of a felony related to controlled substances under either State or Federal law, his having diverted or abused controlled substances, his failure to comply with other State or Federal controlled substance regulations, or his having committed an act of health care fraud resulting in his exclusion from participating in a program pursuant to 42 U.S.C. 1320a–7(a). *See* 21 U.S.C. 824(a)(2), (4), (5); *see also* 21 U.S.C. 823(f).

Rather, the only evidence in the record is that Respondent failed to properly administer anesthesia to a patient. DEA does not, however, have authority to revoke a registration or deny an application simply because a physician has committed an act of medical malpractice.[17] *See generally Gonzales* v. *Oregon,* 546 U.S. 243 (2006). Short of the Medical Board's having concluded that Respondent's conduct posed such a risk to patients as to warrant the suspension or revocation of his medical license (and authority to prescribe controlled substances under State law), DEA could not have denied his renewal application. Thus, Respondent's falsification was not "capable of influencing" the Agency's decision and was thus not material. *Kungys,* 485 U.S. at 772. Accordingly, I concluded that the Government has failed to prove this allegation.

**The Public Interest Allegations**

The Government argues that the evidence relevant to factors two (Respondent's experience in dispensing controlled substances), four (Respondent's compliance with applicable laws related to controlled substances), and five (such other conduct which may threaten public health and safety) supports the revocation of Respondent's registration. Gov. Br. 18, 22. Specifically, the Government argues that Respondent unlawfully distributed several hundred thousand dosage units of hydrocodone, a schedule III controlled substance, to

[16] While *Kungys* involved a denaturalization proceeding, in other civil proceedings, courts have required that a party establish that a falsification is material by "clear, unequivocal, and convincing evidence" and not simply by a "preponderance of the evidence." *Driscoll* v. *Cebalo,* 731 F.2d 878, 884 (1984). In any event, the Government's evidence on materiality would not even meet the preponderance standard.

[17] This is not to say that every case of medical malpractice is not material to the Agency's registration decision. Where, for example, there is evidence that a physician committed malpractice while being under the influence of a an illegally obtained controlled substance, the failure to disclose a State proceeding would be a material falsification even where a State board has imposed only a period of probation. However, here there is no evidence that Respondent was unlawfully under the influence of a controlled substance when he committed the acts which were the basis of the MBC proceeding.

an unknown and unregistered person. *Id.* at 18–19.

The Government argues that even if Harrell Robinson and Maggie Annan "operated without his knowledge or consent, Respondent still violated the [CSA] by failing to supervise their activities." *Id.* at 20 (citing 21 CFR 1301.71(a) & (b)(14)). The Government further argues that under agency precedent, Respondent is strictly liable for the misuse of his registration because he entrusted his registration to these persons. *Id.* at 23 (quoting *Harrell Robinson, M.D.,* 74 FR 61370, 61377–78 (2009) (citing *Rose Mary Jacinta* Lewis, *M.D.,* 72 FR 4035 (2007)). Finally, the Government argues that Respondent violated the CSA (and California law) because he failed "to maintain dispensing records as required by 21 CFR 1304.22(c)." *Id.* at 20 (also citing 21 U.S.C. 827(b) and 21 CFR 1304.04(a)); *see also id.* at 21 (citing Cal. Health & Safety Code § 11190(c)(1) & (G.2)).

Citing the CSA's provisions defining the terms "distribute" and "deliver," the ALJ reasoned that the "constructive transfer of a controlled substance is included in the meaning of distribution." ALJ at 32 (citing 21 U.S.C. 802(8) & (10)). While acknowledging that "[t]he record does not establish that Respondent had actual knowledge of every order placed with Harvard Drug using his DEA number," the ALJ found that "[t]he record conclusively establishes * * * that Respondent had ample reason to suspect that his registration was being misused and that he chose not to act on those suspicions." *Id.* Finding that his testimony as to why he had authorized Robinson to use his DEA registration number and his explanations of his various instructions to Harvard lacked credibility, *id.* at 32–33, the ALJ further found "that Respondent knew or should have known that Dr. Robinson was using [his] DEA registration number to order controlled substances that were likely to be diverted," that "Respondent engaged in [the] distribution of those [controlled] substances," and that these distributions violated the CSA. *Id.* at 33 (citing 21 U.S.C. 841(a)).

I need not decide whether the evidence is sufficient to support the ALJ's finding that Respondent constructively transferred controlled substances and thus distributed them in violation of 21 U.S.C. 841(a).[18] Under the public interest standard, DEA can consider a broader range of conduct than that which supports a finding of a criminal violation of the CSA. *See* 21 U.S.C. 823(f).

Here, the evidence is clear that at least from November 19, 2007, Respondent expressly authorized Robinson to use his DEA registration to order controlled substances. Respondent offered no explanation as to why Robinson, beginning on that date, then needed to use Respondent's registration (as opposed to his own) to obtain controlled substances for the clinic; indeed, Respondent's testimony that he had been performing anesthesia at the clinic for at least four months at that time begs the question: whose registration had been previously used to obtain the controlled substances which Respondent used to anesthetize patients at the clinic?[19]

Moreover, were I to credit Respondent's testimony that: (1) He had only authorized Robinson to use his registration to order controlled substances necessary to perform anesthesia; and (2) he did not create the November 19, 2007 letter memorializing this after the fact (as the Government suggests); it is significant that B.C., who was his own witness, testified that after she was terminated by the Robinsons, an event which occurred only two weeks after he wrote the letter, she called Respondent and told him about the Ready Rx[20] account and "everything that was going on," which "shocked" Respondent. Respondent's testimony that he had never heard of this account until the hearing or that his DEA registration was being used to order oral controlled substances (*i.e.,* hydrocodone drugs) is simply not credible.

Likewise, Mr. Shah testified that during a February 2008 phone conversation with Respondent, the latter asked Shah "what kind of products" Harvard was shipping and Shah told him hydrocodone, which again shocked Respondent. ALJ at 16 (citing Tr. 48–49). While Respondent again professed that Shah said no such thing, even after Shah told him that HDG was not able "to verbally notify me about my DEA usage," Respondent authorized Robinson's office to "place orders as needed."

Yet at no time thereafter did Respondent go to the Chaparral Court clinic to determine whether Robinson was actually complying with the Nov. 19 letter by ordering only peri-operative anesthesia drugs and not oral analgesics, as well as whether Robinson was, notwithstanding the clinic's lack of accreditation, still performing surgeries and had a need for any controlled substances. Indeed, Respondent's various statements and testimony regarding why he wrote the letter to HDG which authorized Robinson to "place as orders as needed" are fundamentally inconsistent.

For example, in his October 2008 letter to the DI, Respondent initially wrote he "was unaware of whether or not Harvard had knowledge that they were sending drugs to a center that was unaccredited and not legally performing surgery." GX 23, at 7. Continuing, he wrote that "[i]n no way did it even occur to me that my allowing Dr. Robinson to order his supplies and anesthesia related drugs could lead to this deception because any law abiding company would have confirmed the status of Dr. Robinson's center and questioned why they were using my DEA to supply an unaccredited center not performing surgery." *Id.*

Given Respondent's statements that the center "was not legally performing surgery," Robinson had no lawful need to order any controlled substances.[21]

[18] The Government did not argue that Respondent is liable for Robinson's unlawful conduct under either a conspiracy or aiding and abetting theory.

[19] Under a DEA regulation, "[a] separate registration is required for each principal place of * * * professional practice at one general physical location where controlled substances are * * * dispensed by a person." 21 CFR 1301.12(a); *see also* 21 U.S.C. 822(e). While the regulation exempts from the separate registration requirement "[a]n office used by a practitioner (who is registered at another location) where controlled substances are prescribed but neither administered nor otherwise dispensed as a regular part of the professional practice of the practitioner at such office, and where no such supplies of controlled substances are maintained," 21 CFR 1301.12(b)(3), it is clear that controlled substances were maintained at the clinic and that someone had to have been registered there for it to lawfully obtain the controlled substances that were used to anesthetize patients even when it was still accredited.

[20] I acknowledge that B.C. testified that the account was with Ready RX, but various documents show that the account was with Top RX. I conclude, however, that this inconsistency is not material as the substance of B.C.'s testimony was to relate the conduct of the Robinsons and not to identify the specific company from which they were purchasing controlled substances.

[21] In his exceptions, Respondent contends that the ALJ erred because she concluded "that California law prohibits surgery in an ambulatory surgery center unless it is accreditated [sic]." Exc. at 12. Respondent further contends that Cal. "Health and Safety Code section 1204(b) applies only to ambulatory surgery centers that are partially or totally owned by physicians," that California law does not prohibit the performance of ambulatory surgery at a surgery center, which is not owned by a physician but which is licensed "pursuant to Health and Safety Code sections 1200 *et* seq.," and that there is no evidence as to who was the actual owner of the Chaparral Court clinic, even though "it was clearly operated by Harrell Robinson." *Id.*

Respondent misstates California law, which clearly provides that "[a] surgical clinic does not include any place or establishment owned or leased *and operated* as a clinic or office by one or more physicians * * * in individual or group practice, regardless of the name used publicly to identify the place or establishment." Cal. Health & Saf. Code § 1204(b)(1) (emphasis added). Moreover, if, as Respondent now contends in his exceptions (and in contrast to his position he took in his October 2008

Moreover, even if it is the case—as contended by Respondent but without any credible support in the record, *see* Resp. Exc. at 12—that the center would have had to have stocks of anesthesia drugs on hand prior to obtaining re-accreditation, Respondent offered no evidence that the center was even close to obtaining re-accreditation. To the contrary, Respondent testified that the accreditation documents had yet to be finalized and submitted.

Moreover, even if the clinic was required to have stocks of anesthesia drugs on hand prior to obtaining re-accreditation, it is not clear why this would have required that Robinson have authority to use Respondent's registration for at least eight months. Indeed, given that the controlled substances that Respondent testified were necessary to perform anesthesia (fentanyl and midazolam) are widely available, it seems that any drugs the clinic would have needed to have on hand as part of the re-accreditation process could have been obtained through a single order from HDG and at a time shortly before any inspection by the accreditation authority.

Even were I to credit Respondent's testimony that he only authorized Robinson to order controlled substances used as peri-operative anesthesia drugs, because these drugs were being ordered under his registration, Respondent was required to maintain records showing the receipt and disposition of the drugs as well as initial inventories of them. *See* 21 U.S.C. 827(a) ("every registrant * * * shall * * * as soon * * * as such registrant first engages in the * * * dispensing of controlled substances * * * make a complete and accurate record of all stocks thereof on hand"); *id.* § 827(a)(3) ("every registrant * * * dispensing a controlled substance or substances shall maintain, on a current basis, a complete and accurate record of each such substance * * * received, sold, delivered, or otherwise disposed of by him"). Yet again, Respondent never went to the Chaparral Court clinic to determine whether the required records were being maintained.

Also, while Respondent asserted that his registered address had been changed to the Chaparral Court address without his consent; that he did not learn of this until July 2008, when he submitted his renewal application; and that "it was unfathomable to him"; he did not report this to DEA. He likewise stated that he did not think twice about the phone calls he received from Alinka Robinson, who was in a state of "panic" because he had yet to renew his registration.

Accordingly, I conclude that even if Respondent was initially unaware that Robinson was using his registration for unlawful purposes, the evidence clearly shows that at various junctures (including within weeks of his authorizing Robinson to use the registration), Respondent clearly had reason to know that his registration was being misused and did nothing to prevent it. *See* 21 CFR 1301.71(a). In any event, under DEA precedent, a registrant is strictly liable for the misconduct of those persons who he authorizes to act under his registration.[22] *See Paul Volkman,* 73 FR 30630, 30644 n.42 (2008); *Rose Mary Jacinta Lewis,* 72 FR at 4041.

Moreover, Respondent was responsible for maintaining records for the controlled substances and yet did nothing to ensure that the records were being kept. Accordingly, I conclude that the evidence pertinent to factors four (Respondent's compliance with applicable controlled substance laws) and five (other conduct which may threaten public health and safety), establishes that Respondent has committed acts which render his registration inconsistent with the public interest. 21 U.S.C. 824(a)(4).

**Sanction**

Under Agency precedent, where, as here, the Government has made out a *prima facie* case that a registrant has committed acts which render his "registration inconsistent with the public interest," he must " 'present[] sufficient mitigating evidence to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration.' " *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988)). "Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs., Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), this Agency has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct." *Medicine Shoppe-Jonesborough,* 73 FR 364 (2008). As the Sixth Circuit has recognized, this Agency "properly consider[s]" a registrant's admission of fault and his candor during the investigation and hearing to be "important factors" in the public interest determination. *See Hoxie,* 419 F.3d at 483.

The ALJ found that it "is abundantly clear from Respondent's testimony and his letters to [the DI, that] Respondent does not admit to any wrongdoing or accept any responsibility for the 120,000 dosage units of hydrocodone that were ordered from [HDG] using his" registration, and that "Respondent knew or should have known that his * * * registration was being misused." ALJ at 33. The ALJ thus concluded that "Respondent's refusal to acknowledge his wrongdoing offers little hope for the prospect that if he retains his registration he will act more responsibly in the future." *Id.*

I agree with the ALJ. Respondent's testimony was riddled with material inconsistencies, including his explanation as to why Robinson needed to use his registration to order drugs for nearly a year if the facility was not legally authorized to perform surgery. Moreover, his claim that he lacked knowledge that the Robinsons were misusing his registration to obtain hydrocodone was contradicted even by his own witness.

Finally, Respondent's attempt to shift responsibility from himself to HDG is wholly unpersuasive. Whatever responsibility HDG bears for the diversion which likely occurred here is irrelevant. As found above, Respondent authorized Robinson to use his registration and then did nothing to determine how it was being used. He did not go to the clinic to see whether Robinson was maintaining records for even those drugs which would be used to provide anesthesia, or to see whether Robinson was, in fact, still performing surgery after the clinic lost its accreditation and could no longer legally do so. And even had I credited his testimony that HDG's personnel did not notify him that Robinson was ordering hydrocodone with his registration, his assertion that there was nothing else he could do to obtain this information is patently absurd given his admission that he never asked either Mr. Shah or Ms. B. what drugs were being ordered from HDG.

Thus, I conclude that Respondent's assertion that he was not "okay" with

letter), it was legal to perform surgery at the Chaparral Court clinic, because, notwithstanding its loss of accreditation, the clinic was licensed as a specialty clinic, *see id.;* this begs the question of why Respondent stopped providing anesthesia for the surgeries that Robinson performed there and why he purportedly was helping Robinson to obtain a new accreditation. *See also* Cal. Health & Safety Code (listing criteria for operating in "an outpatient setting"). Respondent did not address this inconsistency.

[22] To make clear, this is not a case where a practitioner simply provided his DEA registration to a health care facility as part of the credentialing process and a person at the facility subsequently used his registration for unlawful purposes. Rather, Respondent affirmatively authorized Respondent to use his registration to obtain controlled substances, and is thus strictly liable for the misuse of his registration.

what happened is simply a case of crying crocodile tears. Because Respondent has not accepted responsibility for his misconduct and that misconduct manifests an egregious disregard for his responsibilities as a DEA registrant, I hold that Respondent has not rebutted the Government's *prima facie* showing that his continued registration is "inconsistent with the public interest." 21 U.S.C. 824(a)(4). Accordingly, Respondent's registration will be revoked and any pending application will be denied.

**Order**

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a)(4), as well as by 28 CFR 0.100(b) & 0.104, I order that DEA Certificate of Registration, BB3698632, issued to Scott C. Bickman, M.D., be, and it hereby is, revoked. I further order that any application for renewal or modification of such registration be, and it hereby is, denied. This Order is effective April 29, 2011.

Dated: March 22, 2011.

**Michele M. Leonhart,**

*Administrator.*

[FR Doc. 2011–7393 Filed 3–29–11; 8:45 am]

**BILLING CODE 4410–09–P**

---

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### Roger A. Pellmann, M.D.; Revocation of Registration

On January 29, 2010, I, the Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and Immediate Suspension of Registration (Order) to Roger A. Pellmann, M.D. (Respondent), of Germantown, Wisconsin. The Order proposed the revocation of Respondent's registration, AP1892822, on the ground that his "continued registration is inconsistent with the public interest, as that term is defined in 21 U.S.C. 823(f) and (g)(2)(E)(i)." Order, at 1.

The Order alleged that Respondent "possessed and dispensed controlled substances at 3129 S. Ridge Crest, New Berlin, Wisconsin," an unregistered location, in violation of 21 U.S.C. 841(a)(1). Order, at 1. The Order further alleged that beginning "in approximately June 2009," Respondent "prescribed controlled substances to an employee for other than legitimate medical purposes," in violation of 21 U.S.C. 841(a)(1) and 21 CFR 1306.04. *Id.* at 2. The Order also alleged that at Respondent's "request," a local pharmacy dispensed controlled substances which were "returned" to Respondent for his "personal use," in violation of 21 U.S.C. 843(a)(3). *Id.*

Next, the Order alleged that an "accountability audit performed at [Respondent's] office in November 2009" found "an unexplained shortage of approximately 10,470 fentanyl citrate 0.05 mg/ml (2 ml ampule) during the first audit and an unexplained shortage o[f] approximately 9,556 fentanyl citrate 0.05 mg/ml (2 ml ampule) during the second audit." *Id.* The Order also alleged that "accountability audits for morphine sulfate indicated a shortage of approximately 780 units of morphine sulfate injection 15 mg/ml (20 ml vial); 1825 units of morphine sulfate injection 10 mg/ml (1 ml vial); 550 units of morphine sulfate injection 8 mg/ml (1 ml vial); and 200 units of morphine sulfate injection 5 mg/ml (1 ml vial)." *Id.* Finally, the Order alleged that "[n]o initial inventory was taken upon the establishment of the registered location, nor was a biennial inventory taken of the controlled substances on the premises of the registered location every two years" and that "records were not properly maintained for the dispensed controlled substances." *Id.* (citing 21 CFR 1304.11, 1304.11(b) & (c), and 1304.22(c)). Based on the above, I concluded that Respondent's continued registration during these proceedings "constitutes an imminent danger to the public health and safety" and immediately suspended his registration. *Id.* (citing 21 U.S.C. 824(d)).

On February 24, 2010, Respondent timely filed a request for a hearing on the allegations. The matter was placed on the docket of the DEA Administrative Law Judges (ALJ) and was set for hearing on June 22, 2010. Order Terminating Proceeding, at 1. However, on June 7, 2010, counsel for Respondent notified the ALJ that following Respondent's criminal conviction after trial "on facts related to the allegations set forth" in the Order, he "no longer wished to pursue a hearing." *Id.* The same day, Respondent's Counsel also wrote a letter to the ALJ stating that he was "waiving his opportunity to participate in the hearing" and submitting his statement of facts and his position. Letter from Adam C. Essling (June 7, 2010), at 1 (citing 21 CFR 1301.43(c)).

Mr. Essling's letter additionally stated that Respondent "maintains that his registration is not inconsistent with [the] public interest under 21 U.S.C. 823(f)." *Id.* More specifically, the letter related that Respondent "maintains that [J.E.] has been a patient of his since 2005" and that "[a]ll of the controlled substances provided to [J.E.] were for a legitimate purpose." *Id.* However, the letter conceded that Respondent "did not maintain a proper inventory or records for the controlled substances dispensed within the scope of his practice." *Id.*

By order of June 8, 2010, the ALJ terminated the proceeding. Order Terminating Proceeding, at 2. Thereafter, the Investigative Record was forwarded to me for Final Agency Action.

Based on relevant evidence contained in the Investigative Record, I conclude that Respondent has committed acts which render his registration "inconsistent with the public interest." 21 U.S.C. 824(a)(4). I will therefore, order that Respondent's registration be revoked and that any pending applications to renew or modify his registration be denied. I make the following findings of fact.

**Findings**

Respondent is a physician licensed by the State of Wisconsin who practices radiology. Respondent also holds DEA Certificate of Registration, AP1892822; the registration, which does not expire until March 31, 2011, authorizes him to dispense controlled substances as a practitioner at the registered location of CMI—Center for Medical Imaging, W178 N9912 Rivercrest Drive, Suite 102, Germantown, Wisconsin ("CMI," or "Germantown clinic"). Certificate of Registration Status (March 11, 2010). However, on January 29, pursuant to my authority under 21 U.S.C. 824(d), I ordered that Respondent's registration be immediately suspended; Respondent was served with the Order on February 2, 2010.

On September 4, 2009, a confidential source (CI) informed a DEA Diversion Investigator (DI) that Respondent had "been providing [J.E.] with large quantities of liquid Fentanyl and morphine sulfate, both of which are Schedule II controlled substances,[1] for

[1] *See* 21 CFR 1308.12(b)(1)(ix) & (c)(9). According to the FDA-approved package insert for fentanyl citrate injection, a dosage of 0.1 mg in 2 ml. solution is "approximately equivalent in analgesic activity to 10 mg of morphine"; fentanyl is thus approximately 100 times more powerful than morphine. Its approved uses are primarily for analgesic action "during anesthetic periods, premedication, induction and maintenance, and in the immediate postoperative period" as needed, and also as "a narcotic analgesic supplement in general or regional anesthesia." Other uses include "administration with a neuroleptic such as droperidol injection as an anesthetic premedication, for the induction of anesthesia, and as an adjunct in the maintenance of general and regional anesthesia," and "as [an] anesthetic agent with oxygen in selected high risk patients, such as those undergoing open heart surgery or certain complicated neurological or orthopedic procedures."

no legitimate medical purpose and that [J.E.] is addicted to these drugs." Affidavit of G. Connor, at 2–3. The CI further stated that J.E. and Respondent had been involved in a sexual relationship for the past two years, and that J.E. worked at Respondent's Germantown clinic, but "since approximately June 2009," had "been doing most of her work at home because she [was] too addicted to narcotic drugs to go to the office." *Id.* at 3.

According to the CI, approximately two years earlier, the CI was at J.E.'s residence when J.E. complained of a migraine headache; J.E. called Respondent and asked him to bring something for her headache. *Id.* Respondent later arrived "with an IV bag * * * an IV bag holder, several vials and syringes." *Id.* at 3. At that point, the CI left the premises. *Id.*

The CI further stated that several months earlier the company underwriting Respondent's employees' health insurance had informed Respondent that the plan might not "be renewed because of the high number of prescriptions [Respondent] was writing for Schedule II controlled substances for one of the employees at the clinic." *Id.* at 4. The CI further stated that clinic employees filled their prescriptions at Walgreen's pharmacies. *Id.*

A DI obtained records of all the prescriptions written by Respondent and filled at "Walgreens pharmacies located in southeastern Wisconsin during the two-year period from September 1, 2007 through August 31, 2009." *Id.* at 6. The records showed that Walgreen's had filled 409 prescriptions issued by Respondent for narcotic controlled substances in this period, of which "138 (approximately 35%) had been" issued for J.E. *Id.*

The prescriptions for J.E. included six for morphine sulfate, ten for oxycodone, and two for fentanyl patches (or its generic equivalent), all of which are Schedule II controlled substances. *Id.; see* 21 CFR 1308.12(b)(1)(xiii). The prescriptions filled for J.E. also included approximately 109 prescriptions for hydrocodone and seven prescriptions for Hydromet, a hydrocodone-based cough syrup, both of which are Schedule III controlled substances. Affidavit of G. Connors, at 6; *see* 21 CFR 1308.13(e)(1).

J.E.'s prescriptions also fell into a pattern, with the number of dosage units of oxycodone or hydrocodone increasing from 90 to 170 dosage units per month in 2007 to as much as 380 dosage units by January 2009; in addition, during 2008 and 2009, Respondent added morphine sulfate and fentanyl patches to J.E.'s prescriptions. Affidavit of G. Connors, at 7. However, in July 2009, Respondent's prescriptions for J.E. "decreased dramatically"; a Special Agent (SA) attributed this to Respondent's insurance company having told him that it might cancel his clinic's employee-health insurance. *Id.*

A DI obtained data from ARCOS, DEA's Automated Reports and Consolidated Order Systems database. The data showed that while in 2008, Respondent had not obtained any schedule II or III controlled substance, in June 2009; he ordered and received 1,000 dosage units of fentanyl and 250 dosage units of morphine sulfate. *Id.* at 8. Also, in July 2009, Respondent ordered and received 1,280 dosage units of fentanyl and 280 dosage units of morphine sulfate; in August 2009, he ordered and received 1,660 dosage units of fentanyl and 280 dosage units of morphine sulfate; and in September 2009, he ordered and received 3,100 dosage units of fentanyl and 280 dosage units of morphine sulfate. *Id.* As the SA noted, "[t]his substantial increase in [Respondent's] ordering of controlled substances generally coincided with the substantial reduction in the number of prescriptions for controlled substances, which were written by [Respondent], and filled by [J.E.] at Walgreens pharmacies." *Id.*

On November 3, 2009, a DI, with assistance from the Waukesha Metro Drug Enforcement Unit, conducted a search of the garbage at J.E.'s residence. *Id.;* Declaration of K. Federico, at 1. The officers found 421 empty 2-ml. ampules labeled "Fentanyl Citrate 100mcg./1ml.," thirteen (13) empty 1-ml ampules labeled "Morphine Sulfate 8mg./1ml.," one (1) empty 20-ml. bottle labeled "Morphine Sulfate 15mg./1ml.," and numerous syringes and used alcohol pads. Affidavit of G. Connors, at 8; Declaration of K. Federico, at 1.

On November 10, 2009, DEA SAs obtained warrants to search both Respondent's Germantown clinic and J.E.'s residence. Affidavit of E. Roy, at 2. On November 12, 2009, during the execution of the search warrant at the Germantown clinic, the SAs interviewed Respondent. *Id.* at 3. Respondent stated that J.E. was one of two registered nurses employed by his practice and that she was also the vice president of CMI. *Id.* Respondent further stated that he had been treating J.E. since approximately March 2009 for pain "resulting from a fractured tooth." *Id.* Respondent maintained that the tooth subsequently became infected and that he then started treating J.E. with liquid fentanyl. *Id.*

Respondent further stated that he initially injected J.E. with three to five 2-ml. ampules of fentanyl three times per day, but by the time of the interview, he was injecting her with approximately fifty ampules per day. *Id.* He also stated that he had prescribed Vicodin for J.E.'s lower back pain and that J.E. was intermittently taking hydrocodone along with the fentanyl for her pain. *Id.*

Respondent stated that J.E. had not been billed for any of the fentanyl which he had provided to her. *Id.* at 4. He further admitted that he did not have a medical file or chart documenting his treatment of J.E. and a search of the clinic failed to yield a medical record for J.E. *Id.* at 4, 6.

Respondent also stated that he had had several conversations with J.E. in which he told her that she needed a longer-acting narcotic than fentanyl. *Id.* at 4. However, J.E. did not want to change medications. *Id.* Nevertheless, Respondent tried J.E. on morphine sulfate, which left her with a "drug hangover" the next morning. *Id.* Respondent also admitted that J.E. had developed a tolerance to fentanyl and was addicted to it. *Id.* Respondent further admitted that he did not think his dispensing of fentanyl and morphine sulfate to J.E. was "in the usual course of practice," and that "the situation going on between himself and [J.E.] [was] not in the usual course of practice." *Id.* He also admitted that he never conducted an inventory of the controlled substances kept at his clinic. Declaration of S. Osborne, at 4.

Respondent further admitted that he self-administered morphine sulfate for a neck injury and that sometimes J.E. assisted him with the injections. Affidavit of E. Roy, at 8; Declaration of K. Federico, at 1. Based on this information, DEA contacted his attorney regarding "his possession and personal use of morphine." Affidavit of E. Roy, at 8. On November 19, 2009, the attorney turned over to DEA a box intended to hold ten smaller boxes, each of which holds twenty-five 1-ml. ampules of morphine. *Id.* at 8–9. However, the box contained only nine of the smaller boxes of morphine ampules. *Id.* at 9.

DEA audited the records of the Germantown clinic and found significant discrepancies in the amount of fentanyl received and used by Respondent. In the period from

The package insert furthers that the drug "SHOULD BE ADMINISTERED ONLY BY PERSONS SPECIFICALLY TRAINED IN THE USE OF INTRAVENOUS ANESTHETICS AND MANAGEMENT OF THE RESPIRATORY EFFECTS OF POTENT OPIODS. AN OPIOD ANTAGONIST, RESCUCITATIVE AND INTUBATION EQUIPMENT, AND OXYGEN SHOULD BE READILY AVAILABLE."

February 26, 2009, when records indicated Respondent had ninety-four ampules of fentanyl in stock, through November 12, 2009, he received 11,490 such ampules.[2] *Id.* at 5. At the time of the search, he had seven ampules on hand, plus DEA found another 600 ampules in his car, which Respondent claimed he was taking to his home because of a theft at the clinic. *Id.* No dispensing logs for September or October 2009 were found, and the remaining dispensing logs accounted for the disposition of only 507 ampules, less than ten percent of what had been received in this period. *Id.*

The Germantown clinic had a record of all patients who had received fentanyl as part of a medical procedure for the period June 1, 2009 through November 12, 2009. *Id.* at 6. While during this period Respondent purchased 10,590 ampules of fentanyl, the clinic records showed that only 427 ampules were used during medical procedures at the clinic. *Id.* These ampules, combined with the 600 found in the car, likewise account for less than ten percent of the fentanyl Respondent received. *Id.*

The Investigators also performed an audit of Respondent's handling of morphine sulfate for the period February 26, 2009 through November 12, 2009. The audit showed that Respondent could not account for 3,155 vials of the drug, which was "the majority of the morphine sulfate he received" in that period.[3] Declaration of S. Osborne, at 2. According to several clinic employees, morphine "was not used in CMI['s] procedures." *Id.* Moreover, the search of the clinic revealed that Respondent "failed to take an initial inventory [and] maintained no biennial inventory" for any of the controlled substances Respondent had obtained; nor did it have proper records documenting the disposition of the morphine that Respondent obtained. *Id.* at 3.

On November 12, 2009, DEA Investigators also conducted a consensual search of Respondent's residence. Declaration of K. Federico, at 1. While Respondent's residence is not a registered location, the Investigators found "large amounts of empty and full fentanyl citrate ampules, morphine sulfate vials, drug packaging, and intravenous drug use paraphernalia." *Id.*

On November 19, 2009, DEA received information from a second confidential source (CI2) that on November 16, 2009, Respondent had received a box of morphine; according to CI2, morphine was not used in the clinic's procedures. Affidavit of E. Roy, at 8. CI2 later observed Respondent placing one of the containers of morphine in his pocket. *Id.*

On November 23, 2009, pursuant to an immunity agreement with the U.S. Attorney's Office, J.E. was interviewed by DEA investigators. *Id.* at 6. J.E. stated that Respondent gave her Vicodin for back pain in 2007. *Id.* He also prescribed oxycodone, morphine sulfate, and fentanyl patches on several occasions for pain management. *Id.*

J.E. stated that around the summer of 2009, Respondent provided J.E. with fentanyl for a dental problem. *Id.* Respondent began administering the fentanyl to J.E. via an intravenous (IV) line on a regular basis. *Id.* J.E. stated that she consumed two to three vials per week this way. *Id.* She also indicated that morphine made her sleepy and that sometimes Respondent would give her morphine to help her sleep. *Id.* at 7.

As J.E.'s dental problem worsened, her use of fentanyl increased. *Id.* Rather than receive the drug via IV administration, she began injecting herself with a solution of fentanyl and saline. *Id.* By November 12, 2009 (when the search warrant was executed at her residence), J.E. was self-administering approximately forty to fifty vials of fentanyl per day. *Id.* She was also receiving morphine from Respondent to help with her sleep several times each week. *Id.* While typically Respondent brought the drugs to her residence, on a few occasions another clinic employee brought them. *Id.*

In addition, at times J.E. would go to Respondent's house to use fentanyl or morphine that Respondent kept there. *Id.* J.E. stated that she never paid for medication or treatment provided by Respondent. *Id.* She further stated that every few weeks she and Respondent would have conversations about her growing tolerance to fentanyl. *Id.*

On November 11, 2009, J.E. checked herself into a treatment center, where she stayed until November 18, 2009. *Id.* at 8. She further told Investigators that she was receiving treatment from a physician for her fentanyl addiction and was taking Suboxone as part of that treatment. *Id.*

On January 11, 2010, DEA received further information from CI2. CI2 told the Investigators that in the last week, Respondent had noted on CMI's dispensing log that he had dispensed 250 ampules of fentanyl to J.E. *Id.* at 9. CI2 also stated that he had noticed that fifty ampules of fentanyl were missing and were not accounted for in the dispensing log. *Id.* He also reported discovering three plastic zip-lock bags in the Germantown clinic's trash containing empty fentanyl ampules, syringes, dirty cotton pads, and other items; CI2 provided the bags to DEA. *Id.* According to CI2, CMI disposes of needles in a "'sharps' bio-hazard container," and not via the trash. *Id.*

DEA Investigators examined the three plastic bags. They found thirty-eight empty fentanyl ampules, four empty plastic trays (each capable of holding ten (10) fentanyl ampules), syringes, needles, alcohol swabs, gauze dirtied with blood, "Y" adapters for an IV line, and packaging for needles. *Id.* at 10.

On January 12, 2010, CI2 further reported that Respondent had added notes to CMI's fentanyl dispensing log. *Id.* The note indicated that Respondent had used two ampules of fentanyl on January 8, 2010. *Id.*

On January 13, 2010, a criminal complaint was filed against Respondent, and on February 2, 2010, a grand jury indicted him on ten counts of intentionally and knowingly possessing with intent to distribute and unlawfully distributing fentanyl without a legitimate medical purpose on various dates in October and November 2009, in violation of 21 U.S.C. 841(a)(1), as well as six counts of obtaining morphine sulfate by misrepresentation, fraud, and deception in violation of 21 U.S.C. 843(a)(3). Declaration of S. Osborne, at 6; Indictment, *United States* v. *Pellmann,* No. 10–CR–014 (E.D. Wis., filed Feb. 2, 2010).

Respondent was arrested after the filing of the criminal complaint. Following his release from custody, he travelled with J.E. to a Brookfield, Wisconsin hotel where he administered approximately two ampules of fentanyl to her during their stay. Declaration of S. Osborne, at 5. Thereafter, on the weekend of January 15–17, 2010, the two traveled to a Kohler, Wisconsin hotel, where Respondent administered midazolam, a schedule IV controlled substance,[4] to J.E. several times so that she could "detox" from the Fentanyl. *Id.*

[2] Pharmacy records from Ye Olde Pharmacy, where Respondent filled his "general use" prescriptions for controlled substances for "office use," indicate that between February 1, 2009 and July 14, 2009, Respondent obtained 4,100 ampules of fentanyl. *See* Declaration of S. Osborne, at 2–3. ARCOS data from June through September 2009 indicate that he obtained a further 7,040 ampules from distributors for a total of 11,140 ampules. It is not clear what accounts for the difference between the 11,490 figure and the total of 11,140.

[3] Dispensing records from Ye Olde Pharmacy indicate that Respondent received 2,025 dosage units of morphine sulfate between February 2009 and July 14, 2009. ARCOS data for the months of July 2009 through September 2009 indicate that in this period, Respondent obtained a further 1,010 vials of morphine sulfate, making for a total of 3,035 vials. Respondent, however, could account for only 100 vials.

[4] *See* 21 CFR 1308.14(c)(35).

Respondent told J.E. not to mention the hotel visits to anyone. *Id.*

The Investigative Record contains copies of prescriptions which Respondent issued for morphine sulfate and for fentanyl citrate "for office use." The morphine sulfate prescriptions are dated April 23; May 6, 13, 14, 23, and 28; June 6, 16, 23, and 30; and July 6 and 14, 2009. The fentanyl citrate prescriptions date back to August 2007 and extend through July 2009. Typically those prescriptions were for between 50 and 100 vials. However, the prescriptions of May 23 and June 8, 2009 were for 200 vials each.

Respondent went to trial; on June 4, 2010, a federal jury found him guilty of all sixteen counts alleged in the indictment. *U.S.* v. *Pellmann,* Verdict (June 4, 2010). After the return of the verdicts, the District Court allowed Respondent to remain free on bond on several conditions, including that he "have 'no contact whatsoever' " with J.E. and that he "not . . . 'administer even to himself or anyone else any drugs whatsoever.' " Aff. of E. Roy in Supp. of Mot. to Revoke Order of Release, *U.S.* v. *Pellmann,* at 1 (filed July 30, 2010).

However, on July 29, 2010, an Assistant U.S. Attorney received a phone call from another confidential source who reported that a nurse at CMI had confronted Respondent after observing him near the narcotics box and that the nurse thereafter found missing five vials of midazolam. *Id.* Respondent told the nurse he was taking the midazolam to his other clinic in New Berlin. *Id.* This CS further stated that Respondent was continuing to treat J.E., that she was coming to the clinic, and also that Respondent was treating her at his house. *Id.*

Shortly thereafter, a DI interviewed a CMI employee, who stated that the employee who performs CT scans at the clinic was called in on a Saturday by Respondent to do a CT scan of J.E. Aff. of E. Roy in Supp. of Mot. to Revoke Order of Release, at 2. The employee also stated that Respondent talked regularly about his contacts with J.E and stated that he was treating her for her pain and that the two had been staying together. *Id.*

On July 29, 2010, the DI and other Investigators went to CMI. *Id.* at 2. Clinic employees stated that on July 23, 2010, the clinic had received ten boxes of midazolam, with each box containing ten vials for a total of 100 vials. *Id.* CMI's records showed that five vials had been administered to patients and that ten of the vials had been taken to Respondent's New Berlin office, supposedly at the request of a physician (Dr. Z.) who sublets space at that office and who is registered with DEA at both the Germantown clinic and the New Berlin office. *Id.* The DI counted the vials; the count matched the records at eighty-five vials. *Id.*

Respondent was present during the July 29 visit. *Id.* Dr. Z. was not present, and, according to clinic staff, had not been there at all that day. *Id.* According to a clinic employee, Respondent had done at least one patient procedure prior to the Investigators' arrival during which he administered midazolam to the patient. *Id.* After noticing that the computerized office records did not reflect that Respondent had done so, the DI confronted Respondent. *Id.* at 2–3. Respondent admitted that he had, in fact, administered the midazolam, but claimed to have done so under Dr. Z.'s supervision. *Id.* at 3.

That evening, the DI and other investigators went to the New Berlin office and met with Dr. Z. *Id.* at 3. Dr. Z. stated that the New Berlin office did not have any midazolam, that he had never requested Respondent to bring the drug to that office, and that he does not typically use midazolam there. *Id.* Moreover, he stated that he had not authorized Respondent to administer controlled substances during procedures. *Id.*

The following morning, the CMI employee called the DIs and reported that after the DIs left the clinic, she had inspected the supposedly sealed boxes of midazolam. *Id.* She reported that the boxes appeared to have been tampered with and that some of the vials appeared to have been refilled and their tops re-glued. *Id.* Investigators then contacted Dr. Z. and gained his consent to seize all of the controlled substances at the Germantown clinic which had been procured using his DEA registration. *Id.* As the Investigators traveled to the clinic, the employee called again and stated that Respondent had just left the clinic with a bag containing drug vials. *Id.* Upon the Investigators' arrival, the employee told them that Respondent's sister had come to the clinic that morning and delivered ten vials of midazolam. *Id.* Respondent's sister claimed to have obtained the vials from the New Berlin office. *Id.*

Clinic employees opened the controlled substances cabinet, and the Investigators counted the drugs. *Id.* at 4. The Investigators observed signs of tampering on five boxes of midazolam. They also found only fifty-five vials of the drug and concluded that forty vials were missing. *Id.*

Thereafter, Respondent entered the clinic carrying a plastic shopping bag which contained thirty-six empty vials of midazolam. *Id.* Respondent claimed that he had gotten the vials out of the trash and that Dr. Z. had "told him to 'bring back the trash.' "[5] *Id.* The bag also contained Respondent's personal medication, a seven-day pill container, and some pharmacy pamphlets. *Id.*

Based on Respondent's having violated the conditions of release, on July 30, 2010, a United States District Judge issued an arrest warrant for Respondent. *U.S.* v. *Pellmann,* Arrest Warrant (July 30, 2010). Respondent was then arrested.

As noted above, on June 7, 2010, Respondent's Counsel submitted Respondent's Statement of Facts and Position. Therein, Respondent maintained that "all of the controlled substances he administered or dispensed to J.E. were for treatment of her pain related to Trigeminal Neuralgia" and that treating J.E. "required house calls given the nature of the pain and the time of her pain attacks." He further asserted that he discussed with J.E. "her condition on a daily basis and he monitored her condition through daily interactions," and that "[h]e used several different pain medications, anti-inflammatory medication, and antibiotics in association with her pain caused by her Trigeminal Neuralgia and dental problems." He then asserted that all of the controlled substances he provided to J.E. "were for a legitimate medical purpose." However, Respondent admitted that "he did not maintain a proper inventory or records for the controlled substances dispensed within the scope of his practice."

**Discussion**

Section 304(a) of the Controlled Substances Act (CSA) provides that a "registration pursuant to section 823 of this title to * * * dispense a controlled substance * * * may be suspended or revoked by the Attorney General upon a finding that the registrant * * * has committed such acts as would render his registration * * * inconsistent with the public interest as determined under such section." 21 U.S.C. 824(a)(4). With respect to a practitioner's registration, the CSA directs that the following factors be considered in determining the public interest:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to

[5] To make clear, I do not find either statement credible.

the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conducts which may threaten the public health and safety. 21 U.S.C. 823(f).[6]

"[T]hese factors are * * * considered in the disjunctive." *Robert A. Leslie,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors and may give each factor the weight I deem appropriate in determining whether to revoke an existing registration or to deny an application. *Id.* Moreover, I am "not required to make findings as to all of the factors." *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (DC Cir. 2005).

Having reviewed the Investigative Record, I conclude that the evidence relevant to factors two, four, and five establishes that Respondent has committed acts which render his registration inconsistent with the public interest. 21 U.S.C. 824(a)(4). Accordingly, Respondent's registration will be revoked and any pending application will be denied.

*Factor One: The Recommendation of the Appropriate State Licensing Authority*

The record contains no evidence that the Wisconsin Medical Examining Board has made any recommendation to DEA regarding Respondent's registration. Therefore, I find that this factor neither weighs in favor of, or against, a finding that Respondent's continued registration is inconsistent with the public interest.

*Factors Two and Four: Registrant's Experience in Dispensing Controlled Substances and Record of Compliance With Applicable Controlled Substance Laws*

Under a longstanding DEA regulation, a prescription for a controlled substance is not effective unless it is issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. 21 CFR 1306.04(a). This regulation further provides that an "order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of * * * 21 U.S.C. 829 * * * and * * * the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances." *Id. See also* 21 U.S.C. 802(10) (Defining the term "dispense" as meaning "to deliver a controlled substance to an ultimate user * * * by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance.")

As the Supreme Court recently explained, "the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses." *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135, 143 (1975)).

Under Agency precedent, "[i]t is fundamental that a practitioner must establish and maintain a bona-fide doctor-patient relationship in order to be acting 'in the usual course of * * * professional practice' and to issue a prescription for a 'legitimate medical purpose.' " *Paul H. Volkman,* 73 FR 30630, 30642 (2008), *aff'd sub nom. Volkman* v. *DEA,* 567 F.3d 215 (6th Cir. 2009) (citing *United States* v. *Moore,* 423 U.S. 122, 142–43 (1975) ("noting that the evidence established that physician 'exceeded the bounds of "professional practice,' " when 'he gave inadequate physical examinations or none at all,' 'ignored the results of the tests he did make,' and 'took no precautions against * * * misuse and diversion.' ")).

Wisconsin law likewise states that "[a] practitioner may dispense or deliver a controlled substance to or for an individual * * * only for medical treatment * * * in the ordinary course of that practitioner's profession." Wis. Stat. Ann. § 961.38. Wisconsin law also provides that "[a]dministering, dispensing, prescribing, supplying, or obtaining controlled substances * * * otherwise than in the course of legitimate professional practice, or as otherwise prohibited by law" is "unprofessional conduct" by a physician. Wis. Admin. Code [Med.] § 10.02(2)(p).

Respondent's experience in dispensing controlled substances and record of compliance with applicable laws is characterized by his numerous and brazen violations of multiple laws related to controlled substances. As found above, Respondent admitted that he administered and/or distributed to J.E. large quantities of fentanyl, a schedule II controlled substance; he also prescribed to J.E. other schedule II drugs such as oxycodone and morphine, as well as large quantities of Vicodin, a schedule III controlled substance containing hydrocodone. Moreover, Respondent frequently personally brought the drugs to J.E.'s residence.

While in his Statement of Facts and Position, Respondent now asserts that he had a legitimate medical purpose in dispensing the controlled substances to J.E.; Respondent previously admitted in his November 10, 2009 interview that he did not have a medical chart documenting his treatment and medical purpose for administering and distributing controlled substances to her. Respondent's failure to maintain a medical chart on J.E. provides substantial evidence that he did not establish a legitimate doctor-patient relationship with her, a fact which is confirmed by his admission during the interview that his distribution of fentanyl and morphine to J.E. was not in the usual course of professional practice and that the situation between himself and J.E., with whom he likely had a sexual relationship, was not within the usual course of professional practice.[7]

During their respective November 2009 interviews, both Respondent and J.E. asserted that he provided the fentanyl to her to treat pain caused by a tooth which fractured in March 2009 and subsequently became infected. Notably, neither Respondent nor J.E. claimed that at any time after he determined the cause of her pain did he refer her to a dentist, who could have properly diagnosed her problem and treated it. Instead, he supplied her with an ever-increasing amount of fentanyl, a highly potent and abused narcotic.[8] Such a gross departure from accepted standards of medical practice manifests that Respondent lacked a legitimate

[6] Section 304(a)(2) further provides that a registration may be revoked "upon a finding that the registrant * * * has been convicted of a felony under this subchapter [the CSA] * * * or any other law of the United States, or of any State, relating to any substance defined in this subchapter as a controlled substance." 21 U.S.C. 824(a)(2).

[7] Respondent admitted this in his interview during the execution of the search warrant at the Germantown clinic. While his counsel's letter of June 7, 2010 now maintains that J.E. had been his patient since 2005 and had been diagnosed as having Trigeminal Neuralgia, Respondent made no such contention in the November 2009 interview and there is no medical record for J.E. documenting this. The absence of any patient file for J.E. confirms Respondent's admission in the interview that he did not distribute drugs to her in the course of professional practice.

[8] Even assuming that Respondent, a radiologist, has been trained in the proper use of the drug and the management of its respiratory effects, given that the injections took place at J.E.'s residence, it seems implausible that any of items which the package inserts warns should be readily available to counter fentanyl's respiratory depression effects such as an opioid agonist, resuscitative and intubation equipment, and oxygen were available. Finally, given the potency of this drug and the serious adverse reactions which it can cause, it does not seem that this is the type of drug that patients should be self-administering.

medical purpose and acted outside of the usual course of professional practice when he dispensed fentanyl to J.E. 21 CFR 1306.04(a).

Finally, having been found guilty by a jury of all ten counts of unlawfully distributing fentanyl without a legitimate medical purpose in violation of 21 U.S.C. 841(a)(1), Respondent is collaterally estopped from re-litigating the issue of whether he had a legitimate medical purpose when he distributed fentanyl to J.E. *Taylor* v. *Sturgell,* 553 U.S. 880, 892 (2008) (citing *New Hampshire* v. *Maine,* 532 U.S. 742, 748–49 (2001)). I therefore reject Respondent's contention that he had a legitimate medical purpose for providing fentanyl to J.E.

While Respondent admitted in the November 2009 interview that he knew J.E. was addicted to fentanyl, he continued to provide fentanyl to her even after she began receiving treatment for her addiction. Indeed, he continued to administer controlled substances to J.E. even after he had been criminally charged and arrested. More specifically, in January 2010, he administered fentanyl to her at a Brookfield, Wisconsin hotel room; several days later, the two checked in to a Kohler, Wisconsin hotel room where he gave J.E. midazolam to detox her from the fentanyl. The evidence therefore shows that Respondent repeatedly violated the CSA by unlawfully distributing controlled substances to J.E. *See* 21 U.S.C. 841(a)(1) ("[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally * * * to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"); *see Michael F. Myers,* 72 FR 36484, 36486 (2007) (revoking physician's registration where physician, *inter alia,* continued to prescribe OxyContin to a "patient" notwithstanding the "patient's" informing physician that he was addicted to the drug).

Respondent further violated Federal law when he obtained controlled substances by fraud. *See* 21 U.S.C. 843(a)(3) ("It shall be unlawful for any person knowingly or intentionally * * * to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge [.]"). As found above, Respondent wrote numerous prescriptions for fentanyl and morphine sulfate to obtain these drugs from local pharmacies; while Respondent noted on the prescriptions that the controlled substances were "for office use," the evidence shows that only a miniscule portion of the fentanyl (427 ampules out of more than 4,100 ampules obtained in this manner) was used for medical procedures at the clinic and that the vast majority of the fentanyl was being provided to J.E.

As for the morphine, the evidence showed that Respondent obtained more than 2,000 dosage units from a local pharmacy. However, Respondent's clinic did not use this drug in any procedures. Rather, Respondent both self-administered the morphine and distributed it to J.E. It is thus clear that by representing that the fentanyl and morphine were "for office use," Respondent obtained the drugs by fraud and deception.[9] 21 U.S.C. 843(a)(3). *See Randall Relyea,* 73 FR 40378, 40380 (2008) (revoking physician's registration based on violations of section 843(a)(3) and physician's personal abuse of controlled substances thus obtained); *Alan H. Olefsky,* 72 FR 42127, 42128 (2007) (denying application based on physician's violations of section 843(a)(3) and personal abuse of controlled substances thus obtained). Relatedly, DEA regulations prohibit the use of a prescription by "an individual practitioner to obtain controlled substances for supplying the * * * practitioner for the purpose of general dispensing to patients." 21 CFR 1306.04(b).

Wisconsin law prohibits a practitioner from "tak[ing] without a prescription a controlled substance * * * for the practitioner's own use." Wis. Stat. Ann. § 961.38(5). Because Respondent did not obtain the morphine pursuant to a prescription from a physician, he violated Wisconsin law when he used the morphine. He likewise violated the CSA, which renders it "unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice." 21 U.S.C. 844(a).

Respondent further violated both the CSA and DEA regulations by failing to maintain proper records. As found above, during the search of the clinic, there were neither initial inventories nor biennial inventories, dispensing logs were missing for several months, and the dispensing logs that were available were clearly not being properly maintained as demonstrated by the audits which could not account for more than 10,000 dosage units of fentanyl and more than 3,000 dosage units of morphine. *See* 21 U.S.C. 827(a); 21 CFR 1304.03(a), 1304.11, and 1304.22(c). Respondent also admitted that he had failed to maintain the lawfully required records. Even were there no other evidence of Respondent's unlawful conduct, his failure to comply with his recordkeeping obligations is so egregious that it alone would support the revocation of his registration.

As the foregoing demonstrates, Respondent's experience in dispensing controlled substances and his record of compliance with applicable laws related to the distribution and dispensing of controlled substance are characterized by his repeated and flagrant disregard for Federal and State laws. This evidence clearly supports the conclusion that Respondent has committed acts which render his registration inconsistent with the public interest.[10]

*Factor Five—Such Other Conduct Which May Threaten Public Health and Safety Offenses*

On January 29, 2010, Respondent's registration was immediately suspended because his misconduct created an imminent danger to public health and safety. As a consequence of the Order, which was served on him on February 2, Respondent was prohibited from possessing controlled substances (other than those he obtained through a legal prescription) and dispensing them.

[9] Under Federal law, to obtain schedule II controlled substances, a DEA Form 222 must be completed and sent to the distributor. *See* 21 U.S.C. 828(c)(2). This applies even where a practitioner obtains a schedule II controlled substance from a pharmacy. 21 CFR 1307.11(a)(1)(iii). It is unclear whether Respondent ever submitted DEA Form 222s to the pharmacies he obtained schedule II drugs from. However, the Government has the burden of proof on the issue.

As for the morphine and fentanyl he obtained from distributors, Federal law makes it "unlawful for any person to obtain by means of order forms * * * controlled substances for any purpose other than their use, distribution, dispensing, or administration in the conduct of a lawful business in such substances or *in the course of his professional practice.*" 21 U.S.C. 828(e) (emphasis added). Thus, Respondent's obtaining of fentanyl and morphine from various distributors was also illegal.

[10] As found above, on June 4, 2010, a jury found Respondent guilty of ten counts of violating 21 U.S.C. 841(a)(1) and six counts of violating 21 U.S.C. 843(a)(3), both of which are felony offenses. The record does not, however, include a copy of the judgment of conviction entered by the District Court.

Factor three authorizes the Agency to consider a registrant's conviction record under Federal or State laws related to the distribution or dispensing of controlled substances. *See* 21 U.S.C. 823(f)(3); *see also* 21 U.S.C. 824(a)(2) (authorizing revocation where registrant "has been convicted of felony under this subchapter"). However, in light of the substantial misconduct proved on this record, it is unnecessary to determine whether the term "conviction" as used in factor 3 and section 304(a)(2) means a judgment of conviction or simply a finding of guilty which precedes the entry of a final judgment of conviction. *See Deal* v. *United States,* 508 U.S. 129, 131 (1993). I therefore make no findings on this factor.

Notwithstanding the Order (as well as that of the District Court following the jury verdicts which allowed him to remain free on bond on the condition that he not administer any drugs either to himself or others), in July 2010, Respondent proceeded to possess midazolam, a schedule IV controlled substance, and he admitted to administering the drug to a patient. While Respondent claimed that he had administered the midazolam under the supervision of another physician, the latter physician stated that he had not authorized Respondent to administer any controlled substances.

The next day, Investigators received a report from a clinic employee that boxes containing midazolam had been tampered with. Later that day, Investigators went to the clinic and determined that forty vials of midazolam were missing; thereafter, Respondent entered the clinic and had in his possession thirty-six vials which had contained the drug.[11] This evidence supports the conclusion that Respondent possessed these additional amounts of midazolam in violation of the Immediate Suspension Order.

Respondent's violation of the Order (as well as the conditions imposed by the District Court) is egregious and demonstrates that he has no respect for the laws governing the distribution and dispensing of controlled substances and the authority of this Agency and the Courts. This factor buttresses the conclusion that Respondent has committed acts which render his registration inconsistent with the public interest and that his registration should be revoked. For the same reason which led me to order the immediate suspension of his registration, I conclude that this Order should be effective immediately.

## Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a)(4), as well as 28 CFR 0.100(b) & 0.104, I order that DEA Certificate of Registration, AP1892822, issued to Roger A. Pellmann, M.D., be, and it hereby is, revoked. I further order that any application of Roger A. Pellmann, M.D., to renew or modify his registration be, and it hereby is, denied. This order is effective immediately.

Dated: March 22, 2011.

**Michele M. Leonhart,**

*Administrator.*

[FR Doc. 2011–7411 Filed 3–29–11; 8:45 am]

**BILLING CODE 4410–09–P**

[11] To make clear, Respondent did not have a prescription for midazolam.

## DEPARTMENT OF LABOR

### Bureau of Labor Statistics

### Proposed Collection, Comment Request

**ACTION:** Notice.

**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/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed revision of the "Report on Current Employment Statistics." A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the Addresses section of this notice.

**DATES:** Written comments must be submitted to the office listed in the **ADDRESSES** section of this notice on or before May 31, 2011.

**ADDRESSES:** Send comments to Carol Rowan, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue, NE., Washington, DC 20212. Written comments also may be transmitted by fax to 202–691–5111 (this is not a toll free number).

**FOR FURTHER INFORMATION CONTACT:** Carol Rowan, BLS Clearance Officer, 202–691–7628 (this is not a toll free number). (*See* **ADDRESSES** section.)

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Current Employment Statistics (CES) program provides current monthly statistics on employment, hours, and earnings, by industry and geography. CES estimates are among the most visible and widely-used Principal Federal Economic Indicators (PFEIs). CES data are also among the timeliest of the PFEIs, with their release each month by BLS in the *Employment Situation,* typically on the first Friday of each month. The statistics are fundamental inputs in economic decision processes at all levels of government, private enterprise, and organized labor.

The CES monthly estimates of employment, hours, and earnings are based on a sample of U.S. nonagricultural establishments. Information is derived from approximately 290,600 reports (from a sample of 140,000 employers with State Unemployment Insurance (UI) accounts comprised of 440,000 individual worksites), as of January 2011. Each month, firms report their employment, payroll, and hours on forms identified as the BLS–790. The sample is collected under a probability based design. Puerto Rico and the Virgin Islands collect an additional 5,600 reports using a quota sample.

A list of all form types currently used appears in the table below. Respondents receive variations of the basic collection forms, depending on their industry.

The CES program is a voluntary program under Federal statute. Reporting to the State agencies is voluntary in all but four States (Oregon, Washington, North Carolina, South Carolina), Puerto Rico, and the Virgin Islands. To our knowledge, the States that do have mandatory reporting rarely exercise their authority. The collection form's confidentiality statement cites the Confidential Information Protection and Statistical Efficiency Act of 2002 and mentions the State mandatory reporting authority.

## II. Current Action

Office of Management and Budget clearance is being sought for the Report on Current Employment Statistics.

Automated data collection methods are now used for most of the CES sample. Approximately 131,200 reports are received through Electronic Data Interchange as of January 2011. Web data collection accounts for 58,900 reports. Computer Assisted Telephone Interviewing is used to collect 62,000. Fax is also a significant collection mode, as 15,300 reports are collected via this method. Touchtone Data Entry is used for 10,900 reports. In comparison, only 5,700 reports are collected by mail.

The balance of the sample is collected through other automated methods including submission of tapes, diskettes, and email.

## III. Desired Focus of Comments

The Bureau of Labor Statistics is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including

whether the information will have practical utility.

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

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

*Type of Review:* Revision of a currently approved collection.

*Agency:* Bureau of Labor Statistics.

*Title:* Report on Current Employment Statistics.

*OMB Number:* 1220–0011.

*Affected Public:* State or local governments; Businesses or other for-profit; Non-profit institutions.

| Form | Reports | Minutes per report | Frequency of response | Annual responses | Annual burden hours |
|---|---|---|---|---|---|
| A—Mining and Logging | 1,400 | 11 | 12 | 16,800 | 3,080 |
| B—Construction | 13,100 | 11 | 12 | 157,200 | 28,820 |
| C—Manufacturing | 11,400 | 11 | 12 | 136,800 | 25,080 |
| E—Service Providing Industries | 193,400 | 11 | 12 | 2,320,800 | 425,480 |
| G—Public Administration | 47,400 | 6 | 12 | 568,800 | 56,880 |
| S—Education | 9,800 | 6 | 12 | 117,600 | 11,760 |
| F1, F2, F3 Fax Forms | 14,100 | 11 | 12 | 169,200 | 31,020 |
| Total | 290,600 | | | 3,487,200 | 582,120 |

*Total Burden Cost (capital/startup):* $0.

*Total Burden Cost (operating/maintenance):* $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 25th day of March 2011.

**Kimberley Hill,**

*Chief, Division of Management Systems, Bureau of Labor Statistics.*

[FR Doc. 2011–7451 Filed 3–29–11; 8:45 am]

**BILLING CODE 4510–24–P**

## LEGAL SERVICES CORPORATION

### Notice of Availability of Calendar Year 2012 Competitive Grant Funds

**AGENCY:** Legal Services Corporation.

**ACTION:** Solicitation for Proposals for the Provision of Civil Legal Services.

**SUMMARY:** The Legal Services Corporation (LSC) is the national organization charged with administering Federal funds provided for civil legal services to low-income people.

LSC hereby announces the availability of competitive grant funds and is soliciting grant proposals from interested parties who are qualified to provide effective, efficient, and high quality civil legal services to eligible clients in the service area(s) of the States and territories identified below. The exact amount of congressionally appropriated funds and the date, terms, and conditions of their availability for calendar year 2012 have not been determined.

**DATES:** See **SUPPLEMENTARY INFORMATION** section for grants competition dates.

**ADDRESSES:** Legal Services Corporation—Competitive Grants, 3333 K Street, NW., Third Floor, Washington, DC 20007–3522.

**FOR FURTHER INFORMATION CONTACT:** Office of Program Performance by e-mail at *competition@lsc.gov*, or visit the grants competition Web site at *http://www.grants.lsc.gov.*

**SUPPLEMENTARY INFORMATION:** The Request for Proposals (RFP) will be available beginning April 11, 2011. Applicants must file a Notice of Intent to Compete (NIC) to participate in the competitive grants process. Applicants must file the NIC by May 13, 2011, 5 p.m. E.D.T. Other key application and filing dates including the dates for filing grant applications are published at *http://www.grants.lsc.gov.* Once at the site, click on "Key Competition and Grant Renewal Dates for 2012 Funding."

LSC is seeking proposals from: (1) Non-profit organizations that have as a purpose the provision of legal assistance to eligible clients; (2) private attorneys; (3) groups of private attorneys or law firms; (4) State or local governments; and (5) sub-State regional planning and coordination agencies that are composed of sub-State areas and whose governing boards are controlled by locally elected officials.

The RFP, containing the NIC and grant application, guidelines, proposal content requirements, service area descriptions, and specific selection criteria, will be available from *http://www.grants.lsc.gov* beginning April 11, 2011. LSC will not fax the RFP to interested parties.

Below are the service areas for which LSC is requesting grant proposals. Service area descriptions will be available from Appendix A of the RFP. LSC will post all updates and/or changes to this notice at *http://www.grants.lsc.gov.* Interested parties are asked to visit *http://www.grants.lsc.gov* regularly for updates on the LSC competitive grants process.

| State | Service area(s) |
|---|---|
| American Samoa. | AS–1 |
| Alaska | AK–1, NAK–1 |
| Arizona | AZ–2, NAZ–5 |
| California | CA–12, CA–14, CA–31, MCA |
| Connecticut | CT–1, NCT–1 |
| Delaware | DE–1, MDE |
| Guam | GU–1 |
| Idaho | ID–1, MID, NID–1 |
| Iowa | IA–3, MIA |
| Kansas | KS–1 |
| Maine | ME–1, MMX–1, NME–1 |
| Maryland | MD–1, MMD |
| Massachusetts | MA–10 |
| Micronesia | MP–1 |
| Minnesota | NMN–1 |
| Mississippi | NMS–1 |
| Nebraska | NE–4, MNE, NNE–1 |
| Nevada | NV–1, NNV–1 |
| New Hampshire | NH–1 |
| New Jersey | NJ–8, NJ–12, NJ–15, NJ–16, NJ–17, NJ–18, MNJ |
| New Mexico | NM–1, MNM, NNM–2 |
| Ohio | OH–5, OH–17 |
| Oregon | OR–6, MOR, NOR–1 |
| Pennsylvania | PA–11, PA–25 |
| Rhode Island | RI–1 |
| South Carolina | MSC |
| Utah | UT–1, MUT, NUT–1 |
| Vermont | VT–1 |
| Virgin Islands | VI–1 |
| Virginia | VA–15, VA–16 |

| State | Service area(s) |
|---|---|
| Washington ..... | WA–1, MWA, NWA–1 |
| West Virginia ... | MWV |
| Wisconsin ..... | WI–2, NWI–1 |
| Wyoming ..... | WY–4, NWY–1 |

Dated: March 17, 2011.

**Janet LaBella,**

*Director, Office of Program Performance, Legal Services Corporation.*

[FR Doc. 2011–6952 Filed 3–29–11; 8:45 am]

**BILLING CODE 7050–01–P**

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[Notice (11–027)]**

### NASA Advisory Council; Commercial Space Committee; Meeting

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the Commercial Space Committee of the NASA Advisory Council.

**DATES:** April 27, 2011, 2–3:30 p.m., Local Time.

**ADDRESSES:** NASA Headquarters, 300 E Street, SW., Glennan Conference Center Room 1Q39, Washington, DC 20546.

**FOR FURTHER INFORMATION CONTACT:** Mr. John Emond, Office of Chief Technologist, National Aeronautics and Space Administration, Washington, DC 20546. Phone 202–358–1686, *fax:* 202–358–3878, *john.l.emond@nasa.gov.*

**SUPPLEMENTARY INFORMATION:** In recognition of an upcoming meeting of the NASA Advisory Council, this Commercial Space Committee meeting will focus on potential observations, findings, and recommendations of the Committee to the NASA Advisory Council regarding NASA's implementation of programs to enable development of commercially viable space transportation capabilities. This deliberation will reflect on fact-finding presentations the Committee has received to date. The Committee may also explore other areas of commercial activities apart from commercial launch and transportation systems in their discussion.

The meeting will be open to the public up to the seating capacity of the room. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants. Visitors will need to show a valid picture identification such as a driver's license to enter the NASA Headquarters building (West Lobby—Visitor Control Center), and must state that they are attending the NASA Advisory Council Commercial Space Committee meeting in the Glennan Conference Center Room 1Q39 before receiving an access badge. All non-U.S citizens must fax a copy of their passport, and print or type their name, current address, citizenship, company affiliation (if applicable) to include address, telephone number, and their title, place of birth, date of birth, U.S. visa information to include type, number, and expiration date, U.S. Social Security Number (if applicable), and place and date of entry into the U.S., fax to John Emond, NASA Advisory Council, Commercial Space Committee Executive Secretary, *FAX:* (202) 358–3878, by no later than Wednesday April 13, 2011. To expedite admittance, attendees with U.S. citizenship can provide identifying information 3 working days in advance by contacting John Emond via e-mail at *john.l.emond@nasa.gov* or by telephone at (202) 358–1686 or *fax:* (202) 358–3878.

Dated: March 24, 2011.

**P. Diane Rausch,**

*Advisory Committee Management Office, National Aeronautics and Space Administration.*

[FR Doc. 2011–7372 Filed 3–29–11; 8:45 am]

**BILLING CODE 7510–13–P**

## NATIONAL CREDIT UNION ADMINISTRATION

### Sunshine Act; Notice Of Agency Meeting

**TIME AND DATE:** 9:30 a.m., Monday, April 4, 2011.

**PLACE:** Westin San Diego Hotel, Board Room, 3rd Floor, 400 West Broadway, San Diego, CA 92101.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:** 1. Consideration of Supervisory Activities. Closed pursuant to exemptions (8), (9)(A)(ii) and 9(B).

2. Personnel (2). Closed pursuant to exemption (2).

**FOR FURTHER INFORMATION CONTACT:** Mary Rupp, Secretary of the Board, Telephone: 703–518–6304.

**Mary Rupp,**

*Board Secretary.*

[FR Doc. 2011–7608 Filed 3–28–11; 4:15 pm]

**BILLING CODE P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2011–0060; Docket No. 50–271; License No. DPR–28]**

### In the Matter of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station; Director's Decision

#### I. Introduction

By letter dated April 19, 2010, Congressman Paul W. Hodes, U.S. House of Representatives, filed a Petition pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR), Section 2.206, "Requests for action under this subpart," with the Nuclear Regulatory Commission (NRC or the Commission). The Petition requested that the NRC not allow the Vermont Yankee Nuclear Power Station (Vermont Yankee), operated by Entergy Nuclear Operations, Inc. (Entergy or the licensee), to restart in May 2010 after its scheduled refueling outage until the completion of all environmental remediation work and relevant reports on leaking tritium at the plant. Specifically, the Petition asked the NRC to prevent Vermont Yankee from resuming power production until the following efforts have been completed to the Commission's satisfaction: (1) The tritiated groundwater remediation process; (2) the soil remediation process scheduled to take place during the refueling outage, to remove soil containing tritium and radioactive isotopes of cesium, manganese, zinc, and cobalt; (3) Entergy's root cause analysis; and (4) the Commission's review of the documents presented by Entergy as a result of the Commission's Demand for Information (DFI) imposed on the licensee on March 1, 2010.

This Petition was assigned to the NRC's Office of Nuclear Reactor Regulation (NRR) for review. NRR's Petition Review Board (PRB) met on May 3, 2010, and made an initial recommendation to accept this Petition for review. The NRC communicated this decision to the Petitioner's staff, who told the PRB that the Petitioner did not desire to address the PRB. The PRB's final recommendation was to accept the Petition for review. By letter dated May 20, 2010, Agencywide Documents Access and Management System (ADAMS) Accession No. ML101310049, the NRC informed the Petitioner of the PRB's recommendation and also stated that the NRC did not find cause to prohibit the restart of Vermont Yankee.

By letters dated May 14 and June 16, 2010, the Petitioner provided the NRC

with supplements to his Petition. After full consideration of the Petition and supplements, NRR has concluded that the actions requested in the Petition have been taken, with the exception of preventing the restart of Vermont Yankee. Therefore, NRR concludes that the Petition has been granted in part and denied in part, as explained below.

Copies of the Petition are available for inspection at the Commission's Public Document Room (PDR) at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852, and from the NRC's ADAMS Public Electronic Reading Room on the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html* under ADAMS Accession No. ML101120663. The supplemental letters are under ADAMS Accession Nos. ML101370031 and ML101720485. NRC Management Directive 8.11, "Review Process for 10 CFR 2.206 Petitions," ADAMS Accession No. ML041770328, describes the petition review process. Persons who do not have access to ADAMS or who have problems accessing the documents in ADAMS should contact the NRC PDR reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by e-mail to *pdr.resource@nrc.gov*.

The NRC sent a copy of the proposed Director's Decision to the Petitioner for comment on November 18, 2010, and to the licensee for comment on November 29, 2010. The Petitioner did not provide any comments. By e-mail dated December 21, 2010, ADAMS Accession No. ML110050341, the licensee provided minor comments. The licensee's comments and the NRC staff responses are discussed in the Attachment to this Director's Decision.

## II. Discussion

On January 7, 2010, Entergy reported to the NRC that water samples taken from groundwater monitoring well GZ–3 on site at Vermont Yankee showed tritium levels above background. GZ–3 is about 70 feet from the Connecticut River. Tritium is another name for the radioactive nuclide hydrogen-3. Tritium occurs naturally in the environment because of cosmic ray interactions. It is also produced by nuclear reactor operations, and can be legally discharged as a radioactive effluent under NRC regulations. Tritium is chemically identical to normal hydrogen (hydrogen-1), and, like normal hydrogen, tends to combine with oxygen to form water, which is referred to as tritiated water. The detection of tritiated water in the monitoring well indicated abnormal leakage from the nuclear plant. The Environmental Protection Agency's (EPA's) regulatory standard for tritium in drinking water is 20,000 picocuries per liter (pCi/L). Tritium was initially measured at levels up to about 17,000 pCi/L in monitoring well GZ–3. Water from monitoring well GZ–3 is not used for drinking water. Samples at other monitoring wells have also shown some tritium. The highest reading from any monitoring well has been about 2.5 million pCi/L, from monitoring well GZ–10. Entergy immediately started an investigation to identify the source of the tritium, and later installed additional monitoring wells to help locate the source.

Upon notification, the NRC staff initiated actions to review and assess the condition, including review of all available sampling data, hydrologic information and analyses, on-site inspection and assessment of Entergy's plans and process for investigating the condition, and independent determination of public health and safety consequences based on available information. NRC inspectors provided close regulatory oversight of Entergy's investigation in order to independently assure conformance with applicable NRC regulatory requirements, assess licensee performance, and evaluate the condition with respect to NRC's radiological release limits.

On February 27, 2010, following excavation and leak testing of the Advanced Off-Gas (AOG) system pipe tunnel, Entergy reported that it had identified leakage into the surrounding soil, and therefore to the groundwater, from an unsealed joint in the concrete tunnel wall. The AOG pipe tunnel is located about 15 feet underground. Also, piping inside the tunnel had previously been found to be leaking, and the drain inside the tunnel had been found to be clogged. Soil samples in the vicinity showed traces of radioactive isotopes. Entergy reported that the leakage to the environment had been stopped by isolating the piping and containing the water leaking from the AOG pipe tunnel. However, on May 28, 2010, Entergy reported a second leak from AOG piping into the soil. Entergy quickly isolated this leak and has sealed off that piping to prevent further leaks in that area. On June 8, 2010, Entergy reported a leak in the reactor building, which was not associated with the AOG system. The leak reported on June 8th was from a relief valve on a heat exchanger that started leaking to the building drain system. This leakage was collected and processed through the radioactive waste treatment system, and had no effect on the environment. The relief valve was replaced.

As part of its oversight effort, NRC staff conducted an evaluation in accordance with NRC Manual Chapter 0309, "Reactive Inspection Decision Basis for Reactors," to determine if the occurrence with the AOG piping constituted a significant operational event (*i.e.,* a radiological, safeguards, or other safety-related operational condition) that posed an actual or potential hazard to public health and safety, property, or the environment. The evaluation reviewed the condition against the specified deterministic criteria, which are based on regulatory safety limits, and determined that none of the criteria were met. Notwithstanding that determination, NRC staff continued on-going review, oversight, and assessment of the condition, including independent evaluation of any potential public health and safety consequence. These activities included:

1. Several on-site inspections and reviews to assess radiological and hydrological data to establish reasonable assurance that members of the public were not, nor expected to be, exposed to radiation in excess of the dose limits for individual members of the public specified in 10 CFR 20.1301, 100 millirem in a year; and determine if the licensee's performance was in conformance with applicable regulatory requirements.

2. Engagement of hydrological scientists from NRC's Office of Nuclear Reactor Regulation, Office of Regulatory Research, and the U.S. Geological Survey to independently assess the licensee's hydrological and geological data and conclusions on groundwater flow characteristics of the area.

3. Inspection in accordance with NRC Temporary Instruction TI–2515/173, "Review of the Implementation of the Industry Ground Water Protection Voluntary Initiative," to determine the licensee's implementation of the specifications in the industry's groundwater initiative document Nuclear Energy Institute (NEI)–07–07, "Industry Groundwater Protection Initiative—Final Guidance Document," ADAMS Accession No. ML072610036.

4. Independent confirmation of the basis, calculation methodology, and results obtained by the licensee to estimate a contaminated groundwater effluent release and off-site dose consequence to members of the public.

5. Independent analysis of selected groundwater and environmental samples to aid in determining the adequacy of the licensee's analytical methods.

6. Establishment of an approved deviation from NRC's normal Reactor

Oversight Process in order to expend additional NRC inspection resources to fully evaluate and provide continuing regulatory oversight of the licensee's investigation and remediation activities.

7. Documentation of inspection scope and conclusions in publicly available NRC Inspection Reports.

As a result of these activities, the NRC established reasonable assurance, in a timely manner, that this groundwater condition would not result in any dose consequence that would jeopardize public health and safety. To date, information and data continue to support the finding that the dose consequence attributable to the groundwater condition at Vermont Yankee remains well below the "as low as reasonably achievable" (ALARA) dose objectives specified in 10 CFR Part 50, Appendix I; and that the NRC regulatory criteria of 10 CFR 20.1301, "Dose limits for individual members of the public," were never approached.

In addition, the State of Vermont has provided support from the Vermont Department of Health, Office of Public Health Preparedness. The State of Vermont's Radiological Health Chief participated in the oversight of the tritium investigation, with direct onsite participation in inspections and data analysis. In addition, the State of Vermont has performed independent split sampling analyses of the groundwater monitoring samples.

*A. The Tritiated Groundwater Remediation Process*

On March 24, 2010, Entergy began removing tritiated water from extraction well GZ–EW1. On April 7, 2010, Entergy placed into service a second extraction well, GZ–EW1A, with a higher flow capacity. As the highest plume concentration progressed toward the Connecticut River, the extraction wells were sited accordingly, with GZ–15 being used for groundwater extraction at various times starting on July 28, 2010, followed by installation of extraction well EW–2, which began operation along with GZ–14 on September 13, 2010. As of December 21, 2010, Entergy had pumped approximately 307,000 gallons of groundwater out of these wells to reduce the amount of tritiated water in the groundwater. About 298,000 gallons of the extracted water has been shipped offsite for disposal at a licensed waste disposal facility, and the remainder was processed in the station's radioactive waste system. Entergy recently announced it intends to make additional groundwater withdrawals going forward. A plume of tritiated groundwater extends from the source of the leak to the Connecticut River, which is the direction of flow for the groundwater in this location. Although no detectable tritium has been found in the Connecticut River, the hydrology model indicates that there has been some flow into the river, and some flow will continue as rainwater recharges the groundwater. The NRC's inspections indicate that no federal regulatory limits have been or are expected to be exceeded, and there are no health or safety concerns for members of the public or plant workers.

*B. The Soil Remediation Process*

The soil in the vicinity of the leak was contaminated with small amounts of other radioactive nuclides associated with nuclear plant operations, including manganese-54, cobalt-60, zinc-65, strontium-90, and cesium-137. Sampling indicated very little migration in the immediate area, which is typical for these radionuclides. Entergy has removed about 150 cubic feet of contaminated soil, and packaged it for disposal at a licensed disposal facility. Although some minor amounts of soil contaminated with these other radionuclides may remain, NRC inspections indicate that this soil poses no threat to public health and safety. Areas of minor contamination are evaluated and remediated as needed during plant decommissioning in accordance with 10 CFR 50.82. The NRC's experience with decommissioning nuclear plants such as Maine Yankee, Haddam Neck, and Yankee Rowe indicates that these areas can be successfully remediated at that time. The NRC's inspections indicate that no federal regulatory limits have been exceeded, and there are no health or safety concerns for members of the public or plant workers. The initial NRC inspection covered the period of January 25 through April 14, 2010. Inspection results were initially discussed in an NRC letter with preliminary results, dated April 16, 2010, ADAMS Accession No. ML101060419. The NRC issued its completed report on May 20, 2010, ADAMS Accession No. ML101400040, and continues to inspect the licensee's actions in these areas.

*C. Entergy's Root Cause Analysis*

As part of its corrective action program, Entergy performed a root cause analysis (RCA) of the leakage event. The NRC assessed the comprehensiveness of this analysis and documented this review in NRC Inspection Report 05000271/2010009 dated October 13, 2010, ADAMS Accession No. ML102860037. The NRC concluded that Entergy's root and apparent cause evaluations for the tritium groundwater leakage events were appropriate, although the agency noted some performance deficiencies. No violation of NRC requirements was identified.

*D. The NRC's Demand for Information*

On February 24, 2010, Entergy informed the NRC that it had removed some employees at Vermont Yankee from their site positions and placed them on administrative leave. Entergy took these actions as a result of its independent internal investigation into alleged contradictory or misleading information provided to the State of Vermont that was not corrected. In light of Entergy's investigation and resulting actions, the NRC issued a DFI dated March 1, 2010, ADAMS Accession No. ML100570237, requiring Entergy to confirm whether communications over the past 5 years to the NRC by these individuals, that were material to NRC-regulated activities, were complete and accurate. Entergy responded to the NRC on March 31, 2010, ADAMS Accession No. ML100910420. The NRC's review of Entergy's DFI response and Entergy's communications did not identify any cases of incomplete or inaccurate statements to the NRC. The NRC closed the review of the DFI response in a letter to Entergy dated June 17, 2010, ADAMS Accession No. ML101670271. Based on this review, the NRC concludes that Entergy's communications with the NRC have been accurate and have met regulatory requirements. The NRC also concluded that the site employees continue to demonstrate an appropriate safety culture.

*E. NRC Actions Pertaining to Groundwater Contamination*

In March of 2010, NRC's Executive Director of Operations (EDO) established a Groundwater Task Force (GTF) to review the NRC's approach to overseeing buried pipes given the recent incidents of leaking buried pipes at commercial nuclear power plants. The charter of the Task Force was to reevaluate the recommendations made in the Liquid Radioactive Release Lessons Learned Task Force Final Report dated September 1, 2006, ADAMS Accession No. ML062650312; review the actions taken in the Commission paper SECY–09–0174 (Staff Progress in Evaluation of Buried Piping at Nuclear Reactor Facilities, dated December 2, 2009, ADAMS Accession No. ML093160004); and review the actions taken in response to recent releases of tritium into groundwater by nuclear facilities.

The GTF completed its work in June 2010 and provided its report to the EDO.

The report characterized a variety of issues ranging from policy issues to communications improvement opportunities. The complete report may be found under ADAMS Accession No. ML101680435. The GTF determined that the NRC is accomplishing its stated mission of protecting public health, safety, and protection of the environment through its response to groundwater leaks/spills. Within the current regulatory structure, the NRC is correctly applying requirements and properly characterizing the relevant issues. However, the GTF reported that there are further observations, conclusions, and recommendations that the NRC should consider in its oversight of licensed material outside of its design confinement.

The EDO appointed a group of NRC senior executives to review the report and consider its findings. Over the past several months, the group has been reviewing the GTF final report, including the conclusions, recommendations, and their bases. They identified conclusions and recommendations that do not involve policy issues, and tasked the NRC staff to address them. They have also identified policy issues, are developing options to address them, and will send a policy paper to the Commission discussing those options.

The NRC held a public workshop on October 4, 2010, with external stakeholders to discuss the findings of the GTF report and to receive input on the potential policy issues. In addition, a request for public comment was published in the **Federal Register** (75 FR 57987, September 23, 2010). These efforts help to ensure the NRC is considering the right issues on which to focus its attention as it moves forward. The transcript from this meeting is available on the NRC's Web site at: *http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/buried-pipes-tritium.html.*

## III. Conclusion

Based on the information summarized above, the NRC staff concludes that the activities requested by the Petitioner have been completed, with the exception of preventing the restart of Vermont Yankee. Therefore, NRR concludes that the Petition has been granted in part and denied in part. Related documentation includes an NRC letter to Entergy on increased oversight dated April 8, 2010, ADAMS Accession No. ML100990458.

As provided in 10 CFR 2.206(c), a copy of this Director's Decision will be filed with the Secretary of the Commission for the Commission to review. As provided for by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

Dated at Rockville, Maryland, this 27 day of January 2011.

For The Nuclear Regulatory Commission.

**Eric J. Leeds,**

*Director, Office of Nuclear Reactor Regulation.*

**ATTACHMENT TO THE FINAL DIRECTOR'S DECISION; DISCUSSION OF COMMENTS ON THE PROPOSED DIRECTOR'S DECISION FROM THE LICENSEE, AND THE NRC STAFF RESPONSES**

By e-mail dated December 21, 2010, ADAMS Accession No. ML110050341, the licensee provided comments on the proposed Director's Decision on the Petition filed by Congressman Paul Hodes pursuant to 10 CFR 2.206, "Requests for action under this subpart." The licensee's comments and corresponding response from the NRC staff are provided below:

*Comment 1:*

Section II, "Discussion:

a) GZ–3 is actually located approximately 70 ft from the Connecticut River. Actual distance depends on river stage.

b) The highest reading from any monitoring well has been 2.52 million pci/L (measured on 2/8/2010) from monitoring well GZ–10.

c) On June 8th, Entergy reported a leak in the reactor building (June 8th was the date that RHR relief valve leakage was discovered. This required a 4-hour notification to the NRC).

*The NRC Staff Response:*

Revised the Director's Decision to reflect the comments.

*Comment 2:*

A. *The Tritiated Groundwater Remediation Process:*

a) Monitoring well GZ–15 was utilized for groundwater extraction from July 28, 2010, until September 2, 2010, and again from October 28, 2010, until November 8, 2010.

b) As of December 21, 2010, Entergy has pumped 307,000 gallons of groundwater.

c) About 298,000 gallons of water was shipped offsite for disposal and 9,000 gallons was returned to the station's liquid radioactive waste system for in-plant use.

d) Evaluation of continued extraction is on-going.

e) On March 23, 2010, Entergy installed an extraction well (GZ–EW1). (The well was installed on 3/23 and placed in service on 3/24).

*The NRC Staff Response:*

Revised the Director's Decision to reflect the comments.

[FR Doc. 2011–7453 Filed 3–29–11; 8:45 am]

BILLING CODE 7590–01–P

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–338 and 50–339; NRC–2010–0283]**

## Virginia Electric and Power Company North Anna Power Station, Units 1 and 2; Exemption

### 1.0 Background

Virginia Electric and Power Company (VEPCO, the licensee) is the holder of Facility Operating License Nos. NPF–4 and NPF–7 which authorizes operation of the North Anna Power Station, Units 1 and 2 (NAPS). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect.

The facility consists of a pressurized-water reactor located in Louisa County, Virginia.

### 2.0 Request/Action

Title 10 of the Code of Federal Regulations (10 CFR), Part 50, Section 50.46, "Acceptance criteria for emergency core cooling systems [ECCS] for light-water nuclear power reactors," requires that each power reactor meet the acceptance criteria for ECCS provided therein for zircaloy or ZIRLO™ cladding. Appendix K of 10 CFR Part 50, "ECCS Evaluation Models," requires the rate of energy release, hydrogen generation, and cladding oxidation from the metal/water reaction to be calculated using the Baker-Just equation (Baker, L., Just, L.C., "Studies of Metal Water Reactions at High Temperatures, III. Experimental and Theoretical Studies of the Zirconium-Water Reaction," ANL–6548, page 7, May 1962).

Both of the above requirements require the use of zircaloy or ZIRLO™ cladding. The licensee proposes to use Optimized ZIRLO™ as the cladding material and therefore is requesting an exemption from the requirements.

In summary, by letter dated May 6, 2010, (Agencywide Documents Access and Management System (ADAMS), Accession No. ML101260517), the licensee requested an exemption from the requirements of 10 CFR 50.46 and Appendix K to 10 CFR part 50. The reason for the exemption is to allow the use of Optimized ZIRLO™ as a cladding material.

### 3.0 Discussion

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the

requirements of 10 CFR part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) when special circumstances are present. These circumstances include the special circumstances that application of the regulation is not necessary to achieve the underlying purpose of the rule.

*Authorized by Law*

This exemption would allow the licensee to use Optimized ZIRLO™ fuel rod cladding material at NAPS. As stated above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR part 50. The NRC staff has determined that granting of the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

*No Undue Risk to Public Health and Safety*

The underlying purpose of 10 CFR 50.46 is to establish acceptance criteria for adequate ECCS performance. By letter dated June 10, 2005 (ADAMS Accession No. ML051670408), the NRC staff issued a safety evaluation (SE) approving Addendum 1 to Westinghouse Topical Report WCAP–12610–P–A and CENPD–404–P–A, "Optimized ZIRLO™" (ADAMS Accession No. ML062080576) (portions of this topical report are non-publicly available because they contain proprietary information) (the report with the proprietary information removed is available at ADAMS Accession No. ML062080569), wherein the NRC staff approved the use of Optimized ZIRLO™ as a fuel cladding material. The NRC staff approved the use of Optimized ZIRLO™ as a fuel cladding material based on: (1) Similarities with ZIRLO™, (2) demonstrated material performance, and (3) a commitment to provide irradiated data and validate fuel performance models ahead of burnups achieved in batch application. The NRC staff's SE for Optimized ZIRLO™ includes 10 conditions and limitations for its use. As previously documented in the NRC staff's review of topical reports submitted by Westinghouse Electric Company, LLC (Westinghouse), and subject to compliance with the specific conditions of approval established therein, the NRC staff finds that the applicability of these ECCS acceptance criteria to Optimized ZIRLO™ has been demonstrated by Westinghouse. Ring compression tests performed by Westinghouse on Optimized ZIRLO™ (NRC-reviewed, approved, and documented in Appendix B of WCAP–12610–P–A and CENPD–404–P–A, Addendum 1–A, "Optimized ZIRLO™") (ADAMS Accession No. ML062080576) demonstrate an acceptable retention of post-quench ductility up to 10 CFR 50.46 limits of 2200° Fahrenheit and 17 percent equivalent clad reacted. Furthermore, the NRC staff has concluded that oxidation measurements provided by the licensee illustrate that oxide thickness (and associated hydrogen pickup) for Optimized ZIRLO™ at any given burnup would be less than both zircaloy-4 and ZIRLO™. Hence, the NRC staff concludes that Optimized ZIRLO™ would be expected to maintain better post-quench ductility than ZIRLO™. This finding is further supported by an ongoing loss-of-coolant accident (LOCA) research program at Argonne National Laboratory, which has identified a strong correlation between cladding hydrogen content (due to in-service corrosion) and post-quench ductility.

The underlying purpose of 10 CFR part 50, Appendix K, Section I.A.5, "Metal-Water Reaction Rate," is to ensure that cladding oxidation and hydrogen generation are appropriately limited during a LOCA and conservatively accounted for in the ECCS evaluation model. Appendix K states that the rates of energy release, hydrogen concentration, and cladding oxidation from the metal-water reaction shall be calculated using the Baker-Just equation. Since the Baker-Just equation presumes the use of zircaloy clad fuel, strict application of the rule would not permit use of the equation for Optimized ZIRLO™ cladding for determining acceptable fuel performance. However, the NRC staff has found that metal-water reaction tests performed by Westinghouse on Optimized ZIRLO™ demonstrate conservative reaction rates relative to the Baker-Just equation and are bounding for those approved for ZIRLO™ under anticipated operational occurrences and postulated accidents.

Based on the above, no new accident precursors are created by using Optimized ZIRLO™, thus, the probability of postulated accidents is not increased. Also, based on the above, the consequences of postulated accidents are not increased. Therefore, there is no undue risk to public health and safety.

*Consistent With Common Defense and Security*

The proposed exemption would allow the use of Optimized ZIRLO™ fuel rod cladding material at NAPS. This change to the plant configuration has no relation to security issues. Therefore, the common defense and security is not impacted by this exemption.

*Special Circumstances*

Special circumstances, in accordance with 10 CFR 50.12(a)(2)(ii), are present whenever application of the regulation in the particular circumstances is not necessary to achieve the underlying purpose of the rule. The underlying purpose of 10 CFR 50.46 and Appendix K to 10 CFR part 50 is to establish acceptance criteria for ECCS performance and to ensure that cladding oxidation and hydrogen generation are appropriately limited during a LOCA and conservatively accounted for in the ECCS evaluation model. The wording of the regulations in 10 CFR 50.46 and Appendix K is not directly applicable to Optimized ZIRLO™, even though the evaluations above show that the intent of the regulation is met. Therefore, since the underlying purposes of 10 CFR 50.46 and Appendix K are achieved through the use of Optimized ZIRLO™ fuel rod cladding material, the special circumstances required by 10 CFR 50.12(a)(2)(ii) for the granting of an exemption from certain requirements of 10 CFR 50.46 and Appendix K exist.

## 4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12, the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, the Commission hereby grants VEPCO an exemption from certain requirements of 10 CFR 50.46 and Appendix K to 10 CFR Part 50, to allow the use of Optimized ZIRLO™ fuel rod cladding material, for NAPS.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment as published in the **Federal Register** on September 2, 2010 (75 FR 53984).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 23rd day of March 2011.

For the Nuclear Regulatory Commission.

**Joseph G. Giitter,**

*Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2011–7455 Filed 3–29–11; 8:45 am]

**BILLING CODE 7590–01–P**

## POSTAL REGULATORY COMMISSION

**[Docket No. A2011–11; Order No. 702]**

## Post Office Closing

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** This document informs the public that an appeal of the closing of the Ida Post Office in Ida, Arkansas has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioner, and others to take appropriate action.

**DATES:** *Administrative record due (from Postal Service):* April 6, 2011; *deadline for notices to intervene:* April 18, 2011. *See* the Procedural Schedule in the **SUPPLEMENTARY INFORMATION** section for other dates of interest.

**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:** Notice is hereby given that, pursuant to 39 U.S.C. 404(d), on March 22, 2011, the Commission received a petition for review of the Postal Service's determination to close the Ida, Arkansas post office. The petition, which was filed by the Committee to Save Ida Post Office (Petitioner), is postmarked March 16, 2011, and was posted on the Commission's Web site March 22, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2011–11 to consider the Petitioner's appeal. If the Petitioner would like to further explain its position with supplemental information or facts, the Petitioner may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than April 26, 2011.

*Categories of issues apparently raised.* The Petitioner raises the issue of failure to consider the effect on the community. *See* 39 U.S.C. 404(d)(2)(A)(i).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than the one set forth above, or that the Postal Service's determination disposes of one or more of those issues. The deadline for the Postal Service to file the administrative record with the Commission is April 6, 2011. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this Notice is April 6, 2011.

*Availability; Web site posting.* The Commission has posted the appeal and supporting material on its Web site at *http://www.prc.gov.* Additional filings in this case and participants' submissions also will be posted on the Commission's Web site, if provided in electronic format or amenable to conversion, and not subject to a valid protective order. Information on how to use the Commission's Web site is available online or by contacting the Commission's webmaster via telephone at 202–789–6873 or via electronic mail at *prc-webmaster@prc.gov.*

The appeal and all related documents also are available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Monday through Friday, except on Federal government holidays. Docket section personnel may be contacted via electronic mail at *prc-dockets@prc.gov* or via telephone at 202–789–6846.

*Filing of documents.* All filings of documents in this case shall be made using the Internet (Filing Online) pursuant to Commission rules 9(a) and 10(a) at the Commission's Web site, *http://www.prc.gov,* unless a waiver is obtained. *See* 39 CFR 3001.9(a) and 3001.10(a). Instructions for obtaining an account to file documents online may be found on the Commission's Web site or by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at 202–789–6846.

The Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

*Intervention.* Those, other than the Petitioner and respondent, wishing to be heard in this matter are directed to file a notice of intervention. *See* 39 CFR 3001.111(b). Notices of intervention in this case are to be filed on or before April 18, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site unless a waiver is obtained for hardcopy filing. *See* 39 CFR 3001.9(a) and 3001.10(a).

*Further procedures.* By statute, the Commission is required to issue its decision within 120 days from the date it receives the appeal. *See* 39 U.S.C. 404(d)(5). A procedural schedule has been developed to accommodate this statutory deadline. In the interest of expedition, in light of the 120-day decision schedule, the Commission may request the Postal Service or other participants to submit information or memoranda of law on any appropriate issue. As required by the Commission rules, if any motions are filed, responses are due 7 days after any such motion is filed. *See* 39 CFR 3001.21.

*It is ordered:*

1. The Postal Service shall file the administrative record regarding this appeal no later than April 6, 2011.

2. Any responsive pleading by the Postal Service to this Notice is due no later than April 6, 2011.

3. The procedural schedule listed below is hereby adopted.

4. Pursuant to 39 U.S.C. 505, Cassandra L. Hicks is designated officer of the Commission (Public Representative) to represent the interests of the general public.

5. The Secretary shall arrange for publication of this Notice and Order in the **Federal Register**.

PROCEDURAL SCHEDULE

| | |
|---|---|
| March 22, 2011 | Filing of Appeal. |
| April 6, 2011 | Deadline for Postal Service to file administrative record in this appeal. |
| April 6, 2011 | Deadline for the Postal Service to file any responsive pleading. |
| April 18, 2011 | Deadline for notices to intervene (*see* 39 CFR 3001.111(b)). |

PROCEDURAL SCHEDULE—Continued

| | |
|---|---|
| April 26, 2011 | Deadline for Petitioner's Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)). |
| May 16, 2011 | Deadline for answering brief in support of Postal Service (*see* 39 CFR 3001.115(c)). |
| May 31, 2011 | Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)). |
| June 7, 2011 | Deadline for motions by any party requesting oral argument; the Commission will schedule oral argument only when it is a necessary addition to the written filings (*see* 39 CFR 3001.116). |
| July 14, 2011 | Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)). |

By the Commission.

**Shoshana M. Grove,**

*Secretary.*

[FR Doc. 2011–7396 Filed 3–29–11; 8:45 am]

**BILLING CODE 7710–FW–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 29616; 812–13801]**

## Simple Alternatives, LLC and The RBB Fund, Inc.; Notice of Application

Date: March 24, 2011.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of an application under section 6(c) of the Investment Company Act of 1940 ("Act") for an exemption from section 15(a) of the Act and rule 18f–2 under the Act, as well as from certain disclosure requirements.

**SUMMARY OF APPLICATION:** Applicants request an order that would permit them to enter into and materially amend subadvisory agreements without shareholder approval and would grant relief from certain disclosure requirements.

**APPLICANTS:** Simple Alternatives, LLC ("Simple Alternatives") and The RBB Fund, Inc. (the "Company").

**FILING DATES:** The application was filed on July 23, 2010, and amended on December 22, 2010 and March 11, 2011.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on April 18, 2011, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. *Applicants:* c\o Gilbert H. Davis, Esq., Sims Moss Kline & Davis LLP, Suite 1700, Three Ravinia Drive, Atlanta, Georgia 30346.

**FOR FURTHER INFORMATION CONTACT:** Emerson S. Davis, Sr., Senior Counsel, at (202) 551–6868, or Janet M. Grossnickle, Assistant Director, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

### Applicants' Representations

1. The Company, a Maryland corporation, is registered under the Act as an open-end management investment company and offers eighteen series, including the S1 Fund ("S1 Fund").[1] Simple Alternatives is registered as an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act") and serves as the investment adviser to the S1 Fund. An Adviser will serve as the investment adviser to each Fund pursuant to an investment advisory agreement ("Advisory Agreement") with the Fund. Each Advisory Agreement will be approved by the Company's board of directors ("Board"), including a majority of the directors who are not "interested persons," as defined in section 2(a)(19) of the Act, of the Company or the Adviser ("Independent Directors") and by the initial shareholder of the Fund.

2. Under the terms of each Advisory Agreement, the Adviser will be responsible for the overall management of the Fund's business affairs and selecting the Funds' investments in accordance with its investment objectives, policies and restrictions. For the investment management services that it provides to the Fund, the Adviser will receive the fee specified in the Advisory Agreement. The Advisory Agreement also permits the Adviser to retain one or more subadvisers, at its own cost and expense, for the purpose of managing the investments of the Funds. Pursuant to this authority, the Adviser will enter into investment subadvisory agreements ("Subadvisory Agreements") with certain unaffiliated subadvisers (each, a "Subadviser") to provide investment advisory services to the Funds. Simple Alternatives currently employs eight Subadvisers for the S1 Fund. Each Subadviser is and each future Subadviser will be registered as an investment adviser under the Advisers Act. The Adviser will supervise, evaluate and allocate assets to the Subadvisers, and make recommendations to the Board about their hiring, retention or termination, at all times subject to the authority of the Board.

3. Applicants request an order to permit the Adviser, subject to Board approval, to enter into and materially amend Subadvisory Agreements without obtaining shareholder approval. The requested relief will not extend to any subadviser that is an affiliated person, as defined in section 2(a)(3) of the Act, of the Company, a Fund or the Adviser, other than by reason of serving as a subadviser to the Fund ("Affiliated Subadviser").

[1] Applicants also request relief with respect to existing and future series of the Company and any other existing or future registered open-end management investment company or series thereof that: (a) Is advised by Simple Alternatives or any entity controlling, controlled by or under common control with Simple Alternatives (each, an "Adviser"); (b) uses the manager of managers structure described in the application (the "Manager of Managers Structure") and (c) complies with the terms and conditions of this application (together with the S1 Fund, the "Funds" and each, individually, a "Fund"). The only existing registered open-end management investment company that currently intends to rely on the requested order is named as an applicant. If the name of any Fund contains the name of a Subadviser (as defined below), the name of the Adviser that serves as the primary adviser to the Fund will precede the name of the Subadviser.

4. Applicants also request an exemption from the various disclosure provisions described below that may require the Funds to disclose fees paid by the Adviser to the Subadvisers. An exemption is requested to permit the each Fund to disclose (as both a dollar amount and as a percentage of the respective Fund's net assets): (a) The aggregate fees paid to the Adviser and any Affiliated Subadvisers; and (b) the aggregate fees paid to Subadvisers (collectively, "Aggregate Fee Disclosure"). Any Fund that employs an Affiliated Subadviser also will provide separate disclosure of any fees paid to any Affiliated Subadviser.

**Applicants' Legal Analysis**

1. Section 15(a) of the Act provides, in relevant part, that it is unlawful for any person to act as an investment adviser to a registered investment company except pursuant to a written contract that has been approved by the vote of a majority of the company's outstanding voting securities. Rule 18f–2 under the Act provides that each series or class of stock in a series investment company affected by a matter must approve that matter if the Act requires shareholder approval.

2. Form N–1A is the registration statement used by open-end investment companies. Item 19(a)(3) of Form N–1A requires disclosure of the method and amount of the investment adviser's compensation.

3. Rule 20a–1 under the Act requires proxies solicited with respect to an investment company to comply with Schedule 14A under the Securities Exchange Act of 1934 ("1934 Act"). Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A, taken together, require a proxy statement for a shareholder meeting at which the advisory contract will be voted upon to include the "rate of compensation of the investment adviser," the "aggregate amount of the investment adviser's fees," a description of the "terms of the contract to be acted upon," and, if a change in the advisory fee is proposed, the existing and proposed fees and the difference between the two fees.

4. Regulation S–X sets forth the requirements for financial statements required to be included as part of investment company registration statements and shareholder reports filed with the Commission. Sections 6–07(2)(a), (b) and (c) of Regulation S–X require that investment companies include in their financial statements information about investment advisory fees.

5. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provisions of the Act, or from any rule thereunder, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants state that the requested relief meets this standard for the reasons discussed below.

6. Applicants assert that the shareholders are relying on the Adviser's expertise to select one or more Subadvisers best suited to achieve a Fund's investment objectives. Applicants assert that, from the perspective of the shareholder, the role of the Subadvisers is substantially equivalent to that of the individual portfolio managers employed by traditional advisory firms. Applicants state that requiring shareholder approval of each Subadvisory Agreement would subject a Fund to expenses and delays and may preclude the Adviser from acting promptly. Applicants note that the Advisory Agreement and any subadvisory agreement with an Affiliated Subadviser will remain subject to section 15(a) of the Act and rule 18f–2 under the Act.

7. Applicants assert that Subadvisers use a "posted" rate schedule to set their fees. Applicants state that, while Subadvisers are willing to negotiate fees lower than those posted in the schedule, they are reluctant to do so where the fees are disclosed to the public and other Subadvisers. Applicants submit that the requested relief will allow the Adviser to negotiate more effectively with Subadvisers.

**Applicants' Conditions**

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Before a Fund may rely on the requested order, the operation of the Fund in the manner described in the application will be approved by a majority of the Fund's outstanding voting securities, as defined in the Act, or in the case of a Fund whose public shareholders purchase shares on the basis of a prospectus containing the disclosure contemplated by condition 2 below, by the initial shareholder(s) before offering shares of that Fund to the public.

2. Each Fund relying on the requested order will disclose in its prospectus the existence, substance, and effect of any order granted pursuant to this application. Each Fund will hold itself out to the public as utilizing the Manager of Managers Structure. The prospectus will prominently disclose that the Adviser has ultimate responsibility (subject to oversight by the Board) to oversee the Subadvisers and recommend their hiring, termination, and replacement.

3. Within 90 days of the hiring of a new Subadviser, Fund shareholders will be furnished all information about the new Subadviser that would be included in a proxy statement, except as modified to permit Aggregate Fee Disclosure. This information will include Aggregate Fee Disclosure and any change in disclosure caused by the addition of the new Subadviser. To meet this obligation, each Fund will provide shareholders, within 90 days of the hiring of a new Subadviser, an information statement meeting the requirements of Regulation 14C, Schedule 14C and Item 22 of Schedule 14A under the 1934 Act, except as modified by the order to permit Aggregate Fee Disclosure.

4. An Adviser will not enter into a Subadvisory Agreement with any Affiliated Subadviser without such agreement, including the compensation to be paid thereunder, being approved by the shareholders of the applicable Fund.

5. At all times, at least a majority of the Board will be Independent Directors, and the nomination of new or additional Independent Directors will be placed within the discretion of the then-existing Independent Directors.

6. Whenever a subadviser change is proposed for a Fund with an Affiliated Subadviser, the Board, including a majority of the Independent Directors, will make a separate finding, reflected in the applicable Board minutes, that such change is in the best interests of the Fund and its shareholders, and does not involve a conflict of interest from which the Adviser or the Affiliated Subadviser derives an inappropriate advantage.

7. Independent legal counsel, as defined in rule 0–1(a)(6) under the Act, will be engaged to represent the Independent Directors. The selection of such counsel will be within the discretion of the then-existing Independent Directors.

8. Each Adviser will provide the Board, no less frequently than quarterly, with information about the profitability of the Adviser on a per-Fund basis. The information will reflect the impact on profitability of the hiring or termination of any Subadviser during the applicable quarter.

9. Whenever a Subadviser is hired or terminated, the Adviser will provide the Board with information showing the expected impact on the profitability of the Adviser.

10. An Adviser will provide general management services to each Fund, including overall supervisory responsibility for the general management and investment of each Fund's assets and, subject to review and approval of the Board, will: (a) Set each Fund's overall investment strategies; (b) evaluate, select and recommend Subadvisers to manage all or a part of each Fund's assets; (c) allocate and, when appropriate, reallocate each Fund's assets among one or more Subadvisers; (d) monitor and evaluate the performance of Subadvisers; and (e) implement procedures reasonably designed to ensure that the Subadvisers comply with each Fund's investment objective, policies and restrictions.

11. No Director or officer of the Company or a Fund, or director, manager, or officer of an Adviser, will own directly or indirectly (other than through a pooled investment vehicle that is not controlled by such person), any interest in a Subadviser, except for (a) ownership of interests in the Adviser or any entity that controls, is controlled by, or is under common control with the Adviser or (b) ownership of less than 1% of the outstanding securities of any class of equity or debt of any publicly traded company that is either a Subadviser or an entity that controls, is controlled by, or is under common control with a Subadviser.

12. Each Fund will disclose in its registration statement the Aggregate Fee Disclosure.

13. In the event the Commission adopts a rule under the Act providing substantially similar relief to that in the order requested in the application, the requested order will expire on the effective date of that rule.

For the Commission, by the Division of Investment Management, under delegated authority.

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–7417 Filed 3–29–11; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Rel. No. IC–29617; File No. 812–13842]**

## American Family Life Insurance Company, et al.

March 24, 2011.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of application for an order under Section 26(c) of the Investment Company Act of 1940, as amended (the "1940 Act").

**APPLICANTS:** American Family Life Insurance Company (the "Company"), American Family Variable Account I (the "Life Account"), and American Family Variable Account II (the "Annuity Account") (together, the "Applicants").

**SUMMARY OF APPLICATION:** Applicants request an order of the Commission, pursuant to Section 26(c) of the 1940 Act, approving the substitution of shares of the Vanguard Capital Growth Portfolio ("Replacement Portfolio") of the Vanguard Variable Insurance Fund ("Vanguard Fund") for Service Class 2 Shares of the Fidelity Variable Insurance Products Growth Portfolio ("Replaced Portfolio") of the Fidelity Variable Insurance Products Fund ("Fidelity Fund"), currently held by the Life Account and the Annuity Account (each an "Account," together, the "Accounts") to support variable life insurance and annuity contracts issued by the Company (collectively, the "Contracts").

**DATES:** *Filing Date:* The application was filed on November 10, 2010 and amended and restated on February 28, 2011.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving Applicants with a copy of the request, personally or by mail. Hearing requests must be received by the Commission by 5:30 p.m. on April 20, 2011, and should be accompanied by proof of service on Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requester's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the Commission.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicants, c/o David C. Holman, Esq., American Family Life Insurance Company, 6000 American Parkway, Madison, Wisconsin 53783–0001. Copy to Thomas E. Bisset, Esq., Sutherland Asbill & Brennan LLP, 1275 Pennsylvania Ave., NW., Washington, DC 20004–2415.

**FOR FURTHER INFORMATION CONTACT:** Michael L. Kosoff, Branch Chief, at (202) 551–6754 or Harry Eisenstein, Senior Special Counsel, Office of Insurance Products, Division of Investment Management, at (202) 551–6795.

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm,* or by calling (202) 551–8090.

### Applicants' Representation

1. The Company is a stock life insurance company organized under Wisconsin law. The Company conducts a conventional life insurance business and is authorized to transact the business of life insurance, including annuities, in nineteen States. For purposes of the 1940 Act, the Company is the depositor and sponsor of each of the Accounts as those terms have been interpreted by the Commission with respect to variable life insurance and variable annuity separate accounts.

2. Under the insurance law of Wisconsin, the assets of each Account attributable to the Contracts issued through that Account are owned by the Company, but are held separately from the other assets of the Company for the benefit of the owners of, and the persons entitled to payment under, those Contracts. Each Account is a "separate account" as defined by Rule 0–1(e) under the 1940 Act, and is registered with the Commission as a unit investment trust.[1] Each Account is comprised of a number of subaccounts and each subaccount invests exclusively in one of the insurance dedicated mutual fund portfolios made available as investment vehicles underlying the Contracts. Currently, the Replaced Portfolio is available as an investment option under the Company's variable life insurance and variable annuity Contracts.

3. The Life Account is currently divided into nine (9) subaccounts. The assets of the Life Account support variable life insurance contracts and interests in the Account offered through such contracts have been registered under the Securities Act of 1933, as amended (the "1933 Act"), on Form N–6 (File Nos. 333–44956 and 333–147408).

4. The Annuity Account is currently divided into nine (9) subaccounts. The assets of the Annuity Account support variable annuity contracts and interests in the Account offered through such contracts have been registered under the 1933 Act on Form N–4 (File No. 333–45592).

[1] File No. 811–10097 (the Life Account); File No. 811–10121 (the Annuity Account).

5. The Fidelity Fund is registered as an open-end management investment company under the 1940 Act (File No. 811–03329) and currently offers six (6) investment portfolios, each with multiple share classes. The Fidelity Fund issues a series of shares of beneficial interest in connection with each portfolio and has registered such shares under the 1933 Act on Form N–1A (File No. 002–75010).

6. Each portfolio of the Fidelity Fund has entered into an advisory agreement with Fidelity Management & Research Company ("FMR") under which FMR acts as investment adviser for the portfolio. Under each investment advisory agreement, and subject to the supervision of the Fidelity Fund board of trustees, FMR has overall responsibility for the selection of investments in accordance with the investment objective, policies, and limitations of the portfolio and for handling the portfolio's business affairs. FMR or its affiliates, subject to the supervision of the Fidelity Fund board of directors, provide the management and administrative services necessary for the operation of each portfolio. Each portfolio of the Fidelity Fund does, however, pay for the typesetting, printing, and mailing of its proxy materials to shareholders, legal expenses, and the fees of the custodian, auditor, and independent trustees, among other fees and expenses.

7. FMR Co., Inc. ("FMRC"), an investment adviser affiliate of FMR, has entered into a sub-advisory agreement with FMR under which FMRC acts as sub-adviser for certain of the portfolios of the Fidelity Fund, including the Replaced Portfolio. FMRC has day-to-day responsibility for choosing investments for the Replaced Portfolio. FMR pays FMRC for providing sub-advisory services.

8. Fidelity Research & Analysis Company ("FRAC"), an affiliate of FMR, also serves as sub-adviser for the Fidelity Fund and may provide investment research and advice for the Fidelity Fund, including the Replaced Portfolio. Fidelity Management & Research (U.K.) Inc. ("FMR U.K."), Fidelity Management & Research (Hong Kong) Limited ("FMR H.K."), Fidelity Management & Research (Japan) Inc. ("FMR Japan"), FIL International Investment Advisors ("FIIA"), FIL Investment Advisors (U.K.) Ltd. ("FIIA(U.K.)L"), and FIL Investments (Japan) Limited ("FIJ"), all investment adviser affiliates of FMR, assist FMR with foreign investments of the Replaced Portfolio.

9. Neither the Fidelity Fund, any of its portfolios, FMR, FMRC, FRAC, FMR U.K., FMR H.K., FMR Japan, FIIA, FIIA(U.K.)L, nor FIJ are affiliated with the Applicants. The Fidelity Fund does not have manager-of-manager relief for the Replaced Portfolio.

10. The Vanguard Variable Insurance Fund is registered as an open-end management investment company under the 1940 Act (File No. 811–05962) and currently offers fifteen (15) portfolios, including the Replacement Portfolio. The Vanguard Fund issues a series of shares of beneficial interest in connection with each portfolio and has registered such shares under the 1933 Act on Form N–1A (File No. 33–32216).

11. Pursuant to an investment advisory agreement between the Replacement Portfolio and PRIMECAP Management Company ("PRIMECAP"), PRIMECAP provides investment advisory services to the Replacement Portfolio. PRIMECAP manages the Replacement Portfolio subject to the supervision and oversight of the Vanguard Group, Inc. ("Vanguard") and the Replacement Portfolio's board of directors. PRIMECAP employs a multi-portfolio manager approach to managing the Replacement Portfolio. Six (6) portfolio managers are primarily responsible for the day-to-day management of the Replacement Portfolio and each portfolio manager is a principal of PRIMECAP. Each portfolio manager manages a particular segment of the Replacement Portfolio autonomously; there is no decision-making by committee with respect to the management of those segments of the Replacement Portfolio. A small portion of the Replacement Portfolio's assets is co-managed by individuals in PRIMECAP's research department. The Replacement Fund pays PRIMECAP an investment advisory fee quarterly and the fee is a percentage of the average daily net assets of the Replacement Fund during the most recent fiscal quarter.

12. Neither the Vanguard Fund, any of its portfolios, nor PRIMECAP are affiliated with the Applicants. The Vanguard Fund does not have manager-of-manager relief for the Replacement Portfolio.

13. The Contracts are flexible premium variable annuity and variable life insurance contracts. The variable annuity Contracts provide for the accumulation of values on a variable basis, fixed basis, or both, during the accumulation period, and provide settlement or annuity payment options on a fixed basis.[2] The variable life insurance Contracts provide for the accumulation of values on a variable basis, fixed basis, or both, throughout the insured's life, and for a substantial death benefit upon the death of the insured. Under each of the Contracts, the Company reserves the right to substitute shares of one fund for shares of another, or of another investment portfolio, including a portfolio of a different management company.

14. For as long as a variable life insurance Contract remains in force or a variable annuity Contract has not yet been annuitized, a Contract owner may transfer all or any part of the Contract value from one subaccount to another subaccount or to a fixed account. Other than the Company's right to impose certain limitations to deter market timing activity, the Contracts do not limit the number of transfers between the subaccounts or transfers from the subaccounts to the fixed account for any period of time. The Company does, however, assess a charge of $25 per transfer for transfers in excess of twelve per contract year. Guaranteed living benefit rider features are not available with the Contracts.

15. The Company proposes to substitute shares of the Replacement Portfolio for Service Class 2 shares of the Replaced Portfolio currently held in the Accounts (the "proposed substitution"). As of December 31, 2010, 1.05% of the Replaced Portfolio's assets were invested in the Accounts and would be subject to the proposed substitution if so invested on the date of the substitution.

16. Applicants assert that the proposed substitution is part of an effort by the Company to provide a portfolio selection within the Contracts that: (1) Provides a more competitive fee structure relative to other funds in the asset class peer group; (2) provides more competitive long-term returns relative to other funds in the asset class peer group; and (3) maintains the goal of offering a mix of investment options covering basic categories in the risk/return spectrum.

17. In year 2000 when the Company first selected the Replaced Portfolio, the Replaced Portfolio met its desire for a large cap growth equity investment option. The Replaced Portfolio is positioned on the aggressive end of the risk/return spectrum for large cap growth investment options and offered Contract owners a large cap growth investment option with significant risk. Over the past nine years, the Replaced Portfolio has significantly underperformed its peers, as discussed below, leading the Company to reassess the position of its large cap growth

[2] Because only fixed annuity payment options are available under the Contracts, the substitution will not affect Contracts that have been annuitized.

investment option. In an attempt to improve overall returns for the large cap growth investment option while providing for a relatively lower level of risk, the Company decided to select an alternative large cap growth investment option. Applicants believe the Replacement Portfolio meets these goals.

18. The Company believes that an important consideration for the selection and retention of an investment option under the Contracts is that the long-term performance (5 years and longer) of the investment option be competitive as compared to its asset class peer group, particularly given the limited selection of subaccounts available under the Contracts. In the Company's judgment, the Replaced Portfolio has not demonstrated portfolio performance of the standard desired by the Company. Performance of the Replaced Portfolio has been in the third or bottom quartile for comparable funds over the last five years, except for 2007 where performance of the Replaced Portfolio fell within the first quartile. Further, absolute performance of the Replaced Portfolio ranks in the bottom quartile for comparable funds over the last 3- and 5-year periods and in the third quartile, close to the bottom quartile, for the 1-year period.

19. Replacing the Replaced Portfolio with the Replacement Portfolio is appropriate and in the best interest of Contract owners because the stated investment objective, principal investment strategies, and principal investment risks of the Replacement Portfolio are substantially similar to those of the Replaced Portfolio, so that Contract owners will have continuity in investment expectations with somewhat lower risk. In addition, Applicants note that the net expenses of the Replacement Portfolio are substantially less than those for the Replaced Portfolio for the year ended December 31, 2009.

20. The following charts set out the investment objectives, principal investment strategies, and principal investment risks of the Replaced Portfolio and Replacement Portfolio, as stated in their respective prospectuses.

| Replaced portfolio | Replacement portfolio |
|---|---|
| **Fidelity VIP Growth Portfolio (Service Class 2 Shares)** | **Vanguard VIF Capital Growth Portfolio** |
| **Investment Objective** | **Investment Objective** |
| Capital appreciation. | Long-term capital appreciation. |
| **Principal Investment Strategies** | **Principal Investment Strategies** |
| FMR normally invests the fund's assets primarily in common stocks of companies FMR believes have above-average growth potential. Companies with high growth potential tend to be companies with higher than average price/earnings (P/E) or price/book (P/B) ratios. FMR may invest the fund's assets in securities of foreign issuers in addition to securities of domestic issuers. | The Portfolio invests in stocks considered to have above-average earnings growth potential that is not reflected in their current market prices. The Portfolio consists predominantly of large- and mid-capitalization stocks. |
| In buying and selling securities for the fund, FMR relies on fundamental analysis, which involves a bottom-up assessment of a company's potential for success in light of factors including its financial condition, earnings outlook, strategy, management, industry position, and economic and market conditions. | |
| FMR may lend the fund's securities to broker-dealers or other institutions to earn income for the fund. FMR may also use various techniques, such as buying and selling futures contracts and exchange traded funds, to increase or decrease the fund's exposure to changing security prices or other factors that affect security values. | |
| **Principal Investment Risks** | **Principal Investment Risks** |
| *Stock Market Volatility.* The value of equity securities fluctuates in response to issuer, political, market, and economic developments. Fluctuations can be dramatic over the short as well as long term, and different parts of the market and different types of equity securities can react differently to these developments. | *Stock Market Risk.* Stock market risk is the risk that stock prices overall will decline. Stock markets tend to move in cycles, with periods of rising prices and periods of falling prices. |
| | *Investment Style Risk.* Investment style risk is the risk that returns from mid- and large-capitalization growth stocks will trail returns from the overall stock market. Historically, mid-cap stocks have been more volatile in price than the large-cap stocks that dominate the overall market, and they often perform quite differently. |
| | *Manager Risk.* Manager risk is the risk that poor security selection or focus on securities in a particular sector, category, or group of companies will cause the Portfolio to underperform relevant benchmarks or other funds with a similar investment objective. |
| *Foreign Exposure.* Foreign securities, foreign currencies, and securities issued by U.S. entities with substantial foreign operations can involve additional risks relating to political, economic, or regulatory conditions in foreign countries. These risks include fluctuations in foreign currencies; withholding or other taxes; trading, settlement, custodial, and other operational risks; and the less stringent investor protection and disclosure standards of some foreign markets. All of these factors can make foreign investments, especially those in emerging markets, more volatile and potentially less liquid than U.S. investments. In addition, foreign markets can perform differently from the U.S. market. | |
| *Issuer-Specific Changes.* Changes in the financial condition of an issuer or counterparty, changes in specific economic or political conditions that affect a particular type of security or issuer, and changes in general economic or political conditions can increase the risk of default by an issuer or counterparty, which can affect a security's or instrument's value. The value of securities of smaller, less well-known issuers can be more volatile than that of larger issuers. | |

| Replaced portfolio | Replacement portfolio |
|---|---|
| "*Growth*" *Investing.* "Growth" stocks can react differently to issuer, political, market, and economic developments than the market as a whole and other types of stocks. "Growth" stocks tend to be more expensive relative to their earnings or assets compared to other types of stocks. As a result, "growth" stocks tend to be sensitive to changes in their earnings and more volatile than other types of stocks.<br>In response to market, economic, political, or other conditions, FMR may temporarily use a different investment strategy for defensive purposes. If FMR does so, different factors could affect the fund's performance and the fund may not achieve its investment objective. | |

21. The following charts compare advisory fees, other expenses, total operating expenses, and portfolio turnover rates for the year ended December 31, 2009, expressed as an annual percentage of average daily net assets, of the Replaced Portfolio and the Replacement Portfolio. The Replaced Portfolio is subject to a distribution plan or shareholder service plan adopted under Rule 12b–1 of the 1940 Act; the Replacement Portfolio is not subject to such a plan.[3] Neither the Replaced Portfolio nor the Replacement Portfolio impose a redemption fee.

| | Replaced portfolio | Replacement portfolio |
|---|---|---|
| | Fidelity VIP Growth Portfolio (Service Class 2) (percent) | Vanguard Capital Growth Portfolio (percent) |
| | As of 12/31/09 | As of 12/31/09 |
| Advisory Fees | 0.56 | 0.41 |
| 12b–1 Fee | 0.25 | N/A |
| Other Expenses | 0.13 | 0.04 |
| Total Expenses | 0.94 | 0.45 |
| Less Contractual Fee, Waivers and Expense Reimbursements | N/A | N/A |
| Net Expenses | 0.94 | 0.45 |
| Portfolio Turnover | 134 | 8 |

22. The following tables compare the respective asset levels, expenses ratios and performance data for the Replaced Portfolio and the Replacement Portfolio for fiscal years 2007, 2008 and 2009 ended December 31.

| Fidelity VIP Growth Portfolio (Service Class 2 Shares) | Net assets at end of period (dollars) | Expense ratio (percent) | Total return (percent) |
|---|---|---|---|
| 2007 | 898,204,000 | 0.90 | 26.66 |
| 2008 | 447,530,000 | 0.93 | (47.31) |
| 2009 | 528,819,000 | 0.94 | 27.97 |

| Vanguard Capital Growth Portfolio | Net assets at end of period (dollars) | Expense ratio (percent) | Total return (percent) |
|---|---|---|---|
| 2007 | 344,000,000 | 0.42 | 12.48 |
| 2008 | 251,000,000 | 0.42 | (30.36) |
| 2009 | 313,000,000 | 0.45 | 34.30 |

23. The following table shows average annual total returns as of December 31, 2009 for the Replaced Portfolio and the Replacement Portfolio:

[3] With regard to the Replaced Portfolio, the principal underwriter for the Portfolio has entered into an agreement with the principal underwriter for the Contracts, a wholly-owned subsidiary of the Company, for the payment of a fee equal to an annual percentage of the assets of the Replaced Portfolio attributable to the Contracts for the performance of certain distribution and shareholder services. With regard to the Replacement Portfolio, neither the principal underwriter for the Portfolio nor any of the Replacement Portfolio's other affiliates have entered into a similar agreement with the Company, the principal underwriter for the Contracts or any of the Company's other affiliates. As such, neither the Company nor any of its affiliates will receive revenue sharing payments from the principal underwriter of the Replacement Portfolio or from any other affiliates of the Replacement Portfolio.

| Fund | 1 year (percent) | 5 year (percent) | Since inception (percent) | Inception date |
|---|---|---|---|---|
| Fidelity VIP Growth Portfolio (Service Class 2) | 27.97 | −0.81 | −3.73 | 1/12/00 |
| Vanguard Capital Growth Portfolio | 34.30 | 4.80 | 9.63 | 12/3/02 |

24. Applicants believe that the Replacement Portfolio is an appropriate replacement for the Replaced Portfolio for each Contract, and that the Replacement Portfolio represents an investment option that is more compatible with the Replaced Portfolio than are any investment options under the Contracts. The Replacement Portfolio has an investment objective substantially identical to that of the Replaced Portfolio. Both pursue their investment objective by investing, under normal market conditions, in a diversified portfolio of stocks of companies with above average earnings growth potential. Each relies upon a fundamental analysis of companies in determining whether to purchase and sell securities. Each retains the flexibility to invest in the securities of foreign issuers and in derivative instruments, such as options, futures and swap agreements.[4] There are, however, some distinctions between the way in which the principal investment strategies are pursued by the Replaced Portfolio and the Replacement Portfolio.

25. The primary differences in the investment strategies of the Replaced Portfolio and the Replacement Portfolio manifest in the extent to which the advisers may invest in small-capitalization companies and their investment time horizons. For example, the adviser for the Replacement Portfolio seeks capital appreciation predominately through investment in mid- and large-capitalization stocks, whereas the Replaced Portfolio also seeks capital appreciation but does not in any manner restrict its investment to mid- and large-capitalization companies. Instead, there is no limitation on the amount of assets the Replaced Portfolio may invest in small-capitalization companies.

26. The adviser for the Replacement Portfolio also invests with a long-term view of three to five years while the adviser for the Replaced Portfolio does not necessarily invest with such a long-term view in mind. In each such instance where the Replaced Portfolio's investment strategy differs from that of the Replacement Portfolio, the Replaced Portfolio takes on more risk than does the Replacement Portfolio.

27. There also is a strong similarity in the principal investment risks for the Replacement Portfolio and the Replaced Portfolio. The prospectuses and statements of additional information for both the Replacement Portfolio and the Replaced Portfolio mention each portfolio's exposure to stock market risk, risks associated with investment in foreign issuers and use of derivative instruments, as well as volatility associated with investment in growth stocks.

28. Although only the prospectus for the Replacement Portfolio lists manager risk (*i.e.,* the risk that poor security selection or focus on securities in a particular sector, category or group of companies would cause the Portfolio to underperform relevant benchmarks or other funds with similar investment objectives), and investment style risk (*i.e.,* the risk that returns from mid- and large-capitalization growth stocks would underperform the overall stock market), the Replaced Portfolio invests in the same manner in such securities resulting in identical risks. In addition, although only the prospectus for the Replaced Portfolio lists the risk of issuer-specific changes (*i.e.,* the risk that changes in the financial condition of an issuer or counterparty, changes in specific economic or political conditions that affect a particular type of security or issuer, and changes in general economic or political conditions can increase the risk of default by an issuer or counterparty, which can affect a security's or instrument's value), the Replacement Portfolio also invests in the same manner resulting in similar if not identical risk.

29. The Replaced Portfolio, however, may invest a larger portion of its assets in the securities of small-capitalization companies than the Replacement Portfolio. The value of securities of small-capitalization companies can be more volatile than that of large- and mid-capitalization companies. Accordingly, notwithstanding some different investment risk disclosure in the prospectus for the Replacement Portfolio, an investment in the Replacement Portfolio should not necessarily entail any greater risk than an investment in the Replaced Portfolio, and most likely would entail less risk.

30. In addition, although the Replacement Portfolio has not yet achieved a level of assets equal to or greater than the Replaced Portfolio, the Replacement Portfolio has a significantly lower expense ratio than the Replaced Portfolio. Also, historically the Replacement Portfolio has had a significantly lower portfolio turnover rate than the Replaced Portfolio, which over time may contribute to lower costs for Contract owners who allocate Contract value to the Replacement Portfolio subaccount.

31. For those who are Contract owners on the date of the proposed substitution, the Company will reimburse, on the last business day of each fiscal period (not to exceed a fiscal quarter) during the twenty-four months following the date of the proposed substitution, the subaccount investing in the Replacement Portfolio such that the sum of the Replacement Portfolio's total annual fund operating expenses after fee waiver and/or expense reimbursement and subaccount expenses[5] for such period will not exceed, on an annualized basis, the sum of the Replaced Portfolio's total annual fund operating expenses after fee waiver and/or expense reimbursement and subaccount expenses for the fiscal year preceding the date of the proposed substitution. In addition, for twenty-four months following the proposed substitution, the Company will not increase asset-based fees or charges for Contracts outstanding on the date of the proposed substitution.

32. Currently, each Account makes available nine subaccounts as investment options under the variable life insurance contracts or variable annuity contracts, as applicable, funded by the Accounts. Following the proposed substitution, each Account will continue to make available nine subaccounts as investment options under the variable life insurance

[4] Although both the Replaced Portfolio and the Replacement Portfolio retain the flexibility to invest in derivative instruments, historically neither Portfolio appears to have emphasized investment in such instruments. In that regard, the semi-annual report dated June 30, 2010 and the annual reports dated December 31, 2009 and 2008 for each Portfolio indicate that the Portfolio did not invest any assets in derivative instruments as of the date of those reports.

[5] Subaccount expenses refer to those asset-based fees and charges that are deducted on a daily basis from subaccount assets and are reflected in the calculation of subaccount unit values. The mortality and expense risk charge is an example of such asset-based fees and charges.

contracts or variable annuity contracts it funds.

33. By the May 1, 2011 prospectuses for the Contracts and the Accounts, the Company will notify owners of the Contracts of their intention to take the necessary actions, including seeking the order requested by this amended and restated application, to carry out the proposed substitution as described herein. The current prospectus for the Replacement Portfolio, as well as the current prospectuses for all other portfolios available as investment options available under the Contracts, will be bound together with the May 1, 2011 prospectuses for the Contracts and the Accounts.

34. Applicants represent that the prospectuses for the Contracts will describe the proposed substitution and the Replaced Portfolio and Replacement Portfolio, including the fees and expenses of each Portfolio, and advise the Contract owners that from the date of the prospectus until the date of the proposed substitution, the Company will not exercise any rights reserved by it under any Contract to impose additional charges for transfers until at least 30 days after the proposed substitution. Similarly, the prospectuses will disclose that, from May 1, 2011 until the date of the proposed substitution, the Company will permit Contract owners to transfer Contract value out of the subaccount currently holding shares of the Replaced Portfolio to other subaccounts and the fixed account without those transfers being treated as transfers for purposes of determining the remaining number of transfers that may be permitted in the Contract year without a transfer charge. The prospectuses will also advise Contract owners that if the proposed substitution is carried out, then each Contract owner affected by the substitution will be sent a written notice (described immediately below) informing them of the facts and details of the substitution.

35. Applicants represent that within five days after the proposed substitution, Contract owners who are affected by the substitution will be sent a written notice informing them that the substitution was carried out. The notice will also reiterate the facts that the Company: (1) Will not exercise any rights reserved by it under any of the Contracts to impose additional charges for transfers until at least 30 days after the proposed substitution, and (2) will, for at least 30 days following the proposed substitution, permit such Contract owners to transfer Contract values out of the subaccount holding shares of the Replacement Portfolio to other subaccounts and the fixed account without those transfers being treated as transfers for purposes of determining the remaining number of transfers permitted in the Contract year without a transfer charge. The notice as delivered in certain jurisdictions may also explain that the right of a Contract owner to make transfers following the procedures described above (in connection with the proposed substitution) will not affect such Contract owner's right, under insurance regulations in those jurisdictions, to exchange his or her Contract for a fixed-benefit life insurance contract or a fixed-benefit annuity Contract during the 60 days following the substitution.

36. Applicants state that the Company will carry out the proposed substitution by redeeming shares of the Replaced Portfolio held by the Accounts for cash and applying the proceeds to the purchase of shares of the Replacement Portfolio. The proposed substitution will take place at relative net asset value with no change in the amount of any Contract owner's Contract value or death benefit or in the dollar value of his or her investment in either of the Accounts. Contract owners will not incur any fees or charges as a result of the proposed substitution, nor will their rights or the Company's obligations under the Contracts be altered in any way. All applicable expenses incurred in connection with the proposed substitution, including brokerage commissions and legal, accounting, and other fees and expenses, will be paid by the Company. In addition, the proposed substitution will not impose any tax liability on Contract owners. The proposed substitution will not cause the Contract fees and charges currently being paid by existing Contract owners to be greater after the proposed substitution than before the proposed substitution.

37. Applicants represent that the proposed substitution will not be treated as a transfer of Contract value for the purpose of assessing transfer charges or for determining the number of remaining "free" transfers in a Contract year. The Company will not exercise any right it may have under the Contracts to impose additional charges for Contract value transfers under the Contracts for a period of at least 30 days following the proposed substitution. Similarly, from May 1, 2011 until the date of the proposed substitution, the Company will permit Contract owners to make transfers of Contract value out of the Replaced Portfolio subaccount to other subaccounts or the fixed account without those transfers being treated as transfers for purposes of determining the remaining number of transfers permitted in the Contract year without a transfer charge. Likewise, for at least 30 days following the proposed substitution, the Company will permit Contract owners affected by the substitution to transfer Contract value out of the Replacement Portfolio subaccount to other subaccounts or the fixed account without those transfers being treated as transfers for purposes of determining the remaining number of transfers permitted in the Contract year without a transfer charge.

38. Applicants acknowledge that reliance on the exemptive relief requested herein, if granted, depends upon compliance with all of the representations and conditions set forth in this amended and restated application.

39. Applicants represent that the Company is also seeking approval of the proposed substitution from any State insurance regulators whose approval may be necessary or appropriate.

40. The Applicants request that the Commission issue an order pursuant to Section 26(c) of the 1940 Act approving the substitution by the Company of shares of the Replacement Portfolio for Service Class 2 Shares of the Replaced Portfolio currently held by the Accounts.

41. Section 26(c) of the 1940 Act requires the depositor of a registered unit investment trust holding securities of a single issuer to receive Commission approval before substituting the securities held by the trust. Specifically, Section 26(c) states:

> It shall be unlawful for any depositor or trustee of a registered unit investment trust holding the security of a single issuer to substitute another security for such security unless the Commission shall have approved such substitution. The Commission shall issue an order approving such substitution if the evidence establishes that it is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title.

Section 26(c) was added to the 1940 Act by the Investment Company Amendments of 1970 (the "1970 Amendments"). Prior to the enactment of the 1970 Amendments, a depositor of a unit investment trust could substitute new securities for those held by the trust by notifying the trust's security holders of the substitution within five days of the substitution. In 1966, the Commission, concerned with high sales charges then common to most unit investment trusts and the disadvantageous position in which such charges placed investors who did not want to remain invested in the substituted fund, recommended that

Section 26 be amended to require that a proposed substitution of the underlying investments of a trust receive prior Commission approval.[6]

Congress responded to the Commissioners' concerns by enacting Section 26(c) to require that the Commission approve all substitutions by the depositor of investments held by unit investment trusts. The Senate Report on the bill explained the purpose of the amendment as follows:

> The proposed amendment recognizes that in the case of the unit investment trust holding the securities of a single issuer notification to shareholders does not provide adequate protection since the only relief available to shareholders, if dissatisfied, would be to redeem their shares. A shareholder who redeems and reinvests the proceeds in another unit investment trust or in an open-end company would under most circumstances be subject to a new sales load. The proposed amendment would close this gap in shareholder protection by providing for Commission approval of the substitution. The Commission would be required to issue an order approving the substitution if it finds the substitution consistent with the protection of the investors and provisions of the [1940] Act.[7]

42. Applicants represent that the proposed substitution appears to involve the substitution of securities within the meaning of Section 26(c) of the 1940 Act.[8] Applicants therefore request an order from the Commission pursuant to Section 26(c) approving the proposed substitution.

43. Applicants represent that all the Contracts expressly reserve for the Company the right, subject to compliance with applicable law, to substitute shares of one fund or portfolio held by a subaccount of an Account for another. The prospectuses for the Contracts and the Accounts contain appropriate disclosure of this right. The Company has reserved this right of substitution both to protect itself and its Contract owners in situations where it believes an underlying fund is no longer appropriate for Contract owners or where either might be harmed or disadvantaged by circumstances surrounding the issuer of the shares held by one or more of its separate accounts, and to afford the opportunity to replace such shares where to do so could benefit itself and Contract owners.

44. Applicants maintain that Contract owners will be better served by the proposed substitution and that the proposed substitution is appropriate given the Replacement Portfolio, the Replaced Portfolio, and other investment options available under the Contracts. In the last four (4) out of the last five (5) years, the Replacement Portfolio has had investment performance superior to that of the Replaced Portfolio. In addition, for each one-year, five-year and since inception periods ended December 31, 2009, the Replacement Portfolio has had investment performance superior to that of the Replaced Portfolio. The Replacement Portfolio has also had substantially lower expenses than the Replaced Portfolio over these same periods.

45. Applicants believe that the Replacement Portfolio and the Replaced Portfolio are substantially the same in their stated investment objectives and principal investment strategies as to afford investors continuity of investment and risk. In addition, Applicants generally submit that the proposed substitution meets the standards that the Commission and its staff have applied to similar substitutions that have been approved in the past.

46. Applicants believe that Contract owners will be better off with the Replacement Portfolio than with the Replaced Portfolio. The proposed substitution retains for Contract owners the investment flexibility that is a central feature of the Contracts. If the proposed substitution is carried out, all Contract owners will be permitted to allocate purchase payments and transfer Contract values between and among the remaining subaccounts as they could before the proposed substitution.

47. Applicants assert that the proposed substitution is not the type of substitution that Section 26(c) was designed to prevent. Unlike traditional unit investment trusts where a depositor could only substitute an investment security in a manner which permanently affected all the investors in the trust, the Contracts provide each Contract owner with the right to exercise his or her own judgment and transfer Contract values into other subaccounts and the fixed account. Moreover, the Contracts will offer Contract owners the opportunity to transfer amounts out of the affected subaccount into any of the remaining subaccounts without cost or disadvantage. The proposed substitution, therefore, will not result in the type of costly forced redemption that Section 26(c) was designed to prevent.

48. Applicants state that the proposed substitution is also unlike the type of substitution that Section 26(c) was designed to prevent in that by purchasing a Contract, Contract owners select much more than a particular investment company in which to invest their Contract values. They also select the specific type of coverage offered by the Company under the Contracts, as well as numerous other rights and privileges set forth in the Contracts. Contract owners may also have considered the size, financial condition, type, and reputation for service of the Company, from whom they purchased their Contract in the first place. These factors will not change because of the proposed substitution.

*Conclusion*

Applicants request an order of the Commission pursuant to Section 26(c) of the 1940 Act approving the proposed substitution by the Company. Applicants submit that, for all the reasons stated above, the proposed substitution is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management pursuant to delegated authority.

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–7418 Filed 3–29–11; 8:45 am]

**BILLING CODE 8011–01–P**

[6] In the years leading up to its 1966 recommendation, the Commission took the position that the substitution of portfolio securities of a unit investment trust constituted an offer of exchange under Section 11 of the [1940] Act requiring prior Commission approval. The Commission proposed Section 26(c) in order to specifically address substitutions by unit investment trusts which previously had been scrutinized under Section 11 of the [1940] Act. *See* House Committee on Interstate and Foreign Commerce, Report of the Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth, H.R. Rep. No. 2337, 89th Cong., 2d Sess. 337 (1966).

[7] S. Rep. No. 184, 91st Cong., 1st Sess. 41 (1969), reprinted in 1970 U.S. Code Cong. & Admin. News 4897, 4936 (1970).

[8] While Section 26(c), by its terms, applies only to a unit investment trust holding the securities of one issuer, the Commission has interpreted Section 26(c) to apply to "a substitution of securities in any *subaccount* of a registered separate account." Adoption of Permanent Exemptions from Certain Provisions of the Investment Company Act of 1940 for Registered Separate Accounts and Other Persons, Investment Company Act Rel. No. 12678 (Sept. 21, 1982) (emphasis added).

## SECURITIES AND EXCHANGE COMMISSION

**[File No. 500–1]**

## In the Matter of Euro Solar Parks, Inc.; Order of Suspension of Trading

March 28, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Euro Solar Parks, Inc. ("Euro Solar") because of

possible manipulative conduct occurring in the market for the company's stock. Euro Solar is quoted on the OTC Bulletin Board and OTC Link under the ticker symbol ESLP.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EDT on March 28, 2011, through 11:59 p.m. EDT on April 8, 2011.

By the Commission.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011–7572 Filed 3–28–11; 4:15 pm]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64119; File No. SR–OCC–2011–02]**

## Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change To Accommodate the Clearance of Relative Performance Options

March 24, 2011.

### I. Introduction

On January 19, 2011, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change SR–OCC–2011–02 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").[1] The proposed rule change was published for comment in the **Federal Register** on February 7, 2011.[2] No comment letters were received on the proposal. This order approves the proposal.

### II. Description

The purpose of this rule change is to accommodate the clearance of options on certain indexes measuring the relative performance of one reference security or reference index relative to a second reference security or reference index ("Relative Performance Options").[3] The revised rules have been broadly drafted to cover Alpha Options, a Relative Performance Option described below, and any similar product that may be listed on any participant exchange in the future.

NASDAQ OMX PHLX LLC ("Phlx") is proposing to list options ("Alpha Options")[4] on NASDAQ OMX Alpha Indexes ("Alpha Indexes"), a family of indexes developed by NASDAQ OMX Group, Inc. ("Nasdaq"). Alpha Indexes measure relative total returns of one underlying stock and one underlying ETF, which are also traded on the Phlx.[5] An Alpha Index is calculated by measuring the total return performance of the Target Component relative to the total return performance of the Benchmark Component based upon prices of transactions on the primary listing exchange of each underlying component. Each Alpha Index will initially be set at 100.00. Alpha Options will be cash-settled, European-style options. In the event of a corporate event that eliminates one of the underlying components of an Alpha Index, Nasdaq will cease calculation of the Alpha Index for that pair of underlying components, and all outstanding option positions will be immediately settled at the last disseminated price of that Alpha Index.

Relative Performance Options are highly similar to other index options cleared by OCC except for the identity and nature of the underlying index. Therefore, OCC believes that the provisions of its By-Laws and Rules governing index options, as they are currently in effect, are generally sufficient to support the clearance and settlement of Relative Performance Options. However, minor modifications are needed to support the clearance and settlement of Alpha Options and other types of Relative Performance Options that may be introduced in the future. For example, OCC's current Rules do not account for the possibility of an index having a negative value as could occur for certain Relative Performance Indexes. If this should ever occur, the index value would be deemed to be equal to zero or, because certain systems may not accept a zero index value, a near-zero positive amount. Therefore, OCC is modifying its By-Laws to provide for such potential adjustments of the index value by either the listing exchange or OCC.

In addition, OCC's current By-Laws do not account for the possibility that an expiration date may be accelerated when a reference security (*i.e.,* an individual reference security and not a reference index) that is one of the components of an underlying relative performance index ceases to be published as a result of a cash-out merger or similar corporate event. If the value of an underlying Relative Performance Index ceases to be published as a result of such an event, the value of the overlying options would become fixed. Therefore, OCC proposes to modify its By-Laws to provide that OCC will either accelerate or not accelerate the expiration in consultation with the relevant exchange on which the index underlying a Relative Performance Option is listed.

### III. Discussion

Section 17A(b)(3)(F) of the Act[6] requires, among other things, that the rules of a clearing agency be designed to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions. Because the proposed rule change modifies OCC's Rules and By-Laws to support the clearance of Alpha Options and other types of Relative Performance Options that may be introduced in the future, the proposed rule change is facilitating the perfection of the national system for the clearance and settlement of securities transactions and therefore is consistent with the requirements of Section 17A(b)(3)(F) of the Act.

### IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act[7] and the rules and regulations thereunder.

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (File No. SR–OCC–2011–02) be, and hereby is, approved.[9]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[10]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–7366 Filed 3–29–11; 8:45 am]

**BILLING CODE 8011–01–P**

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 34–63811 (February 1, 2011), 76 FR 6648 (February 7, 2011).

[3] A reference security may be an exchange-traded fund ("ETF").

[4] Securities Exchange Act Release No. 34–63575 (December 17, 2010), 75 FR 81320 (December 27, 2010) [File No. SR–Phlx–2010–176].

[5] The combination of the two components is referred to as an "Alpha Pair." The first component of each Alpha Pair is referred to as the "Target Component" and the second component is referred to as the "Benchmark Component."

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] 15 U.S.C. 78q–1.

[8] 15 U.S.C. 78s(b)(2).

[9] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[10] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64121; File No. SR–CHX–2011–01]**

## Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of a Proposed Change to Rules Regarding Proxy Voting by Participants

March 24, 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 March 15, 2011, the Chicago Stock Exchange, Inc. ("CHX" 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 CHX. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposed rule change on an accelerated basis.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CHX proposes to amend Article 8, Rule 14 regarding proxy voting by Participants which hold stock on behalf of the beneficial owner. Specifically, the Exchange would like to enumerate in its rules that Participants are prohibited from voting uninstructed shares if the matter voted on relates to executive compensation, in accordance with provisions of Section 957 of the Dodd-Frank Act, which was signed by the President on July 21, 2010. The text of this proposed rule change is available on the Exchange's Web site at (*http://www.chx.com*) and in 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 CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item III below. The CHX 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 Statutory Basis for, the Proposed Rule Changes*

1. Purpose

CHX proposes to amend Article 8, Rule 14 regarding proxy voting by Participants which hold stock on behalf of the beneficial owner. Specifically, the Exchange would like to enumerate in its rules that Participants are prohibited from voting uninstructed shares if the matter voted on relates to executive compensation, in accordance with provisions of Section 957 of the Dodd-Frank Act, which was signed by the President on July 21, 2010. Because Section 957 of the Dodd-Frank Act does not provide for a transition phase, the Exchange is proposing to adopt the proposed rule changes pursuant to Section 19(b) of the Act to comply with Section 957 of the Dodd-Frank Act and is requesting that the Commission approve the proposal on an accelerated basis. We are also proposing to correct an incorrect cross reference in subsection (a) as well as adding the words "or authorize" in certain places throughout the rule to clarify that the rule includes not only the giving of a proxy but also the authorization of such proxy.

Current Requirements of CHX Article 8, Rule 14

Under current CHX and Commission proxy rules, brokers must deliver proxy materials to beneficial owners and request voting instructions in return. If voting instructions have not been received by the tenth day preceding the meeting date, Rule 14 provides that a broker may vote on certain matters when the broker has no knowledge of any contest as to the action to be taken at the meeting and provided such action is adequately disclosed to stockholders, and does not include authorization for a merger, consolidation or any matter which may affect substantially the rights or privileges of such stock. In addition, the Rule currently identifies 20 matters with respect to which brokers may not vote without instructions from beneficial owners.

Enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Prior to the July 21, 2010 enactment of the Dodd-Frank Act, under Rule 14 and the Exchange's prior interpretations, Participants were permitted to cast votes on some matters, including some executive compensation proposals, without specific instructions from beneficial owners of the stock. However, the Dodd-Frank Act contains a provision explicitly requiring the elimination of broker discretionary voting on matters related to executive compensation.

Section 957 of the Dodd-Frank Act amends Section 6(b)[3] of the Exchange Act to require the rules of each national securities exchange to prohibit any member organization that is not the beneficial owner of a security registered under Section 12[4] of the Exchange Act from granting a proxy to vote the security in connection with certain stockholder votes, unless the beneficial owner of the security has instructed the member organization to vote the proxy in accordance with the voting instructions of the beneficial owner. The stockholder votes covered by Section 957 include any vote (i) with respect to the election of a member of the board of directors of an issuer (other than an uncontested election of a director of an investment company registered under the Investment Company Act of 1940 (the "Investment Company Act")), (ii) executive compensation or (iii) any other significant matter, as determined by the Commission, by rule.

The Exchange prohibits Participants from voting uninstructed shares if the matter voted on is the election of directors (other than in the case of an issuer registered under the Investment Company Act, provided the matter is not the subject of a counter-solicitation). In addition, the Commission has not at this time identified other significant matters with respect to which the Exchange must prohibit member organizations from voting uninstructed shares. Accordingly, in order to carry out the requirements of Section 957 of the Dodd-Frank Act, the Exchange proposes to amend CHX Article 8, Rule 14 to prohibit Participants from voting uninstructed shares if the matter voted on relates to executive compensation.

Specifically, the Exchange is proposing to add a new Item (u) and accompanying commentary to CHX Article 8, Rule 14 (Proxies) to provide that a Participant may not give or authorize a proxy to vote without instructions from the beneficial owner when the matter to be voted upon relates to executive compensation.

The proposed commentary to Item (u) would clarify that a matter relating to executive compensation would include, among other things, the items referred to in Section 14A of the Exchange Act (added by Section 951 of the Dodd-Frank Act), including (i) an advisory vote to approve the compensation of

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 781.

executives, (ii) a vote on whether to hold such an advisory vote every one, two or three years, and (iii) an advisory vote to approve any type of compensation (whether present, deferred, or contingent) that is based on or otherwise relates to an acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of an issuer and the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of an executive officer. In addition, a Participant may not give or authorize a proxy to vote without instructions on a matter relating to executive compensation, even if such matter would otherwise qualify for an exception from the requirements of Item (l), Item (m) or any other Item under CHX Article 8, Rule 14. The Exchange also proposes to add cross reference commentary to Items (l) and (m) to further clarify this point. Any vote on these or similar executive compensation-related matters would be subject to the requirements of CHX Article 8, Rule 14, as amended.

The Exchange notes that the foregoing change is based upon the change that has been adopted by the New York Stock Exchange and that has been previously approved by the Commission.[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act")[6] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[7] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(10)[8] requirements that all national securities exchanges adopt rules prohibiting members from voting, without receiving instructions from the beneficial owner of shares, on the election of a member of a board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission, by rule. The Exchange also believes the proposed rule change is consistent with the Section 6(b)(5)[9] requirements that an exchange have rules that are 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, in general, to protect investors and the public interest. The Exchange is adopting the proposed rule changes to comply with the requirements of Section 957 of the Dodd-Frank Act, and therefore believes the proposed rule changes to be consistent with Section 6(b)(5) of the Act, particularly with respect to the protection of investors and the public interest.

*B. Self-Regulatory Organization's Statement of Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments Regarding the Proposed Rule Changes Received From Members, Participants or Others*

No written comments were either solicited or received.

**III. 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–CHX–2011–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CHX–2011–01. 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 such filing also will be available for inspection and copying at the principal office of CHX. 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–CHX–2011–01 and should be submitted on or before April 20, 2011.

**IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change**

In its filing, the Exchange requested that the Commission approve the proposal on an accelerated basis. The Exchange stated that it believed good cause existed to grant accelerated approval because Section 957 of the Dodd-Frank Act does not provide for a transition period.

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[10] The Commission believes that the proposal is consistent with Section 6(b)(10)[11] of the Act, which requires that national securities exchanges adopt rules prohibiting members that are not beneficial holders of a security from voting uninstructed proxies with respect to the election of a member of the board of directors of an issuer (except for uncontested elections of directors for companies registered under the Investment Company Act), executive compensation, or any other significant matter, as determined by the Commission, by rule. The Commission also believes that the proposal is consistent with Section 6(b)(5)[12] of the Act, which provides, among other things, that the rules of the Exchange

[5] *See* Securities Act Release No. 62874 (September 9, 2010), 75 FR 56152 (September 15, 2010) (SR–NYSE–2010–59).

[6] 15 U.S.C. 78a *et seq.*

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(10).

[9] 15 U.S.C. 78f(b)(5).

[10] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78f(b)(10).

[12] 15 U.S.C. 78f(b)(5).

must be designed to promote just and equitable principles of trade, 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, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposal is consistent with Section 6(b)(10) of the Act because it adopts revisions that comply with that section. As noted in the accompanying Senate Report, Section 957, which adopts Section 6(b)(10), reflects the principle that "final vote tallies should reflect the wishes of the beneficial owners of the stock and not be affected by the wishes of the broker that holds the shares." [13] The proposed rule change will make CHX rules compliant with the new requirements of Section 6(b)(10) by prohibiting broker-dealers, who are not beneficial owners of a security, from voting uninstructed shares with respect to any matter on executive compensation.[14]

The Commission believes that the proposal is consistent with Section 6(b)(5) of the Act because the proposal will further investor protection and the public interest by assuring that shareholder votes on executive compensation matters are made by those with an economic interest in the company, rather than by a broker that has no such economic interest, which should enhance corporate governance and accountability to shareholders.[15]

The Commission notes that the CHX's new rule prohibiting uninstructed broker votes on executive compensation covers the specific items identified in Section 951 of the Dodd-Frank Act, as well as any other matter concerning executive compensation, and has been drafted broadly to reflect the requirements of Section 6(b)(10) of the Act. The proposed rule language also specifically states that a broker vote on any executive compensation matter would not be permitted even it would otherwise qualify for an exception from any item under Article 8, Rule 14. The Commission believes this provision will make clear that any past practice or interpretation that may have permitted a broker vote on an executive compensation matter, under existing rules, will no longer be applicable and is superseded by the newly adopted provisions.

Finally, the Commission notes that the change to reflect that the CHX rules prohibit not only the giving of a proxy, but also the authorization of the proxy, should help to clarify the intent of the CHX proxy rules and is consistent with the requirements of Section 6 of the Act.

Based on the above, the Commission believes that CHX's proposal will further the purposes of Sections 6(b)(5) and 6(b)(10) of the Act by ensuring that brokers, holding shares on behalf of beneficial owners, are not voting uninstructed shares on matters relating to executive compensation, which should enhance corporate accountability to shareholders. The rule filing should also serve to fulfill the Congressional intent in adopting Section 6(b)(10) of the Act.

The Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,[16] for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register**. As noted above, Section 6(b)(10) of the Act, enacted under Section 957 of the Dodd-Frank Act, does not provide for a transition phase, and requires rules of national securities exchanges to prohibit, among other things, broker voting on executive compensation. The Commission believes that good cause exists to grant accelerated approval to the Exchange's proposal, because it will conform Article 8, Rule 14 to the requirements of Section 6(b)(10) of the Act. Moreover, the Commission notes that the proposed changes are based on NYSE Rule 452.[17]

## V. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[18] that the proposed rule change (SR–CHX–2011–01) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–7458 Filed 3–29–11; 8:45 am]

**BILLING CODE 8011–01–P**

[13] *See* S. Rep. No. 111–176, at 136 (2010).

[14] As noted above, Section 6(b)(10) also prohibits broker voting for director elections, except for uncontested director elections of registered investment companies, and also "any other significant matter, as determined by the Commission, by rule." CHX already prohibits broker voting in director elections except for uncontested director elections for registered investment companies. *See* CHX Article 8, Rule 14(c)(4)(s) and note 15, *infra.* As to other matters, the Commission has not, to date, adopted rules concerning other significant matters where uninstructed broker votes should be prohibited, although it may do so in the future. Should the Commission adopt such rules, we would expect CHX to adopt coordinating rules promptly to comply with the statute.

[15] As the Commission stated in approving NYSE rules prohibiting broker voting in the election of directors, having those with an economic interest in the company vote the shares, rather than the broker who has no such economic interest, furthers the goal of enfranchising shareholders. *See* Securities Exchange Act Release No. 60215 (July 1, 2009), 74 FR 33293 (July 10, 2009) (SR–NYSE–2006–92).

[16] 15 U.S.C. 78s(b)(2).

[17] *See supra* note 5.

[18] 15 U.S.C. 78s(b)(2).

[19] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64122; File No. SR–Phlx–2011–03]**

## Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Amendment to Rule 862 Relating to Discretionary Proxy Voting on Executive Compensation Matters

March 24, 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 March 16, 2011, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II 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 and is approving the proposed rule change on an accelerated basis.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, pursuant to Section 19(b)(1) of the Act [3] and Rule 19b–4 thereunder,[4] proposes to amend Phlx Rule 862 (Proxies at Direction of Owner) to prohibit member organizations from voting on matters related to executive compensation, or any other significant matter, as determined by the Securities and Exchange Commission ("Commission") by rule unless instructed by the beneficial owner of the shares.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(1).

[4] 17 CFR 240.19b–4.

## 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 III below. The Exchange 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

Exchange Rule 862 provides instructions on how the proxies are voted. A member organization may give a proxy to vote stock provided that:

(1) It has transmitted proxy-soliciting material to the beneficial owner of stock;

(2) It has not received voting instructions from the beneficial owner by the date specified in the statement accompanying such material; and

(3) Provided such action is adequately disclosed to stockholders and does not include authorization for a merger, consolidation or any matter which may substantially affect the rights or privileges of such stock.

The purpose of the proposed rule change is to amend Exchange Rule 862(2)(b) to prohibit member organizations from voting on matters related to executive compensation, or any other significant matter, as determined by the Commission, unless instructed by the beneficial owner of the shares. On July 21, 2010, the President signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). Section 957 of the Dodd-Frank Act adopted new Section 6(b)(10) of the Act.[5] This new provision requires all national securities exchanges to adopt rules that prohibit their members from voting on the election of a member of the board of directors of an issuer (except for a vote with respect to the uncontested election of a member of the board of directors of any investment company registered under the Investment Company Act of 1940), executive compensation, or any other significant matter, as determined by the Commission, unless the member receives voting instructions from the beneficial owner of the shares.

On August 18, 2010, the Exchange filed amendments to Rule 862 to, in part, eliminate broker discretionary voting for all elections of directors at shareholder meetings, whether contested or not, except for companies registered under the Investment Company Act of 1940 (the "1940 Act"), provided that it is not the subject of counter solicitation.[6]

To further assure compliance with the newly adopted Section 6(b)(10), the Exchange proposes to add a new Item 21 and accompanying commentary to Exchange Rule 862(2)(b) to provide that in no event could a member organization vote shares on matters regarding executive compensation, or any other significant matter, as determined by the Commission, unless instructed by the beneficial owner of the shares. The proposed commentary to Item 21 would clarify that a matter relating to executive compensation would include, among other things, the items referred to in Section 14A of the Exchange Act (added by Section 951 of the Dodd-Frank Act), including (i) an advisory vote to approve the compensation of executives, (ii) a vote on whether to hold such an advisory vote every one, two or three years, and (iii) an advisory vote to approve any type of compensation (whether present, deferred, or contingent) that is based on or otherwise relates to an acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of an issuer and the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of the executive officer. In addition, a member organization may not give or authorize a proxy to vote without instructions on a matter relating to executive compensation, even if such matter would otherwise qualify for an exception from the requirements of Item 12, Item 13 or any other Item under Exchange Rule 862(2)(b). Any vote on these or similar executive compensation-related matters would be subject to the requirements of Exchange Rule 862.

The Exchange's proposal also includes commentaries to Items 12 and 13 to provide guidance that a member organization may not give or authorize a proxy to vote without instructions on a matter relating to executive compensation, even if such matter would otherwise qualify for an exception from the requirements of Item 12, Item 13 or any other Item under Rule 862, and further provides a reference to Item 21.

The Exchange is proposing to add the words "or authorize" in the following places to clarify that the rule includes not only the giving of a proxy but the authorization of such proxy:

1. Exchange Rule 862(2)(b); and
2. Exchange Rule 862(2)(b)(20).

The Exchange also made necessary clerical changes in the following manner:

1. Item 19 deletes the colon and the word "or" at the end of the paragraph, and adds a semi-colon; and
2. Item 20 deletes a period at the end of the paragraph, and adds a semi-colon and the word "or".

Similar changes have already been made at the New York Stock Exchange, Inc. ("NYSE") and The Nasdaq Stock Market LLC ("NASDAQ").[7] Amending Exchange Rule 862 similarly continues to provide consistency among the exchanges to eliminate disparities regarding proxy voting, as well as complies with Section 6(b)(10) of the Act.[8]

2. Statutory Basis

The Exchange 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)(10) of the Act,[10] in particular. Section 6(b)(10) requires that a national securities exchange's rules must prohibit any member that is not the beneficial owner of a security registered under Section 12 from granting a proxy to vote the security in connection with a shareholder vote on, among other things, executive compensation matters, or any other significant matter, as determined by the Commission. The proposed rule change will adopt the prohibition required by Section 6(b)(10).

Section 6(b)(5) requires that the rules of a national securities exchange be 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market

[5] 15 U.S.C. 78f(b)(10).

[6] *See* Securities Exchange Act Release No. 62775 (August 26, 2010), 75 FR 53725 (September 1, 2010)(SR–Phlx–2010–115).

[7] *See* NYSE Rule 452, Securities Exchange Act Release No. 34–62874 (September 9, 2010), 75 FR 56152 (September 15, 2010) (SR–NYSE–2010–59); and NASDAQ Rule 2251, Securities Exchange Act Release No. 34–62992 (September 24, 2010), 75 FR 60844 (October 1, 2010) (SR–NASDAQ–2010–114).

[8] 15 U.S.C. 78f(b)(10).

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(10).

system, and, in general, to protect investors and the public interest. The proposed rule change is consistent with this requirement in that it will protect investors and the public interest by adopting the requirements of Section 957 of the Dodd-Frank Act.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the 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 either solicited or received.

**III. 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–Phlx–2011–03 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2011–03. 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 such filing also will be available for inspection and copying at the principal office of Phlx. 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–Phlx–2011–03 and should be submitted on or before April 20, 2011.

**IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change**

In its filing, the Exchange requested that the Commission approve the proposal on an accelerated basis. The Exchange stated that it believed good cause existed to grant accelerated approval because Section 957 of the Dodd-Frank Act does not provide for a transition period.

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[11] The Commission believes that the proposal is consistent with Section 6(b)(10)[12] of the Act, which requires that national securities exchanges adopt rules prohibiting members that are not beneficial holders of a security from voting uninstructed proxies with respect to the election of a member of the board of directors of an issuer (except for uncontested elections of directors for companies registered under the Investment Company Act), executive compensation, or any other significant matter, as determined by the Commission, by rule. The Commission also believes that the proposal is consistent with Section 6(b)(5)[13] of the Act, which provides, among other things, that the rules of the Exchange must be designed to promote just and equitable principles of trade, 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, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposal is consistent with Section 6(b)(10) of the Act because it adopts revisions that comply with that section. As noted in the accompanying Senate Report, Section 957, which adopts Section 6(b)(10), reflects the principle that "final vote tallies should reflect the wishes of the beneficial owners of the stock and not be affected by the wishes of the broker that holds the shares."[14] The proposed rule change will make Phlx rules compliant with the new requirements of Section 6(b)(10) by prohibiting broker-dealers, who are not beneficial owners of a security, from voting uninstructed shares with respect to any matter on executive compensation or any other significant matter, as determined by the Commission by rule.[15]

The Commission believes that the proposal is consistent with Section 6(b)(5) of the Act because the proposal will further investor protection and the public interest by assuring that shareholder votes on executive compensation matters are made by those with an economic interest in the company, rather than by a broker that has no such economic interest, which should enhance corporate governance and accountability to shareholders.[16]

The Commission notes that Phlx's new rule prohibiting uninstructed broker votes on executive compensation covers the specific items identified in Section 951 of the Dodd-Frank Act, as well as any other matter concerning executive compensation, and has been drafted broadly to reflect the requirements of Section 6(b)(10) of the Act. The proposed rule language also specifically states that a broker vote on any executive compensation matter would not be permitted even it would

[11] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78f(b)(10).

[13] 15 U.S.C. 78f(b)(5).

[14] *See* S. Rep. No. 111–176, at 136 (2010).

[15] As noted above, Section 6(b)(10) also prohibits broker voting for director elections, except for uncontested director elections of registered investment companies. PHLX already prohibits broker voting in director elections except for uncontested director elections for registered investment companies. *See* Phlx Rule 862(2)(b)(19) and note 6 *supra; see also* note 16 *infra.* As to other matters, the Commission has not, to date, adopted rules concerning other significant matters where uninstructed broker votes should be prohibited, although it may do so in the future. Should the Commission adopt such rules, we would expect PHLX to adopt coordinating rules promptly to comply with the statute.

[16] As the Commission stated in approving NYSE rules prohibiting broker voting in the election of directors, having those with an economic interest in the company vote the shares, rather than the broker who has no such economic interest, furthers the goal of enfranchising shareholders. *See* Securities Exchange Act Release No. 60215 (July 1, 2009), 74 FR 33293 (July 10, 2009) (SR–NYSE–2006–92).

otherwise qualify for an exception from any item under Rule 862. The Commission believes this provision will make clear that any past practice or interpretation that may have permitted a broker vote on an executive compensation matter, under existing rules, will no longer be applicable and is superseded by the newly adopted provisions.

Finally, the Commission notes that the change to reflect that Phlx rules prohibit not only the giving of a proxy, but also the authorization of the proxy, should help to clarify the intent of Phlx proxy rules and is consistent with the requirements of Section 6 of the Act.

Based on the above, the Commission believes that the Phlx's proposal will further the purposes of Sections 6(b)(5) and 6(b)(10) of the Act by ensuring that brokers, holding shares on behalf of beneficial owners, are not voting uninstructed shares on matters relating to executive compensation, which should enhance corporate accountability to shareholders. The rule filing should also serve to fulfill the Congressional intent in adopting Section 6(b)(10) of the Act.

The Commission also finds good cause, pursuant to Section 19(b)(2) of the Act,[17] for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register**. As noted above, Section 6(b)(10) of the Act, enacted under Section 957 of the Dodd-Frank Act, does not provide for a transition phase, and requires rules of national securities exchanges to prohibit, among other things, broker voting on executive compensation. The Commission believes that good cause exists to grant accelerated approval to the Exchange's proposal, because it will conform Phlx Rule 862 to the requirements of Section 6(b)(10) of the Act. Moreover, the Commission notes that the proposed changes are based on NYSE Rule 452.[18]

## V. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[19] that the proposed rule change (SR–Phlx–2011–03) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–7415 Filed 3–29–11; 8:45 am]

**BILLING CODE 8011–01–P**

[17] 15 U.S.C. 78s(b)(2).

[18] *See supra* note 7

[19] 15 U.S.C. 78s(b)(2).

[20] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–64120; File No. SR–BX–2011–015]**

## Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Chapter XI of the BOX Trading Rules To Harmonize Them With Rules of the Financial Industry Regulatory Authority, Inc. and Other Options Exchanges

March 24, 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 March 11, 2011, NASDAQ OMX BX, Inc. ("Self-Regulatory Organization" or "SRO") 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 substantially prepared by the SRO. The SRO has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of the filing. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The SRO proposes to amend Chapter XI of the Boston Options Exchange Group, LLC ("BOX") Trading Rules to harmonize them with Rules of the Financial Industry Regulatory Authority, Inc. ("FINRA") and other options exchanges. The text of the proposed rule change is available from the principal office of the SRO, at the Commission's Public Reference Room and also on the SRO's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/.*

### 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 SRO 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 SRO 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

Pursuant to Rule 17d–2 under the Act, the Exchange, BATS Exchange, Inc., Chicago Board Options Exchange, Inc. ("CBOE"), C2 Options Exchange, Incorporated, the International Securities Exchange, LLC, FINRA, New York Stock Exchange LLC, NYSE Amex LLC, NYSE Arca, Inc., The NASDAQ Stock Market LLC, and NASDAQ OMX PHLX, Inc. (collectively the "Options Self Regulatory Council"), entered into an agreement, dated February 9, 2010, (the "17d–2 Agreement") to allocate regulatory responsibility for common rules. By this proposal, the SRO seeks to standardize certain rules with FINRA's rules pursuant to the terms of the 17d–2 Agreement.

First, the SRO proposes to amend its confirmation rule, BOX Rule Chapter XI, Section 13, to add a requirement that confirmations disclose whether the transaction was an opening or closing transaction to harmonize the rule with FINRA Rule 2360(b)(12) and the rule of other options exchanges.[4]

Second, in order to maintain substantial similarity with FINRA rules, the SRO proposes to amend BOX Rule Chapter XI, Section 20 to clarify that the prohibition against guarantees also applies to persons associated with a Participant and to delete the language of BOX Rule Chapter XI, Section 21 related to profit sharing of a customer account, and replace it with the language of FINRA Rule 2150(c),[5] Sharing in Accounts; Extent Permissible. FINRA Rule 2150(c) contains the same prohibition against sharing in accounts as BOX Rule Chapter XI, Section 21, but with additional limited exceptions. The general prohibition contained in BOX Rule Chapter XI, Section 21 against sharing in the profits or losses of a customer account is currently covered by the 17d–2 Agreement. However, the limited exceptions of FINRA Rule 2150(c) are not covered by the 17d–2 Agreement. The Exchange proposes to add those limited exceptions to BOX Rule Chapter XI, Section 21 to harmonize its rule with the FINRA rule and add those limited exceptions

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] As noted other options exchanges have similar rules, *see e.g.* CBOE Rule 9.11.

[5] *Id.* at Rule 9.18.

pursuant to the 17d–2 Agreement. The portion of the rule prohibiting the guarantee of a customer against loss is being amended to clarify that it applies not only to Order Flow Providers but also to persons associated with Participants.

Third, the SRO proposes to amend its options communication rule, BOX Rule Chapter XI, Section 24, by deleting the term "market letters" in the definition of "sales literature" and adding the term "market letters" to the definition of "correspondence" to harmonize the rule with FINRA Rule 2220 and NASD Rule 2210(a)(2).[6]

2. Statutory Basis

The SRO believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[7] in general, and Section 6(b)(5) of the Act,[8] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to prevent fraudulent and manipulative acts, 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. Specifically, the proposed rule changes, by harmonizing BOX Trading Rules with FINRA Rules and the rules of other options exchanges, would provide Participants with a clearer regulatory scheme. The SRO further notes that the proposed rule changes are neither novel nor controversial and are modeled on existing rules.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The SRO does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The SRO has neither solicited nor received comments on the proposed rule change.

**III. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)**

This proposed rule change is filed pursuant to paragraph (A) of section 19(b)(3) of the Exchange Act[9] and Rule 19b–4(f)(6) thereunder.[10] This proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Because the rule change is based upon rules in place at FINRA and other options exchanges, and does not present any novel issues, and is intended to maintain consistency among the exchanges, the SRO requests that the Commission waive the 30-day operative delay period for "non-controversial" proposals and make the proposed rule change effective and operative upon filing.[11]

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 the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further 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–BX–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–BX–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, on official business days between the hours of 10 a.m. and 3 p.m., located at 100 F Street, NE., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the SRO. 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–BX–2011–015 and should be submitted on or before April 20, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011–7398 Filed 3–29–11; 8:45 am]

**BILLING CODE 8011–01–P**

[6] *Id.* at Rule 9.21.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the 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.

[12] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF STATE

**[Public Notice: 7387]**

## 30-Day Notice of Proposed Information Collection: Form DS–1998E, Foreign Service Officer Test Registration Form, OMB Control Number 1405–0008

**ACTION:** Notice of request for public comment and submission to OMB of proposed collection of information.

**SUMMARY:** The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for

approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Foreign Service Officer Test Registration Form.
- *OMB Control Number:* 1405–0008.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* Human Resources, HR/REE/BEX.
- *Form Number:* DS–1998E.
- *Respondents:* Registrants for the Foreign Service Officer Test.
- *Estimated Number of Respondents:* 30,000.
- *Estimated Number of Responses:* 30,000.
- *Average Hours per Response:* 2 hours.
- *Total Estimated Burden:* 60,000 hours.
- *Frequency:* Thrice annually.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

**DATES:** Submit comments to the Office of Management and Budget (OMB) for up to 30 days from March 30, 2011.

**ADDRESSES:** Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by any of the following methods:

- *E-mail:* *oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

**FOR FURTHER INFORMATION CONTACT:** You may obtain copies of the proposed information collection and supporting documents from Sara Rosenberry, HR/REE/BEX, SA–1, 2401 E Street, H–518, Washington, DC 20522, tel: 202–203–5117 or at *RossenberrySA@state.gov.*

**SUPPLEMENTARY INFORMATION:**

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond.

*Abstract of proposed collection:* Individuals registering for the Foreign Service Officer Test will complete a Registration Form that consists of an application form that includes information about their name, age, Social Security Number, contact information, sex, race, national origin, disability, education and work history, and military experience. The information will be used to prepare and issue admission to the Foreign Service Officer Test, to assess registrants' qualifications for selection as a Foreign Service Officer, to provide data useful for improving future tests, and to conduct research studies based on the test results.

*Methodology:* Responses can be submitted electronically.

Dated: March 14, 2011.

**Ruben Torres,**

*Executive Director, HR/EX, Department of State.*

[FR Doc. 2011–7473 Filed 3–29–11; 8:45 am]

BILLING CODE 4710–15–P

## DEPARTMENT OF STATE

**[Public Notice 7389]**

### In the Matter of the Designation of Ibrahim Hassan Tali al-Asiri, also known as Ibrahim Hassan al-Asiri, also known as Ibrahim Hasan Tali'A 'Asiri, also known as Ibrahim Hasan Tali al-'Asiri, also known as Ibrahim al-'Asiri, also known as Ibrahim Hassan Al Asiri, also known as Ibrahim Hassan Tali Assiri, also known as Abu Saleh, also known as Abosslah, as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23, 2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, I hereby determine that the individual known as Ibrahim Hassan Tali al-Asiri, also known as Ibrahim Hassan al-Asiri, also known as Ibrahim Hasan Tali'A 'Asiri, also known as Ibrahim Hasan Tali al-'Asiri, also known as Ibrahim al-'Asiri, also known as Ibrahim Hassan Al Asiri, also known as Ibrahim Hassan Tali Assiri, also known as Abu Saleh, also known as Abosslah, committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in section 10 of Executive Order 13224 that "prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously," I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: February 22, 2011.

**Hillary Rodham Clinton,**

*Secretary of State.*

[FR Doc. 2011–7477 Filed 3–29–11; 8:45 am]

BILLING CODE 4710–10–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Summary Notice No. PE–2011–14]**

### Petition for Exemption; Summary of Petition Received

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

**ACTION:** Notice of petition for exemption received.

**SUMMARY:** This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

**DATES:** Comments on this petition must identify the petition docket number involved and must be received on or before April 19, 2011.

**ADDRESSES:** You may send comments identified by Docket Number FAA–2011–0175 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC between 9

a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy:* We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

*Docket:* To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mark Forseth, ANM–113, (425) 227–2796, Federal Aviation Administration, 1601 Lind Avenue, SW., Renton, WA 98057–3356, or Frances Shaver, (202) 267–4059, Office of Rulemaking (ARM–200), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on March 25, 2011.

**Pamela Hamilton-Powell,**

*Director, Office of Rulemaking.*

### Petition for Exemption

*Docket No.:* FAA–2011–0175.

*Petitioner:* Presidential Airways, Inc.

*Section of 14 CFR Affected:* § 25.857.

*Description of Relief Sought:* The petitioner is requesting relief to permit passenger-cargo combination compartment configuration on Presidential Airways CASA Model C–212–CC, C–212–CD, and C–212–DF airplanes.

[FR Doc. 2011–7445 Filed 3–29–11; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System

Pursuant to Title 49 Code of Federal Regulations (CFR) Part 235 and 49 U.S.C. 20502(a), the following railroad has petitioned the Federal Railroad Administration (FRA) seeking approval for the discontinuance or modification of the signal, as detailed below.

[Docket Number FRA–2011–0005]

*Applicant:* CSX Transportation, Inc., Mr. Joseph Ivanyo, Chief Engineer, Communications and Signals, 500 Water Street, Speed Code J–350, Jacksonville, FL 32202.

The CSX Transportation, Inc. (CSXT) seeks approval of the proposed modification of the block signal system on Main Tracks #1 and #2, at R Cabin, milepost (MP) CA–83.10, Peninsula Subdivision, Huntington Division, Richmond, Virginia.

CSXT will retire controlled signals, 80LA, 80LC, and 80R, at Egypt (MP 81.8) and controlled signals 88LA, 88LC, 88LD, at MP 82.3. The power-operated switch at MP 82.3 will be converted to hand-operation and an electric lock will be installed. An electric lock is to be installed on the hand-operated switch at MP 81.5. Main Track #1 method of operation will become Rule 261 signaled in both directions within Yard Limits, between MP 81.00 and MP 83.2, with the discontinuance and removal of automatic signal #821, at Scott St. (MP 82.03), and automatic signal #831 (MP 83.1) near Orleans St. Electric locks will be installed at switch #83 (MP 83) and switch #83.2 (MP 83.2) on Main #1.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (Docket No. FRA–2011–0005) and may be submitted by any of the following methods:

- *Web site: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://www.regulations.gov.*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Issued in Washington, DC, on March 24, 2011.

**John G. Leeds, Jr.,**

*Director, Office of Safety Analysis.*

[FR Doc. 2011–7464 Filed 3–29–11; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

### Major Capital Investment Program—New Starts

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of discretionary selection of New Starts projects for Funding.

**SUMMARY:** The U.S. Department of Transportation's (DOT) Federal Transit Administration (FTA) announces the discretionary selection of projects for funding using unallocated Major Capital Investment (New Starts) program funds. The funds accelerate federal payments for new fixed guideway projects that are currently under construction.

**FOR FURTHER INFORMATION CONTACT:** For general program information on the New Starts, contact Eric Hu, Office of Program Management, at (202) 366–0870, e-mail: *Eric.Hu@dot.gov,* for program specific issues, contact the appropriate FTA regional office (*See* Appendix A).

**SUPPLEMENTARY INFORMATION:** The New Starts discretionary funds will advance Full Funding Grant Agreements payments and advance the Federal Government's commitments to the selected projects. The funding will give a well-timed boost to communities that have made important investments in their transportation infrastructure.

Furthermore, the advance payments will save financial costs for the local transit project sponsors and free up local funds for other transit projects that will further enhance mobility and livability in their communities. A total of $207,403,999 is available for FTA's discretionary allocation under the New Starts program. Of the total made available, $182,404,000 will fund seven transit projects already under construction; $24,999,999 restores funding for the Oakland Airport Connector. Projects selected for funding are shown in Table 1, which accompanies this announcement. Project identification numbers are assigned to each project and must be used in the Transportation Electronic Award Management grant application. Pre-award authority is granted as of December 27, 2010. The funding announced in this notice will be available for obligation until September 30, 2013.

Issued in Washington, DC, this 23rd day of March, 2011.

**Peter Rogoff,**

*Administrator.*

## Appendix A

FTA Regional and Metropolitan Offices

Mary E. Mello, Regional Administrator, Region 1–Boston, Kendall Square, 55 Broadway, Suite 920, Cambridge, MA 02142–1093, Tel. 617–494–2055.

States served: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

Brigid Hynes-Cherin, Regional Administrator, Region 2–New York, One Bowling Green, Room 429, New York, NY 10004–1415, Tel. 212–668–2170.

States served: New Jersey, New York.

New York Metropolitan Office, Region 2–New York, One Bowling Green, Room 428, New York, NY 10004–1415, Tel. 212–668–2202.

Letitia Thompson, Regional Administrator, Region 3–Philadelphia, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, Tel. 215–656–7100.

States served: Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and District of Columbia. Philadelphia Metropolitan Office, Region 3–Philadelphia, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, Tel. 215–656–7070.

Washington, DC Metropolitan Office, 1990 K Street, NW., Room 510, Washington, DC 20006, Tel. 202–219–3562.

Yvette Taylor, Regional Administrator, Region 4–Atlanta, 230 Peachtree Street, NW. Suite 800, Atlanta, GA 30303, Tel. 404–865–5600.

States served: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and Virgin Islands.

Marisol Simon, Regional Administrator, Region 5–Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. 312–353–2789.

States served: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

Chicago Metropolitan Office, Region 5–Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. 312–353–2789.

Robert C. Patrick, Regional Administrator, Region 6–Ft. Worth, 819 Taylor Street, Room 8A36, Ft. Worth, TX 76102, Tel. 817–978–0550.

States served: Arkansas, Louisiana, Oklahoma, New Mexico and Texas.

Mokhtee Ahmad, Regional Administrator, Region 7–Kansas City, MO, 901 Locust Street, Room 404, Kansas City, MO 64106, Tel. 816–329–3920.

States served: Iowa, Kansas, Missouri, and Nebraska.

Terry Rosapep, Regional Administrator, Region 8–Denver, 12300 West Dakota Ave., Suite 310, Lakewood, CO 80228–2583, Tel. 720–963–3300.

States served: Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.

Leslie T. Rogers, Regional Administrator, Region 9–San Francisco, 201 Mission Street, Room 1650, San Francisco, CA 94105–1926, Tel. 415–744–3133.

States served: American Samoa, Arizona, California, Guam, Hawaii, Nevada, and the Northern Mariana Islands.

Los Angeles Metropolitan Office, Region 9–Los Angeles, 888 S. Figueroa Street, Suite 1850, Los Angeles, CA 90017–1850, Tel. 213–202–3952.

Rick Krochalis. Regional Administrator. Region 10–Seattle. Jackson Federal Building. 915 Second Avenue, Suite 3142. Seattle, WA 98174–1002. Tel. 206–220–7954.

States served: Alaska, Idaho, Oregon, and Washington.

**Table I**
**New Starts Discretionary Allocations**

| State | Project ID | Existing FFGA/Recipient | Allocation |
|---|---|---|---|
| NY | D2010-NWST-001 | New York - East Side Access | $ 44,341,000 |
| NY | D2010-NWST-002 | New York-Second Avenue Subway MOS | $ 40,667,000 |
| TX | D2010-NWST-003 | Dallas-Northwest Southeast LRT MOS | $ 17,788,000 |
| UT | D2010-NWST-004 | Salt Lake City- Mid Jordan LRT | $ 20,623,000 |
| UT | D2010-NWST-09001 | Salt Lake-Weber County to Salt Lake City Commuter Rail | $ 16,500,000 |
| VA | D2010-NWST-005 ($11,581,001); D2010-NWST-08001 ($7,154,000); and D2010-NWST-06001 ($1,063,999) | Northern Virginia- Wiehle Ave. | $ 19,799,000 |
| WA | D2010-NWST-98001($1,145,505); D2010-NWST-06002 ($10,011,543); D2010-NWST-07001 ($11,018,780); and D2010-NWST-05001 ($510,172) | Seattle-University Link LRT Extension | $ 22,686,000 |
| | | Total | $ 182,404,000 |

| State | Project ID | Other Project | Allocation |
|---|---|---|---|
| CA | D2011-NWST-07001 | Oakland Airport Connector | $ 24,999,999 |
| | | Grand Total | $ 207,403,999 |

[FR Doc. 2011–7304 Filed 3–29–11; 8:45 am]
BILLING CODE P

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

### Over-the-Road Bus Accessibility Program Announcement of Project Selections

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of award.

**SUMMARY:** The U.S. Department of Transportation's (DOT) Federal Transit Administration (FTA) announces the selection of projects to be funded under Fiscal Year (FY) 2009 and 2010 appropriations for the Over-the-Road Bus (OTRB) Accessibility Program, authorized by Section 3038 of the Transportation Equity Act for the 21st Century (TEA–21). The OTRB Accessibility Program makes funds available to private operators of over-the-road buses to help finance the incremental capital and training costs of complying with DOT's over-the-road bus accessibility rule, published in the **Federal Register** on September 24, 1998.

**FOR FURTHER INFORMATION CONTACT:** The appropriate FTA Regional Office for grant-specific issues; or Blenda Younger, Office of Program Management, 202–366–2053, for general information about the OTRB Program.

**SUPPLEMENTARY INFORMATION:** A total of $20 million was made available for the program in FY 2009 and FY 2010: $15 million for intercity fixed-route providers and $5 million for all other providers, such as commuter, charter, and tour operators. A total of 165 applicants requested $49.7 million: $27.5 million was requested by intercity fixed-route providers, and $22.2 million was requested by all other providers. Project selections were made on a discretionary basis, based on each applicant's responsiveness to statutory project selection criteria, percent of fleet accessible, and level of funding received in previous years. Because of the high demand for the funds available, most successful applicants received less funding than they requested.

The selected projects will provide funding for the incremental cost of adding lifts to 376 new vehicles, retrofitting 142 vehicles, and $102,759 for training (See Tables I and II). Each of the awardees, as well as applicants who were not selected for funding, will receive a letter explaining how funding decisions were made. Eligible project costs may be incurred by awardees prior to final grant approval. The incremental capital cost for adding wheelchair lift equipment to any new vehicles delivered on or after June 9, 1998, the effective date of TEA–21, is eligible for funding under the OTRB Accessibility Program. Awards are processed through FTA's Transportation Electronic Awards Management System (TEAM), and the project ID's listed in Table I and Table II must be used in the grant application for tracking the obligation of funds. The grant applications will be sent to the U.S. Department of Labor (DOL) for certification under labor protection requirements pursuant to 49 U.S.C. 5333(b). After referring applications to affected employees represented by a labor organization, DOL will issue a certification to FTA. Terms and conditions of the certification will be incorporated in the FTA grant agreement under the new guidelines replacing those in 29 CFR part 215. Please see the Special Warranty Provisions of the Department of Labor Guidelines "Section 5553(b) Federal Transit Law" at 29 CFR 215.7.

Issued in Washington, DC, this 23rd day of March, 2011.

**Peter Rogoff,**

*Administrator.*

## Appendix A

*FTA Regional and Metropolitan Offices*

Mary-Beth Mello, Regional Administrator, Region 1–Boston, Kendall Square, 55 Broadway, Suite 920, Cambridge, MA 02142–1093, Tel. 617–494–2055.

States served: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

Robert C. Patrick, Regional Administrator, Region 6—Ft. Worth, 819 Taylor Street, Room 8A36, Ft. Worth, TX 76102, Tel. 817–978–0550.

States served: Arkansas, Louisiana, Oklahoma, New Mexico and Texas.

Brigid Hynes-Cherin, Regional Administrator, Region 2—New York, One Bowling Green, Room 429, New York, NY 10004–1415, Tel. 212–668–2170.
States served: New Jersey, New York .....
New York Metropolitan Office, Region 2—New York, One Bowling Green, Room 428, New York, NY 10004–1415, Tel. 212–668–2202.

Letitia Thompson, Regional Administrator, Region 3—Philadelphia, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, Tel. 215–656–7100.
States served: Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and District of Columbia.
Philadelphia Metropolitan Office, Region 3—Philadelphia, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, Tel. 215–656–7070.
Washington, D.C. Metropolitan Office, 1990 K Street, NW., Room 510, Washington, DC 20006, Tel. 202–219–3562.

Yvette Taylor, Regional Administrator, Region 4—Atlanta, 230 Peachtree Street, NW., Suite 800, Atlanta, GA 30303, Tel. 404–865–5600.
States served: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and Virgin Islands.

Marisol Simon, Regional Administrator, Region 5—Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. 312–353–2789.
States served: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.
Chicago Metropolitan Office, Region 5—Chicago, 200 West Adams Street, Suite 320, Chicago, IL 60606, Tel. 312–353–2789.

Mokhtee Ahmad, Regional Administrator, Region 7—Kansas City, MO, 901 Locust Street, Room 404, Kansas City, MO 64106, Tel. 816–329–3920.
States served: Iowa, Kansas, Missouri, and Nebraska.

Terry Rosapep, Regional Administrator, Region 8–Denver, 12300 West Dakota Ave., Suite 310, Lakewood, CO 80228–2583, Tel. 720–963–3300.
States served: Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.

Leslie T. Rogers, Regional Administrator, Region 9—San Francisco, 201 Mission Street, Room 1650, San Francisco, CA 94105–1926, Tel. 415–744–3133.
States served: American Samoa, Arizona, California, Guam, Hawaii, Nevada, and the Northern Mariana Islands.
Los Angeles Metropolitan Office, Region 9—Los Angeles, 888 S. Figueroa Street, Suite 1850, Los Angeles, CA 90017–1850, Tel. 213–202–3952.

Rick Krochalis, Regional Administrator, Region 10—Seattle, Jackson Federal Building, 915 Second Avenue, Suite 3142, Seattle, WA 98174–1002, Tel. 206–220–7954.
States served: Alaska, Idaho, Oregon, and Washington.

BILLING CODE P

## Table I

## Federal Transit Administration

### Other Projects

| STATE | Project IDs | Recipient | Project Description | Allocation |
|---|---|---|---|---|
| AL | D2010-OTRB-09033 | Capital Trailways | 2 retros | $ 90,000 |
| AL | D2010-OTRB-09034 | Colonial Trailways | 1 retro | $ 45,000 |
| AL | D2010-OTRB-09035 | Kingdom Coach, Inc. | 1 new lift | $ 45,000 |
| AL | D2010-OTRB-09036 | Southern Trailways | 1 retro | $ 45,000 |
| AR | D2010-OTRB-09064 | Mountain Home Charter Service | 1 new lift | $ 26,500 |
| AZ | D2010-OTRB-09085 | Tour West America, Inc. | 1 retro | $ 45,000 |
| CA | D2010-OTRB-09086 | ElCamino Trailways | 2 new lifts and training, $6,328 | $ 35,128 |
| CA | D2010-OTRB-09087 | All West Coachlines | 1 new lift | $ 45,000 |
| CA | D2010-OTRB-09088 | American Stage Tours, LLC | 1 new lift | $ 45,000 |
| CA | D2010-OTRB-09089 | American Star Trailways | 1 new lift | $ 45,000 |
| CA | D2010-OTRB-09090 | American Transportation Systems | 1 retro | $ 45,000 |
| CA | D2010-OTRB-09091 | Classic Charter, Inc. | 1 new lift | $ 45,000 |
| CA | D2010-OTRB-09092 | Coach America San Diego | 1 new lift | $ 45,000 |
| CA | D2010-OTRB-09093 | Franciscan Lines | 1 new lift and training, $2,250 | $ 27,450 |
| CA | D2010-OTRB-09094 | Royal Coach Tours | 1 new lift | $ 45,000 |
| CA | D2010-OTRB-09095 | Sun Diego Charter Company, Inc. | 1 new lift | $ 45,000 |
| CA | D2010-OTRB-09096 | Sundance Stage Lines, Inc. | 1 new lift | $ 45,000 |
| CA | D2010-OTRB-09097 | Tour Coach Transportation | 1 retro | $ 45,000 |
| CO | D2010-OTRB-09081 | Black Hawk Central City Ace Exp. | 1 new lift | $ 45,000 |
| CT | D2010-OTRB-09001 | Dattco, Inc. | 2 new lifts | $ 90,000 |

| STATE | Project IDs | Recipient | Project Description | Allocation |
|---|---|---|---|---|
| FL | D2010-OTRB-09037 | American Coach Lines Jacksonville | 1 new lift and training, $2,250 | $ 47,250 |
| FL | D2010-OTRB-09038 | American Coach Lines Miami | 2 new lifts | $ 90,000 |
| FL | D2010-OTRB-09039 | Annett Bus Lines | 1 new lift and training, $2,250 | $ 47,250 |
| FL | D2010-OTRB-09040 | Fabulous Coach Lines | 1 new lift | $ 45,000 |
| GA | D2010-OTRB-09041 | American Coach Lines of Atlanta | 1 new lift and training, $2,250 | $ 27,450 |
| GA | D2010-OTRB-09042 | Daniel's Charter & Tours | 1 new lift | $ 45,000 |
| IA | D2010-OTRB-09078 | Windstar Lines, Inc. | 1 retro | $ 45,000 |
| IL | D2010-OTRB-09050 | Colonial Coach Lines, Inc. | 1 new lift | $ 45,000 |
| IL | D2010-OTRB-09051 | Prairie Trailways | 1 new lift | $ 45,000 |
| IL | D2010-OTRB-09052 | Rockford Charter Coach, LLC | 1 retro | $ 45,000 |
| IL | D2010-OTRB-09053 | Southwestern Illinois Bus Co. | 1 new lift and training, $4,500 | $ 29,700 |
| IL | D2010-OTRB-09054 | Spirit Tours, INC. | 1 retro | $ 45,000 |
| IL | D2010-OTRB-09055 | Vandalia Bus Lines, Inc. | 1 new lift and training, $4,500 | $ 60,340 |
| IN | D2010-OTRB-09056 | Bloomington Shuttle Service, Inc. | 1 retro and training, $4,500 | $ 45,000 |
| IN | D2010-OTRB-09057 | Excursions Trailways | 1 new lift | $ 45,000 |
| IN | D2010-OTRB-09058 | Royal Excursions Chauffeur | 1 retro | $ 45,000 |
| KS | D2010-OTRB-09079 | Airecoach Charter & Tours, LLC | 1 retro | $ 45,000 |
| KY | D2010-OTRB-09043 | Toby Tours | 1 retro | $ 45,000 |
| KY | D2010-OTRB-09044 | Miller Transportation | 2 new lifts | $ 90,000 |
| LA | D2010-OTRB-09065 | Calco Travel, Inc. | 1 new lift | $ 45,000 |
| LA | D2010-OTRB-09066 | Dixieland Tours, Inc. | 1 new lift | $ 45,000 |
| LA | D2010-OTRB-09067 | Hotard Coaches, Inc. | 1 new lift | $ 45,000 |
| LA | D2010-OTRB-09068 | Louisiana Trailways, Inc. | 1 new lift | $ 45,000 |

| STATE | Project IDs | Recipient | Project Description | Allocation |
|---|---|---|---|---|
| MA | D2010-OTRB-09002 | Buckingham Bus Company | 1 new lift | $ 45,000 |
| MA | D2010-OTRB-09003 | Cavalier Coach Trailways | 1 new lift | $ 45,000 |
| MA | D2010-OTRB-09004 | Fox Bus Lines, Inc. | 1 new lift | $ 45,000 |
| MD | D2010-OTRB-09020 | Beltway Transportation Service | 1 retro | $ 45,000 |
| MD | D2010-OTRB-09021 | BK Charter Inc. | 1 new lift and training, $550 | $ 33,550 |
| MD | D2010-OTRB-09022 | Golden Ring Travel, Inc. | 1 retro | $ 45,000 |
| MD | D2010-OTRB-09023 | Haymarket Transportation, Inc. | 1 retro | $ 45,000 |
| MI | D2010-OTRB-09059 | Indian Trails, Inc. | 1 new lift | $ 45,000 |
| MN | D2010-OTRB-09060 | Rochester City Lines | 1 new lift | $ 45,000 |
| MN | D2010-OTRB-09061 | Voigt's Bus Service, Inc. | 1 new lift | $ 45,000 |
| MO | D2010-OTRB-09080 | White Knight Limousine | 1 new lift | $ 45,000 |
| MS | D2010-OTRB-09045 | ACR Coach | 1 retro | $ 45,000 |
| MS | D2010-OTRB-09046 | Cline Tours, Inc. | 2 new lifts | $ 90,000 |
| MT | D2010-OTRB-09082 | Beach Transportation | 1 new lift | $ 45,000 |
| NC | D2010-OTRB-09047 | Young Transportation | 1 new lift and training, $4,500 | $ 30,075 |
| ND | D2010-OTRB-09083 | Harlow's Bus Service, Inc. | 1 retro and training, $3,348 | $ 48,348 |
| NJ | D2010-OTRB-09005 | DeCamp Bus Lines | 2 new lifts and training, $2,250 | $ 52,650 |
| NJ | D2010-OTRB-09006 | Raritan Valley Bus Service | 1 new lift | $ 45,000 |
| NJ | D2010-OTRB-09007 | Stout's Charter Service, Inc. | 1 new lift | $ 45,000 |
| NV | D2010-OTRB-09098 | Ryan's Express | 3 new lifts | $ 135,000 |
| NV | D2010-OTRB-09099 | Triple J Tours, Inc. | 1 retro | $ 45,000 |
| NY | D2010-OTRB-09008 | Paradise Trailways | 1 new lift | $ 45,000 |
| NY | D2010-OTRB-09009 | Wade Tours, INC. | 1 retro | $ 45,000 |

| STATE | Project IDs | Recipient | Project Description | Allocation |
|---|---|---|---|---|
| NY | D2010-OTRB-09010 | Birnie Bus Service, Inc. | 1 new lift | $ 45,000 |
| NY | D2010-OTRB-09011 | Brown Coach, Inc. | 1 new lift | $ 45,000 |
| NY | D2010-OTRB-09012 | Leprechaun Lines, Inc. | 1 new lift | $ 45,000 |
| NY | D2010-OTRB-09013 | Onondaga Coach Corporation | 1 retro | $ 45,000 |
| NY | D2010-OTRB-09014 | Private One of New York LLC | 1 new lift | $ 45,000 |
| NY | D2010-OTRB-09015 | Skyliner Travel & Tour Bus Corp. | 1 new lift | $ 45,000 |
| NY | D2010-OTRB-09016 | Trans Express, INC. | 1 new lift | $ 45,000 |
| NY | D2010-OTRB-09017 | Upstate Transit of Saratoga, LLC | 1 new lift | $ 45,000 |
| NY | D2010-OTRB-09018 | World Wide Travel of Greater NY | 1 retro | $ 45,000 |
| NY | D2010-OTRB-09019 | Yankee Trails, Inc. | 1 new lift | $ 45,000 |
| OH | D2010-OTRB-09062 | Croswell Bus Lines, Inc. | 1 new lift | $ 45,000 |
| OK | D2010-OTRB-09069 | Red Carpet Charters | 2 new lifts | $ 90,000 |
| OR | D2010-OTRB-09100 | RAZ Transportation, Co. | 1 new lift and training, $2,250 | $ 27,450 |
| PA | D2010-OTRB-09024 | Anderson Coach and Travel | 1 new lift | $ 45,000 |
| PA | D2010-OTRB-09025 | Easton Coach Company | 1 retro | $ 45,000 |
| PA | D2010-OTRB-09026 | Executive Coach | 1 new lift and training, $4,500 | $ 21,150 |
| PA | D2010-OTRB-09027 | Red Lion Bus Company | 1 retro | $ 45,000 |
| PA | D2010-OTRB-09028 | Sun Coach Lines, LLC. | 1 new lift | $ 45,000 |
| TN | D2010-OTRB-09048 | Greene Coach Company, Inc. | 1 retro | $ 45,000 |
| TN | D2010-OTRB-09049 | Royal Charter and Tour, Inc. | 1 new lift | $ 45,000 |
| TX | D2010-OTRB-09070 | Alliance Bus Charters | 1 retro and training, $1,985 | $ 46,985 |
| TX | D2010-OTRB-09071 | Buses By Bill, Inc. | 1 new lift | $ 45,000 |
| TX | D2010-OTRB-09072 | Cowtown Bus Charters, Inc. | 1 new lift | $ 45,000 |

| STATE | Project IDs | Recipient | Project Description | Allocation |
|---|---|---|---|---|
| TX | D2010-OTRB-09073 | El Expreso Bus Company | 1 new lift | $ 45,000 |
| TX | D2010-OTRB-09074 | Gulf Coast Transportation | 2 new lifts | $ 90,000 |
| TX | D2010-OTRB-09075 | Kerrville Bus Co. | 1 new lift | $ 76,950 |
| TX | D2010-OTRB-09076 | Omnibus Express | 2 new lifts | $ 90,000 |
| TX | D2010-OTRB-09077 | Star Shuttle & Charter | 1 retro | $ 45,000 |
| UT | D2010-OTRB-09084 | Utah Trailways | 1 new lift | $ 45,000 |
| VA | D2010-OTRB-09029 | DC Trails, Inc. | 2 new lifts | $ 90,000 |
| VA | D2010-OTRB-09030 | Fun Tours, Inc. | 1 new lift | $ 45,000 |
| VA | D2010-OTRB-09031 | Newton Bus Service, Inc. | 1 retro | $ 45,000 |
| VA | D2010-OTRB-09032 | Venture Tours, Inc. | 1 retro | $ 45,000 |
| WA | D2010-OTRB-09101 | Starline Luxury Coaches | 1 new lift | $ 45,000 |
| WI | D2010-OTRB-09063 | Lamers Bus Lines, Inc. | 2 new lifts | $ 90,000 |
| | | | | **$ 5,003,226** |

**Table II**
**Federal Transit Administration**
**Intercity Fixed-Route Projects**

| STATE | Project ID | Recipient | Project Description | Allocation |
|---|---|---|---|---|
| AL | D2010-OTRB-10013 | Colonial Trailways | 3 retros | $ 135,000 |
| CA | D2010-OTRB-10026 | Silverado Stages, Inc. | 5 new lifts | $ 163,890 |
| FL | D2010-OTRB-10014 | Escot Bus Lines | 4 new lifts and training, $2,250 | $ 113,960 |
| IL | D2010-OTRB-10016 | Peoria Charter Coach Company | 4 new lifts and training, $4,500 | $ 105,778 |
| IL | D2010-OTRB-10017 | Pioneer Coach Lines, Inc. | 14 new lifts, 14 retros, training, $2,000 | $ 633,300 |
| MA | D2010-OTRB-10001 | Peter Pan Bus Lines | 23 new lifts and training, $4,500 | $ 613,980 |
| MA | D2010-OTRB-10002 | Plymouth & Brockton | 2 new lifts | $ 50,400 |
| ME | D2010-OTRB-10003 | John T. Cyr & Sons, Inc. | 1 new lift | $ 32,928 |
| MN | D2010-OTRB-10018 | Jefferson Lines | 12 new lifts and training, $2,000 | $ 362,000 |
| NE | D2010-OTRB-10025 | Arrow Stage Lines | 2 new lifts, 4 retros, and training, $2,250 | $ 209,449 |
| NH | D2010-OTRB-10004 | C&J Trailways | 2 new lifts | $ 56,448 |
| NH | D2010-OTRB-10005 | Dartmouth Transportation Company | 8 new lifts and training, $2,500 | $ 235,092 |
| NJ | D2010-OTRB-10007 | DeCamp Bus Lines | 1 new lift and training, $2,250 | $ 27,450 |
| NM | D2010-OTRB-10021 | All Aboard America | 7 new lifts and training, $2,250 | $ 207,214 |
| NY | D2010-OTRB-10008 | Adirondack Trailways | 18 new lifts | $ 567,000 |
| NY | D2010-OTRB-10009 | Great Escape Tours & Travel | 12 retros | $ 558,000 |
| NY | D2010-OTRB-10010 | Hampton Jitney, Inc. | 12 new lifts and training, $3,096 | $ 311,417 |
| OH | D2010-OTRB-10019 | Lakefront Lines, Inc. | 9 new lifts and training, $4,500 | $ 231,300 |
| PA | D2010-OTRB-10011 | Fullington Trailways | 4 retros and training, $4,500 | $ 232,560 |
| PA | D2010-OTRB-10012 | Susquehanna Trailways | 3 retros | $ 187,110 |
| RI | D2010-OTRB-10006 | Bonanza Bus Lines | 12 new lifts and training, $9,000 | $ 350,320 |
| TN | D2010-OTRB-10015 | Gray Line Nashville | 3 new lifts and training, $2,250 | $ 90,092 |
| TX | D2010-OTRB-09102 | Americanos USA, LLC | 21 retros | $ 977,986 |
| TX | D2010-OTRB-10022 | Americanos USA, LLC | 9 retros | $ 394,411 |
| TX | D2010-OTRB-00001 | Greyhound | 5 new lifts | $ 190,274 |
| TX | D2010-OTRB-01001 | Greyhound | 2 new lifts | $ 81,874 |

| STATE | Project ID | Recipient | Project Description | Allocation |
|---|---|---|---|---|
| TX | D2010-OTRB-02001 | Greyhound | 7 new lifts | $ 239,818 |
| TX | D2010-OTRB-03001 | Greyhound | 8 new lifts | $ 289,039 |
| TX | D2010-OTRB-04001 | Greyhound | 16 new lifts | $ 574,542 |
| TX | D2010-OTRB-05001 | Greyhound | 15 new lifts | $ 541,050 |
| TX | D2010-OTRB-06001 | Greyhound | 14 new lifts | $ 514,615 |
| TX | D2010-OTRB-09103 | Greyhound | 79 new lifts | $ 2,818,788 |
| TX | D2010-OTRB-10023 | Tornado Bus Company | 4 new lifts, 24 retros, training, $6,000 | $ 1,829,115 |
| TX | D2010-OTRB-10024 | Valley Transit Company, Inc. | 14 retros | $ 776,740 |
| WA | D2010-OTRB-10027 | Northwestern Trailways | 2 new lifts,1 retro | $ 94,500 |
| WA | D2010-OTRB-10028 | MTR Western | 1 new lift | $ 34,022 |
| WI | D2010-OTRB-10020 | Riteway Bus Service, Inc. | 3 retros and training. $702 | $ 178,216 |
| | | | | $ 15,009,678 |

[FR Doc. 2011–7409 Filed 3–29–11; 8:45 am]
**BILLING CODE C**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[U.S. DOT Docket Number NHTSA–2011–0045]**

### Reports, Forms, and Recordkeeping Requirements

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

**ACTION:** Request for public comment on proposed collection of information.

**SUMMARY:** Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections.

This document describes one collection of information for which NHTSA intends to seek OMB approval.

**DATES:** Comments must be received on or before May 31, 2011.

**ADDRESSES:** Comments must refer to the docket notice numbers cited at the beginning of this notice and be submitted to Docket Management, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590. Please identify the proposed collection of information for which a comment is provided, by referencing its OMB clearance Number. It is requested, but not required, that 2 copies of the comment be provided. The Docket Section is open on weekdays from 10 a.m. to 5 p.m.

**FOR FURTHER INFORMATION CONTACT:** Walter Culbreath, NHTSA 1200 New Jersey Avenue, SW., W51–204, NPO–400,Washington, DC 20590. Mr. Culbreath's telephone number is (202) 366–1566. Please identify the relevant collection of information by referring to its OMB Control Number.

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation (at 5 CFR 1320.8(d), an agency must ask for public comment on the following:

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

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

(iii) how to enhance the quality, utility, and clarity of the information to be collected;

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

In compliance with these requirements, NHTSA asks for public comments on the following proposed collections of information:

(1) *Title:* 23 CFR, part 1345, Occupant Protection Incentive Grant-Section 405

*OMB Number:* 2127—0600.

*Affected Public:* Business of other for profit organizations.

*Type of Request:* Extension of a currently approved collection.

*Abstract:* An occupant protection incentive grant is available to states that can demonstrate compliance with at least four of six criteria. Demonstration of compliance requires submission of copies of relevant seat belt and child passenger protection statutes plan and/or reports on statewide seat belt enforcement and child seat education programs and possibly some traffic court records. In addition, States eligible to receive grant funds must submit a

Program Cost Summary (Form 217), allocating section 405 funds to occupant protection programs.

*Estimated Annual Burden:* 1,736.

*Estimated Number of Respondents:* 56.

(2) *Title:* 49 CFR 556, Petitions for Inconsequentiality.

*OMB Control Number:* 2127–0045.

*Affected Public:* Business or other for profit.

*Abstract:* The National Highway Traffic Safety Administration's statue at 49 U.S.C. 30113 General exemptions at subsection (b) Authority to exempt and procedures, authorizes the Secretary of Transportation upon application of a manufacturer, to exempt the applicant from the notice and remedy requirements of 49 U.S.C. Charter 301, if the Secretary determines that the defect or noncompliance is inconsequential as it relates to motor vehicle safety. The notice and remedy requirements of Chapter 301 are set forth in 49 U.S.C. 30120 Remedies for defects and noncompliance. Those sections require a manufacturer of motor vehicles or motor vehicle equipment to notify distributors, dealers, and purchasers if any of the manufacturer's products are determined either to contain a safety-related defect or to fail to comply with an applicable Federal motor vehicle safety standard. The manufacturer is under a concomitant obligation to remedy such defects or noncompliance. NHTSA exercised this statutory authority to excuse inconsequential defects or noncompliance when it promulgated 49 CFR Part 556, Petitions for Inconsequentiality—this regulation establishes the procedures for manufacturers to submit such petitions to the agency will use un evaluating those petitions. Part 556 allows the agency to ensure that petitions filed under 15 U.S.C. 30113 (b) are both properly substantiated and efficiently processed.

*Estimated Annual Burden:* 200 hours.

*Estimated Number of Respondents:* 40.

(3) *Title:* 49 CFR 571.125, Warning Devices.

*OMB Number:* 2127–0506.

*Type of Request:* Extension of a currently approved collection.

*Affected Public:* Business or other for profit organizations.

*Abstract:* 49 U.S.C. 30111, 30112, and 30117 of the National Traffic and Motor Vehicle Safety Act of 1996, authorizes the issuance of Federal Motor Vehicle Safety Standards (FMVSS). The Secretary is authorized to issue, amend, and revoke such rules and regulations as she/he deems necessary.

Using this authority, the agency issued FMVSS no. 125, "Warning Devices" (Appendix 2), which applies to devices, without self contained energy sources, that are designed to be carried mandatory in buses and trucks that have a gross vehicle weight rating (GVWR) greater than 10,000 pounds and voluntarily in other vehicles. These devices are used to warn approaching traffic of the presence of a stopped vehicle, except for devices designed to be permanently affixed to the vehicles.

*Estimated Annual Burden:* 1.

*Estimated Number of Respondents:* 3.

(4) *Title:* 49 CFR 571.218, Motorcycle Helmets (Labeling).

*OMB Number:* 2127–0518.

*Type of Request:* Extension of a currently approved collection.

*Affected Public:* Federal, Local, State, and Tribal Government, Business, or other for-profit organizations.

*Abstract:* The National Traffic Vehicle Safety statute at 49 U.S.C. subchapter II standards and compliance, sections 30111 and 30117 authorizes the issuance of Federal motor vehicle safety standards (FMVSS). The Secretary is authorized to issue, amend, and revoke such rules and regulations as he/she deems necessary. The Secretary is also authorized to require manufacturers to provide information to first purchasers or motor vehicles or motor vehicle equipment when the vehicle equipment is purchased, in a printed matter placed in the vehicle or attached to our accompanying the equipment. Using this authority, the agency issued the initial FMVSS No. 218, Motorcycle Helmets, in 1974. Motorcycle helmets are the devices used for protecting motorcyclists and other motor vehicle users in motor vehicle accidents. Federal Motor Vehicle Safety Standard No. 218 requires that each helmet shall be labeled permanently and legibly (S5.6), in a manner such that the label(s) can be read easily without removing padding or any other permanent part.

*Estimated Annual Burden:* 5,333.

*Estimated Number of Respondents:* 32.

(5) *Title:* Evaluation of State Motorcycle Safety Programs.

*OMB Number:* 2127–0652.

*Type of Request:* Extension of a currently approved collection.

*Affected Public:* Business or other for profit organizations.

*Abstract:* NHTSA will conduct a survey of State Motorcycle Safety Administrators and/or State Highway Safety Offices in all 50 States and the District of Columbia to gather data on State-level motorcycle safety programs. This survey will consist of a questionnaire in mail (paper and pencil) format, which will allow a telephone follow-up for further details as necessary. The study will use the State Motorcycle Safety Administrator and State Highway Safety Office survey to gather comprehensive data on what each of the 50 States and the District of Columbia are doing to promote and ensure safe riding behavior.

*Estimated Annual Burden:* 26.

*Estimated Number of Respondents:* 51.

(6) *Title:* 23 CFR Parts Uniform Safety Program Cost Summary Form for Highway Safety Plan.

*OMB Number:* 2127–0003.

*Type of Request:* Extension of a currently approved collection.

*Affected Public:* Business or other for profit organizations.

*Abstract:* Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting there from. Such program shall be in accordance with uniform guidelines promulgated by the Secretary to improve driver performance, and to improve pedestrian performance, motorcycle safety and bicycle safety. Under this program, States submit the Highway Safety Program and other documentation explaining how they intend to use the grant funds. In order to account for funds expended under these priority areas and other program areas, States are required to submit a Program Cost Summary. The Program Cost Summary is completed to reflect the State's proposed Allocation of funds (including carry-forward funds) by program area, based on the projects and activities identified in the Highway Safety Plan.

*Estimated Annual Burden:* 570.

*Estimated Number of Respondents:* 57.

Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued on: March 25, 2011.

**Dan Pitton,**

*Director Office of Mission, Architect, and Planning.*

[FR Doc. 2011–7490 Filed 3–29–11; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

**[Docket No. PHMSA–2010–0373 (Notice No. 11–2)]**

### Information Collection Activities

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Requests (ICR) abstracted below will be forwarded to the Office of Management and Budget (OMB) for review and comments. The ICRs describe the nature of the information collections and their expected burden. A **Federal Register** Notice with a 60-day comment period soliciting comments on these collections of information was published in the **Federal Register** on December 29, 2010 [75 FR 82142] under Docket No. PHMSA–2010–0373 (Notice No. 10–10).

**DATES:** Interested persons are invited to submit comments on or before April 29, 2011.

**ADDRESSES:** Send comments regarding the burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget (OMB), *Attention:* Desk Officer for PHMSA, 725 17th Street, NW., Washington, DC 20503. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is most effective if OMB receives it within 30 days of publication.

**FOR FURTHER INFORMATION CONTACT:** Deborah Boothe or Steven Andrews, U.S. Department of Transportation, Office of Hazardous Materials Standards (PHH–10), Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE., East Building, 2nd Floor, Washington, DC 20590–0001, Telephone (202) 366–8553.

**SUPPLEMENTARY INFORMATION:** Section 1320.8(d), Title 5, Code of Federal Regulations requires Federal agencies to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies information collection requests that PHMSA will be submitting to OMB for renewal and extension. These information collections are contained in 49 CFR parts 110, 171, 172, 173, 174, 177, 178, 179, and 180, of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180). PHMSA has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on changes in proposed or final rules published since the information collections were last approved. The following information is provided for each information collection: (1) Title of the information collection, including former title if a change is being made; (2) OMB control number; (3) abstract of the information collection activity; (4) description of affected persons; (5) estimate of total annual reporting and recordkeeping burden; and (6) frequency of collection. PHMSA will request a three-year term of approval for each information collection activity and, when approved by OMB, publish notice of the approval in the **Federal Register**.

PHMSA requests comments on the following information collections:

*Title:* Requirements for Cargo Tanks.

*OMB Control Number:* 2137–0014.

*Summary:* This information collection consolidates and describes the information collection provisions in parts 178 and 180 of the HMR involving the manufacture, qualification, maintenance and use of all specification cargo tank motor vehicles. It also includes the information collection and recordkeeping requirements for persons who are engaged in the manufacture, assembly, requalification and maintenance of DOT specification cargo tank motor vehicles. The types of information collected include:

(1) *Registration Statements:* Cargo tank manufacturers and repairers, and cargo tank motor vehicle assemblers are required to be registered with DOT by furnishing information relative to their qualifications to perform the functions in accordance with the HMR. The registration statements are used to identify these persons in order for DOT to ensure that they possess the knowledge and skills necessary to perform the required functions and they are performing the specified functions in accordance with the applicable regulations.

(2) *Requalification and maintenance reports:* These reports are prepared by persons who requalify or maintain cargo tanks. This information is used by cargo tank owners, operators and users, and DOT compliance personnel to verify that the cargo tanks are requalified, maintained and are in proper condition for the transportation of hazardous materials.

(3) *Manufacturers' data reports, certificates and related papers:* These reports are prepared by cargo tank manufacturers and certifiers, and are used by cargo tank owners, operators, users and DOT compliance personnel to verify that a cargo tank motor vehicle was designed and constructed to meet all requirements of the applicable specification.

*Affected Public:* Manufacturers, assemblers, repairers, requalifiers, certifiers and owners of cargo tanks.

*Annual Reporting and Recordkeeping Burden:*

*Number of Respondents:* 41,366.

*Total Annual Responses:* 132,600.

*Total Annual Burden Hours:* 101,507.

*Frequency of Collection:* Periodically.

*Title:* Hazardous Materials Incident Reports.

*OMB Control Number:* 2137–0039.

*Summary:* This collection is applicable upon occurrence of incidents as prescribed in §§ 171.15 and 171.16. A Hazardous Materials Incident Report, DOT Form F 5800.1, must be completed by a person in physical possession of a hazardous material at the time a hazardous material incident occurs in transportation, such as a release of materials, serious accident, evacuation or closure of a main artery. Incidents meeting criteria in § 171.15 also require a telephonic report. This information collection enhances the Department's ability to evaluate the effectiveness of its regulatory program, determine the need for regulatory changes, and address emerging hazardous materials transportation safety issues. The requirements apply to all interstate and intrastate carriers engaged in the transportation of hazardous materials by rail, air, water, and highway.

*Affected Public:* Shippers and carriers of hazardous materials.

*Annual Reporting and Recordkeeping Burden:*

*Number of Respondents:* 1,781.
*Total Annual Responses:* 17,810.
*Total Annual Burden Hours:* 23,746.
*Frequency of collection:* On occasion.
*Title:* Radioactive (RAM) Transportation Requirements.
*OMB Control Number:* 2137–0510.
*Summary:* This information collection consolidates and describes the information collection provisions in the HMR involving the transportation of radioactive materials in commerce. Information collection requirements for RAM include: Shipper notification to consignees of the date(s) of shipments of RAM; expected arrival; special loading/unloading instructions; verification that shippers using foreign-made packages hold a foreign competent authority certificate and verification that the terms of the certificate are being followed for RAM shipments being made into this country; and specific handling instructions from shippers to carriers for fissile RAM, bulk shipments of low specific activity RAM and packages of RAM which emit high levels of external radiation. These information collection requirements help to establish that proper packages are used for the type of radioactive material being transported; external radiation levels do not exceed prescribed limits; and packages are handled appropriately and delivered in a timely manner, so as to ensure the safety of the general public, transport workers, and emergency responders.
*Affected Public:* Shippers and carriers of radioactive materials in commerce.
*Annual Reporting and Recordkeeping Burden:*
*Number of Respondents:* 3,817.
*Total Annual Responses:* 21,519.
*Total Annual Burden Hours:* 15,270.
*Frequency of collection:* On occasion.
*Title:* Flammable Cryogenic Liquids.
*OMB Control Number:* 2137–0542.
*Summary:* Provisions in § 177.840(a)(2) specify certain safety procedures and documentation requirements for drivers of motor vehicles transporting flammable cryogenic liquids. This information allows the driver to take appropriate remedial actions to prevent a catastrophic release of the flammable cryogenics should the temperature of the material begin to rise excessively or if the travel time will exceed the safe travel time. These requirements are intended to ensure a high level of safety when transporting flammable cryogenics due to their extreme flammability and high compression ratio when in a liquid state.
*Affected Public:* Carriers of cryogenic materials.
*Annual Reporting and Recordkeeping Burden:*
*Total Respondents:* 65.
*Total Annual Responses:* 18,200.
*Total Annual Burden Hours:* 1,213.
*Frequency of collection:* On occasion.
*Title:* Rail Carrier and Tank Car Tank Requirements.
*OMB Control Number:* 2137–0559.
*Summary:* This information collection consolidates and describes the information provisions in parts 172, 173, 174, 179, and 180 of the HMR on the transportation of hazardous materials by rail and the manufacture, qualification, maintenance and use of tank cars. The types of information collected include:
(1) *Approvals of the Association of American Railroads (AAR) Tank Car committee:* An approval is required from the AAR Tank Car Committee for a tank car to be used for a commodity other than those specified in part 173 and on the certificate of construction. This information is used to ascertain whether a commodity is suitable for transportation in a tank car. AAR approval also is required for an application for approval of designs, materials and construction, conversion or alteration of tank car tanks constructed to a specification in part 179 or an application for construction of tank cars to any new specification. This information is used to ensure that the design, construction or modification of a tank car or the construction of a tank car to a new specification is performed in accordance with the applicable requirements.
(2) *Progress Reports:* Each owner of a tank car that is required to be modified to meet certain requirements specified in § 173.31 must submit a progress report to the Federal Railroad Administration (FRA). This information is used by FRA to ensure that all affected tank cars are modified before the regulatory compliance date.
(3) *FRA Approvals:* An approval is required from FRA to transport a bulk packaging (such as a portable tank, IM portable tank, intermediate bulk container, cargo tank, or multi-unit tank car tank) containing a hazardous material in container-on-flat-car or trailer-on-flat-car service other than as authorized by § 174.63. FRA uses this information to ensure that the bulk package is properly secured using an adequate restraint system during transportation. In addition, an FRA approval is required for the movement of any tank car that does not conform to the applicable requirements in the HMR. These latter movements are currently being reported under the information collection for special permit applications.
(4) *Manufacturer Reports and Certificate of Construction:* These documents are prepared by tank car manufacturers and used by owners, users and FRA personnel to verify that rail tank cars conform to the applicable specification.
(5) *Quality Assurance Program:* Facilities that build, repair, and ensure the structural integrity of tank cars are required to develop and implement a quality assurance program. This information is used by the facility and DOT compliance personnel to ensure that each tank car is constructed or repaired in accordance with the applicable requirements.
(6) *Inspection Reports:* A written report must be prepared and retained for each tank car that is inspected and tested in accordance with § 180.509 of the HMR. Rail carriers, users, and the FRA use this information to ensure that rail tank cars are properly maintained and in safe condition for transporting hazardous materials.
*Affected Public:* Manufacturers, owners and rail carriers of tank cars.
*Annual Reporting and Recordkeeping Burden:*
*Number of Respondents:* 266.
*Total Annual Responses:* 16,782.
*Total Annual Burden Hours:* 2,689.
*Frequency of collection:* Annually.
*Title:* Container Certification Statement.
*OMB Control Number:* 2137–0582.
*Summary:* Shippers of explosives, in freight containers or transport vehicles by vessel, are required to certify on shipping documentation that the freight container or transport vehicle meets minimal structural serviceability requirements. This requirement is intended to ensure an adequate level of safety for transport of explosives aboard vessel and ensure consistency with similar requirements in international standards.
*Affected Public:* Shippers of explosives in freight containers or transport vehicles by vessel.
*Annual Reporting and Recordkeeping Burden:*
*Annual Respondents:* 650.
*Annual Responses:* 890,000.
*Annual Burden Hours:* 14,908.
*Frequency of collection:* On occasion.
*Title:* Hazardous Materials Public Sector Training and Planning Grants.
*OMB Control Number:* 2137–0586.
*Summary:* Part 110 of 49 CFR sets forth the procedures for reimbursable

grants for public sector planning and training in support of the emergency planning and training efforts of States, Indian tribes and local communities to manage hazardous materials emergencies, particularly those involving transportation. Sections in this part address information collection and recordkeeping with regard to applying for grants, monitoring expenditures, and reporting and requesting modifications.

PHMSA received a consolidated comment from the American Trucking Associations (ATA), the Dangerous Goods Advisory Council (DGAC), and the Institute of Makers of Explosives (IME) pertaining to the renewal of this information collection in response to the 60–Day Notice published on December 29, 2010 [75 FR 82142]. The commenters to that notice: questioned the use of the statement of benefits provided by the Hazardous Materials Public Sector Training and Planning Grants program; asked PHMSA to provide greater program accountability; inquired about an investigation of the grants program; and urged PHMSA to ensure that the fees paid by the regulated community are used for eligible activities, and that the agency publically disclose this information. These comments are beyond the scope of this notice; however, PHMSA has forwarded the commenters' concerns to the appropriate program office and will evaluate the recommendations and consider program changes as necessary and appropriate. In addition, the commenters also urge PHMSA to seek renewal of this information collection in the future. As noted earlier in this notice, PHMSA is requesting a three-year term of approval for each information collection activity and, when approved by OMB, will publish notice of the approval in the **Federal Register**.

*Affected Public:* State and local governments, Indian tribes.

*Annual Reporting and Recordkeeping Burden:*

*Annual Respondents:* 68.

*Annual Responses:* 68.

*Annual Burden Hours:* 5,290.

*Frequency of collection:* On occasion.

*Title:* Response Plans for Shipments of Oil.

*OMB Control Number:* 2137–0591.

*Summary:* In recent years, several major oil discharges have damaged the marine environment of the United States. Under authority of the Federal Water Pollution Control Act, as amended by the Oil Pollution Act of 1990, PHMSA issued regulations in 49 CFR Part 130 that require preparation of written spill response plans.

*Affected Public:* Carriers that transport oil in bulk, by motor vehicle or rail.

*Annual Reporting and Recordkeeping Burden:*

*Annual Respondents:* 8,000.

*Annual Responses:* 8,000.

*Annual Burden Hours:* 10,560.

*Frequency of collection:* On occasion.

*Title:* Hazardous Materials Security Plans.

*OMB Control Number:* 2137–0612.

*Summary:* To assure public safety, shippers and carriers must take reasonable measures to plan and implement procedures to prevent unauthorized persons from taking control of, or attacking, hazardous materials shipments. Part 172 of the HMR requires a person who offers or transports in commerce certain hazardous materials to develop and adhere to a transportation security plan to enhance the security of hazardous materials shipments. The security plan requirement applies to shipments of: (1) Any quantity of a Division 1.1, 1.2, or 1.3 material;

(2) a quantity of a Division 1.4, 1.5, or 1.6 material requiring placarding in accordance with subpart F of part 172; (3) a large bulk quantity of Division 2.1 material; (4) a large bulk quantity of Division 2.2 material with a subsidiary hazard of 5.1; (5) any quantity of a material poisonous by inhalation, as defined in § 171.8 of this subchapter; (6) a large bulk quantity of a Class 3 material meeting the criteria for Packing Group I or II; (7) a quantity of desensitized explosives meeting the definition of Division 4.1 or Class 3 material requiring placarding in accordance with subpart F of part 172; (8) a large bulk quantity of a Division 4.2 material meeting the criteria for Packing Group I or II; (9) a quantity of a Division 4.3 material requiring placarding in accordance with subpart F of part 172; (10) a large bulk quantity of a Division 5.1 material in Packing Groups I and II; perchlorates; or ammonium nitrate, ammonium nitrate fertilizers, or ammonium nitrate emulsions, suspensions, or gels; (11) any quantity of organic peroxide, Type B, liquid or solid, temperature controlled; (12) A large bulk quantity of Division 6.1 material (for a material poisonous by inhalation; (13) a select agent or toxin regulated by the Centers for Disease Control and Prevention under 42 CFR part 73 or the United States Department of Agriculture under 9 CFR part 121; (14) a quantity of uranium hexafluoride requiring placarding under § 172.505(b); (15) International Atomic Energy Agency (IAEA) Code of Conduct Category 1 and 2 materials including Highway Route Controlled quantities as defined in 49 CFR 173.403 or known as radionuclides in forms listed as RAM–QC by the Nuclear Regulatory Commission; and (16) a large bulk quantity of Class 8 material meeting the criteria for Packing Group I. A security plan will enable shippers and carriers to reduce the possibility that a hazardous materials shipment will be used as a weapon of opportunity by a terrorist or criminal.

*Affected Public:* Shippers and carriers of hazardous materials in commerce.

*Annual Reporting and Recordkeeping Burden:*

*Number of Respondents:* 54,999.

*Total Annual Responses:* 54,999.

*Total Annual Burden Hours:* 427,719.

*Frequency of collection:* On occasion.

*Title:* Inspection and Testing of Meter Provers.

*OMB Control Number:* 2137–0620.

*Summary:* This information collection and recordkeeping burden is the result of efforts to eliminate special permits that are no longer needed and to incorporate the use, inspection, and maintenance of mechanical displacement meter provers (meter provers) used to check the accurate flow of liquid hazardous materials into bulk packagings, such as portable tanks and cargo tank motor vehicles, under the HMR. These meter provers are used to ensure that the proper amount of liquid hazardous materials is being loaded and unloaded involving bulk packagings, such as cargo tanks and portable tanks. These meter provers consist of a gauge and several pipes that always contain small amounts of the liquid hazardous material in the pipes as residual material, and, therefore, must be inspected and maintained in accordance with the HMR to ensure they are in proper calibration and working order. These meter provers are not subject to the specification testing and inspection requirements in part 178. However, these meter provers must be visually inspected annually and hydrostatic pressure tested every five years in order to ensure they are properly working as specified in § 173.5a of the HMR. Therefore, this information collection requires that:

(1) Each meter prover must undergo and pass an external visual inspection annually to ensure that the meter provers used in the flow of liquid hazardous materials into bulk packagings are accurate and in conformance with the performance standards in the HMR.

(2) Each meter prover must undergo and pass a hydrostatic pressure test at least every five years to ensure that the meter provers used in the flow of liqiuid

hazardous materials into bulk packagings are accurate and in conformance with the performance standards in the HMR.

(3) Each meter prover must successfully complete the test and inspection and must be marked in accordance with § 180.415(b) and in accordance with § 173.5a.

(4) Each owner must retain a record of the most recent visual inspection and pressure test until the meter prover is requalified.

*Affected Public:* Owners of meter provers used to measure liquid hazardous materials flow into bulk packagings such as cargo tanks and portable tanks.

*Annual Reporting and Recordkeeping Burden:*

*Number of Respondents:* 50.

*Total Annual Responses:* 250.

*Total Annual Burden Hours:* 175.

*Frequency of collection:* On occasion.

*Title:* Requirements for United Nations (UN) Cylinders.

*OMB Control Number:* 2137–0621.

*Summary:* This information collection and recordkeeping burden is the result of efforts to amend the HMR to adopt standards for the design, construction, maintenance and use of cylinders and multiple-element gas containers (MEGCs) based on the standards contained in the United Nations (UN) Recommendations on the Transport of Dangerous Goods. Aligning the HMR with the UN Recommendations promotes flexibility, permits the use of technological advances for the manufacture of the pressure receptacles, provides for a broader selection of pressure receptacles, reduces the need for special permits, and facilitates international commerce in the transportation of compressed gases. Information collection requirements address domestic and international manufacturers of cylinders that request approval by the approval agency for cylinder design types. The approval process for each cylinder design type includes review, filing, and recordkeeping of the approval application. The approval agency is required to maintain a set of the approved drawings and calculations for each design it reviews and a copy of each initial design type approval certificate approved by the Associate Administrator for not less than 20 years.

*Affected Public:* Fillers, owners, users, and retesters of UN cylinders.

*Annual Reporting and Recordkeeping Burden:*

*Number of Respondents:* 50.

*Total Annual Responses:* 150.

*Total Annual Burden Hours:* 900.

*Frequency of collection:* On occasion.

Issued in Washington, DC on March 24, 2011.

**Charles E. Betts,**

*Director, Standards and Rulemaking Division.*

[FR Doc. 2011–7410 Filed 3–29–11; 8:45 am]

BILLING CODE 4910–60–P

## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

**[Docket No. PHMSA–2011–0034 (Notice No. 11–1)]**

### Hazardous Materials: Request for U.S. Competent Authority Approval of International Atomic Energy Agency Special Arrangement CDN/5255/X–96 (Rev. 0) Concerning Transport of Sixteen Radioactively Contaminated Steam Generators From Bruce Power, Tiverton, Ontario to the Studsvik Facility in Sweden via the Great Lakes

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Notice of document availability.

**SUMMARY:** PHMSA is notifying the public of a request by Bruce Power for U.S. competent authority approval of a Canadian special arrangement transport certificate issued in accordance with the International Atomic Energy Agency (IAEA) "Regulations for the Safe Transport of Radioactive Material" (TS–R–1).

**FOR FURTHER INFORMATION CONTACT:** Mr. Rick Boyle, Office of Hazardous Materials Engineering and Research, (202) 366–4545, Pipeline and Hazardous Materials Safety Administration.

*Privacy Act:* Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://www.regulations.gov.*

**SUPPLEMENTARY INFORMATION:** On February 4, 2011, the Canadian Nuclear Safety Commission (CNSC) issued a transport license and certificate to Bruce Power for the transport to Sweden of 16 radioactively contaminated decommissioned steam generator large components originally installed in the Bruce Power nuclear power plant near Tiverton, Ontario. The stated purpose of the transport is to conduct recycling and volume reduction activities in Sweden. Under the terms of the license and certificate, the transport of the steam generators would be conducted in accordance with the special arrangement provisions of the International Atomic Energy Agency "Regulations for the Safe Transport of Radioactive Material" (TS–R–1). The initial leg of transport would be by road and entirely within Canada. The steam generators would then be loaded on a vessel in Owen Sound, Ontario for transport to Sweden via Lake Huron, Lake Erie, and Lake Ontario and interconnecting waterways as well as the St. Lawrence River. At various times the vessel would necessarily enter U.S. waters. Therefore, under IAEA special arrangement provisions, the U.S. would need to revalidate the Canadian certificate in order to permit transport. PHMSA is recognized as the IAEA Competent Authority for the U.S. and is responsible for competent authority approval in these cases.

An application requesting the U.S. competent authority approval of the Canadian certificate was received from Bruce Power on Thursday, February 24, 2011. All relevant documents will be made available for public review online in the docket for this notice. PHMSA intends to conduct a fully independent review of the proposed transport including safety, environmental, and fitness assessments, in consultation with the U.S. Nuclear Regulatory Commission and U.S. Coast Guard. PHMSA must approve, deny, or institute additional controls regarding the transport in the request for competent authority approval.

Issued in Washington, DC, on March 23, 2011 under authority delegated in 49 CFR part 106.

**Magdy El-Sibaie,**

*Associate Administrator.*

[FR Doc. 2011–7408 Filed 3–29–11; 8:45 am]

BILLING CODE 4910–60–P

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

March 24, 2011.

The Department of Treasury will submit the following public information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. A copy of the submission may be obtained by calling the agency contact listed below. Comments regarding this information

collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, 1750 Pennsylvania Avenue, NW., Suite 11010, Washington, DC 20220.

**DATES:** Written comments should be received on or before April 29, 2011 to be assured of consideration.

**Departmental Offices**

*OMB Number:* 1505–0224.

*Type of Review:* Extension without change of a currently approved collection.

*Title:* New Issue Bond Program and Temporary Credit and Liquidity Program.

*Description:* Authorized under section 304(g) of the Federal National Mortgage Association Charter Act (12 U.S.C. 1719(g)) and Section 306(l) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1455(l), as amended by the Housing and Economic Recovery Act (HERA) of 2008 (Pub. L. 110–289; approved July 30, 2008) the Department of the Treasury (Treasury) is implementing two programs under the HFA (Housing Finance Agency) Initiative. The statute provides the Secretary authority to purchase securities and obligations of Fannie Mae and Freddie Mac (the GSEs) as he determines necessary to stabilize the financial markets, prevent disruptions in the availability of mortgage finance, and to protect the taxpayer. On December 4, 2009, the Secretary made the appropriate determination to authorize the two programs of the HFA Initiative: the New Issue Bond Program (NIBP) and the Temporary Credit and Liquidity Program (TCLP). Under the NIBP, Treasury has purchased securities from the GSEs backed by mortgage revenue bonds issued by participating state and local HFAs. Under the TCLP, Treasury has purchased a participation interest from the GSEs in temporary credit and liquidity facilities provided to participating HFAs as a liquidity backstop on their variable-rate debt. In order to properly manage the two programs of the initiative, continue to protect the taxpayer, and assure compliance with the Programs' provisions, Treasury is instituting a series of data collection requirements to be completed by participating HFAs and furnished to Treasury through the GSEs.

*Respondents:* Businesses or other for-profit institutions, and not-for-profit institutions.

*Estimated Total Reporting Burden:* 26,170 hours.

*Agency Contact:* Theo Polan, Department of the Treasury, 1500 Pennsylvania Ave., NW., Room 2054MT, Washington, DC 20220; (202) 622–8085.

*OMB Reviewer:* Shagufta Ahmed, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; (202) 395–7873.

**Dawn D. Wolfgang,**

*Treasury PRA Clearance Officer.*

[FR Doc. 2011–7374 Filed 3–29–11; 8:45 am]

**BILLING CODE 4810–25–P**

## DEPARTMENT OF VETERANS AFFAIRS

### Notice of Intent To Prepare an Environmental Impact Statement for the San Francisco Veterans Affairs Medical Center (SFVAMC) Institutional Master Plan

**AGENCY:** Department of Veterans Affairs (VA).

**ACTION:** Notice of intent.

**SUMMARY:** Pursuant to the National Environmental Policy Act (NEPA) of 1969, as amended, (42 U.S.C. 4331 *et seq.*), the Council on Environmental Quality Regulations for Implementing the Procedural Requirements of NEPA (40 CFR parts 1500–1508), VA's Implementing Regulations (38 CFR part 26), as well as the settlement agreement resulting from Planning Association for *Richmond, et al* v. *U.S. Department of Veterans Affairs,* C–06–02321–SBA (filed 6 June 2008), VA intends to prepare an environmental impact statement (EIS) for the proposed implementation of the SFVAMC Institutional Master Plan (IMP) in San Francisco, California. The SFVAMC IMP involves development and construction of patient care buildings, research buildings, business occupancy buildings, and parking structures, as well as retrofitting seismically deficient buildings. The EIS will address environmental issues associated with 945,000 square feet of new construction and approximately 500,000 square feet of retrofitted development to upgrade the SFVAMC for purposes of meeting the needs of Veterans of the North Coast and San Francisco Bay Area over the next 20 years.

**DATES:** Interested parties are invited to submit comments on or before April 29, 2011 to ensure full consideration during the scoping process.

**ADDRESSES:** Comments should be addressed to John Pechman, Facility Planner, San Francisco VA Medical Center (001), 4150 Clement Street, San Francisco, California 94121, or sent electronically to *John.Pechman@va.gov.*

**FOR FURTHER INFORMATION CONTACT:** John Pechman, Facility Planner, SFVAMC at the address above or by telephone, (415) 221–4810. The SFVAMC IMP is available for viewing on the SFVAMC Web site: *http://www.sanfrancisco.va.gov/visitors/noi.asp.*

**SUPPLEMENTARY INFORMATION:** VA operates the SFVAMC, located at Fort Miley in San Francisco, California. It is the only VA medical center in the City and County of San Francisco and is considered an aging facility with need for retrofitting and expansion. The SFVAMC has identified a need for retrofitting existing buildings to the most recent seismic safety requirements and for an additional 945,000 square feet of medical facility space (in addition to the existing 1.02 million square feet of medical facility space) to meet the needs of San Francisco Bay Area and northern California coast Veterans over the next 20 years.

VA has identified four reasonable alternatives for evaluation in the EIS:

Alternative 1 involves the existing SFVAMC site, which is a 29-acre site located at Fort Miley in the northwestern portion of the City of San Francisco. The site is bounded by Clement Street on the south, Lincoln Park on the north and east, and the National Park Service on the west. Implementation of the SFVAMC Institutional Master Plan Alternative 1 at this site would include approximately 939,200 square feet of new and/or retrofitted development. This alternative would involve development or retrofitting of buildings for patient care, research, business occupancy, residential and parking structures.

Alternative 2 involves a combination of new development and renovation of existing buildings within the existing SFVAMC campus, and relocation of some aspects of the medical center to an alternate site within the City of San Francisco. This alternative may involve retrofit and development of clinical, research, and administrative buildings at the existing SFVAMC site and the construction of a new clinical ambulatory care center, medical research buildings, and parking structures at the new alternate site.

Alternative 3 involves construction and relocation of the entire medical center campus to an alternate site within the City of San Francisco. This alternative would include construction of approximately 1.9 million square feet of new health care, clinical, research, and administrative facilities, including a new ambulatory care center, inpatient and outpatient care, research, business

occupancy buildings, and parking structures.

In addition to the three aforementioned action alternatives, the EIS will evaluate potential environmental effects associated with the no action alternative (Alternative 4). Potential issues to be addressed in the EIS include, but are not limited to biological resources, historic and archaeological resources, geology and soils, hazards, hydrology and water quality, air quality, and transportation. Relevant and reasonable measures that could alleviate environmental effects will be considered.

VA will undertake necessary consultations with regulatory entities pursuant to the Endangered Species Act, Clean Water Act, National Historic Preservation Act, and any other applicable law or regulation. Consultation will include but is not limited to the following Federal, state, and local agencies: State Historic Preservation Officer; U.S. Fish and Wildlife Service; U.S. Environmental Protection Agency; and the National Park Service.

Information related to the EIS process, including notices of public meetings, will be available for viewing on the SFVAMC Web site: *http://www.sanfrancisco.va.gov/.*

Approved: March 18, 2011.

**John R. Gingrich,**

*Chief of Staff, Department of Veterans Affairs.*

[FR Doc. 2011–7435 Filed 3–29–11; 8:45 am]

BILLING CODE 8320–01–P

# Reader Aids

**Federal Register**

Vol. 76, No. 61

Wednesday, March 30, 2011

## CUSTOMER SERVICE AND INFORMATION

| | |
|---|---|
| **Federal Register/Code of Federal Regulations** | |
| General Information, indexes and other finding aids | **202–741–6000** |
| **Laws** | **741–6000** |
| **Presidential Documents** | |
| Executive orders and proclamations | **741–6000** |
| **The United States Government Manual** | **741–6000** |
| **Other Services** | |
| Electronic and on-line services (voice) | **741–6020** |
| Privacy Act Compilation | **741–6064** |
| Public Laws Update Service (numbers, dates, etc.) | **741–6043** |
| TTY for the deaf-and-hard-of-hearing | **741–6086** |

## ELECTRONIC RESEARCH

### World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.fdsys.gov.**

Federal Register information and research tools, including Public Inspection List, indexes, and links to GPO Access are located at: **www.ofr.gov.**

### E-mail

**FEDREGTOC-L** (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **http://listserv.access.gpo.gov** and select *Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings);* then follow the instructions.

**PENS** (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

**FEDREGTOC-L** and **PENS** are mailing lists only. We cannot respond to specific inquiries.

**Reference questions.** Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

**Reminders.** Effective January 1, 2009, the Reminders, including Rules Going Into Effect and Comments Due Next Week, no longer appear in the Reader Aids section of the Federal Register. This information can be found online at **http://www.regulations.gov.**

**CFR Checklist.** Effective January 1, 2009, the CFR Checklist no longer appears in the Federal Register. This information can be found online at **http://bookstore.gpo.gov/.**

## FEDERAL REGISTER PAGES AND DATE, MARCH

11075–11314 ..... 1
11315–11666 ..... 2
11667–11936 ..... 3
11937–12268 ..... 4
12269–12548 ..... 7
12549–12816 ..... 8
12817–13058 ..... 9
13059–13284 ..... 10
13285–13500 ..... 11
13501–13878 ..... 14
13879–14268 ..... 15
14269–14574 ..... 16
14575–14776 ..... 17
14777–15208 ..... 18
15209–15790 ..... 21
15791–16230 ..... 22
16231–16524 ..... 23
16525–16682 ..... 24
16683–17018 ..... 25
17019–17326 ..... 28
17327–17520 ..... 29
17521–17754 ..... 30

## CFR PARTS AFFECTED DURING MARCH

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revison date of each title.

**2 CFR**

**Proposed Rules:**
Ch. XI ..... 16700
Ch. XXIV ..... 11395
Ch. XXVII ..... 11163

**3 CFR**

**Proclamations:**
8628 ..... 11927
8629 ..... 11929
8630 ..... 11931
8631 ..... 11933
8632 ..... 11935
8633 ..... 12265
8634 ..... 12817
8635 ..... 12819
8636 ..... 12821
8637 ..... 15209
8638 ..... 16523
8639 ..... 17327
8640 ..... 17329

**Executive Orders:**
13566 ..... 11315
13567 ..... 13277
13568 ..... 13497

**Administrative Orders:**
Memorandums:
Memorandum of March 4, 2011 ..... 12823
Memorandum of March 8, 2011 ..... 13499
Memorandum of March 11, 2011 ..... 14273
Notice of March 2, 2011 ..... 12267
Notice of March 8, 2011 ..... 13283
Presidential Determinations:
No. 2011–7 of March 7, 2011 ..... 14269
No. 2011–8 of March 7, 2011 ..... 14271

**4 CFR**

81 ..... 12549

**5 CFR**

5901 ..... 14777

**Proposed Rules:**
315 ..... 13100
831 ..... 11684
842 ..... 11684
Ch. VII ..... 15859
Ch. XXI ..... 17572
Ch. XXVI ..... 16700
Ch. XXVIII ..... 11163
Ch. XLII ..... 15224
Ch. LXV ..... 11395

**6 CFR**

37 ..... 12269

**Proposed Rules:**
Ch. I ..... 13526
5 ..... 12609

**7 CFR**

1 ..... 11667
35 ..... 14275
205 ..... 13501
932 ..... 11937
1150 ..... 14777
1218 ..... 11939
1245 ..... 14278
1738 ..... 13770

**Proposed Rules:**
28 ..... 16321
59 ..... 12887
210 ..... 15225
220 ..... 15225
319 ..... 13890, 13892, 14320, 15225, 16700
929 ..... 16322
930 ..... 13528
946 ..... 16323
985 ..... 11971
1206 ..... 13530
1218 ..... 16324
1463 ..... 15859

**8 CFR**

212 ..... 16231
1274a ..... 16525

**Proposed Rules:**
Ch. I ..... 13526
214 ..... 11686
299 ..... 11686
Ch. V ..... 11163

**9 CFR**

56 ..... 15791
93 ..... 16683
94 ..... 15211
145 ..... 15791
146 ..... 15791
147 ..... 15791

**10 CFR**

72 ..... 12825, 17019
429 ..... 12422
430 ..... 12422, 12825
431 ..... 12422
712 ..... 12271

**Proposed Rules:**
35 ..... 17362
50 ..... 12295
52 ..... 16549
72 ..... 17037
170 ..... 14748
171 ..... 14748
430 ..... 13101
431 ..... 11396, 17573, 17577
600 ..... 13300
603 ..... 13300
609 ..... 13300

611 ....13300

**11 CFR**

110 ....16233

**12 CFR**

226 ....11319
326 ....14793
327 ....17521
334 ....14793
702 ....16234
707 ....16235
708a ....13504
708b ....13504
932 ....11668
1208 ....17331
1225 ....11668
1704 ....17332

**Proposed Rules:**

Ch. I ....17572
202 ....13896
222 ....13902
226 ....11598
229 ....16862
380 ....16324
Ch. V ....17572
567 ....12611
700 ....16345
701 ....16345
702 ....16345
703 ....11164
704 ....11164
709 ....11164
741 ....16345, 16570
742 ....11164
1301 ....17038
1320 ....17047
Ch. XV ....17572
Ch. XVII ....11395
Ch. XVIII ....17572

**13 CFR**

124 ....12273

**Proposed Rules:**

Ch. I ....13532
121 ....14323, 16703
124 ....16703
125 ....16703
126 ....16703
127 ....16703
Ch. III ....12616

**14 CFR**

21 ....12250
23 ....17332
25 ....12250, 14794, 14795, 15798, 17022, 17334
27 ....12274
39 ....11324, 11940, 12277, 12556, 12845, 13059, 13061, 13063, 13065, 13067, 13069, 13072, 13074, 13075, 13078, 13080, 14796, 14797, 15800, 15802, 15805, 15808, 15814, 15818, 15820, 15823, 16526
71 ....12278, 13082, 13083, 13084, 13086, 13505, 14799, 14800, 14801, 14802, 15825, 16530
73 ....12558
91 ....16236, 16239
95 ....11675
97 ....11942, 11944, 16686, 16689
119 ....16239
121 ....12550, 12559
129 ....12550, 15212

**Proposed Rules:**

Ch. I ....11699, 16349
21 ....14592
25 ....14341, 14819, 17062, 17582
33 ....11172
39 ....11174, 12617, 12619, 12624, 12627, 12629, 12634, 13534, 13536, 13539, 13541, 13543, 13546, 13921, 13924, 13926, 14346, 14349, 15229, 15864, 15867, 15870, 15872, 16579, 16582, 17362, 17364
71 ....11978, 12298, 12643, 12645, 14820, 14822, 14823, 14824, 15231, 16348
73 ....11399
119 ....14592
121 ....11176, 14592
125 ....14592
135 ....14592
139 ....12300
141 ....14592
142 ....14592
145 ....14592
Ch. II ....11699
Ch. III ....11699

**15 CFR**

750 ....12279
902 ....15826

**Proposed Rules:**

285 ....17367
400 ....12887
Ch. IX ....13549

**16 CFR**

**Proposed Rules:**

301 ....13550
640 ....13902
698 ....13902

**17 CFR**

211 ....17192
230 ....15841
240 ....11327

**Proposed Rules:**

Ch. I ....14826
1 ....14825
3 ....12888
4 ....11701
16 ....14825
23 ....13101
37 ....13101
38 ....13101, 14825
39 ....13101, 16587, 16588
239 ....12896
240 ....14472, 15874, 16707
242 ....12645
270 ....12896
274 ....12896
Ch. IV ....17572

**18 CFR**

35 ....16658
40 ....16240, 16250, 16263, 16277, 16691
410 ....16285

**Proposed Rules:**

35 ....11177

**19 CFR**

12 ....13879, 14575, 16531
102 ....14575, 16531
141 ....14575, 15841, 16531
144 ....14575, 16531
146 ....14575, 16531
163 ....14575, 16531

**Proposed Rules:**

Ch. I ....13526, 17572
351 ....15233

**20 CFR**

404 ....16531

**Proposed Rules:**

404 ....11402, 13111, 13506
405 ....13111
408 ....11402
416 ....11402, 13111, 13506
422 ....11402
Ch. IV ....15224
Ch. V ....15224
655 ....15130
Ch. VI ....15224
Ch. VII ....15224
Ch. IX ....15224

**21 CFR**

1 ....12563
14 ....12563
17 ....12563
113 ....11892
172 ....16285
173 ....11328
179 ....15841
201 ....12847
312 ....13880
314 ....13880
510 ....11330, 16532
516 ....11331
520 ....11330, 12563, 17025, 17336
522 ....17226, 17336
526 ....17336
529 ....16532, 16533, 17026, 17336
556 ....16290
558 ....11330, 16533, 16534, 17026
866 ....16292
1308 ....11075

**Proposed Rules:**

310 ....12916
866 ....16350
Ch. II ....11163

**22 CFR**

62 ....17027

**Proposed Rules:**

Ch. I ....13931
120 ....16588
122 ....16588
123 ....13928, 16353, 16588
126 ....13928
129 ....16588
205 ....16712

**23 CFR**

460 ....12847

**Proposed Rules:**

Ch. I ....11699
Ch. II ....11699
Ch. III ....11699

**24 CFR**

Ch. XV ....11946

**Proposed Rules:**

Ch. I ....11395
Ch. II ....11395
Ch. III ....11395
Ch. IV ....11395
Ch. V ....11395
Ch. VI ....11395
Ch. VIII ....11395
Ch. IX ....11395
Ch. X ....11395
Ch. XII ....11395

**26 CFR**

1 ....11956, 17521
301 ....13880, 17521

**Proposed Rules:**

Ch. I ....17572
1 ....15887
301 ....13932, 14827

**27 CFR**

**Proposed Rules:**

Ch. I ....17572
Ch. II ....11163

**28 CFR**

0 ....15212
35 ....13285
36 ....13286
541 ....11078

**Proposed Rules:**

Ch. I ....11163
16 ....15236
26 ....11705
Ch. III ....11163
Ch. V ....11163
Ch. VI ....11163
Ch. XI ....13931

**29 CFR**

1630 ....16978
4022 ....13883
4044 ....13883

**Proposed Rules:**

Ch. II ....15224
Ch. IV ....15224
Ch. V ....15224
503 ....15130
Ch. XVII ....15224
Ch. XXV ....15224
4022 ....13304

**30 CFR**

250 ....11079
917 ....12849
918 ....12852
926 ....12857

**Proposed Rules:**

Ch. I ....15224
70 ....12648
71 ....12648
72 ....12648
75 ....11187, 12648
90 ....12648
920 ....13112
938 ....12920, 16714

**31 CFR**

356 ....11079

**Proposed Rules:**

Ch. I ....17572
33 ....13526
Ch. II ....17572
223 ....14592
Ch. IV ....17572
Ch. V ....17572
Ch. VI ....17572
Ch. VII ....17572

Ch. VIII....17572
Ch. IX....11163, 17572
Ch. X....17572

**32 CFR**

706....12859
**Proposed Rules:**
Ch. I....16700
Ch. V....16700
Ch. VI....16700
Ch. VII....16700
Ch. XII....16700

**33 CFR**

3....13508
100....13884, 15214, 17339, 17530
117....11332, 11679, 11959, 11960, 13288, 13289, 14279, 14803, 14804, 16294, 16296, 16297, 17339, 17541, 17542
165....11334, 11337, 11961, 14279, 15216, 17530
401....13088
**Proposed Rules:**
Ch. I....13553
100....15244
110....15246
117....13312, 16715
165....14829
Ch. II....16700

**36 CFR**

7....17027
242....12564
294....17341
1281....11337
**Proposed Rules:**
7....15888
Ch. III....16700
Ch. XI....17064

**37 CFR**

380....13026
**Proposed Rules:**
Ch. 1....15891

**38 CFR**

17....11338
19....17544
20....17544
51....11339
76....14282
**Proposed Rules:**
3....14600
17....16354
51....16354
59....11187

**39 CFR**

111....14284, 16534
121....16534
965....15218
**Proposed Rules:**
111....13704, 16588
121....16588
172....13313
177....13313
952....13937

**40 CFR**

49....17028
51....17548
52....11080, 11082, 11083, 11963, 12280, 12587, 12860, 13511, 14584, 14805, 15852, 16696, 17343, 17347, 17548
60....15372, 15704
63....12863, 13514, 14807, 15554, 15608
72....17288
75....17288
80....15855
81....12587, 13289, 14812, 15219
82....17488
98....14812
174....14289
180....11340, 11344, 11965, 12873, 12877, 16297, 16301, 16308, 17556
241....15456
261....16534
271....12283
272....12283
300....11350, 13089
**Proposed Rules:**
Ch. I....11980, 14840
51....15249
52....11190, 11983, 12302, 12305, 12306, 12651, 13567, 13569, 13944, 13962, 14602, 14606, 14611, 14616, 14626, 14631, 14831, 14835, 15249, 15892, 15895, 16168, 16358, 16365, 16593, 16718, 17368, 17373, 17584, 17585, 17592, 17599
55....15898
60....15266
63....12923, 13852, 14636, 14839, 15266
70....12926, 15249
71....15249
132....14351
141....11713
142....11713
152....14358
156....17607
158....14358
170....17607
174....14358, 17374
180....17374, 17611
271....12307
272....12307
281....11404
300....13113
Ch. II....14840
Ch. III....14840
Ch. IV....11163, 14840
Ch. V....14840
Ch. VI....14840
Ch. VII....14840, 16700

**41 CFR**

105–735....15856
**Proposed Rules:**
Ch. 50....15224
Ch. 60....15224
Ch. 61....15224
Ch. 101....15859
Ch. 102....15859
Ch. 105....15859
Ch. 128....11163
Subtitle F....15859

**42 CFR**

413....13515
488....15106
**Proposed Rules:**
5....12307
71....13120
81....15268
410....13292
416....13292
419....13292
1007....14637

**44 CFR**

64....12596, 14293
**Proposed Rules:**
Ch. I....13526
67....12308, 12665, 13569, 13570, 13571, 13572, 14359, 14360, 15900, 16722

**45 CFR**

1180....13097
2522....17347
**Proposed Rules:**
155....13553
Ch. V....11163
1305....14841

**46 CFR**

Ch. I....13526
16....14818
160....17561
170....16697
Ch. III....13526
520....11351
530....11680
531....11680
532....11351
**Proposed Rules:**
Ch. II....11699

**47 CFR**

1....13295, 13296, 17032, 17347, 17568
2....17347
11....12600
25....14297
63....13295, 13296
73....11680, 12292, 13524, 15857
74....11680
87....17347, 17353
90....11681
97....17569
**Proposed Rules:**
Ch. I....14871
1....12308, 13800, 16367
6....13800
7....13800
8....13800
20....12308
36....11632, 13576
43....12308
51....11407
53....11407
54....11632, 16482
61....11632
63....11407
64....11407, 11632, 16367
69....11632
73....11737, 13579, 13966, 14362, 14855, 14856
76....17071
79....14856
87....17613
97....16375

**48 CFR**

Ch. 1....14542
1....14543
2....14543
5....14548
6....14559
7....14543
8....14548
10....14562
13....14566
15....14559, 14568
16....14543, 14548, 14562
18....14548
19....14559, 14566
22....14570
25....14570
30....14570
31....14571
32....14543
38....14548
42....14543
44....14562
50....14543
52....14562, 14570
Ch. 2....11969
207....11361
209....11363
212....11371
215....13297
217....14587
225....14588, 14589
227....11363
232....11371
241....14587
246....14590
252....11363, 11371, 14589, 14590
Ch. 34....12796
**Proposed Rules:**
Ch. 1....16700
52....16700
54....16700
Ch. 2....16700
203....13327
209....14641
211....11190, 11985, 12666
212....11190, 11985, 12666
216....11410
217....11411
231....11414
252....11190, 11985, 12666, 13327, 14641
Ch. 5....15859
532....13329
908....11985
945....11985
970....11985
Ch. 10....17572
Ch. 12....11699
1401....15901
1402....15901
1415....15901
1417....15901
1419....15901
1436....15901
1452....15901
Ch. 24....11395
Ch. 28....11163
Ch. 29....15224
Ch. 61....15859

**49 CFR**

1....15221
109....11570
1155....16538
**Proposed Rules:**
Ch. I....11699
171....11191
173....11191, 14643

177 ....17615
178 ....11191
180 ....11191
Ch. II ....11699
234 ....11992
288 ....16200
Ch. III ....11699
385 ....13121
390 ....13121, 14366
391 ....14366
392 ....17615
395 ....13121
Ch. V ....11699
571 ....11415, 11417, 11418, 15903
585 ....11418
Ch. VI ....11699
665 ....13580
Ch. VII ....11699
Ch. VIII ....11699
Ch. X ....11699
Ch. XI ....11699
Ch. XII ....13526

**50 CFR**

16 ....15857
17 ....11086
92 ....17353
100 ....12564
217 ....16311
223 ....12292
224 ....14299
300 ....14300
622 ....12604, 12605, 12882, 12883, 16547, 16698
648 ....11373, 13887, 17032
660 ....11381, 11969, 17033
665 ....13297, 15222
679 ....11111, 11139, 11161, 11393, 11394, 12293, 12606, 12607, 12883, 12884, 13097, 13098, 14319, 15826, 16699, 17034, 17360, 17569, 17570

**Proposed Rules:**

17 ....12667, 12683, 13121, 14126, 14210, 15919, 15932, 16046
18 ....13454
Ch. II ....13549
223 ....12308, 14882, 14883
224 ....12308, 15932, 16595
Ch. III ....13549
Ch. IV ....13549
Ch. VI ....13549
622 ....13122, 15275
635 ....13583, 14884, 15276
648 ....11737, 11858, 14644, 16595
660 ....13592
665 ....13330, 14367
679 ....13331
680 ....13593, 17088

## LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

**H.J. Res. 48/P.L. 112–6**
Additional Continuing Appropriations Amendments, 2011 (Mar. 18, 2011; 125 Stat. 23)
**Last List March 7, 2011**

## Public Laws Electronic Notification Service (PENS)

**PENS** is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

**Note:** This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.