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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 731

RIN 3206–AL90

Suitability

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing final regulations to assist agencies in carrying out new requirements to reinvestigate individuals in public trust positions under Executive Order (E.O.) 13488, *Granting Reciprocity on Excepted Service and Federal Contractor Employee Fitness and Reinvestigating Individuals in Positions of Public Trust,* to ensure their continued employment is appropriate. This final regulation will implement the suitability reinvestigation provisions of E.O. 13488.

DATES: This rule is effective December 9, 2011.

FOR FURTHER INFORMATION CONTACT: Debra E. Buford, U.S. Office of Personnel Management, Employee Services, telephone (202) 606–2930, fax (202) 606–2613, email *PLR@opm.gov.*

SUPPLEMENTARY INFORMATION:

Background

On January 16, 2009, President George W. Bush signed Executive Order 13488. Section 5 of the order states that ''[i]ndividuals in positions of public trust shall be subject to reinvestigation under standards (including but not limited to the frequency of such reinvestigation) as determined by the Director of the Office of Personnel Management, to ensure their suitability for continuing employment.'' Section 2 of the order defines the terms ''Position of Public Trust'' and ''Suitability'' by reference to 5 CFR part 731. Section 6(b) delegates to OPM the ''authority to implement this order, including the authority to issue regulations and guidance governing suitability, or guidance related to fitness, as the Director determines appropriate.'' Finally, section 6(a) states that ''[a]n agency shall report to the Office of Personnel Management the nature and results of the background investigation and fitness determination (or later changes to that determination) made on an individual, to the extent consistent with law.''

E.O. 13488 is distinct from, but complementary to, E.O. 13467, which concerns, among other things, alignment, to the extent possible, of investigations and standards relating to suitability or fitness, eligibility for logical and physical access, eligibility to hold a sensitive position, eligibility for access to classified information, and, as appropriate, contractor employee fitness.

Public trust positions are those covered by 5 CFR part 731 that an agency head, under 5 CFR 731.106, has designated at a moderate or high risk level, based on the position's potential for adverse impact on the efficiency or integrity of the service. These positions may involve policy-making, major program responsibility, public safety and health, law enforcement duties, fiduciary responsibilities, or other duties demanding a significant degree of public trust, or access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain. Agencies designate public trust positions, and their risk levels, following OPM guidance and taking into account the specific duties of each position.

On November 3, 2009, OPM published, in the **Federal Register** at 74 FR 56747, a proposed rule to guide agencies in carrying out the new requirement to reinvestigate individuals in public trust positions under E.O. 13488. The public comment period ended on January 4, 2010. Several Federal Agency commenters indicated they were unable to provide an informed recommendation related to the frequency of reinvestigations without specific information regarding the scope of the reinvestigations. Thus, on November 5, 2010, OPM published a notice in the **Federal Register** at 75 FR 68222 reopening the comment period on the proposed rule. This notice provided additional information about the scope of reinvestigations for public trust positions to allow for further comment about reinvestigation frequency. In addition, OPM proposed revising the text of the proposed rule at 5 CFR 731.106(d)(2), to resolve an ambiguity regarding investigations that satisfy the public trust reinvestigation requirement, and solicited additional public comment on the revised text. The comment period on this second **Federal Register** notice ended on December 6, 2010.

Response to Public Comments

In response to the original proposed rule and the reopener, OPM received comments from 8 agencies, 4 unions, and 5 individuals. OPM carefully considered comments received in response to the November 3, 2009, and November 5, 2010, **Federal Register** notices in the development of this final rule. The comments fell into one of the following categories: frequency of reinvestigations; impact on resources; timing of implementation of the reinvestigation cycle; reinvestigation requirements; alignment of reinvestigation standards; confusion regarding the term ''assessment''; insufficiency of the information provided; breaks in service of less than 24 months; collective bargaining and labor relations; and miscellaneous. We have not addressed the remaining comments either because they concerned other suitability subparts not being revised or did not relate to suitability at all.

Frequency of Reinvestigations

Many commenters voiced concerns about the frequency of public trust reinvestigations. One labor organization representative said OPM should withdraw the proposed rule and reissue it after providing the rationale for the reinvestigation, the number of Federal employees affected, the reinvestigation criteria, and a cost estimate for performing such investigations. Another labor organization commented that OPM should reconsider the need for periodic reinvestigations in the first place and, upon reexamination, recommend to the Administration that the Executive Order be rescinded. Other commenters stated that OPM should not issue a reinvestigation cycle requirement

without first analyzing the actual need for, and effectiveness of, these investigations, their overall costs to the Government, and whether research exists that suggests 5 years is the most appropriate timeframe. A commenter recommended that reinvestigations be conducted every 10 or 15 years, and opined that it does not appear appropriate to require the same reinvestigation timeframes for public trust positions as for national security positions, considering the potential for harm to the United States. Another commenter recommended a frequency of 10 years, as OPM has not provided data to demonstrate that a more frequent reinvestigation cycle for public trust positions than for national security positions promotes the efficiency of the service. One commenter suggested the frequency be every 7 years as a cost-saving measure. Still another commenter recommended agencies be given additional flexibility so periodic background checks can be extended beyond a 5-year time limit or agencies be granted the flexibility to identify, based on their needs and knowledge of the positions, which ones require reinvestigations every 5 years, rather than imposing a blanket requirement for all positions. During the first comment period, one commenter stated that those positions that truly warrant periodic reinvestigations, such as supervisory and auditor positions, should be reinvestigated no more frequently than once every 5 years. However, during the second comment period, this same commenter stated those positions should be subject to periodic reinvestigations without mentioning a specific timeframe. A labor organization representative stated that, in making certain assumptions about the scope of the investigation, a frequency of every 10 years is sufficient. On the other hand, two commenters suggested that the time period for reinvestigations be lowered from 5 years to a frequency of every 2 or 3 years. Lastly, two commenters stated the policy change is appropriate considering the risk posed by public trust positions in their agency.

OPM did not adopt any of these recommendations. This rule is intended to satisfy E.O. 13488, which requires reinvestigations of public trust positions with a frequency as determined by the Director of the Office of Personnel Management. As described in the reopener, the investigative product for reinvestigations of employees occupying nonsensitive public trust positions will be the National Agency Check with Local Agency Check and Credit Check (NACLC) or Periodic Reinvestigation (PRI) depending on the level of public trust. As proposed, reinvestigations must occur frequently enough to ensure that continued employment of persons in public trust positions remains appropriate. The E.O. requires a meaningful determination of continuing suitability for employment. To be meaningful, a determination cannot reasonably be made with outdated information. Accordingly, we have decided to retain the 5-year reinvestigation requirement.

OPM chose the 5-year timeframe because it is consistent with the coverage period that has long been established as the minimum coverage period for suitability investigations. The National Agency Check with Written Inquiries (NACI) is the minimum required level of initial investigation and is required for low-risk positions. The coverage period for the NACI is 5 years and has historically been 5 years. Considering that a public trust position's potential adverse impact on the efficiency or integrity of the service is greater than that of low-risk positions, we believe 5 years is a reasonable timeframe for public trust reinvestigations. Further, if the scope of coverage for the original suitability investigation is 5 years, it follows that the reinvestigations should be completed within the same timeframe, at a minimum. Therefore, a less-frequent timeframe for reinvestigations has not been adopted.

E.O. 13467 requires OPM to consider efficiency and cost effectiveness in setting reinvestigative requirements as well. Regarding comments about the number of employees impacted and the costs associated with reinvestigations, we recognize that the number of employees who may be affected has a direct correlation to the cost of reinvestigations. However, it is difficult to arrive at an accurate number affected because of the evolving needs of agencies. Historical costs are, therefore, poor indicators of future costs. Agencies are responsible for assessing the position designations within their agencies and will know the number of employees to be reinvestigated and may, therefore, predict the cost based on the price of the required investigation. However, while we cannot allow too much time to go by between reinvestigations, we recognize the need to balance risk and cost. Therefore, we have chosen relatively low-cost investigative products, the NACLC and the PRI, to minimize the cost. As described below, we have also sought to reduce cost by aligning public trust and national security reinvestigation requirements. In addition, OPM commits to periodically assess the cost-effectiveness of the investigative products selected.

Commenters suggested that the frequency of public trust reinvestigations should be aligned with those required for clearance holders. We recognize the need for alignment to the extent possible. Therefore, in section 731.106(d)(2) of the final rule, as in the proposed rule, a reinvestigation for eligibility for access to classified information or to occupy a sensitive national security position may be sufficient to meet the requirements for a public trust reinvestigation. Likewise, in our proposed rule amending 5 CFR part 732, dated December 14, 2010, Designation of National Security Positions, the timeframe for reinvestigations is also set at 5 years for national security positions not requiring eligibility for access to classified information. We expect to publish the revised part 732 regulations in early 2012. In tandem, these provisions in parts 731 and 732 will ensure that one reinvestigation at least every 5 years will be sufficient to meet national security and public trust requirements, so that agencies will not have to bear the burden and expense of requesting multiple reinvestigations to meet separate requirements. A reinvestigation on a Special Sensitive or Critical Sensitive national security position will be sufficient to meet, the reinvestigation need of a High Risk public trust position. A reinvestigation on a Non-Critical Sensitive national security position will be sufficient to meet the reinvestigation need of a Moderate Risk public trust position.

A commenter suggested a 15-year timeframe is an appropriate frequency for reinvestigations for low-risk positions that are investigated with the National Agency Check with Inquiry Investigations (NACI's). However, this rule does not cover low-risk positions. It fulfills the requirements of E.O. 13488, which mandates that individuals who are in public trust positions, defined by 5 CFR part 731 as those designated as moderate and high risk, be reinvestigated. There is no government-wide requirement to conduct reinvestigations of employees in low-risk, nonsensitive positions.

During the initial comment period, a commenter suggested that OPM consider allowing additional flexibility following the first 5-year reinvestigation. The commenter suggested widening the window for subsequent reinvestigations to every 5–10 years at the discretion of the agency, depending on the nature of the position and its public trust level. During the

second comment period, the same commenter suggested agencies be given discretion to stretch the reinvestigation period to 10 years. We did not adopt these recommendations. E.O. 13488 requires reinvestigations of individuals in public trust positions with a frequency determined by the Director of OPM, not by individual agencies. OPM has decided to require all agencies to follow the same reinvestigation schedule to promote consistency across the Federal Government. Further, 5 CFR 731.104 and 731.202 require reciprocal acceptance of prior suitability investigations and adjudications. A consistent reinvestigation cycle will promote reciprocity by giving gaining agencies confidence that they are accepting prior investigations and adjudications that were recent enough to have identified any serious issues that would have affected eligibility for continued employment.

A labor organization representative stated that longer intervals are needed between reinvestigations because it is a stressful and time-consuming process for the typical employee. However, reinvestigations must occur frequently enough if agencies are to carry out the purpose of Executive Order 13488 to ensure that continued employment of persons in public trust positions remains appropriate.

A commenter stated that clarification may be needed to ensure agencies understand the reinvestigation requirement is based on the completion date of the prior investigation. We agree and will provide clarification in the implementing guidance.

Impact on Resources

Many commenters made observations regarding the impact of reinvestigations on time, personnel, and financial resources. A commenter stated that large agencies with a high number of public trust positions would incur a heavy economic impact, while another commenter voiced concerns regarding the strain on personnel resources when taking on the additional reinvestigation requirements, since most employees in moderate-risk positions have not been reinvestigated. A commenter also voiced concern about OPM's Federal Investigative Services having the capacity to perform reinvestigations in a timely manner, while another commenter stated OPM will have major increases in costs and workload. Further, a labor organization representative commented that, since OPM does not know how many Federal employees will be subject to the regulation, no analysis of the program's cost has been provided. A labor organization representative further stated that, before the regulation can be properly evaluated, the costs must be examined. Another labor organization representative stated that OPM should postpone issuing the regulation until the number of employees affected by this regulation and the scope of the investigations that will be conducted are known. However, agencies also commented that such reinvestigations are necessary, and one commenter felt it was irrelevant to consider future investigation and resource capacities in the implementation of suitability policies and procedures.

OPM has not made changes to the rule as a result of these comments. While we agree that reinvestigations will take time and resources to accomplish, they are essential investments to ensure that continued employment of employees is appropriate. OPM's responses to comments about the cost and resource implications of the frequency of reinvestigations, the population affected, and the reinvestigation products selected, are addressed in greater detail above. OPM provides investigative services on a reimbursable basis, pursuant to a revolving fund established by Congress for this purpose, and is thus in a position to readily ensure that sufficient investigative resources are dedicated to meet the requirements of this rule.

During the first comment period, a commenter questioned whether the proposed regulation will allow effective and efficient use of time and resources if the regulations do not establish substantive regulatory standards for adjudicating public trust reinvestigations, and if agencies are unable to use suitability actions as the result of a reinvestigation. During the reopener, the commenter again voiced concerns that the proposed regulation does not meet the test of effectiveness and efficiency regarding the use of time and resources. The regulation is intended to satisfy E.O. 13488 which requires reinvestigations of public trust positions.

Because the Executive order requires a reinvestigation of ''suitability for continuing employment'' and defines ''suitability'' by reference to 5 CFR part 731, agencies should consider the substantive standards in § 731. 202, when evaluating the results of a public trust reinvestigation. However, a person's employment status will determine the applicable agency authority and procedures to be followed in any action taken based on the results of the reinvestigation. In most situations the subject of a reinvestigation will have been employed by his or her agency for more than 1 year following an appointment subject to investigation, and, in that context, only OPM could take a suitability action under 5 CFR part 731 and only under the limited circumstances described in § 731.105(d). Nonetheless, conduct that surfaces during a reinvestigation could form the basis for an adverse action under 5 CFR part 752. Whether to propose and take an adverse action on the basis of a public trust reinvestigation is a matter within the employing agency's discretion.

A commenter expressed concern that, given finite resources, security clearance cases are given first priority to ensure they meet the requirements of the law (*i.e.,* the timeliness requirements for security clearance adjudications in 50 U.S.C. 435b(g)). Further, the commenter stated that, with the implementation of the reinvestigation cycle for public trust positions, the timeliness of determinations based on public trust reinvestigations will only diminish unless Congress or the President requires them to be made within a specified timeframe. These comments did not make any specific recommendation as to the text of the rule. Accordingly, we did not make changes to the rule as a result of these comments. We note that E.O. 13488 requires individuals to be investigated with a frequency determined by the Director of OPM to ensure suitability for continued employment; and that to help achieve this objective the order requires agencies to report the results of background investigations to OPM. Section 731.206 of the final rule implements this reporting requirement, so that OPM can assess the timeliness of agency decisions. This regulation complements the reporting requirements in part 732 for national security investigations and adjudications, which also facilitate monitoring.

One commenter noted that the same resources used to meet new reinvestigation requirements are also used to make initial determinations for suitability and security for new hires. This commenter expressed concern about having sufficient resources to meet these requirements and suggested that the requirements will have an adverse impact on agencies' ability to meet the goals of OPM's Hiring Reform Initiative. As noted above, the re-investigation requirement was imposed by a 2009 Executive Order that requires reinvestigation of public trust positions. Therefore, we do not agree with this commenter's assessment of the impact on hiring reform. The hiring reform initiative is a comprehensive and

integrated approach to Federal hiring that addresses workforce planning, recruitment, hiring process, security and suitability, and orientation. Moreover, this initiative assumes there are ongoing reform efforts to align investigative and adjudicative processes and also addresses various challenges throughout the hiring process, including limited resources. Agencies have known about the reinvestigation requirement for some time, now, and can be presumed to have anticipated its implementation.

A commenter inquired as to whether or not the proposed rule would create other changes to the investigation structure, the overall investigation process, or the types of investigations available that will ultimately impact agencies' workload. The final rule will not affect the structure of investigations, the process, or the types of investigation. However, OPM is assessing its investigative products as part of a Joint Security and Suitability Process Reform effort under E.O. 13467. Future Federal investigative standards resulting from this effort will use automated records to the extent possible and may impact the investigative structure and process. Other impacts on the investigative process may result from our proposed rule in 5 CFR part 732, dated December 14, 2010, Designation of National Security Positions, which prescribes time frames for national security reinvestigations.

Timing of the Implementation of Reinvestigation Cycle

One commenter indicated the regulation lacks clarity as to when the 5-year investigation period will begin following the rule's implementation, while other commenters suggested agencies be given flexibility to implement the reinvestigation cycle. OPM concurs and has added language to the rule stating that implementing guidance will be issued regarding time lines for implementing this regulation. Agencies will be afforded flexibility within the parameters set in that guidance.

One commenter suggested that the reinvestigation cycle be delayed until the new SF–85P, Questionnaire for Public Trust Positions, is published for agency use. This comment is beyond the scope of this regulation. This regulation is intended to satisfy E.O. 13488, which requires reinvestigations of public trust positions.

A commenter suggested delaying implementation of the reinvestigation cycle until OPM implements the tiered investigative model described in section 2.1(a) of E.O. 13467, where each successively higher level of investigation shall build upon, but not duplicate, the ones below it. We did not adopt this recommendation. Although OPM is working on the investigative standards contemplated by E.O. 13467, we do not believe the possibility of future changes to investigative products should affect the need to timely implement E.O. 13488. OPM has added language to this regulation at § 731.106(d)(1) stating that implementing guidance will be issued.

A labor organization representative expressed concern that this regulation will take effect without any prior notice to current Federal employees that informs them they may be subject to reinvestigations. This labor union representative also recommended that current employees be grandfathered under the old rules and the new rules apply only to future employees. This recommendation is not adopted as it does not satisfy the requirements of E.O. 13488, to conduct reinvestigations for all public trust positions. However, we do recognize the commenter's concern and have made revisions to the regulation at § 731.106(d)(3), requiring agencies to notify all current employees impacted by this rule of these new reinvestigation requirements.

The labor organization representative further commented that reinvestigations could result in employees being jeopardized for previously undisclosed past misconduct. OPM does not regard this as an effective argument against a reinvestigation requirement for public trust positions. Rather, the possibility that an employee may not always disclose past misconduct to the employing agency provides a sound reason for conducting such reinvestigations.

Reinvestigation Requirements

One commenter stated that the proposed language confuses reinvestigation requirements for national security positions with new reinvestigation requirements for public trust positions mandated by E.O. 13488. We disagree and did not make a change as a result of this comment. Rather, the separate authorities for reinvestigations for national security positions and public trust positions are outlined to ensure agencies avoid duplicate investigations where an existing investigation already satisfies the requirement.

In the Notice of Proposed Rulemaking dated November 3, 2009, the proposed language in § 731.106(d)(2) states: ''If, prior to the next required reinvestigation, a separate investigation (or reevaluation) is conducted to determine a person's eligibility (or continued eligibility) for access to classified information or as a result of a change in risk level as provided in § 731.106(e), and that investigation is conducted at an equal or higher level than is required for a public trust reinvestigation, a new reinvestigation is not required. * * *'' A commenter stated that the meaning of ''at an equal or higher level'' in § 731.106(d)(2) is unclear. We have reworded this paragraph to clarify that a new investigation is not needed if the previous investigation ''meets or exceeds'' the criteria required for a public trust reinvestigation.

A labor organization representative stated that it welcomed an indication that OPM intends the scope of reinvestigation for moderate-risk positions to be generally less intrusive and narrower in scope than the reinvestigation of employees in high-risk positions. It should be noted that the scope of the reinvestigation may be changed to meet needs such as a further assessment of character or conduct because of new information. A commenter suggested the use of automated reinvestigative database checks without a new investigative questionnaire. This suggestion is not feasible because the effectiveness of reinvestigations relies on updated information provided by the individual. However, OPM is considering the use of automated reinvestigative database checks in addition to a new investigative questionnaire.

One commenter recommended that 5 CFR part 731 be revised to provide general authority to take suitability actions, not only for limited situations currently described in part 731. The commenter believed this change would allow the suitability decision to remain with agency officials responsible for security, enhance consistency, and aid reciprocity. Another commenter recommended that OPM revise the regulations to allow agencies to take suitability actions whenever a new suitability investigation is conducted rather than limiting agency suitability actions to 1 year from the date an individual enters on duty. We did not accept these recommendations as they are beyond the scope of the proposed rule. Further, agencies' authority to take suitability actions is delegated by OPM under 5 U.S.C. 1104(a)(2), and cannot exceed the authority that OPM itself possesses. By regulation, OPM's own jurisdiction to take a suitability action against employees who have completed the first year of appointments subject to investigation is limited to those cases where the employee has committed falsification, deception or fraud in an

examination or appointment; is disqualified under a statutory or regulatory bar to appointment; or has refused to testify when required to do so by Civil Service Rule V. *See* 5 CFR 731.103(g), 731.105(d). OPM does not interpret its suitability jurisdiction more broadly. Further, OPM declines to delegate to agencies the authority to take suitability actions against employees in these circumstances, because they are at the core of OPM's responsibility to protect the integrity of the competitive examining system and to impose government-wide debarments when appropriate. Moreover these are circumstances where there may be a conflict between OPM's and the agencies' interests, as recognized by 5 CFR 731.303(b).

One commenter stated that agencies should be delegated the authority to initiate subsequent reinvestigations based on changes in the position requirements and/or findings of misconduct. Another commenter asked why OPM doesn't issue a regulation moving this entire process to a ''risk-based'' process—*i.e.,* requiring agencies to focus on the actual employees in public trust positions instead of requiring basically all employees to complete this periodic reinvestigation. A third commenter noted that OPM should issue implementing guidance allow public trust reinvestigations to be event-driven to resolve any new potentially adverse information. As previously stated, E.O. 13488 requires reinvestigations of all employees in public trust positions. If position requirements change, an agency should use OPM's Position Designation System to determine any new investigation requirement and subsequent reinvestigation requirements. As for event-driven situations or misconduct, another reinvestigation may or may not be appropriate. When the agency becomes aware of misconduct, it should take appropriate action. This may include fact-finding inquiries and an adverse action under 5 CFR part 752, if appropriate.

A commenter asked whether employees who have been employed for a long period of time will be subject to a less rigorous reinvestigation. Employees will not be subject to less rigorous reinvestigations simply because of their length of service. All public trust employees will be required to undergo reinvestigations at the level commensurate with their position designations.

A commenter stated that the agency conducting the reinvestigation does not appear to have authority under the proposed rule to take any negative action based upon a negative ''assessment''. Another commenter asked what standards will be used to assess an employee's fitness after a reinvestigation. As noted above, since the Executive order requires a reinvestigation of ''suitability for continuing employment'' and defines ''suitability'' by reference to 5 CFR part 731, agencies should consider the substantive standards in § 731. 202, when evaluating the results of a public trust reinvestigation. As currently provided at 5 CFR 731.106(f), a person's employment status will determine the applicable agency authority and procedures to be followed in any action taken based on the results of the reinvestigation. If the character or conduct of an employee undermines the efficiency of the service, the agency may take an adverse action under 5 CFR part 752, if warranted. In addition, to provide further clarification as to the types of actions that can be taken against categories of probationary employees, we have modified the language in § 731.106(f) to include a reference to 5 CFR part 315 for appointees or 5 CFR part 359 for SES probationers.

A labor organization representative commented that the lack of a substantive need for a reinvestigation is illustrated by the narrow nature of the suitability action that could result from the reinvestigation. The labor organization representative further stated that there are better, less intrusive and more targeted ways to uncover and correct an employee's misconduct other than the ''broad brush'' of a reinvestigation. Another labor organization questioned the need to do reinvestigations when only a few investigations will uncover areas of concerns and most issues could not lead to disciplinary actions. We did not make changes to the rule as a result of these comments, which question the need for the Executive order rather than requesting a change to the proposed rule implementing the order.

A labor organization representative called on OPM to recommend to the Administration that it reexamine the need for reinvestigations for public trust positions. This comment is outside the scope of the rulemaking, so it cannot be considered by OPM as part of the rulemaking process.

A commenter stated that the rule should include a requirement that, prior to performing a reinvestigation, the employing agency must review and determine that the employee's position has been properly designated as to risk level. We did not adopt this recommendation, as agencies must use OPM's Position Designation System, and should re-designate positions as appropriate, such as when duties of the position change. OPM will not impose a requirement to review the position designation solely due to a pending reinvestigation. We note that our proposed amendment to 5 CFR 732.204 would require agencies to reassess the sensitivity designation of each national security position within a 24-month period. Proposed section 732.201(c) states that OPM will issue guidance under which an appropriate risk designation will automatically follow from the position's sensitivity designation. Agencies are free to reassess the risk designations of their nonsensitive public trust positions at the same time.

One commenter stated that it has a Continuous Evaluation Program (CEP) in place to identify, investigate, and adjudicate many of the same issues a public trust reinvestigation process would address. Further, the commenter suggested that focusing efforts on agency CEPs would reduce the need for more frequent reinvestigation cycles. Another commenter questioned whether or not there is redundancy between the reinvestigation and the FD–961 (Bioterrorism Preparedness Act: Entity/Individual Information) form. An investigation based on a CEP or the FD–961 that meets all requirements for reinvestigation or goes beyond those requirements may be sufficient. However, the commenters have not provided enough information about the content of the CEP or an FD–961 investigation; therefore, we are not able to determine if these investigations will satisfy the intended investigative requirement for public trust reinvestigations. These recommendations are not adopted because we do not have enough information to evaluate them.

A commenter recommended aligning fingerprinting requirements for periodic reinvestigations on public trust positions with those of reinvestigations for national security positions; and indicated that no fingerprinting is required in most periodic reinvestigations. Criminal checks will remain a critical component of reinvestigations, but whether or not fingerprinting for criminal checks will be required will be addressed in implementing guidance.

One commenter stated that it is using the National Agency Check with Inquiries (NACI) investigation in lieu of the Modified Background Investigation or Limited Background Investigation for moderate-risk public trust positions where the incumbent has no access to

national security classified information. The NACI is not an appropriate level of investigation for Public Trust positions. OPM issued an October 2010 instruction to executive branch agencies regarding the appropriate investigations for moderate-risk public trust positions. The NACLC will be the reinvestigation required for moderate-risk public trust positions because it efficiently provides high-value information necessary to evaluate a person's continued suitability for a moderate-risk position. Future Federal investigative standards may redefine investigation and reinvestigation standards for public trust positions.

One commenter recommended OPM grant exemptions for reinvestigations on Minimum Background Investigations and revise the regulations to clarify or expand definitions of representative public trust position duties in 5 CFR 731.106. This recommendation is not adopted because the Executive order does not authorize OPM to grant exemptions from reinvestigation requirements, and because the definitions of representative public trust position duties are not within the scope of this rulemaking.

Alignment of Reinvestigation Standards

A commenter voiced a concern that OPM may propose that reinvestigations for moderate and high-risk positions be different from the continuous evaluation requirements (at the same tier level) approved in Federal Investigative Standards that were issued in December 2008, but never implemented. OPM declines to modify the rule to reference or align with standards that were not implemented. However, as previously noted, we recognize the need for alignment of reinvestigation requirements to the extent possible, and this alignment is reflected both in § 731.106(d)(2) of this final rule, and in proposed 5 CFR 732.203. Also as previously noted, new investigative standards are under development. The new investigative standards are targeted to be implemented in 2013.

Another commenter stated it is unclear why OPM is deferring establishing new investigative standards for public trust investigations until a later issuance, as this means that the rule offers little guidance on anything other than the frequency of reinvestigations. The commenter also stated that the rule cannot be implemented until guidance on the investigative standards is published. The purpose of this rulemaking is to prescribe the frequency of public trust reinvestigations. In the reopener, we also explained the investigative products we intend to use for public trust reinvestigations for non-sensitive positions: The NACLC and the PRI. Scope and coverage standards have already been established for these products. Investigations and adjudications have been proceeding throughout the period that OPM and other agencies have been working on alignment issues, and will continue to proceed after implementation of these regulations. OPM therefore disagrees with the commenter's assertion that introducing changes to the suitability rule that are required by Executive Order is somehow inappropriate or that there is insufficient guidance to implement the rule. Further, as alignment efforts move forward, new investigative standards and products will be developed, but it is neither necessary nor desirable to codify the scope and coverage standards for investigative products in permanent rules.

Confusion Regarding the Term ''Assessment''

Some commenters stated that the term ''assessment'' caused confusion. One commenter suggested we use the term ''decision'' instead, as ''assessment'' implies observation and evaluation. Another commenter stated that OPM did not adequately explain why it is proposing to replace ''determination'' with ''assessment.'' The commenter recommended that the language remain as it is in the current rule and include new language that states what action must be taken as a result of a reinvestigation. A commenter recommended we change the term ''assessment'' back to ''determination,'' as this commenter believed that any final decision regarding an individual's continued suitability for Federal employment based upon a completed investigation should be called a ''determination'' for consistency across agencies. Another commenter recommended that OPM outline what happens after a completed suitability investigation (''determination'') and what happens after a completed reinvestigation (''assessment''). The commenter also stated that the term ''assessment'' needs to be further defined or explained. Only one commenter indicated that the term ''assessment'' clarified the process.

Since use of the term ''assessment'' has not provided clarification as intended, in § 731.106(d)(1) we have changed the term back to ''determination,'' to reflect the decision-making process associated with ensuring suitability for continuing employment. In the context of this rule, the ''determination'' is a decision as to whether or not to take a suitability action, adverse action, or probationary action, or to refer a case to OPM for adjudication, as appropriate. An adverse action, if taken, must meet statutory procedural requirements. E.O. 13488 does not require an agency to take an adverse action when it otherwise would not be warranted.

To provide further clarification as to the types of actions that can be taken against categories of employees, we have modified the language in § 731.106(f) to include a reference to 5 CFR part 315 for probationers or 5 CFR part 359 for Senior Executive Service (SES) probationers. We have also changed § 731.106(e) to include appointees as well as employees, as changes in risk levels can occur with respect to both.

Insufficient Information

Some labor organization representatives expressed concerns that sufficient information was not provided to enable them to comment in a meaningful fashion regarding the frequency of reinvestigation. We disagree. This rule was originally proposed on November 3, 2009, and reopened on November 5, 2010, to specifically solicit comments on the reinvestigation cycle. The new notice provided adequate information about the intended reinvestigation products. Despite continuing concerns expressed on lack of information, a number of substantive comments were still provided by these parties regarding frequency of reinvestigation.

Breaks in Service That Are Less Than 24 Months

Some commenters observed that the proposed rule does not contain language addressing how breaks in service affect investigative requirements. As a result, they recommended that OPM amend the proposed rule to clarify that a break in service of less than 24 months would not require a new investigation. They argued that this would support the goals of reciprocity and alignment between suitability and national security investigations. OPM agrees and has revised § 731.104(a) to clarify that a new investigation is not required when there has been a break in service of less than 24 months.

Collective Bargaining and Labor Relations

One agency commenter and a labor organization representative expressed the opinion that implementation of these regulations may require collective bargaining for employees in bargaining

units prior to implementation. The commenters made no specific recommendations, so no changes were made to the rule.

A labor organization representative commented that implementation of these regulations will have a negative impact on labor relations and Federal employees and recommends that the National Council on Federal Labor-Management Relations review the rule and make recommendations to the President on whether to proceed with the rule. This labor organization representative also proposed that OPM hold the rule in abeyance until the President decides whether or not to proceed with it. The labor organization representative did not provide any additional information regarding the perceived negative impact on labor relations and Federal employees. We did not adopt these recommendations. The rulemaking is required by E.O. 13488. As long as the E.O. remains in place, there is no basis for OPM to submit this rule for the National Council's review or to hold it in abeyance. The proposed rule dated November 3, 2009, and the reopener dated November 5, 2010, were provided to all unions with Governmentwide consultation rights with OPM for their comments and recommendations regarding the rule. Additionally, agencies, members of the public, and other labor organizations were also provided an opportunity to comment on the proposed rule.

Miscellaneous Comments

One commenter stated that a review should be made as to whether agencies will initiate adverse action proceedings should off-duty criminal conduct be discovered, when the conduct does not have a nexus to the service. OPM did not adopt this recommendation as it is outside the scope of this rule. However, as stated earlier, 5 CFR 731.106(f) currently provides that a person's employment status will determine the applicable agency authority and procedures to be followed in any action taken based on the results of the reinvestigation. This rule prescribes reinvestigation requirements, and cannot be read to amend the statutory standard for bringing an adverse action under 5 U.S.C. chapter 75. Under this standard an adverse action must have a nexus with the efficiency of the service.

One commenter stated that OPM's separate proposal to amend part 732 will, if adopted, have the effect of broadening the categories of position duties that are categorized as ''sensitive'' and, as a result, OPM should not make references in part 731 to the representative position duties of ''public trust'' positions. The definition of representative ''public trust'' position duties in 5 CFR 731.106(b) is not within the text that OPM proposed to amend in the rule, so the comment is outside the scope of the rulemaking. Nonetheless, we note that the commenter appears to assume that national security positions do not also have a public trust risk designation. This assumption is incorrect under § 731.106(b)(2). We also note that the commenter's statement about the possible effect of OPM's proposal to amend part 732 is speculative. As we noted in the Supplementary Information accompanying the notice of proposed rulemaking, the proposed rule contains text intended to address the risk of over-designating national security positions as well as the risk of under-designating such positions.

One commenter stated that directing agencies to make an ''assessment'' of whether findings of an investigation would justify an action against an employee will take the decision out of the personnel security arena and place it into the employee and labor relations arena. While we have agreed to retain the term ''determination'' instead of ''assessment,'' there is no intended change in how these actions are handled in an agency. OPM is aware that some agencies conduct suitability reviews as a human resources function, while other agencies conduct such reviews as a security function. It is not OPM's intent in this rulemaking to prescribe which internal component of an agency will conduct a function.

One commenter stated that, given the reporting requirement, the agency will have to complete the INV Form 79A, Report of Adjudicative Action on OPM Personnel Investigations. The agency further stated that this requirement will place the burden on personnel security divisions to report on actions that may be taken by other offices. While agencies have responsibilities to comply with this rule, it is up to each agency to determine how it will do so.

One commenter questioned why OPM doesn't issue a regulation regarding how employees can dispute the designation of their positions as public trust positions. This question is beyond the scope of the proposed rule, which is limited to the frequency of reinvestigations. However, because the position designation process is a discretionary agency decision, employees should consult with their agency human resources office regarding whether any administrative procedures are available to employees if they wish to dispute whether rules and regulations have been properly applied.

One commenter questioned how designations of public trust positions are made, and recommended that OPM clarify the definition of public trust position duties in its regulation. Designations of public trust positions and their risk levels are made by agencies following OPM guidance and taking into account the specific duties of each position. The comment that OPM should clarify the definition of public trust position duties in the rule cannot be considered because it addresses matters outside the scope of the rulemaking.

Finally, OPM is updating the authority citation for part 731 to include a reference to E.O. 13488. We also are making a correction to the citation format.

Regulatory Flexibility Act

OPM has determined that this rule will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

Executive Order 13563 and Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 13563 and E.O. 12866.

E.O. 13132, Federalism

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

E.O. 12988, Civil Justice Reform

This regulation meets the applicable standard set forth in section 3(a) and (b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This regulation will not result in the expenditure by State, local, or Tribal governments of more than $100 million annually. Thus, no written assessment of unfunded mandates is required.

Congressional Review Act

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of non-

agency parties and, accordingly, is not a ''rule'' as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)

This final regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 5 CFR Part 731

Administrative practices and procedures, Government employees.

U.S. Office of Personnel Management.

John Berry,

Director.

Accordingly, OPM amends part 731, title 5, Code of Federal Regulations, as follows:

PART 731—SUITABILITY

■ 1. The authority citation for part 731 is revised to read as follows:

Authority: 5 U.S.C. 1302, 3301, 7301; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218, as amended; E.O. 13467, 3 CFR, 2009 Comp., p. 198; E.O. 13488, 3 CFR, 2010 Comp., p. 189; 5 CFR, parts 1, 2 and 5.

Subpart A—Scope

■ 2. In § 731.104, remove ''or'' at the end of paragraph (a)(3), replace the period at the end of paragraph (a)(4) with ''; or'', and add a new paragraph (a)(5) to read as follows:

§ 731.104 Appointments subject to investigation.

(a) * * *

(5) Appointment to a covered position where there has been a break in service of less than 24 months, and the service immediately preceding the break was in a covered position, an excepted service position, or a contract employee position described in paragraphs (a)(1) to (a)(4) of this section.

* * * * *

■ 3. In § 731.106, revise paragraphs (d), (e), and (f) to read as follows:

§ 731.106 Designation of public trust positions and investigative requirements.

* * * * *

(d) *Reinvestigation requirements.* (1) Agencies must ensure that reinvestigations are conducted and a determination made regarding continued employment of persons occupying public trust positions at least once every 5 years. The nature of these reinvestigations and any additional requirements and parameters will be established in supplemental guidance issued by OPM.

(2) If, prior to the next required reinvestigation, a separate investigation is conducted to determine a person's eligibility (or continued eligibility) for access to classified information or to hold a sensitive position, or as a result of a change in risk level as provided in paragraph (e) of this section, and that investigation meets or exceeds the requirements for a public trust reinvestigation, a new public trust reinvestigation is not required. Such a completed investigation restarts the cycle for a public trust reinvestigation for that person.

(3) Agencies must notify all employees covered by this section of the reinvestigation requirements under this paragraph.

(e) *Risk level changes.* If an employee or appointee experiences a change to a higher position risk level due to promotion, demotion, or reassignment, or the risk level of the employee's or appointee's position is changed to a higher level, the employee or appointee may remain in or encumber the position. Any upgrade in the investigation required for the new risk level should be initiated within 14 calendar days after the promotion, demotion, reassignment or new designation of risk level is final.

(f) *Completed investigations.* Any suitability investigation (or reinvestigation) completed by an agency under paragraphs (d) and (e) of this section must result in a determination by the employing agency of whether the findings of the investigation would justify an action under this part or under another applicable authority, such as part 315, 359, or 752 of this chapter. Section 731.103 addresses whether an agency may take an action under this part, and whether the matter must be referred to OPM for debarment consideration.

Subpart B—Suitability Determinations and Actions

■ 4. Revise § 731.206 to read as follows:

§ 731.206 Reporting requirements.

Agencies must report to OPM the level or nature, result, and completion date of each background investigation or reinvestigation, each agency decision based on such investigation or reinvestigation, and any personnel action taken based on such investigation or reinvestigation, as required in OPM issuances.

[FR Doc. 2011–29057 Filed 11–8–11; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

Docket No. FAA–2011–0585; Airspace Docket No. 11–AWP–9

Modification of Class E Airspace; Blythe, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies Class E airspace at Blythe, CA, to accommodate aircraft using Area Navigation (RNAV) Global Positioning System (GPS) standard instrument approach procedures at Blythe Airport. This action also corrects geographic coordinates in the regulatory text. This improves the safety and management of Instrument Flight Rules (IFR) operations at the airport.

DATES: Effective date, 0901 UTC, December 15, 2011. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA, 98057; *telephone* (425) 203–4537.

SUPPLEMENTARY INFORMATION:

History

On August 2, 2011, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to modify controlled airspace at Blythe, CA (76 FR 46212). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Subsequent to publication, the FAA found that the boundaries for the controlled airspace needed to be adjusted; this action makes that adjustment.

Class E airspace designations are published in paragraph 6005, of FAA Order 7400.9V dated August 9, 2011, and effective September 15, 2011, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations

listed in this document will be published subsequently in that Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by modifying Class E airspace extending upward from 700 feet above the surface to accommodate IFR aircraft executing RNAV (GPS) standard instrument approach procedures at Blythe Airport. Also, the boundary coordinates in the regulatory text for the Class E 1,200-foot airspace area is adjusted to be in concert with the FAA's aeronautical database. This action is necessary for the safety and management of IFR operations. With the exception of editorial changes and the changes noted above, this rule is the same as that proposed in the NPRM.

The FAA has determined this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106 discusses the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it creates additional controlled airspace at Blythe Airport, Blythe, CA.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9V, Airspace Designations and Reporting Points, dated August 9, 2011, and effective September 15, 2011 is amended as follows:

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

* * * * *

AWP CA E5 Blythe, CA [Modified]

Blythe Airport, CA
(Lat. 33°37′09″ N., long. 114°43′01″ W.)

That airspace extending upward from 700 feet above the surface within a 6.7-mile radius of the Blythe Airport, and within 4 miles south and 1.2 miles north of the 264° bearing from the airport extending from the 6.7-mile radius to 10 miles west of the airport. That airspace extending upward from 1,200 feet above the surface within an area bounded by lat. 33°50′00″ N., long. 114°21′00″ W.; to lat. 33°42′00″ N., long. 114°17′00″ W.; to lat. 33°41′30″ N., long. 114°07′30″ W.; to lat. 33°27′00″ N., long. 114°09′00″ W.; to lat. 33°28′00″ N., long. 114°13′00″ W.; to lat. 33°28′28″ N., long. 114°27′12″ W., thence clockwise along the 15.8-mile radius of Blythe Airport to lat. 33°26′30″ N., long. 114°57′00″ W., to lat. 33°26′00″ N., long. 115°04′00″ W.; to lat. 33°53′00″ N., long. 115°07′00″ W.; to lat. 34°15′00″ N., long. 114°50′00″ W.; to lat. 34°15′00″ N., long. 114°28′00″ W.; to lat. 33°52′00″ N., long. 114°29′00″ W., thence to the point of beginning.

Issued in Seattle, Washington, on October 3, 2011.

John Warner,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2011–28931 Filed 11–8–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 748

[Docket No. 110804481–1527–01]

RIN 0694–AF32

Amendment to Existing Validated End-User Authorizations in the People's Republic of China: National Semiconductor Corporation and Semiconductor Manufacturing International Corporation

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) to remove National Semiconductor Corporation (National Semiconductor) from the list of ''Validated End-Users'' and ''Eligible Destinations'' in the People's Republic of China (PRC). BIS also removes one facility from the list of ''Eligible Destinations'' for Semiconductor Manufacturing International Corporation (SMIC) in the PRC, the Semiconductor Manufacturing International (Chengdu) Corporation, Assembly and Testing (AT2) Facility (SMIC AT2 facility). These amendments are due to material changes in the ownership and control of National Semiconductor and the SMIC AT2 facility. These amendments are not the result of activities of concern by National Semiconductor or SMIC and do not establish any new license requirements or licensing policies for exports, reexports, or transfers (in-country) of items to National Semiconductor, SMIC, or their facilities.

DATES: This rule is effective November 9, 2011.

FOR FURTHER INFORMATION CONTACT: Karen Nies-Vogel, Chair, End-User Review Committee, Bureau of Industry and Security, U.S. Department of Commerce, 14th Street & Pennsylvania Avenue NW., Washington, DC 20230; by telephone: (202) 482–5991, by fax: (202) 482–3991, or email: *ERC@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

Authorization Validated End-User (VEU)

BIS amended the EAR in a final rule on June 19, 2007 (72 FR 33646), creating a new authorization for ''validated end-users'' (VEUs) located in eligible destinations to which eligible items may

be exported, reexported, or transferred (in-country) under a general authorization instead of a license, in conformance with section 748.15 of the EAR. VEUs may obtain eligible items that are on the Commerce Control List, set forth in Supplement No. 1 to Part 774 of the EAR, without having to wait for their suppliers to obtain export licenses from BIS. Eligible items may include commodities, software, and technology, except those controlled for missile technology or crime control reasons.

The VEUs listed in Supplement No. 7 to Part 748 of the EAR were reviewed and approved by the U.S. Government in accordance with the provisions of section 748.15 and Supplement Nos. 8 and 9 to Part 748 of the EAR.

Amendment to Existing Validated End-User Authorizations for the PRC

Removal of VEU Authorization for National Semiconductor Corporation (National Semiconductor)

In a rule published in the **Federal Register** on October 19, 2007 (72 FR 59164), BIS designated National Semiconductor as a VEU and identified three of its facilities (NSC VEU facilities) as ''Eligible Destinations,'' thus authorizing exports, reexports, and transfers (in-country) of certain eligible items to the three eligible facilities under Authorization VEU. Due to a material change in the ownership and control of National Semiconductor, National Semiconductor asked that its VEU authorization be ended. Accordingly, consistent with section 748.15 of the EAR, BIS now amends Supplement No. 7 to Part 748 of the EAR to remove National Semiconductor from the list of approved VEUs and eligible destinations. As a result of this rule, National Semiconductor Corporation and the NSC VEU facilities at the following addresses are no longer authorized to receive items under Authorization VEU:

National Semiconductor Hong Kong Limited, Beijing Representative Office, Room 604, CN Resources Building, No. 8 Jianggumenbei A, Beijing, China, 100005.

National Semiconductor Hong Kong Limited, Shanghai Representative Office, Room 903–905 Central Plaza, No. 227 Huangpi Road North, Shanghai, China, 200003.

National Semiconductor Hong Kong Limited, Shenzhen Representative Office, Room 1709 Di Wang Commercial Centre, Shung Hing Square, 5002 Shenna Road East, Shenzhen, China, 518008.

This amendment is made due to a material change in the ownership and control of National Semiconductor and is not the result of activities of concern by National Semiconductor or the NSC VEU facilities. This action does not establish any new license requirements or licensing policies for exports, reexports or transfers (in-country) of items to National Semiconductor. Rather, the license requirements set forth in the EAR continue to apply to this entity and its facilities. Parties seeking to export, reexport or transfer (in-country) items under the EAR to National Semiconductor or these facilities may now have to obtain a license to do so, depending on the item at issue.

All conditions and restrictions that applied to transactions that were undertaken pursuant to Authorization VEU prior to the effective date of this amendment that involved National Semiconductor or the NSC VEU facilities continue to apply to those transactions. These restrictions and conditions include any that were imposed on National Semiconductor or the NSC VEU facilities in connection with its eligibility for Authorization VEU, as established by BIS in its communications authorizing National Semiconductor's participation in the VEU program.

Removal of Semiconductor Manufacturing International (Chengdu) Corporation, Assembly and Testing (AT2) Facility (SMIC AT2 Facility) From the List of VEU Semiconductor Manufacturing International Corporation's (SMIC's) Approved Facilities in the PRC

In a rule published in the **Federal Register** on October 19, 2007 (72 FR 59164), BIS designated SMIC as a VEU, thus authorizing certain specific exports, reexports and transfers (in-country) to five listed facilities of the company, including the SMIC AT2 facility. Due to a material change in the ownership and control of the SMIC AT2 facility, SMIC has requested that BIS remove that facility's VEU authorization. Accordingly, in this rule, BIS further amends Supplement No. 7 to Part 748 of the EAR to remove the SMIC AT2 facility and its address (8–8 Kexin Road, Export Processing Zone (West Area), Chengdu, China 611731) from the list of SMIC's authorized VEU facilities. This change leaves three SMIC facilities that are approved to receive eligible items under SMIC's VEU authorization.

As a result of this rule, the SMIC AT2 facility is no longer authorized to receive items under Authorization VEU. Thus, parties seeking to export, reexport, or transfer (in-country) items under the EAR to the SMIC AT2 facility may now need to obtain a license to do so, depending on the item at issue.

This amendment is made due to a material change in the ownership and control at the SMIC AT2 facility and is not the result of activities of concern by the SMIC AT2 facility or SMIC. SMIC remains a qualified participant in the VEU program, and thus exports, reexports and transfers (in-country) of the items controlled under the ECCNs listed in SMIC's entry in Supplement No. 7 to Part 748 of the EAR to the SMIC facilities listed in the same part may continue to be made under Authorization VEU. This action does not establish any new license requirements or licensing policies for exports, reexports or transfers (in-country) of items to the SMIC AT2 facility. Rather, the license requirements set forth in the EAR continue to apply to this entity and its facilities.

This amendment applies only to transactions under Authorization VEU involving the SMIC AT2 facility. All conditions and restrictions that applied to transactions that were undertaken pursuant to Authorization VEU prior to the effective date of this amendment, and that involved the SMIC AT2 facility, continue to apply to those transactions. These restrictions and conditions include any that were imposed on the SMIC AT2 facility in connection with its eligibility for Authorization VEU, as established by BIS in its communications authorizing the SMIC AT2 facility's participation in the VEU program.

Saving Clause

Shipments of items removed from eligibility for export, reexport or transfer (in-country) under Authorization VEU (*i.e.,* under the designator VEU) as a result of this regulatory action that were on dock for loading, on lighter, laden aboard an exporting carrier, or en route aboard a carrier to a port of export, on November 9, 2011, pursuant to actual orders for export, reexport or transfer (in-country) to an eligible destination, may proceed to that destination under the previously applicable Authorization so long as they are exported, reexported or transferred (in-country) before November 25, 2011. Any such items not actually exported, reexported or transferred (in-country) before midnight, on November 25, 2011, require an individual license or other applicable authorization under the EAR.

Since August 21, 2001, the Export Administration Act (the Act) has been in lapse and the President, through Executive Order 13222 of August 17,

2001 (3 CFR, 2001 Comp., p. 783 (2002)), as extended most recently by the Notice of August 12, 2011, 76 FR 50661 (August 16, 2011), has continued the EAR in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. This rule involves collections previously approved by the Office of Management and Budget (OMB) under Control Number 0694–0088, ''Multi-Purpose Application,'' which carries a burden hour estimate of 43.8 minutes to prepare and submit form BIS–748; and for recordkeeping, reporting and review requirements in connection with Authorization VEU, which carries an estimated burden of 30 minutes per submission. This rule is expected to result in a decrease in license applications submitted to BIS. Total burden hours associated with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA) and OMB Control Number 0694–0088 are not expected to increase significantly as a result of this rule.

Notwithstanding any other provisions of law, no person is required to respond or to be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

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

4. There is good cause under 5 U.S.C. 553(b)(B) to waive the provisions of the Administrative Procedure Act (APA) requiring prior notice and the opportunity for public comment because, specific to this rule, they are unnecessary, impracticable, and contrary to the public interest.

In determining whether to grant or revoke VEU designations, a committee of U.S. Government agencies evaluates a variety of information, the nature and terms of which are set forth in 15 CFR part 748, supplement No. 8. The criteria for evaluation by the committee are set forth in 15 CFR 748.15(a)(2). The information, commitments, and criteria for this extensive review were all established through the notice of proposed rulemaking and public comment process (71 FR 38313, July 2, 2006, and 72 FR 33646, June 19, 2007). Thus, authorization of a VEU is similar to granting a license: To receive authorization VEU, an application must be submitted on behalf of an entity; the entity must be found to meet certain previously identified criteria; and the application must be approved. Because the authorization granted by BIS pursuant to 15 CFR 748.15 is similar to that granted to exporters for individual licenses, which do not undergo public review when they are approved, denied, revoked, or amended, allowing public review and comments to this rule is unnecessary.

Publication of this rule in other than final form is unnecessary because the procedure for revocation of a VEU or facility from the Authorized VEU list is similar to the license revocation procedure, which does not undergo public review. During the revocation procedure, the U.S. Government analyzes confidential business information according to set criteria to determine whether a given authorized VEU entity remains eligible for VEU status. Revocation may, as in this case, be the result of a material change in circumstance at the VEU or the VEU's authorized facility. Examples of such a material change include changes in the operational status of a VEU facility or changes in the end-use of the products produced at the facility. Such changes may result in a VEU or VEU facility no longer meeting the eligibility criteria for Authorization VEU, and may thus lead the U.S. Government to modify or revoke VEU authorization. VEUs or VEU facilities that undergo material changes that result in their no longer meeting the criteria to be eligible VEUs must, according to the VEU program, have their VEU status revoked. Here, National Semiconductor requested removal from the VEU program and SMIC requested that BIS remove the SMIC AT2 facility from the VEU program due to material changes in ownership and control. Consequently, BIS is removing National Semiconductor from the list of ''Validated End-Users'' and ''Eligible Destinations'' and removing the SMIC AT2 facility from ''Eligible Destinations'' in the EAR. Public comments on whether to make these removals are unnecessary.

Additionally, allowing for prior public notice and comment on this rule may be impracticable and contrary to the public interest. The EAR advance U.S. national security, foreign policy, and economic objectives by ensuring an effective export control system. In accordance with the pre-set criteria, the U.S. Government reviews each VEU and its facilities to ensure that exports, reexports and transfers (in-country) of specified items to these entities are consistent with such objectives. Accordingly, VEUs and their facilities may receive through export, reexport or transfer (in-country) items that would otherwise require a license and transaction-specific review, in part due to national security concerns. However, the VEU and listed facility here are no longer eligible to receive items under Authorized VEU, and in order to protect national security, the restrictions of the EAR must be in place as soon as possible. Allowing public comments on this rule would hinder the ability of BIS to enforce the EAR's restrictions on exports without a license to the listed facilities. Thus public comment on this rule is both impracticable, because allowing such comment would prevent BIS from undertaking its statutory duties, and contrary to the public's national security interests.

In addition, BIS finds good cause to waive the requirement of 5 U.S.C. 553(d)(3) to delay the effectiveness of this regulation, because such a delay is contrary to the public's interest. When the U.S. Government has been notified of or has identified a material change in circumstances that warrants revocation or modification of VEU status for an end-user or a facility of an end-user, there is a need to quickly alert the public that the facility is no longer authorized as a recipient of items under Authorization VEU. Delaying this action's effectiveness could result in items that otherwise require licenses being exported, reexported, or transferred (in-country), license-free, to an ineligible facility, at risk to national security. Accordingly, it would be contrary to the public interest to delay this rule's effectiveness.

No other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under the APA or by any other law, the analytical requirements of the

Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable and no regulatory flexibility analysis has been prepared.

List of Subjects in 15 CFR Part 748

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

Accordingly, part 748 of the EAR (15 CFR parts 730–774) is amended as follows:

PART 748—[AMENDED]

■ 1. The authority citation for 15 CFR part 748 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 12, 2011, 76 FR 50661 (August 16, 2011).

■ 2. Supplement No. 7 to Part 748 is amended by:

■ a. Removing the entire entry for National Semiconductor Corporation; and

■ b. Removing ''Semiconductor Manufacturing International (Chengdu) Corporation, Assembly and Testing (AT2) Facility, 8–8 Kexin Road, Export Processing Zone (West Area), Chengdu, China 611731'' from the ''Eligible Destinations'' column in ''China (People's Republic of)''.

Dated: November 1, 2011.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2011–28916 Filed 11–8–11; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF STATE

22 CFR Part 126

[Public Notice: 7682]

RIN 1400–AC93

Amendment to the International Traffic in Arms Regulations: Sudan

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State is amending the International Traffic in Arms Regulations to include the Republic of the Sudan as a proscribed destination, pursuant to a United Nations Security Council arms embargo, and to clarify that this policy does not apply to the Republic of South Sudan.

DATES: *Effective Date:* This rule is effective November 9, 2011.

FOR FURTHER INFORMATION CONTACT: Mr. Charles B. Shotwell, Director, Office of Defense Trade Controls Policy, U.S. Department of State, *telephone* (202) 663–2792, or *email DDTCResponseTeam@state.gov*. ATTN: Regulatory Change, Sudan.

SUPPLEMENTARY INFORMATION: Section 126.1(v) is added to set out U.S. policy on arms exports to the Republic of the Sudan, in accordance with UN Security Council resolutions imposing an arms embargo and recent political developments in Sudan. UNSC resolution 1556, adopted July 30, 2004, imposes an arms embargo on non-governmental entities and individuals operating in Darfur, with certain exceptions. Subsequently, UNSC resolution 1591, adopted on March 29, 2005, expanded the arms embargo to all parties to the N'djamena Ceasefire Agreement, including the Government of the Republic of Sudan. UNSC resolution 1945, adopted on October 14, 2010, reaffirmed and strengthened the arms embargo. Accordingly, it is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in the Republic of the Sudan. The exceptions, as provided in the referenced resolutions, are for (1) Supplies and related technical training and assistance to monitoring, verification, or peace support operations, including those authorized by the UN or operating with the consent of the relevant parties; (2) supplies of non-lethal military equipment intended solely for humanitarian, human rights monitoring, or protective uses, and related technical training and assistance; (3) personal protective gear for the personal use of United Nations personnel, human rights monitors, representatives of the media, and humanitarian and development workers and associated personnel; and (4) assistance and supplies provided in support of implementation of the Comprehensive Peace Agreement. Licenses submitted pursuant to these exceptions will be considered on a case-by-case basis.

Sections 126.1(c) and (d) are revised to change ''Sudan'' to ''The Republic of the Sudan.''

On July 9, 2011, the Republic of South Sudan declared independence from Sudan and was recognized as a sovereign state by the United States. The policy of denial as it applies to the Republic of the Sudan does not apply to the Republic of South Sudan. Licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in the Republic of the South Sudan will be considered on a case-by-case basis.

Regulatory Analysis and Notices

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from § 553 (Rulemaking) and § 554 (Adjudications) of the Administrative Procedure Act. Since the Department is of the opinion that this rule is exempt from 5 U.S.C. 553, it is the view of the Department of State that the provisions of § 553(d) do not apply to this rulemaking. Therefore, this rule is effective upon publication. The Department also finds that, given the national security issues surrounding U.S. policy towards the Republic of the Sudan, notice and public procedure on this rule would be impracticable, unnecessary, or contrary to the public interest; for the same reason, the rule will be effective immediately. *See* 5 U.S.C. 808(2).

Regulatory Flexibility Act

Since this amendment is not subject to 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Act of 1995

This amendment does not involve a mandate that will result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This amendment has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This amendment will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism

summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this amendment.

Executive Order 12866

The Department is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules governing the conduct of this function are exempt from the requirements of Executive Order 12866. However, the Department has reviewed the proposed rule to ensure its consistency with the regulatory philosophy and principles set forth in the Executive Order.

Executive Order 12988

The Department of State has reviewed the proposed amendment in light of sections 3(a) and 3(b) (2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13563

The Department of State has considered this rule in light of Executive Order 13563, dated January 18, 2011, and affirms that this regulation is consistent with the guidance therein.

Executive Order 13175

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

Paperwork Reduction Act

This rule does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 126

Arms and munitions, Exports.

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, part 126 is amended as follows:

PART 126—GENERAL POLICIES AND PROVISIONS

■ 1. The authority citation for part 126 continues to read as follows:

Authority: Secs. 2, 38, 40, 42, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2791, and 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp., p.79; 22 U.S.C. 2651a; 22 U.S.C. 287c; E.O. 12918, 59 FR 28205; 3 CFR, 1994 Comp., p.899; Sec. 1225, Pub. L. 108–375; Sec. 7089, Pub. L. 111–117.

■ 2. Section 126.1 is amended by revising paragraphs (c)(11) and (d), and adding paragraph (v), to read as follows:

§ 126.1 Prohibited exports and sales to certain countries.

* * * * *

(c) * * *

(11) The Republic of the Sudan (see also paragraph (v) of this section).

(d) *Terrorism.* Exports to countries which the Secretary of State has determined to have repeatedly provided support for acts of international terrorism are contrary to the foreign policy of the United States and are thus subject to the policy specified in paragraph (a) of this section and the requirements of section 40 of the Arms Export Control Act (22 U.S.C. 2780) and the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 (22 U.S.C. 4801, note). The countries in this category are: Cuba, Iran, the Republic of the Sudan, and Syria.

* * * * *

(v) *Sudan.* It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in the Republic of the Sudan, except a license or other approval may be issued, on a case-by-case basis, for:

(1) Supplies and related technical training and assistance to monitoring, verification, or peace support operations, including those authorized by the United Nations or operating with the consent of the relevant parties;

(2) Supplies of non-lethal military equipment intended solely for humanitarian, human rights monitoring, or protective uses and related technical training and assistance;

(3) Personal protective gear for the personal use of United Nations personnel, human rights monitors, representatives of the media, and humanitarian and development workers and associated personnel; or

(4) Assistance and supplies provided in support of implementation of the Comprehensive Peace Agreement.

Note to § 126.1. On July 9, 2011, the Republic of South Sudan declared independence from Sudan and was recognized as a sovereign state by the United States. This policy does not apply to the Republic of South Sudan. Licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in the Republic of the South Sudan will be considered on a case-by-case basis.

Dated: November 2, 2011.

Ellen O. Tauscher,

Under Secretary, Arms Control and International Security, Department of State.

[FR Doc. 2011–29041 Filed 11–4–11; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100 and 165

[Docket No. USCG–2010–1001]

RIN 1625–AA00; 1625–AA08

Special Local Regulations and Safety Zones; Recurring Events in Captain of the Port New York Zone

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is removing, adding, and consolidating special local regulations and establishing permanent safety zones in the Coast Guard Captain of the Port (COTP) New York Zone for annual recurring swim events, fireworks displays, and marine events (annual recurring events). When these special local regulations or safety zones are activated and subject to enforcement, this will restrict vessels from portions of water areas during these annual recurring events. The special local regulations and safety zones will facilitate public notification of events and help protect the public and event participants from the hazards associated with these annual recurring events.

DATES: This rule is effective December 9, 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–2010–1001 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–1001 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 proposed rule, call or email LTJG Eunice James, Coast Guard; telephone (718) 354–4163, email *Eunice.A.James@uscg.mil.* If you have questions on viewing or submitting

material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On June 29, 2011, we published a notice of proposed rulemaking (NPRM) entitled Special Local Regulations and Safety Zones; Recurring Events in Captain of the Port New York Zone in the **Federal Register** (76 FR 125). We received no comments on the proposed rule. No public meeting was requested and none was held.

Basis and Purpose

The legal basis for the proposed rule is 33 U.S.C. 1225, 1226, 1231, 1233; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; Public Law 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to define regulatory safety zones and special local regulations.

Swim events, fireworks displays, and marine events are held on an annual recurring basis on the navigable waters within the COTP New York Zone. In the past, the Coast Guard has established special local regulations, regulated areas, and safety zones for these annual recurring events on a case by case basis to ensure the protection of the maritime public and event participants from the hazards associated with these events. The Coast Guard has not received public comments or concerns regarding the impact to waterway traffic from these annually recurring events.

This rule will consistently apprise the public in a timely manner through permanent publication in Title 33 of the Code of Federal Regulations. The TABLES in this regulation list each annual recurring event requiring a regulated area as administered by the Coast Guard.

By establishing a permanent regulation containing these annual recurring events, the Coast Guard would eliminate the need to establish temporary rules for events that occur on an annual basis, thereby, limiting the costs associated with cumulative regulations.

This rulemaking has removed, added, and consolidated regulations that better meet the Coast Guard's intended purpose of ensuring safety during these events.

Background

The Coast Guard is adding 33 CFR 100.150 and consolidating sections 33 CFR 165.161, 165.162, 165.166, 165.168, 165.170 into a new section, 33 CFR 165.160. The rule applies to the annual recurring events listed in the attached Tables in the COTP New York Zone. The Tables provide the event name, and type, as well as locations of the events. The specific times, dates, regulated areas, and enforcement period for each event will be provided through the Local Notice to Mariners, Broadcast Notice to Mariners and online at *http://homeport.uscg.mil/newyork* or through a Notice of Enforcement published in the **Federal Register**.

During enforcement periods, the safety zones in TABLE 1 to § 165.160 will be enforced from 6 p.m. to 1 a.m. each day a barge with a ''Fireworks—Stay Away'' sign on the port and starboard side is on-scene or a ''Fireworks—Stay Away'' sign is posted on land adjacent to the shoreline, in a location listed in the TABLE 1 to § 165.160. Vessels may enter, remain in, or transit through these safety zones during this time frame if authorized by the COTP New York or the designated representative.

The particular size of the safety zones established for each event will be reevaluated on an annual basis in accordance with Navigational and Vessel Inspection Circular (NVIC) 07–02, Marine Safety at Firework Displays, the National Fire Protection Association Standard 1123, Code for Fireworks Displays (30-yard distance per inch of diameter of the fireworks mortars), and other pertinent regulations and publications.

This regulation will prevent vessels from transiting areas specifically designated as special local regulations or safety zones during the periods of enforcement to ensure the protection of the maritime public and event participants from the hazards associated with the listed annual recurring events. Only event sponsors, designated participants, and official patrol vessels will be allowed to enter regulated areas. Spectators and other vessels not registered as event participants may not enter the safety zones without the permission of the COTP or the designated representative.

Discussion of Comments and Changes

The Coast Guard made the following changes to the published NPRM regulatory text:

Safety zones listed in Table 1 to § 165.160 have been reordered and renumbered to more accurately reflect their geographical locations. In the published NPRM regulatory text, the Rumson, NJ, Safety Zone and the Red Bank, NJ, Safety Zone were listed under the heading ''New York Harbor'' in Table 1 to § 165.160 and numbered as 2.16 and 2.17. They are now listed under the ''Navesink River'' heading in Table 1 to § 165.160 and numbered 7.2 and 7.3 respectively.

Keyport, NJ, Safety Zone was not included in the NPRM and is now listed under the heading ''Navesink River'' and numbered as 7.1. Since The Coast Guard has previously established a temporary safety zone at this location in the past and has not received public comments or concerns regarding the impact to waterway traffic, we decided it should be included in this recurring events regulation.

In the regulatory text under § 165.160(a), the existing text reads as follows: ''Notifications of exact dates and times of the enforcement period will be made to the local maritime community through the Local Notice to Mariners and Broadcast Notice to Mariners or through a Notice of Enforcement in the **Federal Register** well in advance of the events''. We revised the text to help the public better understand our intentions regarding notification of enforcement of the 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.

Executive Order 12866 and Executive Order 13563

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.

We expect the economic impact of this rule to be minimal. Although this regulation may have some impact on the public, the potential impact will be minimized for the following reasons:

The Coast Guard has previously promulgated safety zones or special local regulations, in accordance with 33 CFR Parts 100 and 165, for all event areas contained within this regulation and has not received notice of any negative impact caused by any of the safety zones or special local regulations. By establishing a permanent regulation containing all of these events, the Coast Guard will eliminate the need to establish individual temporary rules for each separate event that occurs on an annual basis, thereby limiting the costs of cumulative regulations.

Vessels will only be restricted from safety zones and special local regulation areas for a short duration of time. Vessels may transit in portions of the affected waterway except for those areas covered by the regulated areas. Notifications of exact dates and times of the enforcement period will be made to the local maritime community through the Local Notice to Mariners and Broadcast Notice to Mariners or through a Notice of Enforcement in the **Federal Register**. No new or additional restrictions would 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 would 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 the listed annual recurring events are being held.

The rule would not have a significant economic impact on a substantial number of small entities for the following reasons: Vessels will only be restricted from safety zones and special local regulation areas for a short time; vessels may transit in portions of the affected waterway except for those areas covered by the regulated areas; 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; notifications of exact dates and times of the enforcement period will be made to the local maritime community through the Local Notice to Mariners and Broadcast Notice to Mariners or through a Notice of Enforcement in the **Federal Register**. No new or additional restrictions would be imposed on vessel traffic.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

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

Authority: 33 U.S.C. 1233.

■ 2. Add a new § 100.150 to read as follows:

§ 100.150 Special Local Regulations; Marine Events in the Coast Guard Sector New York Captain of the Port Zone.

The following regulations apply to the marine events listed in the TABLE to § 100.150. 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 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 Local Notices to Mariners and broadcast over VHF–FM radio. First Coast Guard District Local Notice to Mariners can be found at: *http://www.navcen.uscg.gov/.* The Sector New York Marine Events schedule can also be viewed electronically at *http://www.homeport.uscg.mil/newyork.* Although listed in the Code of Federal Regulations, sponsors of events listed in the TABLE to § 100.150 are still required to submit marine event applications in accordance with 33 CFR 100.15.

(a) *Definitions.* The following definitions apply to this section:

(1) *Designated Representative.* A ''designated representative'' is any Coast Guard commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the Captain of the Port, Sector New York (COTP), to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(2) *Official Patrol Vessels.* Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(3) *Spectators.* All persons and vessels not registered with the event sponsor as participants or official patrol vessels.

(b) Vessel operators desiring to enter or operate within the regulated areas shall contact the COTP or the designated representative via VHF channel 16 or (718) 354–4353 (Sector New York command center) to obtain permission to do so.

(c) Vessels may not transit the regulated areas without the COTP or designated representative 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.

(d) 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 COTP or designated representative.

(e) The COTP or designated representative 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.

(f) The COTP or designated representative 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.

(g) For all power boat races listed, vessels not participating in this event, swimmers, and personal watercraft of any nature are prohibited from entering or moving within the regulated area unless authorized by the COTP or designated representative. Vessels 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.

TABLE TO § 100.150

1.0	Hudson River
1.1 New York Super Boat Race	• Event type: Power Boat Race. • Date: The weekend after Labor Day. • Location: All waters of the Lower Hudson River south of a line drawn from the northwest corner of Pier 76 in Manhattan, New York to a point on the New Jersey shore in Weehawken, New Jersey at approximate position 40°45′52″ N 074°01′01″ W (NAD 1983) and north of a line connecting the following points (all coordinates are NAD 1983): 40°42′16.0″ N, 074°01′09.0″ W; thence to 40°41′55.0″ N, 074°01′16.0″ W; thence to 40°41′47.0″ N, 074°01′36.0″ W; thence to 40°41′55.0″ N, 074°01′59.0″ W; thence to 40°42′20.5″ N, 074°02′06.0″ W.

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 3. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1225, 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 33 CFR 1.05–1 and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 4. Add a new § 165.160 to read as follows:

§ 165.160 Safety Zones; Fireworks Displays and Swim Events in Coast Guard Captain of the Port New York Zone.

(a) *Regulations.* The general regulations contained in 33 CFR 165.23 as well as the following regulations apply to the fireworks displays and swim events listed in Tables 1 and 2 to § 165.160. These regulations will be enforced for the duration of each event. Notifications will be made to the local maritime community through the Local Notice to Mariners and Broadcast Notice to Mariners well in advance of the events. If the event does not have a date listed, then exact dates and times of the enforcement period will be announced through a Notice of Enforcement in the **Federal Register**. 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 Captain of the Port Sector New York Marine Events schedule can also be viewed electronically at *www.homeport.uscg.mil*/newyork. Although listed in the Code of Federal Regulations, sponsors of events listed in Tables 1 and 2 to § 165.160 are still required to submit marine event applications in accordance with 33 CFR 100.15.

(b) *Definitions.* The following definitions apply to this section:

(1) *Designated Representative.* A ''designated representative'' is any Coast Guard commissioned, warrant or petty officer of the U.S. Coast Guard who has been designated by the Captain of the Port, Sector New York (COTP), to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation.

(2) *Official Patrol Vessels.* Official patrol vessels may consist of any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP.

(3) *Spectators.* All persons and vessels not registered with the event sponsor as participants or official patrol vessels.

(b) Vessel operators desiring to enter or operate within the regulated areas shall contact the COTP or the designated representative via VHF channel 16 or (718) 354–4353 (Sector New York command center) to obtain permission to do so.

(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 COTP or designated representative.

(d) Upon being hailed by a U.S. Coast Guard vessel or the designated representative, by siren, radio, flashing light or other means, the operator of the vessel shall proceed as directed. Failure to comply with a lawful direction may result in expulsion from the area, citation for failure to comply, or both.

(e) The COTP or designated representative 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) The regulated area for all fireworks displays listed in Table 1 to § 165.160 is that area of navigable waters within a 360 yard radius of the launch platform or launch site for each fireworks display, unless otherwise noted in TABLE 1 to § 165.160 or modified in USCG First District Local Notice to Mariners at: *http://www.navcen.uscg.gov/*.

(g) Fireworks barges used in these locations will also have a sign on their port and starboard side labeled ''Fireworks—Stay Away''. This sign will consist of 10 inch high by 1.5 inch wide red lettering on a white background. Shore sites used in these locations will display a sign labeled ''Fireworks—Stay Away'' with the same dimensions. These zones will be enforced from 6 p.m. (E.S.T.) to 1 a.m. (E.S.T.) each day a barge with a ''Fireworks—Stay Away'' sign on the port and starboard side is on-scene or a ''Fireworks—Stay Away'' sign is posted in a location listed in TABLE 1 to § 165.160.

(h) For all swim events listed in Table 2 to § 165.160, vessels not associated with the event shall maintain a separation of at least 100 yards from the participants.

TABLE 1 TO § 165.160

1.0	Hudson River
1.1 Macy's 4th of July Fireworks	• Event Type: Fireworks. • Date: July 4th. • Rain Date: July 5th. • Location: All waters of the Hudson River bounded by a line drawn east from approximate position 40°46′35.43″ N, 074°00′37.53″ W in New Jersey, to approximate position 40°46′16.98″ N, 073°59′52.34″ W in New York, thence south along the Manhattan shoreline to approximate position 40°44′48.98″ N, 074°00′41.06″ W, then west to approximate position 40°44′55.91″ N, 074°01′24.94″ W, (NAD 83). Then north along the New Jersey shoreline and back to the point of origin.
2.0	New York Harbor
2.1 Liberty Island Safety Zone	• Launch site: A barge located in approximate position 40°41′16.5″ N 074°02′23″ W (NAD 1983), located in Federal Anchorage 20–C, about 360 yards east of Liberty Island. This Safety Zone is a 360-yard radius from the barge.

TABLE 1 TO § 165.160—Continued

2.2 Ellis Island Safety Zone	• Launch site: A barge located between Federal Anchorages 20–A and 20–B, in approximate position 40°41′45″ N 074°02′09″ W (NAD 1983) about 365 yards east of Ellis Island. This Safety Zone is a 360-yard radius from the barge.
2.3 South Ellis Island Safety Zone	• Launch site: A barge located in approximate position 40°41′39.9″ N 074°02′33.7″ W (NAD 1983), about 260 yards south of Ellis Island. This Safety Zone is a 240-yard radius from the barge.
2.4 South Beach, Staten Island Safety Zone	• Launch site: A barge located in approximate position 40°35′11″ N 074°03′42″ W (NAD 1983), about 350 yards east of South Beach, Staten Island. This Safety Zone is a 360-yard radius from the barge.
2.5 Raritan Bay Safety Zone	• Launch site: A barge located in approximate position 40°30′04″ N 074°15′35″ W (NAD 1983), about 240 yards east of Raritan River Cutoff Channel Buoy 2 (LLNR 36595). This Safety Zone is a 240-yard radius from the barge.
2.6 Coney Island Safety Zone	• Launch site: A land shoot from the south end of Steeplechase Pier, Coney Island in approximate position 40°34′11″ N 073°59′00″ W (NAD 1983). This Safety Zone is a 250-yard radius from the launch site.
2.7 Arthur Kill, Elizabeth, NJ Safety Zone	• Launch site: A land shoot located in Elizabeth, New Jersey in approximate position 40°38′50″ N 074°10′58″ W (NAD 1983), about 675 yards west of Arthur Kill Channel Buoy 20 (LLNR 36780). This Safety Zone is a 150-yard radius from the launch site.
2.8 Rockaway Beach Safety Zone	• Launch site: A barge located in approximate position 40°34′28.2″ N 073°50′00″ W (NAD 1983), 350 yards off of Beach 116th Street. This Safety Zone is a 360-yard radius from the barge.
2.9 Rockaway Inlet Safety Zone	• Launch site: A barge located in approximate position 40°34′19.1″ N 073°54′43.5″ W (NAD 1983). 1200 yards south of Point Breeze. This Safety Zone is a 360-yard radius from the barge.
2.10 Pierhead Channel, NJ Safety Zone	• Launch site: A barge located in approximate position 40°39′18.8″ N 074°04′39.1 W (NAD 1983), approximately 350 yards north of the Kill Van Kull Channel. This Safety Zone is a 360-yard radius from the barge.
2.11 Midland Beach, Staten Island Safety Zone	• Launch site: A barge located in approximate position 40°34′12″ N 074°04′29.6″ W (NAD 1983), approximately 800 yards southeast of Midland Beach. This Safety Zone is a 500-yard radius from the barge.
2.12 Wolfes Pond Park, Staten Island Safety Zone	• Launch site: A barge located in approximate position 40°30′52.1″ N 074°10′58.8″ W (NAD 1983), approximately 540 yards east of Wolfe's Pond Park. This Safety Zone is a 500-yard radius from the barge.
2.13 Ocean Breeze Fishing Pier, Staten Island Safety Zone	• Launch site: A barge located in approximate position 40°34′46.3″ N 074°04′02.0″ W (NAD 1983), approximately 1150 yards west of Hoffman Island. This Safety Zone is a 360-yard radius from the barge.
2.14 Fort Hamilton Safety Zone	• Launch site: A barge located in approximate position 40°36′00″ N 074°01′42.5″ W (NAD 1983), approximately 1400 yards southeast of the Verrazano-Narrows Bridge. This Safety Zone is a 240-yard radius from the barge.
2.15 Liberty State Park Safety Zone	• Launch site: A barge located in approximate position 40°41′20.32″ N 074°03′29.35″ W (NAD 1983), approximately 334 yards south of Pier 7, Liberty State Park, Jersey City, New Jersey. This Safety Zone is a 240-yard radius from the barge.
3.0	Western Long Island Sound
3.1 Peningo Neck, Western Long Island Sound safety zone	• Launch site: A barge located in approximate position 40°56′21″ N 073°41′23″ W (NAD 1983), approximately 525 yards east of Milton Point, Peningo Neck, New York. This Safety Zone is a 300-yard radius from the barge.

TABLE 1 TO § 165.160—Continued

3.2 Satans Toe, Western Long Island Sound Safety Zone	• Launch Site: A barge located in approximate position 40°55′21″ N 073°43′41″ W (NAD 1983), approximately 635 yards northeast of Larchmont Harbor (East Entrance) Light 2 (LLNR 25720). This Safety Zone is a 360-yard radius from the barge.
3.3 Larchmont, NY, Western Long Island Sound Safety Zone	• Launch site: A barge located in approximate position 40°54′45″ N 073°44′55″ W (NAD 1983), approximately 450 yards southwest of the entrance to Horseshoe Harbor. This Safety Zone is a 240-yard radius from the barge.
3.4 Manursing Island, Western Long Island Sound Safety Zone	• Launch site: A barge located in approximate position 40°57′47″ N 073°40′06″ W (NAD 1983), approximately 380 yards north of Rye Beach Transport Rock Buoy 2 (LLNR 25570). This Safety Zone is a 360-yard radius from the barge.
3.5 Glen Island, Western Long Island Sound Safety Zone	• Launch site: A barge located in approximate position 40°53′12″ N 073°46′33″ W (NAD 1983), approximately 350 yards east of the northeast corner of Glen Island, New York. This Safety Zone is a 240-yard radius from the barge.
3.6 Twin Island, Western Long Island Sound Safety Zone	• Launch site: A land shoot located on the east end of Orchard Beach, New York in approximate position 40°52′10″ N 073°47′07″ W (NAD 1983). This Safety Zone is a 200-yard radius from the launch site.
3.7 Davenport Neck, Western Long Island Sound Safety Zone	• Launch site: A barge located in Federal Anchorage 1–A in approximate position 40°53′46″ N 073°46′04″ W (NAD 1983), approximately 360 yards north of Emerald Rock Buoy (LLNR 25810). This Safety Zone is a 360-yard radius from the barge.
3.8 Glen Cove, Hempstead Harbor Safety Zone	• Launch site: A barge located in approximate position 40°51′58″ N 073°39′34″ W (NAD 1983), approximately 500 yards northeast of Glen Cove Breakwater Light 5 (LLNR 27065). This Safety Zone is a 360-yard radius from the barge.
3.9 Bar Beach, Hempstead Harbor Safety Zone	• Launch site: A barge located in approximate position 40°49′50″ N 073°39′12″ W (NAD 1983), approximately 190 yards north of Bar Beach, Hempstead Harbor, New York. This Safety Zone is a 180-yard radius from the barge.
3.10 Larchmont Harbor (north), Western Long Island Sound Safety Zone.	• Launch site: A barge located in approximate position 40°55′21.8″ N 073°44′21.7″ W (NAD 1983), approximately 560 yards north of Umbrella Rock. This Safety Zone is a 240-yard radius from the barge.
3.11 Orchard Beach, The Bronx Safety Zone	• Launch site: All waters of Long Island Sound in an area bound by the following points: 40°51′43.5″ N 073°47′36.3″ W; thence to 40°52′12.2″ N 073°47′13.6″ W; thence to 40°52′02.5″ N 073°46′47.8″ W; thence to 40°51′32.3″ N 073°47′09.9″ W (NAD 1983), thence to the point of origin.
3.12 Larchmont Harbor (south), Western Long Island Sound Safety Zone.	• Launch site: A barge located in approximate position 40°55′16″ N 073°44′15″ W (NAD 1983), approximately 440 yards north of Umbrella Rock, Larchmont Harbor, New York. This Safety Zone is a 240-yard radius from the barge.
3.13 Sands Point Western Long Island Sound Safety Zone	• Launch site: A barge located in approximate position 40°52′03″ N 073°43′39″ W (NAD 1983), northeast of Hart Island, in the vicinity of Sands Point, New York. This Safety Zone is a 180-yard radius from the barge.
3.14 Echo Bay, Western Long Island Sound Safety Zone	• Launch site: A shore launch located in approximate position 40°54′34.41″ N 073°45′56.61″ W (NAD 1983), southeast portion of Harrison Island, New York. This Safety Zone is a 180-yard radius from the barge.
4.0	East River
4.1 Wards Island, East River Safety Zone	• Launch site: A barge located in approximate position 40°46′57.8″ N 073°55′28.6″ W (NAD 1983), approximately 330 yards north of the Robert F. Kennedy Bridge (Triborough Bridge) Bridge. This Safety Zone is a 150-yard radius from the barge.
4.2 Newtown Creek, East River Safety Zone	• Launch site: A barge located in approximate position 40°′44″ 24 N 073°58′00″ W (NAD 1983), approximately 785 yards south of Belmont Island. This Safety Zone is a 360-yard radius from the barge.

TABLE 1 TO § 165.160—Continued

4.3 Corlears, East River Safety Zone	• Launch site: A barge located in approximate position 40°42′34.53″ N 073°58′33.37″ W (NAD 1983), approximately 570 yards south of the Williamsburg Bridge, 250 yards west of Railroad Avenue, Corlears Hook, New York. This Safety Zone is a 180-yard radius from the barge.
4.4 Seaport, East River Safety Zone	• Launch site: All waters of the East River south of the Brooklyn Bridge and north of a line drawn from the southwest corner of Pier 3, Brooklyn, to the southeast corner of Pier 6, Manhattan.
5.0	Hudson River
5.1 Pier 60, Hudson River Safety Zone	• Launch site: A barge located in approximate position 40°44′49″ N 074°01′02″ W (NAD 1983), approximately 500 yards west of Pier 60, Manhattan, New York. This Safety Zone is a 360-yard radius from the barge.
5.2 The Battery, Hudson River Safety Zone	• Launch site: A barge located in approximate position 40°42′00″ N 074°01′17″ W (NAD 1983), approximately 500 yards south of The Battery, Manhattan, New York. This Safety Zone is a 360-yard radius from the barge.
5.3 Battery Park City, Hudson River Safety Zone	• Launch site: A barge located in approximate position 40°42′39″ N 074°01′21″ W (NAD 1983), approximately 480 yard southwest of North Cove Yacht Harbor, Manhattan, New York. This Safety Zone is a 360-yard radius from the barge.
5.4 Pier 90, Hudson River Safety Zone	• Launch site: A barge located in approximate position 40°46′11.8″ N 074°00′14.8″ W (NAD 1983), approximately 375 yards west of Pier 90, Manhattan, New York. This Safety Zone is a 360-yard radius from the barge.
5.5 Yonkers, NY, Hudson River Safety Zone	• Launch site: A barge located in approximate position 40°56′14.5″ N 073°54′33″ W (NAD 1983), approximately 475 yards northwest of the Yonkers Municipal Pier, New York. This Safety Zone is a 360-yard radius from the barge.
5.6 Hastings-on-Hudson, Hudson River Safety Zone	• Launch site: A barge located in approximate position 40°59′44.5″ N 073°53′28″ W (NAD 1983), approximately 425 yards west of Hastings-on-Hudson, New York. This Safety Zone is a 360-yard radius from the barge.
5.7 Pier D, Hudson River Safety Zone	• Launch site: A barge located in approximate position 40°42′57.5″ N 074°01′34″ W (NAD 1983), approximately 375 yards southeast of Pier D, Jersey City, New Jersey. This Safety Zone is a 360-yard radius from the barge.
5.8 Pier 54, Hudson River Safety Zone	• Launch site: A barge located in approximate position 40°44′31″ N 074°01′00″ W (NAD 1983), approximately 380 yards west of Pier 54, Manhattan, New York. This Safety Zone is a 360-yard radius from the barge.
5.9 Pier 84, Hudson River Safety Zone	• Launch site: A barge located in approximate position 40°45′56.9″ N 074°00′25.4″ W (NAD 1983), approximately 380 yards west of Pier 84, Manhattan, New York. This Safety Zone is a 360-yard radius from the barge.
5.10 Peekskill Bay, Hudson River Safety Zone	• Launch site: A barge located in approximate position 41°17′16″ N 073°56′18″ W (NAD 1983), approximately 670 yards north of Travis Point. This Safety Zone is a 360-yard radius from the barge.
5.11 Jersey City, NJ, Hudson River Safety Zone	• Launch site: A barge located in approximate position 40°42′37.3″ N 074°01′41.6″ W (NAD 1983), approximately 420 yards east of Morris Canal Little Basin. This Safety Zone is a 360-yard radius from the barge.
5.12 Newburgh, NY, Hudson River Safety Zone	• Launch site: A barge located in approximate position 41°30′01.2″ N 073°59′42.5″ W (NAD 1983), approximately 930 yards east of Newburgh, New York. This Safety Zone is a 360-yard radius from the barge.

TABLE 1 TO § 165.160—Continued

5.13 Poughkeepsie, NY, Hudson River Safety Zone	• Launch site: A barge located in approximate position 41°42′24.50″ N 073°56′44.16″ W (NAD 1983), approximately 420 yards north of the Mid Hudson Bridge. This Safety Zone is a 300-yard radius from the barge.
5.14 Pier 40, Hudson River Safety Zone	• Launch site: A barge located in approximate position 40°43′30″ N 074°01′06.7″ W (NAD 1983), in the vicinity of the Holland Tunnel Ventilator, 530 yards south of Pier 40, Manhattan, New York. This Safety Zone is a 240-yard radius from the barge.
5.15 Fort Tryon Park, Hudson River Safety Zone	• Launch site: A barge located in approximate position 40°51′52″ N 073°56′24″ W (NAD 1983), approximately 1750 yards north of the George Washington Bridge. This Safety Zone is a 180-yard radius from the barge.
6.0	Hutchinson River
6.1 Bronx, NY Hutchinson River Safety Zone	• Launch site: A barge located in approximate position 40°52′31″ N 073°49′24″ W (NAD 1983). This Safety Zone is a 120-yard radius from the barge.
7.0	Navesink River
7.1 Keyport, NJ, Safety Zone	Launch site: A barge located in approximate position 40°26′24″ N 074°12′18″ W (NAD 1983), approximately 200 yards north of Keyport, NJ. This Safety Zone is a 150-yard radius from the barge.
7.2 Rumson, NJ, Safety Zone	• Launch site: A barge located in approximate position 40°22′39.1″ N 074°01′07.3″ W (NAD 1983), approximately 600 yards south of the Oceanic Bridge. This Safety Zone is a 300-yard radius from the barge.
7.3 Red Bank, NJ, Safety Zone	Launch site: A barge located in approximate position 40°21′20″ N 074°04′10″ W (NAD 1983), approximately 360 yards northwest of Red Bank, NJ. This Safety Zone is a 300-yard radius from the barge.

TABLE 2 TO § 165.160

1.0	Hudson River
1.1 Hudson Valley Triathlon	• Event Type: Swim Event • Date: The first weekend after the 4th of July. • The following area is a safety zone: All waters of the Hudson River in the vicinity of Ulster Landing, bound by the following points: 42°00′03.7″ N, 073°56′43.1″ W; thence to 41°59′52.5″ N, 073°56′34.2″ W thence to 42°00′15.1″ N, 073°56′25.2″ W thence to 42°00′05.4″ N, 073°56′41.9″ W thence along the shoreline to the point of beginning. • This Safety Zone includes all waters within a 100-yard radius of each participating swimmer.
1.2 Newburgh Beacon Swim	• Event Type: Swim Event. • Date: Last weekend in July. • Rain Date: The first weekend in August. • Location: Participants will cross the Hudson River between Newburgh and Beacon, New York approximately 1300 yards south of the Newburgh-Beacon Bridges. • This Safety Zone includes all waters within a 100-yard radius of each participating swimmer.
1.3 Hudson River Swim for Life	• Event Type: Swim Event. • Date: 2nd weekend in September. • Location: Participants will cross the Hudson River in the vicinity of Nyack, New York between Lower Nyack Ledge and Kingsland Point, approximately 200 yards north of the Tappan Zee Bridge. • This Safety Zone includes all waters within a 100-yard radius of each participating swimmer.
1.4 Toughman Half Triathlon	• Event Type: Swim Event. • Date: 2nd weekend in September. • Location: Participants will swim in the vicinity of Croton Point Park, New York between Potato Rock and Harmon, New York from the shoreline out to 1000 yards.

TABLE 2 TO § 165.160—Continued

	• This Safety Zone includes all waters within a 100-yard radius of each participating swimmer.
2.0	East River
2.1 Brooklyn Bridge Swim	• Event Type: Swim Event. • Date: 2nd or 3rd weekend in September. • Location: Participants will swim between Brooklyn and Manhattan, New York crossing the East River along the Brooklyn Bridge. • This Safety Zone includes all waters within a 100-yard radius of each participating swimmer.
3.0	Western Long Island Sound
3.1 Swim Across America	• Event Type: Swim Event. • Date: 4th weekend in July and 2nd weekend in August. • Location: Participants will swim between Glen Cove and Larchmont, New York and an area of Hempstead Harbor between Glen Cove and the vicinity of Umbrella Point. • This Safety Zone includes all waters within a 100-yard radius of each participating swimmer.
4.0	Upper New York Bay, Lower New York Bay
4.1 Ederle Swim	• Event Type: Swim Event. • Date: 2nd or 3rd weekend in October. • Location: Participants will swim between Manhattan, New York and the north shore of Sandy Hook, New Jersey transiting through the upper New York Bay, under the Verrazano-Narrows Bridge and across the Lower New York Bay. The route direction is determined by the predicted tide state and direction of current on the scheduled day of the event. • This Safety Zone includes all waters within a 100-yard radius of each participating swimmer.
4.2 Rose Pitonof Swim.	• Event Type: Swim Event • Date: The 2nd weekend in August. • Location: Participants will swim between Manhattan, New York and the shore of Coney Island, New York transiting through the Upper New York Bay, under the Verrazano-Narrows Bridge and south in the Lower New York Bay. The route direction is determined by the predicted tide state and direction of current on the scheduled day of the event. • This Safety Zone includes all waters within a 100-yard radius of each participating swimmer.

§§ 165.161 and 165.162 [Removed]

■ 5. Sections 165.161 and 165.162 are removed.

§ 165.168 [Removed]

■ 6. Section 165.168 is removed.

§ 165.170 [Removed]

■ 7. Section 165.170 is removed.

Dated: September 27, 2011.

L.L. Fagan,

Captain, U.S. Coast Guard, Captain of the Port New York.

[FR Doc. 2011–28847 Filed 11–8–11; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100 and 165

[Docket No. USCG–2011–0109]

RIN 1625–AA08; AA00

Special Local Regulations and Safety Zones; Recurring Events in Captain of the Port Boston Zone

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is amending special local regulations (SLR) and establishing permanent safety zones in the Coast Guard Sector Boston Captain of the Port (COTP) Zone for annually recurring marine events. The revised SLRs and safety zones are implemented to reduce administrative overhead, expedite public notification of events, and to 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 December 9, 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–2011–0109 and are available online by going to *http://www.regulations.gov*, inserting USCG–2011–0109 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 email Mark Cutter of the Waterways Management Division, U.S. Coast Guard Sector Boston; *telephone* (617) 223–4000, *email Mark.E.Cutter@uscg.mil*. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, *telephone* (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On June 28, 2011, we published a notice of proposed rulemaking (NPRM) entitled: Special Local Regulations and Safety Zones; Recurring Events in Captain of the Port Boston Zone, in the **Federal Register** (76 FR 37690). We did not receive any comments on the proposed rule. No public meeting was requested, and none was held.

Basis and Purpose

The legal basis for this rule is 33 U.S.C. 1226, 1231, 1233; 46 U.S.C. Chapter 454, 701, 3306, 3703; 50 U.S.C. 191, 195; Public Law 107–295, 116 Stat. 2064; and Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to define regulatory safety zones and SLRs.

Marine events are annually held on a recurring basis on the navigable waters within the Coast Guard COTP Boston Zone. These events include fireworks displays, swim events, and other marine events. In the past, the Coast Guard has established SLRs, regulated navigation areas, and safety zones for these events individually 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. The Tables in this regulation list each recurring marine event requiring a regulated area as administered by the Coast Guard.

By establishing a permanent regulation containing these events, the Coast Guard will eliminate the need to establish temporary rules for events that occur on an annual basis. This limits the unnecessary burden of continually establishing temporary rules every year.

This rulemaking amends, removes, and adds regulations that better meet the Coast Guard's intended purpose of ensuring safety during these events.

The Coast Guard has also identified a number of events in 33 CFR part 100 which would be more appropriately located in 33 CFR part 165. This rule amends local regulations contained in 33 CFR part 100 to move firework displays to part 165, a citation that better meets the Coast Guard's intended purpose of ensuring safety during these events.

The Coast Guard has promulgated safety zones or SLRs for these 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 is revising section 33 CFR 100.114, and adding sections 33 CFR 100.130, and 33 CFR 165.118. The changes remove nine outdated regulated areas and establish 43 new permanent regulated areas. The rule applies to each recurring marine event listed in the attached TABLES in the Coast Guard COTP Boston Zone. The TABLES provide the event name, sponsor, and type, as well as approximate dates and locations of the events. Notifications will be made to the local maritime community through the Local Notice to Mariners and/or Broadcast Notice to Mariners well in advance of the events. If the event does not have a date listed, then exact dates and times of the enforcement period will be announced through a Notice of Enforcement in the **Federal Register**.

The particular size of the safety zones established for each event will be reevaluated on an annual basis in accordance with Navigational and Vessel Inspection Circular (NVIC) 07–02, Marine Safety at Firework Displays, the National Fire Protection Association Standard 1123, Code for Fireworks Displays (70-foot distance per inch of diameter of the fireworks mortars), and other pertinent regulations and publications.

This regulation prevents persons and vessels from transiting areas specifically designated as SLRs or safety zones during the periods of enforcement to ensure the protection of the maritime public and event participants from the hazards associated with listed marine events. Only event sponsors, designated participants, and official patrol vessels will be allowed to enter safety zones and SLR areas. Spectators and other vessels not registered as event participants may not enter the regulated areas without the permission of the COTP or the designated representatives.

All persons and vessels shall comply with the instructions of the COTP Boston or the designated on-scene representative. Entering into, transiting through, mooring or anchoring within the regulated areas is prohibited unless authorized by the COTP Boston or the designated on scene representative.

Discussion of Comments and Changes

We did not receive any comments to the proposed rule.

Regulatory Analyses

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

Executive Order 12866 and Executive Order 13563

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.

The Coast Guard determined that this rule is not a significant regulatory action for the following reasons: vessels will only be restricted from safety zones and SLR areas for a short duration of time unless otherwise noted; vessels may transit in portions of the affected waterway except for those areas covered by the safety zones; the Coast Guard has promulgated safety zones or SLRs 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 SLRs. Reasonable notifications will also be made by Local Notice to Mariners (LNM) and Broadcast Notice to Mariners (BNM) well in advance of the events.

The effect of this action simply establishes locations or the approximate dates on which the existing regulations would be enforced and consolidates them within one regulation. No new or additional restrictions would 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 may be small entities: owners or operators of vessels intending to transit, fish, or anchor in the areas where marine events are being held. For the reasons outlined above, this rule would not have a significant impact on a substantial number of small entities.

Assistance for Small Entities

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

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 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 that 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 (h), of the Instruction. This rule involves the establishment of safety zones and special local regulations in support of marine events. 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 continues to read as follows:

Authority: 33 U.S.C. 1233.

§ 100.114 [Amended]

■ 2. Remove the following entries in the ''Fireworks Display Table'' in 33 CFR 100.114 (along with the associated ''Massachusetts'' titles):

■ a. 100.114(5.1) including the Table heading for ''MAY'';
■ b. 100.114(7.6);
■ c. 100.114(7.7);
■ d. 100.114(7.9);
■ e. 100.114(7.178);
■ f. 100.114(7.23);
■ g. 100.114(8.7);
■ h. 100.114(9.1); and
■ i. 100.114(12.1).

■ 3. Add § 100.130 to read as follows:

§ 100.130 Special Local Regulations; Recurring Annual Marine Events in Sector Boston Captain of the Port Zone

This section applies to the marine events listed in Table 1 of this section. The regulations in this section will be enforced for the duration of each event, on or about the dates indicated in Table 1 of this section. Annual notice of the exact dates and times of the effective period of the regulations in this section 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 provided to the local maritime community through the Local Notice to Mariners and/or Broadcast Notice to Mariners well in advance of the events. If the event does not have a date listed, then the exact dates and times of the enforcement will be announced through a Notice of Enforcement in the **Federal Register.** Mariners should consult the **Federal Register** or their LNM to remain apprised of minor schedule or event changes. First Coast Guard District LNM can be found at: *http://www.navcen.uscg.gov/.* The Sector Boston Marine Events schedule can also be viewed electronically at *http://www.homeport.uscg.mil.* Although listed in the Code of Federal Regulations, sponsors of events listed in Table 1 of this section are still required to submit a marine event permit application 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 (PATCOM). PATCOM 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 Boston.

(b) Vessels may not transit the regulated areas without PATCOM 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 LNM, unless authorized by an official patrol vessel.

(d) PATCOM 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) PATCOM 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. Such action may be justified as a result of weather, traffic density, spectator operation or participant behavior.

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

TABLE 1

3.0	MARCH
3.1 Hull Snow Row	• Event Type: Rowing Regatta. • Sponsor: Hull Lifesaving Museum. • Date: A one-day event on Saturday during the second weekend of March, as specified in the USCG District 1 Local Notice to Mariners. • Time: 12:00 pm to 13:00 pm. • Location: All waters of Hingham Bay, between Windmill Point and Sheep's Island within the following points (NAD 83): 42°18.3′ N, 070°55.8′ W. 42°18.3′ N, 070°55.3′ W. 42°16.6′ N, 070°54.9′ W. 42°16.6′ N, 070°56.0′ W.
6.0	JUNE
6.1 Sea-Doo Regional Championships	• Event Type: PWC Race. • Sponsor: Toyota. • Date: A two-day event on Saturday and Sunday during the first weekend of June, as specified in the USCG District 1 Local Notice to Mariners. • Time: 6:30 am to 5:00 pm daily. • Location: All waters of the Atlantic Ocean near Salisbury Beach, Salisbury, MA, within a 100-yard radius of the race course site located at position 42°51.5′ N, 070°48.5′ W (NAD 83).
8.0	AUGUST
8.1 Haverhill River Run	• Event Type: Power Boat Race. • Sponsor: Crescent Yacht Club and South Shore Outboard Association. • Date: A two-day event on Saturday and Sunday during the last weekend of August, as specified in the USCG District 1 Local Notice to Mariners.

TABLE 1—Continued

	• Time: 12:00 pm to 5:00 pm. • Location: All waters of the Merrimack River, between the Interstate 495 Highway Bridge, located at position 42°46.1′ N, 071°07.2′ W (NAD 83), and the Haverhill-Groveland SR97/113 Bridge, located at position 42°45.8′ N, 071°02.1′ W (NAD 83).

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 4. 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.

■ 5. Add § 165.118 to read as follows:

§ 165.118 Safety Zones; Recurring Annual Events held in Coast Guard Sector Boston Captain of the Port Zone.

The Coast Guard is establishing safety zones for the events listed in Table 1 of this section. These regulations in this section will be enforced for the duration of each event, on or about the dates indicated in Table 1 of this section. Annual notice of the exact dates and times of the effective period of the regulations in this section 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 made to the local maritime community through the Local Notice to Mariners and/or Broadcast Notice to Mariners well in advance of the events. If the event does not have a date listed, then the exact dates and times of the enforcement will be announced through a Notice of Enforcement in the **Federal Register.** Mariners should consult the **Federal Register** or their LNM to remain apprised of minor schedule or event changes. First Coast Guard District LNM can be found at: *http://www.navcen.uscg.gov/.* The Sector Boston Marine Events schedule can also be viewed electronically at: *http://www.homeport.uscg.mil.* Although listed in the Code of Federal Regulations, sponsors of events listed in Table 1 of this section are still required to submit a marine event permit 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.'' 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 Boston.

(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 LNM, 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. Such action may be justified as a result of weather, traffic density, spectator operation or participant behavior.

(f) 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 the LNM at: *http://www.navcen.uscg.gov/.*

(g) For all swimming events listed, vessels not associated with the event shall maintain a distance of at least 100 yards from the participants.

TABLE 1

6.0	JUNE
6.1 Sand and Sea Festival Fireworks	• Event Type: Fireworks Display. • Sponsor: Salisbury Beach Partnership, Inc. • Date: A one-night event on Saturday during the last weekend of June, as specified in the USCG District 1 Local Notice to Mariners. • Time: 10:00 pm to 10:30 pm. • Location: All waters of the Atlantic Ocean near Salisbury Beach within a 350-yard radius of the fireworks launch site located at position 42°50.6′ N, 70°48.4′ W (NAD 83).
6.2 St. Peter's Fiesta Fireworks	• Event Type: Fireworks Display. • Sponsor: St. Peters Fiesta. • Date: A one-night event on Saturday during the last weekend of June, as specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:00 pm. • Location: All waters of Gloucester Harbor, Stage Fort Park, within a 350-yard radius of the fireworks launch site on the beach located at position 42°36.3′ N, 070°40.5′ W (NAD 83).
6.3 Surfside Fireworks	• Event Type: Fireworks Display. • Sponsor: Salisbury Beach Partnership and Chamber of Commerce. • Date: Every Saturday from June through September, as specified in the USCG District 1 Local Notice to Mariners.

TABLE 1—Continued

	• Time: 9:30 pm to 10:30 pm. • Location: All waters of the Atlantic Ocean near Salisbury Beach, MA, within a 350-yard radius of the fireworks barge located at position 42°50.6′ N, 070°48.4′ W (NAD 83).
6.4 Cohasset Triathlon	• Event Type: Swim. • Sponsor: Bill Burnett. • Date: A one-day event on Sunday during the last weekend of June, as specified in the USCG District 1 Local Notice to Mariners. • Time: 08:30 am to 10:00 am. • Location: All waters in the vicinity of Cohasset Harbor around Sandy Beach, within the following points (NAD 83): 42°15.6′ N, 070°48.1′ W. 42°15.5′ N, 070°48.1′ W. 42°15.4′ N, 070°47.9′ W. 42°15.4′ N, 070°47.8′ W.
7.0	JULY
7.1 City of Lynn 4th of July Celebration Fireworks	• Event Type: Firework Display. • Sponsor: City of Lynn. • Date: July 3rd, as specified in the USCG District 1 Local Notice to Mariners. • Time: 6:00 pm to 11:00 pm. • Location: All waters of Nahant Bay, within a 350-yard radius of the fireworks barge located at position 42°27.62′ N, 070°55.58′ W (NAD 83).
7.2 Gloucester July 4th Celebration Fireworks	• Event Type: Fireworks Display. • Sponsor: The Gloucester Fund. • Date: July 3rd, as specified in the USCG District 1 Local Notice to Mariners. • Time: 10:30 pm to 11:00 pm. • Location: All waters of Gloucester Harbor, Stage Fort Park, within a 350-yard radius of the fireworks launch site on the beach located at position 42°36.3′ N, 070°40.5′ W (NAD 83).
7.3 Manchester by the Sea Fireworks	• Event Type: Fireworks Display. • Sponsor: Manchester Parks and Recreation Department. • Date: July 4th, as specified in the USCG District 1 Local Notice to Mariners. • Time: 8:30 pm to 10:00 pm. • Location: All waters of Manchester Bay within a 350-yard radius of the fireworks launch site barge located at position 42°35.03′ N, 070°45.52′ W (NAD 83).
7.4 Weymouth 4th of July Celebration Fireworks	• Event Type: Fireworks Display. • Sponsor: Town of Weymouth 4th of July Committee. • Date: Friday or Saturday during the first weekend before July 4th, as specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:30 pm. • Location: All waters of Weymouth Fore River, within a 350-yard radius of the fireworks launch site located at position 42°15.5′ N, 070°56.1′ W (NAD 83).
7.5 Beverly 4th of July Celebration Fireworks	• Event Type: Fireworks Display. • Sponsor: Beverly Harbormaster. • Date: July 4th, as specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 pm to 11:00 pm. • Location: All waters of Beverly Harbor within a 350-yard radius of the fireworks launch barge located at position 42°32.62′ N, 070°52.15′ W (NAD 83).
7.6 Beverly Farms 4th of July Celebration Fireworks	• Event Type: Fireworks Display. • Sponsor: Farms-Pride 4th of July Committee. • Date: July 4th, as specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 pm to 9:30 pm. • Location: All waters of Manchester Bay within a 350-yard radius of the fireworks launch site near West Beach located at position 42°33.84′ N, 070°48.5′ W (NAD 83).

TABLE 1—Continued

7.7 Boston Pops Fireworks	• Event Type: Fireworks Display. • Sponsor: Boston 4 Celebrations. • Date: July 4th, as specified in the USCG District 1 Local Notice to Mariners. • Time: 8:30 pm to 11:00 pm. • Location: All waters of the Charles River within a 350-yard radius of the fireworks barges located in the vicinity of position 42°21.47′ N, 071°05.03′ W (NAD 83).
7.8 City of Salem Fireworks	• Event Type: Fireworks Display. • Sponsor: City of Salem. • Date: July 4th, as specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 pm to 10:00 pm. • Location: All waters of Salem Harbor, within a 350-yard radius of the fireworks launch site located on Derby Wharf at position 42°31.15′ N, 070°53.13′ W (NAD 83).
7.9 Marblehead 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Town of Marblehead. • Date: July 4th, as specified in the USCG District 1 Local Notice to Mariners. • Time: 8:30 pm to 9:30 pm. • Location: All waters of Marblehead Harbor within a 350-yard radius of the fireworks launch site located at position 42°30.34′ N, 070°50.13′ W (NAD 83).
7.10 Plymouth 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: July 4 Plymouth, Inc. • Date: July 4th, as specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 pm to 10:00 pm. • Location: All waters of Plymouth Harbor within a 350-yard radius of the fireworks launch site located at position 42°57.3′ N, 070°38.3′ W (NAD 83).
7.11 Town of Nahant Fireworks	• Event Type: Fireworks Display. • Sponsor: Town of Nahant. • Date: July 4th, as specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 pm to 11:00 pm. • Location: All waters of Nahant Harbor within a 350-yard radius of the fireworks launch site on Bailey's Hill Park located at position 42°25.1′ N, 070°55.8′ W (NAD 83).
7.12 Town of Revere Fireworks	• Event Type: Fireworks Display. • Sponsor: Town of Revere. • Date: July 4th, as specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 pm to 11:00 pm. • Location: All waters of Broad Sound, within a 350-yard radius of the fireworks launch site located at Revere Beach at position 42°24.5′ N, 070°59.47′ W (NAD 83).
7.13 Yankee Homecoming Fireworks	• Event Type: Fireworks Display. • Sponsor: Yankee Homecoming. • Date: A one-day event on Saturday during the last weekend of July or first weekend of August, as specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 pm to 10:00 pm. • Location: All waters of the Merrimack River, within a 350-yard radius of the fireworks launch site located at position 42°48.97′ N, 070°52.68′ W (NAD 83).
7.14 Hingham 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Hingham Lions Club. • Date: July 4th, as specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 pm to 10:00 pm. • Location: All waters within a 350-yard radius of the beach on Button Island located at position 42°15.07′ N, 070°53.03′ W (NAD 83).

TABLE 1—Continued

7.15 Ipswich Independence Day Celebration Fireworks	• Event Type: Fireworks Display. • Sponsor: Trustees of the Foundation. • Date: July 4th, as specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 pm to 10:00 pm. • Location: All waters of Ipswich Bay within a 350-yard radius of the beach located at position 42°41.43′ N, 070°46.49′ W (NAD 83).
7.16 Salisbury Maritime Festival Fireworks	• Event Type: Fireworks Display. • Sponsor: Salisbury Beach Partnership, Inc. • Date: A one-day event on Saturday during the third weekend of July, as specified in the USCG District 1 Local Notice to Mariners. • Time: 10:00 pm to 10:30 pm. • Location: All waters of the Atlantic Ocean near Salisbury Beach within a 350-yard radius of the fireworks launch site located at position 42°50.6′ N, 070°48.4′ W (NAD 83).
7.17 Salisbury 4th of July Fireworks	• Event Type: Fireworks Display. • Sponsor: Salisbury Chamber of Commerce. • Date: July 4th, as specified in the USCG District 1 Local Notice to Mariners. • Time: 9:30 pm to 11:00 pm. • Location: All waters of the Atlantic Ocean near Salisbury Beach within a 350-yard radius of the fireworks launch site located at position 42°50.6′ N, 070°48.4′ W (NAD 83).
7.18 Charles River 1–Mile Swim	• Event Type: Swim. • Sponsor: Charles River Swimming Club, Inc. • Date: A one-day event held on the second Sunday in July, as specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 am to 9:00 am. • Location: All waters of Charles River between the Longfellow Bridge and the Harvard Bridge within the following points (NAD 83): 42°21.7′ N, 071°04.8′ W. 42°21.7′ N, 071°04.3′ W. 42°22.2′ N, 071°07.3′ W. 42°22.1′ N, 070°07.4′ W.
7.19 Swim Across America Boston	• Event Type: Swim. • Sponsor: Swim Across America. • Date: A one-day event on Friday during the third week of July, as specified in the USCG District 1 Local Notice to Mariners. • Time: 7:00 am to 3:00 pm. • Location: All waters of Boston Harbor between Rowes Warf and Little Brewster Island within the following points (NAD 83): 42°21.4′ N, 071°03.0′ W. 42°21.5′ N, 071°02.9′ W. 42°19.8′ N, 070°53.6′ W. 42°19.6′ N, 070°53.4′ W.
7.20 Joppa Flats Open Water Mile	• Event Type: Swim. • Sponsor: Newburyport YMCA. • Date: A one-day event on Saturday during the last week of July, as specified in the USCG District 1 Local Notice to Mariners. • Time: 3:00 pm to 5:00 pm. • Location: All waters of the Merrimack River located in the Joppa Flats within the following points (NAD 83): 42°48.6′ N, 070°50.9′ W. 42°48.6′ N, 070°49.4′ W. 42°48.0′ N, 070°49.4′ W. 42°48.0′ N, 070°57.0′ W.
7.21 Swim Across America Nantasket Beach	• Event Type: Swim. • Sponsor: Swim Across America. • Date: A one-day event on Sunday during the third week of July, as specified in the USCG District 1 Local Notice to Mariners. • Time: 7:00 am to 9:30 am. • Location: All waters of Massachusetts Bay near Nantasket Beach within the following points (NAD 83): 42°16.7′ N, 070°51.9′ W. 42°16.9′ N, 070°51.3′ W. 42°16.3′ N, 070°50.5′ W. 42°16.1′ N, 070°51.0′ W.

TABLE 1—Continued

8.0	August
8.1 Beverly Homecoming Fireworks	• Event Type: Fireworks Display. • Sponsor: Beverly Harbormaster. • Date: A one-day event on Sunday during the first weekend of August, as specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 pm to 11:00 pm. • Location: All waters of Beverly Harbor within a 350-yard radius of the fireworks barge located at position 42°32.62′ N, 070°52.15′ W (NAD 83).
8.2 Celebrate Revere Fireworks	• Event Type: Fireworks Display. • Sponsor: Town of Revere. • Date: A one-day event on Saturday during the first weekend of August, as specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 pm to 11:00 pm. • Location: All waters within a 350-yard radius of the fireworks launch site located at Revere Beach at position 42°24.5′ N, 070°59.47′ W (NAD 83).
8.3 Gloucester Fisherman Triathlon	• Event Type: Swim. • Sponsor: Gloucester Fisherman Athletic Association. • Date: A one-day event on Sunday during the Second week of August, as specified in the USCG District 1 Local Notice to Mariners. • Time: 7:30 am to 8:30 am. • Location: All waters of Western Harbor, within the following points (NAD 83): 42°36.6′ N, 070°40.3′ W. 42°36.5′ N, 070°40.2′ W. 42°36.4′ N, 070°40.7′ W. 42°36.5′ N, 070°40.7′ W.
8.4 Urban Epic Triathlon	• Event Type: Swim. • Sponsor: Tri-Maine/Urban Epic Events. • Date: A one-day event on Sunday during the second week of August, as specified in the USCG District 1 Local Notice to Mariners. • Time: 7:00 am to 10:00 am. • Location: All waters of Dorchester Bay within the following points (NAD 83): 42°18.9′ N, 071°02.0′ W. 42°18.9′ N, 071°01.8′ W. 42°19.5′ N, 071°01.8′ W. 42°19.8′ N, 071°02.2′ W.
8.5 Celebrate the Clean Harbor Swim	• Event Type: Swim. • Sponsor: New England Marathon Swimming Association. • Date: A one-day event on Saturday during the third week of August, as specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 am to 12:00 pm. • Location: All waters of Gloucester Harbor within the following points (NAD 83): 42°35.3′ N, 070°39.8′ W. 42°35.9′ N, 070°39.2′ W. 42°35.9′ N, 070°39.8′ W. 42°35.3′ N, 070°40.2′ W.
8.6 Boston Light Swim	• Event Type: Swim. • Sponsor: Boston Light Swim. • Date: A one-day event on Sunday during the second week of August, as specified in the USCG District 1 Local Notice to Mariners. • Time: 8:00 am to 1:00 pm. • Location: All waters of Boston Harbor between the L Street Bath House and Little Brewster Island within the following points (NAD 83): 42°19.7′ N, 071°02.2′ W. 42°19.9′ N, 071°10.7′ W. 42°19.8′ N, 070°53.6′ W. 42°19.6′ N, 070°53.4′ W.
8.7 Sharkfest Swim	• Event Type: Swim. • Sponsor: Enviro-Sports Productions, Inc. • Date: A one-day event on Sunday during the last week of August, as specified in the USCG District 1 Local Notice to Mariners. • Time: 10:00 am to 12:00 pm.

TABLE 1—Continued

	• Location: All waters of Old Harbor from near Columbia Point to Carson Beach within the following points (NAD 83): 42°19.1′ N, 071°02.2′ W. 42°19.2′ N, 071°01.9′ W. 42°19.7′ N, 071°02.8′ W. 42°19.4′ N, 071°02.9′ W.
9.0	SEPTEMBER
9.1 Gloucester Schooner Festival Fireworks	• Event Type: Fireworks Display. • Sponsor: Stage Fort Park Gloucester. • Date: A one-day event on Saturday during the first weekend of September, as specified in the USCG District 1 Local Notice to Mariners. • Time: 7:00 pm to 11:00 pm. • Location: All waters of Gloucester Harbor within a 350-yard radius of the launch site on the beach located at position 42°36.3′ N, 070°40.5′ W (NAD 83).
9.2 Plymouth Yacht Club Celebration Fireworks	• Event Type: Fireworks Display. • Sponsor: Plymouth Yacht Club. • Date: A one-day event on Saturday during the first weekend of September, as specified in the USCG District 1 Local Notice to Mariners. • Time: 9:00 pm to 11:00 pm. • Location: All waters of Plymouth Harbor within a 350-yard radius of the fireworks barge located at position 41°22.3′ N, 070°39.4′ W (NAD 83).
9.3 Somerville Riverfest Fireworks	• Event Type: Fireworks Display. • Sponsor: Federal Realty Investment Trust. • Date: A one-day event on Saturday during the last weekend of September, as specified in the USCG District 1 Local Notice to Mariners. • Time: 7:30 pm to 10:00 pm. • Location: All waters of the Mystic River within a 350-yard radius of the fireworks barge located at position 42°23.9′ N, 071°04.8′ W (NAD 83).
9.4 Mayflower Triathlon	• Event Type: Swim. • Sponsor: Fast Forward Race Management. • Date: A one-day event on Saturday during the first weekend of September, as specified in the USCG District 1 Local Notice to Mariners. • Time: 10:00 am to 11:00 am. • Location: All waters of Plymouth Inner Harbor within the following points (NAD 83): 41°58.3′ N, 070°40.6′ W. 41°58.7′ N, 070°39.1′ W. 41°56.8′ N, 070°37.8′ W. 41°57.1′ N, 070°39.2′ W.
9.5 Plymouth Rock Triathlon	• Event Type: Swim. • Sponsor: Fast Forward Race Management. • Date: A one-day event on Sunday during the first weekend of September, as specified in the USCG District 1 Local Notice to Mariners. • Time: 7:00 am to 9:30 am. • Location: All waters of Plymouth Inner Harbor within the following points (NAD 83): 41°58.3′ N, 070°40.6′ W. 41°58.7′ N, 070°39.1′ W. 41°56.8′ N, 070°37.8′ W. 41°57.1′ N, 070°39.2′ W.
9.6 Duxbury Beach Triathlon	• Event Type: Swim. • Sponsor: Duxbury Beach Triathlon. • Date: A one-day event on Saturday during the third weekend of September, as specified in the USCG District 1 Local Notice to Mariners. • Time: 08:30 am to 09:30 am. • Location: All waters of Duxbury Bay on the south side of the Powder Point Bridge within the following points (NAD 83): 42°02.8′ N, 070°39.1′ W. 42°03.0′ N, 070°38.7′ W. 42°02.8′ N, 070°38.6′ W. 42°02.7′ N, 070°39.0′ W.

TABLE 1—Continued

10.0	OCTOBER
10.1 Intercontinental Fireworks	• Event Type: Fireworks Display. • Sponsor: Intercontinental Hotel. • Date: A one-day event on Sunday during the last weekend of October, as specified in the USCG District 1 Local Notice to Mariners. • Time: 8:30 pm to 10:30 pm. • Location: All waters of Boston Inner Harbor within a 350-yard radius of the fireworks barge located at position 42°21.2′ N, 071°03′ W (NAD 83).
12.0	DECEMBER
12.1 First Night Boston Fireworks	• Event Type: Fireworks Display. • Sponsor: First Night, Inc. • Date: A one-day event on New Year's Eve, as specified in the USCG District 1 Local Notice to Mariners. • Time: 11:30 pm to 12:30 am. • Location: All waters of Boston Inner Harbor within a 350-yard radius of the fireworks barge located at position 42°21.7′ N, 071°02.6′ W (NAD 83).

Dated: October 11, 2011.

John N. Healey,

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

[FR Doc. 2011–29015 Filed 11–8–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–1025]

Drawbridge Operation Regulation; Neuse River, New Bern, NC

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Fifth Coast Guard District, has issued a temporary deviation from the regulations governing the operation of the Neuse River Railroad Bridge across the Neuse River, mile 34.2, at New Bern, NC. The deviation restricts the operation of the draw span to facilitate repairs to the main mechanism of the bridge.

DATES: This deviation is effective from 9 a.m. on November 15, 2011 until 6 p.m. November 17, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket USCG–2011–1025 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–1025 in the ''Keywords'' box, and then clicking ''Search''. This material is also available for inspection or copying 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 email Mr. Bill H. Brazier, Bridge Management Specialist, Fifth Coast Guard District, telephone (757) 398–6422, email *Bill.H.Brazier@uscg.mil.* If you have questions on reviewing the docket, call Renee V. Wright, Program Manager, Docket Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION: Norfolk and Southern Railroad Corporation, who owns and operates the Neuse River Railroad Bridge, mile 34.2, at New Bern, NC, requested a temporary deviation from the current operating regulations to facilitate repairs to the main mechanism of the bridge.

Under the regular operating schedule, the swing bridge opens on signal as required by 33 CFR 117.5. In the closed position to vessels, the bridge has no available vertical clearance.

To facilitate repairs, the swing span will be closed to vessels requiring an opening from 9 a.m. on November 15, 2011 until and including 6 p.m. on November 17, 2011. There are no alternate routes for vessels transiting this section of the Neuse River.

The majority of the vessels that transit through this bridge during this time of year are recreational with intermittent tug and barge traffic.

The Coast Guard has carefully coordinated the restrictions with commercial and recreational waterway users. The Coast Guard will inform all users of the waterway through our Local and Broadcast Notice to Mariners of the closure periods for the bridge so that vessels can arrange their transits to minimize any impacts caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the draw must return to its original 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: October 27, 2011.

Waverly W. Gregory, Jr.,

Bridge Program Manager, Fifth Coast Guard District.

[FR Doc. 2011–29012 Filed 11–8–11; 8:45 am]

BILLING CODE 9910–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–1020]

Drawbridge Operation Regulation; Calcasieu River, Westlake, 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 Union Pacific Railroad swing bridge across the Calcasieu River, mile 36.4, at Westlake, Calcasieu Parish, Louisiana. The deviation is necessary to upgrade the electrical and mechanical systems of the bridge. This deviation allows the bridge to remain closed-to-navigation on three different dates in November.

DATES: This deviation is effective from 8 a.m. on Thursday, November 10, 2011 through 6 p.m. on Thursday, November 24, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the

docket are part of docket USCG–2011–1020 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–1020 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 email Kay Wade, Bridge Administration Branch, Coast Guard; telephone (504) 671–2128, email *Kay.B.Wade@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 Union Pacific Railroad has requested a temporary deviation from the operating schedule for the swing span bridge across the Calcasieu River, mile 36.4, at Westlake, Calcasieu Parish, Louisiana. The swing span bridge has a vertical clearance of 1.07 feet above mean high water, elevation 3.56 feet Mean Gulf Level in the closed-to-navigation position.

In accordance with 33 CFR 117.5, the bridge currently opens on signal for the passage of vessels. This deviation allows the swing span of the bridge to remain closed-to-navigation from 8 a.m. through 6 p.m. on Thursday, November 10, Thursday, November 17, and Thursday, November 24, 2011. The swing span of the bridge will open for the passage of vessels from 12 noon to 1 p.m. on Thursday, November 17 and Thursday, November 24, 2011.

The closures are necessary in order to remove the existing structural steel, shafts, and gears; and to install two new main drive motors, gears, and wiring on both sides of the pivot pier of the turn span. This maintenance is essential for the continued operation of the bridge. Notices will be published in the Eighth Coast Guard District Local Notice to Mariners and will be broadcast via the Coast Guard Broadcast Notice to Mariners System.

Navigation on the waterway is minimal at the bridge site. The very limited commercial traffic at the bridge site consists of commercial tugs with tows. There are only two companies that transit above the bridge. The bridge will be able to open for emergencies if necessary. There are no alternate waterway routes available. Based on experience and coordination with waterway users, it has been determined that these closures will not have a significant effect on vessels that use the waterway.

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: November 1, 2011.

Eric A. Washburn,

Bridge Administrator.

[FR Doc. 2011–29043 Filed 11–8–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2011–1021]

Drawbridge Operation Regulation; Atlantic Intracoastal Waterway (AIWW), Elizabeth River, Southern Branch, Chesapeake, VA

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Fifth Coast Guard District, has issued a temporary deviation from the regulations governing the operation of the Norfolk Southern #7 Railroad Bridge across the Elizabeth River (Southern Branch), AIWW mile 5.8, at Chesapeake, VA. Under this temporary deviation, the drawbridge may remain in the closed position on specific dates and times to facilitate laying new rail.

DATES: This deviation is effective from 7 a.m. on November 28, 2011 to 5 p.m. on November 29, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–1021 and are available online at *http://www.regulations.gov,* inserting USCG–2011–1021 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 email Mr. Jim Rousseau, Bridge Management Specialist, Fifth Coast Guard District; *telephone:* (757) 398–6557; *Email: James.L.Rousseau2@uscg.mil.* If you have any questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, *telephone:* (202) 366–9826.

SUPPLEMENTARY INFORMATION: The Norfolk Southern Corporation, who owns and operates this single-leaf bascule drawbridge, has requested a temporary deviation from the current operating regulations set out in 33 CFR 117.997(e) to facilitate laying new rail.

Under the current operating schedule, the bridge shall be left in the open position at all times and will only be lowered for the passage of trains and to perform periodic maintenance. The Norfolk Southern #7 Bridge, at AIWW mile 5.8, across the Elizabeth River (Southern Branch) in Chesapeake, VA, has a vertical clearance in the closed position to vessels of 7 feet above mean high water.

To facilitate laying new rail, the drawbridge will be maintained in the closed-to-navigation position from 7 a.m. to 5 p.m. on November 28 and 29, 2011. The bridge normally operates in the open position with several vessels transiting a week. Coordination with waterway users has been completed.

The Coast Guard will inform the users of the waterway through our Local and Broadcast Notices to Mariners of the opening restrictions of the draw span to minimize transiting delays caused by the temporary deviation. There are no alternate routes available but vessels may pass between 5 p.m. and 7 a.m. Mariners able to pass under the bridge in the closed position may do so at any time and the bridge is able to open for emergencies. Mariners are advised to proceed with caution.

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: October 26, 2011.

Waverly W. Gregory, Jr.,

Bridge Program Manager, Fifth Coast Guard District.

[FR Doc. 2011–29013 Filed 11–8–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0978]

RIN 1625–AA00

Safety Zone; Temporary Change for Recurring Fireworks Display Within the Fifth Coast Guard District, Wrightsville Beach, NC

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is temporarily changing the enforcement period and location of safety zone regulations for a recurring fireworks display within the Fifth Coast Guard District. These regulations apply to only one recurring fireworks display event that takes place at Wrightsville Beach, NC. Safety zone regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic in a portion of Motts Channel and Banks Channel near Wrightsville Beach, NC, during the event.

DATES: This rule is effective from 5:30 p.m. to 8:30 p.m. on November 26, 2011, except that amendatory instruction 2a suspending entry (d)10 in § 165.506, Table to § 165.506, is effective November 20, 2011 through November 26, 2011.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0978 and are available online by going to *http://www.regulations.gov*, inserting USCG–2011–0978 in the ''Keyword'' box, and then clicking ''Search.'' They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or email Chief Warrant Officer Joseph Edge, Prevention Department, Coast Guard Sector North Carolina, Atlantic Beach, NC; telephone (252) 247–4525, email *Joseph.M.Edge@uscg.mil*. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because publishing an NPRM is impracticable and contrary to public interest since immediate action is needed to minimize potential danger to the public during the event. The Coast Guard did not receive notification of date change for this event in sufficient time to issue an NPRM and hold a comment period for this rulemaking. The potential dangers posed by fallout from pyrotechnic fireworks displays to vessel traffic transiting the waterway makes this safety zone necessary to provide for the safety of spectator craft and other vessels transiting the event area. For the safety concerns noted, it is in the public interest to have these regulations in effect during the event. The Coast Guard will issue broadcast notice to mariners to advise vessel operators of navigational restrictions. On scene Coast Guard and local law enforcement vessels will also provide actual notice to mariners.

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

Background and Purpose

Fireworks display events are frequently held on or adjacent to navigable waters within the boundary of the Fifth Coast Guard District. For a description of the geographical area of each Coast Guard Sector—Captain of the Port Zone, please see 33 CFR 3.25.

This regulation temporarily changes the enforcement period and geographic location of the safety zone for one recurring marine event, described at (d)(10) of the Table to 33 CFR 165.506, that is normally scheduled to occur each year on the 4th Monday in November. This year, the event will take place on the 4th Saturday, November 26, 2011.

On November 26, 2011, the North Carolina Holiday Flotilla at Wrightsville Beach, NC, will sponsor the ''2011 NC Holiday Flotilla boat parade and fireworks''. The event will take place near Wrightsville Beach, NC, on the waters of Motts Channel and Banks Channel. The regulation at 33 CFR 165.506 is enforced annually for this event. The event will consist of approximately 40 sailboats and powerboats participating in a parade in the vicinity of the Wrightsville Beach, NC, and conclude with a fireworks display. Also, a fleet of spectator vessels is expected to gather near the event site to view the parade and fireworks. To provide for the safety of participants, spectators, and transiting vessels, the Coast Guard will temporarily restrict vessel traffic in the event area from 5:30 p.m. to 8:30 p.m. on November 26, 2011. The regulation at 33 CFR 165.506 will be enforced for the duration of the event. Vessels may not enter the regulated area unless they receive permission from the Coast Guard Patrol Commander.

Discussion of Rule

The Coast Guard is temporarily changing the enforcement period and geographic location of the safety zone for this recurring event within the Fifth Coast Guard District. This regulation applies to only one marine event listed at (d)10 in the Table to § 165.506.

The Table to § 165.506, event (d)10 establishes the enforcement date and geographic location for the ''North Carolina Holiday Flotilla''. This regulation temporarily changes the enforcement date from the fourth Monday in November to Saturday, November 26, 2011 and the location to latitude 34°12′19″ N, longitude 077°48′16″ W. The temporary safety zone will be enforced from 5:30 p.m. to 8:30 p.m. on November 26, 2011, and will restrict general navigation in the regulated area during the event. The North Carolina Holiday Flotilla, which is the sponsor for this event, holds this event annually; however, they have changed the date of the event for 2011 so that it is outside the scope of the existing enforcement period. Except for participants and vessels authorized by the Coast Guard Patrol Commander, no person or vessel will be allowed to enter or remain in the regulated area. These regulations are needed to control vessel traffic during the event to enhance the safety of participants, spectators and transiting vessels.

Regulatory Analyses

We developed this 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, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

Although this rule prevents traffic from transiting a portion of Motts Channel and Banks Channel during the specified event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via marine information broadcasts, local radio stations and area newspapers so mariners can adjust their plans accordingly. Additionally, this rulemaking does not change the permanent regulated areas that have been published in 33 CFR 165.506, Table to § 165.506. In some cases vessel traffic may be able to transit the regulated area when the Coast Guard Patrol Commander deems it is safe to do so.

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 would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in Motts Channel or Banks Channel where this event is being held. This regulation will not have a significant impact on a substantial number of small entities because it will be enforced only during the event that will be patrolled by the Coast Guard patrol commander. The Captain of the Port will ensure that small entities are able to operate in the areas where events are occurring when it is safe to do so. In some cases, vessels will be able to safely transit around the regulated area at various times, and, with the permission of the Patrol Commander, vessels may transit through the regulated area. Before the enforcement period, the Coast Guard will issue maritime advisories so mariners can adjust their plans accordingly.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a

Statement of Energy Effects under Executive Order 13211.

Technical Standards

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

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

Environment

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Amend § 165.506 as follows:

■ a. From November 20, 2011 through November 26, 2011 in § 165.506, Table to § 165.506, suspend entry (d)10.

■ b. From 5:30 p.m. to 8:30 p.m. on November 26, 2011, in § 165.506, Table to § 165.506, add entry (d)(14) to read as follows:

§ 165.506 Safety Zones; Fifth Coast Guard District Fireworks Displays.

* * * * *

(d) *Enforcement period.* * * *

No.	Date	Location	Regulated area
*	*	*	* * * *
14	November 26, 2011	Motts Channel, Banks Channel, Wrightsville Beach, NC, Safety Zone.	All waters of Motts Channel within a 300 yard radius of latitude 34°12′19″ N, longitude 077°48′16″ W, a position located on the east end of Bird Island, Wrightsville Beach, NC.

* * * * *

Dated: October 20, 2011.

Anthony Popiel,

Captain, U.S. Coast Guard, Captain of the Port North Carolina.

[FR Doc. 2011–28850 Filed 11–8–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2011–0093; FRL–8890–8]

Amides, C_5-C_9, N-[3-(dimethylamino)propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl]; 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 amides, C_5-C_9, N-[3-(dimethylamino)propyl]; (CAS Reg. No. 1044764–00–2) and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl]; (CAS Reg. No. 1044764–06–8) when used as inert ingredients (surfactants) in pesticide formulations applied to growing crops and raw agricultural commodities after harvest. Monsanto Company submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting establishment of an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of amides, C_5-C_9, N-[3-(dimethylamino)propyl]; (CAS Reg. No. 1044764–00–2) and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl]; (CAS Reg. No. 1044764–06–8).

DATES: This regulation is effective November 9, 2011. Objections and requests for hearings must be received on or before January 9, 2012, 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–2011–0093. 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 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: Deirdre Sunderland, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 603–0851; email address: *sunderland.deirdre@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 sccess 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://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.* To access the harmonized test guidelines referenced in this document electronically, please go to *http://www.epa.gov/ocspp* 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, 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–2011–0093 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 January 9, 2012. 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–2011–0093, 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.

II. Petition for Exemption

In the **Federal Register** of March 29, 2011 (76 FR 17374) (FRL–8867–4), EPA issued a notice pursuant to section 408 of FFDCA, 21 U.S.C. 346a, announcing the filing of a pesticide petition (PP 0E7815) by Monsanto Company, 1300 I Street NW., Suite 450 East, Washington, DC 20005. The petition requested that 40 CFR 180.910 be amended by establishing an exemption from the requirement of a tolerance for residues of amides, C_5-C_9, N-[3-(dimethylamino) propyl]; (CAS Reg. No. 1044764–00–2) and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl]; (CAS Reg. No. 1044764–06–8) when used as an inert ingredient (surfactants) in pesticide formulations applied to growing crops and raw agricultural commodities after harvest. That notice referenced a summary of the petition prepared by Monsanto Company, the petitioner, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

III. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): Solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term ''inert'' is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

IV. Aggregate Risk Assessment and Determination of Safety

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 tolerance is ''safe.'' Section 408(b)(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. Section 408(b)(2)(C) of FFDCA requires 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. * * *

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with section 408(c)(2)(A) of FFDCA, and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl] including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl] follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies 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. Specific information on the studies received and the nature of the adverse effects caused by amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl] as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies are discussed in this unit.

Acute studies revealed low oral and dermal toxicity (OPPTS Harmonized Test Guidelines 870.1100 and 870.1200). When tested on rabbits, the chemical was shown to be mildly irritating to the skin and severely irritating to the eyes (OPPTS 870.2500 and 870.2400). Skin sensitization studies in guinea pigs showed that amides, C_5-C_9, N-[3-(dimethylamino) propyl] was not a skin sensitizer (OPPTS 870.2600).

Several repeat dose studies were conducted on amides, C_5-C_9, N-[3-(dimethylamino) propyl] (OPPTS 870.3050 and 870.3700). A 28-day range finding study on rats showed no evidence of toxicity at doses up to 300 milligrams/kilograms/day (mg/kg/day). Systemic toxicity (*e.g.,* lower body weight gain, food consumption, and effects on red blood cells) were noted at 800 and 1,000 mg/kg/day. Females in the 800 mg/kg/day group also had lower organ weights of the liver, spleen, and thymus.

A second range finding study administered the test substance to female rats on gestation days 6–19. All females in the 1,000 mg/kg/day group were found dead or euthanized *in extremis* by gestation day 8. In the 500 mg/kg/day group, two females were euthanized *in extremis.* Females in this group exhibited clinical signs of toxicity (*e.g.,* rales, increased respiration, gasping, dilated pupils, salivation, and body weight gains). There were no test-substance related clinical findings noted up to150 mg/kg/day. Intrauterine growth and survival were unaffected at dose levels up to 500 mg/kg/day. No external malformations or developmental variations were noted in this study. The maternal and developmental NOAELs for this study were 150 and 500 mg/kg/day, respectively.

A dietary combined 90-day/Reproductive and Developmental Toxicity Screening study in rats did not show evidence of toxicity at exposures up to 175 mg/kg/day (OPPTS 870.3650/3100). At the high-dose (600 mg/kg/day), systemic toxicity was exhibited by clinical findings, lower mean body weights, body weight gains, and food consumption for males, toxicology phase females, and reproductive phase females. Lower ovary, uterus, and pituitary weights were noted for the 600 mg/kg/day reproductive phase females. In addition, lower litter size, number of pups born, implantation sites, and mean pup body weights were noted in the 600 mg/kg/day group in the presence of excessive maternal toxicity. Therefore, the systemic, reproductive, and developmental NOAELs were considered to be 175 mg/kg/day.

No carcinogenicity studies are available for the inert ingredients amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl]. The Agency used a qualitative structure activity relationship (SAR) database (*i.e.,* DEREK Version 11) to determine if there were structural alerts suggestive of carcinogenicity. No structural alerts were identified for the parent nor its potential major metabolite dimethylaminopropylamine (DMAPA). Based on these results and the negative findings in both the mutagenicity (OPPTS 870.5100) and clastogenicity (OPPTS 870.5395) studies along with the lack of evidence of specific target organ toxicity, the Agency concluded that these inert ingredients have low potential to be carcinogenic.

Functional observational battery (home cage, handling, open field, neuromuscular, and physiological observations) and locomotor activity (no remarkable shifts in the pattern of habituation) were recorded for Sprague-Dawley rats treated with 600 mg/kg/day of the test substance and no test-related effects were observed. Although possible evidence of neurotoxicity was observed in the OPPTS 870.3700 study at 500 mg/kg/day (dilated pupils) and 1,000 mg/kg/day (dilated pupils and clonic convulsions) these clinical signs were considered to be due to generalized toxicity and not of neurologic origin. The Point of Departure (POD) of 175 mg/kg/day used in this risk assessment is protective of the effects seen at these dose levels.

The proposed primary route of metabolism is believed to generate DMAPA which is marketed as an inert ingredient in pesticide formulations. DMAPA (as an inert) has been recently evaluated by the Agency and an exemption from tolerance under 40 CFR 180.920 and 180.930 was established.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological PODs and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

The POD used in the risk assessment for short-term, intermediate-term, and chronic routes of exposure (*i.e.,* oral, dermal, and inhalation) was from the OPPTS Harmonized Test Guideline 870.3650 toxicity study in rats. The NOAEL is 175 mg/kg/day and the LOAEL is 600 mg/kg/day based on body weight decreases and food consumption for both sexes and lower absolute and

relative-to-brain ovary, uterus, and pituitary weights for the reproductive phase females. A 100 fold uncertainty factor was used for the chronic exposure (10X interspecies extrapolation, 10X for intraspecies variability and 1X Food Quality Protection Act (FQPA) factor).

The residential, occupational, and aggregate level of concern (LOC) is for MOEs that are less than 100 and is based on 10X interspecies extrapolation, 10X for intraspecies variability and 1X FQPA factor.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl], EPA considered exposure under the proposed exemption from the requirement of a tolerance. EPA assessed dietary exposures from amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl] in food as follows:

The I–Dietary Exposure Evaluation Model (DEEM) is a highly conservative model with the assumption that the residue level of the inert ingredient would be no higher than the highest tolerance for a given commodity. Implicit in this assumption is that there would be similar rates of degradation between the active and inert ingredient (if any) and that the concentration of inert ingredient in the scenarios leading to these highest of tolerances would be no higher than the concentration of the active ingredient. The model assumes 100 percent crop treated (PCT) for all crops (every food eaten by a person each day has tolerance-level residues).

2. *Dietary exposure from drinking water.* For the purpose of the screening level dietary risk assessment to support this request for an exemption from the requirement of a tolerance for amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl], a conservative drinking water concentration value of 100 parts per billion based on screening level modeling was used to assess the contribution to drinking water for the chronic dietary risk assessments for parent compound. These values were directly entered into the dietary exposure model.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* textiles (clothing and diapers), carpets, swimming pools, and hard surface disinfection on walls, floors, tables).

These inerts may potentially be added to pesticide formulations that are used around the home (*i.e.,* fungicides/insecticides/herbicides). Although there are no known or anticipated residential uses for these inert ingredients, in order to be protective of any future uses, a screening level exposure assessment was performed using high-end exposure scenarios for outdoor residential uses. The Agency selected representative scenarios, based on end-use product application methods and labeled application rates.

The mixer/loader/applicator high exposure outdoor scenarios evaluated were Liquid products: Low Pressure Handwand; Liquid products: Hose End Sprayer; and Ready to Use (RTU): Trigger Pump Sprayer Applications.

The Agency believes that the handler scenarios assessed represent worse-case exposures and risks resulting from the use of outdoor pesticide products containing these inert ingredients in residential environments.

Post application high end outdoor residential exposures (*i.e.,* Dermal exposure to treated lawns (adults/children), Hand-to-Mouth activity for toddlers on treated lawns (children), Object-to-Mouth activity for toddlers on treated lawns (children), and Soil ingestion from treated soil (children)) were also evaluated.

4. *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 amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl] to share a common mechanism of toxicity with any other substances. Amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl] may produce the metabolite DMAPA. The toxicity of this metabolite is addressed in the database. For the purposes of this tolerance action, therefore, EPA has assumed that amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl] do 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.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) 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 on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* Reproductive and developmental effects were evaluated in a 90-day study conducted on Sprague-Dawley (CD) rats. No evidence of toxicity was noted at exposure levels of 15, 50, and 175 mg/kg/day. Systemic toxicity including lower mean body weights, body weight gains, and food consumption for both sexes and lower absolute and relative-to-brain ovary, uterus, and pituitary weights for the reproductive phase females was exhibited at 600 mg/kg/day. In addition, lower mean live litter size on PND 0, number of pups born and implantation sites, and lower mean pup weights were noted in the 600 mg/kg/day group. Therefore, the systemic, reproductive, and developmental NOAELs are considered to be 175 mg/kg/day. All reproductive and developmental effects were noted in the presence of excessive maternal toxicity; therefore, there was no evidence of increased susceptibility in infants and children.

In addition, an Organization for Economic Cooperation and Development (OECD) 421 reproduction and developmental toxicity screening test using the metabolite dimethylaminopropylamine in Sprague-Dawley rats resulted in parental toxicity at 200 mg/kg/day based on decreased body weight gain and clinical signs (respiratory sounds and piloerection). Reproductive and developmental toxicity were not observed at any dose level.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for amides, C_5-C_9, N-[3-(dimethylamino)propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl] is adequate for assessing the sensitivity to infants and children.

ii. There is no indication that amides, C_5-C_9, N-[3-(dimethylamino)propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl] are neurotoxic chemicals and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity. Although possible evidence of neurotoxicity was observed in OPPTS 870.3700 as indicated in the 500 mg/kg/day group (dilated pupils) and the 1,000 mg/kg/day group (dilated pupils and clonic convulsions), these clinical signs were considered to be due to generalized toxicity and not of neurologic origin.

iii. There is no evidence that amides, C_5-C_9, N-[3-(dimethylamino)propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl] results in increased susceptibility in *in utero* rats.

iv. There are no residual uncertainties identified in the exposure databases. The food and drinking water assessment is not likely to underestimate exposure to any subpopulation, including those comprised of infants and children. The food exposure assessments are considered to be highly conservative as they are based on the use of the highest tolerance level from the surrogate pesticides for every food and 100 PCT is assumed for all crops. EPA also made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to amides, C_5-C_9, N-[3-(dimethylamino)propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl] in drinking water. EPA used similarly conservative assumptions to assess post application exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by amides, C_5-C_9, N-[3-(dimethylamino)propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl].

E. Aggregate Risks and Determination of Safety

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, amides, C_5-C_9, N-[3-(dimethylamino)propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl] are not expected to pose an acute risk.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to amides, C_5-C_9, N-[3-(dimethylamino)propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl] from food and water will utilize 35.7 percent of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. There are currently no known residential uses for amides, C_5-C_9, N-[3-(dimethylamino)propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl]. Since there are no current or proposed residential uses, chronic exposure is not expected; however, inert ingredients are used in a variety of formulations and have the potential to be used in residential products. A screening level assessment was conducted for residential exposure and the risk was below the Agency level of concern.

Although there is a potential for amides, C_5-C_9, N-[3-(dimethylamino)propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl] to produce the metabolite dimethylaminopropylamine (DMAPA), which is currently approved under 40 CFR 180.920 and 180.930, EPA does not anticipate any risk concerns from aggregate exposure to DMAPA for the following reasons:

i. Evidence from toxicology studies indicates that metabolization of amides, C_5-C_9, N-[3-(dimethylamino)propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl], to DMAPA does not occur in significant amounts. The parent chemicals (*i.e.,* amides, C_5-C_9, N-[3-(dimethylamino)propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl]) have a larger and more complete toxicity database which resulted in a higher no observed adverse effect level (NOAEL) than the metabolite, DMAPA. The POD NOAEL selected for all exposure scenarios for amides, C_5-C_9, N-[3-(dimethylamino)propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl] is 175 mg/kg/day versus the NOAEL of 50 mg/kg/day for DMAPA. If DMAPA is a major metabolite of amides, C_5-C_9, N-[3-(dimethylamino)propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl] then the toxicity endpoints for amides, C_5-C_9, N-[3-(dimethylamino)propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino)propyl] and DMAPA would be comparable.

ii. The previous risk assessment of metabolite DMAPA (as inert ingredient) indicates that any marginal increase in DMAPA exposure as a result of the use of amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl] would not alter the DMAPA risk significantly nor change EPA's conclusion regarding the safety of DMAPA. [**Federal Register** August 5, 2009 (74 FR 38924) (FRL–8430–2)]

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl] have the potential to be used as inert ingredients in pesticide products that are registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl].

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and proposed high-end residential exposure scenarios result in aggregate MOEs greater than 100. Because EPA's level of concern for amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl] is a MOE of 100 or below, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl] have the potential to be used as inert ingredients in pesticide products that are registered for uses that could result in intermediate-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with intermediate-term residential exposures to amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl].

Using the exposure assumptions described in this unit for intermediate-term exposures, EPA has concluded that the combined intermediate-term food, water, and proposed high-end residential exposure scenarios result in aggregate MOEs greater than 100. Because EPA's level of concern for amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl] is a MOE of

100 or below, these MOEs are not of concern.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in various mutagenicity studies, the lack of a target organ in any of the toxicity studies conducted, and the lack of structural alerts suggestive of carcinogenicity in the structural activity database DEREK Version 11, amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl] are not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to amides, C_5-C_9, N-[3-(dimethylamino) propyl] and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl] residues.

V. 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 U.N. 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 amides, C_5-C_9, N-[3-(dimethylamino) propyl] or amides, C_6-C_{12}, N-[3-(dimethylamino) propyl].

VI. Conclusions

Therefore, an exemption from the requirement of a tolerance is established under 40 CFR 180. 910 for amides, C_5-C_9, N-[3-(dimethylamino) propyl]; (CAS Reg. No 1044764–00–2) and amides, C_6-C_{12}, N-[3-(dimethylamino) propyl]; (CAS Reg. No. 1044764–06–8) when used as inert ingredients (surfactants) in pesticide formulations applied pre- and post-harvest.

VII. Statutory and Executive Order Reviews

This final rule establishes an exemption from the requirement of 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).

VIII. 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: October 18, 2011.

Lois Rossi,

Director, Registration Division, 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. In § 180.910, the table is amended by adding alphabetically the following inert ingredients to read as follows:

§ 180.910 Inert ingredients used pre- and post-harvest; exemptions from the requirement of a tolerance.

* * * * *

Inert ingredients	Limits	Uses
* * * * *	*	*
Amides, C_5-C_9, N-[3-(dimethylamino) propyl]; CAS Reg. No. 1044764–00–2		Surfactant
Amides, C_6-C_{12}, N-[3-(dimethylamino) propyl]; CAS Reg. No. 1044764–06–8		Surfactant
* * * * *	*	*

[FR Doc. 2011–28643 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0876; FRL–9325–6]

Flutriafol; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of flutriafol, ((±)-α-(2-fluorophenyl)-α-(4-fluorophenyl)-1*H*-1,2,4-triazole-1-ethanol, in or on multiple commodities which are identified and discussed later in this document. Cheminova A/S, c/o Cheminova, Inc. requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 9, 2011. Objections and requests for hearings must be received on or before January 9, 2012, 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–2010–0876. 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 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: Tamue L. Gibson, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–9096; email address: *gibson.tamue@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 those engaged in the following activities:

- 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 to provide 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 EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

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

Under FFDCA section 408(g), 21 U.S.C. 346a, 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]–0876 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 January 9, 2012. 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–2010–0876, 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.

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of December 15, 2010 (75 FR 78241) (FRL–8853–1), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of

pesticide petitions (PP 0E7772, 0F7770, 0F7771) by Cheminova A/S, c/o Cheminova, Inc. 1600 Wilson Blvd., Arlington, VA 22209. The petitions requested that 40 CFR part 180 be amended by establishing tolerances for residues of the fungicide flutriafol, including its metabolites and degradates, in or on banana, whole (import tolerance) at 0.50 parts per million (ppm) (PP 0E7772). Corn, field, forage at 4.0 ppm; corn, field, stover at 6.0 ppm; corn, field, grain at 0.01 ppm; corn, field, flour at 0.03 ppm; corn, field, oil at 0.07 ppm; corn, field, meal at 0.03 ppm; corn, pop, stover at 6.0 ppm; corn, pop, grain at 0.01 ppm; grape at 1.1 ppm; grape, raisin at 2.5 ppm; peanut at 0.08 ppm; peanut, hay at 18 ppm; fruit, pome (Crop Group 11) at 0.60 ppm; fruit, stone (Crop Group 12) at 0.80 ppm; beet, sugar, root at 1.5 ppm; beet, sugar, tops at 2.5 ppm; beet, sugar, refined at 0.70 ppm; beet, sugar, molasses at 1.0 ppm; beet, sugar, dried pulp at 1.0 ppm; wheat, forage at 25 ppm; wheat, hay at 9.0 ppm; wheat, straw at 6.0 ppm; wheat, grain at 0.15 ppm; wheat, grain, bran at 0.20 ppm; wheat, grain, germ at 0.20 ppm; barley, hay at 9.0 ppm; barley, straw at 6.0 ppm; barley, grain at 0.15 ppm; barley, grain, bran at 0.20 ppm; buckwheat, grain at 0.15 ppm; oats, forage at 25 ppm; oats, hay at 9.0 ppm; oats, straw at 6.0 ppm; oats, grain at 0.15 ppm; oats, grain, bran at 0.20 ppm; rye, forage at 25 ppm; rye, straw at 6.0 ppm; rye, grain at 0.15 ppm; cattle, liver at 0.12 ppm; goat, liver at 0.12 ppm; horse, liver at 0.12 ppm; sheep, liver at 0.12 ppm; and milk at 0.02 ppm (PP 0F7771). The petition also requested that the 40 CFR part 180 be amended by establishing tolerances for the indirect or inadvertent residues of the fungicide flutriafol, including its metabolites and degradates, in or on sweet corn, field corn and cotton raw agricultural commodities (corn, sweet, forage at 0.05 ppm; corn, sweet, stover at 0.09 ppm; corn, sweet, kernels plus cob with husks removed at 0.01 ppm; corn, field, forage at 0.10 ppm; corn, field, stover at 0.07 ppm; corn, field, grain at 0.01 ppm; cotton, undelinted seed at 0.01 ppm; and cotton, gin byproducts at 0.05 ppm) grown in fields previously planted with soybeans that were treated with flutriafol (PP 0F7770). That notice referenced a summary of the petitions prepared by Cheminova A/S, c/o Cheminova, Inc., the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA raised the requested tolerance levels for direct application to grape; peanut; fruit, stone, group 12–10; and rotational crop tolerances for corn, sweet, forage. EPA lowered tolerance levels for direct application to banana (import); grape, raisin; fruit, pome, group 11–09; beet, sugar; and rotational crop tolerances for corn, sweet, stover; corn, field, forage; and cotton, gin byproducts. EPA is not granting, at this time, tolerances for direct application to beet, sugar, top; peanut, hay; beet, sugar, refined; beet, sugar, molasses; beet, sugar, dried pulp; milk; corn, field, forage; corn, field, stover; corn, field, grain; corn, field, flour; corn, field, refined oil; corn, field, meal; corn, pop; corn, pop, stover; wheat, forage; wheat, hay; wheat, straw; wheat, grain; wheat, bran; wheat, germ; triticale, grain; barley, hay; barley, straw; barley, grain; barley, grain, bran; buckwheat, grain; oat, forage; oat, hay; oat, straw; oat, grain; oat, grain, bran; rye, forage; rye, straw; and rye, grain. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(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. Section 408(b)(2)(C) of FFDCA requires 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. * * *''

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for flutriafol including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with flutriafol follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies 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.

Flutriafol has high oral acute toxicity in the mouse. It has low acute toxicity via the oral, dermal and inhalation routes in rats. Flutriafol is minimally irritating to the eyes and is not a dermal irritant. Flutriafol was not shown to be a skin sensitizer when tested in guinea pigs.

Short-term, subchronic, and chronic toxicity studies in rats, mice, and dogs identified the liver as the primary target organ of flutriafol. Hepatotoxicity was first evident in the subchronic studies (rats and dogs) in the form of increases in liver enzyme release (alkaline phosphatase), liver weights, and histopathology findings ranging from hepatocyte vacuolization to centrilobular hypertrophy and slight increases in hemosiderin-laden Kupffer cells. It is noteworthy that with chronic exposures, there are no indications of progression of liver toxicity in any of the species tested. After over 1 year of exposure, hepatotoxicity in rats, dogs, and mice took the form of:

1. Minimal to severe fatty changes;
2. Bile duct proliferation/cholangiolarfibrosis;
3. Hemosiderin accumulation in Kupffer cells;
4. Centrilobular hypertrophy, and
5. Increases in alkaline phosphatase release.

Slight indications of effects in the hematopoietic system are sporadically seen in the database. These effects were manifested in the form of slight anemia (rats and dogs) and increased platelet, white blood cell, neutrophil, and lymphocyte counts (mice). These effects, however, were minimal in severity.

Specific information on the studies received and the nature of the adverse effects caused by flutriafol as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document ''Flutriafol: Human Health Risk Assessment for Proposed Uses on Corn, Grapes, Peanuts, Pome Fruit (Crop Group 11), Stone Fruit (Crop Group 12),

Sugar Beets, Wheat, Barley, Triticale, Buckwheat, Oats, Rye, Teosinte and Imported Bananas'' at page 40 in docket ID number EPA–HQ–OPP–2010–0876.

B. Toxicological Points of Departure/ Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/ safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for flutriafol used for human risk assessment is shown in the following Table.

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR FLUTRIAFOL FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (Females 13–49 years of age).	NOAEL = 7.5 mg/kg/day) .. UF_A = 10x UF_H = 10x FQPA SF = 1x	Acute RfD = 0.075 mg/kg/day. aPAD = 0.075mg/kg/day FQPA SF = 1x	Developmental study-rabbit LOAEL = 15 mg/kg/day based on decreased number of live fetuses, complete litter resorptions and increased post-implantation loss.
Acute dietary (General population including infants and children).	NOAEL = 250 mg/kg/day .. UF_A = 10x UF_H = 10x FQPA SF = 1x	Acute RfD = 2.5 mg/kg/day aPAD = 2.5 mg/kg/day	Neurotoxicity screening battery-rat LOAEL = 750 mg/kg/day based on decreased body weight, body-weight gain, absolute and relative food consumption, and clinical signs of toxicity in both sexes: Dehydration, urine-stained abdominal fur, ungroomed coat, ptosis, decreased motor activity, prostration, limp muscle tone, muscle flaccidity, hypothermia, hunched posture, impaired or lost righting reflex, scant feces; in males: red or tan perioral substance, chromodacryorrhea, chromorhinorrhea and labored breathing, and in females: piloerection and bradypnea.
Chronic dietary (All populations).	NOAEL= 5 mg/kg/day ..... UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 0.05 mg/kg/day. cPAD = 0.05 mg/kg/day	Chronic toxicity-dog LOAEL = 20 mg/kg/day based on adverse liver findings (increased liver weights, increased centrilobular hepatocyte lipid in the liver, and increases in alkaline phosphatase, albumin, and triglycerides), increased adrenal cortical vacuolation of the zona fasciculata, and marked hemosiderin pigmentation in the liver and spleen in both sexes; mild anemia (characterized by decreased hemoglobin, hematocrit, and red blood cell count) in the males; and initial body weight losses, decreased cumulative body-weight gains, and increased adrenal weights in the females.
Dermal short-term (1 to 30 days)—and Intermediate (1–6 months)—Term.	Dermal (or oral) study NOAEL = 7.5 mg/kg/day (dermal absorption rate = 21%). UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	Developmental toxicity-rabbit LOAEL = 15 mg/kg/day based on decreased number of live fetuses, complete litter resorptions and increased post-implantation loss
Inhalation short-term (1 to 30 days)—and Intermediate (1–6 months)—Term.	Inhalation (or oral) study NOAEL= 7.5 mg/kg/day (inhalation absorption rate = 100%). UF_A = 10x UF_H = 10x FQPA SF = 1x	LOC for MOE = 100	Developmental toxicity-rabbit LOAEL = 15 mg/kg/day based on decreased number of live fetuses, complete litter resorptions and increased post-implantation loss.
Cancer (Oral, dermal, inhalation).	Classification: ''Not likely to be Carcinogenic to Humans'' based on the carcinogenicity studies in rats and mice.		

UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). FQPA SF = Food Quality Protection Act Safety Factor. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. MOE = margin of exposure. mg/kg/day = milligrams/kilogram/day. LOC = level of concern.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to flutriafol, EPA considered exposure under the petitioned-for tolerances as well as all existing flutriafol tolerances in 40 CFR 180.629. EPA assessed dietary exposures from flutriafol in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. Such effects were identified for flutriafol. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA made the following assumptions for the acute exposure assessment: tolerance-level residues and 100% crop treated (CT). EPA used DEEM™ version 7.81 default processing factors.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA made the following assumptions for the chronic exposure assessment: tolerance-level residues and 100% crop treated (CT). EPA used DEEM™ version 7.81 default processing factors.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that flutriafol does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue or PCT information in the dietary assessment for flutriafol. Tolerance level residues and 100% CT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for flutriafol in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of flutriafol. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the FQPA Index Reservoir Screening Tool (FIRST), and Pesticide Root Zone Model Ground Water (PRZM GW), the estimated drinking water concentrations (EDWCs) of flutriafol for acute exposures are estimated to be 48.5 parts per billion (ppb) for surface water and 310 ppb for ground water.

For chronic exposures for non-cancer assessments the EDWC's are estimated to be 5.70 ppb for surface water and 202 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 310 ppb was used to assess the contribution to drinking water.

For chronic dietary risk assessment, the water concentration value of 202 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Flutriafol is not registered for any specific use patterns that would result in residential exposure.

4. *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.''

Flutriafol is a member of the triazole-containing class of pesticides. Although conazoles act similarly in plants (fungi) by inhibiting ergosterol biosynthesis, there is not necessarily a relationship between their pesticidal activity and their mechanism of toxicity in mammals. Structural similarities do not constitute a common mechanism of toxicity. Evidence is needed to establish that the chemicals operate by the same, or essentially the same, sequence of major biochemical events (EPA, 2002). In conazoles, however, a variable pattern of toxicological responses is found; some are hepatotoxic and hepatocarcinogenic in mice. Some induce thyroid tumors in rats. Some induce developmental, reproductive, and neurological effects in rodents. Furthermore, the conazoles produce a diverse range of biochemical events including altered cholesterol levels, stress responses, and altered DNA methylation. It is not clearly understood whether these biochemical events are directly connected to their toxicological outcomes. Thus, there is currently no evidence to indicate that conazoles share common mechanisms of toxicity and EPA is not following a cumulative risk approach based on a common mechanism of toxicity for the conazoles. For information regarding EPA's procedures for cumulating effects from substances found to have a common mechanism of toxicity, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

Triazole-derived pesticides can form the metabolite 1,2,4-triazole (T) and two triazole conjugates triazolylalanine (TA) and triazolylacetic acid (TAA). To support existing tolerances and to establish new tolerances for triazole-derivative pesticides, EPA conducted an initial human-health risk assessment for exposure to T, TA, and TAA resulting from the use of all current and pending uses of any triazole-derived fungicide as of September 1, 2005. The risk assessment was a highly conservative, screening-level evaluation in terms of hazards associated with common metabolites (*e.g.,* use of a maximum combination of uncertainty factors) and potential dietary and non-dietary exposures (*i.e.,* high-end estimates of both dietary and non-dietary exposures). In addition, the Agency retained the additional 10X FQPA SF for the protection of infants and children. The assessment included evaluations of risks for various subgroups, including those comprised of infants and children. The Agency's complete risk assessment can be found in the propiconazole reregistration docket at *http://www.regulations.gov,* docket ID Number EPA–HQ–OPP–2005–0497 and an update to assess the addition of the commodities included in this action may be found in docket ID EPA–HQ–OPP–2011–0120 in the document entitled ''Common Triazole Metabolites: Updated Dietary (Food + Water) Exposure and Risk Assessment to Address the Amended metconazole Section 3 Registration to Add uses on Tuberous and Corm Vegetables (Group 1C) and Bushberry Subgroup 13–07B''.

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) 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 on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the

FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* The potential impact of *in utero* and perinatal flutriafol exposure was investigated in three developmental toxicity studies (two in rats, one in rabbits) and two multigenerational reproduction toxicity studies in rats. In the first of two rat developmental toxicity studies, a quantitative susceptibility was observed (delayed ossification or non-ossification of the skeleton in the fetuses) at a lower dose than maternal effects. In the second rat developmental study, a qualitative susceptibility was noted. Although developmental toxicity occurred at the same dose level that elicited maternal toxicity, the developmental effects (external, visceral, and skeletal malformations; embryo lethality; skeletal variations; a generalized delay in fetal development; and fewer live fetuses) were more severe than the decreased food consumption and body-weight gains observed in the dams. For rabbits, intrauterine deaths occurred at a dose level that also caused adverse effects in maternal animals. In the two-generation reproduction studies, a qualitative susceptibility was also seen. Effects in the offspring—decreased litter size and percentage of live births (increased pup mortality) and liver toxicity can be attributed to the systemic toxicity of the parental animals (decreased body weight and food consumption and liver toxicity).

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for flutriafol is complete.

ii. There is no concern for neurotoxicity with flutriafol. Signs of neurotoxicity were reported in the acute and subchronic neurotoxicity studies at the highest dose only; however, these effects were primarily seen in animals that were agonal (at the point of death) and, thus, are not indicative of neurotoxicity. In addition, there was no evidence of neurotoxicity in any additional short-term studies in rats, mice, and dogs, or in the long-term toxicity studies in rats, mice, and dogs. A developmental neurotoxicity study is not needed given these results.

iii. There are no concerns or residual uncertainties for prenatal and/or postnatal toxicity. Though there is evidence for increased susceptibility in the prenatal studies in rats and rabbits and the two-generation reproduction study in rats, there are no concerns for the offspring toxicity observed in the developmental and reproductive toxicity studies for the following reasons:

- Clear NOAELs and LOAELs were established in the fetuses/offspring for each of these studies;
- The dose-response for these effects is well defined and characterized;
- Developmental endpoints are used for assessing acute dietary risks to the most sensitive population (females 13–49 years old) as well as all other short- and intermediate-term exposure scenarios; and
- The chronic reference dose is greater than 300-fold lower than the dose at which the offspring effects were observed in the two-generation reproduction studies.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100% CT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to flutriafol in drinking water. These assessments will not underestimate the exposure and risks posed by flutriafol.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to flutriafol will occupy 24% of the aPAD for females 13–49 years old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to flutriafol from food and water will utilize 42% of the cPAD for all infants less than 1 year old, the population group receiving the greatest exposure. There are no residential uses for flutriafol.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Flutriafol is not registered for any use patterns that would result in residential exposure. Therefore, the short-term aggregate risk is the sum of the risk from exposure to flutriafol through food and water and will not be greater than the chronic aggregate risk.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Flutriafol is not registered for any use patterns that would result in intermediate-term residential exposure. Therefore, the intermediate-term aggregate risk is the sum of the risk from exposure to flutriafol through food and water, which has already been addressed, and will not be greater than the chronic aggregate risk.

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, flutriafol is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to flutriafol residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology, (gas chromatography/Nitrogen/Phosphorus detector (NPD) for tolerances and method ICIA AM00306 for ruminant liver) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

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 U.N. 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 flutriafol.

C. Revisions to Petitioned-For Tolerances

Based on an analysis of residue levels from crop field trials, EPA raised tolerance levels for direct application to grape; peanut; fruit, stone, group 12–10; and rotational crop tolerances for corn, sweet, forage. For the same reason, EPA lowered tolerance levels for direct application to banana (import); grape, raisin; fruit, pome, group 11–09; beet, sugar; and rotational crop tolerances for corn, sweet, stover; corn, field, forage; and cotton, gin byproducts were lowered.

Additional residue chemistry data are needed to support tolerances for direction application to corn, field, forage; corn, field, stover; corn, field, grain; corn, field, flour; corn, field, refined oil; corn, field, meal; corn, pop; corn, pop, stover; wheat, forage; wheat, hay; wheat, straw; wheat, grain; wheat, grain bran; wheat, grain, germ; triticale, grain; barley, hay; barley, straw; barley, grain; barley, grain, bran; buckwheat, grain; oat, forage; oat, hay; oat, straw; oat, grain; oat, grain, bran; rye, forage; rye, straw; and rye, grain and the proposed milk tolerance. Accordingly, EPA has not made a determination with regard to these petitioned-for tolerances at this time.

EPA is not establishing a tolerance for sugar beet tops because the Agency no longer considers sugar beet tops to be a feed item. EPA has required a label prohibition on feeding of flutriafol-treated peanut hay, and thus is not establishing a peanut hay tolerance. Based on results of the sugar beet processing study, EPA has determined that tolerances are unnecessary for beet, sugar, refined; beet sugar, molasses; and beet, sugar dried pulp. These processed commodities are adequately covered by the associated raw agricultural tolerances.

V. Conclusion

Therefore, tolerances are established for residues of flutriafol, ((±)-α-(2-fluorophenyl)-α-(4-fluorophenyl)-1*H*-1,2,4-triazole-1-ethanol, in or on banana (import) at 0.30 ppm; grape at 1.5 ppm; grape, raisin at 2.4 ppm; peanut at 0.09 ppm; fruit, pome (crop group 11–09) at 0.40 ppm; fruit, stone (crop group 12–10) at 1.5 ppm; beet, sugar at 0.08 ppm; and to the rotation to corn, sweet, forage at 0.09 ppm; corn, sweet, stover at 0.07 ppm; corn, sweet, kernels plus cob with husks removed at 0.01 ppm; corn, field, forage at 0.09 ppm; corn, field, stover at 0.07 ppm; corn, field, grain at 0.01 ppm; corn, field, refined oil at 0.02 ppm; corn, pop, stover at 0.07 ppm; corn, pop at 0.01 ppm; cotton, undelinted seed at 0.01 ppm; and cotton, gin byproducts at 0.02 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to petitions 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).

VII. 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: October 28, 2011.

Lois Rossi,

Director, Registration Division, 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 180.629 is amended by alphabetically adding the following commodities to the table in paragraph

(a), by adding a new footnote 1, and by revising paragraph (d) to read as follows:

§ 180.629 Flutriafol; tolerances for residues.

(a) * * *

Commodity	Parts per million
* * * * * * *	
Banana[1]	0.30
Beet, sugar	0.08
* * * * * * *	
Fruit, pome, group 11–09	0.40
Fruit, stone, group 12–10	1.5
* * * * * * *	
Grape	1.5
Grape, raisin	2.4
* * * * * * *	
Peanut	0.09
* * * * * * *	

[1]There are no U.S. registrations as of October 26, 2011.

* * * * *

(d) *Indirect or inadvertent residues.* Tolerances are established for the indirect or inadvertent residues of the fungicide flutriafol, including its metabolites and degradates, in or on the commodities in the table below when present therein as a result of the application of flutriafol to the growing crops listed in the table to paragraph (a) of this section. Compliance with the following tolerance levels specified below is to be determined by measuring only flutriafol ((±)-α-(2-fluorophenyl)-α-(4-fluorophenyl)-1*H*-1,2,4-triazole-1-ethanol) in or on the following commodities:

Commodity	Parts per million
Corn, field, forage	0.09
Corn, field, grain	0.01
Corn, field, refined oil	0.02
Corn, field, stover	0.07
Corn, pop	0.01
Corn, pop, stover	0.07
Corn, sweet, forage	0.09
Corn, sweet, kernel plus cob with husk removed	0.01
Corn, sweet, stover	0.07
Cotton, gin byproducts	0.02
Cotton, undelinted seed	0.01

[FR Doc. 2011–28947 Filed 11–8–11; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2011–0456; FRL–8890–1]

Trifloxystrobin; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of trifloxystrobin in or on alfalfa, forage and alfalfa, hay. Bayer CropScience requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 9, 2011. Objections and requests for hearings must be received on or before January 9, 2012, 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–2011–0456. 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 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: Tawanda Maignan, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8050; email address: *Maignan.Tawanda@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 those engaged in the following activities:

- 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 to provide 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 EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

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

Under FFDCA section 408(g), 21 U.S.C. 346a, 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–2011–0456 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 January 9, 2012. 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–2011–0456, 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.

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of July 20, 2011 (76 FR 43231) (FRL–8880–1), 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 petition (PP 0F7713) by Bayer CropScience, P.O. Box 12014, 2 T.W. Alexander Dr., Research Triangle Park, NC 27709. The petition requested that 40 CFR 180.555 be amended by establishing tolerances for residues of the fungicide trifloxystrobin, benzeneacetic acid, (E,E)-α-(methoxyimino)-2-[[[[1-[3-(trifluoromethyl) phenyl]ethylidene]amino]oxy]methyl]-methyl ester), in or on alfalfa, forage at 0.01 parts per million (ppm) and alfalfa, hay at 0.01 ppm. That notice referenced a summary of the petition prepared by Bayer CropScience, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(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. Section 408(b)(2)(C) of FFDCA requires 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 * * *.''

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for trifloxystrobin including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with trifloxystrobin follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies 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. Trifloxystrobin exhibits very low toxicity following single oral, dermal and inhalation exposures. It is a strong dermal sensitizer. In repeated dose tests in rats, the liver is the target organ for trifloxystrobin; toxicity is induced following oral and dermal exposure for 28 days. There is no evidence of increased susceptibility following prenatal exposure to rats and rabbits and postnatal exposures to rats. Trifloxystrobin was determined not to be carcinogenic in mice or rats following long-term dietary administration. Trifloxystrobin is positive for mutagenicity in Chinese Hamster V79 cells, albeit at cytotoxic dose levels. However, trifloxystrobin is negative in the remaining mutagenicity studies.

Specific information on the studies received and the nature of the adverse effects caused by trifloxystrobin as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies are discussed in the final rule published in the **Federal**

Register of June 11, 2010 (75 FR 33190) (FRL–8829–2).

B. Toxicological Points of Departure/ Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/ safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for trifloxystrobin used for human risk assessment is discussed in Unit III.B. of the final rule published in the **Federal Register** of June 11, 2010 (75 FR 33190).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to trifloxystrobin, EPA considered exposure under the petitioned-for tolerances as well as all existing trifloxystrobin tolerances in 40 CFR 180.555. EPA assessed dietary exposures from trifloxystrobin in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

Such effects were identified for trifloxystrobin. In estimating acute dietary exposure for females 13–49 years old, EPA conducted an analysis using the Dietary Exposure Evaluation Model (DEEM™ 7.81), which used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998, Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). EPA used tolerance level residues. EPA assumed all commodities with established or proposed tolerances were treated with trifloxystrobin.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998, CSFII to be included in DEEM. As to residue levels in food, EPA used tolerance level residues for all commodities with the exception of apples, oranges and grapes. For these commodities EPA used anticipated residues from field residue trials. EPA assumed all commodities with established or proposed tolerances were treated with trifloxystrobin.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that trifloxystrobin does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and percent crop treated (PCT) information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such Data Call-Ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for trifloxystrobin in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of trifloxystrobin. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS), GENeric Estimated Exposure Concentration (GENEEC), and/or Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of trifloxystrobin plus its major degradation product, CGA–321113 for the proposed alfalfa use are less than those previously estimated in the revised EDWCs for turf use.

Acute and chronic exposures are estimated to be 47.99 parts per billion (ppb) and 47.31 ppb for surface water, respectively. Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Trifloxystrobin is currently registered for the following uses that could result in residential exposures: Ornamentals and turfgrass. EPA assessed residential exposure under the following exposure scenarios: Adult post-application dermal exposure; and children's post-application dermal and/or hand to mouth exposure. Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

4. *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 trifloxystrobin to share a common mechanism of toxicity with any other substances, and trifloxystrobin does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that trifloxystrobin 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.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) 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 on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act Safety Factor (FQPA SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* There is no indication of increased susceptibility of rat or rabbits to trifloxystrobin. In the prenatal developmental study in rats, there was no developmental toxicity at the limit dose. In the prenatal developmental study in rabbits, developmental toxicity was seen at a dose that was higher than the dose that caused maternal toxicity. In the 2-generation reproduction study, there was no offspring toxicity at the highest dose tested.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1x. That decision is based on the following findings:

i. The toxicity database for trifloxystrobin is complete except for neurotoxicity and immunotoxicity testing. Recent changes to 40 CFR part 158 make neurotoxicity and immunotoxicity testing required for pesticide registration; however, the existing data are sufficient for endpoint selection for exposure/risk assessment scenarios, and for evaluation of the requirements under the FQPA. Although acute and subchronic neurotoxicity and immunotoxicity studies are needed to complete the database, there are no concerns for immunotoxicity or neurotoxicity based on the results of the existing studies. The toxicological database for trifloxystrobin does not show any evidence of treatment-related effects on the immune system. There was a decrease in the incidence of hemosiderosis in the spleen of F0 and F1 parental males and females in the 2-generation reproduction study. The effect was not seen in any other toxicity studies, and it was not a primary effect on the spleen. This decrease may indicate a decrease of red blood cell turnover; but it is not an effect on the immune system. Further, there was no evidence of neurotoxicity at the limit dose in an unacceptable acute neurotoxicity study or in the other subchronic and chronic studies in the database. EPA does not believe that conducting neurotoxicity or immunotoxicity studies will result in a dose less than the points of departure already used in this risk assessment and an additional database uncertainty factor (UF) for potential neurotoxicity and/or immunotoxicity does not need to be applied.

ii. There is no indication that trifloxystrobin is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There is no evidence that trifloxystrobin results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The acute and chronic dietary food exposure assessments utilize existing and proposed tolerance level residues and 100 PCT information for all commodities, except for apples, oranges, and grapes which utilized anticipated residues for the chronic dietary assessment. By using these screening-level assessments with minor refinement, actual exposures/risks from residues in food will not be underestimated. EPA made conservative (protective) assumptions in the ground water and surface water modeling used to assess exposure to trifloxystrobin in drinking water. EPA used similarly conservative assumptions to assess postapplication exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by trifloxystrobin.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. With the exception of the sub-population females 13–49 years, no adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to trifloxystrobin will occupy <2% of the aPAD for females 13–49 years old.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to trifloxystrobin from food and water will utilize 34% of the cPAD for the general U.S. population and 64% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of trifloxystrobin is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Trifloxystrobin is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to trifloxystrobin.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs of 1,100 for adults (dermal residential + dietary food and drinking water exposures); 650 for children 1–2 years (dermal residential + dietary food and drinking water exposures); and 120 for children 1–2 years (incidental oral + dietary food and drinking water exposures). Because EPA's level of concern for trifloxystrobin is a MOE of 100 or below, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Trifloxystrobin is not expected to pose an intermediate-term risk based on a short soil half-life (approximately 2 days).

5. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, trifloxystrobin is not expected to pose a cancer risk to humans.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to trifloxystrobin residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodologies (gas chromatography with nitrogen phosphorus detection (GC/NPD), Method AG–659A and liquid chromatography with tandem mass spectrometry detection (LC/MS/MS), Method No. 200177) are available to enforce the tolerance expression.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

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 U.N. 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 trifloxystrobin in or on alfalfa forage or alfalfa hay. Also, since Canada does not establish tolerances for livestock feed items, no Canadian MRLs have been established for these commodities.

V. Conclusion

Therefore, tolerances are established for residues of trifloxystrobin, benzeneacetic acid, (E,E)-α-(methoxyimino)-2-[[[[1-[3-(trifluoromethyl) phenyl]ethylidene]amino]oxy]methyl]-methyl ester), in or on alfalfa, forage at 0.01 ppm and alfalfa, hay at 0.01 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances 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).

VII. 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: October 4, 2011.

Daniel J. Rosenblatt,

Acting Director, Registration Division, 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 180.555 is amended by alphabetically adding the following commodities to the table in paragraph (a) to read as follows:

§ 180.555 Trifloxystrobin; tolerance of residues.

(a) * * *

Commodity	Parts per million
Alfalfa, forage	0.01
Alfalfa, hay	0.01

* * * * *

* * * * *

[FR Doc. 2011–28945 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0619; FRL–8890–2]

Abamectin (avermectin); Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of abamectin (avermectin) in or on onion, bulb, subgroup 3–07A; chive, fresh leaves; chive, dried leaves; and bean, dry, seed. This regulation additionally removes time-limited tolerances on bean, lima, seed; and onion, bulb, as the tolerances will be superseded by permanent tolerance. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 9, 2011. Objections and requests for hearings must be received on or before January 9, 2012, 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–2010–0619. 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 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: Laura Nollen, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; *telephone number:* (703) 305–7390; *email address: nollen.laura@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 those engaged in the following activities:

- 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 to provide 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 EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

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

Under FFDCA section 408(g), 21 U.S.C. 346a, 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–2010–0619 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 January 9, 2012. 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–2010–0619, 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.

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of August 11, 2010 (75 FR 48667) (FRL–8840–6), 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 petition (PP 0E7738) by IR–4, 500 College Rd. East, Suite 201W, Princeton, NJ 08540. The petition requested that 40 CFR 180.449 be amended by establishing tolerances for residues of the insecticide abamectin (avermectin B_1), a mixture of avermectins containing greater than or equal to 80% avermectin B_{1a} (5-O-demethyl avermectin A_1) and less than or equal to 20% avermectin B_{1b} (5-O-demethyl 25-de(1-methylpropyl)-25-(1-methylethyl) avermectin A_1) and its delta-8,9-isomer, in or on bean, dry, seed at 0.01 parts per million (ppm); chive, dried leaves at 0.07 ppm; chive, fresh leaves at 0.01 ppm; and onion, bulb, subgroup 3–07A at 0.01 ppm. That notice referenced a summary of the petition prepared on behalf of IR–4 by Syngenta Crop Protection, Inc., the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has revised the proposed tolerance for chive, dried leaves. Additionally, the Agency has revised the tolerance expression for all established commodities to be consistent with current Agency policy. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(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. Section 408(b)(2)(C) of FFDCA requires 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.* * *''

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for abamectin (avermectin) including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with abamectin (avermectin) follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies 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.

Abamectin (avermectin) has moderate to high acute toxicity by the oral route, high acute toxicity by the inhalation route, and low acute toxicity by the dermal route. It is slightly irritating to the skin, but is not an ocular irritant or a dermal sensitizer. The main target organ for abamectin (avermectin) is the nervous system. Neurotoxicity and developmental effects were detected in multiple studies and species of test animals. Signs of neurotoxicity were reported in studies of rats, mice, and dog and included decreases in foot splay reflex, mydriasis, curvature of the spine, decreased fore- and hind-limb grip strength, tip-toe gate, tremors, ataxia, or spastic movements of the limbs. Decreased body weight was also one of the most frequent findings. Severe effects, including death and morbid sacrifice, were noted in studies with rats and mice following repeated exposures.

Increased qualitative and/or quantitative susceptibility was seen in prenatal developmental toxicity studies in mice and rabbits, and the reproductive toxicity and developmental neurotoxicity studies in rats. Developmental data indicate that the most sensitive effect of abamectin (avermectin) on fetuses is the increase in the incidence of cleft palates in mice and rabbits in the presence of no or minimal maternal toxicity. No maternal or developmental toxicity was seen in the prenatal developmental toxicity study in rats.

The rat reproductive toxicity studies (two 1-generation reproduction studies and a 2-generation reproduction study) noted decreased pup body weights and/or survival at lower dose levels than those that caused parental toxicity. The developmental neurotoxicity studies in rats noted pup mortality and/or decreased body weights in the absence of maternal toxicity; there were no signs of neurotoxicity noted. In both the rat reproduction and a developmental neurotoxicity study, the data clearly indicated that the decrease in pup body weight seen at one dose level rapidly progressed to death at the next higher tested dose level. Oncogenicity and mutagenicity studies provide no indication that abamectin (avermectin) is carcinogenic or mutagenic; abamection (avermectin) has been classified as ''not likely to be carcinogenic to humans.''

Specific information on the studies received and the nature of the adverse effects caused by abamectin (avermectin) as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document: ''Abamectin. Human Health Risk Assessment for Proposed Uses on the Bulb Onion Subgroup 3–07A, Chives, and Dry Beans,'' pp. 54–58 in docket ID number EPA–HQ–OPP–2010–0619.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which the NOAEL and the LOAEL. Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for abamectin (avermectin) used for human risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR ABAMECTIN (AVERMECTIN) FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/Scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (General population including infants and children).	NOAEL = 0.5 mg/kg/day ... UF_A = 10x UF_H = 10x FQPA SF = 1x	Acute RfD = 0.005 mg/kg/day. aPAD = 0.005 mg/kg/day ..	12-Week dose-range finding study in dogs LOAEL = 1.0 mg/kg/day based on mydriasis seen 1–5 times during the first week of treatment; Acute neurotoxicity study in rats LOAEL = 1.5 mg/kg/day based on increased incidence of foot splay.
Chronic dietary (All populations).	NOAEL= 0.12 mg/kg/day .. UF_A = 10x UF_H = 10x FQPA SF = 3x	Chronic RfD = 0.0012 mg/kg/day. cPAD = 0.0004 mg/kg/day	Combined data: Three rat reproduction studies and two rat developmental neurotoxicity studies LOAEL = 0.2 mg/kg/day based on decreased pup body weight in pups at 0.2 mg/kg/day.
Incidental oral short- and intermediate-term (1 to 30 days and 1 to 6 months).	NOAEL= 0.12 mg/kg/day .. UF_A = 10x UF_H = 10x FQPA SF = 3x	LOC for MOE = 300	Combined data: Three rat reproduction studies and two rat developmental neurotoxicity studies LOAEL = 0.2 mg/kg/day based on decreased pup body weight.
Dermal (all durations)	Dermal (or oral) study ..... NOAEL = 0.12 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 3x	LOC for MOE = 300	Combined data: Three rat reproduction studies and two rat developmental neurotoxicity studies LOAEL = 0.2 mg/kg/day based on decreased pup body weight.
Inhalation (all durations)	Dermal (or oral) study ..... NOAEL = 0.12 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 3x	LOC for MOE = 300	Combined data: Three rat reproduction studies and two rat developmental neurotoxicity studies LOAEL = 0.2 mg/kg/day based on decreased pup body weight.
Cancer (Oral, dermal, inhalation).	"Not likely to be carcinogenic to humans" based on the absence of significant increase in tumor incidence in two adequate rodent carcinogenicity studies.		

UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). FQPA SF = Food Quality Protection Act Safety Factor. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. MOE = margin of exposure. LOC = level of concern.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to abamectin (avermectin), EPA considered exposure under the petitioned-for tolerances as well as all existing abamectin (avermectin) tolerances in 40 CFR 180.449. EPA assessed dietary exposures from abamectin (avermectin) in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

Such effects were identified for abamectin (avermectin). In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA utilized tolerance level residues for the proposed crops and okra and anticipated residues for the remaining commodities. Empirical processing factors and percent crop treated (PCT) data were also used, when available.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA utilized tolerance level residues for the proposed crops and okra, and average residues from field trials for the remaining crops. Empirical processing factors and PCT were also used, when available.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that abamectin (avermectin) does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and PCT information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- *Condition A:* The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- *Condition B:* The exposure estimate does not underestimate exposure for any significant subpopulation group.
- *Condition C:* Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

For the acute dietary assessment, the maximum PCT for existing uses were estimated as follows:

Almonds, 75%; apples, 10%; apricots, 5%; avocados, 60%; cantaloupes, 30%; celery, 65%; cherries, 2.5%; cotton, 20%; cucumbers, 10%; grapefruit, 80%; grapes, 25%; honeydew, 35%; lemons, 55%; lettuce, 20%; oranges, 45%; peaches, 2.5%; pears, 80%; pecans, 2.5%; peppers, 25%; potatoes, 2.5%; prunes, 10%; pumpkins, 10%; spinach, 45%; squash, 10%; strawberries, 45%; tangerines, 65%; tomatoes, 20%; walnuts, 20%; and watermelons, 10%.

For the chronic dietary assessment, the average PCT for existing uses were estimated as follows:

Almonds, 50%; apples, 5%; apricots, 5%; avocados, 40%; cantaloupes, 15%; celery, 40%; cherries, 1%; cotton, 5%; cucumbers, 5%; grapefruit, 60%; grapes, 10%; honeydew, 20%; lemons, 35%; lettuce, 10%; oranges, 25%; peaches, 1%; pears, 70%; pecans, 1%; peppers, 10%; potatoes, 1%; prunes, 2.5%; pumpkins, 2.5%; spinach, 20%; squash, 5%; strawberries, 30%; tangerines, 60%; tomatoes, 10%; walnuts, 10%; and watermelons, 5%.

In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6–7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition A, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions B and C, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which abamectin (avermectin) may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for abamectin (avermectin) in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of abamectin (avermectin). Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of abamectin (avermectin) for acute exposures are estimated to be 2.3 parts per billion (ppb) for surface water and 1.6×10^{-3} ppb for ground water, and for chronic exposures for non-cancer assessments are estimated to be 1.3 ppb for surface water and 1.6×10^{-3} ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 2.3 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment, the water concentration of value 1.3 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Abamectin (avermectin) is currently registered for the following uses that could result in residential handler and postapplication exposures: Granular baits used to treat lawns and indoor crack and crevice dust products. EPA assessed residential exposure using the following assumptions: Adults were assessed for short- and intermediate-term residential handler and postapplication exposures (dermal and inhalation). Children were assessed for short- and intermediate-term postapplication dermal, inhalation, and incidental ingestion exposures (hand-to-mouth and object-to-mouth). Recreational exposures to turf are expected to be similar to, or less than, those described above, and were therefore not assessed. Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

4. *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 abamectin (avermectin) to share a common mechanism of toxicity with any other substances, and abamectin (avermectin) does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that abamectin (avermectin) 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.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) 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 on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* The abamectin (avermectin) toxicity database is adequate to evaluate

potential increased susceptibility of infants and children, and includes developmental toxicity studies in rat, mice, and rabbits; two 1-generation rat reproductive toxicity studies in rat; a 2-generation reproductive toxicity study in rat; and two developmental neurotoxicity studies in rat. No developmental effects were seen in the rat developmental toxicity study. However, increased quantitative susceptibility was noted in the prenatal developmental toxicity studies in mice and rabbits, the rat reproductive toxicity studies, and the developmental neurotoxicity studies in rat.

3. *Conclusion.* In previous abamectin (avermectin) risk assessments, the 10x FQPA safety factor was retained as a database uncertainty factor for the lack of a developmental neurotoxicity study. Two developmental neurotoxicity studies have now been submitted and reviewed and the findings in these studies were considered in the identification of toxicological points of departure and uncertainty/safety factors.

EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X for the acute dietary assessment and 3X for all assessments other than acute dietary. That decision is based on the following findings:

i. For all risk assessments involving repeated exposures to abamectin (avermectin), EPA determined that a 3x safety factor would be appropriate, based on the severity of effects (decrease in pup body weight and mortality) and the steepness of the dose-response curve seen in the developmental neurotoxicity study and three reproductive toxicity studies in the rat. These studies have documented a very narrow dose range from NOAEL (0.12 mg/kg/day) to adverse effect (0.2 mg/kg/day) to severe adverse effect (0.4 mg/kg/day). Dose spacing is commonly greater than 2x between NOAEL and LOAEL, and the 3x difference between the NOAEL and the dose that induced mortality in the pups in the developmental neurotoxicity study provides little margin of safety for the severity of the effects seen.

Retaining an additional 3x FQPA safety factor effectively provides a 10x margin between the dose which causes death (0.4 mg/kg/day) and the NOAEL adjusted by the additional safety factor (0.12 mg/kg/day/3x = 0.04 mg/kg/day). A dose spacing of 10x between a NOAEL and LOAEL is as broad, if not broader, than the dose spacing generally used in animal testing and thus removes the residual concern of the steepness of the dose-response curve and the severe effects noted.

Additionally, this adjusted point of departure (0.04 mg/kg/day) would address the concerns for the increased susceptibility seen at higher doses in the 2-generation reproduction study in rats (LOAEL = 0.4 mg/kg/day), prenatal developmental study in mice (LOAEL = 0.75 mg/kg/day), the prenatal developmental toxicity study in rabbits (LOAEL = 2 mg/kg/day), and the 1-generation rat reproduction study (LOAEL = 0.2 mg/kg/day).

With respect to acute dietary exposure, the endpoint selected for risk assessment is based on mydriasis observed in dogs. The EPA determined that the additional 3x factor applied to chronic and other exposure scenarios is not applicable to acute exposure for the following reasons:

a. The concerns noted for steepness of the dose-response curve and the severity of effects were not seen in the studies where mydriasis occurred.

b. The reduced body weights noted in studies following repeated exposure to abamectin (avermectin) are not a single dose effect.

c. The increased susceptibility seen in the prenatal developmental toxicity studies, reproductive toxicity studies, and the developmental neurotoxicity studies were seen at a dose lower (LOAEL 0.2 mg/kg/day) than the dose (LOAEL 1.0 mg/kg/day) that caused mydriasis.

Therefore, EPA has determined that it would be appropriate if the FQPA SF were reduced to 1X for the acute dietary assessment.

ii. The toxicity database for abamectin (avermectin) is complete, except for immunotoxicity testing. Recent changes to 40 CFR part 158 imposed new data requirements for immunotoxicity testing (OPPTS Guideline 870.7800) for pesticide registration. However, the toxicity database for abamectin (avermectin) provides no indication of immunotoxicity and abamectin (avermectin) does not belong to a class of chemicals that would be expected to be immunotoxic. EPA does not believe that conducting an immunotoxicity study will result in a NOAEL less than the NOAELs of 0.5 mg/kg/day and 0.12 mg/kg/day already set for abamectin (avermectin) acute and repeated exposures, respectively, and an additional uncertainty factor is not needed to account for potential immunotoxicity.

iii. Signs of neurotoxicity ranging from decrease in foot splay reflex, mydriasis (*i.e.,* excessive dilation of the pupil), curvature of the spine, decreased fore- and hind-limb grip strength, tip-toe gate, tremors, ataxia, or spastic movements of the limbs were reported in various studies with different durations of abamectin (avermectin) exposure in rats, mice, and dogs. However, the results of two submitted rat developmental neurotoxicity studies did not show any evidence of neurotoxicity.

iv. There are no residual uncertainties identified in the exposure databases. The acute and chronic dietary exposure assessments were refined and utilized tolerance level or anticipated residues, default or empirical processing factors, and PCT estimates. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to abamectin (avermectin) in drinking water. EPA used similarly conservative assumptions to assess postapplication exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by abamectin (avermectin).

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to abamectin (avermectin) will occupy 30% of the aPAD for infants less than 1 year old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to abamectin (avermectin) from food and water will utilize 50% of the cPAD for children 1–2 years old the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of abamectin (avermectin) is not expected.

3. *Short- and intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account short- and intermediate-term residential exposure plus chronic exposure to food and water

(considered to be a background exposure level). Abamectin (avermectin) is currently registered for uses that could result in short- and intermediate-term residential exposures, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short- and intermediate-term residential exposures to abamectin (avermectin).

Using the exposure assumptions described in this unit for short- and intermediate-term exposures, EPA has concluded the combined short- and intermediate-term food, water, and residential exposures result in aggregate MOEs of 1200 for the general population and 500 for children 1–2 years old. Because EPA's level of concern for abamectin (avermectin) is a MOE of 300 or below, these MOEs are not of concern.

4. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, abamectin (avermectin) is not expected to pose a cancer risk to humans.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to abamectin (avermectin) residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodologies are available in Pesticide Analytical Manual II (PAM II) for citrus and processed fractions (Method I), ginned cottonseed (Method IA), and bovine tissues and milk (Method II). Additionally, Method M–073 and M–936–95–2 have been validated by the Agency and submitted for inclusion in PAM II as enforcement methods. These five methods are adequate for enforcement of the tolerances on plants and livestock.

Method M–073 and M–936–95–2 may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; *telephone number:* (410) 305–2905; *email address: residuemethods@epa.gov.*

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 U.N. 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.

There are currently no Codex MRLs for abamectin (avermectin) on commodities associated with this petition.

C. Revisions to Petitioned-For Tolerances

Based upon review of the data supporting the petition, EPA revised the proposed tolerance for chive, dried leaves from 0.07 ppm to 0.02 ppm. EPA revised the tolerance level based on analysis of the residue field trial data using the Agency's Tolerance Spreadsheet in accordance with the Agency's *Guidance for Setting Pesticide Tolerances Based on Field Trial Data.* Additionally, the Agency has revised the tolerance expression to clarify:

1. That, as provided in FFDCA section 408(a)(3), the tolerance covers metabolites and degradates of abamectin (avermectin) not specifically mentioned; and

2. That compliance with the specified tolerance levels is to be determined by measuring only the specific compounds mentioned in the tolerance expression.

V. Conclusion

Therefore, tolerances are established for residues of abamectin (avermectin), avermectin B_1 [a mixture of avermectins containing greater than or equal to 80% avermectin B_{1a} (5-*O*-demethyl avermectin A_1) and less than or equal to 20% avermectin B_{1b} (5-*O*-demethyl-25-de(1-methylpropyl)-25-(1-methylethyl) avermectin A_1)] and its delta-8,9-isomer, in or on onion, bulb, subgroup 3–07A at 0.01 ppm; chive, fresh leaves at 0.01 ppm; chive, dried leaves at 0.02 ppm; and bean, dry, seed at 0.01 ppm. This regulation additionally removes the time-limited tolerances on bean, lima, seed at 0.005 ppm; and onion, bulb at 0.005 ppm, as they will be superseded by permanent tolerances.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances 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).

VII. 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: September 30, 2011.

Daniel J. Rosenblatt,

Acting Director, Registration Division, 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 180.449 is amended in paragraph (a) by revising the introductory text and alphabetically adding the following commodities to the table and by revising paragraph (b) to read as follows:

§ 180.449 Avermectin B_1 and its delta-8,9-isomer; tolerances for residues.

(a) *General.* Tolerances are established for residues of abamectin (avermectin), including its metabolites and degradates, in or on the commodities in the following table. Compliance with the tolerance levels specified in the following table is to be determined by measuring only avermectin B_1 [a mixture of avermectins containing greater than or equal to 80% avermectin B_{1a} (5-*O*-demethyl avermectin A_1) and less than or equal to 20% avermectin B_{1b} (5-*O*-demethyl-25-de(1-methylpropyl)-25-(1-methylethyl) avermectin A_1)] and its delta-8,9-isomer in or on the following commodities:

Commodity	Parts per million
* * * * *	
Bean, dry, seed	0.01
* * * * *	
Chive, dried leaves	0.02
Chive, fresh leaves	0.01
* * * * *	
Onion, bulb, subgroup 3–07A	0.01
* * * * *	

(b) *Section 18 emergency exemptions.* [Reserved]

* * * * *

[FR Doc. 2011–28666 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2011–0583; FRL–8891–4]

Methacrylic Acid-Methyl Methacrylate-Polyethylene Glycol Monomethyl Ether Methacrylate Graft Copolymer; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer when used as an inert ingredient in a pesticide chemical formulation. Akzo Noel Surface Chemistry LLC 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 methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer on food or feed commodities.

DATES: This regulation is effective November 9, 2011. Objections and requests for hearings must be received on or before January 9, 2012, 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–2011–0583. 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 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: Alganesh Debesai, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8353; email address: *debesai.alganesh@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://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. Can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, 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–2011–0583 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 January 9, 2012. 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–2011–0583, 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.

II. Background and Statutory Findings

In the **Federal Register** of Friday, August 26, 2011 (76 FR 53372) (FRL–8884–9), EPA issued a notice pursuant to section 408 of FFDCA, 21 U.S.C. 346a, announcing the receipt of a pesticide petition (PP 1E7875) filed by Akzo Nobel Surface Chemistry LLC, 909 Mueller Avenue, Chattanooga, TN 37406. The petition requested that 40 CFR 180.960 be amended by establishing an exemption from the requirement of a tolerance for residues of methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer; CAS Reg. No. 111740–36–4. That notice included a summary of the petition prepared by the petitioner and solicited comments on the petitioner's request. The Agency did not receive any comments.

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 use in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing an exemption from the requirement of 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 * * *'' and specifies factors EPA is to consider in establishing an exemption.

III. Risk Assessment and Statutory Findings

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be shown that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established. Consistent with FFDCA section 408(b)(2)(D), 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. In the case of certain chemical substances that are defined as polymers, the Agency has established a set of criteria to identify categories of polymers expected to present minimal or no risk. The definition of a polymer is given in 40 CFR 723.250(b) and the exclusion criteria for identifying these low-risk polymers are described in 40 CFR 723.250(d). Methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer conforms to the definition of a polymer given in 40 CFR 723.250(b) and meets the following criteria that are used to identify low-risk polymers.

1. The polymer is not a cationic polymer nor is it reasonably anticipated to become a cationic polymer in a natural aquatic environment.
2. The polymer does contain as an integral part of its composition the atomic elements carbon, hydrogen, and oxygen.
3. The polymer does not contain as an integral part of its composition, except as impurities, any element other than those listed in 40 CFR 723.250(d)(2)(ii).
4. The polymer is neither designed nor can it be reasonably anticipated to substantially degrade, decompose, or depolymerize.
5. The polymer is manufactured or imported from monomers and/or reactants that are already included on the TSCA Chemical Substance Inventory or manufactured under an applicable TSCA section 5 exemption.
6. The polymer is not a water absorbing polymer with a number average molecular weight (MW) greater than or equal to 10,000 daltons.

Additionally, the polymer also meets as required the following exemption criteria specified in 40 CFR 723.250(e).

7. The polymer's number average MW of 1,884 is greater than 1,000 and less than 10,000 daltons. The polymer contains less than 10% oligomeric material below MW 500 and less than 25% oligomeric material below MW1,000, and the polymer does not contain any reactive functional groups.

Thus, methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer meets the criteria for a polymer to be considered low risk under 40 CFR 723.250. Based on its conformance to the criteria in this unit, no mammalian toxicity is anticipated from dietary, inhalation, or dermal exposure to methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer.

IV. Aggregate Exposures

For the purposes of assessing potential exposure under this exemption, EPA considered that methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer could be present in all raw and processed agricultural commodities and drinking water, and that non-occupational non-dietary exposure was possible. The number average MW of methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer is 1,884 daltons. Generally, a polymer of this size would be poorly absorbed through the intact gastrointestinal tract or through intact human skin. Since methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer conform to the criteria that identify a low-risk polymer, there are no concerns for risks associated with any potential exposure scenarios that are reasonably foreseeable. The Agency has determined that a tolerance is not necessary to protect the public health.

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 methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer to share a common mechanism of toxicity with any other substances, and methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer 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. Additional Safety Factor for the Protection of Infants and Children

Section 408(b)(2)(C) of FFDCA 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 data base unless EPA concludes that a different margin of safety will be safe for infants and children. Due to the expected low toxicity of methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer, EPA has not used a safety factor analysis to assess the risk. For the same reasons the additional tenfold safety factor is unnecessary.

VII. Determination of Safety

Based on the conformance to the criteria used to identify a low-risk polymer, EPA concludes that there is a reasonable certainty of no harm to the U.S. population, including infants and children, from aggregate exposure to residues of methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer.

VIII. 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 U.N. 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 methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer.

IX. Conclusion

Accordingly, EPA finds that exempting residues of methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer from the requirement of a tolerance will be safe.

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 rules 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 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).

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, or otherwise have any unique impacts on local governments. 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) (Public Law 104–4).

Although this action does not 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), 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. As such, to the extent that information is publicly available or was submitted in comments to EPA, the Agency considered whether groups or segments of the population, 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 discussed in this document, compared to the general population.

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 rule in the **Federal Register**. This 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: October 6, 2011.

Daniel J. Rosenblatt,

Acting Director, Registration Division, 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. In § 180.960, the table is amended by adding alphabetically the following polymers to read as follows:

§ 180.960 Polymers; exemptions from the requirement of a tolerance.

* * * * *

Polymer	CAS No.
* * * * *	
Methacrylic acid-methyl methacrylate-polyethylene glycol monomethyl ether methacrylate graft copolymer, minimum number average molecular weight (in amu), 1,800	111740–36–4
* * * * *	

[FR Doc. 2011–28792 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2011–0333; FRL–8891–1]

Methacrylic Polymer; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of 2-Propenoic acid, 2-methyl-, telomer with 2-ethylhexyl 2-propenoate, 2-propanol and sodium 2-methyl-2-[(1-oxo-2-propen-1-yl) amino]-1-propanesulfonate (1:1), sodium salt (CAS Reg. No. 1260001–65–7), also known as methacrylic polymer, when used as an inert ingredient in a pesticide chemical formulation under 40 CFR 180.960. AkzoNobel Surface Chemistry LLC 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 2-Propenoic acid, 2-methyl-, telomer with 2-ethylhexyl 2-propenoate, 2-propanol and sodium 2-methyl-2-[(1-oxo-2-propen-1-yl) amino]-1-propanesulfonate (1:1), sodium salt on food or feed commodities.

DATES: This regulation is effective November 9, 2011. Objections and requests for hearings must be received on or before January 9, 2012, 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–2011–0333. 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 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: William Cutchin, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460–0001; telephone number: (703) 305–7990; email address: *cutchin.william@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://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. Can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, 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–2011–0333 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 January 9, 2012. 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–2011–0333, 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 Avenue 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 July 6, 2011 (79 FR 39358) (FRL–8875–6), EPA issued a notice pursuant to section 408 of FFDCA, 21 U.S.C. 346a, announcing the receipt of a pesticide petition (PP 1E7835) filed by AkzoNobel Surface Chemistry LLC, 909 Mueller Ave., Chattanooga, TN 37406. The petition requested that 40 CFR 180.960 be amended by establishing an exemption from the requirement of a tolerance for residues of methacrylic acid sodium salt (CAS No. 1260001–65–7). This tolerance exemption uses the common chemical name methacrylic polymer, also known as 2-Propenoic acid, 2-methyl-, telomer with 2-ethylhexyl 2-propenoate, 2-propanol and sodium 2-methyl-2-[(1-oxo-2-propen-1-yl) amino]-1-propanesulfonate (1:1), sodium salt; CAS Reg. No. 1260001–65–7. That notice included a summary of the petition prepared by the petitioner and solicited comments on the petitioner's request. The Agency received 2 comments from private citizens who opposed the authorization to sell any pesticide that leaves a residue on food. The Agency understands the commenter's concerns and recognizes that some individuals believe that no residue of pesticides should be allowed. However, under the existing legal framework provided by section 408 of FFDCA, EPA is authorized to establish pesticide tolerances or exemptions where persons seeking such tolerances or exemptions have demonstrated that the pesticide meets the safety standard imposed by the statute.

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 use in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing an exemption from the requirement of 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 * * *'' and specifies factors EPA is to consider in establishing an exemption.

III. Risk Assessment and Statutory Findings

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be shown that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(b)(2)(D), 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. In the case of certain chemical substances that are defined as polymers, the Agency has established a set of criteria to identify categories of polymers expected to present minimal or no risk. The definition of a polymer is given in 40 CFR 723.250(b) and the exclusion criteria for identifying these low-risk polymers are described in 40 CFR 723.250(d). Methacrylic polymer conforms to the definition of a polymer given in 40 CFR 723.250(b) and meets

the following criteria that are used to identify low-risk polymers.

1. The polymer is not a cationic polymer nor is it reasonably anticipated to become a cationic polymer in a natural aquatic environment.

2. The polymer does contain as an integral part of its composition the atomic elements carbon, hydrogen, and oxygen.

3. The polymer does not contain as an integral part of its composition, except as impurities, any element other than those listed in 40 CFR 723.250(d)(2)(ii).

4. The polymer is neither designed nor can it be reasonably anticipated to substantially degrade, decompose, or depolymerize.

5. The polymer is manufactured or imported from monomers and/or reactants that are already included on the TSCA Chemical Substance Inventory or manufactured under an applicable TSCA section 5 exemption.

6. The polymer is not a water absorbing polymer with a number average molecular weight (MW) greater than or equal to 10,000 daltons.

Additionally, the polymer also meets as required the following exemption criteria specified in 40 CFR 723.250(e).

7. The polymer's number average MW of 2,900 is greater than 1,000 and less than 10,000 daltons. The polymer contains less than 10% oligomeric material below MW 500 and less than 25% oligomeric material below MW 1,000, and the polymer does not contain any reactive functional groups (See 40 CFR 723.250(e) for more information on reactive functional groups).

Thus, methacrylic polymer meets the criteria for a polymer to be considered low risk under 40 CFR 723.250. Based on its conformance to the criteria in this unit, no mammalian toxicity is anticipated from dietary, inhalation, or dermal exposure to methacrylic polymer.

IV. Aggregate Exposures

For the purposes of assessing potential exposure under this exemption, EPA considered that methacrylic polymer could be present in all raw and processed agricultural commodities and drinking water, and that non-occupational non-dietary exposure was possible. The number average MW of methacrylic polymer is 2,900 daltons. Generally, a polymer of this size would be poorly absorbed through the intact gastrointestinal tract or through intact human skin. Since methacrylic polymer conform to the criteria that identify a low-risk polymer, there are no concerns for risks associated with any potential exposure scenarios that are reasonably foreseeable. The Agency has determined that a tolerance is not necessary to protect the public health.

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 methacrylic polymer to share a common mechanism of toxicity with any other substances, and methacrylic polymer does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that methacrylic polymer 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. Additional Safety Factor for the Protection of Infants and Children

Section 408(b)(2)(C) of FFDCA 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 data base unless EPA concludes that a different margin of safety will be safe for infants and children. Due to the expected low toxicity of methacrylic polymer, EPA has not used a safety factor analysis to assess the risk. For the same reasons the additional tenfold safety factor is unnecessary.

VII. Determination of Safety

Based on the conformance to the criteria used to identify a low-risk polymer, EPA concludes that there is a reasonable certainty of no harm to the U.S. population, including infants and children, from aggregate exposure to residues of methacrylic polymer.

VIII. Other Considerations

A. Existing Exemptions From a Tolerance

There are currently no existing exemptions from a tolerance for methacrylic polymer.

B. 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.

C. 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 U.N. 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 methacrylic polymer.

IX. Conclusion

Accordingly, EPA finds that exempting residues of methacrylic polymer from the requirement of a tolerance will be safe.

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 rules 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 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).

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, or otherwise have any unique impacts on local governments. 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).

Although this action does not 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), 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. As such, to the extent that information is publicly available or was submitted in comments to EPA, the Agency considered whether groups or segments of the population, 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 discussed in this document, compared to the general population.

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 rule in the **Federal Register**. This 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: October 18, 2011.

Lois Rossi,

Director, Registration Division, 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. In § 180.960, the table is amended by adding alphabetically the following polymer to read as follows:

§ 180.960 Polymers; exemptions from the requirement of a tolerance.

* * * * *

Polymer	CAS No.
* * * * * * *	
2-Propenoic acid, 2-methyl-, telomer with 2-ethylhexyl 2-propenoate, 2-propanol and sodium 2-methyl-2-[(1-oxo-2-propen-1-yl) amino]-1-propanesulfonate (1:1), sodium salt, minimum number average molecular weight (in amu): 2,900	1260001–65–7
* * * * * * *	

[FR Doc. 2011–28952 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 67

[Docket ID FEMA–2011–0002]

Final Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Base (1% annual-chance) Flood Elevations (BFEs) and modified BFEs are made final for the communities listed below. The BFEs and modified BFEs are the basis for the floodplain management measures that each community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: The date of issuance of the Flood Insurance Rate Map (FIRM) showing BFEs and modified BFEs for each community. This date may be obtained by contacting the office where the maps are available for inspection as indicated in the table below.

ADDRESSES: The final BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the modified BFEs for each community listed. These modified

elevations have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Deputy Federal Insurance and Mitigation Administrator has resolved any appeals resulting from this notification.

This final rule is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the proof Flood Insurance Study and FIRM available at the address cited below for each community. The BFEs and modified BFEs are made final in the communities listed below. Elevations at selected locations in each community are shown.

National Environmental Policy Act. This final rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This final rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This final rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 67

Administrative practice and procedure, Flood insurance, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 67 is amended as follows:

PART 67—[AMENDED]

■ 1. The authority citation for part 67 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 67.11 [Amended]

■ 2. The tables published under the authority of § 67.11 are amended as follows:

State	City/town/county	Source of flooding	Location	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified
City of Indianola, Nebraska Docket No.: FEMA–B–1147				
Nebraska	City of Indianola	Coon Creek	Approximately 260 feet downstream of Burlington Northern Railroad.	+2378
			Approximately 1.13 miles upstream of D Street.	+2397

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Indianola
Maps are available for inspection at 210 North 4th Street, Indianola, NE 69034.

City of Sioux Falls, South Dakota Docket No.: FEMA–B–1149				
South Dakota	City of Sioux Falls	Big Sioux River	Approximately 0.5 mile downstream of Cliff Avenue, landward of north levee.	+1320
			Approximately 1,800 feet upstream of Cliff Avenue, landward of north levee.	+1324

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Sioux Falls
Maps are available for inspection at 224 West 9th Street, Sioux Falls, SD 57117.

City of Suffolk, Virginia (Independent City) Docket No.: FEMA–B–1145				
Virginia	City of Suffolk	Hampton Roads	From the intersection of Sandy Drive and South Road to approximately 310 feet south, extending approximately 500 feet west along Sandy Drive.	+8

State	City/town/county	Source of flooding	Location	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified
Virginia	City of Suffolk	Unnamed ponding areas controlled by Hampton Roads.	From the intersection of Sandy Drive and Hampton Road to approximately 1,100 feet south, and extending approximately 510 feet east along Sandy Drive.	+8

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Suffolk
Maps are available for inspection at the City Manager's Office, 441 Market Street, Suffolk, VA 23434.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Summit County, Colorado, and Incorporated Areas Docket No.: FEMA–B–1049			
Willow Creek	At the confluence with the Blue River	+8682	Town of Silverthorne, Unincorporated Areas of Summit County.
	Approximately 1,235 feet upstream of Ruby Road	+8874	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Town of Silverthorne
Maps are available for inspection at 601 Center Circle, Silverthorne, CO 80493.

Unincorporated Areas of Summit County
Maps are available for inspection at 208 East Lincoln Avenue, Breckenridge, CO 80424.

Marion County, Illinois, and Incorporated Areas Docket No.: FEMA–B–1104			
CEI Branch of Town Creek	Approximately 650 feet upstream of Chicago and Eastern Illinois Dam.	+530	Unincorporated Areas of Marion County.
	Approximately 1,100 feet upstream of Old Yards Road	+530	
Crooked Creek	Approximately 1,650 feet downstream of West Green Street extended.	+464	Unincorporated Areas of Marion County.
	Approximately at the upstream side of Breway Hill Road	+468	
Folks Creek	Approximately at the downstream side of Kell Street	+515	Unincorporated Areas of Marion County.
	Approximately at the upstream side of Blair Street	+531	
Fulton Branch	Approximately at the upstream side of the railroad	+490	City of Centralia.
	Approximately 300 feet upstream of U.S. Route 51 (Southbound Lane).	+492	
Fulton Branch Tributary	Approximately at the upstream side of Wabash Avenue	+499	City of Centralia.
	Approximately at the downstream side of U.S. Route 51	+512	
Raccoon Creek	Approximately 0.85 mile downstream of Green Street Road.	+468	Unincorporated Areas of Marion County.
	Approximately at the downstream side of Raccoon Lake Dam.	+468	
Raccoon Lake	Approximately at the upstream side of Raccoon Lake Dam.	+480	Unincorporated Areas of Marion County.
	Approximately 1.27 miles downstream of Illinois Route 161.	+480	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Town Creek	Approximately at the downstream side of Kell Street	+502	Unincorporated Areas of Marion County.
	Approximately 1,600 feet downstream of Tonti Road	+550	
Tributary No. 1	Approximately at the upstream side of Franklin Street	+530	Unincorporated Areas of Marion County.
	Approximately 570 feet upstream of Franklin Street	+530	
Tributary No. 2	Approximately 1,200 feet downstream of Lake Street extended.	+525	Unincorporated Areas of Marion County.
	Approximately at the downstream side of West Blair Street.	+542	
Unnamed Tributary A	Approximately 420 feet upstream of Green Street Road	+468	City of Centralia, Unincorporated Areas of Marion County.
	Approximately 90 feet downstream of Club House Road	+468	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Centralia

Maps are available for inspection at City Hall, 222 South Poplar Street, Centralia, IL 62801.

Unincorporated Areas of Marion County

Maps are available for inspection at the Marion County Courthouse, 100 Broadway Avenue, Salem, IL 62881.

Marshall County, Indiana, and Incorporated Areas
Docket No.: FEMA–B–1148

Yellow River	At East 4th Road	+800	Unincorporated Areas of Marshall County.
	Approximately 0.57 mile upstream of East 4th Road	+800	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Unincorporated Areas of Marshall County

Maps are available for inspection at the Marshall County Government Office, 112 West Jefferson Street, Plymouth, IN 46563.

Marshall County, Iowa, and Incorporated Areas
Docket No.: FEMA–B–1147

Iowa River	Approximately 0.47 mile downstream of Main Street Road	+861	Unincorporated Areas of Marshall County.
	Approximately 1.25 miles upstream of Prairie Avenue	+881	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Unincorporated Areas of Marshall County

Maps are available for inspection at Marshall County Courthouse, 1 East Main Street, Marshalltown, IA 50158.

Alpena County, Michigan (All Jurisdictions)
Docket No.: FEMA–B–1151

Lake Huron	From approximately 1.3 miles northwest of the intersection of Rockport Road and Old Grade Road, to approximately 700 feet southeast of the intersection of South State Avenue and Mason Street.	+583	City of Alpena, Township of Alpena.
Lake Huron	From approximately 1,000 feet northeast of the intersection of Curtis Drive and U.S. Route 23, to approximately 4.5 miles southeast of the intersection of Wilds Road and Brousseau Road.	+583	Township of Sanborn.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Long Lake	Entire shoreline within community	+651	Township of Alpena.

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Alpena
Maps are available for inspection at 208 North 1st Avenue, Alpena, MI 49707.

Township of Alpena
Maps are available for inspection at 4385 U.S. Route 23 North, Alpena, MI 49707.

Township of Sanborn
Maps are available for inspection at 10068 Ossineke Road, Ossineke, MI 49766.

Sherburne County, Minnesota, and Incorporated Areas
Docket No.: FEMA–B–1125

Big Elk Lake	Entire shoreline	+969	Unincorporated Areas of Sherburne County.
Briggs Lake	Entire shoreline	+969	Unincorporated Areas of Sherburne County.
Eagle Lake	Entire shoreline	+928	Unincorporated Areas of Sherburne County.
Elk Lake	Entire shoreline	+953	Unincorporated Areas of Sherburne County.
Elk River	Approximately 50 feet upstream of U.S. Route 10	+877	City of Becker, City of Big Lake, City of Elk River, Unincorporated Areas of Sherburne County.
	At Big Elk Lake	+969	
Fremont Lake	Entire shoreline	+977	City of Zimmerman, Unincorporated Areas of Sherburne County.
Julia Lake	Entire shoreline	+969	Unincorporated Areas of Sherburne County.
Long Pond	Entire shoreline	+966	Unincorporated Areas of Sherburne County.
Rush Lake	Entire shoreline	+969	Unincorporated Areas of Sherburne County.
Trott Brook	At the Anoka County boundary	+879	City of Elk River.
	Approximately 0.86 mile upstream of Brook Road	+943	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Becker
Maps are available for inspection at City Hall, 12060 Sherburne Avenue, Becker, MN 55308.

City of Big Lake
Maps are available for inspection at City Hall, 160 Lake Street North, Big Lake, MN 55309.

City of Elk River
Maps are available for inspection at City Hall, 13065 Orono Parkway, Elk River, MN 55330.

City of Zimmerman
Maps are available for inspection at City Hall, 12980 Fremont Avenue, Zimmerman, MN 55398.

Unincorporated Areas of Sherburne County
Maps are available for inspection at the Sherburne County Government Center, 13880 U.S. Route 10, Elk River, MN 55330.

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Clark County, Nevada, and Incorporated Areas Docket No.: FEMA–B–1133			
Las Vegas Wash	At the mouth of Las Vegas Wash (Lake Las Vegas Parkway).	+1431	City of Henderson, City of Las Vegas, City of North Las Vegas, Unincorporated Areas of Clark County.
	Approximately 375 feet upstream of North Las Vegas Boulevard.	+1852	
Unnamed Tributary to Las Vegas Wash A Channel.	Approximately 1,000 feet upstream of the intersection of Las Vegas Wash and Las Vegas Boulevard.	+1857	City of North Las Vegas.
	Approximately 400 feet downstream of I–15	+1886	
Unnamed Wash Along Gowan Road.	Approximately 180 feet upstream of the intersection of North Rancho Drive and West Gowan Road.	+2256	City of Las Vegas, Unincorporated Areas of Clark County.
	At the intersection of West Gowan Road and U.S. Route 95.	+2311	
Unnamed Wash Along Maverick Street and Duncan Drive.	Approximately 300 feet upstream of the intersection of Duncan Drive and North Rancho Drive.	+2258	City of Las Vegas, Unincorporated Areas of Clark County.
	Approximately 150 feet downstream of the intersection of West Gowan Road and Maverick Street.	+2280	
Unnamed Wash Along North Rancho Drive.	Approximately 300 feet upstream of the intersection of North Rancho Drive and North Decatur Boulevard.	+2209	City of Las Vegas, City of North Las Vegas.
	Approximately 250 feet upstream of the intersection of North Rancho Drive and West Craig Road.	+2298	
Unnamed Wash along U.S. Route 95.	At the intersection of West Gowan Street and U.S. Route 95.	+2317	City of Las Vegas.
	Approximately 950 feet upstream of the intersection of U.S. Route 95 and West Craig Road.	+2325	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Henderson
Maps are available for inspection at the Public Works Department, 240 Water Street, Henderson, NV 89015.

City of Las Vegas
Maps are available for inspection at the Public Works Department, 400 Stewart Avenue, Las Vegas, NV 89101.

City of North Las Vegas
Maps are available for inspection at the Public Works Department, 2200 Civic Center Drive, North Las Vegas, NV 89030.

Unincorporated Areas of Clark County
Maps are available for inspection at the Clark County Public Works Department, 500 South Grand Central Parkway, Las Vegas, NV 89155.

Lincoln County, New Mexico, and Incorporated Areas Docket No.: FEMA–B–1109			
Brady Canyon	At the confluence with the Rio Ruidoso	+6746	Unincorporated Areas of Lincoln County, Village of Ruidoso.
	Approximately 1,100 feet upstream of Ash Drive	+6948	
Carrizo Creek	At the confluence with the Rio Ruidoso	+6553	Unincorporated Areas of Lincoln County, Village of Ruidoso.
	Just upstream of Carrizo Canyon Road	+6751	
Cedar Creek	At the confluence with the Rio Ruidoso	+6534	Unincorporated Areas of Lincoln County, Village of Ruidoso.
	Approximately 500 feet upstream of Musket Ball Drive	+7160	
Cherokee Bill Canyon	At the confluence with the Rio Ruidoso	+6446	Unincorporated Areas of Lincoln County, Village of Ruidoso.
	Approximately 1,800 feet upstream of Dunagan Trail	+6693	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Musket Ball Creek	Just upstream of Cedar Creek Drive	+7150	Unincorporated Areas of Lincoln County.
	Approximately 285 feet upstream of Musket Ball Drive	+7216	
North Fork Cedar Creek	Approximately 1,750 feet downstream of Spring Canyon Road.	+7160	Unincorporated Areas of Lincoln County.
	Just downstream of Watson Road	+7302	
Rio Bonito	Approximately 650 feet downstream of State Highway 48	+6845	Unincorporated Areas of Lincoln County.
	Just downstream of Bonito Lake Dam	+7318	
Rio Ruidoso	Approximately 1.0 mile downstream of County Road 17	+5188	City of Ruidoso Downs, Unincorporated Areas of Lincoln County, Village of Ruidoso.
	Approximately 800 feet upstream of Malone Road	+7168	
Salado Creek	Approximately 320 feet upstream of U.S. Route 380	+6382	Unincorporated Areas of Lincoln County, Village of Capitan.
	Approximately 110 feet upstream of Dean Drive	+6484	
South Fork Cedar Creek	Approximately 480 feet downstream of Chuck Wagon Road.	+7160	Unincorporated Areas of Lincoln County.
	Approximately 330 feet upstream of Jarratt Drive	+7233	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Ruidoso Downs
Maps are available for inspection at 122 Downs Drive, Ruidoso Downs, NM 88346.

Unincorporated Areas of Lincoln County
Maps are available for inspection at the Lincoln County Floodplain Manager's Office, 115 Kansas City Road, Ruidoso, NM 88345.

Village of Capitan
Maps are available for inspection at the Lincoln County Floodplain Manager's Office, 115 Kansas City Road, Ruidoso, NM 88345.

Village of Ruidoso
Maps are available for inspection at 313 Cree Meadows Drive, Ruidoso, NM 88345.

Erath County, Texas, and Incorporated Areas
Docket No.: FEMA–B–1112

North Bosque River	Just upstream of East Lingleville Road	+1265	Unincorporated Areas of Erath County.
	Approximately 0.5 mile upstream of State Highway 108	+1276	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

Unincorporated Areas of Erath County
Maps are available for inspection at the Erath County Courthouse, 100 West Washington, Stephenville, TX 76401.

Pierce County, Wisconsin, and Incorporated Areas
Docket No.: FEMA–B–1100

Bay City Creek	Approximately 900 feet upstream of State Highway 35	+690	Unincorporated Areas of Pierce County.
	Approximately 1,000 feet upstream of State Highway 35	+691	
Eau Galle River	Approximately 0.8 mile upstream of Winter Avenue (State Highway 72).	+846	Unincorporated Areas of Pierce County.
	Approximately 0.9 mile upstream of Winter Avenue (State Highway 72).	+847	
Kinnickinnic River	Approximately 1,600 feet downstream of Lake Louise Dam.	+810	Unincorporated Areas of Pierce County.
	Approximately 1,000 feet downstream of Lake Louise Dam.	+812	

Flooding source(s)	Location of referenced elevation	* Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ∧ Elevation in meters (MSL) Modified	Communities affected
Mississippi River	At the Pepin County boundary	+681	City of Prescott, Unincorporated Areas of Pierce County, Village of Bay City, Village of Maiden Rock.
	Approximately 1,700 feet south of the intersection of State Highway 35 and Walter Street.	+690	
Rush Coulee	Approximately 250 feet downstream of Maple Avenue (County Highway S).	+832	Unincorporated Areas of Pierce County.
	At Maple Avenue (County Highway S)	+833	

* National Geodetic Vertical Datum.
+ North American Vertical Datum.
# Depth in feet above ground.
∧ Mean Sea Level, rounded to the nearest 0.1 meter.

ADDRESSES

City of Prescott

Maps are available for inspection at City Hall, 800 Borner Street North, Prescott, WI 54021.

Unincorporated Areas of Pierce County

Maps are available for inspection at the Pierce County Courthouse, 414 West Main Street, Ellsworth, WI 54011.

Village of Bay City

Maps are available for inspection at the Village Hall, West 6371 Main Street, Bay City, WI 54723.

Village of Maiden Rock

Maps are available for inspection at the Village Hall, West 3535 State Highway 35, Maiden Rock, WI 54750.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: October 28, 2011.

David L. Miller,

Associate Administrator, Federal Insurance and Mitigation Administration, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2011–28974 Filed 11–8–11; 8:45 am]

BILLING CODE 9110–12–P

Proposed Rules

Federal Register
Vol. 76, No. 217
Wednesday, November 9, 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 AGRICULTURE

Agricultural Marketing Service

7 CFR Part 930

[Doc. No. AO–370–A9; 11–0093; AMS–FV–10–0087; FV10–930–5]

Tart Cherries Grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin; Recommended Decision and Opportunity To File Written Exceptions to Proposed Amendment of Marketing Order No. 930

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and opportunity to file exceptions.

SUMMARY: This is a recommended decision regarding proposed amendments to Marketing Order No. 930 (order), which regulates the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin. These amendments were proposed by the Cherry Industry Administrative Board (CIAB), which is responsible for local administration of the order. These amendments would revise: Section 930.10, the definition of ''Handle,'' Section 930.50, ''Marketing Policy,'' and Section 930.58, ''Grower Diversion Privilege.''

The proposed amendments are intended to improve the operation and administration of the order. This recommended decision invites written exceptions on the proposed amendments.

DATES: Written exceptions must be filed by November 25, 2011.

ADDRESSES: Written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, Room 1031–S, Washington, DC 20250–9200, *Fax*: (202) 720–9776 or via the Internet at *http://www.regulations.gov*, or to Parisa Salehi at the Email address provided in the **FOR FURTHER INFORMATION CONTACT** section. All comments should reference the document number and the date and page number of this issue of the **Federal Register**. Comments will be made available for public inspection in the Office of the Hearing Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov*. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the Internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Parisa Salehi, Marketing Order and Agreement Division, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC; *Telephone:* (202) 720–9918, *Fax:* (202) 720–8938, or *Email: Parisa.Salehi@ams.usda.gov;* or Martin Engeler, Marketing Order and Agreement Division, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Fresno, California, *Telephone:* (559) 487–5110, *Fax:* (559) 487–5906, or *Email: Martin.Engeler@ams.usda.gov*.

Small businesses may request information on this proceeding by contacting Laurel May, Marketing Order Administration Division, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250–0237; *Telephone:* (202) 205–2830, *Fax:* (202) 720–8938, *Email: Laurel.May@ams.usda.gov*.

SUPPLEMENTARY INFORMATION: Prior document in this proceeding: Notice of Hearing issued on March 4, 2011, and published in the March 14, 2011, issue of the **Federal Register** (76 FR 13528).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed amendment to Marketing Order 930 regulating the handling of tart cherries grown in Michigan, New York, Pennsylvania, Oregon, Utah, Washington, and Wisconsin and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Parisa Salehi, whose address is listed above.

This recommended decision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act'', and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900).

The proposed amendments are based on the record of a public hearing held April 20 and 21, 2011, in Grand Rapids, Michigan, and on April 26, 2011, in Provo, Utah. Notice of this hearing was published in the **Federal Register** on March 14, 2011 (76 FR 13528).

The proposed amendments were recommended by CIAB and submitted to USDA on September 22, 2010.

The proposed amendments recommended by CIAB are summarized below.

1. Amendment 1 would revise the term ''handle'' within the order. This proposal would revise existing § 930.10, Handle, to exclude handler acquisition of grower diversion certificates from the definition of handle.

2. Amendment 2 would revise the ''marketing policy'' provisions in § 930.50 of the order so that grower-diverted cherries are not counted as production in the volume control formula.

3. Amendment 3 would revise the existing § 930.58, so grower-diverted cherries are not treated as actual harvested cherries.

In addition to the proposed amendments to the order, AMS proposed making any additional changes to the order as may be necessary to conform to any amendment that may result from the hearings.

Eighteen industry witnesses testified at the hearing. These witnesses represented tart cherry producers and handlers in the production area, as well as CIAB staff, and all supported the proposed amendments.

At the conclusion of the hearing, the Administrative Law Judge established a deadline of June 28, 2011, for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing. CIAB requested an extension of time to submit its brief. Its request was granted and the date for submission of briefs was set to July 8,

2011. One brief was filed; it supported the proposed amendments.

Material Issues

The material issues presented on the record of hearing are as follows:

(1) Whether to amend the order to exclude grower diversion certificates from the definition of handle;

(2) Whether to amend the order so that grower diverted cherries are not counted as production in the volume control formula;

(3) Whether to amend the order so that grower diverted cherries are not treated as actual harvested cherries.

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof.

Material Issue Number 1—Definition of Handle

Section 930.10 of the order should be amended to exclude handler acquisition of grower diversion certificates from the definition of handle.

Under Section 930.10 of the order, the current definition of ''handle'' includes the converting of cherries commercially into a processed product, and obtaining grower diversion certificates. Under the order, a ''handler'' is any person who first handles cherries. Marketing order obligations are applicable to handlers, and are based upon the quantity of cherries handled by handlers.

Volume control provisions under the order provide a mechanism for the industry to set aside crop in large crop years to help stabilize supply and prices. When volume control is in effect, free and restricted percentages are established. These percentages are applied to cherries and grower diversion certificates acquired by handlers from growers. Handlers can market free percentage cherries to any market. To meet their restricted percentage obligation, handlers have three options: place cherries in inventory reserve, acquire grower diversion certificates, or divert cherries themselves.

Grower diversion provisions under the order provide another method of managing supply by allowing growers the opportunity to undertake in-orchard diversion of cherries prior to or during harvest. When a grower chooses to divert cherries from production, the CIAB issues a grower diversion certificate to that grower representing the quantity of the diverted cherries that were left in the orchard. Growers can redeem the diversion certificates with handlers, who then use the certificates as one of their compliance tools to satisfy their restricted percentages.

Under current order provisions, handler acquisition of grower diversion certificates is treated the same as actual cherries delivered. Thus, when volume regulation is in effect, free and restricted percentages apply to the quantity of cherries (including grower diversion certificates) handled by each handler. As handlers acquire grower diversion certificates in order to help satisfy their restricted obligation, their restricted obligation increases. The result is a reduction in value to handlers of the grower diversion certificates, which in turn causes a disincentive for growers to divert cherries.

Because the current order provisions regarding handler acquisitions of grower diversion certificates reduces the value of grower diversion certificates to handlers, growers are less likely to divert cherries from production than they would be if handler acquisition of grower diversion certificates was not considered ''handling'', and handlers' restricted obligations did not increase with the acquisition of such certificates.

According to hearing evidence, currently, when a handler utilizes the grower diversion certificates, the handler compensates the grower at a reduced rate because the certificates' worth as a compliance tool to a handler is reduced. Witnesses testified that as a result, growers have less incentive to divert cherries and utilize grower diversion certificates. Data was presented at the hearing to illustrate the potential difference in costs associated with diverting cherries by leaving them un-harvested versus harvesting them. The data illustrates that costs to both growers and handlers would be reduced, if this amendment is implemented. A discussion of the costs and possible reimbursement to growers, as well as the benefits, is included in the Regulatory Flexibility Analysis section of this recommended decision.

Record evidence supports that if this amendment is implemented, it would satisfy its intent to increase the value of grower diversion certificates, and thus provide incentives for growers to leave some fruit un-harvested, as they would receive full credit for diverting a portion of their crops. According to the record, one of the primary reasons the order was established was to improve grower returns. The record indicates that while the order has benefited growers, prices in general do not reach the growers' costs of production in some years. The record further indicates, however, that if this proposal is implemented, it would provide additional benefits to growers, and help provide long-term sustainability of the industry.

Record evidence indicates that the current marketing order provisions discourage in-orchard diversions, especially in those years when the restricted percentage is large. Therefore, this aspect in the order should be restructured to better serve the needs of the tart cherry industry. Witnesses testified that if the term ''handle'' is amended according to this proposal, it provides an incentive for growers to divert a portion of their crop in high volume crop years. Grower diversion can reduce growers' costs of harvesting and transporting fruit. It can also help improve prices by decreasing the supply of cherries in handlers' inventories. When the available supply of cherries to the market is decreased, the price depressing effect of oversupply is no longer present, resulting in a positive effect for both growers and handlers.

Witnesses testified that the intent of this recommendation is to remove the disincentive for growers to divert cherries from production. The record indicates that increased grower diversion activity will help to reduce excess supply, which in turn is expected to positively impact grower returns. In addition, grower costs associated with harvesting and transporting cherries to handlers will be reduced as more cherries are diverted in orchard. Witnesses supported the idea that increasing the value of un-harvested cherries would improve the volume control provisions of the order, and would incentivize growers to divert their cherries in orchard. There was no opposition testimony against this proposed amendment. For the reasons stated herein, it is recommended that § 930.10, Handle, be amended to exclude the phrase ''or obtain grower diversion certificates issued pursuant to § 930.58.''

Material Issue Number 2—Marketing Policy

Section 930.50 of the order should be amended so that grower diverted cherries are not counted as production in the volume control formula. Section 930.50(d) of the order currently provides in part that ''No later than September 15 of each crop year the Board shall review actual production during the current crop year * * *.'' Section 930.50(d), would be revised to read as follows: ''No later than September 15 of each crop year the Board shall review the most current information available including, but not limited to, processed production and grower diversion of cherries during the current crop year.''

Section 930.50 provides the parameters for computing volume control percentages under the order. The CIAB must meet on or about July 1 of each crop year to review sales data, inventory data, current crop forecasts, and market conditions. From this information, the CIAB computes an optimum supply, which essentially represents the desirable amount of cherries needed to satisfy market demands for the upcoming crop year. The CIAB also considers the carryin inventory and production for the upcoming crop year to determine if the supply of cherries is expected to exceed the optimum supply. If the expected supply exceeds the optimum supply, free and restricted volume control percentages are computed and implemented. Under current order provisions, cherries that have been diverted from production by growers are considered as part of the production when computing volume control percentages, because they are considered to be ''handled'' when they are acquired by handlers, as discussed under Material Issue Number 1. This proposed amendment would require the CIAB to consider the quantity of grower diversion certificates acquired by handlers when computing volume control percentages, under the optimum supply formula (OSF) and is consistent with the proposed amendment under Material Issue Number 1.

Through the volume control provisions of the order, the supply and demand of tart cherries are brought into proper relationship with each other. When the supply of tart cherries available to the market exceeds the average demand for them in the domestic or ''free'' market, the crop is restricted in terms of what may move into the free market. The restricted cherries therefore are kept out of the domestic market. A restricted percentage is calculated pursuant to Section 930.50 of the order and each handler's acquisition of cherries and grower diversion certificates is subject to that percentage.

The volume control mechanism under the order involves growers diverting cherries from production by leaving them unharvested in the orchard. Handlers can coordinate with their growers during large crop years by encouraging them to divert cherries from production. Handlers can then acquire from the growers the diversion certificates issued to growers by the CIAB and use them as credit against their restriction or reserve obligation.

As previously discussed, handlers must currently include the pounds of cherries represented by the grower certificates they acquire as part of their ''handling,'' as though these cherries had been delivered and processed. This results in grower-diverted cherries being included as part of production when the CIAB computes volume control percentages.

Witnesses testified that grower diversion certificates contribute to the supply for the purpose of the OSF. Consequently, grower in-orchard diversions effectively increase the supply of restricted cherries in any given year, even though none of these cherries are delivered or processed. A restricted percentage is calculated pursuant to the OSF, and each handler's handle of restricted cherries is subject to that percentage.

Witnesses testified that the fluctuation of the restriction percentage and its impact upon grower diversion certificates creates considerable uncertainty. This uncertainty stems from the fact that grower diversions are part of the supply calculation in the OSF, currently and contribute to restriction determination.

If these amendments are implemented, grower diversion certificates would not be included as part of production in the volume control formula. This is because, if the cherries are diverted, they would not be added to the supply and would therefore not be part of OSF.

An additional change will be made to this section to the factors that the CIAB considers when it computes the preliminary and interim percentages or determines the final percentages to recommend to the Secretary. Section 930.50(e) will be amended to include an additional factor and phrase: ''to be the quantity of grower-diverted cherries during the crop year.'' The order currently includes only nine factors. A new section 930.50(e) would include an additional factor, ''(10) The quantity of grower-diverted cherries during the crop year.'' This change will require the CIAB to consider grower diversion of cherries in OSF when it computes final percentages.

For the reasons stated above, it is recommended that § 930.50, Marketing Policy, be amended to exclude grower diverted cherries from the calculation of actual production in the volume control formula, and to include an additional factor when computing preliminary or interim percentages, or determining final percentages for recommendation to the Secretary, by the CIAB. No opposition testimony was given regarding this proposed amendment, and it is thus recommended for adoption.

Material Issue Number 3—Grower Diversion Privilege

Section 930.58 provides parameters for grower diversion of cherries under the order. Section 930.58(a) of the order provides that grower delivery of diversion certificates to a handler shall be treated as though they were actual harvested cherries. Section 930.58(a) should be modified to eliminate the phrase ''as though there were actual harvested cherries'' to correspond to the proposed definition of handle.

As discussed under Material Issue Numbers 1 and 2, the proposed amendments to section 930.10 and section 930.50 would change how grower diversion of cherries are accounted for under the order. Grower diversion certificates acquired by handlers would no longer be counted as handled cherries, and would also not be included as production in the volume control formula. The proposed amendment to section 930.58(a) would make reference to the treatment of grower diversion certificates consistent with the proposed amendments to sections 930.10 and 930.50 by removing the reference that grower diversion certificates are treated as handled cherries.

No testimony opposing this proposal was provided at the hearing. For the reasons stated above, it is recommended that a § 930.58, Grower diversion privilege, be revised so that grower diverted cherries would not be considered and accounted for as actual harvested cherries.

Small Business Considerations

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit.

There are approximately 40 handlers of tart cherries subject to regulation under the order and approximately 600 producers of tart cherries in the regulated area. Small agricultural service firms, which include handlers, have been defined by the Small Business Administration (SBA)(13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small

agricultural producers are defined as those having annual receipts of less than $750,000. A majority of the tart cherry producers and handlers are considered small entities under the SBA standards.

The geographic region regulated by the order includes the states of Michigan, New York, Oregon, Pennsylvania, Utah, Washington, and Wisconsin. Acreage devoted to tart cherry production in the regulated area has declined in recent years. According to data presented at the hearings, bearing acreage in 1987–88 totaled 50,050 acres; by 2010–11 it had declined to 35,650 acres. Michigan accounts for 73 percent of total U.S. bearing acreage with 26,200 bearing acres. Utah is second, with a reported 3,300 acres, or approximately nine percent of the total. The remaining states' acreage ranges from 600 to 1,800 acres. The order includes authority for (1) Volume regulation, (2) promotion and research, and (3) grade and quality standards. Volume regulation is used under the order to augment supplies during low supply years, with product placed in reserves during large supply years.

Production of tart cherries can fluctuate widely from year to year. The magnitude of these fluctuations is one of the most pronounced for any agricultural commodity in the United States, and is due in large part to weather related conditions during the bloom and growing seasons. This fluctuation in supply presents a marketing challenge for the tart cherry industry because demand for the product is relatively inelastic, meaning a change in supply has a proportionately larger change in price.

According to data presented at the hearing, production has ranged from a low of 62.5 million pounds in 2002–03 to a high of 395.6 million pounds in 1995–96. For 2010–11, Michigan accounted for 71 percent of total U.S. production with 135 million pounds. Utah is second, with a reported 23 million pounds, or approximately twelve percent of the total. The remaining states produce between 15.4 and 1.2 million pounds.

During the hearings, multiple witnesses testified that they did not believe that the proposed amendments would have any adverse impacts on small agricultural service firms or small agricultural producers as defined by the SBA. According to the record, the proposed amendments would help agricultural businesses and growers by encouraging growers to divert some of their tart cherries in the orchard during years of extremely large supply. The proposed amendments would result in higher grower returns during years of extremely large supply. Processors would not incur the cost of processing and storing excess tart cherries. Furthermore, the growers who divert their crop do not incur harvest and transportation costs. The proposed amendments would result in a lower possibility of market saturation. Overall the supply of tart cherries in extremely large supply years result in higher returns for growers.

The proposed amendments are intended to provide additional flexibility in administering the volume control provisions of the order, and to improve its operation and administration. Record evidence indicates that the proposed amendments are intended to benefit all producers and handlers under the order, regardless of size.

There are three proposed amendments. Amendment one would amend Section 930.10 of the order to change the definition of ''handle,'' so that handler acquisition of grower diversion certificates is not considered handling. Amendment two would amend the ''marketing policy'' provisions in Section 930.50 of the order so that grower-diverted cherries are not counted as production in the OSF. Amendment three would amend section 930.58 of the order so that grower-diverted cherries are not treated as actual harvested cherries. The proposed amendments would modify how grower diversions are accounted for under the order.

Evidence presented when the order was promulgated indicated that a grower diversion program could benefit the industry by managing fluctuating supply. Witnesses indicated that the order has been successful in this regard. However, the record indicated that the order should be more flexible in addressing how grower diversions are utilized under the order.

The most efficient method to deal with a surplus is at the lowest level of the production and processing chain. The industry wastes the least amount of resources if it diverts cherries in the orchard. Once they are harvested, chilled, washed, de-stemmed, sorted, pitted, and packed, significantly higher costs are incurred and there is a greater risk of waste. Diverting surplus cherries in the orchard is the most cost effective method of dealing with a surplus situation and provides the largest benefit to growers through lower costs.

The order establishes an opportunity for growers to undertake in-orchard diversions of cherries (§ 930.58). These diversions are done during harvest in accordance with procedures defined under the order and are overseen by the CIAB. The CIAB issues grower diversion certificates to the growers that represent the pounds of cherries that were left in the orchard.

Growers redeem the diversion certificates with handlers, who use them as one of their compliance alternatives to meet their reserve or restricted obligation. However, under the current order definition of ''handle,'' handlers must include the pounds of cherries represented by the certificates as part of the total cherries that have been delivered and processed.

Consequently, grower in-orchard diversions effectively increase the supply of restricted cherries even though none of those cherries were delivered for processing. Grower diversion certificates are considered to be part of the total quantity of cherries that a handler receives and processes, and contribute to the total supply of restricted cherries in the OSF. This creates confusion for both the growers and processors.

The OSF is the mechanism specified in the order and used by CIAB to determine the relationship between the demand and supply of tart cherries in a given year. When the supply of tart cherries exceeds the average demand, volume regulation is implemented.

In an effort to stabilize supply and prices, the tart cherry industry uses volume regulation which allows the industry to set free and restricted percentages. Free percentage cherries can be marketed by handlers to any outlet, while restricted percentage cherries are placed in a reserve inventory. The primary purpose of setting restricted percentages and placing cherries in a reserve inventory is to attempt to balance supply with demand.

A related component of OSF under the order involves growers diverting cherries by leaving them unharvested in the orchard. Handlers can coordinate with their growers in large crop years by encouraging them to divert cherries from production. Handlers can then acquire the diversion certificates issued to growers and use them as credit toward their restriction or reserve obligations.

The interaction of sections 930.10 and 930.50 of the order establishes that grower in-orchard diversion is subject to the restriction percentage calculated for the year. Because of this, grower diversion certificates have less value when growers redeem them with handlers. Therefore, when a handler utilizes the grower diversion certificates received from growers, the certificates have a reduced value as a compliance

tool in meeting the restricted obligation. Because the certificates have a reduced value growers will deliver most of their crop to handlers instead of diverting cherries in the orchard in large crop years.

The intent of these amendments is to remove the grower disincentive for in-orchard diversion. If the method grower diversions are accounted for is changed, the grower diversion program is expected to help mitigate the negative effects of oversupply, by increasing the amount of cherries diverted from production.

This action is expected to have a positive impact on growers with respect to the value of the grower diversion certificates. If the value of the certificates increases, grower diversion of cherries in large crop years is expected to increase. Increased grower diversion activity will help to reduce excess supplies, which in turn is expected to have a positive impact on grower returns. In addition, grower costs associated with harvesting and transporting cherries to handlers will be reduced as more cherries are diverted.

This action is also expected to have a positive impact on handlers. As more fruit is diverted in the orchard, handlers will avoid the processing and storage costs that they would otherwise incur if growers harvested and delivered the fruit. Reducing the available supply of cherries is expected to mitigate the price depressing effects that oversupply typically has on the market, resulting in a positive effect for both growers and handlers.

Testimony at the hearing supported that the amendments, which would encourage grower diversions, would not have a negative impact on small growers or handlers. The hearing record supported that these amendments would benefit small growers by providing better opportunities to divert cherries in the orchard in large crop years. Small handlers are not always able to ship to export markets or have as much new product activity as larger handlers. Small handlers would benefit from these amendments by providing diversion credits as a way to meet their restrictions.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0177 (Tart cherries Grown in the States of Michigan, New York, Pennsylvania, Oregon, Utah, Washington and Wisconsin). No changes in those requirements is necessary a result of this action. Should any change become necessary, it would be submitted to OMB for approval.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. All of these amendments are designed to enhance the administration and functioning of the marketing order to the benefit of the industry.

The implementation of these requirements is not expected to have any additional costs on handler. In fact, these proposed changes are expected to reduce costs for both growers and handlers.

In addition, the meetings regarding these proposals as well as the hearing dates were widely publicized throughout the existing tart cherry production area and all interested persons were invited to attend the meetings and the hearings and participate in CIAB deliberations on all issues. All CIAB meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues. The CIAB itself is composed of members representing handlers, producers and the public. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

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

Civil Justice Reform

The amendments to Marketing Order 930 proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order, is not in accordance with the law, and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

Rulings on Briefs of Interested Persons

Briefs, proposed findings and conclusions, and the evidence in the record, were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

General Findings

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. The marketing order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. The marketing order, as amended, and as hereby proposed to be further amended, regulates the handling of tart cherries grown in the production area in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing order upon which a hearing has been held;

3. The marketing order, as amended, and as hereby proposed to be further amended, is limited in its application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The marketing order, as amended, and as hereby proposed to be further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give

due recognition to the differences in the production and marketing of tart cherries grown in the production area; and

5. All handling of tart cherries grown in the production area as defined in the marketing order, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

A 15-day comment period is provided to allow interested persons to respond to this proposal. Fifteen days is deemed appropriate because these proposed changes have been widely publicized and implementation of the changes, if adopted, would be desirable to benefit the industry prior to the next crop year which begins on July 1, 2012. All written exceptions timely received will be considered and a grower referendum will be conducted before any of these proposals are implemented.

List of Subjects in 7 CFR Part 930

Marketing agreements, Reporting and recordkeeping requirements, Tart cherries.

For the reasons set forth in the preamble, 7 CFR part 930 is proposed to be amended as follows:

PART 930—TART CHERRIES GROWN IN THE STATES OF MICHIGAN, NEW YORK, PENNSYLVANIA, OREGON, UTAH, WASHINGTON, AND WISCONSIN

1. The authority citation for 7 CFR part 930 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Revise the introductory paragraph in § 930.10 to read as follows:

§ 930.10 Handle.

Handle means the process to brine, can, concentrate, freeze, dehydrate, pit, press or puree cherries, or in any other way convert cherries commercially into a processed product, or divert cherries pursuant to § 930.59, or to otherwise place cherries into the current of commerce within the production area or from the area to points outside thereof: *Provided,* That the term handle shall not include:

* * * * *

3. Revise paragraphs (d) and (e) of § 930.50 to read as follows:

§ 930.50 Marketing Policy.

* * * * *

(d) *Final percentages.* No later than September 15 of each crop year, the Board shall review the most current information available including, but not limited to, processed production and grower diversions of cherries during the current crop year. The Board shall make such adjustments as are necessary between free and restricted tonnage to achieve the optimum supply and recommend such final free market tonnage and restricted percentages to the Secretary and announce them in accordance with paragraph (h) of this section. The difference between any final free market tonnage percentage designated by the Secretary and 100 percent shall be the final restricted percentage. With its recommendation, the Board shall report on its consideration of the factors in paragraph (e) of this section.

(e) *Factors.* When computing preliminary and interim percentages, or determining final percentages for recommendation to the Secretary, the Board shall give consideration to the following factors:

(1) The estimated total production of cherries;

(2) The estimated size of the crop to be handled;

(3) The expected general quality of such cherry production;

(4) The expected carryover as of July 1 of canned and frozen cherries and other cherry products;

(5) The expected demand conditions for cherries in different market segments;

(6) Supplies of competing commodities;

(7) An analysis of economic factors having a bearing on the marketing of cherries;

(8) The estimated tonnage held by handlers in primary or secondary inventory reserves;

(9) Any estimated release of primary or secondary inventory reserve cherries during the crop year; and

(10) The quantity of grower-diverted cherries during the crop year.

* * * * *

4. Revise paragraph (a) of § 930.58 to read as follows:

§ 930.58 Grower Diversion privilege.

(a) *In general.* Any grower may voluntarily elect to

divert, in accordance with the provisions of this section, all or a portion of the cherries which otherwise, upon delivery to a handler, would become restricted percentage cherries. Upon such diversion and compliance with the provisions of this section, the Board shall issue to the diverting grower a grower diversion certificate which such grower may deliver to a handler. Any grower diversions completed in accordance with this section, but which are undertaken in districts subsequently exempted by the Board from volume regulation under § 930.52(d), shall qualify for diversion credit.

* * * * *

Dated: November 3, 2011.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2011–29031 Filed 11–8–11; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 987

[Doc. No. AMS–FV–10–0025; FV10–987–1 PR]

Domestic Dates Produced or Packed in Riverside County, CA; Proposed Amendments to Marketing Order 987 and Referendum Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This rule proposes seven amendments to Marketing Agreement and Order No. 987 (order), which regulates the handling of domestic dates produced or packed in Riverside County, California, and provides growers with the opportunity to vote in a referendum to determine if they favor the changes. Five amendments were proposed by the California Date Administrative Committee (CDAC or committee), which is responsible for local administration of the order. These proposed amendments are intended to improve administration of and compliance with the order and reflect current industry practices.

In addition to the committee's proposals, the Agricultural Marketing Service (AMS) proposes two amendments that would provide for a continuance referendum every six years, and would establish term limits of up to six consecutive years for committee members. These proposals would allow producers to indicate continued support for the order and provide all interested industry members the opportunity to serve on the committee.

DATES: The referendum will be conducted from January 16, 2012, through February 3, 2012. The representative period for the purpose of the referendum is October 1, 2010, through September 30, 2011.

FOR FURTHER INFORMATION CONTACT: Martin Engeler, Senior Marketing Specialist, Marketing Order and Agreement Division, Fruit and

Vegetable Programs, AMS, USDA; Telephone: (559) 487–5110, Fax: (559) 487–5906, or Kathleen M. Finn, Rulemaking Team Program Manager, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or Email: *Martin.Engeler@ams.usda.gov* or *Kathy.Finn@ams.usda.gov.*

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

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Agreement and Order No. 987, both as amended (7 CFR part 987), regulating the handling of domestic dates produced or packed in Riverside County, California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR part 900) authorize amendment of the order through this informal rulemaking action.

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

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

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

Section 1504 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) (Pub. L. 110–246) made changes to section 18c(17) of the Act, which in turn required the addition of supplemental rules of practice to 7 CFR part 900 (73 FR 49307; August, 21, 2008). The additional supplemental rules of practice authorize the use of informal rulemaking (5 U.S.C. 553) to amend federal fruit, vegetable, and nut marketing agreements and orders if certain criteria are met.

AMS has considered the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and other relevant matters, and has determined that amending the order as proposed by the committee could appropriately be accomplished through informal rulemaking.

The committee's proposed amendments were recommended following deliberations at public meetings on October 30, 2008; October 29, 2009; and February 25, 2010. The proposed amendments were first submitted to AMS on May 29, 2009. After further discussions with AMS, the committee submitted revised proposals to AMS on March 2, 2010.

A proposed rule soliciting comments on the proposed amendments was issued on June 6, 2011, and published in the **Federal Register** on June 14, 2011 (76 FR 34618). No comments were received. AMS will conduct a producer referendum to determine support for the proposed amendments. If appropriate, a final rule will then be issued to effectuate the amendments favored by producers in the referendum.

The committee's proposed amendments would: (1) Authorize the committee to recommend regulatory exemptions for certain date varieties if market conditions warrant such exemption. Currently the order only provides for exemptions for handlers who sell dates directly to consumers in limited market outlets; (2) Increase the terms of office for committee members and alternates from two to three years; (3) Authorize the committee to conduct business by means of telephone or video conference technologies. Currently all committee meetings must be assembled; (4) Authorize the committee to collect interest charges and late fees on delinquent assessment payments. Currently, the order does not provide authority for the collection of interest and late fees; and (5) Authorize the committee to build and maintain an operating monetary reserve not to exceed one year's average expenses. Currently, the committee is authorized to maintain an operating reserve not to exceed 50 percent of an average year's expenses.

AMS further proposes to amend the order by: (1) Requiring that a producer referendum be conducted every six years to determine continued support for the order; and (2) establishing term limits of no longer than two consecutive terms of office or six consecutive years for committee members and alternates. Finally, AMS proposes to make conforming changes to the order as may be necessary to conform to any amendment to the order that may result from this rulemaking action.

Proposal Number 1—Regulatory Exemptions

Section 987.5 of the order defines the date varieties that are regulated under the order. Regulated varieties are subject to the minimum grade, size, inspection, certification, volume control, interhandler transfer, container, reporting, and assessment requirements authorized under §§ 987.39 through 987.51, §§ 987.61 through 987.68, and § 987.72 of the order.

Currently, § 987.5 lists four date varieties for regulation under the order, including the Deglet Noor, Zahidi, Halawy, and Khadrawy varieties. At the time the order was established, these four varieties were produced or handled in Riverside County in sufficient quantities to warrant regulation. At times, production of some varieties may decline to the point that the committee believes that the cost to handlers of inspecting and reporting those varieties outweighs the benefits of doing so. For instance, the committee reports that the cost of regulating two date varieties currently outweighs the benefit of doing so as very little assessment revenue is generated by the handling of those two varieties. In such cases, the committee believes it should have the authority to recommend regulatory exemption of those varieties until such time as it is again appropriate to regulate them.

To address this issue, the committee proposed amending the order by temporarily suspending the varieties currently produced in minimal quantities from inclusion in § 987.5—Dates. However, AMS believes that the committee would have greater flexibility if it were authorized to recommend regulatory exemptions for varieties produced, with the approval of the Secretary, through the informal rulemaking process. In this way, any future changes in production levels or other market considerations for any variety could be addressed through informal rulemaking.

Section 987.52 authorizes the committee to exempt handlers of dates for sale in certain market outlets from regulation if those sales are unlikely to interfere with the objectives of the order. However, the section does not authorize the exemption of dates sold into regular markets by variety. Such authority would allow the committee to recommend, subject to approval of the Secretary, that certain varieties be exempted from the order's regulations through informal rulemaking. Such authority should be broad enough to include exemptions for a variety of reasons, including periods of minimal production. This flexibility would allow the committee to respond to changes in the production and marketing environment in a timely manner. As production and market conditions change, the committee could recommend lifting the regulatory exemptions, as appropriate.

For example, two varieties regulated under the order are currently being produced in very small quantities. New date garden plantings of those varieties are still immature, and have not reached full production. Under the proposed amendment, the committee could recommend, through the informal rulemaking process, that those two varieties be exempted from the order's regulations. When the trees of each variety mature and are producing in sufficient quantities to warrant regulation, the committee could recommend that the variety-specific exemptions be removed.

For the reasons stated above, it is proposed that § 987.52, Exemption, be amended by designating the current text of that section as paragraph (a) and adding a new paragraph (b) providing authority for the committee to recommend that any variety may be exempt from regulations established pursuant to §§ 987.39 through 987.51, §§ 987.61 through 987.68, and § 987.72.

Proposal Number 2—Terms of Office

Section 987.23 of the order specifies that the terms of office for committee members and alternates are two years, beginning on August 1. Section 987.24 of the order specifies that nominations for committee positions are held by June 15, every other year. The committee proposed amending the order to extend member and alternate terms of office from two to three years.

The terms of office for another California date industry program, the California Date Commission (commission), are three years. Some committee members may also serve on the commission. Nominations for the two programs occasionally, but not always, take place within a few weeks of each other. Because nominations coincide in some years and don't coincide in others, the committee believes that voters can become confused about whether or not they have submitted ballots, and thus are less likely to participate in the committee's nomination process. The committee believes that extending terms of office to three years and synchronizing nominations with those of the commission would improve the nomination process and encourage greater participation in committee nominations.

Additionally, the number of date producers and handlers in the production area has declined over time, making it increasingly difficult to find new candidates to serve as members and alternates on the nine-member committee every other year. The committee believes that extending the terms of office for one year would give the industry more time to identify and recruit potential new committee members between nomination periods.

The current committee was nominated in 2010 and is expected to serve until 2012. If this amendment is adopted, terms of office of the current committee members and alternates would be extended until 2014, or whenever a new committee is selected by the Secretary. Thereafter, the three-year terms of office would commence with the new committee selected in 2014. This would coincide with the commission's nomination cycle.

For the reasons stated above, it is proposed that § 987.23 of the order be amended to change committee member and alternate terms of office from two to three years. The section should also specify that the terms of office of members and alternates serving at the time the amendment is effectuated would end on July 31, 2014. Further, Section 987.24 should be amended to specify that nominations for committee positions are held by June 15 of every third year rather than every other year.

Proposal Number 3—Committee Meetings

Section 987.31 of the order specifies procedures for conducting committee business. Quorum requirements are defined, and the minimum voting requirements for various matters are specified. The section specifies that votes cast at assembled meetings shall be cast in person. The section also authorizes the committee to vote on any proposition by mail, telephone, or telegram after all members and alternates acting as members have received identical explanations about the proposition. Telephone votes must be confirmed in writing within two weeks. Actions approved by mail, telephone, or telegram voting must be unanimous to be valid.

Currently, the order does not authorize the committee to conduct business meetings by telephone or other means of modern communication technology, such as video conference. The committee proposed amending the order to authorize the use of such technology in certain situations.

The use of telephone conference and video conference capability has become standard in the date industry, as well as in other marketing order programs. Use of such technology allows producers and handlers to address urgent committee business with minimal disruption to their individual business responsibilities. Telephone and video conferences also bolster participation by other interested parties who would otherwise be unable to participate in industry meetings due to the constraints of time and distance.

The committee believes that the use of telephone and video conference technology would be appropriate in certain situations, such as when the matters to be discussed are minor, or when emergencies demand immediate decisions by the committee. The committee also believes that some business matters should be addressed at assembled meetings, and that alternate meeting formats would not be appropriate for all situations. The committee proposed that the chairperson should have the discretion to determine the appropriate format for any committee meeting.

There could be some situations in which the chairperson determines that members may participate in assembled meetings by telephone or other means of communication. Although the member's alternate may be present at the same assembled meeting, the committee believes that the member should retain the right to vote on any issue that comes before the committee in that meeting, even if he or she is participating via telephone or videoconference. Therefore, the requirement that votes at assembled meetings shall be cast in person should be removed. Nevertheless, the committee believes that votes cast by telephone should continue to be confirmed in writing within two weeks of the meeting. Finally, because telegrams are no longer in standard use, authority to vote by telegram should be removed.

For the reasons stated above, it is proposed that § 987.31, Procedure, be amended by: Revising paragraph (d) to provide for participation in assembled

committee meetings as well as telephone, video conference, or other types of meetings; providing the committee chairperson with discretion to determine the appropriate meeting format and whether members may participate in assembled meetings by telephone or other means; clarifying that members attending assembled meetings by alternate means of communication retain the same voting privileges they would otherwise have; and removing the requirement that votes at assembled meetings shall be cast in person. Paragraph (e) of § 987.31 would be amended by removing the words ''or telegram.''

Proposal Number 4—Interest and Late Payment Charges

Section 987.72 requires date handlers to pay the committee assessments upon merchantable and utility dates they have certified as such. Funds to administer the order are derived from such assessments. The committee, with USDA approval, formulates annual budgets of expenses and recommends appropriate assessment rates. The committee's budgeted expenditures include those for general administration of the program, as well as the cost of promotional programs and marketing and media consultants.

Currently, the order does not authorize the committee to charge interest or late payment charges for delinquent assessment payments. The committee believes that adding such authority would provide greater incentive for handlers to make assessment payments on time. This in turn would help ensure that the committee is able to meet its financial obligations and continue to fund its programs on a continuing basis.

Charging interest and late payment charges on unpaid financial obligations is commonplace in the business world, and implementation of such charges would bring the committee's financial operations in line with standard business practices. Such charges would remove any financial advantage for those who do not pay on time while they benefit from committee programs, creating a more level playing field for the industry.

The committee recommended amending the order to authorize the collection of interest and late payment charges for delinquent payments. Such authority would allow the committee to establish, through informal rulemaking, parameters for implementation, including timeframes and appropriate interest and late payment charges that would be imposed if necessary. This authority is intended to strengthen compliance with the order's assessment requirements.

For the reasons stated above, it is proposed that paragraphs (b) through (d) of § 987.72 be redesignated paragraphs (c) through (e), respectively, and that a new paragraph (b) be added to the order to specify that any assessment not paid by a handler within a period of time specified by the committee may be subject to an interest or late payment charge, or both. The new paragraph would further specify that the period of time, interest rate, and late payment charge shall be as recommended by the committee and approved by the Secretary.

Proposal Number 5—Operating Reserve

Paragraph (c) of § 987.72 currently authorizes the committee to establish and maintain a monetary operating reserve in an amount not to exceed 50 percent of an average year's expenses. The average year's expenses are calculated using the actual expenses of the five most recent crop years. Should the existing reserve ever exceed the recalculated average, there is no requirement to lower the reserve to meet that average. Funds in the reserve are available for use by the committee to meet its financial obligations in connection with administration of the order and its programs. Annual budgets and assessment rates are revised as appropriate in an effort to maintain the authorized operating reserve balance.

The committee occasionally uses reserve funds when the assessment revenues they have collected are not sufficient to meet their budgeted expenses. This may happen when the date crop is smaller than expected, which reduces the total amount of assessments paid by handlers. In other instances, the committee may desire later in the year to take advantage of a promotional opportunity for which it had not budgeted at the beginning of the year. With the approval of the Secretary, the committee could revise their budget to include the promotional program and use reserve funds to cover its costs without increasing the current assessment rate.

In crop years with unexpectedly high production, the approved assessment rate may generate excess funds. Under the order's current provisions, the committee is only authorized to retain an amount not to exceed 50 percent of an average year's expenses. Any excess funds must be returned to handlers or applied as a credit against their accounts for the upcoming year.

The committee proposed raising the operating reserve limit from 50 percent of an average year's expenses to an amount not to exceed one year's average expenses. This would allow the committee to retain more surplus assessment revenues they may collect. A larger operating reserve would strengthen the committee's continuity and confidence in managing committee business. A larger reserve would provide sufficient funds to meet the committee's budgeted financial obligations, including the maintenance of strategic marketing programs, in short crop years as well as provide the flexibility to respond to unexpected opportunities. The committee could recommend annual assessment rates. Over a number of years, the reserve could gradually increase until the balance approximates one year's average expenses, as calculated using the five most recent years' actual expenses.

For the reasons stated above, it is proposed that paragraph (c) of § 987.72, which would be redesignated paragraph (d) as described under amendment Proposal Number 4 above, be further amended to authorize the committee to build and maintain an operating monetary reserve not to exceed one year's average expenses, based upon the actual expenses of the five most recent crop years.

Proposal Number 6—Continuance Referenda

AMS proposes to amend the order by adding a provision for continuance referenda every six years. Provision for periodic continuance referenda would offer producers the opportunity to indicate ongoing support for the order and its programs. Experience has shown that marketing order programs need significant industry support to operate effectively. Continuance of the date order would require the favorable vote of at least two-thirds of those voting, or of those representing at least two-thirds of the production volume represented in the referendum. This is the same support that is typically required for issuance or amendment of an order.

The order was last amended on February 1, 1978 (43 FR 4253). Since that time, USDA has recommended that producers of commodities regulated under federal marketing orders be offered the opportunity to participate in periodic continuance referenda. The California date marketing order does not currently provide for continuance referenda. Therefore, it is recommended that § 987.82—Effective time, suspension, or termination, be amended by redesignating paragraph (b)(3) as paragraph (b)(4) and adding a new paragraph (b)(3) to provide that a continuance referendum shall be conducted six years after the

amendment becomes effective and every six years thereafter.

In paragraph (b)(2) of § 987.82, the word ''growers,'' which appears in the heading and in the text of that paragraph, should be replaced with the word ''producers'' to conform with the definition provided in § 987.7 of the order; and the word ''he,'' in reference to the Secretary, should be replaced by the words ''he or she'' to modernize the section.

Proposal Number 7—Term Limits

AMS proposes to amend the order by establishing term limits on the number of consecutive terms a person may serve on the committee.

Currently, the term of office for each member and alternate member of the committee is two years. Committee members and alternates continue to serve until their successors have been selected by the Secretary and have qualified. The order does not specify any term limits for members or alternates. Members and alternates may be selected to serve consecutive terms in those positions, as long as they continue to be eligible and willing to do so.

As explained under Proposal number 2 above, the committee has proposed to amend the order to provide for three-year terms of office. AMS is proposing to further amend the order to specify that members may serve up to two consecutive three-year terms, not to exceed six consecutive years. This proposal for a limitation on tenure would not apply to alternates. Once a member has served on the committee for two consecutive terms, or six years, the member would be required to step down for at least one year before being eligible to serve as a member again. The member could serve as an alternate during that time.

AMS's experience with similar marketing programs is that establishing tenure limits is a means to increase industry participation on the committee and in its programs. By inviting potential new members to serve, small and large entities who have not been actively involved previously may be encouraged to take part in the order's activities and gain committee experience.

For the reasons stated above, it is proposed that § 987.23 be further amended by specifying that members may serve up to two consecutive three-year terms, not to exceed six consecutive years as members. There would be no such limitation for alternates. After serving for six consecutive years, members would be required to step down for at least one year before being eligible to serve again. If the order is amended to allow three-year terms of office, members who were appointed in 2010 and continued to serve until 2014 would be allowed to serve one additional three-year term of office before being required to step down. Any other service prior to the order amendment would not count toward the term limit.

Conforming Changes to Administrative Rules and Regulations

Adoption of two of the proposed amendments to the order would require that conforming changes be made to § 987.124 of the order's administrative rules and regulations. These changes would not be voted upon by producers in the referendum, but would be made as conforming changes if Proposal Number 2, to make terms of office three years long, and/or Proposal Number 7, to add term limits, are approved by voters participating in the referendum.

Currently, paragraph (a) of § 987.124 specifies that nominations materials are provided to producers and producer-handlers no later than June 15 of each even numbered year. If the order is amended to provide for three-year terms of office as explained in Proposal number 2 above, nominations would be conducted every three years, rather than every two years. Therefore, § 987.124(a) should be changed to specify that ballot materials are provided to producers and producer handlers no later than June 15 of every third year.

Paragraph (a)(1) of § 987.124 currently specifies that the ballots should contain the list of incumbents who are willing to continue serve on the committee. As explained above, some incumbents may no longer be eligible to serve in their positions if the proposal to add term limits is adopted. Therefore, § 987.124(a)(1) should be revised to clarify that the names of incumbents who are both willing and eligible to continue serving should be listed on the ballots.

Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 85 producers of dates in the production area and 8 handlers subject to regulation under the marketing order. The Small Business Administration (13 CFR 121.201) defines small agricultural producers as those having annual receipts of less than $750,000, and small agricultural service firms are defined as those having annual receipts of less than $7,000,000.

According to the National Agricultural Statistics Service (NASS), the 2010 crop yield was approximately 7,080 pounds, or 3.54 tons, of dates per acre. NASS estimates that the 2010 grower price was approximately $0.585 per pound, or $1,170 per ton. Thus, the value of date production in 2010 averaged about $4,142 per acre (7,080 pounds per acre times $0.585 per pound). At that average price, a producer would have to farm over 181 acres to receive an annual income from dates of $750,000 ($750,000 divided by $4,142 per acre equals 181.1 acres). According to committee staff, the majority of California date producers farm fewer than 181 acres. Thus, it can be concluded that the majority of date producers could be considered small entities. According to data from the committee, the majority of handlers of California dates may also be considered small entities.

The amendments proposed by the committee would authorize the committee to recommend regulatory exemptions for dates by variety, provide for three year terms of office for committee members, provide for committee meetings by telephone and other means of communication, authorize an operating monetary reserve not to exceed one year's average expenses, and authorize the collection of interest and late payment charges on delinquent assessment payments.

Amendments proposed by AMS would provide for continuance referenda every six years, and would specify term limits of not more than six consecutive years for committee positions. Conforming changes to the order's administrative rules and regulations would be made as necessary to facilitate implementation of any amendments approved by voters in the referendum. Specifically, the committee's nomination and polling procedures would be modified to require that balloting materials be provided to producers by June 15 of every third year.

The committee's proposed amendments were unanimously recommended at public meetings held

on October 30, 2008; October 29, 2009; and February 25, 2010. The committee believes that each of their proposed amendments would benefit producers and handlers of all sizes.

If granted authority to temporarily exempt certain date varieties from regulation, the committee could determine whether the costs of collecting assessments and reports on individual varieties are warranted. Handler burden related to those functions would be reduced for exempted varieties. Decreases in handler assessment obligation and reporting costs could be passed on to producers. Administrative costs related to enforcing regulatory compliance for those varieties would also be reduced.

Producer and handler participation in committee nominations is expected to improve if member terms of office are extended from two to three years. Extending the terms of office would afford the committee more time to identify and develop potential new members between committee selections. Coordinating committee nomination periods with those of other industry programs is expected to reduce voter confusion and increase the number of ballots returned, thus improving producer and handler representation on the committee.

Adding authority for alternative meeting formats is expected to improve participation in committee deliberations by industry members of all sizes. Such authority would minimize the time that committee members would be required to be away from their individual businesses. Authorizing the chairperson to determine the format for each meeting would ensure that critical committee business is addressed appropriately. By providing greater flexibility for meeting attendance and participation, the committee hopes to benefit from the input of a greater number of interested persons whose perspectives and ideas could improve the marketing of California dates, which would in turn benefit both producers and handlers.

Authorizing the committee to impose interest and late payment charges on delinquent assessments is intended to encourage handlers to make payments on a timely basis. There would be no additional cost to handlers who comply with the order's assessment requirements. Timely assessment payments allow the committee to make and keep financial obligations with regard to operation of its programs, including marketing and promotion, which are intended to benefit all producers and handlers.

If authority to build and maintain an operating reserve equal to one year's average expenses is added to the order, the committee could recommend increases to their assessment rate in order to gradually build the reserve. During high production years, excess assessments could be added to the reserve until the fund's limit is reached. The larger operating reserve would help ensure that the committee has sufficient funds to meet its financial obligations and maintain critical marketing programs, even during short crop years. Such stability is expected to allow the committee to conduct programs that will benefit all entities, regardless of size.

AMS's proposal to add provision for continuance referenda is expected to afford producers the opportunity to indicate ongoing support for the order and its programs. The proposal to add term limits is expected to encourage participation on the committee by all interested industry members. Support for the program, and active participation on the committee by a diverse group of industry members, are expected to benefit all producers and handlers by ensuring that the program continues to meet the industry's evolving needs.

Proposed changes to the order's nomination and polling regulations are administrative in nature and are intended to facilitate implementation of the proposed amendments, if adopted.

Where measurable, the costs outlined in this analysis are expected to be proportional to the size of business, so smaller businesses should not be unduly burdened. Benefits associated with improved efficiencies and greater representation on the committee should accrue to all entities, regardless of size.

Alternatives to these proposals include making no changes at this time. However, the proposed changes are necessary to update administration of the order to reflect current industry practices, provide consistent funding that will enable the committee to maintain valuable marketing programs, and provide greater opportunity for committee participation.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0178, Vegetable and Specialty Crops. No changes in those requirements as a result of this proceeding are anticipated. Should any changes become necessary, they would be submitted to OMB for approval.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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

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

The committee's meetings, at which these proposals were discussed, were widely publicized throughout the date industry. All interested persons were invited to attend the meetings and encouraged to participate in committee deliberations on all issues. Like all committee meetings, the meetings were public, and all entities, both large and small, were encouraged to express their views on these proposals.

A proposed rule concerning this action was published in the **Federal Register** on June 14, 2011 (76 FR 34618). Copies of the rule were mailed or sent via facsimile to all committee members and date handlers. Finally, the rule was made available through the Internet by USDA and the Office of the Federal Register. A 30-day comment period ending July 14, 2011, was provided to allow interested persons to respond to the proposal. No comments were received in response to the proposal.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Laurel May at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

Findings and Conclusions

The findings and conclusions and general findings and determinations included in the proposed rule set forth in the June 14, 2011, issue of the **Federal Register** are hereby approved and adopted.

Marketing Order

Annexed hereto and made a part hereof is the document entitled ''Order Amending the Order Regulating the Handling of Dates Produced or Packed in Riverside County, California.'' This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and

conclusions. *It is hereby ordered,* That this entire rule be published in the **Federal Register**.

Referendum Order

It is hereby directed that a referendum be conducted in accordance with the procedure for the conduct of referenda (7 CFR part 900.400–407) to determine whether the annexed order amending the order regulating the handling of dates produced or packed in Riverside County, California is approved by growers, as defined under the terms of the order, who during a representative period were engaged in the production of dates in the production area. The representative period for the conduct of such referendum is hereby determined to be October 1, 2010, through September 30, 2011.

The agents of the Secretary to conduct such referendum are designated to be Terry Vawter and Jeff Smutny, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487–5901, or Email: *Terry.Vawter@ams.usda.gov* or *Jeffrey.Smutny@ams.usda.gov,* respectively.

List of Subjects in 7 CFR Part 987

Dates, Marketing agreements, Reporting and recordkeeping requirements.

Dated: November 3, 2011.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

Order Amending the Order Regulating the Handling of Dates Produced or Packed in Riverside County, California [1]

Findings and Determinations

The findingshereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing agreement and order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. The marketing agreement and order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

2. The marketing agreement and order, as amended, and as hereby proposed to be further amended, regulate the handling of dates produced or packed in the production area (Riverside County, California) in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order;

3. The marketing agreement and order, as amended, and as hereby proposed to be further amended, are limited in application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. The marketing agreement and order, as amended, and as hereby proposed to be further amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of dates produced or packed in the production area; and

5. All handling of dates produced or packed in the production area as defined in the marketing agreement and order is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

Order Relative to Handling

It is therefore ordered, That on and after the effective date hereof, all handling of dates grown or packed in Riverside County, California shall be in conformity to, and in compliance with, the terms and conditions of the said order as hereby proposed to be amended as follows:

The provisions of the proposed marketing order amending the order contained in the proposed rule issued by the Administrator on June 6, 2011, and published in the **Federal Register** (76 FR 34618) on June 14, 2011, will be and are the terms and provisions of this order amending the order and are set forth in full herein.

PART 987—DOMESTIC DATES PRODUCED OR PACKED IN RIVERSIDE COUNTY, CALIFORNIA

1. The authority citation for 7 CFR part 987 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Revise § 987.23 to read as follows:

§ 987.23 Term of office.

The term of office for members and alternate members shall be three years beginning August 1, except that such term may be shorter if the Committee composition is changed in the interim pursuant to § 987.21. *Provided,* That the terms of office of all members and alternates currently serving at the time of the amendment will end on July 31, 2014. Commencing with the term of office that begins on August 1, 2014, members may serve up to two consecutive three-year terms, not to exceed six consecutive years as members: *Provided,* That members who were serving at the time of the amendment and who continued to serve until 2014 may serve only one additional three-year term of office. Members who have served two consecutive terms or six years may not serve as members for at least one year before becoming eligible to serve again. Except as provided above, the limitation on consecutive terms of office and years of service does not apply to service on the committee prior to enactment of the amendment, and does not apply to alternates. Each member and alternate member shall, unless otherwise ordered by the Secretary, continue to serve until his or her successor has been selected and has qualified.

3. Revise paragraph (a) of § 987.24 to read as follows:

§ 987.24 Nomination and selection.

(a) Nomination for members and alternate members of the Committee shall be made not later than June 15 of every third year.

* * * * *

4. Amend § 987.31 by revising paragraphs (d) and (e) to read as follows:

§ 987.31 [Amended]

* * * * *

(d) At the discretion of the chairperson, Committee meetings may be assembled or conducted by means of teleconference, video conference, or other means of communication that may be developed. Assembled meetings may also allow for participation by means of teleconference or video conference or other communication methods, at the discretion of the chair. Members participating in meetings via any of these alternative means retain the same voting privileges that they would otherwise have.

(e) The Committee may vote upon any proposition by mail, or by telephone when confirmed in writing within two weeks, upon due notice and full and identical explanation to all members, including alternates acting as members, but any such action shall not be

[1] This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

considered valid unless unanimously approved.

* * * * *

5. Amend § 987.52 by designating the existing text as paragraph (a) and by adding a new paragraph (b) to read as follows:

§ 987.52 [Amended]

(a) * * *

(b) The Committee may, with the approval of the Secretary, recommend that the handling of any date variety be exempted from regulations established pursuant to §§ 987.39 through 987.51 and §§ 987.61 through 987.72.

6. Amend § 987.72 by redesignating paragraphs (b) through (d) as paragraphs (c) through (e), respectively; by adding a new paragraph (b); and by revising redesignated paragraph (d) to read as follows:

§ 987.72 [Amended]

* * * * *

(b) *Delinquent payments.* Any assessment not paid by a handler within a period of time prescribed by the Committee may be subject to an interest or late payment charge, or both. The period of time, rate of interest, and late payment charge shall be as recommended by the Committee and approved by the Secretary.

(c) * * *

(d) *Operating reserve.* The Committee, with the approval of the Secretary, may establish and maintain during one or more crop years an operating monetary reserve in an amount not to exceed the average of one year's expenses incurred during the most recent five preceding crop years, except that an established reserve need not be reduced to conform to any recomputed average. Funds in reserve shall be available for use by the Committee for expenses authorized pursuant to § 987.71.

* * * * *

7. Amend § 987.82 by revising paragraph (b)(2), redesignating paragraph (b)(3) as paragraph (b)(4), and adding a new paragraph (b)(3) to read as follows:

§ 987.82 [Amended]

* * * * *

(b) * * *

(2) *When favored by producers.* The Secretary shall terminate the provisions of this part at the end of any crop year whenever he or she finds that such termination is favored by a majority of the producers of dates who, during that crop year, have been engaged in the production for market of dates in the area of production: *Provided,* That such majority have, during such period, produced for market more than 50 percent of the volume of such dates produced for market within said area; but such termination shall be effective only if announced on or before August 1 of the then current crop year.

(3) *Continuance referendum.* The Secretary shall conduct a referendum six years after the effective date of this section and every sixth year thereafter to ascertain whether continuance of this part is favored by producers. The Secretary may terminate the provisions of this part at the end of any crop year in which he or she has found that continuance of this part is not favored by producers who, during a representative period determined by the Secretary, have been engaged in the production for market of dates in the production area.

* * * * *

8. Revise § 987.124(a) to read as follows:

§ 987.124 Nomination and polling.

(a) Date producers and producer-handlers shall be provided an opportunity to nominate and vote for individuals to serve on the Committee. For this purpose, the Committee shall, no later than June 15 of every third year, provide date producers and producer-handlers nomination and balloting material by mail or equivalent electronic means, upon which producers and producer-handlers may nominate candidates and cast their votes for members and alternate members of the Committee in accordance with the requirements in paragraphs (b)(1) and (b)(2) of this section, respectively. All ballots are subject to verification. Balloting material should be provided to voters at least two weeks before the due date and should contain, at least, the following information:

(1) The names of incumbents who are willing and eligible to continue to serve on the Committee;

(2) The names of other persons willing and eligible to serve;

(3) Instructions on how voters may add write-in candidates;

(4) The date on which the ballot is due to the Committee or its agent; and

(5) How and where to return ballots.

[FR Doc. 2011–29032 Filed 11–8–11; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1168; Directorate Identifier 2010–NM–239–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 767–200 and –300 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all The Boeing Company Model 767–200 and –300 series airplanes. This proposed AD was prompted by reports of cracks in the inner chords at both left-side and right-side stations 859.5, 883.5, and 903.5. This proposed AD would require repetitive inspections of the frame inner chord transition radius for cracks, and related investigative and corrective actions if necessary. We are proposing this AD to prevent large cracks in the frames and adjacent structure that can adversely affect the structural integrity of the airplane.

DATES: We must receive comments on this proposed AD by December 27, 2011.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone (206) 544–5000, extension 1; fax (206) 766–5680; email *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of

this material at the FAA, call (425) 227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Berhane Alazar, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: (425) 917–6577; fax: (425) 917–6590; email: *Berhane.Alazar@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–1168; Directorate Identifier 2010–NM–239–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We have received reports of cracks in the inner chords at both left-side and right-side stations 859.5, 883.5, and 903.5. The reports indicate crack lengths that range from 0.10 inch up to 1.8 inches that originate from the inner chord transition radius. In some cases, the crack has intersected adjacent fastener holes. Analysis has determined the cause of the cracks in the frame inner chords to be a stress concentration at the transition radius. Cracks in the frame inner chord transition radius can propagate and intersect fastener holes in the frame chord. These cracks can propagate further into the frame structure and adjacent structure and become large enough to adversely affect the structural integrity of the airplane.

Relevant Service Information

We reviewed Boeing Service Bulletin 767–53A0209, Revision 1, dated July 27, 2011. This service information describes procedures for repetitive detailed inspections or surface high frequency eddy current (HFEC) inspections of the frame inner chord transition radius for cracks at stations 859.5, 883.5, and 903.5, as applicable, left and right buttock line 89, below water line 200; and related investigative and corrective actions, if necessary.

Related investigative actions include a detailed inspection for filler(s) between the frame and stub-beam, and measuring for filler thickness if necessary; and an open hole HFEC inspection for cracks in the frame inner chord, failsafe chord, frame web, doubler (if necessary), and stub-beam, if necessary.

Corrective actions include contacting Boeing for repair instructions; repairing; and oversizing the holes, and trimming out the inner chord transition radius crack and installing a 1-to-2 hole repair angle; if necessary.

The compliance time for the initial inspection is either 11,000 total flight cycles or 2,400 flight cycles after the date on the service bulletin (whichever occurs later); or 14,000 total flight cycles or 3,000 flight cycles after the date on the service bulletin (whichever occurs later); depending on airplane configuration. The repetitive inspection interval ranges between 2,400 and 6,000 flight cycles, depending on the inspection type.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and the Service Information.''

The post-repair inspections specified in Tables 2, 4, 6, and 8 of paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 767–53A0209, Revision 1, dated July 27, 2011, are not required by this proposed AD.

Differences Between the Proposed AD and the Service Information

Boeing Service Bulletin 767–53A0209, Revision 1, dated July 27, 2011, specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Costs of Compliance

We estimate that this proposed AD will affect 325 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Detailed or HFEC inspection	23 or 26 work-hours × $85 per hour = $1,955 or $2,210 per inspection cycle.	$0	$1,955 or $2,210 per inspection cycle.	Up to $718,250 per inspection cycle.

We estimate the following costs to do any necessary repairs that would be required based on the results of the proposed inspection. We have no way of determining the number of aircraft that might need these repairs.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Repair	24 work-hours × $85 per hour = $2,040.	$383 to $8,327 per frame	$2,423 to $10,367 per frame.
On-condition detailed and HFEC inspections and measurement.	7 work-hours × $85 per hour = $595 per frame.	$0	$595.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

(3) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

The Boeing Company: Docket No. FAA–2011–1168; Directorate Identifier 2010–NM–239–AD.

(a) Comments Due Date

We must receive comments by December 27, 2011.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 767–200 and –300 series airplanes, certificated in any category, as identified in Boeing Service Bulletin 767–53A0209, Revision 1, dated July 27, 2011.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 53: Fuselage.

(e) Unsafe Condition

This AD was prompted by reports of cracks in the inner chords at both left-side and right-side stations 859.5, 883.5, and 903.5. We are issuing this AD to prevent large cracks in the frames and adjacent structure that can adversely affect the structural integrity of the airplane.

(f) Compliance

Comply with this AD within the compliance times specified, unless already done.

(g) Repetitive Inspections, Related Investigative Actions, and Corrective Actions

Except as required by paragraph (h)(2) of this AD, at the times specified in paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 767–53A0209, Revision 1, dated July 27, 2011: Perform a detailed inspection or a surface high frequency eddy current (HFEC) inspection for cracking in the frame inner chord transition radius at stations 859.5, 883.5, and 903.5, as applicable, left buttock line and right buttock line 89, below water line 200; and do all applicable related investigative and corrective actions; in accordance with the Accomplishment Instructions of Boeing Service Bulletin 767–53A0209, Revision 1, dated July 27, 2011; except as required by paragraph (h)(1) of this AD. Do all applicable related investigative and corrective actions before further flight. If no cracking is found, repeat the inspections thereafter at the applicable interval specified in paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 767–53A0209, Revision 1, dated July 27, 2011.

Note 1: The post-repair inspections specified in Tables 2, 4, 6, and 8 of paragraph 1.E., ''Compliance,'' of Boeing Service Bulletin 767–53A0209, Revision 1, dated July 27, 2011, may be used in support of compliance with Section 121.1109(c)(2) or 129.109(c)(2) of the Federal Aviation Regulations (14 CFR 121.1109(c)(2) or 14 CFR 129.109(c)(2)).

(h) Exceptions to the Service Information

(1) If any cracking is found during any inspection required by this AD, and Boeing Service Bulletin 767–53A0209, Revision 1, dated July 27, 2011, specifies to contact Boeing for appropriate action: Before further flight, repair the cracking using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(2) Where Boeing Service Bulletin 767–53A0209, Revision 1, dated July 27, 2011, specifies a compliance time after the date on the service bulletin, this AD requires compliance within the specified compliance time after the effective date of this AD.

(i) No Reporting Required

Although Boeing Service Bulletin 767–53A0209, Revision 1, dated July 27, 2011, specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector,

or lacking a principal inspector, the manager of the local flight standards district office/ certificate holding district office.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane and 14 CFR 25.571, Amendment 45, and the approval must specifically refer to this AD.

(k) Related Information

(l) For more information about this AD, contact Berhane Alazar, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, ACO, 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: (425) 917–6577; fax: (425) 917–6590; email: *Berhane.Alazar@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone (206) 544–5000, extension 1; fax (206) 766–5680; email *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call (425) 227–1221.

Issued in Renton, Washington, on October 21, 2011.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–28759 Filed 11–8–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Part 101

[Docket No. USCBP–2011–0031]

Modification of the Port Limits of Green Bay, WI

AGENCY: U.S. Customs and Border Protection; Department of Homeland Security.

ACTION: Notice of proposed rulemaking.

SUMMARY: U.S. Customs and Border Protection (CBP) is proposing to extend the geographic limits of the port of Green Bay, Wisconsin, to update and change the description of the port boundaries to refer to identifiable roadways and waterways rather than townships and to include the entire Austin Straubel Airport. Due to an error, a portion of the airport is located outside the current port limits. The change is part of CBP's continuing program to more efficiently utilize its personnel, facilities, and resources, and to provide better service to carriers, importers, and the general public.

DATES: Comments must be received on or before January 9, 2012.

ADDRESSES: You may submit comments, identified by docket number USCBP–2011–0031, by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Border Security Regulations Branch, Regulations and Rulings, Office of International Trade, Customs and Border Protection, 799 9th Street NW., 5th Floor, Washington, DC 20229–1179.

Instructions: All submissions received must include the agency name and docket title for this rulemaking, and must reference docket number USCBP–2011–0031. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Office of International Trade, Customs and Border Protection, 799 9th Street NW., 5th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 325–0118.

FOR FURTHER INFORMATION CONTACT: Robert Neustadt, Office of Field Operations, (312) 983–1201 (not a toll-free number) or by email at *Robert.Neustadt@dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Public Participation

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

II. Background and Purpose

CBP ports of entry are locations where CBP officers and employees are assigned to accept entries of merchandise, clear passengers, collect duties, and enforce the various provisions of customs, immigration, agriculture and related U.S. laws at the border. The term ''port of entry'' is used in the code of Federal Regulations (CFR) in title 8 for immigration purposes and in title 19 for customs purposes. For customs purposes, CBP regulations list designated CBP ports of entry and the limits of each port in section 101.3(b)(1) of title 19 (19 CFR 101.3(b)(1)).

For immigration purposes, CBP regulations list ports of entry for aliens arriving by vessel and land transportation in section 100.4(a) of title 8 (8 CFR 100.4(a)). These ports are listed according to location by districts and are designated as Class A, B, or C. Green Bay, Wisconsin, is included in this list in District No. 9, as a Class A port of entry, meaning a port that is designated as a port of entry for all aliens arriving by vessel and land transportation.

As part of its continuing efforts to provide better service to carriers, importers, and the general public, CBP, of the Department of Homeland Security (DHS), is proposing to extend the port boundaries for the port of entry at Green Bay, Wisconsin.

The port of entry originally consisted of only the corporate limits of Green Bay, Wisconsin. Treasury Decision (T.D) 54597, May 27, 1958, expanded the port limits to also include several townships and the city of De Pere, all in the State of Wisconsin. Specifically, the current port limits of the Green Bay port of entry include the corporate limits of Green Bay, Wisconsin, and the territory within the townships of Ashwaubenon, Allouez, Preble and Howard and the city of De Pere, all in the State of Wisconsin. CBP is proposing to change the port limits because the boundaries of the listed townships are not easy to locate, one of the townships identified in T.D. 54597 (Preble) no longer exists, and due to an error, a portion of the Austin Straubel Airport is located outside the current port limits.

In order to eliminate the discrepancy of the nonexistent township, to make the boundaries more easily identifiable to the public, and to correct the omission of a portion of the airport, CBP is proposing to amend 19 CFR 101.3(b)(1) to expand and revise the port boundaries. The proposed boundaries

would include all the territory located within the current port limits as well as the entire Austin Straubel Airport. In addition, for ease of identification, the proposed boundaries would be identified by reference to specific roadways and waterways rather than by townships. CBP has determined that this proposed change would not result in a change in the service that is provided to the public by the port, nor require a change in the staffing or workload at the port.

III. Current Port Limits of Green Bay, Wisconsin

The current port limits of the Green Bay port of entry are described by the corporate limits of Green Bay, Wisconsin, and the territory within the townships of Ashwaubenon, Allouez, Preble and Howard and the city of De Pere, all in the State of Wisconsin. We have included a map of the current port limits in the docket as ''Attachment A: Green Bay (Current).''

IV. Proposed Port Limits of Green Bay, Wisconsin

The new port limits of Green Bay, Wisconsin, are proposed as follows:

Beginning at the point in the Sensiba State Wildlife Area where Lineville Rd. meets the shore of Lake Michigan, proceeding west on Lineville Rd. to the intersection with Westline Rd.; then south on Westline Rd. to the intersection with Glendale Ave.; then west on Glendale Ave. to the intersection with County Line Rd. (Country Route U); then south on County Line Rd. to the intersection with Wisconsin State Route 29/32; then southeast on Route 29/32 to the intersection with Riverdale Dr. (County Route J); then southwest on Riverdale Dr. to the intersection with Hillcrest Dr.; then south on Hillcrest Dr. to the intersection with W Mason St. (State Route 54); then southwest on W Mason St. to the intersection with S Pine Tree Rd.; then south on S Pine Tree Rd. to the intersection with Orlando Dr.; then east on Orlando Dr. (which turns into Grant St.) to the intersection with 3rd St.; then north on 3rd St. to Main St. (State Route 32); then east on Main St. across the Fox River onto George St.; then east on George St. to the intersection with S Webster Ave.; then southwest on S Webster Ave. to Chicago St. (County Route G); then southeast on Chicago St. to the intersection with Monroe Rd. (County Route GV); then northeast on Monroe Rd. to the intersection with State Route 172; then east on State Route 172 to the intersection with Interstate 43; then northeast on I–43 to the intersection with Manitowoc Rd.; then southeast on Manitowoc Rd. to the intersection with Eaton Rd. (County Route JJ), then east on Eaton Rd. to the intersection with S Vandenberg Rd. (County Route OO/QQ); then north on S Vandenberg Rd. to the intersection with Humboldt Rd., then northwest on Humboldt Rd. to the intersection with N Northview Rd.; then north on N Northview Rd. to the intersection with Luxemburg Rd.; then west on Luxemburg Rd. to the intersection with Spartan Rd.; then north on Spartan Rd. to the intersection with State Route 54/57; then northeast and north on Route 57 to the intersection with Van Lanen Rd.; then west on Van Lanen to the point where Van Lanen Rd. meets the shore of Lake Michigan. We have included a map of these proposed port limits in the docket as ''Attachment B: Green Bay (Proposed).''

V. Regulatory Requirements

A. Signing Authority

The signing authority for this document falls under 19 CFR 0.2(a). Accordingly, the notice of proposed rulemaking may be signed by the Secretary of Homeland Security (or her delegate).

B. Executive Order 12866: Regulatory Planning and Review

This proposed rule is not considered to be a ''significant regulatory action'' under section 3(f) of Executive Order 12866, as supplemented by Executive Order 13563. Accordingly, this proposed rule has not been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. The proposed change is intended to expand the geographical boundaries of the Port of Green Bay, Wisconsin, and make it more easily identifiable to the public. There are no new costs to the public associated with this rule.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires Federal agencies to examine the impact a rule would have on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act), a small not-for-profit organization, or a small governmental jurisdiction (locality with fewer than 50,000 people).

This proposed rule does not directly regulate small entities. The proposed change is part of CBP's continuing program to more efficiently utilize its personnel, facilities, and resources, and to provide better service to carriers, importers, and the general public. To the extent that all entities are able to more efficiently or conveniently access the facilities and resources within the proposed expanded geographical area of the new port limits, this proposed rule, if finalized, should confer benefits to CBP, carriers, importers, and the general public.

Because this rule does not directly regulate small entities, we do not believe that this rule has a significant economic impact on a substantial number of small entities. However, we welcome comments on that assumption. The most helpful comments are those that can give us specific information or examples of a direct impact on small entities. If we do not receive comments that demonstrate that the rule causes small entities to incur direct costs, we may certify that this action does not have a significant economic impact on a substantial number of small entities during the final rule.

D. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

E. Executive Order 13132

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

F. Authority

This change is proposed under the authority of 5 U.S.C. 301, 6 U.S.C. 112, 203 and 211, 8 U.S.C. 1103 and 19 U.S.C. 2, 66 and 1624.

VI. Proposed Amendment to Regulations

If the proposed port limits for Green Bay, Wisconsin, are adopted, CBP will amend 19 CFR 101.3(b)(1) as necessary to reflect the new port limits.

Dated: November 4, 2011.

Janet Napolitano,

Secretary of Homeland Security.

[FR Doc. 2011–29028 Filed 11–8–11; 8:45 am]

BILLING CODE 9111–14–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2011–0082; FRL–9325–1]

Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of filing of petitions and request for comment.

SUMMARY: This document announces the Agency's receipt of several initial filings of pesticide petitions requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before December 9, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) of interest as shown in the body of this document, 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 number and the pesticide petition number of interest as shown in the body of this document. 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 email. 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 email comment directly to EPA without going through regulations.gov, your email 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: A contact person, with telephone number and email address, is listed at the end of each pesticide petition summary. You may also reach each contact person by mail at Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

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 at the end of the pesticide petition summary of interest.

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 email. 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 pesticides discussed in this document, compared to the general population.

II. What action is the agency taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, requesting the establishment or modification of regulations in 40 CFR part 174 or part 180 for residues of pesticide chemicals in or on various food commodities. The Agency is taking public comment on the requests before responding to the petitioners. EPA is not proposing any particular action at this time. EPA has determined that the pesticide petitions described in this document contain the data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. After considering the public comments, EPA intends to evaluate whether and what action may be warranted. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this document, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available on-line at *http://www.regulations.gov.*

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

New Tolerances

1. *PP 1E7908.* (EPA–HQ–OPP–2011–0759). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to establish tolerances in 40 CFR part 180 for residues of the insecticide buprofezin, in or on bean, succulent at 0.02 parts per million (ppm); *Brassica,* leafy greens, subgroup 5B at 55 ppm; turnip, greens at 55 ppm; vegetable, fruiting, group 8–10 at 3.0 ppm; fruit, citrus, group 10–10 at 2.5 ppm; fruit, pome, group 11–10 at 4.0 ppm; persimmon at 1.9 ppm; and tea at 20 ppm. This summary has been prepared by Nichino America, Inc., 4550 New Linden Hill Road, Suite 501, Wilmington, DE 91808, the registrant. The proposed analytical method involves extraction, partition, clean-up and detection of residues by gas chromatography using nitrogen phosphorous detection (GC/NPD). Contact: Andrew Ertman, (703) 308–9367, email address: *ertman.andrew@epa.gov.*

2. *PP 1E7919.* (EPA–HQ–OPP–2011–0792). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to establish tolerances in 40 CFR part 180 for residues of the insecticide acetamiprid, *N* 1-[(6-chloro-3-pyridyl)methyl]- *N* 2-cyano- *N* 1-methylacetamidine, in or on asparagus at 0.8 ppm; *Brassica,* leafy greens, subgroup 5B at 15 ppm; turnip greens at 15 ppm; corn, sweet, kernel plus cob with husks removed at 0.01 ppm; corn, sweet, forage at 10 ppm; corn, sweet, stover at 30 ppm; vegetable, fruiting, group 8–10 at 0.20 ppm; fruit, citrus, group 10–10 at 0.50 ppm; fruit, pome, group 11–10 at 1.0 ppm; and *Brassica,* head and stem, subgroup 5A at 1.20 ppm. Based upon the metabolism of acetamiprid in plants and the toxicology of the parent and metabolites, quantification of the parent acetamiprid is sufficient to determine toxic residues. As a result a method was developed that involves extraction of acetamiprid from crop matrices with a solvent followed by a decantation and filtration and finally analysis by a liquid chromatography with tandem mass spectrometry (LC/MS/MS) method. Contact: Laura Nollen, (703) 305–7390, email address: *nollen.laura@epa.gov.*

3. *PP* 1E7911. (EPA–HQ–OPP–2011–0780). Summit Agro North America Holding Corporation, 600 Third Avenue, New York, NY 10016–2001, c/o Landis International, Inc., P.O. Box 5126, Valdosta, GA 31603–5126, requests to establish tolerances in 40 CFR part 180 for residues of the fungicide triforine, piperazine-1,4-diylbis(2,2,2-trichloroethane-1,1-diyl)diformamide in or on blueberry at 0.02 ppm; and tomato at 0.5 ppm. Adequate analytical enforcement methods are available to enforce the proposed tolerances. Triforine was extracted from blueberries, tomato and tomato paste with acetone. The final samples were analyzed by LC/MS/MS for quantitation of triforine. Contact: Heather Garvie, (703) 308–0034, email address: *garvie.heather@epa.gov.*

4. *PP* 1F7891. (EPA–HQ–OPP–2011–0717). Syngenta Crop Protection, LLC., P.O. Box 18300, Greensboro, NC 27419–8300, requests to establish a tolerance in 40 CFR part 180 for residues of the fungicide azoxystrobin, (methyl (*E*)-2-[2-[6-(2-yanophenoxy) pyrimidin-4-yloxy]phenyl]-3-methoxyacrylate) and the *Z*-isomer of azoxystrobin, (methyl (*Z*)-2-[2-[6-(2- cyanophenoxy)pyrimidin-4-yloxy]pheny1]-3-methoxyacrylate), in or on sugarcane at 0.2 ppm. An adequate analytical method, GC/NPD or in mobile phase by high performance liquid chromatography with ultra-violet detection (HPLC/UV), is available for enforcement purposes with a limit of detection that allows monitoring of food with residues at or above the levels set in these tolerances. Contact: Shaunta Hill, (703) 347–8961, email address: *hill.shaunta@epa.gov.*

5. *PP* 1F7892. (EPA–HQ–OPP–2011–0772). Syngenta Crop Protection, LLC., P.O. Box 18300, Greensboro, NC 27419–8300, requests to establish a tolerance in 40 CFR part 180 for residues of the fungicide propiconazole, 1*H*-1,2,4-Triazole, 1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-, and its metabolites determined as 2,4-dichlorobenzoic acid and expressed as parent compound, in or on sugarcane at 1.0 ppm. Analytical methods adequate to determine parent propiconazole, total propiconazole as 2,4-dichlorobenzoic acid, and the triazole metabolites (1,2,4-Triazole, Triazole Alanine, and Triazole Acetic Acid) are available for enforcement purposes with limits of detection that allow monitoring of food with residues at or above the levels set

in this tolerance. Contact: Erin Malone, (703) 347–0253, email address: *malone.erin@epa.gov.*

6. *PP 1F7905.* (EPA–HQ–OPP–2011–0759). Nichino America, Inc., 4550 New Linden Hill Road, Suite 501, Wilmington, DE 91808, requests to establish a tolerance in 40 CFR part 180 for residues of the insecticide buprofezin, in or on nut, tree group 14 (including pistachios) at 0.05 ppm. The proposed analytical method involves extraction, partition, clean-up and detection of residues by LC/MS/MS. Contact: Samantha Hulkower, (703) 603–0683, email address: *hulkower.samantha@epa.gov.*

Amended Tolerances

1. *PP 1E7908.* (EPA–HQ–OPP–2011–0759). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to remove the existing tolerances in 40 CFR 180.511 for residues of the insecticide buprofezin, in or on non-bell pepper; fruiting vegetable group 8, except non-bell pepper; fruit, citrus, group 10; and fruit, pome, group 11 which will now be covered by the newly requested tolerances under ''New Tolerances''. This summary has been prepared by Nichino America, Inc., Wilmington, DE 19808, the registrant. Contact: Andrew Ertman, (703) 308–9367, email address: *ertman.andrew@epa.gov.*

2. *PP* 1E7919. (EPA–HQ–OPP–2011–0792). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests upon approval of the aforementioned tolerances under ''New Tolerances'', to remove the established tolerances in 40 CFR 180.578 for residues of the insecticide acetamiprid, *N* 1-[(6-chloro-3-pyridyl)methyl]- *N* 2-cyano- *N* 1-methylacetamidine, in or on fruit, citrus, group 10 at 0.50 ppm; fruit, pome, group 11 at 1.0 ppm; vegetable, fruiting, group 8 at 0.20 ppm; and vegetable, *Brassica,* leafy, group 5 at 1.20 ppm. The fruit, citrus, group 10; fruit, pome, group 11; and vegetable, fruiting, group 8 tolerances will be superseded by the updated crop group tolerances. The vegetable, *Brassica,* leafy group 5 tolerance will be superseded by the *Brassica,* leafy greens, subgroup 5B and *Brassica,* head and stem, subgroup 5A tolerances. Contact: Laura Nollen, (703) 305–7390, email address: *nollen.laura@epa.gov.*

New Tolerance Exemption

PP 1E7918. (EPA–HQ–OPP–2011–0829). United Phosphorus, Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406, requests to establish an exemption from the requirement of a tolerance in 40 CFR 180.1195 for residues of titanium dioxide (CAS No. 13463–67–7) in or on growing crops when used as a pesticide inert ingredient ultraviolet (UV) protectant in herbicide formulations at no more than 5 percent by weight of the formulation. The petition proposes to establish exemptions from the requirement of a tolerance and no analytical method is generally required for the establishment of a tolerance exemption. Contact: David Lieu, (703) 305–0079, email address: *lieu.david@epa.gov.*

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 18, 2011.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2011–28647 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0703; FRL–9325–3]

Withdrawal of a Pesticide Petition for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of withdrawal of a pesticide petition.

SUMMARY: This document announces the withdrawal of a pesticide petition requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities. The petition was either withdrawn voluntarily by the petitioner or administratively by the Agency.

FOR FURTHER INFORMATION CONTACT: Deirdre Sunderland, Registration Division (7505P), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 603–0851; fax number: (703) 305–0599; email address: *sunderland.deirdre@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Although this action only applies to the registrant in question, it is directed to the public in general. Since various individuals or entities may be interested, the Agency has not attempted to describe all the specific entities that may be interested in this action. If you have any questions regarding this action, please consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How can I get copies of this document and other related information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0703. 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 Office of Pesticide Programs (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.

II. What action is the agency taking?

EPA is announcing the withdrawal of a pesticide petition received under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, requesting the establishment or modification of regulations in 40 CFR part 174 or part 180 for residues of pesticide chemicals in or on various food commodities.

Pursuant to 40 CFR 180.7(f), a summary of the petition covered by this document, prepared by the petitioner, was included in a docket EPA created for each rulemaking. The docket for the petition is available on-line at *http://www.regulations.gov.*

EPA issued a notice in the **Federal Register** of September 23, 2010 (75 FR 57942) (FRL–8845–4), which announced the submission of a pesticide petition (PP 0E7727) by Interregional Research Project Number 4 (IR–4), on behalf of Koppert Biological Systems, Inc., 28465 Beverly Rd., Romulus, MI 48174. The petition proposed to amend 40 CFR 180.920 by establishing an exemption from the requirement of a tolerance for residues of lactoperoxidase (CAS No. 9003–99–0) in or on all raw agricultural commodities when used pre-harvest as a pesticide inert ingredient in pesticide formulations of the active ingredients potassium iodide and potassium thiocyanate. On September 9, 2011, IR–4, on behalf of Koppert Biological Systems, Inc., notified EPA that it was withdrawing this petition.

List of Subjects in 40 CFR Part 180

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 24, 2011.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2011–28934 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2006–0766; FRL–8887–8]

Tolerance Crop Grouping Program III

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing revisions to its pesticide tolerance crop grouping regulations, which allow the establishment of tolerances for multiple, related crops based on data from a representative set of crops. The present revisions would expand existing crop groups for stone fruits and tree nuts by establishing new crop subgroups and/or adding new commodities. EPA expects these revisions to promote greater use of crop groupings for tolerance-setting purposes and, in particular, to assist in making available lower risk pesticides for minor crops, both domestically and in countries that export food to the United States. This is the third in a series of planned crop group updates expected to be proposed over the next several years.

DATES: Comments must be received on or before January 9, 2012.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2006–0766, 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–2006–0766. 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 email. 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 email comment directly to EPA without going through regulations.gov, your email 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: Laura Nollen, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–7390; email address: *nollen.laura@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 or food manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111), *e.g.,* agricultural workers; greenhouse, nursery, and floriculture workers; farmers.
- Animal production (NAICS code 112), *e.g.,* cattle ranchers and farmers, dairy cattle farmers, livestock farmers.
- Food manufacturing (NAICS code 311), *e.g.,* agricultural workers; farmers; greenhouse, nursery, and floriculture workers; ranchers; pesticide applicators.
- Pesticide manufacturing (NAICS code 32532), *e.g.,* agricultural workers; commercial applicators; farmers; greenhouse, nursery, and floriculture workers; residential users.

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 email. 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. Background

A. Tolerance-Setting Requirements and Petitions To Expand the Existing Crop Grouping System

EPA is authorized to establish maximum residue limits or tolerances for pesticide chemical residues in or on food commodities under section 408 of the Federal Food, Drug and Cosmetic Act (FFDCA) (21 U.S.C. 346a). EPA establishes pesticide tolerances only after determining that aggregate exposure to the pesticide is considered safe. The U.S. Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA) enforce compliance with tolerance limits.

Traditionally, tolerances are established for a specific pesticide and commodity combination. However, under EPA's crop grouping regulations (40 CFR 180.41), a single tolerance may be established that applies to a group of related commodities. For example, the current Stone Fruit Crop Group 12 includes 11 stone fruit commodities, including cherry, peach, and plum. The proposed Stone Fruit Crop Group 12–11 expands on the existing crop group and will include 22 commodities, if adopted. Crop group tolerances may be established based on residue data from designated representative commodities within the group. Representative commodities are selected based on EPA's determination that they are likely to bear the maximum level of residue that could occur on any crop within the group. Once a crop group tolerance is established, the tolerance level applies to all commodities within the group.

This proposed rule is the third in a series of planned crop group amendments expected to be completed over the next several years. Specific information regarding the history of the crop group regulations, the previous amendments to the regulations and the process for amending crop groups can be found in the **Federal Register** of May 23, 2007 (72 FR 28920) (FRL–8126–1). Specific information regarding how the Agency implements crop group amendments can be found in 40 CFR 180.40(j).

Today's proposal is based upon two petitions developed by the International Crop Grouping Consulting Committee (ICGCC) workgroup and submitted to EPA by a nation-wide cooperative project, the Interregional Research Project Number 4 (IR–4). These petitions and the monographs supporting them have been included in the docket for the proposed rule. EPA expects that a series of additional petitions seeking amendments and changes to the crop grouping regulations (40 CFR 180.41) will originate from the ICGCC workgroup over the next several years.

EPA believes that this proposal is a burden-reducing regulation. It will provide for greater sharing of data by permitting the results from a magnitude of residue field trial studies in one crop to be applied to other, similar crops. The primary beneficiaries are minor crop producers and consumers. Minor crop producers will benefit because lower registration costs will encourage more products to be registered for use on minor crops, providing additional tools for pest control. Consumers are expected to benefit by having more affordable and abundant food products available. Secondary beneficiaries include pesticide registrants, as expanded markets for pesticide products will lead to increased sales.

EPA believes that data from representative crops will not underestimate the public exposure to pesticide residues through the consumption of treated crops. IR–4, which is publicly funded, will also more efficiently use resources as a result of this rule. Revisions to the crop grouping scheme will result in no appreciable costs or negative impacts to consumers, minor crop producers, pesticide registrants, the environment, or human health.

B. International Considerations

1. *North American Free Trade Agreement (NAFTA) partner involvement in proposal.* EPA's Chemistry Science Advisory Council (ChemSAC), an internal Agency peer review committee, provided a detailed analysis for each proposed crop group to Canada's Pest Management Regulatory Agency (PMRA), IR–4, and the government of Mexico for their review and comment, and invited these parties to participate in the ChemSAC meeting to finalize the recommendations for each petition.

PMRA has indicated that it will, in parallel with the United States effort and under the authority of Canada's Pest Control Products (PCP) Act (2002), establish equivalent crop groups. Additionally, once the new crop groups become effective in the United States, Mexico will have them as a reference for the establishment of maximum residue limits in Mexico.

2. *Relationship of proposal to Codex activities.* The American and Canadian Delegations to the Codex Committee on Pesticide Residues (CCPR) have an ongoing effort to harmonize the NAFTA crop groups and representative commodities with those being developed by Codex, an international commission created to develop international food standards, guidelines and related texts, as part of their revision of the *Codex Classification of Foods and Feeds.* Canada and the United States are working closely with the Chairs of the Codex group for this project (Netherlands and the United States) to coordinate the U. S. crop group amendments with the efforts to amend the Codex crop groups. The goals of coordinating these NAFTA activities with Codex activities are to minimize differences within and among the U. S. and Codex groups and to develop representative commodities for each group that will be acceptable on an international basis. These efforts could lead to the increased harmonization of tolerances and maximum residue level recommendations.

C. Scheme for Organization of Revised and Pre-Existing Crop Groups

EPA has amended the generic crop group regulations to include an explicit scheme for how revised crop groups will be organized in the regulations.

In brief, the regulations now specify that when a crop group is amended in a manner that expands or contracts its coverage of commodities, EPA will (1) Retain the pre-existing crop group in

§ 180.41; (2) insert the new, related crop group immediately after the pre-existing crop group in the CFR; and (3) title the new, related crop group in a way that clearly differentiates it from the pre-existing crop group. The new, related crop group will retain roughly the same name and number as the pre-existing group except that the number will be followed by a hyphen and the final two digits of the year it is established. For example, EPA is proposing to revise crop group 12: Stone Fruit Group. The revised group will be titled Crop Group 12–11: Stone Fruit Group. Although EPA will initially retain pre-existing crop groups that have been superseded by new crop groups, EPA will not establish new tolerances under the pre-existing groups. Further, EPA plans to eventually convert tolerances for any pre-existing crop groups to tolerances with the coverage of the new crop group. This conversion will be effected both through the registration review process and in the course of establishing new tolerances for a pesticide. To this end, EPA requests that petitioners for tolerances address this issue in their petitions.

For example, assuming EPA adopts the proposed amendment that would create Crop Group 14–11: Tree Nut Group, any tolerance petition for a pesticide that has a Group 14 tolerance should include a request that the Group 14 tolerance be superseded by a Group 14–11 tolerance, since the representative commodities are equivalent. When all crop group tolerances for a superseded crop group have been revised or removed, EPA will remove the superseded group from § 180.41.

III. Specific Proposed Revisions

This Unit explains the proposed amendments to the crop group regulations.

A. Crop Group 12–11: Stone Fruit Group

EPA is proposing to revise Stone Fruit Crop Group 12 in the following manner.

1. *Add commodities.* EPA proposes to amend existing Crop Group 12 by expanding it from 11 to 22 commodities. The existing Crop Group 12 contains the following 11 commodities:

- Apricot, *Prunus armeniaca;*
- Cherry, sweet, *Prunus avium;*
- Cherry, tart, *Prunus cerasus;*
- Nectarine, *Prunus persica;*
- Peach, *Prunus persica;*
- Plum, *Prunus domestica, Prunus* spp.;
- Plum, Chickasaw, *Prunus angustifolia;*
- Plum, Damson, *Prunus domestica* spp. *insititia;*
- Plum, Japanese, *Prunus salicina;*
- Plumcot, *Prunus armeniaca* x *P. domestica;*
- Prune (fresh), *Prunus domestica, Prunus* spp.

EPA proposes to expand Crop Group 12 by adding the following 11 additional commodities to the commodities already included in Crop Group 12 and naming the new crop grouping as Crop Group 12–11:

- Apricot, Japanese, *Prunus mume* Siebold & Zucc.;
- Capulin, *Prunus serotina* Ehrh. subsp. *capuli* (Cav.) McVaugh;
- Cherry, black, *Prunus serotina* Ehrh. subsp. *Serotina;*
- Cherry, Nanking, *Prunus tomentosa* Thunb.;
- Chokecherry, *Prunus virginiana* L.;
- Plum, American, *Prunus americana* Marshall;
- Plum, beach, *Prunus maritima* Marshall;
- Plum, Canada, *Prunus nigra* Aiton;
- Plum, cherry, *Prunus cerasifera* Ehrh.;
- Plum, Klamath, *Prunus subcordata* Benth.;
- Sloe, *Prunus spinosa* L.;

Including cultivars, varieties, and/or hybrids of these.

The additional commodities proposed for Stone Fruit Crop Group 12–11 were chosen based on similarities and characteristics of the *Rosaceae* family, of which all existing and proposed commodities are members. The commodities were also chosen based on similarities to the existing stone fruit commodities in cultural practices, edible food and animal feed portions, residue levels, geographical locations, pest problems, established tolerances, and for international harmonization purposes. The scientific names for each commodity entry proposed for Stone Fruit Crop Group 12–11 are also being proposed to be updated to reflect the current taxonomic name.

2. *Create crop subgroups.* EPA proposes to add three crop subgroups to Crop Group 12–11: Stone Fruit Group, as follows:

i. *Cherry subgroup 12–11A.* (*Representative commodities*- Sweet cherry or Tart cherry). Six commodities proposed in this subgroup are: Cherry, black; Capulin; Cherry, Nanking; Cherry, sweet; Cherry, tart; and Chokecherry; including cultivars, varieties and/or hybrids of these.

ii. *Peach subgroup 12–11B.* (*Representative commodity*- Peach). Two commodities proposed in this subgroup are: Nectarine and Peach, including cultivars, varieties and/or hybrids of these.

iii. *Plum subgroup 12–11C.* (*Representative commodities*- Plum or Prune, plum). Fourteen commodities proposed in this subgroup are: Apricot; Apricot, Japanese; Plum; Plum, American; Plum, beach; Plum, Canada; Plum, cherry; Plum, Chickasaw; Plum, Damson; Plum, Japanese; Plum, Klamath; Plumcot; Plum, prune; Sloe; including cultivars, varieties and/or hybrids of these.

The creation of these subgroups and the choice of representative commodity designations are based on similarities in pest pressures, cultural practices, and the edible portion of the commodity. The Agency also determined that three subgroups would be appropriate, as listed above, in order to harmonize with Codex subgroups and representative commodities for stone fruit. EPA has determined that residue data on the designated representative crops will provide adequate information on residue levels in crops and subgroups.

B. Crop Group 14–11: Tree Nut Group

EPA is proposing to revise Tree Nuts Crop Group 14 in the following manner.

Add commodities. EPA proposes to amend the existing Tree Nuts Crop Group 14 by expanding it from 12 to 39 commodities. The existing Crop Group 14 contains the following 12 commodities:

- Almond, *Prunus dulcis;*
- Beechnut, *Fagus* spp.;
- Brazil nut, *Bertholletia excelsa;*
- Butternut, *Juglans cinerea;*
- Cashew, *Anacardium occidentale;*
- Chestnut, *Castanea* spp.;
- Chinquapin, *Castanea pumila;*
- Filbert (hazelnut), *Corylus* spp.;
- Hickory nut, *Carya* spp.;
- Macadamia nut (bush nut), *Macadamia* spp.;
- Pecan, *Carya illinoensis;*
- Walnut, black and English (Persian), *Juglans* spp.

EPA proposes to expand crop group 14 by adding the following 26 commodities and naming the new crop grouping as Crop Group 14–11. The added commodities are:

- African nut-tree, *Ricinodendron heudelotii* (Baill.) Heckel;
- Brazilian pine, *Araucaria angustifolia* (Bertol.) Kuntze;
- Bunya, *Araucaria bidwillii* Hook.;
- Bur oak, *Quercus macrocarpa* Michx.;
- Cajou nut, *Anacardium giganteum* Hance ex Engl.;
- Candlenut, *Aleurites moluccanus* (L.) Willd.;
- Coconut, *Cocos nucifera* L.;
- Coquito nut, *Jubaea chilensis* (Molina) Baill.;
- Dika nut, *Irvingia gabonensis* (Aubry-Lecomte ex O'Rorke) Baill.;

- Ginkgo, *Ginkgo biloba* L.;
- Guiana chestnut, *Pachira aquatica* Aubl.;
- Heartnut, *Juglans ailantifolia* Carrière var. *cordiformis* (Makino) Rehder, *J. ailantifolia* Carrière;
- Japanese horse-chestnut, *Aesculus turbinata* Blume;
- Mongongo nut, *Schinziophyton rautanenii* (Schinz) Radcl.-Sm.;
- Monkey-pot, *Lecythis pisonis* Cambess.;
- Monkey puzzle nut, *Araucaria araucana* (Molina) K. Koch;
- Okari nut, *Terminalia kaernbachii* Warb.;
- Pachira nut, *Pachira insignis* (Sw.) Savigny;
- Peach palm nut, *Bactris gasipaes* Kunth var. *gasipaes, B. gasipaes* Kunth;
- Pequi, *Caryocar brasiliense* Cambess., *C. villosum* (Aubl.) Pers., *C. nuciferum* L.;
- Pili nut, *Canarium ovatum* Engl., *C. vulgare* Leenh., *C. indicum* L.;
- Pine nut, *Pinus edulis* Engelm., *P. koraiensis* Siebold & Zucc., *P. sibirica* Du Tour, *P. pumila* (Pall.) Regel, *P. gerardiana* Wall. ex D. Don, *P. monophylla* Torr. & Frém., *P. quadrifolia* Parl. ex Sudw., *P. pinea* L.;
- Pistachio, *Pistacia vera* L.;
- Sapucaia nut, *Lecythis zabucaja* Aubl.;
- Tropical almond, *Terminalia catappa* L.;
- Yellowhorn, *Xanthoceras sorbifolium* Bunge

Including cultivars, varieties, and/or hybrids of these.

EPA additionally proposes to include the current Crop Group 14 entry for Walnut, black and English (Persian) (*Juglans* spp.) as two separate commodity entries in the new crop group, as follows: Walnut, black, *Juglans hindsii Jeps.* ex R. E. Sm., *J. microcarpa* Berland., *J. nigra* L.; and Walnut, English, *Juglans regia* L., including cultivars, varieties, and/or hybrids of these.

There are 18 different plant families represented in the proposed Tree Nut Crop Group 14–11. The proposed commodities were chosen based on similarities in edible food and animal feed items, residue levels, geographical locations, established tolerances, and for international harmonization purposes. The commodities were also chosen based on similar cultural practices and uses, including harvesting, processing (hulling, drying), marketing, and nutritional values. Therefore, all of these commodities were found to have similar characteristics and uses to become a member of Tree Nut Crop Group 14–11. The scientific names for each commodity entry proposed for Tree Nut Crop Group 14–11 have also been updated to reflect the current taxonomic name.

Pistachio was previously rejected as a member of Tree Nuts Crop Group 14, because there were concerns that the unsealed husks or shells surrounding pistachio nuts would expose the edible portion to significantly higher pesticide residues than would be found in other tree nuts. Subsequent to that decision, EPA examined scientific literature (Refs. 1 and 2) and found that although the pistachio shell splits before harvest, the nutmeat remains inside an intact hull, so it may not be exposed to a pesticide. Based on this information, a study was conducted to determine how intact the outer hull that surrounds the shell and nutmeat remains during the season, from flowering to harvest. The results of this study confirmed that the shells of pistachio nuts split naturally in the orchard [≤80%] prior to harvest, but the hull stays intact, covering and protecting the kernel from invasion by molds, insects, and nonsystemic pesticides (Ref. 3). Therefore, the concerns that the unsealed husks or shells (splits) found in pistachio nuts would expose the edible portion to significantly higher pesticide residues than would occur in other tree nuts proved to be unfounded. Additionally, the EPA conducted an analysis of tolerances that had been established for 15 pesticides on pistachios and compared the tolerance levels with those registered on the same pesticides for other tree nuts. In all cases except for permethrin, the established tolerances were identical. Even with permethrin (§ 180.378), the tolerance of 0.1 ppm established on pistachio was well within the Crop Group limit of 5X for the other tree nuts, which were established at 0.05 ppm. As a result, the Agency concluded that pesticide residues on pistachio nutmeat should be similar to the other nut crops that are members of the existing Tree Nut Crop Group, and are therefore appropriate for inclusion in the revised crop group proposed in this rule.

IV. References

The following references are used in this document and are available in the docket for this proposed rulemaking.

1. Sommer, N.F., J.R. Buchanan, and R.J. Fortlage. 1986. ''Relation of Early Splitting and Tattering of Pistachio Nuts to Aflatoxin in the Orchard.'' *Phytopathology* 76:692–694

2. Sommer, N.F. 1994. ''Genetic Variation in the Resistance of Various Cultivars of Tree Nut to Aspergillus flavus,'' Univ. CA. Project Report #0500–00029–006–01S. USDA Current Research Information Service.

3. Schneider, Bernard A. 2000. ''Review of Request for Residue Data Developed for Almonds To Be Translatable to Pistachios for Establishing Tolerances.''

V. Statutory and Executive Order Reviews

A. Executive Order 12866

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

EPA prepared an analysis of the potential costs and benefits associated with this action in the first proposed rule published May 23, 2007 (77 FR 28920). This analysis is contained in ''Economic Analysis Proposed Expansion of Crop Grouping Program.'' A copy of the analysis is available in the docket and is briefly summarized here.

This is a burden-reducing regulation. Crop grouping has saved money by permitting the results of pesticide exposure studies for one crop to be applied to other, similar crops. This regulation expands certain existing crop groups and adds one new crop group.

The primary beneficiaries of the regulation are minor crop producers and consumers. Specialty crop producers will benefit because lower registration costs will encourage manufacturers to register more pesticides on minor crops, providing these growers with additional pesticide options. The greater availability of pesticides for use in the United States as well as increased coverage of tolerances to imported commodities may result in a larger supply of imported and domestically produced specialty produce at potentially lower costs benefiting consumers. Secondary beneficiaries are pesticide registrants, who benefit because expanded markets for pesticides will lead to increased sales. IR–4 and EPA, which are publicly funded Federal government entities, will more efficiently use resources as a result of the rule.

EPA will conserve resources if, as expected, new or expanded crop groups result in fewer emergency pesticide use requests from specialty crop growers. Further, new and expanded crop groups will likely reduce the number of separate risk assessments and tolerance rulemaking that EPA will have to conduct. The public will further benefit from the increased international harmonization of crop classification and nomenclature, harmonized commodity import and export standards, and increased potential for resource sharing between EPA and other pesticide

regulatory agencies. Revisions to the crop grouping program will result in no appreciable costs or negative impacts to consumers, specialty crop producers, and pesticide registrants.

The benefits of the proposed rule can be shown through the example of the impact of changes to Crop Group 3 in a prior rulemaking from December 7, 2007 (72 FR 69150). That rulemaking established Bulb Vegetable Crop Group 3–07, which expanded upon the related Crop Group 3, Bulb Vegetables from 7 to 25 crops, an increase of 18 from the original crop group. Prior to the establishment of the expanded crop group, adding tolerances for the 18 crops would have required a minimum of 18 field trials at a cost of approximately $5.4 million (assuming $300,000 per field trial). However, after promulgation of the new group, these 18 new crops could obtain pesticide tolerances under a Crop Group 3–07 tolerance with no field trials in addition to those required on the representative commodities (which did not change with the expansion of the group). Fewer field trials mean a greater likelihood that these commodities will obtain tolerance coverage under the FFDCA, aiding growers and reducing the costs of both the IR–4 data development process and the EPA review process.

B. Paperwork Reduction Act

This action does not impose any new information collection requirements that would require additional review or approval by OMB under the provisions of the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* However, the proposed rule is expected to reduce mandatory paperwork due to a reduction in required studies. The proposed rule will have the effect of reducing the number of residue chemistry studies because fewer representative crops would need to be tested under a crop grouping scheme, than would otherwise be required.

C. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* the Agency hereby certifies that this rule will not have a significant adverse economic impact on a substantial number of small entities. This proposed rule does not have any direct adverse impacts on small businesses, small non-profit organizations, or small local governments.

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

In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities'' (5 U.S.C. 603 and 604). Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden or otherwise has a positive economic effect on all of the small entities subject to the rule.

This proposed action provides regulatory relief and regulatory flexibility. The new crop groups ease the process for pesticide manufacturers to obtain pesticide tolerances on greater numbers of crops. Pesticides will be more widely available to growers for use on crops, particularly specialty crops.

D. Unfunded Mandates Reform Act

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4), EPA has determined that this proposed regulatory action does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Accordingly, this rule is not subject to the requirements of sections 202, 203, 204, and 205 of UMRA.

E. Executive Order 13132

Pursuant to Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999), EPA has determined that this action does not have federalism implications, because it will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in the Order. Thus, Executive Order 13132 does not apply to this proposed rule.

F. Executive Order 13175

As required by Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000), EPA has determined that this proposed rule does not have tribal implications because it will not have any effect on tribal governments, 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, as specified in the Order. Thus, Executive Order 13175 does not apply to this proposed rule.

G. Executive Order 13045

Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997) does not apply to this proposed rule because this action is not designated as an economically significant regulatory action as defined by Executive Order 12866 (see Unit IV.A.), nor does it establish an environmental standard, or otherwise have a disproportionate effect on children.

H. Executive Order 13211

This action is not a ''significant energy action'' as defined in Executive Order 13211, entitled *Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) because it is not designated as a regulatory action as defined by Executive Order 12866 (see Unit IV.A.), nor is it likely to have any adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), (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 impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, and sampling procedures) that are developed or adopted by voluntary consensus standards bodies. This proposed rule does not impose any technical standards that would require EPA to consider the use of any voluntary consensus standards.

J. Executive Order 12898

This action does not have an adverse impact on the environmental and health conditions in low-income and minority communities. Therefore, this action does not involve special consideration

of environmental justice related issues as specified in Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, pesticides and pests.

Dated: October 27, 2011.

Stephen A. Owens,

Assistant Administrator for Chemical Safety and Pollution Prevention.

Therefore, it is proposed that 40 CFR chapter I be amended as follows:

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

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

2. In § 180.41 amend as follows:

a. Redesignate paragraphs (c)(17) through (c)(26) as paragraphs (c)(18) through (c)(27), respectively, and add a new paragraph (c)(17).

b. Redesignate newly redesignated paragraphs (c)(21) through (c)(27) as paragraphs (c)(22) through (c)(28), respectively, and add a new paragraph (c)(21).

These proposed amendments read as follows:

§ 180.41 Crop group tables.

* * * * *

(c) * * *

(17) *Crop Group 12–11:* Stone Fruit Group.

(i) *Representative commodities.* Sweet cherry or Tart cherry, Peach, and Plum or Prune plum.

(ii) *Commodities.* The following Table 1 is a list of all commodities included in Crop Group 12–11.

TABLE 1—CROP GROUP 12–11: STONE FRUIT GROUP

Commodities	Related crop subgroup
Apricot (*Prunus armeniaca* L.)	12–11C
Apricot, Japanese (*Prunus mume* Siebold & Zucc.)	12–11C
Capulin (*Prunus serotina* Ehrh. subsp. *capuli* (Cav.) McVaugh)	12–11A
Cherry, black (*Prunus serotina* Ehrh. subsp. *Serotina*)	12–11A
Cherry, Nanking (*Prunus tomentosa* Thunb.)	12–11A
Cherry, sweet (*Prunus avium* L.)	12–11A
Cherry, tart (*Prunus cerasus* L.)	12–11A
Chokecherry (*Prunus virginiana* L.)	12–11A
Nectarine (*Prunus persica* (L.) Batsch var. *nucipersica* (Suckow) C.K. Schneid)	12–11B
Peach (*Prunus persica* (L.) Batsch var. *persica*)	12–11B
Plum (*Prunus domestica* L. subsp. *Domestica*)	12–11C
Plum, American (*Prunus americana* Marshall)	12–11C
Plum, beach (*Prunus maritima* Marshall)	12–11C
Plum, Canada (*Prunus nigra* Aiton)	12–11C
Plum, cherry (*Prunus cerasifera* Ehrh.)	12–11C
Plum, Chickasaw (*Prunus angustifolia* Marshall)	12–11C
Plum, Damson (*Prunus domestica* L. subsp. *insititia* (L.) C.K. Schneid.)	12–11C
Plum, Japanese (*Prunus salicina* Lindl.; *P. salicina* Lindl. var. *salicina*)	12–11C
Plum, Klamath (*Prunus subcordata* Benth)	12–11C
Plum, prune (*Prunus domestica* L. subsp. *Domestica*)	12–11C
Plumcot (*Prunus* hybr.)	12–11C
Sloe (*Prunus spinosa* L.)	12–11C
Cultivars, varieties, and/or hybrids of these	

(iii) *Crop subgroups.* The following Table 2 identifies the crop subgroups for Crop Group 12–11, specifies the representative commodities for each subgroup, and lists all the commodities included in each subgroup.

TABLE 2—CROP GROUP 12–11: SUBGROUP LISTING

Representative commodities	Commodities
Crop subgroup 12–11A. Cherry subgroup	
Cherry, sweet or Cherry, tart	Capulin; Cherry, black; Cherry, Nanking; Cherry, sweet; Cherry, tart; Chokecherry; cultivars, varieties, and/or hybrids of these.
Crop subgroup 12–11B. Peach subgroup	
Peach	Peach; Nectarine; cultivars, varieties, and/or hybrids of these.
Crop subgroup 12–11C. Plum subgroup	
Plum or Prune plum	Apricot; Apricot, Japanese; Plum; Plum, American; Plum, beach; Plum, Canada; Plum, cherry; Plum, Chickasaw; Plum, Damson; Plum, Japanese; Plum, Klamath; Plumcot; Plum, prune; Sloe; cultivars, varieties, and/or hybrids of these.

* * * * *

(21) *Crop Group 14–11.* Tree Nut Group.

(i) *Representative commodities.* Almond and Pecan.

(ii) *Commodities.* The following is a list of all commodities included in Crop Group 14–11.

Crop Group 14–11: Tree Nut Group—Commodities

African nut-tree (*Ricinodendron heudelotii* (Baill.) Heckel)
Almond (*Prunus dulcis* (Mill.) D.A. Webb)
Beechnut (*Fagus grandifolia* Ehrh., *F. sylvatica* L., *F. sylvatica* L. subsp. *Sylvatica*)
Brazil nut (*Bertholletia excelsa* Humb. & Bonpl.)
Brazilian pine (*Araucaria angustifolia* (Bertol.) Kuntze)
Bunya (*Araucaria bidwillii* Hook.)
Bur oak (*Quercus macrocarpa* Michx.)
Butternut (*Juglans cinerea* L.)
Cajou nut (*Anacardium giganteum* Hance ex Engl.)
Candlenut (*Aleurites moluccanus* (L.) Willd.)
Cashew (*Anacardium occidentale* L.)
Chestnut (*Castanea crenata* Siebold & Zucc., *C. dentata* (Marshall) Borkh., *C. mollissima* Blume, *C. sativa* Mill.)
Chinquapin (*Castanea pumila* (L.) Mill., *C. ozarkensis* Ashe)
Coconut (*Cocos nucifera* L.)
Coquito nut (*Jubaea chilensis* (Molina) Baill.)
Dika nut (*Irvingia gabonensis* (Aubry-Lecomte ex O'Rorke) Baill.)
Ginkgo (*Ginkgo biloba* L.)
Guiana chestnut (*Pachira aquatica* Aubl.)
Hazelnut, Filbert (*Corylus americana* Marshall, *C. avellana* L., *C. californica* (A. DC.) Rose, *C. chinensis* Franch.)
Heartnut (*Juglans ailantifolia* Carrière var. *cordiformis* (Makino) Rehder, *J. ailantifolia* Carrière)
Hickory nut (*Carya cathayensis* Sarg., *C. glabra* (Mill.) Sweet, *C. laciniosa* (F. Michx.) W. P. C. Barton, *C. myristiciformis* (F. Michx.) Elliott, *C. ovata* (Mill.) K. Koch, *C. tomentosa* (Lam.) Nutt.)
Japanese horse-chestnut (*Aesculus turbinata* Blume)
Macadamia nut (*Macadamia integrifolia* Maiden & Betche, *M. tetraphylla* L.A.S. Johnson)
Mongongo nut (*Schinziophyton rautanenii* (Schinz) Radcl.-Sm.)
Monkey-pot (*Lecythis pisonis* Cambess.)
Monkey puzzle nut (*Araucaria araucana* (Molina) K. Koch)
Okari nut (*Terminalia kaernbachii* Warb.)
Pachira nut (*Pachira insignis* (Sw.) Savigny)
Peach palm nut (*Bactris gasipaes* Kunth var. *gasipaes, B. gasipaes* Kunth)
Pecan (*Carya illinoinensis* (Wangenh.) K.Koch)
Pequi (*Caryocar brasiliense* Cambess., *C. villosum* (Aubl.) Pers, *C. nuciferum* L.)
Pili nut (*Canarium ovatum* Engl., *C. vulgare* Leenh., *C. indicum* L.)
Pine nut (*Pinus edulis* Engelm., *P. koraiensis* Siebold & Zucc., *P. sibirica* Du Tour, *P. pumila* (Pall.) Regel, *P. gerardiana* Wall. ex D. Don, *P. monophylla* Torr. & Frém., *P. quadrifolia* Parl. ex Sudw., *P. pinea* L.)
Pistachio (*Pistacia vera* L.)
Sapucaia nut (*Lecythis zabucaja* Aubl.)
Tropical almond (*Terminalia catappa* L.)
Walnut, black (*Juglans hindsii* Jeps. ex R. E. Sm., *J. microcarpa* Berland., *J. nigra* L.)
Walnut, English (*Juglans regia* L.)
Yellowhorn (*Xanthoceras sorbifolium* Bunge)
Cultivars, varieties, and/or hybrids of these.

* * * * *

[FR Doc. 2011–29071 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 76, No. 217

Wednesday, November 9, 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

Submission for OMB Review; Comment Request

November 3, 2011.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Agricultural Research Service

Title: Use of the Grounds and Facilities as well as Commercial Photography and Cinematography at the U.S. Arboretum.

OMB Control Number: 0518–0024.

Summary of Collection: The mission of the U.S. National Arboretum (USNA) is to conduct research, provide education, and conserve and display trees, shrubs, flowers, and other plans to enhance the environment. The USNA is a 446-acre public facility. The grounds of the USNA are available to the general public for purposes of education and passive recreation. The USNA has many spectacular feature and garden displays which are very popular to visitors and photographers. Section 890(b) of the Federal Agriculture Improvement and Reform Act of 1996, Public Law 104–107 (''FAIR ACT'') provided statutory authorities regarding the USNA. These authorities include the ability to charge fees for temporary use by individuals or groups of USNA facilities and grounds for any purpose consistent with the mission of USNA. Also, the authority was provided to charge fees for the use of the USNA for commercial photography and cinematography.

Need and Use of the Information: USNA officials will collect the information using applications in the form of questionnaires. The collected information is used by USNA to determine if a requestor's needs can be met and the request is consistent with the mission and goals of the USNA uses of the information. If the basic information is not collected, USNA officials will not be able to determine if a requestor's needs are met.

Description of Respondents: Business or other for profit; not-for-profit institutions; individuals or households; Federal Government; State, Local or Tribal Government.

Number of Respondents: 445.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 223.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2011–28968 Filed 11–8–11; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Forest Service

Klamath National Forest; California; Pumice Vegetation Management Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Klamath National Forest will prepare an environmental impact statement (EIS) to document and publically disclose the environmental effects of implementing the Pumice Vegetation Management project. The project is being developed to address deteriorating forest health conditions, increasing hazardous fuel conditions, and reduced ecological diversity all caused by a century of fire exclusion, and past management activities.

DATES: Comments concerning the scope of analysis must be received by December 9, 2011. The draft environmental impact statement is expected June 2012, and the final environmental impact statement is expected October 2012.

ADDRESSES: Send written comments to: Patricia A. Grantham, Forest Supervisor, *Attn:* Ben Haupt, Pumice Vegetation Management Project Team Leader, Goosenest Ranger District, 37805 Highway 97, Macdoel, California 96058. Comments may also be sent via email to *comments-pacificsouthwest-klamath@fs.fed.us*, or via facsimile to (530) 398–5749. Include the subject ''Pumice Scoping.'' Email attachments are acceptable in the following formats: plain text (.txt), rich text (.rtf), Word (.doc or .docx), or portable document format (.pdf). Oral comments may be provided to the interdisciplinary team lead in person at the Goosenest Ranger District office or by phone: (530) 398–5790 during normal business hours, Monday through Friday, 8 a.m. to 4:30 p.m., except holidays.

FOR FURTHER INFORMATION CONTACT: Project documents can be found on the project Web site at *http://www.fs.fed.us/nepa/fs-usda-pop.php/?project=30290*. If you have questions, concerns, or suggestions regarding the proposal, contact Ben Haupt (phone: (530) 398–5790) at the Goosenest Ranger District, Klamath National Forest, 37805 Highway 97, Macdoel, California 96058.

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 Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: There are 6,473 acres of treatment proposed within the 9,056-acre project boundary on the Goosenest Ranger District of the Klamath National Forest. The project is located entirely within the Tamarack Flat 7th field watershed. The western extent of the project area is about eight miles east of Tennant, California in Siskiyou County; T43N, R1E, Sections 12 and 13; T43N, R2E, Sections 2–11, 14–21, 29 and 30; T44N, R2E, Sections 32 and 33, Mt. Diablo Meridian. About 247 acres of private land are located within the project boundary, but are excluded from the proposed treatments. Elevation ranges from 5,500–7,200 feet.

Purpose and Need for Action

The purpose of this project is to: restore fire as an ecosystem process; improve stand resilience to wildfire, insects and disease; reduce stand densities to productive and sustainable levels; maintain and encourage vegetation species diversity and stand structure; reduce the risk of undesired wildfire effects to important resources within the project area; and provide opportunities for public firewood cutting.

Proposed Action

The project includes eight overlapping types of treatment: (1) Thin From Below; (2) Thin From Below and Thin Chip; (3) Thin Chip; (4) Small Tree Thinning and Pile Burn; (5) Seed Tree and Small Tree Thinning; (6) Firewood; (7) Commercial Christmas Trees; and (8) Prescribed Fire. In addition to the above treatments, the proposed action includes the temporary access on 15.50 miles of temporary roads along existing road beds within the project. A total of 0.75 miles of new temporary roads will be constructed in order to implement the project. Both existing and new temporary roads will be closed and hydrologically stabilized at the end of the project. Acres by treatment type are described below and do not account for overlap in treatment types.

(1) Thin From Below (693 acres): Thin from below will be variable (140–220 ft^2/ac Basal Area) removing trees greater than 10 inches diameter at breast height (DBH), leaving dominant and co-dominant trees that exhibit health and vigor in order to increase resiliency to fire, insects and disease. Ponderosa pine will be favored, which will increase the percentage of pine in the species composition. Stocking levels will be commensurate with site productivity and standard guidelines. To maintain stand diversity, no-treatment retention clumps varying from 15–25 percent of the stand will be left in each stand.

(2) Thin From Below and Thin Chip (1,973 acres): The goal of this treatment is to thin from below (140–220 ft^2/ac Basal Area) and reduce stocking levels in the understory. This will increase species and structural diversity. Thin chip treatment will thin trees ranging between three and 10 inches DBH to a variable spacing of 15–25 feet. Treatment will focus on those areas with the most ladder fuels to reduce the risk of stand replacing wildfire. No-treatment (leave) clumps will vary from 15–25 percent depending upon stand conditions.

(3) Thin Chip (1,088 acres): Even-aged early seral stands will be variably thinned removing trees ranging between three and 10 inches DBH. Reducing stand densities will improve tree vigor, increase species and structural diversity, and reduce the risk of stand replacing wildfire. No-treatment clumps will vary from 15–40 percent depending upon stand conditions.

(4) Small Tree Thinning and Pile Burn (128 acres): Treatment will be applied to previously harvested stands that have dense tree regeneration. Trees ranging between three to 10 inches DBH will be variably thinned to a spacing of 15–25 feet. Trees will be cut by hand or low ground pressure machinery. Trees will then be piled and burned or chipped and removed.

(5) Seed Tree and Small Tree Thinning (245 acres): These lodgepole pine stands were previously harvested with strip clear cuts. Treatment within the retention strips from previous harvest will remove trees greater than 10 inches DBH, and leave one to five healthy dominant trees per acre to serve as a seed source. Trees ranging between three and 10 inches DBH will be thinned to a variable spacing of 15–25 feet in previously harvested strips.

(6) Firewood (206 acres): Firewood cutting will be made available to the public for permitted firewood cutting. Dead lodgepole trees, which were created by western and mountain pine beetle mortality within several lodgepole stands, will be removed by permit only. Standing dead and down trees will be cut by hand. All limbs and debris will be scattered to a depth of no greater than 18 inches; individual pieces will not exceed four feet in length. Trees and limbs will be utilized down to three inches in diameter.

(7) Commercial Christmas Trees (94 acres): Shasta red and white fir trees less than eight inches DBH will be harvested. Leave trees will be retained at a maximum of 16 feet to meet 16 by 16 foot spacing for the stand. Leave trees are defined as trees at least four feet tall and four inches DBH. Trees will be harvested with chainsaws and removed to existing skid trails and roads for removal by hand or ATV. Trees will be cut below the lowest living branch, with a maximum stump height of approximately 10 inches. All activity-generated slash will be treated so the residual slash on the ground is no higher than 18 inches and not more than four feet long. Approximately 1,000 pounds of boughs (or stems) may be cut by hand with pruning shears and/or chainsaws. Sheared trees will have a maximum harvest of one-third the diameter of the bottom half of the tree cut for boughs. Boughs may not be longer than 24 inches in length. Trees for bough harvest may not be the dominant or co-dominant leave trees. Cut boughs will be removed to vehicles parked on existing skid trails or roads.

(8) Prescribed Fire (6,473 acres): Prescribed fire will be used in varying intensities (mosaic pattern of burned and unburned patches) either as a stand-alone treatment, or following mechanical treatments. Pre-treatment such as hand piling of ladder and activity fuels will ensure that the residual stand is protected. Piles will be burned within two years of their construction. Prescribed fire will be used under controlled situations and favorable weather conditions. The objectives are to reduce natural fuel loads, surface and ladder fuels, and past activity slash, while increasing herbaceous species and encouraging pine regeneration. Due to feasibility considerations, prescribed fire treatments will not take place all at once, but incrementally throughout the life of the project. Prior to implementation of prescribed fire, detailed burn plans will be prepared for all prescribed fire activities.

Road access: The proposed action includes the temporary access along 15.50 miles of temporary roads along existing road beds within the project area. A total of 0.75 miles of new temporary roads will be constructed in order to implement the project. All roads needed for treatment access will be cleared and graded as necessary to allow log truck and equipment access using minimum disturbance methods and minimum clearing widths. New temporary roads constructed for this project will be graded, out-sloped, covered with slash if needed, and blocked with natural barriers after the harvest season (prior to the first winter

use). All temporary roads will be closed and hydrologically stabilized at the end of the project. No new roads will be added to the National Forest System.

The Forest Service developed project design features to mitigate adverse environmental impacts of the proposed action to forest resources. To view project design features, maps, and additional information about this project please visit the following Web site: *http://www.fs.fed.us/nepa/fs-usda-pop.php/?project=30290*.

Responsible Official

The Responsible Official for this project is the Forest Supervisor for the Klamath National Forest, Patricia A. Grantham, 1312 Fairlane Road, Yreka, California 96097.

Nature of Decision To Be Made

The Forest Service is the lead agency for the project. Based on the result of the NEPA analysis, the Forest Supervisor's record of decision regarding the Pumice Vegetation Management Project will recommend implementation of one of the following: (1) The proposed action; (2) an alternative to the proposed action; or (3) the no-action alternative. The record of decision will also document the consistency of the selected alternative with the Klamath National Forest Land and Resource Management Plan (1995, as amended).

Scoping Process

This notice of intent initiates the scoping process, which guides the development of the EIS. To be considered for EIS development, comments should be submitted prior to the close of this comment period. To be most helpful to the agency for alternative development and effects analysis, comments should be as specific as possible and discuss potentially significant issues, points of discussion, dispute, or debate about the effects of the proposed action.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public project record. Comments submitted anonymously will be accepted and considered; however, anonymous comments will not provide the agency with the ability to provide the respondent with subsequent environmental documents. See the **ADDRESSES** section at the beginning of this notice for more information about how and when to submit comments.

Dated: November 1, 2011.

Patricia A. Grantham,

Forest Supervisor, Klamath National Forest.

[FR Doc. 2011–29046 Filed 11–8–11; 8:45 am]

BILLING CODE 3410–11–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of meeting.

DATE AND TIME: Friday, November 18, 2011; 9:30 a.m. EST.

PLACE: 624 Ninth Street NW., Room 540, Washington, DC 20425.

Meeting Agenda

This meeting is open to the public.

I. Approval of Agenda
II. Approval of the October 21, 2011 Meeting Minutes
III. Program Planning Update and discussion of projects:
- Update on 2012 Statutory Enforcement Report planning
- Update on Trafficking Briefing planning
- Approval of School Discipline Report—Findings and Recommendations
- Review of Concept Papers/Approval

IV. Management and Operations
- Staff Director's report
- Budget/Appropriations update
- Discussion of the use of Commission Letterhead/Approval of AI
- Discussion on Implementation of Page Limits for Commissioner Statements/Approval

V. State Advisory Committee Issues:
- Re-chartering the Arizona SAC
- Re-chartering the Hawaii SAC

VI. Adjourn

CONTACT PERSON FOR FURTHER INFORMATION: Lenore Ostrowsky, Acting Chief, Public Affairs Unit (202) 376–8591.

Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact Pamela Dunston at (202) 376–8105 or at *signlanguage@usccr.gov* at least seven business days before the scheduled date of the meeting.

Dated: November 7, 2011.

Kimberly A. Tolhurst,

Senior Attorney-Advisor.

[FR Doc. 2011–29134 Filed 11–7–11; 4:15 pm]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–905]

Certain Polyester Staple Fiber From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, and Revocation of an Order in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On July 8, 2011, the Department of Commerce (''Department'') published in the **Federal Register** the *Preliminary Results* of the 2009–2010 administrative review of the antidumping duty order on certain polyester staple fiber from the People's Republic of China (''PRC'').[1] We gave interested parties an opportunity to comment on the *Preliminary Results.* None were received. As such, these final results do not differ from the *Preliminary Results.* We find that the mandatory respondents in this review, Ningbo Dafa Chemical Fiber Co., Ltd. (''Ningbo Dafa'') and Cixi Santai Chemical Fiber Co., Ltd. (''Cixi Santai'') did not sell subject merchandise at less than normal value during the period of review (''POR''), June 1, 2009, through May 31, 2010. The final dumping margin for this administrative review is listed in the ''Final Results of Review'' section below.

DATES: *Effective Date:* November 9, 2011.

FOR FURTHER INFORMATION CONTACT: Steven Hampton, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0116.

SUPPLEMENTARY INFORMATION:

Background

As noted above, on July 8, 2011, the Department published the *Preliminary Results* of the administrative review of certain polyester staple fiber from the PRC. The Department did not receive comments from interested parties on our *Preliminary Results.*

Changes Since the Preliminary Results

We have not made any changes to our *Preliminary Results.*

[1] *See Certain Polyester Staple Fiber From the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review, and Intent To Revoke Order in Part,* 76 FR 40329 (July 8, 2011) (''*Preliminary Results*'').

Scope of the Order

The merchandise subject to the order is synthetic staple fibers, not carded, combed or otherwise processed for spinning, of polyesters measuring 3.3 decitex (3 denier, inclusive) or more in diameter. This merchandise is cut to lengths varying from one inch (25 mm) to five inches (127 mm). The subject merchandise may be coated, usually with a silicon or other finish, or not coated. Polyester staple fiber is generally used as stuffing in sleeping bags, mattresses, ski jackets, comforters, cushions, pillows, and furniture.

The following products are excluded from the scope of the order: (1) Polyester staple fiber of less than 3.3 decitex (less than 3 denier) currently classifiable in the Harmonized Tariff Schedule of the United States (''HTSUS'') at subheading 5503.20.0025 and known to the industry as polyester staple fiber for spinning and generally used in woven and knit applications to produce textile and apparel products; (2) polyester staple fiber of 10 to 18 denier that are cut to lengths of 6 to 8 inches and that are generally used in the manufacture of carpeting; and (3) low-melt polyester staple fiber defined as a bi-component fiber with an outer, non-polyester sheath that melts at a significantly lower temperature than its inner polyester core (classified at HTSUS 5503.20.0015).

Certain polyester staple fiber is classifiable under the HTSUS subheadings 5503.20.0045 and 5503.20.0065. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under the order is dispositive.

Revocation of Order, in Part

In the *Preliminary Results,* we preliminarily determined that Ningbo Dafa and Cixi Santai qualify for revocation from the antidumping duty order on certain polyester staple fiber from the PRC, and invited parties to comment. None were received. Accordingly, in accordance with 19 CFR 351.222(b)(2)(ii), we are revoking the order on certain polyester staple fiber from the PRC manufactured and exported by Ningbo Dafa or Cixi Santai to the United States.

Final Results of Review

The dumping margins for the POR are as follows:

Company	Antidumping duty margin (percent)
Ningbo Dafa Chemical Fiber Co., Ltd.	0.00
Cixi Santai Chemical Fiber Co., Ltd.	0.00
Hangzhou Sanxin Paper Co., Ltd.	4.44
Zhaoqing Tifo New Fiber Co., Ltd.	4.44
Huvis Sichuan Chemical Fiber Corporation	4.44
Zhejiang Waysun Chemical Fiber Co., Ltd.	4.44

Assessment

Upon issuance of the final results, the Department will determine, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. Pursuant to 19 CFR 351.212(b)(1), we will calculate importer-specific (or customer) *ad valorem* duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. In accordance with 19 CFR 351.106(c)(2), we will instruct CBP to liquidate, without regard to antidumping duties, all entries of subject merchandise during the POR for which the importer-specific assessment rate is zero or *de minimis.*

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For the exporters listed above, the cash deposit rate will be the rate established in the final results of review (except, if the rate is zero or *de minimis, i.e.,* less than 0.5 percent, a zero cash deposit rate will be required for that company); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 44.3 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non-PRC exporter. The deposit requirements, when imposed, shall remain in effect until further notice.

Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this administrative review and notice in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: November 2, 2011.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2011–29050 Filed 11–8–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–816]

Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Notice of Extension of Time Limit for the Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Victoria Cho at (202) 482–3797, AD/CVD Operations, Office 3, Import Administration, International Trade

Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

Background

On September 29, 2010, the U.S. Department of Commerce (Department) published a notice of initiation of the administrative review of the antidumping duty order on corrosion-resistant carbon steel flat products from Korea, covering the period August 1, 2009, to July 31, 2010. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 75 FR 60076 (September 29, 2010).

On September 6, 2011, the Department published the preliminary results of this review. *See Certain Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Preliminary Results of the Seventeenth Antidumping Duty Administrative Review,* 76 FR 55004 (September 6, 2011). The final results of this review are currently due no later than January 4, 2012.

Extension of Time Limit of the Final Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to issue the final results of a review within 120 days after the date on which the preliminary results are published. However, if it is not practicable to complete the review within that time period, section 751(a)(3)(A) of the Act allows the Department to extend the time limit for the final results to a maximum of 180 days. *See also* 19 CFR 351.213(h)(2).

We determine that it is not practicable to complete the final results of this review within the original time limit because additional time is needed to gather and analyze a significant amount of information pertaining to the company requesting revocation. Also, given the number and complexity of issues in this case, the Department is fully extending the time limit for the final results. The final results are now due no later than March 4, 2012. As that day falls on a Sunday, the final results are due no later than March 5, 2012. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant of the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

This extension is in accordance with section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2). This notice is published pursuant to sections 751(a)(1) and 777(i)(1) of the Act.

Dated: November 3, 2011.

Gary Taverman,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–29056 Filed 11–8–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–899]

Artist Canvas From the People's Republic of China: Continuation of the Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: As a result of the determinations by the Department of Commerce (''Department'') and the International Trade Commission (''ITC'') that revocation of the antidumping duty order on artist canvas from the People's Republic of China (''PRC'') would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, the Department is publishing a notice of continuation of the antidumping duty order.

DATES: *Effective Date:* November 9, 2011.

FOR FURTHER INFORMATION CONTACT: Brooke Kennedy or Eugene Degnan, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; *telephone:* (202) 482–3818 or (202) 482–0414, respectively.

SUPPLEMENTARY INFORMATION: On May 2, 2011, the Department initiated the first sunset review of the antidumping duty order on artist canvas from the PRC pursuant to section 751(c) of the Tariff Act of 1930, as amended (''Act''). *See Initiation of Five-Year (''Sunset'') Review,* 76 FR 24459 (May 2, 2011) (''*Sunset Initiation*'').

As a result of its review, the Department determined that revocation of the antidumping duty order on artist canvas from the PRC would likely lead to a continuation or recurrence of dumping and, therefore, notified the ITC of the magnitude of the margins likely to prevail should the order be revoked. *See Artist Canvas from the People's Republic of China: Final Results of the Expedited First Sunset Review of the Antidumping Duty Order,* 76 FR 55351 (September 7, 2011). On October 12, 2011, the ITC determined, pursuant to section 751(c) of the Act, that revocation of the antidumping duty order on artist canvas from the PRC would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See* USITC Publication 4273 (October 2011), Artist Canvas from China: Investigation No. 731–TA–1091 (First Review), and *Artist Canvas from China,* 76 FR 67208 (October 31, 2011).

Scope of the Order

The products covered by this order are artist canvases regardless of dimension and/or size, whether assembled or unassembled, that have been primed/coated, whether or not made from cotton, whether or not archival, whether bleached or unbleached, and whether or not containing an ink receptive top coat. Priming/coating includes the application of a solution, designed to promote the adherence of artist materials, such as paint or ink, to the fabric. Artist canvases (*i.e.,* pre-stretched canvases, canvas panels, canvas pads, canvas rolls (including bulk rolls that have been primed), printable canvases, floor cloths, and placemats) are tightly woven prepared painting and/or printing surfaces. Artist canvas and stretcher strips (whether or not made of wood and whether or not assembled) included within a kit or set are covered by this proceeding.

Artist canvases subject to this order are currently classifiable under subheadings 5901.90.20.00 and 5901.90.40.00 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Specifically excluded from the scope of this order are tracing cloths, ''paint by number'' or ''paint-it-yourself'' artist canvases with a copyrighted preprinted outline, pattern, or design, whether or not included in a painting set or kit.[1] Also excluded are stretcher strips, whether or not made from wood, so long as they are not incorporated into artist canvases or sold as part of an artist canvas kit or set. While the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Additionally, we have determined that canvas woven and primed in the India, but cut, stretched and framed in the PRC and exported from the PRC, are not subject to the order covering artist canvas from the PRC.

[1] Artist canvases with a non-copyrighted preprinted outline, pattern, or design are included in the scope, whether or not included in a painting set or kit.

Subsequent to the issuance of the Order, we issued the following scope rulings:

On April 10, 2008, in response to an inquiry from Tara Materials, Inc., the Department ruled that artist canvas that has been woven, primed with gesso, and cut to size in the United States and shipped to the PRC, is excluded from the scope . *See Notice of Scope Rulings,* 73 FR 49418 (August 21, 2008).

On May 25, 2009, in response to an inquiry from C2F, Inc., the Department ruled that artist canvas that has been woven and primed in South Korea, then cut to size and framed in the PRC, and thereafter imported into the United States, is excluded from the scope. *See Notice of Scope Rulings,* 74 FR 49859 (September 29, 2009).

On July 9, 2009, in response to an inquiry from Art Supplies Enterprises, Inc., the Department ruled that artist canvas that has been woven and primed in Vietnam, then cut to size and framed in the PRC, is excluded from the scope. *See Notice of Scope Rulings,* 75 FR 14138 (March 24, 2010).

On August 8, 2009, in response to an inquiry from Art Supplies Enterprises, Inc., the Department ruled that artist canvas that has been woven and primed in India, then cut and framed in the PRC, is excluded from the scope. *See Notice of Scope Rulings,* 75 FR 14138 (March 24, 2010).

On May 13, 2010, in response to an inquiry from Wuxi Phoenix Artist Materials Co, Inc., the Department ruled that artist canvas that is coated and primed in Vietnam, then cut and framed in the PRC, is excluded from the scope. *See Notice of Scope Rulings,* 75 FR 79339 (December 20, 2010).

On July 19, 2010, in response to an inquiry from Masterpiece Artist, the Department ruled that scrapbooking canvas, which is artist canvas used for scrapbooking purposes, is included in the scope.[2]

Continuation of the Order

As a result of these determinations by the Department and the ITC that revocation of the antidumping duty order on artist canvas would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping order on artist canvas from the PRC. U.S. Customs and Border Protection will continue to collect antidumping duty cash deposits at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of the continuation of the order will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act, the Department intends to initiate the next five-year review of the order not later than 30 days prior to the fifth anniversary of the effective date of continuation.

This five-year (sunset) review and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act.

Dated: October 31, 2011.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2011–29049 Filed 11–8–11; 8:45 am]

BILLING CODE 3510–DS–P

[2] *See Notice of Scope Rulings,* 76 FR 10558 (February 25, 2011).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–904]

Certain Activated Carbon From the People's Republic of China: Notice of Court Decision Not in Harmony With Final Results of Administrative Review and Notice of Amended Final Results of Administrative Review Pursuant to Court Decision

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On October 24, 2011, the United States Court of International Trade (''CIT''). sustained the Department of Commerce's (''the Department'') results of redetermination pursuant to the CIT's remand order in *Calgon Carbon Corporation, et al.* v. *United States,* Consol. Court No. 09–00524 (February 17, 2011) (''*Remand*'').[1]

Consistent with the decision of the United States Court of Appeals for the Federal Circuit (''CAFC'') in *Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990) (''*Timken*''), as clarified by *Diamond Sawblades Mfrs. Coalition* v. *United States,* F.3d, Court No. 2010–1024, 1090 (Fed. Cir. December 9, 2010) (''*Diamond Sawblades*''), the Department is notifying the public that the final judgment in this case is not in harmony with the Department's final determination and is amending the final results of the administrative review of the antidumping duty order on certain activated carbon from the People's Republic of China (''PRC'') covering the period of review (''POR'') of October 11, 2006 through March 31, 2008, with respect to the separate rate margin assigned to Hebei Foreign Trade and Advertising Corporation (''Hebei Foreign'') and the margin assigned to Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., and its affiliate[2] (collectively ''Cherishmet''). *See First Administrative Review of Certain Activated Carbon From the People's Republic of China: Final Results,* 74 FR 57995 (November 10, 2009) (''*Final Results*'') and accompanying Issues and Decision Memorandum (''IDM'') and *Certain Activated Carbon From the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review,* 74 FR 66952 (December 17, 2009) (''*Amended Final Results*'') (collectively ''*AR1 Final Results*'').

DATES: *Effective Date:* October 24, 2011.

FOR FURTHER INFORMATION CONTACT: Robert Palmer, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–9068.

SUPPLEMENTARY INFORMATION: In the first administrative review of the antidumping duty order on certain activated carbon from the PRC, the Department did not grant Hebei Foreign a separate rate, stating that record evidence demonstrated that Hebei Foreign's separate rate company certification was certified by Mr. Wang Kezhang, who was not employed by Hebei Foreign, and, therefore, the Department could not consider the separate rates certification to have been properly certified on behalf of the company in accordance with the filing requirements of 19 CFR 351.303(g)(1).[3] The CIT remanded to the Department to explain the requirements of 19 CFR 351.303(g)(1) and permit Hebei Foreign to attempt to find an alternative individual who fulfills the Department's regulatory requirements regarding certifications if the Department

[1] *See* Final Results Of Redetermination Pursuant To Court Remand, Court No. 09–00524, dated July 25, 2011, available at: *http://www.ia.ita.doc.gov/remands/index.html* (''Carbon Remand''). The previous action, *Calgon Carbon Corporation, et al.* v. *United States,* Court No. 09–00518 was ''deconsolidated'' which resulted in a caption change to *Hebei Foreign Trade and Advertising Corporation., et al.* v. *United States,* Court No. 09–00524 (CIT October 24, 2011) Slip Op. 11–134 (judgment).

[2] The Department found Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. and Beijing Pacific Activated Carbon Products Co., Ltd. (hereinafter referred to as ''Cherishmet'') to be affiliated and a single entity in *Final Results* at 74 FR 57998.

[3] *See Final Results* IDM at Comment 22.

determines that Mr. Wang was in a position to know the facts, but was not an employee in the sense required by the Department's certification regulation.[4]

Moreover, in the *AR1 Final Results,* the Department valued hydrochloric acid (''HCl'') using World Trade Atlas (''WTA'') data for Cherishmet and valued carbonized materials using the WTA value for other cokes of coal. The CIT remanded to the Department to permit Cherishmet the opportunity to place HCl data on the record[5] and remanded to the Department to address argument that imports under Indian HTS 2704.00.90 ''Other Cokes of Coal'' are not product-specific and ''to select the best method for valuation of the input as possible.''[6]

Additionally, in the *AR1 Final Results,* the Department calculated a surrogate wage value in accordance with the regression-based methodology set forth in 19 CFR 351.408(c)(3). In *Dorbest Ltd.* v. *United States,* 604 F.3d 1363 (Fed. Cir. 2010) (''*Dorbest*''), the U.S. Court of Appeals for the Federal Circuit (''CAFC'') held that the Department's ''{regression-based} method for calculating wage rates {as stipulated by 19 CFR 351.408(c)(3)} uses data not permitted by {the statutory requirements laid out in section 773 of the Tariff Act of 1930, as amended (the ''Act'') (*i.e.* 19 U.S.C. 1677b(c))}.''[7] Specifically, the CAFC interpreted section 773(c) of the Act to require the use of data from market economy countries that are both economically comparable to the NME at issue and significant producers of the subject merchandise, unless such data are unavailable. Because the Department's regulation requires the Department to use data from economically dissimilar countries and from countries that do not produce comparable merchandise, the CAFC invalidated the Department's labor regulation (19 CFR 351.408(c)(3)). On June 21, 2011, the Department revised its labor calculation methodology for valuing an NME respondent's cost of labor in NME antidumping proceedings.[8] In *Labor Methodologies,* the Department found that the best methodology for valuing the NME respondent's cost of labor is to use the industry-specific labor rate from the surrogate country. Additionally, the Department found that the best data source for calculating the industry-specific labor rate for the surrogate country is the data reported under ''Chapter 6A: Labor Cost in Manufacturing'' from the ILO Yearbook of Labor Statistics.[9] Following *Dorbest,* the Department requested a voluntary remand for its labor rate calculations for Cherishmet in the *AR1 Final Results.* The CIT granted the Department's request for a voluntary remand for its labor rate calculations for Cherishmet in the *AR1 Final Results* with instructions that the labor wage value be recalculated without reliance on the invalidated labor regulation.[10]

On July 25, 2011, the Department issued its final results of redetermination pursuant to *Remand.* Pursuant to *Remand,* we granted a separate rate to Hebei Foreign for the first administrative review period. Additionally, pursuant to the *Dorbest* ruling, *Labor Methodologies* and *Remand,* we revised the labor rate calculation methodology to comply with the CAFC's interpretation of section 773 of the Act. We also recalculated the HCl surrogate value using prices from *Chemical Weekly,* and recalculated the carbonized material surrogate value using WTA Indian import statistics under the Harmonized Tariff Schedule number for coconut shell charcoal. The Department's redetermination resulted in changes to the *AR1 Final Results* for Hebei Foreign's margin from 228.11 percent to 16.35 percent and for Cherishmet's margin from 16.84 percent to 2.95 percent. The CIT sustained the Department's remand redetermination with respect to Hebei Foreign and Cherishmet on October 24, 2011.[11]

Timken Notice

In its decision in *Timken,* 893 F.2d at 341, as clarified by *Diamond Sawblades,* the CAFC has held that, pursuant to section 516A(e) of the Act, the Department must publish a notice of a court decision that is not ''in harmony'' with a Department determination and must suspend liquidation of entries pending a ''conclusive'' court decision. The CIT's October 24, 2011 judgment sustaining the Department's remand redetermination with respect to Hebei Foreign and Cherishmet constitutes a final decision of that court that is not in harmony with the Department's *AR1 Final Results.* This notice is published in fulfillment of the publication requirements of *Timken.* Accordingly, the Department will continue the suspension of liquidation of the subject merchandise pending the expiration of the period of appeal or, if appealed, pending a final and conclusive court decision. The cash deposit rate will remain the company-specific rate established for the subsequent and most recent period during which the respondents were reviewed.[12]

Amended Final Results

Because there is now a final court decision with respect to Hebei Foreign and Cherishmet, we are amending the *AR1 Final Results* to reflect the results of the above-described litigation. The revised dumping margins are as follows:

Exporter name	Margin (percent)
Hebei Foreign Trade and Advertising Corporation	16.35
Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd.[13]	2.95

In the event the CIT's ruling is not appealed or, if appealed, upheld by the CAFC, the Department will instruct U.S. Customs and Border Protection to assess antidumping duties on entries of the subject merchandise during the POR from Hebei Foreign and Cherishmet based on the revised assessment rates calculated by the Department.

This notice is issued and published in accordance with sections 516A(c)(1), 516A(e), 751(a)(1), and 777(i)(1) of the Act.

Dated: November 3, 2011.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2011–29052 Filed 11–8–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA813

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

[4] *See Remand* at 9.

[5] *See Remand* at 15.

[6] *See id.* at 19.

[7] *See Dorbest,* 604 F.3d at 1372.

[8] *See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor,* 76 FR 36092 (June 21, 2011) (''*Labor Methodologies*'').

[9] *See Labor Methodologies* at 39063.

[10] *See Remand* at 24–25.

[11] *See Hebei Foreign Trade and Advertising Corporation., et al.* v. *United States,* Court No. 09–00524 (CIT October 24, 2011) Slip Op. 11–134 (judgment).

[12] Limited to Cherishmet. *See Certain Activated Carbon From the People's Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review,* 75 FR 70208, 70209 (November 17, 2010) (''*Carbon AR2*'').

[13] The Department found Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. and Beijing Pacific Activated Carbon Products Co., Ltd. to be affiliated and a single entity in *Final Results* at 74 FR 57998.

Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (MAFMC) Summer Flounder Monitoring Committee, Scup Monitoring Committee, Black Sea Bass Monitoring Committee, and the Mid-Atlantic Fishery Council's and the Atlantic States Marine Fisheries Commission's Summer Flounder, Scup, and Black Sea Bass Advisors will hold public meetings.

DATES: Wednesday, December 7, 2011 from 9 a.m. to 5 p.m. (Monitoring Committees in person) and Thursday, December 8, 2011 from 10 a.m. to 4 p.m. (Advisors via Webinar). See **SUPPLEMENTARY INFORMATION** for meeting agenda.

ADDRESSES: The Summer Flounder, Scup, and Black Sea Bass Monitoring Committee meetings will be held at the Doubletree by Hilton BWI Airport, 890 Elkridge Landing Road, Linthicum, MD 21090; (*telephone:* (410)–859–8060). The Summer Flounder, Scup, and Black Sea Bass Advisors meetings will be held via webinar with a telephone-only connection option. Details on webinar registration and the telephone-only connection details are available at: *http://www.mafmc.org.*

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; *telephone:* (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; *telephone:* (302) 526–5255.

SUPPLEMENTARY INFORMATION: The Summer Flounder, Scup, and Black Sea Bass Monitoring Committee will meet on Wednesday, December 7, 2011 from 9 a.m. to 5 p.m. (see **ADDRESSES**) to reconsider the 2012 annual catch targets recommendations and other commercial management measures for summer flounder and scup, and to recommend recreational management measures for the summer flounder, scup, and black sea bass fisheries in 2012. On Thursday, December 8, 2011, the Summer Flounder, Scup, and Black Sea Bass Advisors will meet to reconsider their recommendations for the summer flounder and scup commercial management measures, and to recommend recreational management measures for the summer flounder, scup, and black sea bass fisheries in 2012. The Summer Flounder Advisors will meet via Webinar from 9 a.m. to 11 a.m., the Scup Advisors will meet via Webinar from 12:30 p.m. to 2:30 p.m., and the Black Sea Bass Advisors will meet via Webinar from 2:30 p.m. to 4:30 p.m. (see **ADDRESSES**).

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Saunders at the Mid-Atlantic Council Office, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: November 4, 2011.

Tracey L. Thompson,

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

[FR Doc. 2011–29008 Filed 11–8–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA814

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (MAFMC) Executive Committee will hold a public meeting.

DATES: The meeting will be held on Thursday, December 1, 2011 from 10 a.m. to 4 p.m.

ADDRESSES: The meeting will be held at BWI Airport Marriott, 1743 West Nursery Road, Linthicum Heights, MD; telephone: (410) 859–8300.

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The purpose of this Committee meeting is to discuss progress to date and future direction with respect to the Council's work on the implementation of Ecosystem Based Fishery Management. A specific topic to be discussed will be the Council plan for moving forward with the development of ecosystem based fishery management approach in 2012. In addition, the Committee will review and discuss a comprehensive list of Council priorities for 2012. The final topic to be discussed will be potential revisions to the Council's Statement of Organization Practices and Procedures (SOPPSs).

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Saunders at the Mid-Atlantic Council Office, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: November 4, 2011.

Tracey L. Thompson,

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

[FR Doc. 2011–29027 Filed 11–8–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 11–29]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 11–29 with attached transmittal and policy justification.

Dated: November 4, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

OCT 26 2011

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 11-29, concerning the Department of the Army's proposed Letter(s) of Offer and Acceptance to the Kingdom of Saudi Arabia for major defense equipment estimated to cost $33 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

Richard A. Genaille, Jr.
Deputy Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Regional Balance (Classified Document Provided Under Separate Cover)

BILLING CODE 5001–06–C

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser:* Kingdom of Saudi Arabia, Ministry of Defense and Aviation (MODA).

(ii) *Total Estimated Value:*

Major Defense Equipment*	$31 million.
Other	2 million.
Total	33 million.

*As defined in Section 47(6) of the Arms Export Control Act.

(iii) *Description and Quantity or Quantities of Articles or Services Under Consideration for Purchase:* 124 M1151A1–B1 Up-Armored High Mobility Multi-Purpose Wheeled Vehicles (HMMWVs) and 99 M1152A1–B2 Up-Armored HMMWVs, with supplemental armor kits, spare and repair parts, support and test equipment, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering, technical and logistics support services, and other related elements of logistical and program support.

(iv) *Military Department:* Army (UDL, VUI, VUJ, VUO, VUQ).

(v) *Prior Related Cases, if any:* FMS Case VMZ, A10—$1.1 billion—21 Dec 07.

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed To Be Paid:* None.

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed To Be Sold:* None.

(viii) *Date Report Delivered to Congress:* 26 October 2011.

Policy Justification

Saudi Arabia—M1151A1–B1, M1152A1–B2 HMMWVs

The Kingdom of Saudi Arabia has requested a possible sale of 124 M1151A1–B1 Up-Armored High Mobility Multi-Purpose Wheeled Vehicles (HMMWVs) and 99 M1152A1–B2 Up-Armored HMMWVs, with supplemental armor kits, spare and repair parts, support and test equipment, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering, technical and logistics support services, and other related elements of logistical and program support. The estimated cost is $33 million.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country that has been, and continues to be, an important force for political stability and economic progress in the Middle East.

The proposed sale will provide a highly mobile and light combat vehicle capability enabling the Royal Saudi Land Forces (RSLF) to rapidly engage and defeat perimeter security threats and readily employ counter- and anti-terrorism measures. The RSLF already has HMMWVs in its inventory and will have no difficulty absorbing these vehicles.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractor will be AM General of South Bend, Indiana. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to Saudi Arabia.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

[FR Doc. 2011–29053 Filed 11–8–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 11–44]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 11–44 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: November 4, 2011.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

OCT 26 2011

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 11-44, concerning the Department of the Air Force's proposed Letter(s) of Offer and Acceptance to India for defense articles and services estimated to cost $1.2 billion. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

Richard A. Genaille, Jr.
Deputy Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser:* India.

(ii) *Total Estimated Value:*

Major Defense Equipment*	$ .650 billion.
Other	.550 billion.
Total	1.200 billion.

*As defined in Section 47(6) of the Arms Export Control Act.

(iii) *Description and Quantity or Quantities of Articles or Services Under Consideration for Purchase:* 6 Lockheed Martin C–130J United States Air Force (USAF) baseline aircraft including: USAF baseline equipment, 6 Rolls Royce AE 2100D3 spare engines, 8 AN/AAR–47 Missile Warning Systems (two of them spares), 8 AN/ALR–56M Advanced Radar Warning Receivers (two of them spares), 8 AN/ALE–47 Counter-Measures Dispensing Systems (two of them spares), 8 AAQ–22 Star SAFIRE III Special Operations Suites (two of them spares), 8 ARC–210 Radios (Non-COMSEC), and 3200 Flare Cartridges. Also included are spare and repair parts, configuration updates, communications security equipment and radios, integration studies, support equipment, publications and technical documentation, technical services, personnel training and training equipment, foreign liaison office

support, Field Service Representatives' services, U.S. Government and contractor engineering and logistics personnel services, and other related elements of logistics support.

(iv) *Military Department:* Air Force (SAD).

(v) *Prior Related Cases, if any:* FMS case SAA–$962M–Jan08.

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed To Be Paid:* None.

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed To Be Sold:* See Attached Annex.

(viii) *Date Report Delivered to Congress:* 26 October 2011.

Policy Justification

India—C–130J Aircraft

The Government of India has requested a possible sale of 6 Lockheed Martin C–130J United States Air Force (USAF) baseline aircraft including: USAF baseline equipment, 6 Rolls Royce AE 2100D3 spare engines, 8 AN/AAR–47 Missile Warning Systems (two of them spares), 8 AN/ALR–56M Advanced Radar Warning Receivers (two of them spares), 8 AN/ALE–47 Counter-Measures Dispensing Systems (two of them spares), 8 AAQ–22 Star SAFIRE III Special Operations Suites (two of them spares), 8 ARC–210 Radios (Non-COMSEC), and 3200 Flare Cartridges. Also included are spare and repair parts, configuration updates, communications security equipment and radios, integration studies, support equipment, publications and technical documentation, technical services, personnel training and training equipment, foreign liaison office support, Field Service Representatives' services, U.S. Government and contractor engineering and logistics personnel services, and other related elements of logistics support. The estimated cost is $1.2 billion.

This proposed sale will contribute to the foreign policy and national security of the United States by helping to improve the security of an important partner and to strengthen the U.S.-India strategic relationship.

The proposed sale will provide the Indian Government with a credible special operations airlift capability that will help deter aggression in the region and provide enhanced humanitarian assistance and disaster relief support.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractors will be Lockheed Martin Aeronautics Company in Marietta, Georgia, and Rolls-Royce Corporation in Indianapolis, Indiana. Offset agreements associated with this proposed sale are expected, but at this time the specific offset agreements are undetermined and will be defined in negotiations between the purchaser and the contractors.

Implementation of this proposed sale may require the assignment of ten U.S. Government and contractor representatives in India for a period of up to three years.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Annex—Item No. vii

(vii) Sensitivity of Technology

1. The C–130 Hercules aircraft performs primarily the tactical portion of the airlift mission. The aircraft is capable of operating from rough, dirt strips and is the prime transport for air dropping troops and equipment into hostile areas. The C–130 operates throughout the U.S. Air Force, fulfilling a wide range of operational missions in both peace and war. The C–130J improvements over the C–130E include improved maximum speed, climb time, cruising altitude and range. The C–130J has 55 feet of cargo compartment length, an additional 15 feet over the original ''short'' aircraft.

2. The AN/ALE–47 Counter-Measures Dispensing System (CMDS) is an integrated, threat-adaptive, software-programmable dispensing system capable of dispensing chaff, flares, and active radio frequency expendables. The threats countered by the CMDS include radar-directed anti-aircraft artillery (AAA), radar command-guided missiles, radar homing guided missiles, and infrared (IR) guided missiles. The system is internally mounted and may be operated as a stand-alone system or may be integrated with other on-board early warning and avionics systems. The AN/ALE–47 uses threat data received over the aircraft interfaces to assess the threat situation and to determine a response. Expendable routines tailored to the immediate aircraft and threat environment may be dispensed using one of four operational modes. Hardware is Unclassified. Technical data and documentation to be provided is Unclassified.

3. The AN/AAR–47 Missile Warning System is a small, lightweight, passive, electro-optic, threat warning device used to detect surface-to-air missiles fired at helicopters and low-flying fixed-wing aircraft and automatically provide countermeasures, as well as audio and visual-sector warning messages to the aircrew. The basic system consists of multiple Optical Sensor Converter (OSC) units, a Computer Processor (CP) and a Control Indicator (CI). The set of OSC units, normally four, is mounted on the aircraft exterior to provide omni-directional protection. The OSC detects the rocket plume of missiles and sends appropriate signals to the CP for processing. The CP analyzes the data from each OSC and automatically deploys the appropriate countermeasures. The CP also contains comprehensive built-in test circuitry. The control indicator displays the incoming direction of the threat, so that the pilot can take appropriate action. Hardware is Unclassified. Technical data and documentation to be provided is Unclassified.

4. The AN/ALR–56M Advanced Radar Warning Receiver continuously detects and intercepts radio frequency signals in certain frequency ranges and analyzes and separates threat signals from non-threat signals. It contributes to full-dimensional protection by providing individual aircraft probability of survival through improved aircrew situational awareness of the radar-guided threat environment. The ALR–56M is designed to provide improved performance in a dense signal environment and improved detection of modern threats signals. Hardware is Unclassified. Technical data and documentation to be provided is Unclassified.

5. The AN/AAQ–22 Star SAFIRE III is a gyro-stabilized, multi-spectral Electro-Optical/Infrared (EO/IR) system configured to operate simultaneously in multiple bands including the visible, near-IR and mid-wave IR bands. The system consists of an externally mounted turret sensor unit and internally mounted central electronics unit and system control unit. Images will be displayed in the aircraft real-time, and recorded for subsequent ground analysis. Hardware is considered Unclassified. Technical data and documentation to be provided are considered Unclassified.

6. If a technologically advanced adversary were to obtain knowledge of the specific hardware or software in this proposed sale, the information could be used to develop countermeasures that might reduce system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. 2011–29054 Filed 11–8–11; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

U.S. Air Force Scientific Advisory Board; Notice of Meeting

AGENCY: Department of the Air Force, U.S. Air Force Scientific Advisory Board.

ACTION: Meeting notice.

SUMMARY: Due to difficulties, beyond the control of the U.S. Air Force Scientific Advisory Board (SAB) or its Designated Federal Officer, the Board must meet no later than November 2, 2011 to deliberate on recent events impacting upon one of the Board's current tasks from the Secretary of the Air Force. Since the Department of the Air Force is unable to file a **Federal Register** notice announcing the meeting within the 15-calendar day period the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the SAB meeting will take place November 2, 2011 at 1180 Air Force Pentagon, Rm 4E979, Washington, DC 20330, beginning at 1 p.m. (EDT).

The purpose of this SAB meeting is to review the *Aircraft Oxygen Generation* quick-look study.

In accordance with 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155, the Administrative Assistant of the Air Force, in consultation with the Air Force General Counsel, has agreed that the public interest requires the United States Air Force Scientific Advisory Board meeting be closed to the public because it will involve discussions including trade secrets and matters covered by 5 U.S.C. 552b(c)(4).

Any member of the public wishing to provide input to the United States Air Force Scientific Advisory Board should submit a written statement in accordance with 41 CFR 102–3.140(c) and section 10(a)(3) of the Federal Advisory Committee Act and the procedures described in this paragraph. Written statements can be submitted to the Designated Federal Officer at the address detailed below at any time. Statements being submitted in response to the agenda mentioned in this notice will be accepted by the Designated Federal Officer at the fax number listed below up to two hours prior to the meeting which is the subject of this notice. Written statements received after this date may not be provided to or considered by the United States Air Force Scientific Advisory Board until its next meeting. The Designated Federal Officer will review all timely submissions with the United States Air Force Scientific Advisory Board Chairperson and ensure they are provided to members of the United States Air Force Scientific Advisory Board before the meeting that is the subject of this notice.

FOR FURTHER INFORMATION CONTACT: The United States Air Force Scientific Advisory Board Executive Director and Designated Federal Officer, Lt. Col. Matthew E. Zuber, *voice* (240) 612–5503, *fax* (703) 695–4301, United States Air Force Scientific Advisory Board, 1500 West Perimeter Road, Ste. #3300, Joint Base Andrews AFB, MD 20762, *matthew.zuber@pentagon.af.mil.*

Bao-Anh Trinh,

Air Force Federal Register Liaison Officer.

[FR Doc. 2011–28998 Filed 11–8–11; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Notice and Request for Comments.

SUMMARY: The Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995, intends to extend for three years, an information collection request with the Office of Management and Budget (OMB). Comments are invited on: (a) Whether the extended 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, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before January 9, 2012. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments may be sent to Robert M. Myers, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585–1615, 202–287–1584, or by fax at (202) 287–1349, or by email at *robert.myers@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Information regarding data collection is available at *http://www.wfis.lm.doe.gov.* Reporting requirements are found in DOE Order 350.1, Contractor Human Resource Management Programs, *http://www.directives.doe.gov/directives/current-directives/350.1-BOrder-Chg3/view.* Requests for additional information should be directed to Robert Myers at the address listed above.

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) *OMB No.:* 1910–0600; (2) *Information Collection Request Title:* Industrial Relations; (3) *Type of Review:* Renewal; (4) *Purpose:* This information is required for management oversight of the Department of Energy's Facilities Management Contractors and to ensure that the programmatic and administrative management requirements of the contract are managed efficiently and effectively; (5) *Annual Estimated Number of Respondents:* 316; (6) *Annual Estimated Number of Total Responses:* 316; (7) *Annual Estimated Number of Burden Hours:* 8,140; (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $0.

Statutory Authority: 42 U.S.C. 7256; 48 CFR 970.0370–1.

Issued in Washington, DC, on November 2, 2011.

Patrick M. Ferraro,

Acting Director, Office of Procurement and Assistance Management (OPAM).

[FR Doc. 2011–29018 Filed 11–8–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[OE Docket No. EA–315–A]

Application To Export Electric Energy; BP Energy Company

AGENCY: Office of Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of application.

SUMMARY: BP Energy Company (BP Energy) has applied to renew its authority to transmit electric energy from the United States to Canada pursuant to section 202(e) of the Federal Power Act (FPA).

DATES: Comments, protests, or motions to intervene must be submitted on or before December 9, 2011.

ADDRESSES: Comments, protests, or motions to intervene should be addressed to: Christopher Lawrence, Office of Electricity Delivery and Energy Reliability, Mail Code: OE–20, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585–0350. Because of delays in handling conventional mail, it is recommended that documents be transmitted by overnight mail, by electronic mail to *Christopher.Lawrence@hq.doe.gov,* or by facsimile to (202) 586–8008.

FOR FURTHER INFORMATION CONTACT: Christopher Lawrence (Program Office) at (202) 586–5260, or by email to *Christopher.Lawrence@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated by the Department of Energy (DOE) pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b), 7172(f)) and require authorization under section 202(e) of the FPA (16 U.S.C. 824a(e)).

On January 17, 2007 the Department of Energy (DOE) issued Order No. EA–315, which authorized BP Energy to transmit electric energy from the United States to Canada as a power marketer for a five-year term using existing international transmission facilities. That authority will expire on January 17, 2012. On October 31, 2011, BP Energy filed an application with DOE for renewal of the export authority contained in Order No. EA–315 for an additional five-year term.

The electric energy that BP Energy proposes to export to Canada would be surplus energy purchased from electric utilities, Federal power marketing agencies, and other entities within the United States. The existing international transmission facilities to be utilized by BP Energy have previously been authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

Procedural Matters: Any person desiring to be heard in this proceeding should file a comment or protest to the application at the address provided above. Protests should be filed in accordance with Rule 211 of the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedures (18 CFR 385.211). Any person desiring to become a party to these proceedings should file a motion to intervene at the above address in accordance with FERC Rule 214 (385.214). Five copies of such comments, protests, or motions to intervene should be sent to the address provided above on or before the date listed above.

Comments on the BP Energy application to export electric energy to Canada should be clearly marked with OE Docket No. 315–A. An additional copy is to be filed directly with Casey P. McFaden, BP Americas Inc., 201 Helios Way, Houston, TX 77079, *casey.mcfaden@bp.com* and Michael C. Griffen, Morgan, Lewis & Bockius LLP, 111 Pennsylvania, Ave. NW., Washington, DC 20004, *mgriffen@morganlewis.com.* A final decision will be made on this application after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after a determination is made by DOE that the proposed action will not have an adverse impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above, by accessing the program Web site at *http://energy.gov/node/11845* or by emailing Angela Troy at *Angela.Troy@hq.doe.gov.*

Issued in Washington, DC, on November 3, 2011.

Brian Mills,

Director, Permitting and Siting, Office of Electricity Delivery and Energy Reliability.

[FR Doc. 2011–29017 Filed 11–8–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[OE Docket No. EA–314–A]

Application To Export Electric Energy; BP Energy Company

AGENCY: Office of Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of application.

SUMMARY: BP Energy Company (BP Energy) has applied to renew its authority to transmit electric energy from the United States to Mexico pursuant to section 202(e) of the Federal Power Act (FPA).

DATES: Comments, protests, or motions to intervene must be submitted on or before December 9, 2011.

ADDRESSES: Comments, protests, or motions to intervene should be addressed to: Christopher Lawrence, Office of Electricity Delivery and Energy Reliability, Mail Code: OE–20, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585–0350. Because of delays in handling conventional mail, it is recommended that documents be transmitted by overnight mail, by electronic mail to *Christopher.Lawrence@hq.doe.gov*, or by facsimile to (202) 586–8008.

FOR FURTHER INFORMATION CONTACT: Christopher Lawrence (Program Office) at (202) 586–5260, or by email to *Christopher.Lawrence@hq.doe.gov*

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated by the Department of Energy (DOE) pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b), 7172(f)) and require authorization under section 202(e) of the FPA (16 U.S.C. 824a(e)).

On February 22, 2007 the Department of Energy (DOE) issued Order No. EA–314, which authorized BP Energy to transmit electric energy from the United States to Mexico as a power marketer for a five-year term using existing international transmission facilities. That authority will expire on February 22, 2012. On October 31, 2011, BP Energy filed an application with DOE for renewal of the export authority contained in Order No. EA–314 for an additional five-year term.

The electric energy that BP Energy proposes to export to Mexico would be surplus energy purchased from electric utilities, Federal power marketing agencies, and other entities within the United States. The existing international transmission facilities to be utilized by BP Energy have previously been authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

Procedural Matters: Any person desiring to be heard in this proceeding should file a comment or protest to the application at the address provided above. Protests should be filed in accordance with Rule 211 of the Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedures (18 CFR 385.211). Any person desiring to become a party to these proceedings should file a motion to intervene at the above address in accordance with FERC Rule 214 (385.214). Five copies of such comments, protests, or motions to intervene should be sent to the address provided above on or before the date listed above.

Comments on the BP Energy application to export electric energy to Mexico should be clearly marked with OE Docket No. 315–A. An additional

copy is to be filed directly with Casey P. McFaden, BP Americas Inc., 201 Helios Way, Houston, TX 77079, *casey.mcfaden@bp.com* AND Michael C. Griffen, Morgan, Lewis & Bockius LLP, 111 Pennsylvania, Ave. NW., Washington, DC 20004, *mgriffen@morganlewis.com*. A final decision will be made on this application after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after a determination is made by DOE that the proposed action will not have an adverse impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above, by accessing the program Web site at *http://energy.gov/node/11845* or by emailing Angela Troy at *Angela.Troy@hq.doe.gov*.

Issued in Washington, DC, on November 3, 2011.

Brian Mills,

Director, Permitting and Siting, Office of Electricity Delivery and Energy Reliability.

[FR Doc. 2011–29020 Filed 11–8–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

International Energy Agency Meetings

AGENCY: Department of Energy.

ACTION: Notice of Meetings.

SUMMARY: The Industry Advisory Board (IAB) to the International Energy Agency (IEA) will meet on November 16–17, 2011, at the headquarters of the IEA in Paris, France, in connection with a meeting of the IEA's Standing Group on Emergency Questions (SEQ) on November 16 and 17; and on November 17 in connection with a joint meeting of the SEQ and the IEA's Standing Group on the Oil Market on November 17.

DATES: November 16–17, 2011.

ADDRESSES: 9, rue de la Fédération, Paris, France.

FOR FURTHER INFORMATION CONTACT: Diana D. Clark, Assistant General for International and National Security Programs, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–3417.

SUPPLEMENTARY INFORMATION: In accordance with section 252(c)(1)(A)(i) of the Energy Policy and Conservation Act (42 U.S.C. 6272(c)(1)(A)(i)) (EPCA), the following notice of meeting is provided:

Meetings of the Industry Advisory Board (IAB) to the International Energy Agency (IEA) will be held at the headquarters of the IEA, 9, rue de la Fédération, Paris, France, on November 16, 2011, beginning at 9:30 a.m., and continuing on November 17 at 9:30 a.m.; and on November 17 commencing at 11:15 a.m. The purpose of this notice is to permit attendance by representatives of U.S. company members of the IAB at a meeting of the IEA's Standing Group on Emergency Questions (SEQ), which is scheduled to be held at the headquarters of the IEA on November 16 commencing at 9:30 a.m.; and a joint meeting of the SEQ and the IEA's Standing Group on the Oil Market (SOM) on November 17 commencing at 11:15 a.m. The IAB will also hold a preparatory meeting among company representatives on November 16 at the same location at 8:30 a.m. The agenda for this preparatory meeting is to review the agendas for the SEQ meeting and the joint SEQ/SOM meeting on November 17.

The agenda of the SEQ meeting on November 16–17 is under the control of the SEQ. It is expected that the SEQ will adopt the following agenda:

1. Adoption of the Agenda
2. Approval of the Summary Record of the 133rd Meeting
3. Status of Compliance with IEP Stockholding Commitments
4. Emergency Response Review Program
   —Schedule of Emergency Response Reviews
   —Emergency Response Review of Hungary
   —Emergency Response Review of Korea
   —Questionnaire Response of France
   —Questionnaire Response of Switzerland
   —Questionnaire Response of The Netherlands
5. Emergency Response Exercises
   —Preparations for ERE6
6. Emergency Response Measures
   —Costs and Benefits of Stockholding
7. Policy and Other Developments in Member Countries
   —Mid-Term ERR of Luxembourg
   —Mid-Term ERR of Italy
   —Oral Reports by Administrations
8. Report from the Industry Advisory Board
9. Review of Libya Collective Action
   —Draft Evaluation
   —Emergency Questionnaire QuE
10. Report on the 2011 Ministerial
   —Future Work on Electricity Security
   —Presentation on Energy Security Model (MOSES) and Future Work on the Model
11. Activities with International Organizations and Non-Member Countries
   —ASEAN (APSA)
   —China
   —Indonesia
   —Emergency Response Assessment of Chile
   —Report on Recent Discussions with India and Thailand
12. Documents for Information
   —Emergency Reserve Situation of IEA Member Countries on July 1, 2011
   —Base Period Final Consumption: 3Q 2010–2Q 2011
   —Updated Emergency Contacts List
13. Other Business
   —Tentative Schedule of Next Meetings:
      —March 28–30, 2012
      —June 26–28, 2012
      —November 27–29, 2012 (ERE6)

The agenda of the joint SEQ/SOM meeting on November 17 is under the control of the SEQ and the SOM. It is expected that the SEQ and SOM will adopt the following agenda:

1. Introductory Remarks by the Director of Energy Markets and Security
2. Adoption of the Agenda
3. Approval of the Summary Record of the June 2011 Joint Meeting
4. Oil Market Update
5. Report on Joint Activities
   —G20 Work on Oil, Coal, and Gas Market Volatility
   —G20 Work on Price Reporting Agencies (PRAs)
   —Upcoming IEA/IEF/OPEC Workshops:
      —Physical and Financial Market Interactions (Vienna, November 2011)
      —Oil and Energy Market Outlooks (Riyadh, January 2012)
6. Gas Market Update
7. Workshop: The Market Implications of OECD Refinery Rationalization
8. Other Business
   —Tentative Schedule of Upcoming Meetings:
      —March 27–29, 2012
      —June 26–28, 2012
      —November 27–29, 2012

As provided in section 252(c)(1)(A)(ii) of the Energy Policy and Conservation Act (42 U.S.C. 6272(c)(1)(A)(ii)), the meetings of the IAB are open to representatives of members of the IAB and their counsel; representatives of members of the IEA's Standing Group on Emergency Questions and the IEA's Standing Group on the Oil Markets; representatives of the Departments of Energy, Justice, and State, the Federal Trade Commission, the General Accounting Office, Committees of Congress, the IEA, and the European Commission; and invitees of the IAB, the SEQ, the SOM, or the IEA.

Issued in Washington, DC, November 2, 2011.

Diana D. Clark,

Assistant General Counsel for International and National Security Programs.

[FR Doc. 2011–29024 Filed 11–8–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC12–20–000.
Applicants: Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc.
Description: Application of Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc.
Filed Date: 11/02/2011.
Accession Number: 20111102–5094.
Comment Date: 5 p.m. ET on 11/23/2011.

Docket Numbers: EC12–21–000.
Applicants: ITC Midwest LLC.
Description: ITC Midwest Section 203 Application regarding Huxley Substation Transmission Assets.
Filed Date: 11/02/2011.
Accession Number: 20111102–5096.
Comment Date: 5 p.m. ET on 11/23/2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1478–003.
Applicants: Pennsylvania Electric Company.
Description: Revised MBR Power Sales Tariff to be effective 11/2/2011.
Filed Date: 11/02/2011.
Accession Number: 20111102–5069.
Comment Date: 5 p.m. ET on 11/23/2011.

Docket Numbers: ER10–2834–001; ER10–2821–001.
Applicants: Munnsville Wind Farm, LLC, Stony Creek Wind Farm, LLC.
Description: Notice of Change in Status of Munnsville Wind Farm, LLC and Stony Creek Wind Farm, LLC.
Filed Date: 11/02/2011.
Accession Number: 20111102–5117.
Comment Date: 5 p.m. ET on 11/23/2011.

Docket Numbers: ER11–3614–004
Applicants: Glacial Energy Holdings.
Description: Substitute Baseline Tariff to be effective 11/1/2011.
Filed Date: 11/02/2011.
Accession Number: 20111102–5008.
Comment Date: 5 p.m. ET on 11/23/2011.

Docket Numbers: ER11–4214–000.
Applicants: PacifiCorp.
Description: NV Energy Refund Report to be effective N/A.
Filed Date: 11/02/2011.
Accession Number: 20111102–5068.
Comment Date: 5 p.m. ET on 11/23/2011.

Docket Numbers: ER11–4596–001.
Applicants: South Carolina Electric & Gas Company.
Description: Amendment of Pending Tariff Filing Attachment C to be effective 1/1/2012.
Filed Date: 11/01/2011.
Accession Number: 20111101–5095.
Comment Date: 5 p.m. ET on 11/22/2011.

Docket Numbers: ER11–4677–001
Applicants: NextEra Energy Montezuma II Wind, LLC.
Description: NextEra Energy Montezuma II Wind, LLC Amendment to MBR Application and Revision to be effective 11/2/2011.
Filed Date: 11/01/2011.
Accession Number: 20111101–5182.
Comment Date: 5 p.m. ET on 11/15/2011.

Docket Numbers: ER12–52–001.
Applicants: Windpower Partners 1993, L.P.
Description: Windpower Partners 1993, L.P. Amendment to MBR Application and Revision to be effective 11/2/2011.
Filed Date: 11/01/2011.
Accession Number: 20111101–5183.
Comment Date: 5 p.m. ET on 11/15/2011.

Docket Numbers: ER12–129–001.
Applicants: Spindle Hill Energy LLC.
Description: Supplement to October 20, 2011 Market-Based Rate Tariff Filing to be effective 12/20/2011.
Filed Date: 11/02/2011.
Accession Number: 20111102–5009.
Comment Date: 5 p.m. ET on 11/23/2011.

Docket Numbers: ER12–323–000.
Applicants: San Joaquin Cogen, LLC.
Description: SJC First Revised MBR to be effective 9/10/2010.
Filed Date: 11/02/2011.
Accession Number: 20111102–5070.
Comment Date: 5 p.m. ET on 11/23/2011.

Docket Numbers: ER12–324–000
Applicants: PJM Interconnection, L.L.C.
Description: Queue No. W1–105; Original Service Agreement No. 3090 to be effective 10/4/2011.
Filed Date: 11/02/2011.
Accession Number: 20111102–5071.
Comment Date: 5 p.m. ET on 11/23/2011.

Docket Numbers: ER12–325–000.
Applicants: Florida Power & Light Company.
Description: FPL and Lee County Electric Cooperative, Inc. First Revised SA No. 266 to be effective 1/1/2012.
Filed Date: 11/02/2011.
Accession Number: 20111102–5072.
Comment Date: 5 p.m. ET on 11/23/2011.

Docket Numbers: ER12–326–000.
Applicants: PJM Interconnection, L.L.C.
Description: Queue No. W1–106; Original Service Agreement No. 3091 to be effective 10/4/2011.
Filed Date: 11/02/2011.
Accession Number: 20111102–5077.
Comment Date: 5 p.m. ET on 11/23/2011.

Docket Numbers: ER12–327–000
Applicants: L&L Energy LLC.
Description: Baseline refile to be effective 11/3/2011.
Filed Date: 11/02/2011.
Accession Number: 20111102–5080.
Comment Date: 5 p.m. ET on 11/23/2011.

Docket Numbers: ER12–328–000.
Applicants: Stony Creek Wind Farm, LLC.
Description: Application For Category 1 Seller Designation In Southeast Region to be effective 1/1/2011.
Filed Date: 11/02/2011.
Accession Number: 20111102–5097.
Comment Date: 5 p.m. ET on 11/23/2011.

Docket Numbers: ER12–329–000.
Applicants: Ontario Power Generation, Inc.
Description: Refund Report of Ontario Power Generation, Inc.
Filed Date: 11/02/2011.
Accession Number: 20111102–5098.
Comment Date: 5 p.m. ET on 11/23/2011.

Docket Numbers: ER12–330–000.
Applicants: Florida Power & Light Company.
Description: FPL and Seminole Electric Cooperative, Inc. Ninth Revised SA. No. 162 to be effective 1/1/2012.
Filed Date: 11/02/2011.
Accession Number: 20111102–5103.
Comment Date: 5 p.m. ET on 11/23/2011.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings

can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 2, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–29004 Filed 11–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC12–19–000.

Applicants: LSP Energy Limited Partnership, TPF II Southeast Holdings, LLC.

Description: LSP Energy Limited Partnership and TPF II Southeast Holdings, LLC, Joint Application For Approval Under Section 203 of the Federal Power Act, And Request for Expedited.

Filed Date: 11/01/2011.

Accession Number: 20111101–5232.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2912–002.

Applicants: Alliance for Cooperative Energy Services.

Description: Notice of Non-Material Change in Status of Alliance for Cooperative Energy Services Power Marketing LLC.

Filed Date: 11/01/2011.

Accession Number: 20111101–5164.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER10–3058–001; ER10–3059–001; ER10–3065–001; ER10–3066–001.

Applicants: Pinelawn Power, LLC.

Description: J–POWER North America Holdings Co., Ltd.'s Supplemental Filing of Triennial Market Power Update for the Northeast Region.

Filed Date: 10/20/2011.

Accession Number: 20111020–5152.

Comment Date: 5 p.m. Eastern Time on Thursday, November 10, 2011.

Docket Numbers: ER12–305–000.

Applicants: Orange Grove Energy, L.P.

Description: Orange Grove Energy, L.P. submits tariff filing per 35.13(a)(2)(iii: Orange Grove Black Start Agreement to be effective 1/1/2012.

Filed Date: 11/01/2011.

Accession Number: 20111101–5108.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–306–000.

Applicants: Baltimore Gas and Electric Company, PJM Interconnection, L.L.C.

Description: Baltimore Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii: BGE submits revisions to PJM's Tariff Attach H–2A–BGE's Trans. Formula Rate to be effective 6/1/2012.

Filed Date: 11/01/2011.

Accession Number: 20111101–5125.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–307–000.

Applicants: Green Mountain Energy Company.

Description: Request for Limited One-Time Waiver of Tariff Provision and Expedited Treatment of Green Mountain Energy Company.

Filed Date: 11/01/2011.

Accession Number: 20111101–5141.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–308–000.

Applicants: Manzana Wind LLC.

Description: Manzana Wind LLC submits tariff filing per 35.12: Market-Based Rate Application to be effective 12/31/2011.

Filed Date: 11/01/2011.

Accession Number: 20111101–5166.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–309–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 11–1–11 Attachment X_Queue Reform to be effective 1/1/2012.

Filed Date: 11/01/2011.

Accession Number: 20111101–5174.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–310–000.

Applicants: Ameren Illinois Company, Midwest Independent Transmission System Operator, Inc.

Description: Ameren Illinois Company submits tariff filing per 35.13(a)(2)(iii: 11–01–11 AIC Attachment O to be effective 1/1/2012.

Filed Date: 11/01/2011.

Accession Number: 20111101–5175.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–311–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits tariff filing per 35.13(a)(2)(iii: Rate Schedule Amendments for ITCC Language to be effective 1/1/2012.

Filed Date: 11/01/2011.

Accession Number: 20111101–5180.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–312–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 11–01–11 Attachment MM and MM–GRE to be effective 1/1/2012.

Filed Date: 11/01/2011.

Accession Number: 20111101–5181.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–313–000.

Applicants: Pacific Gas and Electric Company.

Description: Pacific Gas and Electric Company submits tariff filing per 35.13(a)(2)(i): Hercules Municipal Utility IA and WDT Service Agreements to be effective 1/1/2012.

Filed Date: 11/01/2011.

Accession Number: 20111101–5187.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–314–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits tariff filing per 35.13(a)(2)(iii: TO Amendments for ITCC Language to be effective 1/1/2012.

Filed Date: 11/01/2011.

Accession Number: 20111101–5188.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–315–000.

Applicants: NorthWestern Corporation.

Description: NorthWestern Corporation submits tariff filing per 35: Compliance Filing to Bring Accepted Provision into eTariff to be effective 1/1/2011.

Filed Date: 11/01/2011.

Accession Number: 20111101–5189.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–316–000.

Applicants: NorthWestern Corporation.

Description: NorthWestern Corporation submits tariff filing per 35.13(a)(2)(iii: Revision to MT OATT Schedule 3 Regarding Self-Supply to be effective 12/31/2011.

Filed Date: 11/01/2011.

Accession Number: 20111101–5191.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–317–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits tariff filing per 35.13(a)(2)(iii: WDAT Amendments for ITCC Language to be effective 1/1/2012.

Filed Date: 11/01/2011.

Accession Number: 20111101–5202.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–318–000.

Applicants: Pacific Gas and Electric Company.

Description: Pacific Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii: E&P Agreement for Westlands Solar Farms to be effective 11/3/2011.

Filed Date: 11/02/2011.

Accession Number: 20111102–5012.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 23, 2011.

Docket Numbers: ER12–319–000.

Applicants: Duke Energy Ohio, Inc.

Description: Duke Energy Ohio, Inc. submits notice of cancellation.

Filed Date: 11/01/2011.

Accession Number: 20111101–5231

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–320–000.

Applicants: PacifiCorp.

Description: Notice of Termination of Pacificorp.

Filed Date: 11/01/2011.

Accession Number: 20111101–5234.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–321–000.

Applicants: PacifiCorp.

Description: Notice of Termination of Pacificorp.

Filed Date: 11/01/2011.

Accession Number: 20111101–5235.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Docket Numbers: ER12–322–000.

Applicants: Pacific Gas and Electric Company.

Description: Notices of Termination of Hercules WDT Service Agreement Nos. 9 and 13 of Pacific Gas and Electric Company.

Filed Date: 11/01/2011.

Accession Number: 20111101–5236.

Comment Date: 5 p.m. Eastern Time on Tuesday, November 22, 2011.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES11–51–000.

Applicants: PacifiCorp.

Description: Amendment to Application for Authorization to Issue and Sell up to $1.5 Billion for Unsecured Short-Term Indebtedness of Pacificorp.

Filed Date: 10/28/2011.

Accession Number: 20111028–5212.

Comment Date: 5 p.m. Eastern Time on Monday, November 14, 2011.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 2, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–29003 Filed 11–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–547–000]

Natural Gas Pipeline Company of America, LLC; Notice of Intent To Prepare an Environmental Assessment for the Proposed 2012 Storage Optimization Project and Request for Comments on Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the 2012 Storage Optimization Project involving abandonment of certain facilities and construction and operation of new facilities by Natural Gas Pipeline Company of America, LLC (Natural) in Washington County, Iowa; Effingham, Clinton, and Piatt Counties, Illinois; and Harrison County, Texas. This EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine what issues need to be evaluated in the EA. Please note that the scoping period will close on, December 1, 2011.

Comments may be submitted in written form. Further details on how to submit written comments are provided in the Public Participation section of this notice.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives are asked to notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, you may be contacted by a representative of Natural about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the company could initiate condemnation proceedings where compensation would be determined in accordance with state law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility on My Land? What Do I Need To Know?'' was attached to the project notice Natural provided to landowners. This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is also available for viewing on the FERC Web site (*http://www.ferc.gov*).

Summary of the Proposed Project

Natural states that the benefits of the 2012 Storage Optimization Project would serve the public convenience and necessity by replacing aging compressor units with new equipment and thereby improving and optimizing its market area storage withdrawal and injection capabilities, system flexibility and reliability

The proposed Project would consist of the following:

Compressor Station 205—Washington County, Iowa

- Construct and operate a new 3,550 hp gas-fired compressor unit at Natural's Compressor Station 205 located near Keota in Washington County, Iowa.
- Abandon by removal the existing dual 6-inch-diameter meter runs at Natural's Compressor Station 205.
- Install new 10-inch-diameter meter.

Proposed Compressor Station 206A—Effingham County, Illinois

• Construct and operate a new 22,000 hp electric motor driven compressor station located near Altamont in Effingham County, Illinois.

Compressor Stations 310 and 311—Centralia and Clinton Counties, Illinois

• Abandon in place two 2,800 hp gas-fired compressor units at Natural's CS 310 located near Centralia in Clinton County, Illinois.

• Abandon in place three 2,800 hp gas-fired compressor units at Natural's CS 311 located near Hammond in Piatt County, Illinois.

North Lansing Storage Field—Harrison County, Texas

• Reduce the cushion gas inventory by 5 Bcf at Natural's North Lansing Storage Field near Longview in Harrison County, Texas.

The general location of the project facilities is shown in appendix 1.[1]

Land Requirements for Construction

Construction of the new proposed Compressor Station 206A would permanently disturb about 14.32 acres of land. The remaining proposed work would be conducted within existing facility areas.

The EA Process

The Natural Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us[2] to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. All comments received will be considered during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

• Geology and soils;
• Land use;
• Water resources, fisheries, and wetlands;
• Cultural resources;
• Vegetation and wildlife;
• Air quality and noise;
• Endangered and threatened species; and
• Public safety.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Our independent analysis of the issues will be presented in the EA. The EA will be placed in the public record and, depending on the comments received during the scoping process, may be published and distributed to the public. A comment period will be allotted if the EA is published for review. We will consider all comments on the EA before we make our recommendations to the Commission. To ensure your comments are considered, please carefully follow the instructions in the Public Participation section below.

With this notice, we are asking agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EA. These agencies may choose to participate once they have evaluated the proposal relative to their responsibilities. Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Consultations Under Section 106 of the Natural Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the Natural Historic Preservation Act, we are using this notice to initiate consultation with applicable State Historic Preservation Office(s) (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[3] We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO(s) as the project is further developed. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA would document our findings on the potential project impacts on historic properties and summarize the status of consultations under section 106.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that they will be received in Washington, DC on or before December 1, 2011.

For your convenience, there are three methods which you can use to submit your comments to the Commission. In all instances please reference the project docket number (CP11–547–000) with your submission. The Commission encourages electronic filing of comments and has expert eFiling staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

(1) You may file your comments electronically by using the eComment feature, which is located on the Commission's Web site at *http://www.ferc.gov* under the link to Documents and Filings. An eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments electronically by using the eFiling feature, which is located on the Commission's Web site at *http://www.ferc.gov* under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making. A comment on a particular project is considered a ''Comment on a Filing''; or

(3) You may file a paper copy of your comments at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

[1] The appendices referenced in this notice are not being printed in the **Federal Register.** Copies of appendices were sent to all those receiving this notice in the mail and are available at *http://www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[2] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

[3] The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, part 800. Historic properties are defined in those regulations as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the Natural Register of Historic Places.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; Native American Tribes; environmental and public interest groups; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If the EA is published for distribution, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an ''intervenor'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the ''e-filing'' link on the Commission's Web site.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits in the Docket number field (i.e., CP11–547). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm*.

Finally, public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Dated: November 2, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–28989 Filed 11–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL11–39–001]

Gregory R. Swecker and Beverly F. Swecker v. Midland Power Cooperative and State of Iowa; Notice of Filing

Take notice that on October 27, 2011, Gregory R. Swecker and Beverly F. Swecker (Complainants) filed a notice of disconnection of back-up power to Complainant's QF and residence by Midland Power Cooperative (Respondent) and request for an expedited order for reconnection. In addition, on October 31, 2011 Complainants filed a second request for expedited order for reconnection.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on November 8, 2011.

Dated: November 1, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–28987 Filed 11–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ12–1–000]

City of Vernon, CA; Notice of Filing

Take notice that on October 27, 2011, City of Vernon, California submitted its tariff filing per 35.25(e): 2012 TRR/TRBAA Update Filing and Ministerial Changes to be effective 1/1/2012.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the

Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on November 17, 2011.

Dated: November 1, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–28988 Filed 11–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–295–000]

NaturEner Rim Rock Wind Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of NaturEner Rim Rock Wind Energy, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is November 22, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 2, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–28991 Filed 11–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–281–000]

Northampton Generating Company, L.P.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Northampton Generating Company, L.P.'s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is November 22, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 2, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–28990 Filed 11–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 14304–000; 14305–000

Don Pedro Hydro, LLC; Moccasin Pumped Storage, LLC; Notice of Competing Preliminary Permit Applications Accepted For Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On October 14, 2011, Don Pedro Hydro, LLC (DPH) and Moccasin Pumped Storage, LLC (Moccasin) filed

preliminary permit applications, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of a hydropower project at the existing Don Pedro Hydroelectric Project, located on the Tuolumne River, in Tuolumne County, California. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

DPH's proposed Don Pedro Pumped Storage Hydroelectric Project No. 14304–000 would consist of: (1) An upper reservoir with a total active storage capacity of 25,000 acre-feet and a surface area of 241 acres at maximum normal water surface elevation of 1,565 feet above mean sea level (msl); (2) a 900-foot-long, 32-foot-diamenter vertical shaft connecting to a 1,100 foot-long concrete lined penstock; (3) four 640-foot-long, 11-foot-diameter steel penstocks; (4) a powerhouse with four 250 MW pump/turbines having an installed capacity of approximately 1000 megawatts (MW); (5) a tailrace with 250-foot-long, 15 foot-diameter draft tubes and a 44-foot-diameter, 2,380 foot-long tunnel; (6) an intake on the existing Don Pedro reservoir, which would be used as the lower reservoir; and (7) use of existing transmission lines. The proposed project would have an annual generation of 3,683 gigawatt-hours (GWh).

Applicant Contact: Mr. Vincent Lamarra, Symbiotics, LLC, 975 South State Highway 89/91, Logan, UT 84321. (435) 752–2580.

Moccasin's Moccasin Pumped Storage Project No. 14305–000 would consist of:

Alternative A—(1) an upper reservoir with a total active storage capacity of 25,000 acre-feet and a surface area of 240 acres at maximum normal water surface elevation of 1,565 feet above mean sea level (msl); (2) a one-half mile-long, 32-foot-diameter tunnel to connect the upper reservoir with the existing Don Pedro reservoir; (3) a powerhouse with four 250 MW pump/turbines having an installed capacity of approximately 1,000 megawatts (MW); (4) an intake on the existing Don Pedro reservoir, which would be used as the lower reservoir; and (5) either a 47-mile-long, 230-kilovolt transmission line or a 60 to70 mile-long 500kV transmission line. Alternative A of the proposed project would have an annual generation of 3,675 gigawatt-hours (GWh).

Alternative B—(1) an upper reservoir with a total active storage capacity of 13,000 acre-feet and a surface area of 166 acres at maximum normal water surface elevation of 1,560 feet msl; (2) a 1.1-mile-long, 25-foot-diameter tunnel to connect the upper reservoir with the existing Don Pedro reservoir; (3) a powerhouse with pump/turbines having an installed capacity of approximately 440 MW; (4) an intake on the existing Don Pedro reservoir, which would be used as the lower reservoir; and (5) either a 47-mile-long, 230-kilovolt transmission line or a 60 to 70-mile-long, 500kV transmission line. Alternative B of the proposed project would have an annual generation of 770 GWh.

Applicant Contact: Mr. Greg Probst, enXco Development Corporation, 517 SW 4th Avenue, Suite 300, Portland, OR 97204. (503) 219–3166.

FERC Contact: Jim Hastreiter, *james.hastreiter@ferc.gov,* (503) 552–2760.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–14304–000, or P–14305–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: November 1, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–28986 Filed 11–8–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14229–000]

Goat Lake Hydro, Inc.; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On July 15, 2011, Goat Lake Hydro, Inc. filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Connelly Lake Hydropower Project (Connelly Lake Project) to be located on Connelly Lake, and an unknown tributary of the Chilkoot River, Haines Borough, Alaska. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The project will consist of the existing 90-acre Connelly Lake and the following proposed new facilities: (1) A 60-foot-high rock-filled dam proposed to be constructed at the outlet of Connelly Lake which would raise Connelly Lake from elevation 2,280 feet to 2,325 feet mean sea level and increase the surface area from 90 acres to170 acres; (2) an intake to be constructed on the left abutment of the dam; (3) a spillway (either an ungated weir on the right abutment of the dam, or a shaft spillway on the left abutment); (4) a 42-inch-diameter, 5,700-foot-long, above-ground penstock extending from the outlet of the intake tunnel to the powerhouse on the west bank of the Chilkoot River; (5) a 40-foot-long, 60-foot-wide powerhouse to contain two turbine/generating units with a total installed capacity of 12 megawatts, with a hydraulic capacity of 90 cubic feet per second, and an average hydraulic head of 2,120 feet; (6) an excavated, riprap-lined channel tailrace extending about 50 feet from the powerhouse to the Chilkoot River; (7) a 14-mile-long, 34.5-kilovolt transmission line proposed to interconnect with a local, existing utility transmission line; and (8) appurtenant facilities. The

estimated annual generation of the Connelly Lake Project would be 45 gigawatt-hours.

Applicant Contact: Mr. Robert S. Grimm, CEO/President, Goat Lake Hydro, Inc., c/o Alaska Power & Telephone Company, P.O. Box 3222, Port Townsend, WA 98368. *phone:* (360) 385–1733 ex. 120.

FERC Contact: Kim Nguyen; *phone:* (202) 502–6105, or *kim.nguyen@ferc.gov.*

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1-(866) 208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14229–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: November 2, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2011–28992 Filed 11–8–11; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2003–0004; FRL–8891–8]

Access to Confidential Business Information by Protection Strategies Incorporated

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform the public that EPA has recently learned of a corporate merger/acquisition involving a contractor cleared for access to the Toxic Substances Control Act (TSCA) confidential business information and to provide notice that this contract has been extended until December 31, 2011. Protection Strategies Incorporated (PSI) has been the owner of Eagle Technologies Incorporated (Eagle) since March 2010. Eagle's previous contract (EP–W–06–029) expired September 30, 2011. A bridge contract, signed on September 30, 2011, with Eagle's successor PSI, is currently in place and will expire December 31, 2011. EPA has authorized its contractor, PSI of Arlington, VA, to access information which has been submitted to EPA under all sections of TSCA. Some of the information may be claimed or determined to be Confidential Business Information (CBI).

DATES: Access to the confidential data will occur no sooner than November 16, 2011.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Pamela Moseley, Information Management Division (7407M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–8956; fax number: (202) 564–8955; email address: *moseley.pamela@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave. Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this notice apply to me?

This action is directed to the public in general. This action may, however, be of interest to all who manufacture, process, or distribute industrial chemicals. Since other entities may also 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 technical person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPPT–2003–0004. 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, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the Office of Pollution Prevention and Toxics (OPPT) Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC), Rm. 3334, EPA West Bldg., 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

II. What action is the agency taking?

Under EPA contract number EP–11–H–000885, contractor PSI of 2300 Ninth Street South, Suite 501, Arlington, VA, will assist OPPT in providing support for work on alarms, card readers, doors, locks, and keys. The contractor will also escort workers or maintenance personnel during security hours.

In accordance with 40 CFR 2.306(j), EPA has determined that under EPA contract number EP–11–H–000885, PSI will require access to CBI under all sections of TSCA to perform successfully the duties specified under the contract. PSI personnel will be given access to information submitted to EPA under all sections of TSCA. Some of the information may be claimed or determined to be CBI.

EPA is issuing this notice to inform all submitters of information under all

sections of TSCA that EPA may provide PSI access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract will take place at EPA Headquarters in accordance with EPA's *TSCA CBI Protection Manual.*

Access to TSCA data, including CBI, will continue until December 31, 2011. If the contract is extended, this access will also continue for the duration of the extended contract without further notice.

PSI personnel will be required to sign nondisclosure agreements and will be briefed on appropriate security procedures before they are permitted access to TSCA CBI.

List of Subjects

Environmental protection, Confidential business information.

Dated: October 17, 2011.

Mario Caraballo,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2011–29074 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2011–0831; FRL–8891–6]

Certain New Chemicals; Receipt and Status Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5 of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Chemical Substances Inventory (TSCA Inventory)) to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under TSCA sections 5(d)(2) and 5(d)(3), EPA is required to publish in the **Federal Register** a notice of receipt of a premanufacture notice (PMN) or an application for a test marketing exemption (TME), and to publish in the **Federal Register** periodic status reports on the new chemicals under review and the receipt of notices of commencement (NOC) to manufacture those chemicals. This document, which covers the period from September 12, 2011 to September 23, 2011, and provides the required notice and status report, consists of the PMNs and TMEs, both pending or expired, and the NOC to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

DATES: Comments identified by the specific PMN number or TME number, must be received on or before December 9, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2011–0831, and the specific PMN number or TME number for the chemical related to your comment, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave. NW., Washington, DC. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: 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 email. 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 email comment directly to EPA without going through regulations.gov, your email 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, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave. NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Bernice Mudd, Information Management Division (7407M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; *telephone number:* (202) 564–8951; *fax number:* (202) 564–8955; *email address: Mudd.Bernice@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; *telephone number:* (202) 554–1404; *email address: TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitter of the PMNs addressed in 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 email. 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. Why is EPA taking this action?

EPA classifies a chemical substance as either an ''existing'' chemical or a ''new'' chemical. Any chemical substance that is not on EPA's TSCA Inventory is classified as a ''new chemical,'' while those that are on the TSCA Inventory are classified as an ''existing chemical.'' For more information about the TSCA Inventory go to: *http://www.epa.gov/opptintr/newchems/pubs/inventory.htm.* Anyone who plans to manufacture or import a new chemical substance for a non-exempt commercial purpose is required by TSCA section 5 to provide EPA with a PMN, before initiating the activity. Section 5(h)(1) of TSCA authorizes EPA to allow persons, upon application, to manufacture (includes import) or process a new chemical substance, or a chemical substance subject to a significant new use rule (SNUR) issued under TSCA section 5(a), for ''test marketing'' purposes, which is referred to as a test marketing exemption, or TME. For more information about the requirements applicable to a new chemical go to: *http://www.epa.gov/opt/newchems.*

Under TSCA sections 5(d)(2) and 5(d)(3), EPA is required to publish in the **Federal Register** a notice of receipt of a PMN or an application for a TME and to publish in the **Federal Register** periodic status reports on the new chemicals under review and the receipt of NOCs to manufacture those chemicals. This status report, which covers the period from September 12, 2011 to September 23.2011, consists of the PMNs and TMEs, both pending or expired, and the NOCs to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

III. Receipt and Status Reports

In Table I. of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the PMNs received by EPA during this period: The EPA case number assigned to the PMN, the date the PMN was received by EPA, the projected end date for EPA's review of the PMN, the submitting manufacturer/importer, the potential uses identified by the manufacturer/importer in the PMN, and the chemical identity.

TABLE I—28 PMNS RECEIVED FROM SEPTEMBER 12, 2011 TO SEPTEMBER 23, 2011

Case No.	Received date	Projected notice end date	Manufacturer/Importer	Use	Chemical
P–11–0625	9/12/2011	12/10/2011	CBI	(G) Dispersion additive	(G) Hetericyclic methyl quinacridone.
P–11–0626	9/12/2011	12/10/2011	CBI	(G) Petroleum substitute	(G) Highly branched isoparaffinic hydrocarbons.
P–11–0627	9/12/2011	12/10/2011	CBI	(G) Petroleum substitute	(G) Highly branched isoparaffinic hydrocarbons.
P–11–0628	9/12/2011	12/10/2011	CBI	(G) Petroleum substitute	(G) Highly branched isoparaffinic hydrocarbons.
P–11–0629	9/14/2011	12/12/2011	CBI	(S) Crosslinker for waterborne polymers/coatings.	(G) Carbodiimide crosslinker.
P–11–0630	9/13/2011	12/11/2011	Crison LLC	(S) Monomer to be polymerized, copolymerized for use in coatings; medical research.	(G)3-[(1-hydroxy-2-methylpropan-2-yl)amino]-2-methylpropanoic acid.
P–11–0631	9/13/2011	12/11/2011	Crison LLC	(S) Monomer to be polymerized, copolymerized for use in coatings; medical research.	(G)3-[[1-hydroxy-2-(hydroxmethyl)butan-2-yl]amino)-2-methyl propanoic acid.
P–11–0632	9/13/2011	12/11/2011	Crison LLC	(S) Monomer to be polymerized, copolymerized for use in coatings; medical research.	(G)3-[[1-3-dihydroxy-2-(hydroxymethyl)propan-2-yl]amino)-2-methylpropanoic acid.

TABLE I—28 PMNS RECEIVED FROM SEPTEMBER 12, 2011 TO SEPTEMBER 23, 2011—Continued

Case No.	Received date	Projected notice end date	Manufacturer/Importer	Use	Chemical
P–11–0633	9/14/2011	12/12/2011	CBI	(G) Radiation curing agent	(G) Bisalkylidene cycloalkanol, polymers with diisocyanatoalkane polymer, isocyanato-isocyanatoalkyl-alkylcycloalkane, hydroxyalkyl acrylate and polyglycol acrylate.
P–11–0634	9/14/2011	12/12/2011	CBI	(S) Ph indicator	(S) 1(3h)-Isobenzofuranone, 3,3-bis(4-hydroxy-3-methoxyphenyl)-0.
P–11–0635	9/14/2011	12/12/2011	Dow Chemical Company	(G) Reactant for production of polyurethane elastomers.	(G) Toulene diisocyanate prepolymer.
P–11–0636	9/14/2011	12/12/2011	Dow Chemical Company	(G) Reactant for production of polyurethane elastomers.	(G) Toulene diisocyanate prepolymer.
P–11–0637	9/14/2011	12/12/2011	Evonik Goldschmidt Corporation.	(S) Polyurethane foam catalyst.	(S) Tin, C_{16-18} and C_{18}-unsaturated fatty acids castor-oil fatty acids complexes.
P–11–0638	9/15/2011	12/13/2011	CBI	(G) Diesel fuel additive	(G) Aminocarbonyl ammonio carboxy modified polyolefin.
P–11–0639	9/15/2011	12/13/2011	Henkel Corporation	(S) Glue stick	(S) Starch, ethers, carboxymethyl 2-hydroxypropyl ether.
P–11–0640	9/16/2011	12/14/2011	CBI	(G) Adhesive and cleaning component.	(G) Short fusion partner protein.
P–11–0641	9/16/2011	12/14/2011	CBI	(G) Epoxy catalyst	(S) 1,3-benzenediol, 4,4′-[[3-(1h-imidazol-1-yl) propyl]carbonimidoyl]bis-.
P–11–0642	9/16/2011	12/14/2011	Phoenix Chemical Inc.	(S) Additive for silicone foam	(S) Siloxanes and silicones, di-me, me 3,3,4,4,5,5,6,6,6-nonafluorohexyl.
P–11–0643	9/16/2011	12/14/2011	CBI	(G) Defoamer	(G) Modified silicone polymer.
P–11–0644	9/19/2011	12/17/2011	GMZ Inc.	(G) Heat stabilizer for pvc, co-stabilizer for Ca/Zn-systems, co-stabilizer for organic systems, acid-, halogen scavanger for polyolefins and elastomers. Used as heat stabilizer and acid scavanger in pvc-cables, pvc-profiles and pvc-foils.	(S) Calcium, carbonate hydroxy aluminum complexes.
P–11–0645	9/19/2011	12/17/2011	CBI	(G) Additive, open, non-dispersive use.	(G) Epoxy resin, reaction product with alkanolamine.
P–11–0646	9/20/2011	12/18/2011	CBI	(G) Fabric treatment	(G) Perfluoroalkylethyl methacrylate copolymer.
P–11–0647	9/20/2011	12/18/2011	CBI	(G) Water and oil repellent	(G) Perfluoroalkylethyl methacrylate copolymer.
P–11–0648	9/22/2011	12/20/2011	Cytec Industries Inc.	(S) Binder for printing inks	(G) Substituted carbomonocycle, polymer with alkyl diol, bis[substituted carbomonocycle ester].
P–11–0649	9/22/2011	12/20/2011	Cytec Industries Inc.	(S) Primary ink binder resin for narrow web heat shrink sleeve packaging.	(G) Substituted carbomonocycle, polymer with alkyldiols, di[substituted carbomonocycle ester].
P–11–0650	9/23/2011	12/21/2011	CBI	(G) Additive, open, non-dispersive use.	(G) Epoxy resin, reaction product with amines.
P–11–0651	9/22/2011	12/20/2011	Shin-Etsu Silicones of America, Inc.	(S) Silicone gel for automotive; silicone gel for electronics device.	(G) Methylhydrogen siloxane.

TABLE I—28 PMNS RECEIVED FROM SEPTEMBER 12, 2011 TO SEPTEMBER 23, 2011—Continued

Case No.	Received date	Projected notice end date	Manufacturer/Importer	Use	Chemical
P–11–0652	9/23/2011	12/21/2011	CBI	(G) Plastics additive	(S) 1,4-cyclohexanedicarboxylic acid, 1,4-dibutyl ester.

In Table II. of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the TMEs received by EPA during this period: The EPA case number assigned to the TME, the date the TME was received by EPA, the projected end date for EPA's review of the TME, the submitting manufacturer/importer, the potential uses identified by the manufacturer/importer in the TME, and the chemical identity.

TABLE II—2 TMES RECEIVED FROM SEPTEMBER 12, 2011 TO SEPTEMBER 23, 2011

Case No.	Received date	Projected notice end date	Manufacturer/Importer	Use	Chemical
T–11–0016	9/22/2011	11/5/2011	Cytec Industries Inc.	(S) Binder for printing inks	(G) Substituted carbomonocycle, polymer with alkyl diol, bis[substituted carbomonocycle ester].
T–11–0017	9/22/2011	11/5/2011	Cytec Industries Inc.	(S) Primary ink binder resin for narrow web heat shrink sleeve packaging.	(G) Substituted carbomonocycle, polymer with alkyldiols, di[substituted carbomonocycle ester].

In Table III. of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the NOCs received by EPA during this period: The EPA case number assigned to the NOC, the date the NOC was received by EPA, the projected end date for EPA's review of the NOC, and chemical identity.

TABLE III—15 NOCS RECEIVED FROM SEPTEMBER 12, 2011 TO SEPTEMBER 23, 2011

Case No.	Received date	Commencement notice end date	Chemical
P–08–0391	9/13/2011	8/16/2011	(G) Alkyl lactyl lactate.
P–10–0398	9/22/2011	9/19/2011	(G) Amine neutralized polyacrylic acid.
P–11–0114	9/20/2011	9/6/2011	(S) 2(3h)-furanone, 3-ethyldihydro-5,5-dimethyl-.
P–11–0249	9/20/2011	8/23/2011	(G) Acrylic latex.
P–11–0291	9/22/2011	8/20/2011	(G) Polyester resin.
P–11–0319	9/23/2011	9/21/2011	(G) Polyester polyether urethane block copolymer.
P–11–0365	9/19/2011	9/16/2011	(G) Tall oil acids, reaction products with dialkyleneamine and acid anhydride, compounds with polyalkylene glycol hydrogen maleate alkyl ethers.
P–11–0390	9/22/2011	9/19/2011	(G) 2-propenoic acid, 2-methyl, alkyl ester, polymer with aralkyl 2-methyl-2-propenoate, polyethyleneglycole 2-methyl-2-propenoate, 2-(dimethylamino)ethyl 2-methyl-2-propenoate, [(1-methoxy-2-methyl-1-propen-1-yl)oxy]trimethylsilane-initiated, glycidyl tolyl ether-quaternized,benzoates (salts).
P–11–0416	9/16/2011	9/10/2011	(G) Modified rosin.
P–11–0417	9/13/2011	9/4/2011	(G) Phosphorous acid alkyl ester.
P–11–0419	9/22/2011	9/16/2011	(S) Octadecanoic acid, manufacturer of, by-products from, distant lights.
P–11–0420	9/20/2011	9/8/2011	(S) Isooctadecanoic acid, manufacturer of, by-products from, distant lights.
P–11–0421	9/22/2011	9/16/2011	(S) Octadecanoic acid, manufacturer of, by-products from, distant residues.
P–11–0422	9/20/2011	9/8/2011	(S) Isooctadecanoic acid, manufacturer of, by-products from, distant residues.
P–11–0431	9/19/2011	9/16/2011	(G) Poly[oxyalkylenediyl], α-hydro-ω-hydroxy-, polymer with disubstituted carbomonocycle, alkyl acrylate blocked.

If you are interested in information that is not included in these tables, you may contact EPA as described in Unit II. to access additional non-CBI information that may be available.

List of Subjects

Environmental protection, Chemicals, Hazardous substances, Imports, Notice of commencement, Premanufacturer, Reporting and recordkeeping requirements, Test marketing exemptions.

Dated: October 3, 2011.

Chandler Sirmons,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2011–28950 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0746; FRL–8888–9]

Pyrethrins/Pyrethroid Cumulative Risk Assessment; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's cumulative risk assessment for the naturally occurring pyrethrins and synthetic pyrethroid pesticides (often collectively called the 'pyrethroids') and opens a public comment period on this document and other supporting documents which are available in the docket. The Food Quality Protection Act of 1996 (FQPA) requires the EPA to consider available information concerning the cumulative effects on human health resulting from exposure to multiple chemicals that have a common mechanism of toxicity when making regulatory decisions. The Agency has identified a common mechanism of toxicity for the naturally occurring pyrethrins and synthetic pyrethroid pesticides, and has conducted a screening-level cumulative risk assessment for all pesticidal uses for the pyrethroids. Based on this assessment, EPA has concluded that the cumulative risks from existing pyrethroid uses are below the Agency's level of concern. Because this cumulative assessment uses a number of very conservative assumptions, EPA is providing an opportunity, through this notice, for interested parties to provide comments and input on any additional information that may be used to further refine the very conservative nature of this cumulative risk assessment.

DATES: Comments must be received on or before January 9, 2012.

ADDRESSES: Submit your comments identified by the docket identification (ID) number EPA–HQ–OPP–2011–0746, 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 number EPA–HQ–OPP–2011–0746. 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 email. 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 email comment directly to EPA without going through regulations.gov, your email 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:* Dana L. Friedman, Chemical Review Manager, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; *telephone number:* (703) 347–8827; *fax number:* (703) 308–7070; *email address: friedman.dana@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, farm worker, 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 chemical review manager 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 email. 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 pesticides discussed in this document, compared to the general population.

II. Authority

Section 408(b)(2)(D)(v) of the Federal Food, Drug, and Cosmetic Act (FFDCA) directs the Agency to consider available information on the cumulative risk from substances sharing a common mechanism of toxicity. On June 30, 2011, the Agency determined that the naturally occurring pyrethrins and synthetic pyrethroid pesticides share a common mechanism of toxicity. This determination can be found in the document entitled ''Draft Science Policy Paper for the Proposed Common Mechanism Grouping for the Pyrethrins and Synthetic Pyrethroids,'' which is available in the docket EPA–HQ–OPP–2011–0746.

List of Subjects

Environmental protection, Cumulative Risk Assessment, Pesticides and pests, Pyrethrins and Pyrethroids.

Dated: October 28, 2011.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2011–29089 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0001; FRL–9325–7]

SFIREG Full Committee; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Association of American Pesticide Control Officials (AAPCO)/ State FIFRA Issues Research and Evaluation Group (SFIREG), Full Committee will hold a 2-day meeting, beginning on December 5, 2011, and ending December 6, 2011. This notice announces the location and times for the meeting and sets forth the tentative agenda topics.

DATES: The meeting will be held on Monday, December 5, 2011, from 8:30 a.m. to 5 p.m. and 8:30 a.m. to 12 noon on Tuesday, December 6, 2011.

To request accommodation of a disability, please contact the person listed under **FOR FURTHER INFORMATON CONTACT**, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

ADDRESSES: The meeting will be held at EPA, One Potomac Yard (South Bldg.) 2777 Crystal Dr., Arlington VA. First Floor, South Conference Room.

FOR FURTHER INFORMATION CONTACT: Ron Kendall, Field External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; *telephone number:* (703) 305–5561; *fax number:* (703) 305–1850; *email address: kendall.ron@epa.gov* or Grier Stayton, SFIREG Executive Secretary, P.O. Box 466, Milford, DE 19963; *telephone number:* (302) 422–8152; *fax:* (302) 422–2435; *email address:* Stayton, Grier at *aapco-sfireg@comcast.net.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are interested in pesticide regulation issues affecting states and any discussion between EPA and SFIREG on FIFRA field implementation issues related to human health, environmental exposure to pesticides, and insight into EPA's decision-making process. You are invited and encouraged to attend the meetings and participate as appropriate. Potentially affected entities may include, but are not limited to:

Those persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug and Cosmetics Act or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and those who sell, distribute or use pesticides, as well as any non government organization.

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 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 copies of this document and other related information?

EPA has established a docket for this action under docket ID number EPA–HQ–OPP–2011–0001. 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 Office of Pesticide Programs (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.

II. Tentative Agenda Topics

1. Bed Bug IP—letter sent to Agency.
2. Endangered Species Act Consultation—letter sent to Agency.
3. Supplemental labeling—status of Office of General Counsel determination of regulatory status of documents associated with supplemental labeling.
4. Chemigation Issue Paper—letter to Agency.
5. Drift recommendation from Pesticide Operations and Management Working Committee (POM/WC).
6. POM aluminum phosphide label letter.
7. Self-contained breathing apparatus recommendation from POM/WC.
8. Distributor label recommendation—letter sent in September.
9. Agency response to the SFIREG/ Environmental Quality Issues Working. Committee letter in support of the aquatic benchmark database.
10. National Pollution Discharge Elimination System update/response to the POM letter on Stay.
11. Performance measures development initiative.
12. Discussion of non-cropland sites definition.
13. September 21, 2011, Label Workshop Report.
14. Imprelis update.
15. Bed bug efforts update.
16. Regional issues.
17. Status of Worker Protection Standard Revision.

III. How can I request to participate in this meeting?

This meeting is open for the public to attend. You may attend the meeting without further notification.

List of Subjects

Environmental protection.

Dated: October 20, 2011.

Jay S. Ellenberger,

Acting Director, Field External Affairs Division, Office of Pesticide Programs.

[FR Doc. 2011–28638 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0700; FRL–8892–3]

Pesticide Emergency Exemptions; Agency Decisions and State and Federal Agency Crisis Declarations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted or denied emergency exemptions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) for use of pesticides as listed in this notice. The exemptions or denials were granted during the period July 1, 2011 to September 30, 2011, to control unforeseen pest outbreaks.

FOR FURTHER INFORMATION CONTACT: See each emergency exemption or denial for the name of a contact person. The following information applies to all contact persons: Team Leader, Emergency Response Team, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; *telephone number:* (703) 306–0309.

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 at the end of the emergency exemption or denial of interest.

B. How can I get copies of this document and other related information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2011–0700. Publicly available docket materials are available either electronically 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.

II. Background

EPA has granted or denied emergency exemptions to the following State and Federal agencies. The emergency exemptions may take the following form: Crisis, public health, quarantine, or specific. EPA has also listed denied emergency exemption requests in this notice.

Under FIFRA section 18, EPA can authorize the use of a pesticide when emergency conditions exist. Authorizations (commonly called emergency exemptions) are granted to State and Federal agencies and are of four types:

1. A ''specific exemption'' authorizes use of a pesticide against specific pests on a limited acreage in a particular State. Most emergency exemptions are specific exemptions.
2. ''Quarantine'' and ''public health'' exemptions are emergency exemptions issued for quarantine or public health purposes. These are rarely requested.
3. A ''crisis exemption'' is initiated by a State or Federal agency (and is confirmed by EPA) when there is insufficient time to request and obtain EPA permission for use of a pesticide in an emergency.

EPA may deny an emergency exemption: If the State or Federal agency cannot demonstrate that an emergency exists, if the use poses unacceptable risks to the environment, or if EPA cannot reach a conclusion that the proposed pesticide use is likely to result in ''a reasonable certainty of no harm'' to human health, including exposure of residues of the pesticide to infants and children.

If the emergency use of the pesticide on a food or feed commodity would result in pesticide chemical residues, EPA establishes a time-limited tolerance meeting the ''reasonable certainty of no harm standard'' of the Federal Food, Drug, and Cosmetic Act (FFDCA).

In this document: EPA identifies the State or Federal agency granted the exemption or denial, the type of exemption, the pesticide authorized and the pests, the crop or use for which authorized, number of acres (if applicable), and the duration of the exemption. EPA also gives the **Federal Register** citation for the time-limited tolerance, if any.

III. Emergency Exemptions and Denials

A. U.S. States and Territories

California

Environmental Protection Agency, Department of Pesticide Regulation

Crisis: On August 9, 2011, for the post harvest use of sulfur dioxide on figs to control gray mold caused by *Botrytis cinerea* (*B. cinerea*); this program will end on December 31, 2011. *Contact:* Libby Pemberton.

Specific Exemption: EPA authorized the use of lambda-cyhalothrin on asparagus to control aphids; July 12, 2011 to October 31, 2011. *Contact:* Libby Pemberton.

EPA authorized the use of abamectin on bean, lima, dry to control spider mites; July 6. 2011 to March 31, 2012. *Contact:* Keri Grinstead.

Florida

Department of Agriculture and Consumer Services

Specific Exemption: EPA authorized the use of hop beta acids in beehives to control varroa mite; August 17, 2011 to December 31, 2011. *Contact:* Stacey Groce.

Kentucky

Department of Agriculture

Specific Exemption: EPA authorized the use of hop beta acids in beehives to control varroa mite; July 12, 2011 to December 31, 2011. *Contact:* Stacey Groce.

Louisiana

Department of Agriculture and Forestry

Specific Exemption: EPA authorized the use of dinotefuran on rice to control

rice stink bug (*Oebalus pugnax*); July 12, 2011, to October 30, 2011. *Contact:* Libby Pemberton.

Nebraska

Department of Agriculture

Denial: On September 12, 2011, EPA denied the use of a product containing the two active ingredients, rimsulfuron and thifensulfuron methyl, to control weeds in chicory cultivation. *Contact:* Andrea Conrath.

New Jersey

Department of Environmental Protection

Specific Exemption: EPA authorized the use of quinclorac on cranberry to control dodder; July 12, 2011 to December 15, 2011. *Contact:* Marcel Howard.

Ohio

Department of Agriculture

Specific Exemption: EPA authorized the use of hop beta acids in beehives to control varroa mite; August 15, 2011 to December 31, 2011. *Contact:* Stacey Groce.

Oregon

Department of Agriculture

Specific Exemption: EPA authorized the use of quinclorac on cranberry to control yellow loosestrife; August 8, 2011 to August 31, 2011. *Contact:* Marcel Howard.

Utah

Department of Agriculture and Food

Specific Exemption: EPA authorized the use of hop beta acids in beehives to control varroa mite; July 15, 2011 to December 31, 2011. *Contact:* Stacey Groce.

Washington

Department of Agriculture

Specific Exemption: EPA authorized the use of lambda-cyhalothrin on asparagus to control aphids; July 12, 2011 to September 30, 2011. *Contact:* Libby Pemberton.

EPA authorized the use of quinclorac on cranberry to control yellow loosestrife; August 8, 2011 to August 31, 2011. *Contact:* Marcel Howard.

Wyoming

Department of Agriculture

Denial: On September 12, 2011, EPA denied the use of a product containing the two active ingredients, rimsulfuron and thifensulfuron methyl, to control weeds in chicory cultivation. *Contact:* Andrea Conrath.

B. Federal Departments and Agencies

Department of Defense

U.S. Army Research Institute of Infectious Diseases (USAMRIID)

Quarantine: EPA authorized the use of paraformaldehyde to decontaminate biological containment areas, biological safety cabinets and equipment, and high efficiency particulate air (HEPA) filters in the ventilation system to prevent the release of infectious microorganisms from containment areas; September 27, 2011 to September 27, 2014. *Contact:* Princess Campbell.

Department of Homeland Security

Batelle National Biodefense Institute (BNBI)

Quarantine: EPA authorized the use of paraformaldehyde to decontaminate microbiological containment areas, biological safety cabinets and equipment, and high efficiency particulate air (HEPA) filters in the ventilation system to prevent the release of infectious microorganisms from containment areas; September 27, 2011 to September 27, 2014. *Contact:* Princess Campbell.

List of Subjects

Environmental protection, Antimicrobials, Health and safety, Pesticides and pests.

Dated: October 27, 2011.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2011–28940 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0005; FRL–9326–6]

Pesticide Products; Receipt of Applications to Register New Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register new uses for pesticide products containing currently registered active ingredients, pursuant to the provisions of section 3(c) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. EPA is publishing this Notice of applications, pursuant to section 3(c)(4) of FIFRA.

DATES: Comments must be received on or before December 9, 2011.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number specified in Unit II, 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 number specified for the pesticide of interest as shown in the registration application summaries. 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 email. 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 email comment directly to EPA without going through regulations.gov, your email 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: A contact person is listed at the end of each registration application summary and may be contacted by telephone or email. The mailing address for each contact person listed is: Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001 or Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

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 email. 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). If you are commenting on a docket that addresses multiple products, please indicate which registration number or numbers your comment applies.

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 for New Uses

EPA received applications as follows to register pesticide products containing currently registered active ingredients pursuant to the provisions of section 3(c) of FIFRA, and is publishing this Notice of applications pursuant to section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

1. *Registration numbers:* 8033–20, 8033–23, 8033–36. *Docket number:* EPA–HQ–OPP–2011–0792. *Company name and address:* Nippon Soda Co., Ltd, c/o Nisso America, Inc., 45 Broadway, Suite 2120, New York, NY 10006. *Active ingredient:* Acetamiprid. *Proposed uses:* Asparagus, Brassica leafy greens subgroup 5B, turnip greens, sweet corn, fruiting vegetable group 8–10, citrus fruit group 10–10, pome fruit group 11–10. *Contact:* Jennifer Urbanski, Registration Division, (703) 347–0156, *urbanski.jennifer@epa.gov.*

2. *Registration number:* 8033–RRT. *Docket number:* EPA–HQ–OPP–2011–0861. *Company name and address:* Nippon Soda Co., Ltd., c/o Nisso America, Inc., 45 Broadway, Suite 2120, New York, NY 10006. *Active ingredient:* Acetamiprid. *Proposed use:* Fly bait. *Contact:* Jennifer Urbanski, Registration Division, (703) 347–0156, *urbanski.jennifer@epa.gov.*

3. *Registration numbers:* 81880–2, 81880–6, 81880–15, 81880–18. *Docket number:* EPA–HQ–OPP–2011–0781. *Company name and address:* Canyon Group LLC., c/o Gowan Company, 370 South Main St., Yuma, AZ 85364. *Active ingredient:* Halosulfuron-methyl. *Proposed uses:* Proso millet, pastures, and rangeland. *Contact:* Maggie Rudick, Registration Division, (703) 347–0257, *rudick.maggie@epa.gov.*

4. *Registration number:* 100–617. *Docket number:* EPA–HQ–OPP–2011–0772. *Company name and address:* Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419. *Active ingredient:* Propiconazole. *Proposed use:* Foliar application to sugarcane. *Contact:* Erin Malone, Registration Division, (703) 347–0253, *malone.erin@epa.gov.*

5. *Registration number:* 100–1324. *Docket number:* EPA–HQ–OPP–2011–0772. *Company name and address:* Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419. *Active ingredients:* Propiconazole and Azoxystrobin. *Proposed use:* Foliar application to sugarcane. *Contact:* Erin Malone, Registration Division, (703) 347–0253, *malone.erin@epa.gov.*

6. *Registration numbers/File symbols:* 71711–16, 71711–20, 71711–21, 71711–32, 71711–33. *Docket number:* EPA–HQ–OPP–2011–0759. *Company name and address:* Nichino America, Inc., 4550 New Linden Hill Road, Suite 501, Wilmington, DE 91808. *Active ingredient:* Buprofezin. *Proposed uses:* Tree nuts, crop group 14; Brassica, leafy greens, subgroup 5B; turnip greens; bean, succulent; persimmon. *Contact:* Samantha Hulkower, Registration

Division, (703) 603–0683, *hulkower.samantha@epa.gov.*

7. *Registration numbers/File symbols:* 88760–R, 88760–E. *Docket number:* EPA–HQ–OPP–2011–0871. *Company name and address:* Terramera, Inc., 702–889 W. Pender Street, Vancouver, B.C., V6C 3B2. *Active ingredient:* Cold Pressed Neem Oil. *Proposed use:* Indoor use for the control of bed bugs. *Contact:* Gina Casciano, Biopesticides and Pollution Prevention Division, (703) 605–0513, *casciano.gina@epa.gov.*

List of Subjects

Environmental protection, Pesticides and pests.

Dated: November 3, 2011.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2011–29077 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0005; FRL–8890–9]

Pesticide Products; Receipt of Applications To Register New Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register new uses for pesticide products containing currently registered active ingredients, pursuant to the provisions of section 3(c) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. EPA is publishing this notice of such applications, pursuant to section 3(c)(4) of FIFRA.

DATES: Comments must be received on or before December 9, 2011.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number specified within the table below, 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 number specified for the pesticide of interest as shown in the registration application summaries. 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 email. 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 email comment directly to EPA without going through regulations.gov, your email 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: A contact person is listed at the end of each registration application summary and may be contacted by telephone or email. The mailing address for each contact person listed is: Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

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 email. 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). If you are commenting on a docket that addresses multiple products, please indicate to which registration number(s) your comment applies.

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 for New Uses

EPA received applications as follows to register pesticide products containing currently registered active ingredients pursuant to the provisions of section 3(c) of FIFRA, and is publishing this Notice of such applications pursuant to section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

1. *Registration Numbers:* 100–1098, 100–1120, and 100–1220. *Docket Number:* EPA–HQ–OPP–2011–0717. *Company Name and Address:* Syngenta Crop Protection, P.O. Box 18300, Greensboro, NC 27419. *Active Ingredient:* Azoxystrobin. *Proposed Use:* Sugarcane. *Contact:* Shaunta Hill, (703) 347–8961, *hill.shaunta@epa.gov.*

2. *Registration Number:* 100–1324. *Docket Number:* EPA–HQ–OPP–2011–0717. *Company Name and Address:* Syngenta Crop Protection, P.O. Box 18300, Greensboro, NC 27419. *Active Ingredients:* Azoxystrobin and Propiconazole. *Proposed Use:* Sugarcane. *Contact:* Shaunta Hill, (703) 347–8961, *hill.shaunta@epa.gov.*

3. *Registration Number:* 279–3149. *Docket Number:* EPA–HQ–OPP–2011–0758. *Company Name and Address:* FMC Corporation, 1735 Market Street, Philadelphia, PA 19103. *Active Ingredient:* Sulfentrazone. *Proposed Uses:* For formulation into end-use herbicide products used on cowpea, succulent (Tennessee only); crop subgroup 20B, sunflower; rhubarb; spring wheat (Pacific Northwest only); and turnip. *Contact:* Bethany Benbow, (703) 347–8072, *benbow.bethany@epa.gov.*

4. *Registration Numbers:* 279–3189 and 279–3220. *Docket Number:* EPA–HQ–OPP–2011–0758. *Company Name and Address:* FMC Corporation, 1735 Market Street, Philadelphia, PA 19103. *Active Ingredient:* Sulfentrazone. *Proposed Uses:* For use on cowpea, succulent (Tennessee only); crop subgroup 20B, sunflower; rhubarb; spring wheat (Pacific Northwest only) and turnip. *Contact:* Bethany Benbow, (703) 347–8072, *benbow.bethany@epa.gov.*

5. *Registration Number:* 279–3370. *Docket Number:* EPA–HQ–OPP–2011–0758. *Company Name and Address:* FMC Corporation, 1735 Market Street, Philadelphia, PA 19103. *Active Ingredient:* Sulfentrazone. *Proposed Uses:* For use on crop subgroup 20B, sunflower; rhubarb; spring wheat (Pacific Northwest only); and turnip. *Contact:* Bethany Benbow, (703) 347–8072, *benbow.bethany@epa.gov.*

6. *Registration Numbers:* 55260–4, 55260–6 and 55260–11. *Docket Number:* EPA–HQ–OPP–2011–0743. *Company Name and Address:* Agriphar S.A. c/o Ceres Intenational, LLC., 1087 Heartsease Drive, West Chester, PA 19382. *Active Ingredient:* Dodine. *Proposed Uses:* Stone fruits and tree nuts. *Contact:* Tamue L. Gibson, (703) 305–9096, *gibson.tamue@epa.gov.*

7. *Registration Number:* 59639–97. *Docket Number:* EPA–HQ–OPP–2011–0593. *Company Name and Address:* Valent U.S.A. Corporation, 1600 Riviera Ave., Suite 200, Walnut Creek, CA 94596. *Active Ingredient:* Flumioxazin. *Proposed Uses:* For formulation into end-use herbicide products used on crop subgroup 6C, dried shelled pea and bean (except soybean); crop subgroup 20A, rapeseed; crop subgroup 20B, sunflower; and wheat. *Contact:* Bethany Benbow, (703) 347–8072, *benbow.bethany@epa.gov.*

8. *Registration Numbers:* 59639–99 and 59639–119. *Docket Number:* EPA–HQ–OPP–2011–0593. *Company Name and Address:* Valent U.S.A. Corporation, 1600 Riviera Ave., Suite 200, Walnut Creek, CA 94596. *Active Ingredient:* Flumioxazin. *Proposed Use(s):* For use on field peas; flax; lentils; sunflower; safflower; and wheat. *Contact:* Bethany Benbow, (703) 347–8072, *benbow.bethany@epa.gov.*

9. *Registration Numbers:* 68387–7 and 68387–8. *Docket Number:* EPA–HQ–OPP–2011–0741. *Company Name and Address:* Cytec Industries Inc., 5 Garret Mountain Plaza, Woodland Park, NJ 07424. *Active Ingredient:* Phosphine gas. *Proposed Uses:* For use on all fruits and vegetables (RACs) in cold storage. *Contact:* Gene Benbow, (703) 347–0235, *benbow.gene@epa.gov.*

10. *Registration Number:* 72500–11. *Docket Number:* EPA–HQ–OPP–2009–0625. *Company Name and Address:* Scimetrics Ltd., Corporation, P.O. Box 1045, Wellington, CO 80549. *Active Ingredients:* Diphacinone and Imidacloprid. *Proposed Uses:* For use on Wyoming ground squirrel (*Spermophilus elegans*) in parks, golf courses, fruit tree orchards, non-crop rights-of-way, and other non-crop areas. *Contact:* Dan Peacock, (703) 305–5407, *peacock.dan@epa.gov.*

List of Subjects

Environmental protection, Pesticides and pest.

Dated: October 5, 2011.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2011–28657 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9489–1]

Proposed CERCLA Administrative Cost Recovery Settlement; Tracy Lead Battery Site, Tracy, MN

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with Section 122(I) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (''CERCLA''), 42 U.S.C. 9622(I), notice is hereby given of a proposed administrative settlement for recovery of past response costs concerning the Tracy Lead Battery Site in Tracy, Minnesota with the following settling parties: Day Side Recycling Corporation, Bay Side Holding Corporation and Zenith Investment and Management Corporation. The settlement requires the settling parties to pay $45,300.00 to the Hazardous Substance Superfund. The settlement includes a covenant not to sue the settling parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. 9607(a). For thirty (30) days following the date of publication of this notice, the Agency

will receive written comments relating to the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at the U.S. EPA Record Center, Room 714 U.S. EPA, 77 West Jackson Boulevard, Chicago, Illinois.

DATES: Comments must be submitted on or before December 9, 2011.

ADDRESSES: The proposed settlement is available for public inspection at the U.S. EPA Records Center, Room 714, 77 West Jackson Boulevard, Chicago, Illinois. A copy of the proposed settlement may be obtained from Associate Regional Counsel, Steven P. Kaiser, 77 West Jackson Boulevard, Chicago, Illinois 60604 whose telephone number is (312) 353–3804. Comments should reference the Tracy Lead Battery Site and EPA Docket No. CERCLA–05–2012–0001 and should be addressed to Steven P. Kaiser, 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Steven P. Kaiser, 77 West Jackson Boulevard, Chicago, Illinois 60604 whose telephone number is (312) 353–3804.

Dated: November 1, 2011.

Richard C. Karl,

Director, Superfund Division, Region 5.

[FR Doc. 2011–29062 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9489–3]

Public Water System Supervision Program Revision for the State of New Mexico

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of tentative approval.

SUMMARY: Notice is hereby given that the State of New Mexico is revising its approved Public Water System Supervision Program. New Mexico has adopted the Lead and Copper Rule Short Term Revisions. The purpose of this rule is to improve control and reduce the risk of lead and copper in drinking water. EPA has determined that this rule revision submitted by New Mexico is no less stringent than the corresponding federal regulation. Therefore, EPA intends to approve the program revisions.

DATES: All interested parties may request a public hearing. A request for a public hearing must be submitted by December 9, 2011 to the Regional Administrator at the EPA Region 6 address shown below. Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator. However, if a substantial request for a public hearing is made by December 9, 2011, a public hearing will be held. If no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on his own motion, this determination shall become final and effective on December 9, 2011. Any request for a public hearing shall include the following information: The name, address, and telephone number of the individual, organization, or other entity requesting a hearing; a brief statement of the requesting person's interest in the Regional Administrator's determination and a brief statement of the information that the requesting person intends to submit at such hearing; and the signature of the individual making the request, or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

ADDRESSES: All documents relating to this determination are available for inspection between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, at the following offices: New Mexico Environment Department, Drinking Water Bureau, 525 Camino De Los Marquez, Suite 4, Santa Fe, New Mexico, 87505 and the United States Environmental Protection Agency, Region 6, Drinking Water Section (6WQ–SD), 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202.

FOR FURTHER INFORMATION CONTACT: Bill Hurlbut, EPA Region 6, Drinking Water Section at the Dallas address given above or at telephone (214)–665–8305 or by email (*hurlbut.bill@epa.gov*).

Authority: Section 1413 of the Safe Drinking Water Act, as amended (1996), and 40 CFR Part 142 of the National Primary Drinking Water Regulations.

Dated: October 12, 2011.

Al Armendariz,

Regional Administrator, Region 6.

[FR Doc. 2011–29063 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0852; FRL–9325–8]

Streptomycin Sulfate; Receipt of Application for Emergency Exemption, Solicitation of Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received a specific exemption request from the Florida Department of Agriculture and Consumer Services to use the pesticide streptomycin sulfate (CAS No. 3810–74–0) to treat up to 54,000 acres of fresh-market grapefruit to control citrus canker (caused by the bacteria *Xanthomonas axonopodis pv. Citri (Xac)*).

The applicant proposes a use of a pesticide which contains the active ingredient, streptomycin sulfate, also used in humans and animals as an antibiotic drug. EPA is soliciting public comment before making the decision whether or not to grant the exemption.

DATES: Comments must be received on or before November 25, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2011–0852 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–2011–0852. 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 email. 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 email comment directly to EPA without going through *regulations.gov,* your email 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:

Andrea Conrath, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–9356; fax number: (703) 605–0781 email address: *conrath.andrea@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 *www.regulations.gov* or email. 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. What action is the Agency taking?

Under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), at the discretion of the Administrator, a Federal or State agency may be exempted from any provision of FIFRA if the Administrator determines that emergency conditions exist which require the exemption. The Florida Department of Agriculture and Consumer Services (FDACS) has requested the Administrator to issue a specific exemption for the use of streptomycin sulfate on fresh-market grapefruit to control citrus canker. Information in accordance with 40 CFR part 166 was submitted as part of this request.

As part of this request, the applicant asserts that available alternative controls cause phytotoxic effects when used during higher temperatures, and therefore are not adequate to effectively control citrus canker in grapefruit grown for the fresh market. The FDACS claims that significant economic losses are occurring and that this introduced pathogen has become a serious threat to the fresh-market grapefruit industry in the state of Florida.

The Applicant proposes to make no more than two applications per crop of streptomycin sulfate, at a rate of 0.448 lb active ingredient per acre (a.i./A), equivalent to 2 lbs. formulated product per acre. A maximum total of 0.896 lb a.i./Acre (4 lbs product/A) could be applied on up to 54,000 acres of grapefruit in June through September of

2012. Use could potentially occur statewide, but would primarily be in the commercial grapefruit-producing counties of Polk, Hendry, Highlands, De Soto, Hardee, St. Lucie, Indian River, Collier, Manatee and Martin Counties. At maximum rates, applications, and acreage, 48,384 lbs of a.i. (216,000 lbs product) could be used under the proposed program.

This notice does not constitute a decision by EPA on the application itself. The regulations governing section 18 of FIFRA allow for publication of a notice of receipt of an application for a specific exemption if the Administrator determines that publication of a notice is appropriate. The applicant proposes a use of a pesticide containing streptomycin sulfate, which is also used in human and animal treatment as an antibiotic. The notice provides an opportunity for public comment on the application.

The Agency will review and consider all comments received during the comment period in determining whether to issue the specific exemption requested by the Florida Department of Agriculture and Consumer Services.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: October 27, 2011.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2011–29082 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9489–4; Docket ID No. EPA–HQ–ORD–2011–0738]

Draft Toxicological Review of Vanadium Pentoxide: In Support of Summary Information on the Integrated Risk Information System (IRIS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Public Comment Period Extension; Notice of Change in Date of Listening Session.

SUMMARY: EPA announced a 60-day public comment period on September 30, 2011, (76FR60825) for the external review draft human health assessment titled, ''Toxicological Review of Vanadium Pentoxide: In Support of Summary Information on the Integrated Risk Information System (IRIS)'' (EPA/635R–11/004A). EPA is extending the public comment period 30 days at the request of the Vanadium Producers and Reclaimers Association. EPA is also rescheduling the listening session to December 8, 2011. The draft assessment was prepared by the National Center for Environmental Assessment (NCEA) within the EPA Office of Research and Development (ORD). EPA has released this draft assessment solely for the purpose of pre-dissemination peer review under applicable information quality guidelines. This draft assessment has not been formally disseminated by EPA. It does not represent and should not be construed to represent any Agency policy or determination. After public review and comment, an EPA contractor will convene an expert panel for independent external peer review of this draft assessment. The public comment period and external peer review meeting are separate processes that provide opportunities for all interested parties to comment on the assessment. The external peer review meeting will be scheduled at a later date and announced in the **Federal Register**. Public comments submitted during the public comment period will be provided to the external peer reviewers before the panel meeting and considered by EPA in the disposition of public comments. Public comments received after the public comment period closes will not be submitted to the external peer reviewers and will only be considered by EPA if time permits.

DATES: The public comment period will be extended 30 days to end December 29, 2011. Comments should be in writing and must be received by EPA by December 29, 2011.

The Listening Session on the draft IRIS assessment for vanadium pentoxide will be held on December 8, 2011, beginning at 9 a.m. and ending at 4 p.m., Eastern Standard Time, or when the last presentation has been completed. If you wish to attend the Listening Session, please register by December 1, 2011, following the detailed instructions under **DATES** provided in the previous Notice (76FR60825).

ADDRESSES: The draft ''Toxicological Review of Vanadium Pentoxide: In Support of Summary Information on the Integrated Risk Information System (IRIS)'' is available primarily via the Internet on the NCEA home page under the Recent Additions and Publications menus at *http://www.epa.gov/ncea.* A limited number of paper copies are available from the Information Management Team (Address: Information Management Team, National Center for Environmental Assessment (Mail Code: 8601P), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone: (703) 347–8561; facsimile: (703) 347–8691). If you request a paper copy, please provide your name, mailing address, and the draft assessment title.

Comments may be submitted electronically via *http://www.regulations.gov,* by email, by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions provided in the **SUPPLEMENTARY INFORMATION** section of the previous Notice (76FR60825).

Additional Information: For information on the docket, *www.regulations.gov,* or the public comment period, please contact the Office of Environmental Information (OEI) Docket (Mail Code: 28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 566–1752; facsimile: (202) 566–9744; or email: *ORD.Docket@epa.gov.*

For information on the draft assessment, please contact Maureen Gwinn, National Center for Environmental Assessment (8601P), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (703) 347–8565; facsimile: (703) 347–8689; or email: *FRN_Questions@epa.gov.*

Dated: November 3, 2011.

Darrell A. Winner,

Acting Director, National Center for Environmental Assessment.

[FR Doc. 2011–29067 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0038; FRL–8891–5]

Primus Solutions, Inc., and Arctic Slope Regional Corp.; Transfer of Data

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces that pesticide related information submitted to EPA's Office of Pesticide Programs (OPP) pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA), including information that may have been claimed as Confidential Business Information (CBI) by the submitter, will be transferred to Primus Solutions, Inc., and its subcontractor, Arctic Slope Regional Corporation (ASRC) in

accordance with 40 CFR 2.307(h)(3) and 2.308(i)(2). Primus Solutions, Inc., and its subcontractor, ASRC have been awarded a contract to perform work for OPP, and access to this information will enable Primus Solutions, Inc., and its subcontractor, ASRC, to fulfill the obligations of the contract.

DATES: Primus Solutions, Inc., and its subcontractor, ASRC will be given access to this information on or before November 14, 2011.

FOR FURTHER INFORMATION CONTACT: Mario Steadman, Information Technology and Resources Management Division (7502P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–8338, *steadman.mario@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action applies to the public in general. As such, 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. How can I get copies of this document and other related information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2011–0038. 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 Office of Pesticide Programs, 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.

II. Contractor Requirements

Under Contract No. EP–W–11–024, Primus Solutions, Inc., and its subcontractor, ASRC, will provide assistance to Antimicrobials Division reviewers to process applications for new registrations, new uses, amendments, and notifications within the time frame set forth by the Agency in order to meet the mandated timelines required under the Food Quality Protection Act and the Pesticide Registration Improvement Renewal Act of 2007.

OPP has determined that access by Primus Solutions, Inc., and its subcontractor, ASRC to information on all pesticide chemicals is necessary for the performance of this contract.

Some of this information may be entitled to confidential treatment. The information has been submitted to EPA under sections 3, 4, 6, and 7 of FIFRA and under sections 408 and 409 of FFDCA.

In accordance with the requirements of 40 CFR 2.307(h)(2), the contract with Primus Solutions, Inc., and its subcontractor, ASRC prohibits use of the information for any purpose not specified in the contract; prohibits disclosure of the information to a third party without prior written approval from the Agency; and requires that each official and employee of the contractor sign an agreement to protect the information from unauthorized release and to handle it in accordance with the *FIFRA Information Security Manual.* In addition, Primus Solutions, Inc., and its subcontractor, ASRC are required to submit for EPA approval a security plan under which any CBI will be secured and protected against unauthorized release or compromise. No information will be provided to Primus Solutions, Inc., and its subcontractor, ASRC until the requirements in this document have been fully satisfied. Records of information provided to Primus Solutions, Inc., and its subcontractor, ASRC will be maintained by EPA Project Officers for this contract. All information supplied to Primus Solutions, Inc., and its subcontractor, ASRC by EPA for use in connection with this contract will be returned to EPA when Primus Solutions, Inc., and its subcontractor, ASRC have completed their work.

List of Subjects

Environmental protection, Business and industry, Government contracts, Government property, Security measures.

Dated: October 26, 2011.

Oscar Morales,

Director, Information Technology and Resources Management Division, Office of Pesticide Programs.

[FR Doc. 2011–28626 Filed 11–8–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collections Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collections, as required by the Paperwork Reduction Act of 1995 (PRA). Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before January 9, 2012. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov mailto:PRA@fcc.gov* and to *Cathy.Williams@fcc.gov mailto:Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collections, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1047.

Title: Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, FCC 03–112.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit entities; State, local or tribal government.

Number of Respondents and Responses: 23 respondents; 23 responses.

Estimated Time per Response: 5 hours.

Frequency of Response: Recordkeeping requirement.

Total Annual Burden: 115 hours.

Total Annual Cost: $230.

Obligation to Respond: Required to obtain or retain benefit. The statutory authority for this collection is found at section 225 of the Act, 47 U.S.C. 225. The law was enacted on July 26, 1990, as Title IV of the Americans with Disabilities Act (ADA), Public Law 101–336, 104 Stat. 327, 366–69.

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information from individuals.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On June 17, 2011, the Commission released the *Telecommunication Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Americans with Disabilities Act of 1990,* CC Docket No. 98–67, CG Docket No. 10–123, Second Report and Order, Order on Reconsideration, and Notice of Proposed Rulemaking, published at 68 FR 50993, August 25, 2003 and published at 68 FR 50973, August 25, 2003, adopting additional requirements related to the substance and implementation of TRS mandatory minimum standards. In 47 CFR 64.604(a)(3), the Commission required TRS facilities to provide speed dialing functionality, that entails providers maintaining a list of telephone numbers, which imposes an annual recordkeeping requirement under the PRA.

OMB Control Number: 3060–0737.

Title: Disclosure Requirements for Information Services Provided Under a Presubscription or Comparable Arrangement.

Form Number: N/A. *Type of Review:* Extension of a currently approved collection. *Respondents:* Business or other for-profit entities.

Number of Respondents and Responses: 1,000 respondents; 1,000 responses.

Estimated Time per Response: 4.5 hours.

Frequency of Response: Annual and on occasion reporting requirement; Third party disclosure.

Total Annual Burden: 4,500 hours.

Total Annual Cost: $0.

Obligation to Respond: Voluntary. The statutory authority for this collection is contained in 47 U.S.C. 228.

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information (PII) from individuals.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Section 64.1501(b) of the Commission's rules defines a presubscription or comparable arrangement as a contractual agreement in which an information service provider makes specified disclosures to consumers when offering ''presubscribed'' information services.

The disclosures are intended to ensure that consumers receive information regarding the terms and conditions associated with these services before they enter into contracts to subscribe to them.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2011–28966 Filed 11–8–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[WC Docket No. 06–122; DA 11–1751]

Revised 2011 Annual Telecommunications Reporting Worksheet (FCC Form 499–A) and Accompanying Instructions

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Wireline Competition Bureau released the revised Telecommunications Reporting Worksheet (FCC Form 499–A) and accompanying instructions that have been approved by the Office of Management and Budget.

DATES: Non-interconnected VoIP filers subject to TRS contribution obligations must submit the FCC Form 499–A to register with the Commission by December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Ernesto Beckford, Wireline Competition Bureau, Telecommunications Access Policy Division, at (202) 418–7400 or via the Internet at *Ernesto.Beckford@fcc.gov.*

SUPPLEMENTARY INFORMATION: On October 14, 2011, the Office of Management and Budget approved revisions to the Telecommunications Reporting Worksheet, FCC Form 499–A (the Form) and accompanying instructions. The revisions to the Form and instructions were made in accordance with the Commission's recent order implementing section 103(b) of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA). This section requires that both interconnected *and* non-interconnected voice over Internet protocol (VoIP) service providers participate in and contribute to the Telecommunications Relay Services Fund (TRS Fund).

The revisions to the Form and accompanying instructions include the following:

- Adding a definition for non-interconnected VoIP service providers.
- Adding a filing requirement for non-interconnected VoIP service providers with interstate end-user revenues subject to TRS Fund contributions. Such providers must file the Form to register with the Commission by December 31, 2011. If a non-interconnected VoIP provider has already registered with the Commission (*e.g.,* because it has other lines of business subject to the Commission's registration and reporting requirements), it need not refile the Form.
- Requiring non-interconnected VoIP service providers with interstate end-user revenues subject to TRS Fund contributions to designate an agent for service of process.
- Updating Form instruction references (for Lines 404.1 to 404.3, and 414.1 to 414.2) in accordance with the CVAA and Commission order.
- Revising the contact information for the TRS Administrator.

In compliance with 47 CFR 1.47, 52.17(b), 52.32(b), 54.711(a), and 64.604(c)(5)(iii)(B), the revised FCC Form 499–A for 2011 and the FCC Form 499–A Instructions can be found at: *http://transition.fcc.gov/Forms/Form499–A/499a2–2011.pdf.*

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty).

For further information, please contact Ernesto Beckford,

Telecommunications Access Policy Division, Wireline Competition Bureau at (202) 418–7400 or TTY (202) 418–0484.

Federal Communications Commission.

Vickie Robinson,

Telecommunications Access Policy Division, Deputy Chief.

[FR Doc. 2011–28972 Filed 11–8–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 5, 2011.

A. Federal Reserve Bank of Cleveland (Nadine Wallman, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

1. *S&T Bancorp Inc.,* Indiana, Pennsylvania; to acquire and thereby merge with Mainline Bancorp Inc., Ebensburg, Pennsylvania, and indirectly acquire Mainline National Bank, Portage, Pennsylvania.

B. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street NE., Atlanta, Georgia 30309:

1. *Independent Bancshares, Inc. Employee Stock Ownership Plan,* Red Bay, Alabama; to acquire an additional 19.30 percent, for a total of 47 percent, of the voting shares of Independent Bancshares, Inc., and thereby indirectly acquire voting shares of Community Spirit Bank, both in Red Bay, Alabama, and Spirit Bancshares, Inc., and Spirit Bank, both in Belmont, Mississippi.

C. Federal Reserve Bank of San Francisco (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *Carpenter Fund Manager GP, LLC; Carpenter Fund Management Company, LLC; Carpenter Community BancFund, L.P.; Carpenter Community BanFund—A, L.P.; Carpenter Community BancFund—CA, L.P.; SCJ, Inc.; and CCFW, Inc.,* all in Irvine, California, to acquire more than 24.9 percent of the voting securities of Pacific Mercantile Bancorp, and thereby indirectly acquire voting shares of Pacific Mercantile Bank, both in Costa Mesa, California.

Board of Governors of the Federal Reserve System, November 4, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–29039 Filed 11–8–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage In or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than December 5, 2011.

A. Federal Reserve Bank of Cleveland (Nadine Wallman, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

1. FNB Corporation, Hermitage, Pennsylvania; to acquire Parkvale Financial Corporation, and indirectly acquire Parkvale Savings Bank, both in Monroeville, Pennsylvania, and thereby engage in operating a state savings bank, pursuant to section 225.28(b)(4) of Regulation Y.

Board of Governors of the Federal Reserve System, November 4, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–29038 Filed 11–8–11; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Submission for OMB Review; Comment Request

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Notice and request for comment.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, the FTC is seeking public comments on its request to OMB for a three-year extension of the current PRA clearance for information collection requirements contained in its Trade Regulation Rule entitled Labeling and Advertising of Home Insulation (R-value Rule or Rule) (OMB Control Number 3084–0109). That clearance expires on November 30, 2011.

DATES: Comments must be filed by December 9, 2011.

ADDRESSES: Interested parties may submit written comments by following the instructions in the Request for Comments part of the **SUPPLEMENTARY INFORMATION** section below. Comments in electronic form should be submitted by using this Web link: *https://ftcpublic.commentworks.com/ftc/rvalueruleprа2.* Comments in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex J), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Hampton Newsome, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580, (202) 326–2889.

SUPPLEMENTARY INFORMATION:

Title: R-value Rule, 16 CFR Part 460.

OMB Control Number: 3084–0109.

Type of Review: Extension of a currently approved collection.

Abstract: The R-value Rule sets uniform standards for the substantiation and disclosure of accurate, material product information about the thermal performance characteristics of home insulation products. The R-value of an insulation is its resistance to the flow of heat. This tells consumers how well a product is likely to perform as an insulator and allows consumers to determine whether the cost of the insulation is justified.

On August 12, 2011, the Commission sought comment on the information collection requirements in the R-value Rule. 76 FR 50218. No comments were received. As required by OMB regulations, 5 CFR Part 1320, the FTC is providing this second opportunity for public comment.

Estimated Annual Hours Burden: 126,827 hours.

Likely Respondents and Estimated Burden:

Installation manufacturers, installers, new home sellers and retailers.

(a) Installation manufacturers.

- Testing by installation manufacturers − 15 new products/year × 2 hours each = 30 hours; and
- Disclosures by installation manufacturers − [(144 manufacturers × 20 hours) + (6 largest manufacturers x 80 hours each] = 3,360 hours.
- Recordkeeping by installation manufacturers − 150 manufacturers × 1 hour each = 150 hours.

(b) Installers.

- Disclosures by retrofit installers (manufacturer's insulation fact sheet) − 2 million retrofit installations/year × 2 minutes each = 66,667 hours.
- Disclosures by installers (advertising) − 1,615 installers × 1 hour each = 1,615 hours.
- Recordkeeping by installers − 1,615 installers × 5 minutes each = 134 hours.

(c) New home sellers.

- Disclosures by new home sellers − 586,900 new home sales/year × 30 seconds each = 4,871 hours.

(d) Retailers.

- Disclosures by retailers − [25,000 retailers × 1 hour each (fact sheets) + 25,000 retailers × 1 hour each (advertising disclosure) = 50,000 hours.

Frequency of Response: Periodic.

Total Annual Labor Cost: $2,517,036 per year [approximately $780 for testing, based on 30 hours for manufacturers (30 hours × $26 per hour for skilled technical personnel); $3,976 for manufacturers' and installers' compliance with the Rule's recordkeeping requirements, based on 284 hours (284 hours × $14 per hour for clerical personnel); $47,040 for manufacturers' compliance with third-party disclosure requirements, based on 3,360 hours (3,360 hours × $14 per hour for clerical personnel); and $2,465,240 for disclosure compliance by installers, new home sellers, and retailers (123,262 hours ×$20 per hour for sales persons).]

Request For Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before December 9, 2011. Write ''R-value Rule: FTC File No. R811001'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment doesn't include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment doesn't include any sensitive health information, like medical records or other individually identifiable health information. In addition, don't include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential * * *, '' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, don't include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names. If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c). Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online, or to send them to the Commission by courier or overnight service. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/rvalueruleprа2,* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov,* you also may file a comment through that Web site.

If you file your comment on paper, write ''R-value Rule: FTC File No. R811001'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex J), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before December 9, 2011. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.shtm.*

Comments on the information collection requirements subject to review under the PRA should also be submitted to OMB. If sent by U.S. mail, address comments to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission, New Executive Office Building, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503. Comments sent to OMB by U.S. postal mail, however, are subject to delays due to heightened security precautions. Thus, comments instead should be sent by facsimile to (202) 395–5167.

Willard K. Tom,

General Counsel.

[FR Doc. 2011–29016 Filed 11–8–11; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Statement of Organization, Functions, and Delegations of Authority: Office of the Assistant Secretary for Financial Resources

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) is updating a portion of one office, the Office of the Assistant Secretary for Financial Resources (ASFR), which is located within the Office of the Secretary (OS). The update is designed to streamline and clarify the roles and responsibilities with ASFR's Office of Grants and Acquisition Policy and Accountability (OGAPA).

FOR FURTHER INFORMATION CONTACT: Richard Turman, Principal Deputy Assistant Secretary for Financial Resources, 200 Independence Ave., SW., Washington, DC 20201, (202) 690–6061.

Part A, Office of the Secretary, Statement of Organization, Functions and Delegations of Authority for the Department of Health and Human Services (HHS) is being amended at Chapter AMT, ''Office of Grants and Acquisition Policy and Accountability (OGAPA)'' as last amended at 74 FR 57679–82 dated November 09, 2009.

The Changes are as follows:

1. Under Chapter AM, ''Office of the Assistant Secretary for Financial Resources,'' delete Chapter AMT, ''Office of Grants and Acquisition Policy and Accountability,'' in its entirety and replace with the following:

Chapter AMT, Office of Grants and Acquisition Policy and Accountability (AMT)

Section AMT.00 Mission. The Office of Grants and Acquisition Policy and Accountability (OGAPA) provides Department-wide leadership and management in the areas of grants and acquisition management through policy development, data systems operations and analysis, performance measurement, oversight, and workforce training, development, and certification. OGAPA fosters collaboration, innovation, and accountability in the administration and management of the grants and acquisition functions throughout the Department. In addition to facilitating Departmental implementation of and compliance with existing grants and acquisition laws and regulations, OGAPA provides Departmental and government-wide leadership on implementation of the Federal Financial Accountability and Transparency Act (FFATA) for grant and acquisition activities. OGAPA is the organizational location for Grants.gov, which provides a Government-wide electronic portal for citizens to ''Find'' and ''Apply'' for Federal grant opportunities. OGAPA represents the Department in dealing with the Office of Management and Budget (OMB), U.S. Government Accountability Office (GAO), other Federal agencies, and Congress in the area of grants and acquisition policies and management.

Section AMT.10 Organization. OGAPA is headed by a Deputy Assistant Secretary for Grants and Acquisition Policy and Accountability who reports to the Assistant Secretary for Financial Resources. The Deputy Assistant Secretary also serves as the Department's Suspension and Debarment Official. OGAPA consists of the following components:

- Immediate Office of Grants and Acquisition Policy and Accountability (AMT).
- Division of Grants (AMT1).
- Division of Acquisition (AMT2).
- Office of Small & Disadvantaged Business Utilization (AMT3).

Section AMT.20 Functions

1. Immediate Office of Grants and Acquisition Policy and Accountability (AMT). The Immediate Office of Grants and Acquisition Policy and Accountability consists of the Deputy Assistant Secretary and support staff who assist in the management and administration of the Office's functions, and facilitate and coordinate OGAPA-wide initiatives and activities on behalf of the grants, acquisition and small business communities, including Suspension and Debarment related activities.

2. Division of Grants (AMT1). The Division of Grants is headed by an Associate Deputy Assistant Secretary who serves as the Department's Senior Grants Executive and the Division Director. The Division Director provides leadership, guidance, and oversight to constituent organizations, and coordinates long and short-range planning for HHS' grants management policies, practices, systems and workforce. This Division provides technical assistance to the Department's OPDIVs and STAFFDIVs, evaluates effectiveness of the grants programs and processes; develops pertinent HHS-wide regulatory guidance, policies, and performance standards; maintains and reports Departmental grant/financial assistance award information; and conducts special Departmental initiatives related to grants. It also serves as the focal point for coordinating ASFR's response to cross-cutting Freedom of Information Act (FOIA) requests, audits, reports and suspension and debarment activities related to grants. The Division provides input for coordinated Department positions on proposed legislation and Government regulations specific to grant-related matters. The Division also manages activities associated with the training, development, and certification of—and strategic planning for—the Department's grants management workforce. In its role as managing partner of Grants.gov, the Division engages with grant-making agencies within and external to HHS, grantees, and the Office of Management and Budget.

3. Division of Acquisition (AMT2). The Division of Acquisition is headed by an Associate Deputy Assistant Secretary, who serves as the Department's Senior Procurement Executive and the Division Director. The Division Director provides leadership, guidance, and oversight to constituent organizations, and coordinates long and short-range planning for HHS' acquisition practices, systems and workforce. This Division provides technical assistance to the Department's OPDIVs and STAFFDIVs; evaluates effectiveness of the acquisition programs and processes; develops pertinent HHS-wide regulatory guidance, policies, and performance standards; maintains Departmental contract award information; and conducts special Departmental initiatives related to acquisition. It also serves as the focal point for coordinating ASFR's response to cross-cutting Freedom of Information Act (FOIA) requests, audits, reports, and suspension and debarment activities related to acquisition. The Division provides input for coordinated Department positions on proposed legislation and Government regulations specific to acquisition-related matters. The Division also manages activities associated with the training, development, and certification of—and strategic planning for—the Department's acquisition workforce.

4. Office of Small & Disadvantaged Business Utilization (AMT3). The Office of Small & Disadvantaged Business Utilization (OSDBU) is headed by a Director who reports directly to the Deputy Secretary and is administratively supported by OGAPA. The OSDBU fosters the use of small business as Federal contractors pursuant to Public Law 95–507 and has responsibility within the Department for policy, plans, and oversight to execute

the functions under Sections 8 & 15 of the Small Business Act. The OSDBU provides leadership, policy, guidance and supervision, as well as coordinating short- and long-range strategic planning to assure that small business vendors have a fair opportunity to compete for and receive business with the Department. The Office also provides technical assistance to the Department's OPDIVs and STAFFDIVs; reviews and evaluates planned procurements to ensure that small businesses are given thorough consideration; evaluates effectiveness of the small business programs and processes; develops pertinent HHS-wide policies, guidance, and performance standards; maintains Departmental small business reports; and conducts special Departmental initiatives related to small and socio-economic business concerns. The OSDBU manages the development and implementation of appropriate outreach programs aimed at heightening the awareness of the small business community to the contracting opportunities available within HHS. The OSDBU provides input for coordinated Department positions on proposed legislation and Government regulations on matters affecting cognizant small socioeconomic business programs. It also serves as the focal point for coordinating ASFR's response to cross-cutting Freedom of Information Act (FOIA) requests, audits, and activities related to small business related efforts and programs.

Dated: November 2, 2011.

E.J. Holland, Jr.,

Assistant Secretary for Administration.

[FR Doc. 2011–28964 Filed 11–8–11; 8:45 am]

BILLING CODE 4150–24–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0797]

Agency Information Collection Activities; Proposed Collection; Comment Request; State Enforcement Notifications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on reporting requirements contained in existing FDA regulations governing State enforcement notifications.

DATES: Submit either electronic or written comments on the collection of information by January 9, 2012.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, II, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, (301) 796–3793.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

State Enforcement Notifications—21 CFR 100.2(d) (OMB Control Number 0910–0275)—Extension

Section 310(b) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 337(b)) authorizes States to enforce certain sections of the FD&C Act in their own names but provides that States must notify FDA before doing so. Section 100.2(d) (21 CFR 100.2(d)) sets forth the information that a State must provide to FDA in a letter of notification when it intends to take enforcement action under the FD&C Act against a particular food located in the State. The information required under § 100.2(d) will enable FDA to identify the food against which the State intends to take action and advise the State whether Federal action has been taken against it. With certain narrow exceptions, Federal enforcement action precludes State action under the FD&C Act.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
100.2(d)	1	1	1	10	10

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The estimated reporting burden for § 100.2(d) is minimal because enforcement notifications are seldom used by States. During the last 3 years, FDA has not received any new enforcement notifications; therefore, the Agency estimates that one or fewer notifications will be submitted annually. Although FDA has not received any new enforcement notifications in the last 3 years, it believes these information collection provisions should be extended to provide for the potential future need of a State government to submit enforcement notifications informing FDA when it intends to take enforcement action under the FD&C Act against a particular food located in the State.

Dated: November 4, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–29058 Filed 11–8–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

The Development and Evaluation of Human Cytomegalovirus Vaccines; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

The Food and Drug Administration, Center for Biologics Evaluation and Research, the National Institutes of Health, the National Institute of Allergy and Infectious Diseases, the Centers for Disease Control and Prevention, and the National Vaccine Program Office are announcing a public workshop entitled ''The Development and Evaluation of Human Cytomegalovirus Vaccines.'' The purpose of the public workshop is to identify and discuss key issues related to the development and evaluation of human cytomegalovirus (HCMV) vaccines. The public workshop will include presentations on HCMV disease and pathogenesis and issues related to vaccine development.

Date and Time: The public workshop will be held on January 10 and January 11, 2012, from 8:30 a.m. to 5:30 p.m.

Location: The public workshop will be held at Lister Hill Center Auditorium, National Institutes of Health, Bldg. 38A, 8600 Rockville Pike, Bethesda, MD 20894. Pre-registered participants will receive additional information on parking and public transportation with their email registration confirmation.

Contact Person: Manen Bishop, Center for Biologics Evaluation and Research (HFM–43), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448, (301) 827–2000, FAX: (301) 827–3079, email: *CBERTraining@fda.hhs.gov* (Subject line: HCMV Vaccine Workshop).

Registration: Mail or fax your registration information (including name, title, firm name, address, telephone, and fax numbers) to Manen Bishop (see *Contact Person*) or email to *CBERTraining@fda.hhs.gov* (Subject line: HCMV Workshop Registration) by December 12, 2011. There is no registration fee for the public workshop. Early registration is recommended because seating is limited. Registration on the day of the public workshop will be provided on a space available basis beginning at 8 a.m.

If you need special accommodations due to a disability, please contact Manen Bishop (see *Contact Person*) at least 7 days in advance.

SUPPLEMENTARY INFORMATION: HCMV, also known as human herpesvirus 5, infects approximately half of the U.S. population by adulthood. While most infections are without symptoms, the infection is lifelong. However, the disease may become apparent in children who were infected during gestation (congenital HCMV) and in infected individuals with weakened immune systems. Congenital HCMV infection causes mental retardation, learning disabilities, hearing loss, vision loss, and other disabilities. Patients undergoing stem cell or solid-organ transplants are at particularly high risk for severe disease or death from HCMV infection.

An effective vaccine could have a significant impact on rates of congenital anomalies and severe infections caused by HCMV. However, efforts to develop a vaccine against HCMV have not yet been successful.

The public workshop will focus on the status of knowledge about HCMV biology and epidemiology and on vaccine development strategies. Topics for discussion will include: (1) HCMV epidemiology and diagnosis, (2) HCMV immunology and virology, (3) manufacturers' and regulators' perspectives, (4) target populations for a HCMV vaccine, (5) design of clinical trials to study HCMV vaccines in the setting of congenital HCMV and transplants, and (6) next steps toward development of HCMV vaccines.

Transcripts: Please be advised that as soon as possible after a transcript of the public workshop is available, it will be accessible at: *http://www.fda.gov/BiologicsBloodVaccines/NewsEvents/WorkshopsMeetingsConferences/TranscriptsMinutes/default.htm.* Transcripts of the public workshop may also be requested in writing from the Division of Freedom of Information (ELEM–1029), Food and Drug Administration, 12420 Parklawn Dr., Element Bldg., Rockville, MD 20857.

Dated: November 3, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–29006 Filed 11–8–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; Application for Collaboration With the NIH Center for Translational Therapeutics (NCTT)

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the (insert name of NIH Institute or Center), the National Institutes of Health (NIH) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Proposed Collection: Title: Application for collaboration with the NIH Center for Translational Therapeutics (NCTT). *Type of Information Collection Request:* NEW. *Need and Use of Information Collection:* Programs at the NCTT provide opportunities to partner with and gain access to both common and specifically rare and neglected disease through a variety of programs delivering assay development, screening, hit to lead chemistry, lead optimization, chemical biology studies, drug development capabilities, expertise, and clinical/regulatory resources in a collaborative environment with the goal of moving promising therapeutics into human clinical trials. NCTT uses an application and evaluation process to select collaborators. Selected investigators provide the drug project starting points and ongoing biological/disease expertise throughout the project. *Frequency of Response:* Four per year. *Affected Public:* Research scientists. *Type of Respondents:* Academic scientists, industry, not-for-profits, government

organizations, patient groups. The annual reporting burden is as follows: *Estimated Number of Respondents:* 170. *Estimated Number of Responses per Respondent:* 1. *Average Burden Hours Per Response:* 4. *Estimated Total Annual Burden Hours Requested:* 680.

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
Applicants	170	1	4	680

The annualized cost to respondents is estimated at: $68,000. Capital Costs are $0. Operating Cost is roughly $15,000 for the database to accept and coordinate responses.

Request For Comments: Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. John McKew, Chief, Preclinical Development Branch, NIH Center for Translational Therapeutics, 9800 Medical Center Drive, Building B, Rockville, MD 20850.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60-days of the date of this publication.

Dated: November 1, 2011.

John McKew,

Chief, Preclinical Development Branch, NIH Center for Translational Therapeutics, National Human Genome Research Institute, National Institutes of Health.

[FR Doc. 2011–28965 Filed 11–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Gap Junctions: Program Project Grant Review.

Date: December 6–7, 2011.

Time: 8 a.m. to 11 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Peter B Guthrie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4142, MSC 7850, Bethesda, MD 20892, (301) 435–1239, *guthriep@csr.nih.gov.*

Name of Committee: Biology of Development and Aging Integrated Review Group, International and Cooperative Projects—1 Study Section.

Date: December 13, 2011.

Time: 12 p.m. to 7 p.m.

Agenda: To review and evaluate grant applications.

Place: Westin Grand, 2350 M Street, NW.,Washington, DC 20037.

Contact Person: Hilary D Sigmon, Ph.D.,Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5222, MSC 7852, Bethesda, MD 20892, (301) 594–6377, *sigmonh@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 2, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–28958 Filed 11–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. 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 Cancer Institute Special Emphasis Panel, Cancer Diagnostic and Therapeutic Agents Enabled by Nanotechnology.

Date: November 29, 2011.

Time: 8 a.m. to 7 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Savvas C Makrides, Ph.D., Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd., Rm 8053, Bethesda, MD 20892, (301) 594–1279, *makridessc@mail.nih.gov.*

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/sep/sep.htm,* where an agenda and any additional

information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: November 2, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–28963 Filed 11–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Cell Biology.

Date: December 8–9, 2011.

Time: 8 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Michael H Chaitin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5202, MSC 7850, Bethesda, MD 20892, (301) 435–0910, *chaitinm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Program Project: Developmental Pharmacology.

Date: December 14–15, 2011.

Time: 8 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Janet M Larkin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1102, MSC 7840, Bethesda, MD 20892, (301) 806–2765, *larkinja@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 2, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–28962 Filed 11–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. 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 Cancer Institute Initial Review Group, Subcommittee A—Cancer Centers.

Date: December 1–2, 2011.

Time: 8 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Gail J Bryant, MD, Medical Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Blvd., Room 8107, MSC 8328, Bethesda, MD 20892–8328, (301) 402–0801, *gb30t@nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/irg/irg.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: November 2, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–28960 Filed 11–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Program Project: Computational Resource Review.

Date: November 16–18, 2011.

Time: 7 p.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Grand Hyatt San Francisco, 345 Stockton Street, San Francisco, CA 94108.

Contact Person: Raymond Jacobson, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5858, MSC 7849, Bethesda, MD 20892, (301) 996–7702, *jacobsonrh@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Hematology and Homeostasis.

Date: November 29, 2011.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Luis Espinoza, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6183, MSC 7804, Bethesda, MD 20892, (301) 495–1213, *espinozala@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 2, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–28961 Filed 11–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute On Alcohol Abuse And Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group, Biomedical Research Review Subcommittee.

Date: March 13, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Philippe Marmillot, Ph.D., Scientific Review Officer National Institutes Of Health, National Institute On Alcohol Abuse And Alcoholism, 5635 Fishers Lane, Rm 2019, Bethesda, MD 20892, (301) 443–2861, *marmillotp@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards., National Institutes of Health, HHS)

Dated: November 3, 2011

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–29073 Filed 11–8–11; 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 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 Child Health and Human Development Special Emphasis Panel, HIV Reproduction.

Date: December 1, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Dupont Hotel, 1500 New Hampshire Avenue NW., Washington, DC 20036.

Date: December 2, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Dupont Hotel, 1500 New Hampshire Avenue NW., Washington, DC 20036.

Contact Person: Carla T. Walls, Ph.D., 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) 435–6898, *wallsc@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: November 3, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–29025 Filed 11–8–11; 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 Group, NIH Summer Research Experience Programs (R25).

Date: December 2, 2011.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Anne Krey, Ph.D., 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, *ak41o@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: November 3, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–29023 Filed 11–8–11; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development; Special Emphasis Panel; Infertility Treatment, Child Growth and Development to age Three Years.

Date: November 28, 2011.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Sathasiva B. Kandasamy, Ph.D., 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) 435–6680, *skandasa@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: November 3, 2011.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–29022 Filed 11–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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 materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Pilot Clinical Trial.

Date: December 5, 2011.

Time: 2:15 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Richard D. Crosland, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892, (301) 594–0635, *Rc218u@nih.gov.*

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; NINDS Research Education Programs for Residents and Fellows in Neurology, Neurosurgery, Neuropathology and Neuroradiology.

Date: December 8, 2011.

Time: 9 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Raul A. Saavedra, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892, (301) 496–9223, *saavedrr@ninds.nih.gov.*

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Stroke Clinical Trial.

Date: December 8, 2011.

Time: 2:15 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Richard D. Crosland, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892, (301) 594–0635, *Rc218u@nih.gov.*

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; SMA NeuroNEXT SEP.

Date: December 14, 2011.

Time: 9 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Shanta Rajaram, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892, (301) 435–6033, rajarams@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: November 2, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–29021 Filed 11–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: AIDS/HIV Neurobiology.

Date: November 17–18, 2011.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kenneth A Roebuck, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, MSC 7852, Bethesda, MD 20892, (301) 435–1166, *roebuckk@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Neurodevelopment and Neural Disorders.

Date: November 28, 2011.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Laurent Taupenot, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4811, MSC 7850, Bethesda, MD 20892, (301) 435–1203, *taupenol@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Biomedical Imaging.

Date: December 2, 2011.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Malgorzata Klosek, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4188, MSC 7849, Bethesda, MD 20892, (301) 435–2211, *klosekm@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 2, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–29019 Filed 11–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Notice of Closed Meeting Center for Scientific Review

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: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cell Biology.

Date: November 22, 2011.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Wallace Ip, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5128, MSC 7840, Bethesda, MD 20892, (301) 435–1191, *ipws@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 1, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–28959 Filed 11–8–11; 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 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 Allergy and Infectious Diseases Special Emphasis Panel, The Infant Immune System: Implications for Vaccines and Response to Infections.

Date: December 1–2, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Salons AB, Bethesda, MD 20892.

Contact Person: Lakshmi Ramachandra, Ph.D., 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: November 2, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–28957 Filed 11–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; 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 Biomedical Imaging and Bioengineering Special Emphasis Panel,Biomed—ISS.

Date: January 18, 2012.

Time: 11 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Democracy II, 6707 Democracy Blvd. 900, Bethesda, MD 20892,(Telephone Conference Call).

Contact Person: Ruth Grossman, DDS, Scientific Review Officer, National Institute of Biomedical Imagin and Bioengineering, National Institutes of Health,6707 Democracy Boulevard, Rm. 960, Bethesda, MD 20892,(301) 496–8775, *grossmanrs@mail.nih.gov.*

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel,2012 P41 Reverse Site Visit.

Date: February 26–27, 2012.

Time: 6 p.m. to 9 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Station, Bethesda, MD 20814.

Contact Person: Ruth Grossman, DDS, Scientific Review Officer, National Institute of Biomedical Imagin and Bioengineering, National Institutes of Health,6707 Democracy Boulevard, Rm. 960, Bethesda, MD 20892,(301) 496–8775, *grossmanrs@mail.nih.gov.*

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel,2012 P41 Site Visit.

Date: March 28–30, 2012.

Time: 6 p.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: InterContinental Chicago, 505 North Michigan Avenue, Chicago, IL.

Contact Person: Ruth Grossman, DDS, Scientific Review Officer, National Institute of Biomedical Imagin and Bioengineering, National Institutes of Health,6707 Democracy Boulevard, Rm. 960, Bethesda, MD 20892,(301) 496–8775, *grossmanrs@mail.nih.gov.*

Dated: November 2, 2011.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–28956 Filed 11–8–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2011–0078]

Privacy Act of 1974; Department of Homeland Security United States Coast Guard-029 Notice of Arrival and Departure System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security proposes to update and reissue an existing system of records titled, ''Department of Homeland Security United States Coast Guard-029 Notice of Arrival and Departure System of Records.'' This system of records allows the Department of Homeland Security/United States Coast Guard to facilitate the effective and efficient entry and departure of vessels into and from the United States and assist with assigning priorities for conducting maritime safety and security missions in accordance with international and United States regulations. As a result of the biennial review of this system, records have been updated to include cargo within the purpose and record source categories. This updated system will be included in the Department of Homeland Security's inventory of record systems. The Privacy Act exemptions for this system remain unchanged.

DATES: Submit comments on or before December 9, 2011. This system will be effective December 9, 2011.

ADDRESSES: You may submit comments, identified by docket number DHS–2011–0078 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (703) 483–2999.
- *Mail:* Mary Ellen Callahan, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Marilyn Scott-Perez (202) 475–3515 Privacy Officer, United States Coast Guard, 2100 2nd Street SW., Stop 7101, Washington, DC 20593. For privacy issues contact: Mary Ellen Callahan (703) 235–0780, Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Homeland Security (DHS) United States Coast Guard (USCG) proposes to update and reissue an existing DHS system of records titled, ''DHS/USCG–029 Notice of Arrival and Departure (NOAD) System of Records.''

USCG collects information related to NOAD for U.S. vessels in commercial service and all foreign vessels bound for or departing from ports or waterways within the United States. This information is maintained within the Ship Arrival Notification System (SANS), as well as other USCG systems used for screening and vetting of vessels, primarily, but not exclusively, through Marine Information for Safety and Law Enforcement (MISLE), DHS/USCG–013, June 25, 2009, 74 FR 30305 and the Maritime Awareness Global Network (MAGNet) System of Records Notice, DHS/USCG–061, May 15, 2008, 73 FR 28143. Information is retrieved from the SANS by vessel and not by personal identifier; however, USCG uses the information taken from the SANS in other systems to conduct screening and vetting of individuals pursuant to its mission for protecting and securing the maritime sector.

The information that is required to be collected and submitted through Electronic Notice of Arrival and Departure (eNOAD) can be found on routine arrival/departure documents that passengers and crewmembers must provide to DHS when entering or departing the United States. eNOAD information includes complete name, date and place of birth, gender, country of citizenship, travel/mariner document type, number and country of issuance, expiration date, country of residence, status on board the vessel, and U.S. destination address (except for U.S. Citizens, lawful permanent residents, crew and those in transit).

Additionally, vessel carriers and operators must provide the vessel name, vessel country of registry/flag, International Maritime Organization (IMO) number or other official number, voyage number, date of arrival/departure, and foreign port where the passengers and crew members began/terminate their sea transportation to the United States.

USCG will collect vessel particulars that are submitted by the vessel owner, agent, master, operator, or person in charge of a vessel in advance of a vessel's arrival or departure from the U.S. The information will be used to perform counterterrorism, law enforcement, safety and security queries to identify risks to the vessel or to the United States.

The purpose of the information collection is to assess risk to vessels arriving to or departing from a U.S. port and to identify vessels that may pose a safety or security risk to the United States.

The information collection allows USCG to facilitate the effective and efficient entry and departure of vessels into and from the U.S. and assist the USCG with assigning priorities while conducting maritime safety and security missions in accordance with international and U.S. regulations.

NOAD information is maintained for a period of no more than ten years or when no longer needed, whichever is longer, from the date of collection at which time the data is deleted. Should derogatory information be discovered by USCG either through TECS or USCG's own sources, such information would be communicated either through USCG's MAGNet, the Coast Guard

Messaging System (CGMS), or other USCG systems.[1] NOAD data is transmitted to the Intelligence Coordination Center (ICC) and stored in the CoastWatch Pre-Arrival Processing Program (CP3). NOAD data within CP3 is destroyed or deleted when no longer needed for reference, or when ten years old, whichever is later.

As a result of the biennial review of this system, the purpose and the record source categories have been amended to include cargo. Cargo has been collected under previous rulemaking but was never included in the SORN. Disclosure to consumer reporting agencies category has also been added.

Consistent with DHS' information sharing mission, information stored in NOAD may be shared with other DHS components, as well as appropriate federal, state, local, Tribal, territorial foreign, or international government agencies. This sharing will only occur after DHS determines that the receiving component or agency has a need to know the information to carry out national security, law enforcement, immigration, intelligence, or other functions consistent with the routine uses set forth in this system of records notice. This system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which the U.S. government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. The SANS is not a system of records, but NOAD information maintained in the SANS can be removed and used in other systems within USCG. Below is the description of the DHS/United States Coast Guard-029 Notice of Arrival and Departure System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget (OMB) and to Congress.

System of Records: DHS/USCG–029

SYSTEM NAME:

DHS/USCG–029 Notice of Arrival and Departure Information (NOAD).

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

NOAD information for USCG is collected within the Ship Arrival Notification System (SANS) located at USCG Operations Systems Center in Kearneysville, WV. NOAD records may be maintained in the SANS, or at computer terminals located at USCG Headquarters, headquarters units, area offices, sector offices, sector sub-unit offices, and other locations where USCG authorized personnel may be posted to facilitate DHS' mission.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this notice consist of crew members who arrive and depart the U.S. by sea and individuals associated with a vessel and whose information is submitted as part of a notice of arrival or notice of departure, including but not limited to vessel owners, operators, charterers, reporting parties, 24-hour contacts, company security officers and persons in addition to crew who arrive and depart the U.S. by sea.

CATEGORIES OF RECORDS IN THE SYSTEM:

- Records on vessels includes: name of vessel; name of registered owner; country of registry; call sign; IMO number or, if a vessel does not have an IMO number the official number; name of the operator; name of charterer; name of classification society.
- Records on arrival information pertaining to the vessel includes: names of last five foreign ports or places visited by the vessel; dates of arrival and departure for last five foreign ports or places visited; for each port or place of the U.S. to be visited, the name of the receiving facility, the port or place; for the port or place of the U.S. the estimated date and time of arrival; for the port or place in the U.S. the estimated date and time of departure; the location (port or place and country) or position (latitude and longitude or waterway and mile marker) of the vessel at the time of reporting; the name and telephone number of a 24-hour point of contact (POC).
- Records on departure information as it pertains to the voyage includes: the name of departing port or waterways of the U.S., the estimated date and time of departure; next port or place of call (including foreign), the estimated date and time of arrival; the name and telephone number of a 24-hour POC.
- Records on crewmembers include: full name; date of birth; nationality; identification type (for example, passport, U.S. Alien Registration Card, U.S. Merchant Mariner Document, foreign mariner document, government issued picture ID (Canada), or government-issued picture ID (U.S.), number, issuing country, issue date, expiration date); position or duties on the vessel; where the crewmember embarked (list port or place and country); where the crewmember will disembark.
- Records for each individual onboard in addition to crew include: full name; date of birth; nationality; identification type (for example: passport, U.S. alien registration card, government-issued picture ID (Canada), government-issued picture ID (U.S.), number, issuing country, issue date, expiration date); U.S. address information; and from where the person embarked (list port or place and country).
- Records related to cargo onboard the vessel include: a general description of cargo other than Certain Dangerous Cargo (CDC) onboard the vessel (e.g., grain, container, oil, *etc.*); name of each CDC carried, including United Nations (UN) number, if applicable; and amount of each CDC carried.
- Records regarding the operational condition of equipment required by 33 CFR part 164; the date of issuance for the company's document of compliance certificate; the date of issuance of the vessel's safety management certificate; the name of the flag administration, or recognized organization(s) representing the vessel flag administration, that issued those certificates.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 14 U.S.C. 632; 33 U.S.C. 1223, 46 U.S.C. 3717; 46 U.S.C. 12501; Federal Records Act of 1950, Pub. L. 90–620; The Maritime Transportation Act of 2002, Pub. L. 107–295; The Homeland Security Act of 2002, Pub. L. 107–296; 33 CFR part 160, 36 CFR chapter XII.

PURPOSE(S):

The purpose of this system is to maintain NOAD information to screen individuals and cargo associated with

[1] See *http://www.dhs.gov/privacy* for PIAs for MAGNet and the Law Enforcement Intelligence Database (LEIDB), a system used to analyze USCG message traffic.

vessels entering or departing U.S. waterways for maritime safety, maritime security, maritime law enforcement, marine environmental protection, and other related purposes.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the U.S. Department of Justice (DOJ) (including U.S. Attorney offices) or other federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation: (1) DHS, or (2) any employee of DHS in his/her official capacity, or (3) any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent said employee, or (4) the U.S. or any agency thereof;

B. To a Congressional office, for the record of an individual in response to an inquiry from that Congressional office made at the request of the individual to whom the record pertains;

C. To the National Archives and Records Administration or other federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purposes of performing an audit, or oversight operations as authorized by law but only such information as is necessary and relevant to such audit or oversight function;

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. DHS has determined that as a result of a suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the federal government, when necessary to accomplish an agency function related to this system of records, in compliance with the Privacy Act of 1974, as amended;

G. To an appropriate federal, state, Tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure;

H. To federal and foreign government intelligence or counterterrorism agencies or components where USCG becomes aware of an indication of a threat or potential threat to national or international security, or where such use is to assist in anti-terrorism efforts and disclosure is appropriate to the proper performance of the official duties of the person making the disclosure.

I. To an organization or individual in either the public or private sector, either foreign or domestic, where there is a reason to believe that the recipient is or could become the target of a particular terrorist activity or conspiracy, to the extent the information is relevant to the protection of life, property, or other vital interests of a data subject and disclosure is proper and consistent with the official duties of the person making the disclosure;

J. To appropriate federal, state, local, Tribal, or foreign governmental agencies or multilateral governmental organizations, for the purpose of protecting the vital interests of a data subject or other persons, including to assist such agencies or organizations in preventing exposure to or transmission of a communicable or quarantined disease or for combating other significant public health threats; appropriate notice will be provided of any identified health threat or risk;

K. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, settlement negotiations, response to a subpoena, or in connection with criminal law proceedings;

L. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate in the proper performance of the official duties of the officer making the disclosure;

M. To an appropriate federal, state, local, Tribal, territorial, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit and when disclosure is appropriate to the proper performance of the official duties of the person making the request;

N. To appropriate federal, state, local, Tribal, or foreign governmental agencies or multilateral governmental organizations where USCG is aware of a need to utilize relevant data for purposes of testing new technology and systems designed to enhance border security or identify other violations of law.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

NOAD information is stored electronically in the SANS located at USCG Operations Systems Center in Kearneysville, WV. USCG uses an alternative storage facility for the SANS historical logs and system backups. Derivative NOAD system data may be stored on USCG Standard Workstation III computers or USCG unit servers located at USCG Headquarters, headquarters units, area offices, sector offices, sector sub-unit offices, and other locations where USCG authorized personnel may be posted to facilitate DHS' mission.

RETRIEVABILITY:

NOAD information maintained in the SANS is not retrievable by name or other unique personal identifier. NOAD information is extracted from the SANS by vessel and then retrieved by name,

passport number, or other unique personal identifier.

SAFEGUARDS:

NOAD data in the SANS is safeguarded in accordance with applicable laws, rules, and policies. All records are protected from unauthorized access through appropriate administrative, physical, and technical safeguards. These safeguards include role-based access provisions, restricting access to authorized personnel who have a need-to-know, using locks, and password protection identification features. USCG file areas are locked after normal duty hours and the facilities are protected from the outside by security personnel.

The system manager, in addition, has the capability to maintain system back-ups for the purpose of supporting continuity of operations and the discrete need to isolate and copy specific data access transactions for the purpose of conducting security incident investigations.

All communication links with the USCG datacenter are encrypted. The databases are Certified and Accredited in accordance with the requirements of the Federal Information Security Management Act (FISMA).

RETENTION AND DISPOSAL:

In accordance with NARA Disposition Authority number N1–026–05–11, NOAD information on vessels and individuals maintained in the SANS is destroyed or deleted when no longer needed for reference, or after ten years old, whichever is later. Why does this seem much more general than other retention schedules? Is this consistent with other discussions of retention?

Outputs, which include ad-hoc reports generated for local and immediate use to provide a variety of interested parties, for example, Captain of the Port and marine safety offices, sea marshals, Customs and Border Patrol, Immigration and Customs Enforcement with the necessary information to set up security zones, scheduling boarding and inspections activities, actions for non-compliance with regulations, and other activities in support of USCG's mission to provide for safety and security of U.S. ports, will be deleted after five years if they do not constitute a permanent record according to NARA.

SYSTEM MANAGER AND ADDRESS:

Commandant, USCG–26, United States Coast Guard Headquarters, 2100 2nd Street SW., Washington, DC 20593–0001.

NOTIFICATION PROCEDURE:

The Secretary of Homeland Security has exempted this system from the notification, access, and amendment procedures of the Privacy Act because it is a law enforcement system. However, DHS/USCG will consider individual requests to determine whether or not information may be released. Thus, to determine whether this system contains records relating to you, write to the System Manager identified above. Your written request should include your name and mailing address. You may also provide any additional information that will assist in determining if there is a record relating to you if applicable, such as your Merchant Mariner License or document number, the name and identifying number (documentation number, state registration number, IMO number, etc.) of any vessel with which you have been associated and the name and address of any facility (including platforms, deep water ports, marinas, or terminals) with which you have been associated. The request must be signed by the individual, or his/her legal representative, and must be notarized to certify the identity of the requesting individual pursuant to 28 U.S.C. 1746 (unsworn declarations under penalty of perjury). Submit a written request identifying the record system and the category and types of records sought to the Executive Agent. Request can also be submitted via the FOI/Privacy Acts. See *http://www.uscg.mil/foia/* for additional information.

RECORD ACCESS PROCEDURES:

Write to the System Manager at the address given above in accordance with the Notification Procedure.'' Provide your full name and a description of the information you seek, including the time frame during which the record(s) may have been generated. Individuals requesting access to their own records must comply with DHS's Privacy Act regulation on verification of identity (6 CFR 5.21(d)). Further information may also be found at *http://www.dhs.gov/foia* or at *http://www.uscg.mil/foia/.*

CONTESTING RECORD PROCEDURES:

See ''Notification'' procedures above.

RECORD SOURCE CATEGORIES:

The system contains data received from vessel carriers and operators regarding passengers, crewmembers, and cargo which arrive in, depart from, transit through the U.S. on a vessel carrier covered by notice of arrival and departure regulations.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

This system, however, may contain records or information recompiled from or created from information contained in other systems of records, which are exempt from certain provisions of the Privacy Act. For these records or information only, in accordance with 5 U.S.C. 552a(j)(2), (k)(1), and (k)(2), DHS will also claim the original exemptions for these records or information from subsections (c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (4)(G) through (I), (5), and (8); (f), and (g) of the Privacy Act of 1974, as amended, as necessary and appropriate to protect such information.

Dated: October 13, 2011.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2011–28975 Filed 11–8–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2011–0031; OMB No. 1660–0038]

Agency Information Collection Activities: Proposed Collection; Comment Request, Write Your Own (WYO) Company Participation Criteria; New Applicant

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency, 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 a proposed extension, without change, of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning information collected from new applicants to the National Flood Insurance Program (NFIP), Write-Your-Own (WYO) Program.

DATES: Comments must be submitted on or before January 9, 2012.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *http://www.regulations.gov* under Docket ID FEMA–2011–0031. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Docket Manager, Office of Chief

Counsel, DHS/FEMA, 500 C Street SW., Room 835, Washington, DC 20472–3100.

(3) *Facsimile.* Submit comments to (703) 483–2999.

(4) *Email.* Submit comments to *FEMA–POLICY@dhs.gov.* Include Docket ID FEMA–2011–0031 in the subject line.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Dennis Kuhns, Director, Risk Insurance Division, Mitigation Directorate, Federal Emergency Management Agency, (703) 605–0429 for additional information. You may contact the Records Management Division for copies of the proposed collection of information at facsimile number (202) 646–3347 or email address: *FEMA–Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION: Under the National Flood Insurance Program's (NFIP) Write Your Own (WYO) Program, the Federal Emergency Management Agency may enter into arrangements authorized by the National Flood Insurance Act of 1968, as amended (the Act) with individual private sector insurance companies that are licensed to engage in the business of property insurance. These companies may offer flood insurance coverage to eligible property owners utilizing their customary business practices. To facilitate the marketing of flood insurance, the Federal Government will be a guarantor of flood insurance coverage for WYO companies policies issued under the WYO arrangement. To ensure that a company seeking to return or participate in the WYO program is qualified, FEMA is requiring a one-time submission of information to determine the company's qualifications, as set forth in 44 CFR 62.24.

Collection of Information

Title: Write Your Own (WYO) Company Participation Criteria; New Applicant.

Type of Information Collection: Extension, without change, of a currently approved information collection.

OMB Number: 1660–0038.

FEMA Forms: None.

Abstract: New insurance companies that seek to participate in the WYO program, as well as former WYO companies seeking to return, must meet standards for WYO Financial Control Plan (approved under OMB Control# 1660–0020). Private Insurance Companies and/or public entity risk-sharing organizations wishing to enter or reenter the WYO program must demonstrate the ability to meet the financial requirements. The information allows FEMA to determine the applicant's capability of meeting program goals including marketing of flood insurance, training agents and staff in the program rules, and its capabilities for claims handling and disaster response.

Affected Public: Business of other for-profit.

Number of Respondents: 5.

Number of Responses: 5.

Estimated Total Annual Burden Hours: 35.

ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/form number	Number of respondents	Number of responses per respondent	Total number of responses	Average burden per response (in hours)	Total annual burden (in hours)	Average hourly wage rate	Total annual respondent cost
Business or Other for-profit (Insurance Industry).	Application Process/No Form.	5	1	5	7	35	$63.53	$2,223.55
Total	.....	5	.....	5	.....	35	.....	2,223.55

Estimated Cost: The estimated annual cost to respondents for the hour burden is $2,223.55. There are no annual costs to respondents operations and maintenance costs for technical services. There is no annual start-up or capital costs. The cost to the Federal Government is $1,204.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) Evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Gary L. Anderson,

Acting Chief Administrative Officer, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2011–28977 Filed 11–8–11; 8:45 am]

BILLING CODE 9110–11–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2011–0032; OMB No. 1660–0068]

Agency Information Collection Activities: Proposed Collection; Comment Request, Federal Hotel and Motel Fire Safety Declaration Form

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency, 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 a proposed extension, without change, of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the collection of information regarding the existence of smoke detectors and sprinkler systems within hotels and motels.

DATES: Comments must be submitted on or before January 9, 2012.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *http://www.regulations.gov* under Docket ID FEMA–2011–0032. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Regulatory Affairs Division, Office of Chief Counsel, DHS/FEMA, 500 C Street SW., Room 835, Washington, DC 20472–3100.

(3) *Facsimile.* Submit comments to (703) 483–2999.

(4) *Email.* Submit comments to *FEMA-POLICY@dhs.gov.* Include Docket ID FEMA–2011–0032 in the subject line.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bruce Hensler, Fire Program Specialist, FEMA/U.S. Fire Administration, (301) 447–1263 for additional information. You may contact the Records Management Division for copies of the proposed collection of information at facsimile number (202) 646–3347 or email address: *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION: Public Law 101–391 requires FEMA to establish and maintain a list of hotels, motels, and similar places of public accommodation meeting minimum requirements for protection of life from fire; the list is known as the National Master List (NML). This law resulted from a series of deadly fires in hotels and motels, occurring in the late 70's and 80's, with high loss of life. The legislative intent of this public law is to provide all travelers the assurance of fire-safety in accommodations identified on the National Master List. Public Law 101–391 further stipulates that Federal employees on official travel stay in properties approved by the authority having jurisdiction (AHJ) and listed on the current NML.

Collection of Information

Title: Federal Hotel and Motel Fire Safety Declaration Form.

Type of Information Collection: Extension, without change, of a currently approved information collection.

OMB Number: 1660–0068.

Form Titles and Numbers: FEMA Form 516–0–1, Federal Hotel and Motel Fire Safety Declaration Form.

Abstract: FEMA collects information voluntarily offered by places of accommodation regarding the existence of smoke detectors and automatic fire sprinkler systems. The information is compiled as a National Master List of lodging establishments meeting minimum criteria for life-safety from fire, as defined in the Hotel and Motel Fire Safety Act of 1990. The list is used by Federal employees to select lodging for work-related travel and by the general public seeking life-safety while traveling.

Affected Public: Business or other for-profit; State, local or Tribal Government.

Estimated Total Annual Burden Hours: 694 hours.

ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/ form number	Number of respondents	Number of responses per respondent	Total Number of responses	Average burden per response (in hours)	Total annual burden (in hours)	Average hourly wage rate	Total annual respondent cost
Business or other for-Profit.	Federal Hotel and Motel Fire Safety Declaration Form/FEMA Form 516–0–1.	2,275	1	2,275	0.25 ..... (15 mins.)	569	$36.72	$20,894
State, local or Tribal Government.	Review of FEMA Form 516–0–1.	19	20	380	0.33 ..... (20 mins.)	125	35.70	4,463
Total	.....	2,294	.....	2,655	.....	694	.....	25,357

Estimated Cost: The estimated annual cost to respondents for the hour burden is $25,357. There are no annual costs to respondents operations and maintenance costs for technical services. There is no annual start-up or capital costs. The cost to the Federal Government is $71,141.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) Evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology,

e.g., permitting electronic submission of responses.

Gary L. Anderson,

Acting Chief Administrative Officer, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2011–28978 Filed 11–8–11; 8:45 am]

BILLING CODE 9111–45–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2010–0004]

National Disaster Recovery Framework (NDRF)

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice of availability.

SUMMARY: This document provides notice of the availability of the final National Disaster Recovery Framework (NDRF). The NDRF is intended to work in concert with the National Response Framework (NRF) to provide organizing constructs and principles solely focused on disaster recovery. Recognizing the continuum between preparedness, response, recovery, and mitigation, the NDRF transitions with and continues beyond the scope of the National Response Framework.

DATES: This NDRF is effective September 23, 2011.

ADDRESSES: This final NDRF is available online at *http://www.regulations.gov* and on FEMA's Web site at *http://www.fema.gov.* The proposed and final NDRF, all related **Federal Register** Notices, and all public comments received during the comment period are available at *http://www.regulations.gov* under docket ID FEMA–2010–0004. You may also view a hard copy of the final NDRF at the Office of Chief Counsel, Federal Emergency Management Agency, Room 835, 500 C Street SW., Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: Gerilee Bennett, National Planning Branch Chief, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4173.

SUPPLEMENTARY INFORMATION The NDRF addresses the short, intermediate, and long-term challenges of managing disaster recovery. Like the NRF, the NDRF is intended to address all hazards events, whether natural or manmade, and provide constructs that are scalable, adaptable, and responsive to the changing needs of different disasters. In recognizing the continuum between preparedness, response, recovery, and mitigation, the NDRF is intended to overlap and continue beyond the scope of the NRF.

The NDRF provides recovery concepts and principles important to all disaster recovery stakeholders. It provides guidance to stakeholders for engaging in pre-disaster recovery planning and other recovery preparedness and resiliency building efforts; clarifies roles for local, State, Tribal and Federal governments, private non-profit and private sector organizations; provides guidance for facilitating post-disaster recovery planning to expedite long-term disaster recovery; and provides assistance to stakeholders in identifying recovery needs beyond replacement or return to pre-disaster condition. The document also provides guidance that impacted communities may use to develop recovery priorities, and measure recovery progress and outcomes against their agreed-upon objectives. It also provides guidance for both government and non-governmental organizations providing recovery assistance to track progress, ensure accountability, and make adjustments to ongoing assistance. The NDRF lays out a systematic approach to disaster recovery, applicable to all levels of government and sectors of communities with recovery responsibilities.

On February 10, 2010, the Long Term Disaster Recovery Working Group published a draft of the NDRF in the **Federal Register** on February 10, 2010 (75 FR6681). In response to this posting, we received 139 comments. These comments helped to clarify and strengthen key NDRF concepts including the role of private sector and nongovernmental organizations in recovery, coordination with State and local recovery partners, and the central role leadership plays in successful recovery efforts.

The NDRF does not have the force or effect of law.

Authority: 6 U.S.C. 771; 42 U.S.C. 5121–5207.

Dated: October 26, 2011.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–28970 Filed 11–8–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

National Customs Automation Program Test Concerning Automated Commercial Environment (ACE) Simplified Entry

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This document announces U.S. Customs and Border Protection's (CBP's) plan to conduct a National Customs Automation Program (NCAP) test concerning Automated Commercial Environment (ACE) entry capability. This new capability will include functionality specific to the filing of entry data for formal and informal consumption entries. This functionality will simplify the entry process by allowing participants to submit 12 required and three (3) optional data elements to CBP at any time prior to the arrival of the merchandise on the conveyance transporting the cargo to the United States. This data will fulfill merchandise entry requirements and will allow for earlier release decisions and more certainty for the importer in determining the logistics of cargo delivery. This initial phase of the test will be open to entries filed in the air transportation mode only. This notice invites parties to participate in the test, seeks public comment concerning any aspect of the planned test, describes the eligibility requirements for participation in the test, and outlines the development and evaluation methodology to be used in the test. This notice will be referred to as the Simplified Entry Notice.

DATES: Communication to CBP indicating interest in participation in this planned test is requested within five (5) business days from November 9, 2011. Comments may be submitted to the Web site indicated in the ''Addresses'' section below at any time throughout the test. The initial phase of the test will begin on or about December 31, 2011 and will run for approximately two years. CBP will begin an evaluation of the initial phase of the test after the test has been ongoing for approximately 90 days for purposes of possible extension or expansion.

ADDRESSES: Comments concerning this notice and indication of interest in participation in Simplified Entry should be submitted via email to *cbpsimplifiedprocess@dhs.gov.* For a comment, please indicate ''*Simplified*

Entry **Federal Register** *Notice''* in the subject line of your email.

FOR FURTHER INFORMATION CONTACT: For policy related questions, contact Steve Hilsen, Trade Policy and Programs, Office of International Trade, at *stephen.hilsen@dhs.gov.* For technical questions, contact Susan Maskell, Client Representative Branch, ACE Business Office, Office of International Trade, at *susan.maskell@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The National Customs Automation Program (NCAP) was established in Subtitle B of Title VI—Customs Modernization, in the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2170, December 8, 1993) (Customs Modernization Act). *See* 19 U.S.C. 1411. Through NCAP, the initial thrust of customs modernization was on trade compliance and the development of the Automated Commercial Environment (ACE), the planned successor to the Automated Commercial System (ACS). ACE is an automated and electronic system for commercial trade processing which is intended to streamline business processes, facilitate growth in trade, ensure cargo security, and foster participation in global commerce, while ensuring compliance with U.S. laws and regulations and reducing costs for U.S. Customs and Border Protection (CBP) and all of its communities of interest. The ability to meet these objectives depends on successfully modernizing CBP's business functions and the information technology that supports those functions. CBP's modernization efforts are accomplished through phased releases of ACE component functionality designed to replace a specific legacy ACS function. Each release will begin with a test and will end with mandatory compliance with the new ACE feature, thus retiring the legacy ACS function. Each release builds on previous releases and sets the foundation for subsequent releases.

Through the NCAP process, CBP is testing the ACE Entry Summary, Accounts and Revenue (ESAR) capabilities. See the General Notice published August 26, 2008 (73 FR 50337) for more information. These new capabilities include functionality specific to the filing and processing of entry summaries for formal consumption entries and informal entries. These capabilities serve to assist the importer in completion of entry as required by the provisions of 19 U.S.C. 1484(a)(1)(B).

In addition, CBP is conducting an NCAP test concerning the transmission of required advance ocean and rail data through the Automated Commercial Environment (ACE). See the General Notice published October 20, 2010 (75 FR 64737) for more information.

In order to provide the link between the transmission of manifest data and the completion of entry summary functionality, CBP is now initiating a test to automate the merchandise entry and release process required prior to the filing of entry summaries. Most commonly, entry information is submitted to CBP electronically through the Automated Broker Interface (ABI) with the submission of the electronic equivalent of the CBP Form 3461 (see 19 U.S.C. 1484(a)(1)(A), 19 CFR 141.61, Subpart D to 19 CFR part 143, 19 CFR 142.3, and 19 CFR 142.4.) Entry may be filed prior to the arrival of merchandise in the United States in line with current filing requirements. CBP also allows entry and entry summary information to be filed with the Importer Security Filing that is required of all cargo arriving by vessel (see 19 CFR 149.6.) In all instances where entry information is filed prior to merchandise arrival, the merchandise is not authorized for release until it has arrived within the port limits with the intent to unlade (see 19 CFR 141.68(e).)

The current CBP Form 3461 contains 27 data elements. In an effort to simplify the merchandise release process, allow for more streamlined electronic transmission for the filing broker, stand alone filer, and/or importer, and assist importers in finalizing cargo movement logistics, CBP is announcing this test to reduce the number of data elements required to obtain release of products to 12 for cargo transported by air. The filer may provide three other optional data elements that will be described below. The entry information required by this test will be in lieu of filing of the CBP Form 3461 or its electronic equivalent. The test will involve the transmission and acceptance of the data by CBP and the return of status messages concerning the shipment to the filer.

Authorization for the Test

The Customs Modernization provisions in the North American Free Trade Agreement Implementation Act provide the Commissioner of CBP with authority to conduct limited test programs or procedures designed to evaluate planned components of the NCAP. This test is authorized pursuant to § 101.9(b) of the CBP Regulations (19 CFR 101.9(b)) which provides for the testing of NCAP programs or procedures. *See* Treasury Decision (T.D.) 95–21.

Implementation of the Test Concerning Simplified Entry

In General

This document announces CBP's plan to conduct a new test concerning entry filing via a process known as Simplified Entry.

This filing is considered customs business for purposes of 19 U.S.C. 1641. The party filing Simplified Entry Data must have the right to make entry as provided in 19 U.S.C. 1484. Accordingly, only the importer or customs broker acting on the importer's behalf may submit this filing. This will not change as the test is rolled out.

Filing of Simplified Entry Data is in lieu of filing a CBP Form 3461 or its electronic equivalent. It is not in lieu of filing an entry summary as both an entry and entry summary as permitted by 19 CFR 142.19. All entry summaries resulting from Simplified Entry Data release must be made in ACE.

Initial Test Phase Rules

For the initial test phase the following rules apply:

The initial test is for entries filed in the air transportation mode.

The Simplified Entry filing will only be allowed for Type 01 and Type 11 consumption entries. Participants cannot file an entry summary in lieu of the simplified entry.

No formal entry filed under Simplified Entry can be released under a single transaction bond. A continuous bond must be used.

The filing of entries on split shipments or unassembled or disassembled entities will not be supported in the initial phase of the test.

The port of arrival and the port of entry and unlading must be the same for any Simplified Entry filed.

The manifested bill of lading quantity count and the release bill of lading quantity count covered by the Simplified Entry must match.

Once CBP sends a release message, participants cannot send another simplified entry to replace or amend the one previously filed.

Data Elements To Be Filed

In lieu of filing CBP Form 3461 data, the importer or broker acting on behalf of the importer must file the following 12 data elements (to be known as the Simplified Entry Data Set or Simplified Entry Data) with CBP:

(1) Importer of Record Number.

(2) Buyer name and address.

(3) Buyer Employer Identification Number (consignee number).

(4) Seller name and address.
(5) Manufacturer/supplier name and address.
(6) HTS 10-digit number.
(7) Country of origin.
(8) Bill of lading/house air waybill number.
(9) Bill of lading issuer code.
(10) Entry number.
(11) Entry type.
(12) Estimated shipment value.

In the air environment in the initial test phase, the entry filer, at his option, may also provide the additional three (3) data elements:

(13) Ship to party name and address (optional).
(14) Consolidator name and address (optional).
(15) Container stuffing location (optional).

Data element (1) and data elements (6) through (12) are defined in the same manner as when they are used for entry filing on the CBP Form 3461. Data elements (2) through (5) and (13) through (15) are defined in accordance with the provisions of 19 CFR 149.3.

The Simplified Entry Data Set may be filed at any time prior to the arrival of the cargo in the United States port of arrival with the intent to unlade.

Functionality

Upon receipt of the Simplified Entry Data, CBP will make all decisions with regard to release of the merchandise and will transmit its cargo release decision to the filer. Releases will be made at the house bill level. The merchandise will then be considered to be entered upon its arrival in the port with the intent to unlade, as provided by current 19 CFR 141.68(e).

Admissibility Determinations by Other Government Agencies

For this first phase of the test, Simplified Entry Data will only be accepted for entries that do not fall under the admissibility jurisdiction of Other Government Agencies (OGAs).

Eligibility Requirements

Importer self-filers and customs brokers seeking to participate in and benefit from Simplified Entry functionality available in this test must have an ACE Portal Account and either be able to file ACE entry summaries or have evinced the intent to file entry summaries in ACE.

Parties seeking to participate in this test must use a software package that has completed ABI certification testing for ACE and offers the simplified entry message set prior to transmitting data under the test. See the General Notice of August 26, 2008 (73 FR 50337) for a complete discussion on procedures for obtaining an ACE Portal Account. Importers not self filing must be sure their broker has the capability to file entry summaries in ACE.

Importers seeking to participate must hold a Tier 2 status or higher in the Customs-Trade Partnership Against Terrorism (C–TPAT). Brokers seeking to participate must be C–TPAT certified. For more information on C–TPAT see: *http://www.cbp.gov/xp/cgov/trade/cargo_security/ctpat/what_ctpat/ctpat_overview.xml.*

Test Participant Selection Criteria

CBP will limit the initial pilot of this test to nine (9) accounts. CBP reserves the right to raise this limit on the number of participants during the initial stages of the test should testing capabilities allow.

Specifically, CBP is looking for test participants to include at least:

- 1 or more Importer self-filers.
- 1 or more Brokers.

Any importers for whom brokers file Simplified Entries must meet the C–TPAT Tier 2 criteria or higher.

When submitting a request to participate, a party should include information regarding estimated volume of entries anticipated to be filed under Simplified Entry and the identity of the ports where filings are likely to occur. CBP will use this information to determine resource requirements necessary to support the initial phase of the test.

Importer participants will be selected based upon entry filing volume and diversity of industries represented, giving consideration to the order in which participation requests are received.

Broker participants will be selected based upon entry filing volume, client diversity, and ports served, also with consideration given to the order in which participation requests are received.

Test Restrictions and Duration

The initial stages of the test will include only entries originating in the air environment. Land border arrivals, both truck and rail, and vessel ocean arrivals will be included in later stages of the test.

The initial phase of the test will begin on or about December 31, 2011, and will run for approximately two years. After the pilot begins, an evaluation will take place for purposes of extension or expansion of the test to other modes of transportation.

Regulatory Provisions Affected

Regulations that conflict with the terms and conditions of this test, namely regulations contained in parts 141, 142, and 143, including section 142.3, are suspended and overridden to the extent of the conflict for the duration of this test for those participants in this test and only to the extent of their participation in this test.

Future Expansion of the Test

Any future expansion in ACE including but not limited to any new Simplified Entry Data, the timing of submission of the data, or messaging between filers and CBP, will be announced via a separate **Federal Register** notice.

Confidentiality

All data submitted and entered into the ACE Portal is subject to the Trade Secrets Act (18 U.S.C. 1905) and is considered confidential, except to the extent as otherwise provided by law. As stated in previous notices, participation in this or any of the previous ACE tests is not confidential and upon a written Freedom of Information Act (FOIA) request, a name(s) of an approved participant(s) will be disclosed by CBP in accordance with 5 U.S.C. 552.

Application Process

Any party seeking to participate must submit an email to *cbpsimplifiedprocess@dhs.gov* with the subject heading ''Simplified Entry Participant Request''. All emails must be received within five (5) business days of the date of publication of this Notice.

Misconduct

If a test participant fails to abide by the rules, procedures, or term and conditions of this and all other applicable **Federal Register** Notices, fails to exercise reasonable care in the execution of participant obligations, or otherwise fails to comply with all applicable laws and regulations, then the participant may be suspended from participation in this test and/or subjected to penalties, liquidated damages, and/or other administrative or judicial sanction. Additionally, CBP has the right to suspend a test participant based on a determination that an unacceptable compliance risk exists. Such proposed suspension will apprise the participant of the facts or conduct warranting suspension. Any decision proposing suspension may be appealed in writing to the Assistant Commissioner (Office of International Trade) within 15 days of the decision date. Should the participant appeal the notice of proposed suspension, the participant should address the facts or conduct charges contained in the notice and state how the participant has or will

achieve compliance. However, in the case of willfulness or where public health interests are concerned, the suspension may be effective immediately.

Test Evaluation Criteria

All interested parties are invited to comment on any aspect of this test at any time. To ensure adequate feedback, participants are required to take part in an evaluation of this test. CBP needs comments and feedback on all aspects of this test, including the design, conduct and implementation of the test, in order to determine whether to modify, alter, expand, limit, continue, end or implement this program by regulation. The final results of the evaluation will be published in the **Federal Register** and the Customs Bulletin as required by section 101.9 of the CBP regulations.

Paperwork Reduction Act

As noted above, CBP will be accepting only nine participants in the NCAP test. This means that fewer than ten persons will be subject to any information collections under the NCAP test. Accordingly, collections of information encompassed within this notice are exempted from the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3502 and 3507).

Dated: November 2, 2011.

Allen Gina,

Assistant Commissioner, Office of International Trade.

[FR Doc. 2011–29055 Filed 11–8–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–ES–2011–N182; 50120–1112–0000–F2]

Draft Environmental Assessment, Incidental Take Plan, and Application for an Incidental Take Permit; Maine Department of Inland Fisheries and Wildlife's Statewide Furbearer Trapping Program

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; announcement of public meeting.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have received an application from the Maine Department of Inland Fisheries and Wildlife (MDIFW) for an incidental take permit under the Endangered Species Act of 1973, as amended (ESA). We are considering issuing a 15-year permit to the applicant that would authorize take of the federally threatened Canada lynx incidental to otherwise lawful activities associated with MDIFW's Statewide furbearer trapping program. Pursuant to the ESA and the National Environmental Policy Act, we announce the availability of MDIFW's incidental take permit application and draft incidental take plan (ITP), as well as the Service's draft environmental assessment (EA), for public review and comment. We provide this notice to seek comments from the public and Federal, Tribal, State, and local governments.

DATES: *Comment Period:* To ensure consideration, we must receive your written comments by January 9, 2012.

Meetings: We will hold three public information sessions to educate the public about MDIFW's proposal, the Service's permitting process, and the National Environmental Policy Act (NEPA) process. Each session will be from 5 to 9 p.m. and have information tables, presentations by the agencies, and opportunities for discussion and written comments. These meetings are not formal public hearings. Formal public comments will need to be submitted in written form.

The dates and locations of the meetings will be:

December 13: University of Maine at Presque Isle, 181 Maine Street, Presque Isle, 04769 (Grand Ballroom-Allagash and Aroostook rooms) (207) 768–9502;

December 14 at Black Bear Inn, 4 Godfrey Drive, Orono, 04473 (207) 866–7120;

December 15: University of Southern Maine in Gorham, 37 College Avenue, Gorham, 04038 (Bailey Hall) (207) 780–5961.

Information about these meetings will also posted on the Service's Maine Field Office's (MEFO's) Web site at *http://www.fws.gov/mainefieldoffice/index.html* or is available by calling (207) 866–3344.

ADDRESSES: Send comments by U.S. mail to Attn: Lynx HCP, Laury Zicari, Field Supervisor, U.S. Fish and Wildlife Service, Maine Field Office, 17 Godfrey Drive Suite #2, Orono, ME 04473, or via email to *hcpmainetrapping@fws.gov.*

SUPPLEMENTARY INFORMATION: We received an application from the Maine Department of Inland Fisheries and Wildlife (MDIFW) for an incidental take permit to take the federally threatened Canada lynx (*Lynx canadensis*) in conjunction with Maine's furbearer trapping program. A conservation program to minimize and mitigate for the incidental take would be implemented by MDIFW as described in their draft incidental take plan (ITP).

We prepared a draft environmental assessment (EA) to comply with NEPA (43 U.S.C. 4321 *et seq.*). The draft EA describes the proposed action and possible alternatives, and analyzes the effects of the alternatives on the human environment. We will evaluate whether the proposed action (Maine's draft ITP and associated avoidance, minimization, and mitigation measures) and other alternatives in the draft EA are adequate to support a finding of no significant impact (FONSI) under NEPA, and we will also determine whether the draft ITP meets the issuance criteria under section 10(a)(1)(A) of the ESA (16 U.S.C. 1531 *et seq.*). We are not identifying a preferred alternative, nor making a FONSI determination at this time. We are requesting comments on MDIFW's draft ITP and our preliminary analyses in the draft EA. Under Summary of Areas to Focus on in Public Review of MDIFW's Draft Incidental Take Plan, we have highlighted areas where public input would be particularly valuable.

Availability of Documents

The draft ITP and draft EA are available on the MEFO Web site at: *http://www.fws.gov/mainefieldoffice/index.html.* Alternatively, copies of the draft ITP and draft EA will be available for public review during regular business hours at MEFO (see **ADDRESSES**). Those who do not have access to the Web site or cannot visit our office can request copies by telephone at (207) 866–3344, or by letter to MEFO/Attn: Lynx HCP (see **ADDRESSES**). Those with computer access will be provided with a compact disk or paper copies.

Background

Section 9 of the ESA (16 U.S.C. 1531 *et seq.*) and its implementing regulations prohibit the ''take'' of animal species listed as endangered or threatened. Take is defined under the ESA as to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed animal species, or to attempt to engage in such conduct'' (16 U.S.C. 1538). However, under section 10(a) 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 incidental take permits for threatened and endangered species, respectively, are found in the Code of Federal Regulations (50 CFR 17.22 and 17.32).

If an incidental take permit is granted to the MDIFW, the State and licensed trappers conducting otherwise legal trapping activities Statewide would be authorized to incidentally take Canada lynx according to limitations prescribed in the draft ITP, along with any additional conditions the Service determines are necessary and appropriate for issuance of an incidental take permit. MDIFW seeks an incidental take permit for a potential of 195 lynx for 15 years from permit issuance. Take, as defined by the ESA, could occur in the following ways: Harassing, harming, trapping, capturing, collecting, wounding, or killing. Not all take during the 15 years would cause mortality. Of the lynx requested to be taken, MDIFW anticipates that all would be trapped, captured, or collected; up to 187 would be harmed or harassed and released with minor injury; up to 3 could have severe injuries requiring rehabilitation; and up to 5 could be killed (3 adults and 2 kittens indirectly killed because their mother was killed in a trap).

The MDIFW draft ITP proposes various measures to minimize and mitigate the effects of take of Canada lynx. This includes the retention or adoption of trapping rules and regulations, maintaining a lynx reporting phone hotline, developing a protocol for evaluating injured lynx, educating trappers, and improving traps. In addition, MDIFW proposes to compensate for five lynx mortalities by creating or managing 5,000 acres of lynx habitat on areas managed by Maine Bureau of Parks and Lands.

MDIFW's proposed action consists of the continuation of the Statewide trapping program and implementation of the draft ITP. We have determined that MDIFW's application facially satisfies the statutory and regulatory permit application submission criteria (16 U.S.C. 10(a)(2)(A) and 50 CFR 17.32(b)(1)(iii)). We seek your input on the content of the application as we assess it relative to the incidental take permit issuance criteria (16 U.S.C. 10(a)(2)(B) and 50 CFR 17.32(b)(2)).

Summary of Areas To Focus on in Public Review of MDIFW's Draft Incidental Take Plan

The MDIFW's obligation is to minimize and mitigate impacts to the maximum extent practicable. The determination of projected take in the draft ITP was based in part on past incidences of reported take of lynx; however, there is evidence that not all lynx trapped are reported. To analyze the full extent of impacts of the proposed action on lynx, and to ensure that the mitigation is commensurate with the level of impacts, an accurate assessment of all lynx taken in traps is required. The Service requests any information on the extent of trapping of lynx that is not reported.

The Service further requests information on the use and practicability of current State trapping regulations and their effectiveness in avoiding trapping of lynx. The Service notes that since submission of the draft ITP, MDIFW has incorporated several changes to their trapping regulations that may benefit lynx but are not reflected in the current proposal. Specifically, the Service would like feedback as to whether these regulations are easily understood and implemented by trappers and are effective in eliminating take of lynx. The Service also seeks input on whether there are different trapping methods that could be more effective in avoiding trapping of lynx.

MDIFW proposes conservation of 5,000 acres of lynx mitigation land. Further details are needed regarding the timing for completing the mitigation actions; location and quality of habitat; other uses that would be allowed on the lynx mitigation land; which management measures will be employed; how management will be secured; and how enforceable management requirements would be over the life of the incidental take permit. The Service seeks comments on the adequacy of mitigation offered and whether there are additional means to compensate for lynx take.

Incidental take projections were made assuming that lynx populations remain at early 2000s levels (at least 500 lynx). We seek input as to whether the population models in the draft ITP accurately portray future population trends and adequately assess the effects of incidental trapping. In addition, we seek input on the adequacy and accuracy of the models used in the draft ITP.

The draft ITP addresses uncertainty in changed circumstances but does not contain specific adaptive management strategies. Thus, we seek input on whether there are additional measures or monitoring that could be put in place to provide better information on changes in trapper effort, changes in the range of lynx population, unanticipated lynx behavior, changing lynx habitat, and changing lynx populations.

Harm and harassment to lynx are forms of take identified in the draft ITP. We are particularly interested in whether there is information in addition to that provided in the draft ITP concerning the nature or injury and survival of incidentally trapped lynx or other furbearers. What percentage of trapped lynx are injured? How does trapping affect their survival? Are critical lynx behaviors affected by the trapping experience?

Compensatory mitigation in the draft ITP is proposed only for the five lynx mortalities; nonlethal take is not currently addressed. We are interested in suggestions for additional practicable measures to minimize and mitigate to the maximum extent practicable the full range of types of take. We also request input on other forms of mitigation that are offered in the ITP, including lynx research, management agreements with forest landowners, planning documents, and trapper education and outreach.

The most effective and useful comments are substantive. Substantive comments raise specific issues or concerns about the ITP and the draft EA, as well as supportive data or references. Comments merely providing support for or opposition to the ITP and EA will not be useful.

National Environmental Policy Act

In compliance with NEPA of 1969, we analyzed the impacts of implementing the draft ITP, issuance of the permit, and a reasonable range of alternatives. Based on this analysis and any new information resulting from public comment on the proposed action, we will determine if there would be any significant impacts or effects caused by issuing the incidental take permit. We have prepared a draft EA on this proposed action and have made it available for public inspection in person at MEFO (see **ADDRESSES** section).

NEPA requires that a range of reasonable alternatives to the proposed action be described. We developed the draft EA between November 2008 and May 2010. The draft EA analyzes five alternatives, each having a suite of conservation measures to minimize and mitigate take of lynx. We designed the alternatives based on discussions with Service experts and staff; scientific, trapping, and management experts; and MDIFW. We evaluated a no-action alternative (i.e., not issuing an incidental take permit), MDIFW's proposed ITP, two other alternatives comprised of multiple minimization and mitigation measures, and a fifth alternative in which upland trapping in northern Maine would be discontinued.

Although we attempted to fully develop alternatives, we believe there could be expertise among trappers and non-trappers that may provide other minimization and mitigation measures in addition to those in the draft ITP and the draft EA. We are seeking public input on the draft EA to determine

whether there is additional information not in the draft ITP and draft EA that could better inform the decision making process.

In the draft EA, we attempted to quantify the incidental take of non-target wildlife (species other than lynx) in traps. We are particularly interested in whether there is information in addition to that provided in the draft EA concerning the prevalence of incidental take of non-target wildlife in traps. Which species are most frequently caught in Maine? What percent of these animals are injured or killed, and does incidental trapping have population-level affects?

At this time, there is no draft Implementing Agreement (IA) associated with the draft ITP. The purpose of an IA is to ensure proper implementation of each of the terms and conditions of the final ITP and to describe the applicable remedies and recourse should any party fail to perform its obligations, responsibilities, and tasks. We may elect to develop an IA with MDIFW once any necessary changes to the draft ITP have been made.

Public Comments

The Service invites the public to comment on the draft ITP and draft EA during a 60-day public comment period (see **DATES**). All comments received, including names and addresses, will become part of the administrative record. Before including your address, phone number, electronic mail address, or other personal identifying information in your comment, you should be aware that your entire comment including your personal identifying information may be made publicly available at any time. While you may request at the top of your document that we withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

This notice is provided pursuant to section 10(c) of the ESA (16 U.S.C. 1531 et seq.) and NEPA regulations (40 CFR 1506.6).

Dated: September 2, 2011.

Wendi Weber,

Acting Regional Director, Northeast Region.

[FR Doc. 2011–28999 Filed 11–8–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[USGS GX12EB00A184000]

Agency Information Collection Activities: The William T. Pecora Award Application and Nomination Process

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of establishing a new information collection (1028–NEW).

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), we are notifying the public that we have submitted to the Office of Management and Budget (OMB) an information collection request (ICR) for the collection of nominations for the William T. Pecora Award. As part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to comment on this ICR. We may not conduct or sponsor and a person is not required to respond to a collection unless it displays a currently valid Office of Management and Budget (OMB) control number. DATE: Submit written comments by December 9, 2011.

ADDRESSES: Please submit written comments on this information collection directly to the Office of Management and Budget (OMB) Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of the Interior via email to *OIRA_DOCKET@omb.eop.gov* or fax at (202) 395–5806; and identify your submission as 1028–NEW, William T. Pecora Award. Please also submit a copy of your written comments to the USGS Information Collections Officer, U.S. Geological Survey, 12201 Sunrise Valley Drive Mail Stop 807, Reston, VA 20192 (mail); (703) 648–6853 (fax); or *smbaloch@usgs.gov* (email). Please reference Information Collection 1028–NEW, William T. Pecora Award in the subject line.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, please contact the U.S. Geological Survey, Tina Pruett, MS–517, 12201 Sunrise Valley Dr. Reston, VA 20192 (mail), by telephone (703) 648–4585, or *tpruett@usgs.gov* (email).

SUPPLEMENTARY INFORMATION:

Abstract: The William T. Pecora Award is presented annually to individuals or groups that make outstanding contributions toward understanding the earth by means of remote sensing. The award is sponsored jointly by the Department of the Interior (DOI) and the National Aeronautics and Space Administration (NASA).

In 1974 the Pecora award was established in honor of Dr. William T. Pecora, former Director of the U.S. Geological Survey, Under Secretary, Department of the Interior and a motivating force behind the establishment of a program for civil remote sensing of the earth from space. The purpose of the award is to recognize individuals or groups working in the field of remote sensing of the earth. National and international nominations are accepted from the public and private sector individuals, teams, organizations, and professional societies.

Nomination packages include three sections: (A) Cover Sheet, (B) Summary Statement, and (C) Supplemental Materials. The cover sheet includes professional contact information. The Summary Statement is limited to two pages and describes the nominee's achievements in the scientific and technical remote sensing community, contributions leading to successful practical applications of remote sensing, and/or major breakthroughs in remote sensing science or technology. Nominations may include up to 10 pages of supplemental information such as resume, publications list, and/or letters of endorsement.

The award consists of a citation and plaque, which are presented to the recipient at an appropriate public forum by the Secretary of the Interior and the NASA Administrator or their representatives. The name of the recipient is also inscribed on permanent plaques, which are displayed by the sponsoring agencies.

II. Data

OMB Control Number: 1028–New.

Title: The William T. Pecora Award Application and Nomination Process.

Type of Request: This is a new request.

Affected Public: Individuals or households; businesses and other academic and non-profit institutions; State, local and tribal governments.

Respondent Obligation: Voluntary.

Frequency of Collection. Annually.

Estimated Number Annual Respondents: 20.

Annual Burden Hours: 200 hours. We estimate the public reporting burden averages 10 hours per response.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: We have not identified any ''non-hour cost'' burdens associated with this collection of information.

III. Request for Comments

On August 16, 2011, we published a **Federal Register** notice (76 FR 50753)

announcing that we would submit this ICR to OMB for approval and soliciting comments. The comment period closed on October 17, 2011. We did not receive any comments in response to that notice.

We again invite comments concerning this ICR on: (a) Whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, usefulness, and clarity of the information to be collected; and (d) ways to minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Please note that the comments submitted in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at anytime. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: November 1, 2011.

Bruce Quirk,

Program Coordinator, Land Remote Sensing Program, U.S. Geological Survey.

[FR Doc. 2011–28973 Filed 11–8–11; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

National Earthquake Prediction Evaluation Council (NEPEC)

AGENCY: U.S. Geological Survey.

ACTION: Notice of Meeting.

SUMMARY: Pursuant to Public Law 96–472, the National Earthquake Prediction Evaluation Council (NEPEC) will hold a 1½-day meeting on November 14 and 15, 2011, on the campus of the University of Washington. The Council is comprised of members from academia and the Federal Government. The Council shall advise the Director of the U.S. Geological Survey on proposed earthquake predictions, on the completeness and scientific validity of the available data related to earthquake predictions, and on related matters as assigned by the Director. Additional information about the Council may be found at: *http://www.earthquake.usgs.gov/aboutus/nepec/.*

At the meeting, the Council will receive briefings on lessons learned from the 2010 Chile and 2011 Japan subduction earthquakes, monitoring and research efforts relating to earthquakes in the Pacific Northwest, research and development relating to earthquake early warning and short-term aftershock forecasting, and recent findings from the study of episodic tremor and slip and from the analysis of various seismic hazards in and around the State of Washington. The Council will also receive brief updates on the project intended to deliver an updated Uniform California Earthquake Rupture Forecast (UCERF3) in summer 2012, and on other topics.

A draft workshop agenda is available on request (contact information below). In order to ensure sufficient seating and hand-outs, it is requested that visitors pre-register by November 8, 2011. Members of the public wishing to make a statement to the Council should provide notice of that intention by November 8 so that time may be allotted in the agenda.

DATES: The meeting will be held in Parrington Hall at the University of Washington, Seattle, Washington 98195. On November 14 it will be in the Forum Room 309, commencing at 8:30 a.m. and adjourning at 5:30 p.m. On November 15 it will be in the Commons Room 308, commencing at 8:30 a.m. and adjourning at noon. Times are approximate. Guests are encouraged to contact the Executive Secretary for a copy of the agenda and instructions for parking and locating the meeting rooms.

FOR FURTHER INFORMATION CONTACT: Dr. Michael Blanpied, Executive Secretary, National Earthquake Prediction Evaluation Council, U.S. Geological Survey, MS 905, 12201 Sunrise Valley Drive Reston, Virginia 20192, (703) 648–6696, Email: *mblanpied@usgs.gov.*

Dated: October 28, 2011.

John R. Filson,

Acting Program Coordinator, Earthquake Hazards Program.

[FR Doc. 2011–29026 Filed 11–8–11; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–1011–8767; 2200–3200–665]

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 October 21, 2011. Pursuant to section 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 November 25, 2011. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

J. Paul Loether,

Chief, National Register of Historic Places/National Historic Landmarks Program.

COLORADO

Grand County

Kenjockety, Address Restricted, Rand, 11000858

DELAWARE

Sussex County

McColley's Chapel, 18168 Redden Rd., Georgetown, 11000859

FLORIDA

Monroe County

Alligator Reef Light, (Light Stations of the United States MPS) Offshore 3.5 mi. S. of Upper Matecumbe Key, Islamorada, 11000860

Orange County

Interlachen Avenue Historic District, Roughly bounded by S. Knowles, E. New England, S. Interlachen Aves., E. Morse Blvd., Lincoln & E. Canton Aves., Winter Park, 11000861

IDAHO

Latah County

Lawrence, Russell, Farmstead, (Agricultural Properties of Latah County, Idaho MPS) 5471 ID 8, Deary, 11000862

MICHIGAN

Berrien County

Buchanan North and West Neighborhoods Historic District, Roughly bounded by Main, 4th, Chippewa, W. Front, S. Detroit, Chicago, Clark, Roe & Charles Sts., Buchanan, 11000863

Ingham County

Michigan State Medical Society Building, 120 W. Saginaw St., East Lansing, 11000864

Mackinac County

Hiawatha Sportsman's Club 1931 Maintenance Building and Commissary, Lake Blvd. (Garfield Township), Millecoquins, 11000865

Manitou Lodge, G Trail, Hiawatha Sportman's Club (Garfield Township), Naubinway, 11000866

Wayne County

Nacirema Club, 6118 30th St., Detroit, 11000867

MISSISSIPPI

Carroll County

Midway Methodist Church and Cemetery, Cnty. Rd. 31, Vaiden, 11000868

Jackson County

International Ship Building Company, Roughly bounded by Columbus Dr., Yazoo Lake, Garfield, Monroe, & Gen. Lee Sts. & Wright, Lafayette, & McKinley Aves., Pascagoula, 11000869

Lincoln County

Cohn, Emile, House, 536 S. Jackson St., Brookhaven, 11000870

MONTANA

Missoula County

University of Montana Historic District (Boundary Increase), 32 Campus Dr., Missoula, 11000871

NEW JERSEY

Mercer County

Bear Tavern Road—Jacob's Creek Crossing Rural Historic District, Bear Tavern Rd. & Jacobs Creek Rd. (Hopewell & Ewing Townships), Somerset, 11000872

VIRGINIA

Fauquier County

Auburn Battlefield, (Civil War in Virginia MPS) Bounded by Casanova, Auburn Baptist Church, & Catlett, Catlett, 11000873

Shenandoah County

Forestville Historic District, Jct. of VA 42, 614 & 767, Forestville, 11000874

WYOMING

Hot Springs County

Kirby Jail and Town Hall, 120 E. 4th St., Kirby, 11000875

[FR Doc. 2011–28976 Filed 11–8–11; 8:45 am]

BILLING CODE 4312–51–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–720]

Limited Exclusion and Cease and Desist Orders; Terminations of Investigations: Certain Biometric Scanning Devices, Components Thereof, Associated Software, and Products Containing the Same

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to modify a final initial determination (''ID'') of the presiding administrative law judge (''ALJ'') finding a violation of section 337 by respondents in the above-captioned investigation, and has issued a limited exclusion order directed against products of respondents Suprema, Inc. (''Suprema'') of Gyeonggi, Korea and Mentalix, Inc. (''Mentalix'') of Plano, Texas, and a cease and desist order directed against Mentalix.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, *telephone* (202) 708–2310. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, *telephone* (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 17, 2010 based on a complaint filed on May 11, 2010, by Cross Match Technologies, Inc. (''Cross Match'') of Palm Beach Gardens, Florida. 75 FR 34482–83. The complaint, as amended on May 26, 2010, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain biometric scanning devices, components thereof, associated software, and products containing the same by reason of infringement of certain claims of U.S. Patent Nos. 5,900,993 (''the '993 patent''); 7,203,344 (''the '344 patent''); 7,277,562 (''the '562 patent''); and 6,483,932 (''the '932 patent''). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337, and names two respondents, Suprema and Mentalix.

On November 10, 2010, the Commission issued notice of its determination not to review the ALJ's ID granting Cross Match's motion to amend the complaint by adding allegations of infringement as to claims 5–6, 12, and 30 of the '562 patent, and claims 7, 15, 19, and 45 of the '44 patent. On December 27, 2010, the Commission issued notice of its determination not to review the ALJ's ID granting Cross Match's motion to terminate the investigation as to claims 6–8, 13–15, and 19–21 of the '932 patent (eliminating this patent from the investigation); claims 13 and 16 of the '993 patent; claims 4, 15, 30, 32, and 44 of the '344 patent; and claim 2 of the '562 patent based on withdrawal of these claims from the complaint. On March 18, 2011, the Commission issued notice of its determination not to review the ALJ's ID granting Cross Match's motion for summary determination that it satisfies the economic prong of the domestic industry requirement.

On June 17, 2011, the ALJ issued his final ID finding a violation of section 337 by reason of infringement of one or more of claims 10, 12, and 15 of the '993 patent by the imported devices. The ALJ also found a violation of section 337 by reason of infringement of claim 19 of the '344 patent. The ALJ found no violation of section 337 with respect to the '562 patent. He also issued his recommendation on remedy and bonding during the period of Presidential review. On July 5, 2011, Cross Match, respondents, and the Commission investigative attorney (''IA'') each filed a petition for review of the final ID; and on July 13, 2011, each filed a response to the opposing petitions.

On August 18, 2011, the Commission determined to review the ALJ's finding of a violation of section 337 based on infringement of claim 19 of the '344

patent. The determinations made in the final ID that were not reviewed became final determinations of the Commission by operation of rule. *See* 19 U.S.C. 210.42(h).

The Commission requested briefing on certain questions concerning the issues under review and requested written submissions on the issues of remedy, the public interest, and bonding from the parties and interested non-parties. 76 FR 52970–71 (August 24, 2011).

On August 30 and September 8, 2011, respectively, complainant Cross Match, respondents, and the IA each filed a brief and a reply brief on the issues for which the Commission requested written submissions.

Having reviewed the record in this investigation, including the final ID and the parties' written submissions, the Commission has determined to: (1) Modify-in-part the final ID and issue an Opinion supplementing the ID's analysis concerning its finding that the accused scanners infringe claim 19 of the '344 patent; and (2) affirm all other findings of the ID underlying the issue under review. Specifically, the Commission has determined that respondent Mentalix directly infringes claim 19 of the '344 patent, and that respondent Suprema indirectly infringes claim 19, via induced infringement, but does not infringe claim 19 via contributory infringement. These actions result in a finding of a violation of section 337 with respect to claim 19 of the '344 patent.

Further, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that the appropriate form of relief is both: (1) A limited exclusion order prohibiting the unlicensed entry of biometric scanning devices, components thereof, associated software, and products containing the same that infringe one or more of claims 10, 12, and 15 of the '993 patent and claim 19 of the '344 patent where the infringing scanning devices are manufactured abroad by or on behalf of, or are imported by or on behalf of, Suprema or Mentalix, or any of their affiliated companies, parents, subsidiaries, licensees, contractors, or other related business entities, or successors or assigns; and (2) a cease and desist order prohibiting Mentalix, Inc. from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or distributors for, biometric scanning devices, components thereof, associated software, and products containing the same that infringe one or more of claims 10, 12, and 15 of the '993 patent and claim 19 of the '344 patent.

The Commission further determined that the public interest factors enumerated in sections 337(d)(1), (f)(1) (19 U.S.C. 1337(d)(1), (f)(1)) do not preclude issuance of the limited exclusion or cease and desist order. Finally, the Commission determined that a bond of 100 percent of the entered value of the covered products is required to permit temporary importation during the period of Presidential review (19 U.S.C. 1337(j)). The Commission's orders and opinion were delivered to the President and to the United States Trade Representative on the day of their issuance.

The Commission has terminated this investigation. The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.42, 210.45, and 210.50 of the Commission's Rules of Practice and Procedure (19 CFR 210.42, 210.45, 210.50).

By order of the Commission.

Issued: October 24, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–27884 Filed 11–8–11; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–11–031]

Government In the Sunshine Act Meeting Notice

AGENCY: *Agency Holding The Meeting:* United States International Trade Commission.

DATES: *Time and Date:* November 15, 2011 at 11 a.m.

PLACE: Room 100, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

Matters To Be Considered

1. Agendas for future meetings: none.
2. Minutes.
3. Ratification List.
4. Vote in Inv. Nos. 731–TA–340–E and H (Third Review) (Solid Urea from Russia and Ukraine). The Commission is currently scheduled to transmit its determinations and Commissioners' opinions to the Secretary of Commerce on or before December 5, 2011.
5. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

Issued: November 4, 2011.

By order of the Commission.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. 2011–29124 Filed 11–7–11; 11:15 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–11–032]

Government in the Sunshine Act Meeting Notice

AGENCY: *Agency Holding the Meeting:* United States International Trade Commission.

DATES: *Time and Date:* November 17, 2011 at 11 a.m.

Place: Room 100, 500 E Street SW., Washington, DC 20436, Telephone: (202) 205–2000.

Status: Open to the public.

Matters To Be Considered

1. Agendas for future meetings: none.
2. Minutes.
3. Ratification List.
4. Vote in Inv. Nos. 731–TA–540 and 541 (Third Review) (Welded Stainless Steel Pipe from Korea and Taiwan). The Commission is currently scheduled to transmit its determinations and Commissioners' opinions to the Secretary of Commerce on or before December 1, 2011.
5. Vote in Inv. No. 731–TA–461 (Third Review) (Gray Portland Cement and Cement Clinker from Japan). The Commission is currently scheduled to transmit its determination and Commissioners' opinions to the Secretary of Commerce on or before December 2, 2011.
6. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission.

Issued: November 4, 2011.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. 2011–29125 Filed 11–7–11; 11:15 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Foreign Claims Settlement Commission

[F.C.S.C. Meeting and Hearing Notice No. 12–11]

Sunshine Act Meeting

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR 503.25) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of open meetings as follows:

Thursday, November 17, 2011:

10 a.m.—Oral hearings on objections to Commission's Proposed Decisions in Claim Nos. LIB–II–162, LIB–II–163.

11 a.m.—Issuance of Proposed Decisions in claims against Libya.

1 p.m.—Oral hearings on objections to Commission's Proposed Decisions in Claim Nos. LIB–I–042.

2 p.m.—LIB–I–033.

2:45 p.m.—LIB–II–096, LIB–II–099, LIB–II–108 and LIB–II–119.

Friday, November 18, 2011:

10 a.m.—Oral hearings on objections to Commission's Proposed Decisions in Claim Nos. LIB–II–007.

10:45 a.m.—Claim No. LIB–II–101.

Status: Open.

All meetings are held at the Foreign Claims Settlement Commission, 600 E Street NW., Washington, DC. Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Judith H. Lock, Executive Officer, Foreign Claims Settlement Commission, 600 E Street NW., Suite 6002, Washington, DC 20579. *Telephone:* (202) 616–6975.

Jaleh F. Barrett,

Chief Counsel.

[FR Doc. 2011–29150 Filed 11–7–11; 4:15 pm]

BILLING CODE 4410–BA–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (NIJ) Docket No. 1572]

Stab-Resistant Body Armor Standard Workshop

AGENCY: National Institute of Justice, DOJ.

ACTION: Notice.

SUMMARY: The National Institute of Justice (NIJ) and the National Institute of Standards and Technology (NIST) are jointly hosting a workshop focused on the NIJ *Stab-resistant Body Armor Standard,* and the discussion is directed toward manufacturers, certification bodies, and test laboratories. This workshop is being held specifically to discuss with interested parties recent progress made toward the revised NIJ *Stab-resistant Body Armor Standard* and to receive input, comments, and recommendations.

The workshop will be held on Wednesday, November 30, 2011 at NIST, 100 Bureau Drive, Gaithersburg, MD, Building 101, Lecture Room A. The workshop will begin with a general session from 9 a.m. to 11 a.m. Following the general session, individual 30-minute breakout session will be offered from 11:30 a.m. to 2:30 p.m. for those interested in the following:

(1) One-on-one conversation with NIJ leadership.

(2) One-on-one discussion with Compliance Testing Program personnel.

(3) One-on-one discussion with personnel leading development of the revised standard.

Time slots for individual breakout sessions may be requested from the registration page indicated below. Additional time slots will be made available if needed to accommodate attendee requests.

Workshop discussions will be documented and published on *http://www.justnet.org.* Information shared during the individual breakout sessions that NIJ views as beneficial to the broader body armor community will be summarized as part of the workshop notes. Contributors of comments will not be identified in the workshop notes. Each attendee is advised that it is the responsibility of the contributor to protect any information that they may consider proprietary during both the workshop and any individual breakout session in which they may participate.

Space is limited at this workshop, and as a result, only 50 participants will be allowed to register for the general session. Individual time slots will be available on the registration page. We request that each organization limit their representatives to no more than two per organization. Exceptions to this limit may occur, should space allow. Participants planning to attend are responsible for their own travel arrangements.

Participants are strongly encouraged to come prepared to ask questions and to voice suggestions and concerns. Registration information may be found at *http://www.justnet.org/Pages/BA-Workshops-Registration-2011.aspx.* Registration will close on November 21, 2011.

DATES: The workshop will be held on Wednesday, November 30, 2011 at NIST, 100 Bureau Drive, Gaithersburg, MD, Building 101, Lecture Room A. The workshop will begin with a general session from 9 a.m. to 11 a.m. Following the general session, individual 30-minute breakout session will be offered from 11:30 a.m. to 2:30 p.m.

ADDRESSES: National Institute of Standards and Technology (NIST), 100 Bureau Drive, Gaithersburg, MD, Building 101, Lecture Room A.

FOR FURTHER INFORMATION CONTACT: Casandra Robinson, National Institute of Justice, by telephone at (202) 305–2596 [*Note:* this is not a toll-free telephone number], or by email at *casandra.robinson@usdoj.gov.*

Kristina Rose,

Deputy Director, National Institute of Justice.

[FR Doc. 2011–29072 Filed 11–8–11; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification of Application of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and 30 CFR part 44 govern the application, processing, and disposition of petitions for modification. This notice is a summary of petitions for modification submitted to the Mine Safety and Health Administration (MSHA) by the parties listed below to modify the application of existing mandatory safety standards codified in Title 30 of the Code of Federal Regulations.

DATES: All comments on the petitions must be received by the Office of Standards, Regulations and Variances on or before December 9, 2011.

ADDRESSES: You may submit your comments, identified by ''docket number'' on the subject line, by any of the following methods:

1. *Electronic Mail: zzMSHA-comments@dol.gov.* Include the docket number of the petition in the subject line of the message.
2. *Facsimile:* (202) 693–9441.
3. *Regular Mail:* MSHA, Office of Standards, Regulations and Variances, 1100 Wilson Boulevard Room 2350, Arlington, Virginia 22209–3939, Attention: Roslyn B. Fontaine, Acting Director, Office of Standards, Regulations and Variances.
4. *Hand-Delivery or Courier:* MSHA, Office of Standards, Regulations and Variances, 1100 Wilson Boulevard

Room 2350, Arlington, Virginia 22209–3939, Attention: Roslyn B. Fontaine, Acting Director, Office of Standards, Regulations and Variances.

MSHA will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments. Individuals who submit comments by hand-delivery are required to check in at the receptionist's desk on the 21st floor.

Individuals may inspect copies of the petitions and comments during normal business hours at the address listed above.

FOR FURTHER INFORMATION CONTACT: Barbara Barron, Office of Standards, Regulations and Variances at (202) 693–9447 (Voice), *barron.barbara@dol.gov* (Email), or (202) 693–9441 (Facsimile). [These are not toll-free numbers].

SUPPLEMENTARY INFORMATION:

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of labor determines that:

(1) An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

(2) That the application of such standard to such mine will result in a diminution of safety to the miners in such mine. In addition, the regulations at 30 CFR 44.10 and 44.11 establish the requirements and procedures for filing petitions for modification.

II. Petitions for Modification

Docket Number: M–2011–034–C.

Petitioner: Greenfields Coal Company, LLC, 550 North Eisenhower Drive Suite B, Beckley, West Virginia 25801.

Mine: Alpheus Refuse Site, MSHA Mine I.D. No. 46–08438, located in McDowell County, West Virginia.

Regulation Affected: 30 CFR 77.214(a) (Refuse piles; general).

Modification Request: The petitioner requests a modification of the existing standard to permit the remainder of the openings between the highwall and the mine seal to be backfilled with non-acid producing inert material, as much as practical, without damaging the existing block seals related to previously sealed mine openings associated with the abandoned Southern Minerals, Inc., Mine No. 1, WV DEP Permit No. U–4008–05, MSHA I.D. No. 46–09236. The petitioner states that:

(1) There are five existing previously sealed mine openings associated with the abandoned Southern Minerals, Inc., Mine No. 10, WV DEP Permit No. U–4008–05, MSHA I.D. No. 46–09236.

Mining was completed in June 2010 and the mine seals were certified by a Registered Professional Engineer on August 31, 2010.

(2) The soil will extend at least 4 feet in all directions beyond the limits of the mine opening. Any exposed coal seam along the mine bench will be covered with soil to at least 4 feet above the seam.

(3) The existing wet seal high-density polyethylene pipe in the far right mine opening will be extended beyond the limits of the course refuse fill maintaining at least 1 percent slope for positive drainage.

(4) The existing mine bench and highwall will be reclaimed with course refuse as detailed in the Refuse Disposal Plan for refuse site WV04–08438–02.

(5) Since the existing mine is abandoned, this plan will provide the same measure of protection for the miners as is given to them by the existing standard.

Docket Number: M–2011–035–C.

Petitioner: West Virginia Mine Power, Inc., P.O. Box 574, Rupert, West Virginia 25984–0574.

Mine: Midland Trail Mine No. 2, MSHA I.D. No. 46–08909, located in Greenbrier County, West Virginia.

Regulation Affected: 30 CFR 75.1101–1(b) (Deluge-type water spray system).

Modification Request: The petitioner requests a modification of the existing standard to eliminate the use of blow-off dust covers for the spray nozzles of a deluge-type water spray system. The petitioner states that:

(1) As an alternative to using the blow-off dust covers, a person trained in the testing procedures specific to the deluge-type water spray fire suppression systems utilized at each belt drive will:

(a) Conduct a visual examination of each of the deluge-type water spray fire suppression systems.

(b) Conduct a functional test of the deluge-type water spray fire suppression systems by actuating the system and watching its performance.

(c) Record the results of the examination and functional test in a book maintained on the surface. The record will be made available to the MSHA representative and retained at the mine for one year.

(2) Any malfunction or clogged nozzle detected will be corrected immediately.

(3) The procedure used to perform the functional test will be posted at or near each belt drive that utilizes a deluge-type water spray fire suppression system.

The petitioner states that the overall safety of the mine and the miners will be improved based on weekly examinations of deluge-type water spray fire suppression systems at each belt drive. The petitioner asserts that the alternative method will provide a measure of protection equal to or greater than that of the existing standard.

Docket Number: M–2011–036–C.

Petitioner: West Virginia Mine Power, Inc., P.O. Box 574, Rupert, West Virginia 25984–0574.

Mine: Mountaineer Pocahontas Mine No. 1, MSHA I.D. No. 46–09172, located in Greenbrier County, West Virginia.

Regulation Affected: 30 CFR 75.208 (Warning devices).

Modification Request: The petitioner requests a modification of the existing standard to eliminate physically placing a warning device on the last row of permanent mine roof supports. As an alternative, the petitioner proposes to place the warning device on the second row of permanent support outby the last row of permanent support. This will allow at least a 4-foot safety zone for additional protection to the miners required to position themselves in proximity to the last row of permanent roof supports. The petitioner states that:

(1) This placement will aid equipment operators and others ''in determining their positions for maximum safety'' when they are approaching an unsupported area of the mine roof.

(2) Mine history since 1969 has proven that work in close proximity to the last row of roof bolt support is not always a safe location.

(3) Slickensides, roof slabs, drag folds, and other geological faults whether detectible or undetectable, can and will breach the last row of support.

The petitioner asserts that the overall safety of the mine and the miners will be improved and the proposed alternative method will provide a measure of protection equal to or greater than that of the existing standard.

Dated: November 4, 2011.

Patricia W. Silvey,

Certifying Officer.

[FR Doc. 2011–29009 Filed 11–8–11; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification of Application of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and 30 CFR part 44 govern the application, processing, and disposition of petitions for modification. This notice is a summary of petitions for modification submitted to the Mine Safety and Health Administration (MSHA) by the parties listed below to modify the application of existing mandatory safety standards codified in Title 30 of the Code of Federal Regulations.

DATES: All comments on the petitions must be received by the Office of Standards, Regulations and Variances on or before December 9, 2011.

ADDRESSES: You may submit your comments, identified by ''docket number'' on the subject line, by any of the following methods:

1. *Electronic Mail: zzMSHA-comments@dol.gov.* Include the docket number of the petition in the subject line of the message.
2. *Facsimile:* (202) 693–9441.
3. *Regular Mail:* MSHA, Office of Standards, Regulations and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939, Attention: Roslyn B. Fontaine, Acting Director, Office of Standards, Regulations and Variances.
4. *Hand-Delivery or Courier:* MSHA, Office of Standards, Regulations and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939, Attention: Roslyn B. Fontaine, Acting Director, Office of Standards, Regulations and Variances.

MSHA will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments. Individuals who submit comments by hand-delivery are required to check in at the receptionist's desk on the 21st floor.

Individuals may inspect copies of the petitions and comments during normal business hours at the address listed above.

FOR FURTHER INFORMATION CONTACT: Barbara Barron, Office of Standards, Regulations and Variances at (202) 693–9447 (Voice), *barron.barbara@dol.gov* (Email), or (202) 693–9441 (Facsimile). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION:

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

(1) An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

(2) That the application of such standard to such mine will result in a diminution of safety to the miners in such mine. In addition, the regulations at 30 CFR 44.10 and 44.11 establish the requirements and procedures for filing petitions for modification.

II. Petitions for Modification

Docket Number: M–2011–010–M.

Petitioner: ISP Minerals, Inc., 1101 Opal Court, Suite 315, Hagerstown, Maryland 21740.

Mines: Annapolis Mine, MSHA I.D. No. 23–00288, #1 Hillcrest Drive, Annapolis, Missouri 63620, located in Iron County, Missouri; Charmian Mine, MSHA I.D. No. 36–03460, 1455 Old Waynesboro Road, Blue Ridge Summit, Pennsylvania 17214, located in Adams County, Pennsylvania; Kremlin Mine, MSHA I.D. No. 47–00148, 248 Kremlin Road, Pembine, Wisconsin 54156, located in Marinette County, Wisconsin.

Regulation Affected: 30 CFR 56.13020 (Use of compressed air).

Modification Request: The three mines are open pit surface mines that extract nonmetallic crushed stones. The petitioner requests a modification of the existing standard to permit the use of a clothes cleaning process that uses regulated compressed air for cleaning miners' dust-laden clothing. The petitioner states that:

(1) The alternative method provides a direct reduction of a miners' exposure to respirable crystalline dust, thus reducing their health risk while providing no less than the same measure of protection provided by the existing standard.

(2) The proposed alternative method has been jointly developed with and successfully tested by the National Institute for Occupational Safety and Health (NIOSH).

(3) The proposed clothes cleaning process uses a regulated, compressed air nozzle manifold to blow dust from a worker's clothing. This activity is performed in an enclosed booth which captures the dust and vents it directly to the atmosphere. Since the booth is under negative pressure, with air moving downward away from the worker's breathing zone, no dust escapes to contaminate the work environment or other workers.

To ensure that the proposed modification will guarantee no less than the same measure of protection afforded the miners under the existing standard, the petitioner proposes to:

(1) Ensure that only miners trained in the operation of the clothes cleaning booth will be permitted to use the booth to clean their clothes. Miners not trained to use the booth will have access to HEPA vacuum equipment to clean their clothes.

(2) The petitioner will incorporate the NIOSH Clothes Cleaning Process Instruction Manual into their MSHA Part 46 Training Plan and train affected miners in the process.

(3) Miners entering the booth will examine valves and nozzles for damage or malfunction and will close the door fully before opening the air valve. Any defects will be repaired prior to the booth being used.

(4) Miners entering the booth will wear full-seal goggles for eye protection, ear plugs or muffs for hearing protection, and half-mask fit-tested respirators with N–100 filters for respiratory protection. A sign will be conspicuously posted requiring the above personal protective equipment when the booth is entered.

(5) Air flow through the booth will be sufficient to maintain negative pressure during use of the cleaning system to prevent contamination of the environment outside the booth. Air flow will be in a downward direction, thereby moving contaminants away from the miner's breathing zone.

(6) Air pressure through the spray manifold will be limited to 30 pounds per square inch or less. (Compressed air at up to 30 pounds per square inch is allowed by the Occupational Safety and Health Administration for cleaning purposes). A lock box with a single-plant-manager controlled key will be used to prevent regulator tampering.

(7) The air spray manifold will consist of a 1½-inch schedule 40 steel pipe that has a failure pressure of 1,300 pounds per square inch, is capped at the base, and is actuated by an electrically controlled ball valve at the top.

(8) The air spray manifold will contain 26 nozzles at 30 pounds per square inch gauge.

(9) The uppermost spray of the spray manifold will be located not more than 56 inches from the floor.

(10) Side deflectors will be used to eliminate the possibility of incidental contact with the air nozzles during the clothes cleaning process.

(11) The petitioner will conduct periodic maintenance checks of the booth in accordance with the recommendations contained in the NIOSH Clothes Cleaning Process Instruction Manual.

(l2) The air receiver tank supplying air to the manifold system will be of sufficient volume to permit no less than 20 seconds of continuous cleaning time.

(13) An appropriate hazard warning sign will be posted on the booth to state, at a minimum, ''Compressed Air'' and ''Respirable Silica Dust''.

(14) Minimum performance criteria for the local exhaust ventilation system servicing the booth will be maintained at all times. Provisions will be established by the Petitioner to remove the booth from service if volumetric airflow falls below 80 percent of original design capacity and/or booth negative pressure falls below 0.1 inch water gauge.

The petitioner asserts that the alternative method will at all times guarantee no less than the same measure of protection afforded the miners by the existing standard.

Docket Number: M–2011–011–M.

Petitioner: ISP Granule Products, LLC, 1101 Opal Court, Suite 315, Hagerstown, Maryland 21740.

Mine: Ione Mine, MSHA I.D. No. 04–05533, 1900 Highway 104, Ione, California 95640, located in Amador County, California.

Regulation Affected: 30 CFR 56.13020 (Use of compressed air).

Modification Request: The mine is an open pit surface mine that extracts nonmetallic crushed stone. The petitioner requests a modification of the existing standard to permit the use of a clothes cleaning process that uses regulated compressed air for cleaning miners' dust-laden clothing. The petitioner states that:

(1) The alternative method provides a direct reduction of a miners' exposure to respirable crystalline dust, thus reducing their health risk while providing no less than the same measure of protection provided by the existing standard.

(2) The proposed alternative method has been jointly developed with and successfully tested by the National Institute for Occupational Safety and Health (NIOSH).

(3) The proposed clothes cleaning process uses a regulated, compressed air nozzle manifold to blow dust from a worker's clothing. This activity is performed in an enclosed booth which captures the dust and vents it directly to the atmosphere. Since the booth is under negative pressure, with air moving downward away from the worker's breathing zone, no dust escapes to contaminate the work environment or other workers.

To ensure that the proposed modification will guarantee no less than the same measure of protection afforded the miners under the existing standard, the petitioner proposes to:

(1) Ensure that only miners trained in the operation of the clothes cleaning booth will be permitted to use the booth to clean their clothes. Miners not trained to use the booth will have access to HEPA vacuum equipment to clean their clothes.

(2) The petitioner will incorporate the NIOSH Clothes Cleaning Process Instruction Manual into their MSHA Part 46 Training Plan and train affected miners in the process.

(3) Miners entering the booth will examine valves and nozzles for damage or malfunction and will close the door fully before opening the air valve. Any defects will be repaired prior to the booth being used.

(4) Miners entering the booth will wear full-seal goggles for eye protection, ear plugs or muffs for hearing protection, and half-mask fit-tested respirators with N–100 filters for respiratory protection. A sign will be conspicuously posted requiring the above personal protective equipment when the booth is entered.

(5) Air flow through the booth will be sufficient to maintain negative pressure during use of the cleaning system to prevent contamination of the environment outside the booth. Air flow will be in a downward direction, thereby moving contaminants away from the miner's breathing zone.

(6) Air pressure through the spray manifold will be limited to 30 pounds per square inch or less. (Compressed air at up to 30 pounds per square inch is allowed by the Occupational Safety and Health Administration for cleaning purposes). A lock box with a single, plant-manager-controlled key will be used to prevent regulator tampering.

(7) The air spray manifold will consist of a 1½-inch schedule 40 steel pipe that has a failure pressure of 1,300 pounds per square inch, is capped at the base, and is actuated by an electrically controlled ball valve at the top.

(8) The air spray manifold will contain 26 nozzles at 30 pounds per square inch gauge.

(9) The uppermost spray of the spray manifold will be located not more than 56 inches from the floor.

(10) Side deflectors will be used to eliminate the possibility of incidental contact with the air nozzles during the clothes cleaning process.

(11) The petitioner will conduct periodic maintenance checks of the booth in accordance with the recommendations contained in the NIOSH Clothes Cleaning Process Instruction Manual.

(l2) The air receiver tank supplying air to the manifold system will be of sufficient volume to permit no less than 20 seconds of continuous cleaning time.

(13) An appropriate hazard warning sign will be posted on the booth to state, at a minimum, ''Compressed Air'' and ''Respirable Silica Dust''.

(14) Minimum performance criteria for the local exhaust ventilation system servicing the booth will be maintained at all times. Provisions will be established by the Petitioner to remove the booth from service if volumetric airflow falls below 80 percent of original design capacity and/or booth negative pressure falls below 0.1 inch water gauge.

The petitioner asserts that the alternative method will at all times guarantee no less than the same measure of protection afforded the miners by the existing standard.

Docket Number: M–2011–037–C.

Petitioner: Affinity Coal Company, LLC, 111 Affinity Complex Road, Sophia, West Virginia 25921.

Mine: Affinity Mine, MSHA I.D. No. 46–08878, 111 Affinity Complex Road, Sophia, West Virginia 25921, located in Raleigh County, West Virginia.

Regulation Affected: 30 CFR 75.1101–1(b) (Deluge-type water spray system).

Modification Request: The petitioner requests a modification of the existing standard to eliminate the use of blow-off dust covers for the spray nozzles of a deluge-type water spray system installed at belt-conveyor drives in an underground coal mine. The petitioner states that:

(1) As an alternative to using the blow-off dust covers, a person trained in the testing procedures specific to the deluge-type water spray fire suppression systems used at each belt drive will once each week:

(a) Conduct a visual examination of each of the deluge-type water spray fire suppression systems.

(b) Conduct a functional test of the deluge-type water spray fire suppression systems by actuating the system and watching its performance.

(c) Record the results of the examination and functional test in a

book maintained on the surface. The record will be made available to the MSHA representative and retained at the mine for one year.

(2) Any malfunction or clogged nozzle detected will be corrected immediately.

(3) The procedure used to perform the functional test will be posted at or near each belt drive that uses a deluge-type water spray fire suppression system.

The petitioner asserts that the alternative method will provide at all times a measure of protection for the miners equal to or greater than that of the existing standard.

Dated: November 4, 2011.

Patricia W. Silvey,

Certifying Officer.

[FR Doc. 2011–29010 Filed 11–8–11; 8:45 am]

BILLING CODE 4510–43–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 11–114]

NASA Advisory Council; Science Committee Planetary Protection Subcommittee; 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 (NASA) announces a meeting of the Planetary Protection Subcommittee of the NASA Advisory Council (NAC). This Subcommittee reports to the Science Committee of the NAC. The Meeting will be held for the purpose of soliciting, from the scientific community and other persons, scientific and technical information relevant to program planning.

DATES: Monday, November 28, 2011, 9:15 a.m. to 5p.m., and Tuesday, November 29, 2011, 9:15 a.m. to 1p.m., Local Time.

ADDRESSES: The Kurt H. Debus Conference Center, Juno and Jupiter Rooms, Kennedy Space Center Visitor Complex, SR 405, Kennedy Space Center, FL 32899.

FOR FURTHER INFORMATION CONTACT: Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, *fax* (202) 358–4118, or *mnorris@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. This meeting will also be available telephonically and by WebEx. Any interested person may call the USA toll free conference call number 1–(888) 282–0433, or the USA toll and international conference call number 1–(517) 308–9220, pass code PPS, to participate in this meeting by telephone. The WebEx link is *http://tinyurl.com/3zo5v3r.* The agenda for the meeting includes the following topics:

—Mars Missions: Status and Plans.
—Technology Needs for Returning Planetary Samples to Earth.
—Agency Planetary Protection Integration/Coordination Activities.

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Attendees will be requested to sign a register. To expedite admittance, attendees may submit their name and affiliation by November 18, 2011, to Marian Norris via email at *mnorris@nasa.gov* or by telephone at (202) 358–4452. Attendees are requested to park in Lot 4 or 5 at the Visitor Complex. Do not go to the ticket booth. Proceed directly to the Main Entrance turnstiles, which open at 9 a.m., and notify the gate agent at the turnstiles that you are attending the NAC meeting. The meeting attendees will be permitted entry through the turnstiles and magnetometers for the NAC meeting at the Debus Center.

November 3, 2011.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration and Space Administration.

[FR Doc. 2011–28955 Filed 11–8–11; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL LABOR RELATIONS BOARD

Order Contingently Delegating Authority to the General Counsel

AGENCY: National Labor Relations Board.

Authority: Sections 3, 4, 6, and 10 of the National Labor Relations Act, 29 U.S.C. Sec. 3, 4, 6, and 10.

ACTION: Notice.

SUMMARY: The National Labor Relations Board has issued an Order contingently delegating to the General Counsel full authority over court litigation matters that otherwise would require Board authorization and full authority to certify the results of any secret ballot election conducted under the National Emergency provisions of the Labor Management Relations Act, sections 206–210, 29 U.S.C. 176–180. These delegations shall become effective during any time at which the Board has fewer than three Members and shall cease to be effective whenever the Board has at least three Members.

DATES: This Order is effective November 3, 2011.

FOR FURTHER INFORMATION CONTACT: Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street NW., Washington, DC 20570, (202) 273–1067 (this is not a toll-free number), 1–(866) 315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION: The National Labor Relations Board anticipates that in the near future it may, for a temporary period, have fewer than three Members of its full complement of five Members.[1] The Board also recognizes that it has a continuing responsibility to fulfill its statutory obligations in the most effective and efficient manner possible. To assure that the Agency will be able to meet its obligations to the public to the greatest extent possible, the Board has decided to temporarily delegate to the General Counsel full authority on all court litigation matters that would otherwise require Board authorization, and full authority to certify the results of any secret ballot election conducted under the National Emergency provisions of the Labor Management Relations Act, sections 206–210, 29 U.S.C. 176–180. This delegation shall be effective during any time at which the Board has fewer than three Members and is made under the authority granted to the Board under sections 3, 4, 6, and 10 of the National Labor Relations Act.

Accordingly, the Board delegates to the General Counsel full and final authority and responsibility on behalf of the Board to initiate and prosecute injunction proceedings under section 10(j) or section 10(e) and (f) of the Act, contempt proceedings pertaining to the enforcement of or compliance with any order of the Board, and any other court litigation that would otherwise require Board authorization; and to institute and conduct appeals to the Supreme Court by writ of error or on petition for certiorari. The Board also delegates to the General Counsel full and final authority and responsibility on behalf of the Board to certify to the Attorney General the results of any secret ballot elections held among employees on the question of whether they wish to accept the final offer of settlement made by their employer pursuant to section 209(b) of the Labor Management

[1] The Board now has three Members, one of whom, Member Becker, is in recess appointment which will expire at the sine die adjournment of the current session of Congress.

Relations Act, 29 U.S.C. 179(b). These delegations shall become and remain effective during any time at which the Board has fewer than three Members, unless and until revoked by the Board.

This delegation relates to the internal management of the National Labor Relations Board and is therefore, pursuant to 5 U.S.C. 553, exempt from the notice and comment requirements of the Administrative Procedure Act. Further, public notice and comment is impractical because of the immediate need for Board action. The public interest requires that this Order take effect immediately.

All existing delegations of authority to the General Counsel and to staff in effect prior to the date of this order remain in full force and effect.[2] For the reasons stated above, the Board finds good cause to make this order effective immediately in accordance with 5 U.S.C. 553(d).

Signed in Washington, DC November 3, 2011.

Mark Gaston Pearce,

Chairman.

[FR Doc. 2011–29014 Filed 11–8–11; 8:45 am]

BILLING CODE 7545–01–P

[2] On December 14, 2001, and on November 19, 2002, the Board previously delegated to the General Counsel, on the same basis, full authority on all court litigation matters that would otherwise require Board authorization, and full authority to certify the results of any secret ballot election conducted under the National Emergency provisions of the Labor Management Relations Act, sections 206–210, 29 U.S.C. 176–180, effective during any time when the Board has fewer than three Members. *See* 66 FR 65998 (December 21, 2001), and 67 FR 65998–65999 (November 25, 2002). This Order consolidates, restates and affirms those prior delegations.

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Cyberinfrastructure; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Cyberinfrastructure (25150).

Date and Time: November 28–29, 2011 10 a.m.–5:15 p.m.

Place: National Science Foundation, 4201 Wilson Blvd., Room 1235, Arlington, VA 22230.

Type of Meeting: Open.

Contact Person: Kristen Oberright, Office of the Director, Office of Cyberinfrastructure (OD/OCI), National Science Foundation, 4201 Wilson Blvd., Suite 1145, Arlington, VA 22230, Telephone: (703) 292–8970

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: To advise NSF on the impact of its policies, programs and activities on the CI community. To provide advice to the Director/NSF on issues related to long-range planning.

Agenda: Discussion of CIF21 programs and planning and update on OCI activities.

Dated: November 4, 2011.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2011–29007 Filed 11–8–11; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

National Science Board; Sunshine Act Meetings; Notice

The National Science Board's Subcommittee on Facilities (SCF), pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of a meeting for the transaction of National Science Board business, as follows:

DATE AND TIME: Monday, November 7, 2011 from 4 to 5 p.m., EST.

SUBJECT MATTER: Discussion of Mid-scale Instrumentation Report.

STATUS: Open.

This meeting will be held by teleconference originating at the National Science Board Office, National Science Foundation, 4201Wilson Blvd., Arlington, VA 22230. A room will be available for the public and NSF staff to listen-in on this teleconference meeting. All visitors must contact the Board Office at least *one day* prior to the meeting to arrange for a visitor's badge and obtain the room number. Call (703) 292–7000 to request your badge, which will be ready for pick-up at the visitor's desk on the day of the meeting. All visitors must report to the NSF visitor desk at the 9th and N. Stuart Streets entrance to receive their visitor's badge on the day of the teleconference.

Please refer to the National Science Board Web site (*http://www.nsf.gov/nsb/notices/*) for information or schedule updates, or contact: Blane Dahl, National Science Foundation, 4201Wilson Blvd., Arlington, VA 22230. *Telephone:* (703) 292–7000.

Ann Bushmiller,

Senior Counsel to the National Science Board.

[FR Doc. 2011–29193 Filed 11–7–11; 4:15 pm]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0255]

Annual Public Meeting of the Interagency Steering Committee on Multimedia Environmental Modeling

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of meeting.

SUMMARY: The annual public meeting of the Federal Interagency Steering Committee on Multimedia Environmental Modeling (ISCMEM) will convene to discuss the latest developments in environmental modeling applications, tools and frameworks as well as new operational initiatives for FY 2012 among the participating agencies. The meeting will be hosted by the U.S. Nuclear Regulatory Commission, one of the participants in the ISCMEM, at its headquarters building in Rockville, MD. The meeting is open to the public and all interested parties may attend.

DATES: November 28 and 29, 2011, from 8:30 a.m. to 5:30 p.m., EST.

ADDRESSES: Nuclear Regulatory Commission, Two White Flint North Auditorium, 11545 Rockville Pike, Rockville, Maryland.

FOR FURTHER INFORMATION CONTACT: Pre-registration may be accomplished through the ISCMEM public Web site: *https://iemhub.org/groups/iscmem2011meeting.* Instructions for registration through the Web site may be requested by email to: *Mark.Fuhrmann@nrc.gov.* Other inquiries and notice of intent to attend the meeting (including indication of citizenship and affiliation) may be faxed or emailed to: Mark Fuhrmann, Environmental Transport Branch, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Tel (301) 251–7472, Fax (301) 251–7422, email: *Mark.Fuhrmann@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Background: In 2001, six Federal agencies began formal cooperation under a Memorandum of Understanding (MOU) on the research and development of multimedia (i.e., air, soil, water) environmental models. This MOU established the Interagency Steering Committee on Multimedia Environmental Modeling. The MOU was revised and renewed in 2006, and has just been revised and renewed for a third five year period in 2011. The MOU establishes a framework for facilitating cooperation and coordination among research organizations in the participating agencies. The first five

agencies to sign the current renewal of the MOU include: The National Science Foundation; the U.S. Nuclear Regulatory Commission; the Environmental Protection Agency; the U.S. Department of Energy, Office of Environmental Management; and the U.S. Geological Survey. Other agencies are still reviewing the revised MOU. These agencies are cooperating and coordinating in the research and development of multimedia environmental models, software and related databases, including development, enhancements, applications and assessments of site specific, generic, and process-oriented multimedia environmental models as they pertain to human and environmental health risk assessment. Multimedia model development and simulation supports interagency interests in risk assessment, uncertainty analyses, water supply issues and assessments of contaminant transport.

Purpose of the Public Meeting: The annual public meeting provides an opportunity for the scientific community, other Federal and State agencies, and the public to be briefed on ISCMEM activities and their initiatives for the upcoming year, and to discuss technological advancements in multimedia environmental modeling.

Proposed Agenda: The ISCMEM Chair will open the meeting with a brief overview of the goals of the MOU and an update on current activities and future plans of ISCMEM. This introduction will be followed by a series of invited technical presentations for the remainder of the first day and the morning of the second day focusing on topics of mutual interest to ISCMEM participants. The steering committee will hold an open business session on the afternoon of the second day. A detailed agenda with presentation titles and speakers will be posted on the ISCMEM public Web site: *https://www.iemhub.org/groups/iscmem2011meeting.* The agenda and instructions for registration will also be available through the list of public meetings on the US Nuclear Regulatory Commission Web site at *http://www.nrc.gov/public-involve/public-meetings.html.*

Meeting Access: The auditorium of the U.S. Nuclear Regulatory Commission Headquarters building is located at 11545 Rockville Pike, Rockville, MD, directly across Marinelli Road from the White Flint Metro stop. The most convenient transportation to the meeting venue is via Metro Rail since there is extremely limited on-street parking. Please take Metro to the White Flint Metro stop on the Red Line. Please allow time to register with building security and bring two photo ID's. Direct access to the auditorium will be available around the back of the building for those who have pre-registered through the web site listed above under **FOR FURTHER INFORMATION CONTACT** or via the agency contact information. Please follow signs for the ISCMEM public meeting.

The NRC provides *reasonable accommodation* to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in this meeting, or need this meeting notice or the transcript or other information from the meeting in another format (e.g., Braille, large print), please notify the NRC's meeting coordinator. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

Dated at Rockville, Maryland, this 28 day of October 2011.

For the Nuclear Regulatory Commission.

William R. Ott,

Chief, Environmental Transport Branch, Division of Risk Analysis, Office of Nuclear Regulatory Research.

[FR Doc. 2011–29030 Filed 11–8–11; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Senior Executive Service Performance Review Board

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: Notice is hereby given of the appointment of members of the OPM Performance Review Board.

FOR FURTHER INFORMATION CONTACT: Laurie Filer, Center for Human Capital Management Services, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415, (202) 606–1786.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management Section 4314(c) (1) through (5) of Title 5, U.S.C., requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more SES performance review boards. The board reviews and evaluates the initial appraisal of a senior executive's performance by the supervisor, and considers recommendations to the appointing authority regarding the performance of the senior executive.

Office of Personnel Management.

John Berry,

Director.

The following have been designated as members of the Performance Review Board of the U.S. Office of Personnel Management:

Elizabeth A. Montoya, Chief of Staff;
Elaine Kaplan, General Counsel;
Jeffrey Sumberg, Associate Director;
Kathy Dillaman, Senior Advisor;
John O'Brien, Director of Healthcare and Insurance;
Joseph Kennedy, Deputy Associate Director;
Charles D. Grimes, III, Chief Operating Officer;
Mark Reinhold, Deputy Associate Director for Human Resources—Executive Secretariat.

[FR Doc. 2011–29047 Filed 11–8–11; 8:45 am]

BILLING CODE 6325–45–P

POSTAL REGULATORY COMMISSION

[Docket No. A2012–37; Order No. 943]

Post Office Closing

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the Boles, Arkansas post office has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioners, and others to take appropriate action.

DATES: November 11, 2011: Administrative record due (from Postal Service); November 28, 2011, 4:30 p.m., Eastern Time: Deadline for notices to intervene. *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 the **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 October 27, 2011, the Commission received a petition for review of the Postal Service's determination to close the Boles post office in Boles, Arkansas. The petition for review was filed by Carlene Stovall (Petitioner) and is postmarked October 17, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2012–37 to consider Petitioner's appeal. If Petitioner would like to further explain her position with supplemental information or facts, Petitioner may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than December 1, 2011.

Categories of issues apparently raised. Petitioner contends that (1) The Postal Service failed to consider whether or not it will continue to provide a maximum degree of effective and regular postal services to the community (*see* 39 U.S.C. 404(d)(2)(A)(iii)); (2) the Postal Service failed to adequately consider the economic savings resulting from the closure (*see* 39 U.S.C. 404(d)(2)(A)(iv)); and (3) Petitioner contends that there are factual errors contained in the Final Determination.

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than those 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 applicable administrative record with the Commission is November 11, 2011. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this notice is November 11, 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 participant's submissions also will be posted on the 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 are also available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Eastern Time, 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, *http://www.prc.gov,* or by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at (202) 789–6846.

Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

Intervention. Persons, other than the Petitioners and respondents, 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 November 28, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site, *http://www.prc.gov*, 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 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 applicable administrative record regarding this appeal no later than November 11, 2011.

2. Any responsive pleading by the Postal Service to this notice is due no later than November 11, 2011.

3. The procedural schedule listed below is hereby adopted.

4. Pursuant to 39 U.S.C. 505, Katrina R. Martinez 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 and Procedural Schedule in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

PROCEDURAL SCHEDULE

October 27, 2011	Filing of Appeal.
November 11, 2011	Deadline for the Postal Service to file the applicable administrative record in this appeal.
November 11, 2011	Deadline for the Postal Service to file any responsive pleading.
November 28, 2011	Deadline for notices to intervene (*see* 39 CFR 3001.111(b)).
December 1, 2011	Deadline for Petitioners' Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)).
December 21, 2011	Deadline for answering brief in support of the Postal Service (*see* 39 CFR 3001.115(c)).
January 5, 2012	Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)).
January 12, 2012	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).
February 14, 2012	Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)).

[FR Doc. 2011–28933 Filed 11–8–11; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. A2012–39; Order No. 945]

Post Office Closing

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the Kettlersville, Ohio post office has been filed. It identifies preliminary steps and provides a procedural

schedule. Publication of this document will allow the Postal Service, petitioners, and others to take appropriate action.

DATES: November 14, 2011: Administrative record due (from Postal Service); November 28, 2011, 4:30 p.m., Eastern Time: Deadline for notices to intervene. *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 the **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 October 27, 2011, the Commission received a petition for review of the Postal Service's determination to close the Kettlersville post office in Kettlersville, Ohio. The petition for review was filed by Eric S. Kaminsky (Petitioner) and is postmarked October 19, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2012–39 to consider Petitioner's appeal. If Petitioner would like to further explain his position with supplemental information or facts, Petitioner may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than December 1, 2011.

Categories of issues apparently raised. Petitioner contends that (1) The Postal Service failed to consider the economic savings resulting from the closure (*see* 39 U.S.C. 404(d)(2)(A)(iv)); and (2) Petitioner contends there are factual errors contained in the Final Determination.

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than those 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 applicable administrative record with the Commission is November 14, 2011. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this notice is November 14, 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 participant's submissions also will be posted on the 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 are also available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Eastern Time, 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, *http://www.prc.gov,* or by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at (202) 789–6846.

Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

Intervention. Persons, other than the Petitioners and respondents, 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 November 28, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site, *http://www.prc.gov,* 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 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 applicable administrative record regarding this appeal no later than November 14, 2011.

2. Any responsive pleading by the Postal Service to this notice is due no later than November 14, 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 and Procedural Schedule in the **Federal Register.**

By the Commission.

Shoshana M. Grove,

Secretary.

PROCEDURAL SCHEDULE

October 27, 2011	Filing of Appeal.
November 14, 2011	Deadline for the Postal Service to file the applicable administrative record in this appeal.
November 14, 2011	Deadline for the Postal Service to file any responsive pleading.
November 28, 2011	Deadline for notices to intervene (*see* 39 CFR 3001.111(b)).
December 1, 2011	Deadline for Petitioners' Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)).
December 21, 2011	Deadline for answering brief in support of the Postal Service (*see* 39 CFR 3001.115(c)).
January 5, 2011	Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)).

PROCEDURAL SCHEDULE—Continued

January 12, 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).
February 14, 2012	Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)).

[FR Doc. 2011–29000 Filed 11–8–11; 8:45 am]
BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. A2012–40; Order No. 946]

Post Office Closing

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document informs the public that an appeal of the closing of the Beech Grove, Kentucky post office has been filed. It identifies preliminary steps and provides a procedural schedule. Publication of this document will allow the Postal Service, petitioners, and others to take appropriate action.

DATES: *November 14, 2011:* Administrative record due (from Postal Service); November 28, 2011, 4:30 p.m., Eastern Time: Deadline for notices to intervene. *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 the **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 October 27, 2011, the Commission received a petition for review of the Postal Service's determination to close the Beech Grove post office in Beech Grove, Kentucky. The petition for review was filed by Joseph L.V. Dant (Petitioner) and is postmarked October 19, 2011. The Commission hereby institutes a proceeding under 39 U.S.C. 404(d)(5) and establishes Docket No. A2012–40 to consider Petitioner's appeal. If Petitioner would like to further explain his position with supplemental information or facts, Petitioner may either file a Participant Statement on PRC Form 61 or file a brief with the Commission no later than December 1, 2011.

Categories of issues apparently raised. Petitioner contends that (1) the Postal Service failed to consider the effect of the closing on the community (*see* 39 U.S.C. 404(d)(2)(A)(i)); and (2) the Postal Service failed to consider the economic savings resulting from the closure (*see* 39 U.S.C. 404(d)(2)(A)(iv)).

After the Postal Service files the administrative record and the Commission reviews it, the Commission may find that there are more legal issues than those 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 applicable administrative record with the Commission is November 14, 2011. *See* 39 CFR 3001.113. In addition, the due date for any responsive pleading by the Postal Service to this notice is November 14, 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 participant's submissions also will be posted on the 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 are also available for public inspection in the Commission's docket section. Docket section hours are 8 a.m. to 4:30 p.m., Eastern Time, 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, *http://www.prc.gov,* or by contacting the Commission's docket section at *prc-dockets@prc.gov* or via telephone at (202) 789–6846.

Commission reserves the right to redact personal information which may infringe on an individual's privacy rights from documents filed in this proceeding.

Intervention. Persons, other than the Petitioners and respondents, 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 November 28, 2011. A notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site, *http://www.prc.gov,* 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 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 applicable administrative record regarding this appeal no later than November 14, 2011.

2. Any responsive pleading by the Postal Service to this notice is due no later than November 14, 2011.

3. The procedural schedule listed below is hereby adopted.

4. Pursuant to 39 U.S.C. 505, Patricia A. Gallagher 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 and Procedural Schedule in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

PROCEDURAL SCHEDULE

October 27, 2011	Filing of Appeal.
November 14, 2011	Deadline for the Postal Service to file the applicable administrative record in this appeal.
November 14, 2011	Deadline for the Postal Service to file any responsive pleading.
November 28, 2011	Deadline for notices to intervene (*see* 39 CFR 3001.111(b)).
December 1, 2011	Deadline for Petitioners' Form 61 or initial brief in support of petition (*see* 39 CFR 3001.115(a) and (b)).
December 21, 2011	Deadline for answering brief in support of the Postal Service (*see* 39 CFR 3001.115(c)).
January 5, 2011	Deadline for reply briefs in response to answering briefs (*see* 39 CFR 3001.115(d)).
January 12, 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).
February 16, 2012	Expiration of the Commission's 120-day decisional schedule (*see* 39 U.S.C. 404(d)(5)).

[FR Doc. 2011–29002 Filed 11–8–11; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65671; File No. SR–NYSEAMEX–2011–84]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing of Rule Change Proposing a One-Year Pilot Program Adding New Rule 107C To Establish a Retail Liquidity Program To Attract Additional Retail Order Flow to the Exchange for NYSE Amex Equities Traded Securities

November 2, 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 October 19, 2011, NYSE Amex LLC (''NYSE Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 Exchange proposes a one-year pilot program that would add new NYSE Amex Equities Rule 107C to establish a Retail Liquidity Program (''Program'' or ''proposed rule change'') to attract additional retail order flow to the Exchange for NYSE Amex Equities traded securities[3] while also providing the potential for price improvement to such order flow. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

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 self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing a one-year pilot program that would add new NYSE Amex Equities Rule 107C to establish a Retail Liquidity Program to attract additional retail order flow to the Exchange for NYSE Amex Equities traded securities while also providing the potential for price improvement to such order flow.

Under the proposed rule change, the Exchange would create two new classes of market participants: (1) Retail Member Organizations (''RMOs''), which would be eligible to submit certain retail order flow (''Retail Orders'') to the Exchange, and (2) Retail Liquidity Providers (''RLPs''), which would be required to provide potential price improvement for Retail Orders in the form of non-displayed interest that is better than the best protected bid or the best protected offer (''PBBO'')[4] (''Retail Price Improvement Order'' or ''RPI''). Member organizations other than RLPs would also be permitted, but not required, to submit Retail Price Improvement Orders.

The Exchange will submit a separate proposal to amend its Price List in connection with the proposed Retail Liquidity Program. Under that proposal, the Exchange would charge RLPs and other member organizations a fee for executions of their Retail Price Improvement Orders against Retail Orders and in turn would provide a credit to RMOs for executions of their Retail Orders against the Retail Price Improvement Orders of RLPs and other member organizations.

Definitions

The Exchange proposes to adopt the following definitions under proposed NYSE Amex Equities Rule 107C(a). First, the term ''Retail Liquidity Provider'' would be defined as a member organization that is approved by the Exchange to act as such and to submit Retail Price Improvement Orders

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] ''NYSE Amex Equities traded securities'' refers to all securities available to be traded on NYSE Amex Equities, including but not limited to NYSE Amex-listed securities as well as those listed on the Nasdaq Stock Market traded pursuant to unlisted trading privileges. *See* Securities Exchange Act Release 34–62479, 75 Fed. Reg. 41264 (July 15, 2010).

[4] The terms protected bid and protected offer would have the same meaning as defined in Regulation NMS Rule 600(b)(57). The PBB is the best-priced protected bid and the PBO is the best-priced protected offer. Generally, the PBB and PBO and the national best bid (''NBB'') and national best offer (''NBO'') will be the same. However, a market center is not required to route to the NBB or NBO if that market center is subject to an exception under Regulation NMS Rule 611(b)(1) or if such NBB or NBO is otherwise not available for an automatic execution. In such case, the PBB or PBO would be the best-priced protected bid or offer to which a market center must route interest pursuant to Regulation NMS Rule 611.

according to certain requirements set forth in proposed Rule 107C.

Second, the term ''Retail Member Organization'' would be defined as a member organization (or a division thereof) that has been approved by the Exchange to submit Retail Orders.

Third, the term ''Retail Order'' would be defined as:

- An agency order that originates from a natural person and is submitted to the Exchange by an RMO, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology; or
- A proprietary order of an RMO that results from liquidating a position acquired from the internalization of an order that satisfies the requirements of the preceding subparagraph.

Finally, the term ''Retail Price Improvement Order'' would be defined as non-displayed interest in NYSE Amex Equities traded securities that is better than the best protected bid (''PBB'') or best protected offer (''PBO'') by at least $0.001 and that is identified as a Retail Price Improvement Order in a manner prescribed by the Exchange.[5] The price of an RPI would be determined by an RLP's entry of the following into Exchange systems: (1) RPI buy or sell interest; (2) an offset, if any; and (3) a ceiling or floor price. The Exchange expects that RPI sell or buy interest typically would be entered to track the PBBO. The offset would be a predetermined amount by which the RLP is willing to improve the PBBO, subject to a ceiling or floor price. The ceiling or floor price would be the amount above or below which the RLP does not wish to trade. RPIs in their entirety (the buy or sell interest, the offset, and the ceiling or floor) will remain undisplayed. Exchange systems will monitor whether RPI buy or sell interest, adjusted by any offset and subject to the ceiling or floor price, is eligible to interact with incoming Retail Orders.

RPIs would interact with Retail Orders as follows. Assume an RLP enters RPI sell interest with an offset of $0.001 and a floor of $10.10 while the PBO is $10.11. The RPI could interact with an incoming buy Retail Order at $10.109. If, however, the PBO was $10.10, the RPI could not interact with the Retail Order because the price required to deliver the minimum $0.001 price improvement ($10.099) would violate the RLP's floor of $10.10. If an RLP otherwise enters an offset greater than the minimum required price improvement and the offset would produce a price that would violate the RLP's floor, the offset would be applied only to the extent that it respects the RLP's floor. By way of illustration, assume RPI buy interest is entered with an offset of $0.005 and a ceiling of $10.112 while the PBB is at $10.11. The RPI could interact with an incoming sell Retail Order at $10.112, because it would produce the required price improvement without violating the RLP's ceiling, but it could not interact above the $10.112 ceiling. Finally, if an RLP enters an RPI without an offset, the RPI will interact with Retail Orders at the level of the RLP's floor or ceiling as long as the minimum required price improvement is produced. Accordingly, if RPI sell interest is entered with no offset and a $10.098 floor while the PBO is $10.11, the RPI could interact with the Retail Order at $10.098, producing $0.012 of price improvement. Exchange systems will not cancel RPI interest when it is not eligible to interact with incoming Retail Orders; such RPI interest will remain in Exchange systems and may become eligible again to interact with Retail Orders depending on the PBB or PBO.

An RLP would only be permitted to enter a Retail Price Improvement Order for the particular security or securities to which it is assigned as RLP.

RMO Qualifications and Approval Process

Under proposed NYSE Amex Equities Rule 107C(b), any member organization[6] could qualify as an RMO if it conducts a retail business or handles retail orders on behalf of another broker-dealer. Any member organization that wishes to obtain RMO status would be required to submit: (1) An application form; (2) an attestation, in a form prescribed by the Exchange, that any order submitted by the member organization as a Retail Order would meet the qualifications for such orders under proposed Rule 107C; and (3) supporting documentation sufficient to demonstrate the retail nature and characteristics of the applicant's order flow.[7]

An RMO would be required to have written policies and procedures reasonably designed to assure that it will only designate orders as Retail Orders if all requirements of a Retail Order are met. Such written policies and procedures must require the member organization to (i) Exercise due diligence before entering a Retail Order to assure that entry as a Retail Orders is in compliance with the requirements of the proposed rule, and (ii) monitor whether orders entered as Retail Orders meet the applicable requirements. If the RMO represents Retail Orders from another broker-dealer customer, the RMO's supervisory procedures must be reasonably designed to assure that the orders it receives from such broker-dealer customer that it designates as Retail Orders meet the definition of a Retail Order. The RMO must (i) Obtain an annual written representation, in a form acceptable to the Exchange, from each broker-dealer customer that sends it orders to be designated as Retail Orders that entry of such orders as Retail Orders will be in compliance with the requirements of the proposed rule, and (ii) monitor whether its broker-dealer customer's Retail Order flow continues to meet the applicable requirements.[8]

If the Exchange disapproves the application, the Exchange would provide a written notice to the member organization. The disapproved applicant could appeal the disapproval by the Exchange as provided in proposed Rule 107C(i), and/or reapply for RMO status 90 days after the disapproval notice is issued by the Exchange. An RMO also

[5] Exchange systems would prevent Retail Orders from interacting with Retail Price Improvement Orders if the RPI is not priced at least $0.001 better than the PBBO. The Exchange notes, however, that price improvement of $0.001 would be a minimum requirement and RLPs and other member organizations could enter Retail Price Improvement Orders that better the PBBO by more than $0.001. Exchange systems will accept Retail Price Improvement Orders without a minimum price improvement value; however, such interest will execute at its floor or ceiling price only if such floor or ceiling price is better than the PBBO by $0.001 or more. Concurrently with this filing, the Exchange has submitted a request for an exemption under Regulation NMS Rule 612 that would permit it to accept and rank the undisplayed Retail Price Improvement Orders. As outlined in the request, the Exchange believes that the minimum price improvement available under the Program, which would amount to $0.05 on a 500 share order, would be meaningful to the small retail investor. *See* Letter from Janet M. McGinness, Senior Vice President—Legal & Corporate Secretary, Office of the General Counsel, NYSE Euronext to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission dated October 19, 2011 (''Sub-Penny Rule Exemption Request'').

[6] An RLP may also act as an RMO for securities to which it is not assigned, subject to the qualification and approval process established by the proposed rule.

[7] For example, a prospective RMO could be required to provide sample marketing literature, Web site screenshots, other publicly disclosed materials describing the retail nature of their order flow, and such other documentation and information as the Exchange may require to obtain reasonable assurance that the applicant's order flow would meet the requirements of the Retail Order definition.

[8] FINRA, on behalf of the Exchange, will review an RMO's compliance with these requirements through an exam-based review of the RMO's internal controls.

could voluntarily withdraw from such status at any time by giving written notice to the Exchange.

RLP Qualifications

To qualify as an RLP under proposed NYSE Amex Equities Rule 107C(c), a member organization would be required to: (1) Already be approved as a Designated Market Maker (''DMM'') or Supplemental Liquidity Provider (''SLP''); (2) demonstrate an ability to meet the requirements of an RLP; (3) have mnemonics or the ability to accommodate other Exchange-supplied designations that identify to the Exchange RLP trading activity in assigned RLP securities; and (4) have adequate trading infrastructure and technology to support electronic trading.

Because an RLP would only be permitted to trade electronically, a member organization's technology must be fully automated to accommodate the Exchange's trading and reporting systems that are relevant to operating as an RLP. If a member organization were unable to support the relevant electronic trading and reporting systems of the Exchange for RLP trading activity, it would not qualify as an RLP.

RLP Approval Process

Under proposed NYSE Amex Equities Rule 107C(d), to become an RLP, a member organization would be required to submit an RLP application form with all supporting documentation to the Exchange. The Exchange would determine whether an applicant was qualified to become an RLP as set forth above. After an applicant submitted an RLP application to the Exchange with supporting documentation, the Exchange would notify the applicant member organization of its decision. The Exchange could approve one or more member organizations to act as an RLP for a particular security. The Exchange could also approve a particular member organization to act as RLP for one or more securities. Approved RLPs would be assigned securities according to requests made to, and approved by, the Exchange.

If an applicant were approved by the Exchange to act as an RLP, the applicant would be required to establish connectivity with relevant Exchange systems before the applicant would be permitted to trade as an RLP on the Exchange.

If the Exchange disapproves the application, the Exchange would provide a written notice to the member organization. The disapproved applicant could appeal the disapproval by the Exchange as provided in proposed Rule 107C(i) and/or reapply for RLP status 90 days after the disapproval notice is issued by the Exchange.

Voluntary Withdrawal of RLP Status

An RLP would be permitted to withdraw its status as an RLP by giving notice to the Exchange under proposed NYSE Amex Equities Rule 107C(e). The withdrawal would become effective when those securities assigned to the withdrawing RLP are reassigned to another RLP. After the Exchange receives the notice of withdrawal from the withdrawing RLP, the Exchange would reassign such securities as soon as practicable, but no later than 30 days after the date the notice is received by the Exchange. If the reassignment of securities takes longer than the 30-day period, the withdrawing RLP would have no further obligations and would not be held responsible for any matters concerning its previously assigned RLP securities.

RLP Requirements

Under proposed NYSE Amex Equities Rule 107C(f), an RLP would only be permitted to enter Retail Price Improvement Orders electronically and directly into Exchange systems and facilities designated for this purpose and only for the securities to which it is assigned as RLP. In order to be eligible for execution fees that are lower than non-RLP rates, an RLP would be required to maintain (1) A Retail Price Improvement Order that is better than the PBB at least five percent of the trading day for each assigned security; and (2) a Retail Price Improvement Order that is better than the PBO at least five percent of the trading day for each assigned security.

An RLP's five-percent requirements would be calculated by determining the average percentage of time the RLP maintains a Retail Price Improvement Order in each of its RLP securities during the regular trading day, on a daily and monthly basis. The Exchange would determine whether an RLP has met this requirement by calculating the following:

(1) The ''Daily Bid Percentage'' would be calculated by determining the percentage of time an RLP maintains a Retail Price Improvement Order with respect to the PBB during each trading day for a calendar month;

(2) The ''Daily Offer Percentage'' would be calculated by determining the percentage of time an RLP maintains a Retail Price Improvement Order with respect to the PBO during each trading day for a calendar month;

(3) The ''Monthly Average Bid Percentage'' would be calculated for each RLP security by summing the security's ''Daily Bid Percentages'' for each trading day in a calendar month then dividing the resulting sum by the total number of trading days in such calendar month; and

(4) The ''Monthly Average Offer Percentage'' would be calculated for each RLP security by summing the security's ''Daily Offer Percentage'' for each trading day in a calendar month and then dividing the resulting sum by the total number of trading days in such calendar month.

Finally, only Retail Price Improvement Orders would be used when calculating whether an RLP is in compliance with its five-percent requirements.

The Exchange would determine whether an RLP met its five-percent requirement by determining the average percentage of time an RLP maintains a Retail Price Improvement Order in each of its RLP securities during the regular trading day on a daily and monthly basis. The lower fees would not apply during a month in which the RLP did not satisfy the five-percent requirements. Additionally, beginning with the third month of operation as an RLP, an RLP's failure to satisfy the five-percent requirements described above for each of its assigned securities could result in action taken by the Exchange, as described below.

The Exchange will not begin calculating whether an RLP meets the quoting requirement during the first two calendar months that the RLP is participating in the Program. If the Program is implemented mid-month, the Exchange will begin calculating the quoting requirement two calendar months after the end of the month in which the program was implemented.

Failure of RLP to Meet Requirements

Proposed NYSE Amex Equities Rule 107C(g) addresses an RLP's failure to meet its requirements. If, after the first two months an RLP acted as an RLP, an RLP fails to meet any of the requirements of proposed Rule 107C(f) for any assigned RLP security for three consecutive months, the Exchange could, in its discretion, take one or more of the following actions: [9] (1) Revoke the assignment of any or all of the affected securities from the RLP; (2) revoke the assignment of unaffected securities from the RLP; or (3) disqualify the member organization from its status as an RLP.

The Exchange, in its sole discretion, would determine if and when a member organization is disqualified from its status as an RLP. One calendar month prior to any such determination, the

[9] As discussed previously, an RLP's failure to satisfy its requirement would result in the RLP no longer being charged the lower fees for execution of its Retail Price Improvement Orders.

Exchange would notify an RLP of such impending disqualification in writing. When disqualification determinations are made, the Exchange would provide a written disqualification notice to the member organization.

A disqualified RLP could appeal the disqualification as provided in proposed Rule 107C(i) and/or reapply for RLP status 90 days after the disqualification notice is issued by the Exchange.[10]

Failure of RMO to Abide by Retail Order Requirements

Proposed NYSE Amex Equities Rule 107C(h) addresses an RMO's failure to abide by Retail Order requirements. If an RMO designates orders submitted to the Exchange as Retail Orders and the Exchange determines, in its sole discretion, that those orders fail to meet any of the requirements of Retail Orders, the Exchange may disqualify a member organization from its status as an RMO. When disqualification determinations are made, the Exchange would provide a written disqualification notice to the member organization. A disqualified RMO could appeal the disqualification as provided in proposed Rule 107C(i) and/or reapply for RMO status 90 days after the disqualification notice is issued by the Exchange.[11]

Appeal of Disapproval or Disqualification

Proposed NYSE Amex Equities Rule 107C(i) provides appeal rights to member organizations. If a member organization disputes the Exchange's decision to disapprove it under proposed Rule 107C(b) or (d) or disqualify it under proposed Rule 107C(g) or (h), such member organization (''appellant'') may request, within five business days after notice of the decision is issued by the Exchange, that the Retail Liquidity Program Panel (''RLP Panel'') review the decision to determine if it was correct.[12]

The RLP Panel would consist of the NYSE's Chief Regulatory Officer (''CRO''), or a designee of the CRO, and two officers of the Exchange designated by the Co-Head of U.S. Listings and Cash Execution. The RLP Panel would review the facts and render a decision within the time frame prescribed by the Exchange. The RLP Panel could overturn or modify an action taken by the Exchange and all determinations by the RLP Panel would constitute final action by the Exchange on the matter at issue.

Retail Liquidity Identifier

Under proposed NYSE Amex Equities Rule 107C(j), the Exchange proposes to disseminate an identifier through proprietary Exchange data feeds when RPI interest priced at least $0.001 better than the PBB or PBO for a particular security is available in Exchange systems (''Retail Liquidity Identifier''). The Retail Liquidity Identifier would not be disseminated to the Consolidated Quote Stream.

Retail Order Designations

Under proposed NYSE Amex Equities Rule 107C(k), an RMO can designate how a Retail Order would interact with available contra-side interest as follows. As proposed, a Type 1-designated Retail Order would interact only with available contra-side Retail Price Improvement Orders and would not interact with other available contra-side interest in Exchange systems or route to other markets. The portion of a Type 1-designated Retail Order that does not execute against contra-side Retail Price Improvement Orders would be immediately and automatically cancelled. A Type 2-designated Retail Order would interact first with available contra-side Retail Price Improvement Orders and any remaining portion of the Retail Order would be executed as a Regulation NMS-compliant Immediate or Cancel Order pursuant to NYSE Amex Equities Rule 13. Accordingly, a Type 2-designated Retail Order could interact with other interest in Exchange systems, but would not route to other markets. A Type 3-designated Retail Order would interact first with available contra-side Retail Price Improvement Orders and any remaining portion of the Retail Order would be executed as an Exchange Immediate or Cancel Order pursuant to NYSE Amex Equities Rule 13. Accordingly, a Type 3-designated Retail Order could interact with other interest in Exchange systems and, if necessary, would route to other markets in compliance with Regulation NMS.

Priority and Order Allocation

Under proposed NYSE Amex Equities Rule 107C(l), the Exchange proposes that competing Retail Price Improvement Orders in the same security would be ranked and allocated according to price then time of entry into Exchange systems. The Exchange further proposes that executions would occur at the price level that completes the incoming order's execution. Any remaining unexecuted RPI interest will remain available to interact with other incoming Retail Orders if such interest is at an eligible price. Any remaining unexecuted portion of the Retail Order will cancel or execute in accordance with proposed Rule 107C(k). The following example illustrates this proposed method:

PBBO for security ABC is $10.00–$10.05.

RLP 1 enters a Retail Price Improvement Order to buy ABC at $10.01 for 500.

RLP 2 then enters a Retail Price Improvement Order to buy ABC at $10.02 for 500.

RLP 3 then enters a Retail Price Improvement Order to buy ABC at $10.03 for 500.

An incoming Retail Order to sell ABC for 1,000 would execute first against RLP 3's bid for 500, because it is the best priced bid, then against RLP 2's bid for 500, because it is the next best priced bid. RLP 1 would not be filled because the entire size of the Retail Order to sell 1,000 would be depleted. The Retail Order executes at the price that completes the order's execution. In this example the entire 1,000 order to sell would execute at $10.02 because it would result in a complete fill.

However, assume the same facts above, except that RLP 2's Retail Price Improvement Order to buy ABC at $10.02 was for 100. The incoming Retail Order to sell 1,000 would execute first against RLP 3's bid for 500, because it is the best priced bid, then against RLP 2's bid for 100, because it is the next best priced bid. RLP 1 would then receive an execution for 400 of its bid for 500, at which point the entire size of the Retail Order to sell 1,000 would be depleted. The Retail Order executes at the price that completes the order's execution, which is $10.01.

Implementation

The Exchange proposes that all NYSE-listed and NYSE Amex Equities traded securities would be eligible for inclusion in the Retail Liquidity Program.[13] In order to provide for an efficient implementation, the Retail Liquidity Program would initially cover only a certain specified list of NYSE-listed securities to which RLPs are assigned, as announced by the Exchange via Information Memo. The Exchange

[10] The Exchange notes that the Retail Price Improvement Order executions of a member organization disqualified from acting as an RLP would thereafter be subject to the transaction pricing applicable to non-RLP member organizations.

[11] As above for RLPs, the Retail Order executions of a member organization disqualified from RMO status would thereafter be subject to the transaction pricing applicable to non-RMO member organizations.

[12] In the event a member organization is disqualified from its status as an RLP pursuant to proposed NYSE Amex Equities Rule 107C(g), the Exchange would not reassign the appellant's securities to a different RLP until the RLP Panel has informed the appellant of its ruling.

[13] New York Stock Exchange LLC is filing a companion rule proposal to adopt NYSE Rule 107C. *See* SR–NYSE–2011–55.

anticipates that the securities included within the Retail Liquidity Program would be expanded periodically as demand for RLP assignments develops in response to increased Retail Order activity on the Exchange.[14]

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[15] in general, and furthers the objectives of Section 6(b)(5),[16] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the proposed rule change is consistent with these principles because it would increase competition among execution venues, encourage additional liquidity, and offer the potential for price improvement to retail investors. The Exchange notes that a significant percentage of the orders of individual investors are executed over-the-counter.[17] The Exchange believes that it is appropriate to create a financial incentive to bring more retail order flow to a public market.

The Exchange understands that Section 6(b)(5) of the Act prohibits an exchange from establishing rules that treat market participants in an unfairly discriminatory manner. However, Section 6(b)(5) of the Act does not prohibit exchange members or other broker-dealers from discriminating, so long as their activities are otherwise consistent with the federal securities laws. Nor does Section 6(b)(5) of the Act require exchanges to preclude discrimination by broker-dealers. Broker-dealers commonly differentiate between customers based on the nature and profitability of their business.

While the Exchange believes that markets and price discovery optimally function through the interactions of diverse flow types, it also believes that growth in internalization has required differentiation of retail order flow from other order flow types. The differentiation proposed herein by the Exchange is not designed to permit unfair discrimination, but instead to promote a competitive process around retail executions such that retail investors would receive better prices than they currently do through bilateral internalization arrangements. The Exchange believes that the transparency and competitiveness of operating a program such as the Retail Liquidity Program on an exchange market would result in better prices for retail investors. The Exchange recognizes that sub-penny trading and pricing could potentially result in undesirable market behavior. The Exchange will monitor the Program in an effort to identify and address any such behavior.

Finally, the Exchange proposes that the Commission approve the proposed rule for a pilot period of twelve months from the date of implementation, which shall occur no later than 90 days after Commission approval of Rule 107C. The Program shall expire on a date that will be determined upon adoption of Rule 107C. The Exchange believes that this pilot period is of sufficient length to permit both the Exchange and the Commission to assess the impact of the rule change described herein.

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 that is 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 solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be 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. The Commission specifically requests comment on the following:

- A stated purpose of this proposal is to attract retail order flow, a significant percentage of which is currently executed over-the-counter, to the exchange. What are the benefits, if any, of executing marketable retail orders on an exchange instead of over-the-counter? To what extent, if any, would this proposal realize those benefits? What other effects, if any, would this proposal have upon the overall market?
- The proposal contemplates that Retail Liquidity Providers may offer price improvement to Retail Orders in sub-penny amounts. In its proposal, the exchange notes that it is concurrently requesting an exemption from the sub-penny rule, Rule 612 of Regulation NMS, to permit the exchange to accept and rank Retail Price Improvement Orders. If the Commission were to approve this proposal and grant the exemption, what impact, positive or negative, would the proposal have upon the market? Would this proposal, if approved, produce a significantly larger volume of sub-penny trades than is currently the case, or would it primarily shift sub-penny trades away from non-exchange venues to the exchange?

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 email to *rule-comments@sec.gov.* Please include File Number SR- NYSEAMEX–2011–84 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- NYSEAMEX–2011–84. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission

[14] The Exchange would announce any such expansions via Information Memo.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

[17] *See* Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (noting that dark pools and internalizing broker-dealers executed approximately 25.4% of share volume in September 2009). *See also* Mary L. Schapiro, Strengthening Our Equity Market Structure (Speech at the Economic Club of New York, Sept. 7, 2010) (available on the Commission's Web site). In her speech, Chairman Schapiro noted that nearly 30 percent of volume in U.S.-listed equities was executed in venues that do not display their liquidity or make it generally available to the public and the percentage was increasing nearly every month.

will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *http://www.nyse.com.* 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–NYSEAMEX–2011–84 and should be submitted on or before November 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority. [18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28993 Filed 11–8–11; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65676; File No. SR–BATS–2011–045]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify the Market Opening Procedures of BATS Options

November 3, 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 October 25, 2011, BATS Exchange, Inc. (''Exchange'' or ''BATS'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposal to amend the Rules applicable to the BATS options market (''BATS Options'') in order to modify the opening procedures for BATS Options. The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BATS Options currently opens options, other than index options,[4] for trading based on the first transaction after 9:30 a.m. Eastern Time in the securities underlying the options as reported on the first print disseminated pursuant to an effective national market system plan. The Exchange proposes to modify this procedure to wait for the first transaction on the primary listing market for each underlying security prior to opening trading in the related options. The Exchange believes this change is appropriate because on the primary listing market a security typically opens through an auction mechanism that provides for additional price discovery as compared to non-listing markets.[5] Accordingly, the Exchange believes the proposed change will help to improve the opening process of BATS Options by ensuring that an underlying security has been opened pursuant to a robust price discovery process before opening the overlying options for trading.

[3] 17 CFR 240.19b–4(f)(6).

[4] BATS Rule 21.7 states that index options will open for trading at 9:30 a.m. Eastern Time, without requiring an execution in any underlying security. The Exchange notes that BATS Options does not currently offer trading of index options.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[6] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[7] because it would 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, protect investors and the public interest. In particular, the proposed rule change will allow the Exchange to protect investors and the public interest by waiting to open options for trading until the primary listing market for the applicable underlying security has opened such security, which should lead to more accurate prices on BATS Options at the market open.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) by its terms, become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective

[5] *See, e.g.,* NYSE and NASDAQ.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiver of the 30-day operative delay would allow the Exchange to immediately implement the proposed modifications to its market opening procedures, which are designed to protect investors and other market participants by ensuring that an underlying security has opened pursuant to a robust price discovery process before opening of the overlying options for trading. The Exchange represents that the proposed change will not require a significant programming effort by Users[10] of BATS Options or other market participants and that it expects to have operational and technological changes in place to support the proposed rule change on or about November 4, 2011.[11] As such, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest and designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BATS–2011–045 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–BATS–2011–045. This file number should be included on the subject line if email 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 offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BATS–2011–045, and should be submitted on or before November 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–28995 Filed 11–8–11; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] As defined in BATS Rule 16.1(a)(62), a ''User'' on BATS Options is either a member of BATS Options (''Options Member'') or a sponsored participant who is authorized to obtain access to the Exchange's system pursuant to BATS Rule 11.3 (''Sponsored Participant'').

[11] *See* SR–BATS–2011–045, Item 7.

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65682; File No. SR–CBOE–2011–099]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Concerning Industry Directors and the Nomination of Representative Directors

November 3, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 21, 2011, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On November 1, 2011, the Exchange submitted a technical amendment (''Amendment No. 1'') to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to: (i) Amend its Bylaws to eliminate the requirement that at least 30% of the members of the Board of Directors must be Industry Directors; (ii) amend its Bylaws relating to its Advisory Board; (iii) amend its Bylaws relating to the nomination of Representative Directors; and (iv) make conforming changes to the CBOE Certificate of Incorporation and the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] As provided in the instructions to Form 19b–4, the Exchange noted in Item 2 of its filing that it needed to obtain, but had not yet obtained, formal approval from its Board of Directors for the Bylaw, Certificate of Incorporation, and Voting Agreement changes set forth in this proposed rule change. The Exchange also noted that it needed to obtain, but had not yet obtained, approval from CBOE Holdings, the Exchange's sole stockholder, of the changes to the Certificate of Incorporation and Voting Agreement. The Exchange stated that once these approvals were obtained, it would file a technical amendment to this proposed rule change to reflect these approvals. Amendment No. 1 reflected that the requisite approvals were obtained on November 1, 2011, and represented that no further action in connection with this proposed rule change was required. In addition, Amendment No. 1 contained the Exchange's consent to an extension of time for Commission consideration of this proposed rule change for an additional thirty-five days after November 1, 2011 (the filing date of this amendment).

Voting Agreement between CBOE and CBOE Holdings, Inc. (''CBOE Holdings''). The text of the proposed amendments to CBOE's Bylaws, CBOE's Certificate of Incorporation and the Voting Agreement are available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to (i) Amend CBOE's Bylaws to eliminate the requirement that at least 30% of the members of the Board of Directors must be Industry Directors; (ii) amend CBOE's Bylaws relating to its Advisory Board; (iii) amend CBOE's Bylaws relating to the nomination of Representative Directors; and (iv) make conforming changes to CBOE's Certificate of Incorporation and the Voting Agreement between CBOE and CBOE Holdings.

(1) Elimination of 30% Industry Director Requirement

In light of CBOE's demutualization and conversion from a membership organization to a stock corporation owned by a public holding company in June, 2010, and based on the Exchange's experience since that time in operating in that form, the Exchange believes that it is no longer necessary that its Bylaws contain a requirement that its Board of Directors be composed of at least 30% Industry Directors. The Exchange believes that eliminating the requirement that at least 30% of its Board be composed of Industry Directors as defined in the Bylaws provides it with appropriate flexibility as it evaluates the structure and composition of its Board in the future. The Exchange notes that it has not made a determination as to whether it will reduce (or eliminate) the number of directors on its Board who qualify as an Industry Director as defined in the Bylaws. Even if the number of individuals who would technically qualify as Industry Directors on the Board of Directors is reduced, the Exchange recognizes the importance of having directors who have industry expertise and knowledge (whether those directors are Industry Directors or Non-Industry Directors). Additionally, no matter what the composition of its Board is, the Exchange intends to maintain the fair representation of its Trading Permit Holders in the selection of its directors and administration of its affairs consistent with Section 6(b)(3) of the Securities Exchange Act of 1934, as amended (''Act''), as further described below.

In the event the Exchange determines in the future to reduce the number of directors on its Board who would qualify as an Industry Director, the Exchange believes that a Board composed of all or nearly all Non-Industry Directors would be consistent with the Act, including Section 6(b)(3) of the Act relating to the fair representation of CBOE Trading Permit Holders in the selection of directors and the administration of the Exchange.[4] The Exchanges also notes that in such a case, at all times at least 20% of the directors serving on the Board shall be Representative Directors nominated (or otherwise selected through the petition process) by the Representative Director Nominating Body as provided in Section 3.2 of the Bylaws. Under Section 3.2, the Representative Director Nominating Body provides a mechanism for Trading Permit Holders to provide input with respect to the nominees for Representative Directors and also allows for Trading Permit Holders to nominate alternative candidates by petition.

In connection with the proposed elimination of the requirement that at least 30% of the Board shall be composed of Industry Directors, CBOE also proposes to amend Section 4.4 of its Bylaws relating to the composition of the Nominating and Governance Committee. Specifically, CBOE proposes to delete the clause that states that the Nominating and Governance Committee shall consist of both Industry and Non-Industry Directors, given that at some point in the future the Board may not have Industry Directors serving on it.

[4] *See, e.g.,* Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678 (December 24, 2003) (approving SR–NYSE–2003–34).

(2) Amendments Relating to the Advisory Board

Recently, CBOE amended its Bylaws to provide for the establishment of an Advisory Board which shall advise the Office of the Chairman regarding matters of interest to Trading Permit Holders. CBOE now proposes to amend Section 6.1 of the Bylaws to clarify that the Exchange ''will'' (as opposed to ''may'') have an Advisory Board, which shall advise the Board of Directors in addition to the Office of the Chairman regarding matters that impact Trading Permit Holders. CBOE also proposes to amend Section 6.1 of its Bylaws to expressly provide that at least two members of the Advisory Board shall be Trading Permit Holders or persons associated with Trading Permit Holders. CBOE notes that the Advisory Board provides a mechanism for Trading Permit Holders to provide industry feedback to CBOE's Chairman and CEO, Executive Vice Chairman, President and Lead Director, all of whom are members of the Advisory Board, consistent with Section 6(b)(3) of the Act.

(3) Nomination of Representative Directors

The Exchange Bylaws will continue to require that at least 20% of CBOE's directors must be Representative Directors. However, the Exchange proposes to amend its Bylaws in a number of respects with regard to the nomination process for the Representative Directors. Currently, as described in Section 3.2 of the Bylaws, the Representative Directors are nominated (or otherwise selected through a petition process) by the Industry-Director Subcommittee of the CBOE Nominating and Governance Committee. The Industry-Director Subcommittee is composed of all of the Industry Directors serving on the Nominating and Governance Committee. CBOE Trading Permit Holders may nominate alternative Representative Director candidates to those nominated by the Industry Director Subcommittee, in which case a Run-off Election is held in which CBOE's Trading Permit Holders vote to determine which candidates will be elected to the CBOE Board of Directors to serve as Representative Directors.

Because it is possible that at some point in the future CBOE's Board may not have Industry Directors as defined in the Bylaws serving on it, CBOE proposes to amend its Bylaws to eliminate the requirement in Section 3.2 that the Representative Directors must be Industry Directors. In addition, CBOE proposes to incorporate into the Bylaws

the concept of a Representative Director Nominating Body which shall mean the current Industry-Director Subcommittee of the Nominating and Governance Committee if there are at least two Industry Directors on the Nominating and Governance Committee. If the Nominating and Governance Committee has less than two Industry Directors as defined in the Bylaws, then the Representative Director Nominating Body shall mean the Trading Permit Holders Subcommittee of the Advisory Board.[5] The Representative Director Nominating Body will nominate the Representative Directors in accordance with the provisions of Section 3.2 of the Bylaws. In that regard, it will perform the functions currently performed by the Industry-Director Subcommittee.

In addition, CBOE proposes to amend Section 3.2 of the Bylaws with regard to the time period by which the Representative Director nominees are announced via circular to the Trading Permit Holders, the deadline for Trading Permit Holders to nominate alternative candidates via petition, and the timing of any Run-Off Election. Presently, Section 3.2 of the Bylaws provides that the Industry-Director Subcommittee shall issue a circular announcing its Representative Director nominees not later than January 15th, or the first business day thereafter if the 15th is not a business day. Trading Permit Holders may nominate alternative candidates for the Representative Director positions by petition, which petition needs to be filed with the Secretary of the Exchange not later than 5 p.m. on the Monday preceding the first Friday in February (or the first business day thereafter in the event that Monday occurs on a holiday). If one or more valid petitions are received, a Run-Off Election is held at least 20 days prior to the mailing of any notice of the annual meeting.

CBOE believes that it would be useful and appropriate to modify these deadlines in order to provide the Exchange, the Nominating and Governance Committee and the Representative Director Nominating Body with additional flexibility. The Exchange proposes to amend Section 3.2 to provide that:

- The Representative Director Nominating Body shall issue a circular to the Trading Permit Holders identifying the Representative Director nominees not earlier than December 1st and not later than January 15th, or the first business day thereafter if January 15th is not a business day;
- Trading Permit Holders may nominate alternative candidates for election to the Representative Director positions to be elected in a given year by submitting a petition to the Secretary not later than 5 p.m. (Chicago time) on the 10th business day following the issuance of the circular to the Trading Permit Holders identifying the Representative Director nominees selected by the Representative Director Nominating Body (''Petition Deadline''). The Exchange believes that 10 business days is a reasonable and sufficient amount of time for Trading Permit Holders to obtain a petition signed by individuals representing not more than 10% of the total outstanding Trading Permits at that time to nominate by petition alternative candidates for election to the Representative Director positions. CBOE notes that many Trading Permit Holders hold multiple permits. CBOE also notes that 10 business days is consistent with the minimum time period that was effective in 2010 and that would be available in 2011 under the existing Bylaws for the nomination of alternative candidates by petition; and
- The Run-off Election will be held not more than 45 days after the Petition Deadline.

As noted, the Exchange believes that modifying these deadlines as proposed will provide the Exchange with additional flexibility and enable the Exchange to complete the process for determining its nominees at an earlier point in time without changing the time period. Modifying these deadlines also will assist in synchronizing CBOE's nomination process with the nomination process for CBOE's parent company, CBOE Holdings, Inc. In addition to the above changes, CBOE proposes to replace all references to the Industry-Director Subcommittee in the Bylaws with the term Representative Director Nominating Body.

Finally, CBOE proposes to amend Section 2.2 of its Bylaws relating to the timing of its annual meeting to clarify that in no event shall the annual meeting date each year be prior to the completion of the process for the nomination of the Representative Directors for that annual meeting as set forth in Sections 3.1 and 3.2.

CBOE is not proposing to amend any other provisions with regard to the timing and process for the nomination of the Representative Directors.

(4) Amendment to Certificate of Incorporation and Voting Agreement

CBOE also proposes to make conforming changes to its Certificate of Incorporation and the Voting Agreement between it and its parent company, CBOE Holdings. Specifically, CBOE proposes to amend its Certificate of Incorporation and the Voting Agreement to replace the references to the Industry-Director Subcommittee with the term Representative Director Nominating Body. It also proposes to make non-substantive changes to the Voting Agreement.

2. Statutory Basis

For the reasons set forth above, CBOE believes that this filing is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(1) of the Act[7] and Section 6(b)(5) of the Act[8] in particular, in that (i) It enables CBOE to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its Trading Permit Holders and persons associated with its Trading Permit Holders, with the provisions of the Act, the rules and regulations thereunder, and the rules of CBOE and (ii) 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. Specifically, CBOE believes that the proposed changes will improve and add greater flexibility to CBOE's governance structure (i) By eliminating the requirement that the Board of Directors shall be composed of at least 30% Industry Directors as defined in the Bylaws; (ii) by modifying the process for the nomination of Representative Directors, including granting the Trading Permit Holders and persons associated with Trading Permit Holders on the Advisory Board the authority to nominate the Representative Directors in those instances in which the Nominating and Governance Committee has less than two Industry Directors; (iii) by amending the Bylaws to provide that the Exchange will establish an Advisory Board, which CBOE views as a useful vehicle for the Board to receive input from the perspective of Trading Permit Holders and with respect to matters of interest to Trading Permit Holders; and (iv) by modifying the deadlines relating to the nomination of the Representative Directors, which CBOE believes will provide it, the Nominating and Governance Committee and the Representative Director Nominating Body with additional flexibility with respect to the timing of the nomination process so that the Exchange is not locked into specific dates that may not work well during a particular year. Additionally, CBOE believes that this filing is consistent with Section 6(b)(3) of the Act in that CBOE's Bylaws will continue to provide for the fair

[5] *See* proposed new Bylaw definition 1.1(k) and the proposed changes to Sections 4.4 and 6.1 of the Bylaws.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(1).

[8] 15 U.S.C. 78f(b)(5).

representation of CBOE Trading Permit Holders in the selection of directors and the administration of the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition 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 Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

As reflected in Amendment No. 1, the Exchange has consented to an extension of time for Commission consideration of this proposal for an additional thirty-five days after the filing of Amendment No. 1.[9]

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 email to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2011–099 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2011–099. This file number should be included on the subject line if email 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. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2011–099, and should be submitted on or before November 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–29037 Filed 11–8–11; 8:45 am]

BILLING CODE 8011–01–P

[9] Amendment No. 1 was filed on November 1, 2011. *See supra* note 3 (describing Amendment No. 1).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65681; File No. SR–C2–2011–031]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Concerning Industry Directors and the Nomination of Representative Directors

November 3, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 21, 2011, the C2 Options Exchange, Incorporated (''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On November 1, 2011, the Exchange submitted a technical amendment (''Amendment No. 1'') to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to: (i) Amend its Bylaws to eliminate the requirement that at least 30% of the members of the Board of Directors must be Industry Directors; (ii) amend its Bylaws relating to its Advisory Board; (iii) amend its Bylaws relating to the nomination of Representative Directors; and (iv) make conforming changes to the C2 Certificate of Incorporation and the Voting Agreement between C2 and CBOE Holdings, Inc. (''CBOE Holdings''). The text of the proposed amendments to C2's Bylaws, C2's Certificate of Incorporation and the Voting Agreement are available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] As provided in the instructions to Form 19b–4, the Exchange noted in Item 2 of its filing that it needed to obtain, but had not yet obtained, formal approval from its Board of Directors for the Bylaw, Certificate of Incorporation, and Voting Agreement changes set forth in this proposed rule change. The Exchange also noted that it needed to obtain, but had not yet obtained, approval from CBOE Holdings, the Exchange's sole stockholder, of the changes to the Certificate of Incorporation and Voting Agreement. The Exchange stated that once these approvals were obtained, it would file a technical amendment to this proposed rule change to reflect these approvals. Amendment No. 1 reflected that the requisite approvals were obtained on November 1, 2011, and represented that no further action in connection with this proposed rule change was required. In addition, Amendment No. 1 contained the Exchange's consent to an extension of time for Commission consideration of this proposed rule change for an additional thirty-five days after November 1, 2011 (the filing date of this amendment).

any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to (i) Amend C2's Bylaws to eliminate the requirement that at least 30% of the members of the Board of Directors must be Industry Directors; (ii) amend C2's Bylaws relating to its Advisory Board; (iii) amend C2's Bylaws relating to the nomination of Representative Directors; and (iv) make conforming changes to C2's Certificate of Incorporation and the Voting Agreement between C2 and CBOE Holdings.

(1) Elimination of 30% Industry Director Requirement

Based on the Exchange's experience since its launch in October 2010, the Exchange believes that it is no longer necessary that its Bylaws contain a requirement that its Board of Directors be composed of at least 30% Industry Directors. The Exchange believes that eliminating the requirement that at least 30% of its Board be composed of Industry Directors as defined in the Bylaws provides it with appropriate flexibility as it evaluates the structure and composition of its Board in the future. The Exchange notes that it has not made a determination as to whether it will reduce (or eliminate) the number of directors on its Board who qualify as an Industry Director as defined in the Bylaws. Even if the number of individuals who would technically qualify as Industry Directors on the Board of Directors is reduced, the Exchange recognizes the importance of having directors who have industry expertise and knowledge (whether those directors are Industry Directors or Non-Industry Directors). Additionally, no matter what the composition of its Board is, the Exchange intends to maintain the fair representation of its Trading Permit Holders in the selection of its directors and administration of its affairs consistent with Section 6(b)(3) of the Securities Exchange Act of 1934, as amended (''Act''), as further described below.

In the event the Exchange determines in the future to reduce the number of directors on its Board who would qualify as an Industry Director, the Exchange believes that a Board composed of all or nearly all Non-Industry Directors would be consistent with the Act, including Section 6(b)(3) of the Act relating to the fair representation of C2 Trading Permit Holders in the selection of directors and the administration of the Exchange.[4] The Exchanges also notes that in such a case, at all times at least 20% of the directors serving on the Board shall be Representative Directors nominated (or otherwise selected through the petition process) by the Representative Director Nominating Body as provided in Section 3.2 of the Bylaws. Under Section 3.2, the Representative Director Nominating Body provides a mechanism for Trading Permit Holders to provide input with respect to the nominees for Representative Directors and also allows for Trading Permit Holders to nominate alternative candidates by petition.

In connection with the proposed elimination of the requirement that at least 30% of the Board shall be composed of Industry Directors, C2 also proposes to amend Section 4.4 of its Bylaws relating to the composition of the Nominating and Governance Committee. Specifically, C2 proposes to delete the clause that states that the Nominating and Governance Committee shall consist of both Industry and Non-Industry Directors, given that at some point in the future the Board may not have Industry Directors serving on it.

(2) Amendments Relating to the Advisory Board

Recently, C2 amended its Bylaws to provide for the establishment of an Advisory Board which shall advise the Office of the Chairman regarding matters of interest to Trading Permit Holders. C2 now proposes to amend Section 6.1 of the Bylaws to clarify that the Exchange ''will'' (as opposed to ''may'') have an Advisory Board, which shall advise the Board of Directors in addition to the Office of the Chairman regarding matters that impact Trading Permit Holders. C2 also proposes to amend Section 6.1 of its Bylaws to expressly provide that at least two members of the Advisory Board shall be Trading Permit Holders or persons associated with Trading Permit Holders. C2 notes that the Advisory Board provides a mechanism for Trading Permit Holders to provide industry feedback to C2's Chairman and CEO, Executive Vice Chairman, President and Lead Director, all of whom are members of the Advisory Board, consistent with Section 6(b)(3) of the Act.

(3) Nomination of Representative Directors

The Exchange Bylaws will continue to require that at least 20% of C2's directors must be Representative Directors. However, the Exchange proposes to amend its Bylaws in a number of respects with regard to the nomination process for the Representative Directors. Currently, as described in Section 3.2 of the Bylaws, the Representative Directors are nominated (or otherwise selected through a petition process) by the Industry-Director Subcommittee of the C2 Nominating and Governance Committee. The Industry-Director Subcommittee is composed of all of the Industry Directors serving on the Nominating and Governance Committee. C2 Trading Permit Holders may nominate alternative Representative Director candidates to those nominated by the Industry Director Subcommittee, in which case a Run-off Election is held in which C2's Trading Permit Holders vote to determine which candidates will be elected to the C2 Board of Directors to serve as Representative Directors.

Because it is possible that at some point in the future C2's Board may not have Industry Directors as defined in the Bylaws serving on it, C2 proposes to amend its Bylaws to eliminate the requirement in Section 3.2 that the Representative Directors must be Industry Directors. In addition, C2 proposes to incorporate into the Bylaws the concept of a Representative Director Nominating Body which shall mean the current Industry-Director Subcommittee of the Nominating and Governance Committee if there are at least two Industry Directors on the Nominating and Governance Committee. If the Nominating and Governance Committee has less than two Industry Directors as defined in the Bylaws, then the Representative Director Nominating Body shall mean the Trading Permit Holders Subcommittee of the Advisory Board.[5] The Representative Director Nominating Body will nominate the Representative Directors in accordance with the provisions of Section 3.2 of the Bylaws. In that regard, it will perform the functions currently performed by the Industry-Director Subcommittee.

[4] *See, e.g.,* Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678 (December 24, 2003) (approving SR–NYSE–2003–34).

[5] *See* proposed new Bylaw definition 1.1(k) and the proposed changes to Sections 4.4 and 6.1 of the Bylaws.

In addition, C2 proposes to amend Section 3.2 of the Bylaws with regard to the time period by which the Representative Director nominees are announced via circular to the Trading Permit Holders, the deadline for Trading Permit Holders to nominate alternative candidates via petition, and the timing of any Run-Off Election. Presently, Section 3.2 of the Bylaws provides that the Industry-Director Subcommittee shall issue a circular announcing its Representative Director nominees not later than January 15th, or the first business day thereafter if the 15th is not a business day. Trading Permit Holders may nominate alternative candidates for the Representative Director positions by petition, which petition needs to be filed with the Secretary of the Exchange not later than 5 p.m. on the Monday preceding the first Friday in February (or the first business day thereafter in the event that Monday occurs on a holiday). If one or more valid petitions are received, a Run-Off Election is held at least 20 days prior to the mailing of any notice of the annual meeting.

C2 believes that it would be useful and appropriate to modify these deadlines in order to provide the Exchange, the Nominating and Governance Committee and the Representative Director Nominating Body with additional flexibility. The Exchange proposes to amend Section 3.2 to provide that:

- The Representative Director Nominating Body shall issue a circular to the Trading Permit Holders identifying the Representative Director nominees not earlier than December 1st and not later than January 15th, or the first business day thereafter if January 15th is not a business day;
- Trading Permit Holders may nominate alternative candidates for election to the Representative Director positions to be elected in a given year by submitting a petition to the Secretary not later than 5 p.m. (Chicago time) on the 10th business day following the issuance of the circular to the Trading Permit Holders identifying the Representative Director nominees selected by the Representative Director Nominating Body (''Petition Deadline''). The Exchange believes that 10 business days is a reasonable and sufficient amount of time for Trading Permit Holders to obtain a petition signed by individuals representing not more than 10% of the total outstanding Trading Permits at that time to nominate by petition alternative candidates for election to the Representative Director positions. C2 notes that 10 business days is consistent with the minimum time period that was effective in 2010 and that would be available in 2011 under the existing Bylaws for the nomination of alternative candidates by petition; and
- The Run-off Election will be held not more than 45 days after the Petition Deadline.

As noted, the Exchange believes that modifying these deadlines as proposed will provide the Exchange with additional flexibility and enable the Exchange to complete the process for determining its nominees at an earlier point in time without changing the time period. Modifying these deadlines also will assist in synchronizing C2's nomination process with the nomination process for C2's parent company, CBOE Holdings. In addition to the above changes, C2 proposes to replace all references to the Industry-Director Subcommittee in the Bylaws with the term Representative Director Nominating Body.

Finally, C2 proposes to amend Section 2.2 of its Bylaws relating to the timing of its annual meeting to clarify that in no event shall the annual meeting date each year be prior to the completion of the process for the nomination of the Representative Directors for that annual meeting as set forth in Sections 3.1 and 3.2.

C2 is not proposing to amend any other provisions with regard to the timing and process for the nomination of the Representative Directors.

(4) Amendment to Certificate of Incorporation and Voting Agreement

C2 also proposes to make conforming changes to its Certificate of Incorporation and the Voting Agreement between it and its parent company, CBOE Holdings. Specifically, C2 proposes to amend its Certificate of Incorporation and the Voting Agreement to replace the references to the Industry-Director Subcommittee with the term Representative Director Nominating Body. It also proposes to make non-substantive changes to the Voting Agreement.

2. Statutory Basis

For the reasons set forth above, C2 believes that this filing is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Section 6(b)(1) of the Act[7] and Section 6(b)(5) of the Act[8] in particular, in that (i) it enables C2 to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its Trading Permit Holders and persons associated with its Trading Permit Holders, with the provisions of the Act, the rules and regulations thereunder, and the rules of C2 and (ii) 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. Specifically, C2 believes that the proposed changes will improve and add greater flexibility to C2's governance structure (i) by eliminating the requirement that the Board of Directors shall be composed of at least 30% Industry Directors as defined in the Bylaws; (ii) by modifying the process for the nomination of Representative Directors, including granting the Trading Permit Holders and persons associated with Trading Permit Holders on the Advisory Board the authority to nominate the Representative Directors in those instances in which the Nominating and Governance Committee has less than two Industry Directors; (iii) by amending the Bylaws to provide that the Exchange will establish an Advisory Board, which C2 views as a useful vehicle for the Board to receive input from the perspective of Trading Permit Holders and with respect to matters of interest to Trading Permit Holders; and (iv) by modifying the deadlines relating to the nomination of the Representative Directors, which C2 believes will provide it, the Nominating and Governance Committee and the Representative Director Nominating Body with additional flexibility with respect to the timing of the nomination process so that the Exchange is not locked into specific dates that may not work well during a particular year. Additionally, C2 believes that this filing is consistent with Section 6(b)(3) of the Act in that C2's Bylaws will continue to provide for the fair representation of C2 Trading Permit Holders in the selection of directors and the administration of the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 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 Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(1).

[8] 15 U.S.C. 78f(b)(5).

90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

As reflected in Amendment No. 1, the Exchange has consented to an extension of time for Commission consideration of this proposal for an additional thirty-five days after the filing of Amendment No. 1.[9]

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 email to *rule-comments@sec.gov.* Please include File Number SR–C2–2011–031 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–C2–2011–031. This file number should be included on the subject line if email 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. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–C2–2011–031, and should be submitted on or before November 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–29036 Filed 11–8–11; 8:45 am]

BILLING CODE 8011–01–P

[9] Amendment No. 1 was filed on November 1, 2011. *See supra* note 3 (describing Amendment No. 1).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65677; File No. SR–CBOE–2011–104]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated: Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Compliance Deadline for Registration and Qualification Pursuant to Rule 3.6A

November 3, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,[1] notice is hereby given that on October 31, 2011, the Chicago Board Options Exchange, Incorporated (''CBOE'' or the ''Exchange'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by CBOE. The Exchange has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule pursuant to Section 19(b)(3)(A)(i) of the Act[2] and Rule 19b–4(f)(1) thereunder,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[4] the Exchange proposes to extend the October 29, 2011 deadline to November 5, 2011 to comply with its rules regarding registration and qualification of individual Trading Permit Holders and individual associated persons. CBOE is not proposing any textual changes to the Rules of CBOE. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change

(1) Purpose

Pursuant to Rule 15b7–1,[5] promulgated under the Exchange Act,[6] ''No registered broker or dealer shall effect any transaction in * * * any security unless any natural person associated with such broker or dealer who effects or is involved in effecting such transaction is registered or approved in accordance with the standards of training, experience, competence, and other qualification standards * * * established by the rules of any national securities exchange * * *'' CBOE Rule 3.6A sets forth the requirements for registration and qualification of individual Trading Permit Holders and individual associated persons. In response to a request by the Division of Trading and Markets at the Securities and Exchange Commission (the ''Commission'' or ''SEC''), CBOE recently amended its rules to expand its registration and

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s(b)(3)(A)(i).

[3] 17 CFR 240.19b–4(f)(1).

[4] 15 U.S.C. 78s(b)(1).

[5] 17 CFR 240.15b7–1.

[6] 15 U.S.C. 78a *et seq.*

qualification requirements set forth in CBOE Rule 3.6A to include individual Trading Permit Holders and individual associated persons that are engaged or to be engaged in the securities business of a Trading Permit Holder or TPH organization.[7] CBOE Rule 3.6A provides that these individuals must be registered with the Exchange in the category of registration appropriate to the function to be performed as prescribed by the Exchange. Further, Rule 3.6A requires, among other things, that an individual Trading Permit Holder or individual associated person submit an application for registration and pass the appropriate qualification examination before the registration can become effective. The revised requirements apply to both CBOE and CBOE Stock Exchange (''CBSX'') Trading Permit Holders and their associated persons.

In conjunction with the registration requirements established by SR–CBOE–2010–084, three new qualification examinations became available on June 20, 2011 in the Central Registration Depository system (''WebCRD''), which is operated by the Financial Industry Regulatory Authority, Incorporated (''FINRA''). These registration categories include the following (the required qualification examinations and prerequisites, as applicable, associated with each registration category are in parentheses): PT—Proprietary Trader (Series 56), CT—Proprietary Trader Compliance Officer (Series 14, Series 56 prerequisite) and TP—Proprietary Trader Principal (Series 24, Series 56 prerequisite). In the Approval Order for SR–CBOE–2010–084, the SEC established a deadline of August 12, 2011 for CBOE and CBSX individual Trading Permit Holders and individual associated persons of CBOE and CBSX Trading Permit Holders to register for and pass the applicable qualification examination(s). CBOE recently submitted a rule filing extending the deadline until October 29, 2011.[8] CBOE respectfully requests to extend the October 29, 2011 deadline to November 5, 2011.

(2) Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(1)[10] of the Act in particular, in that it is designed to enforce compliance by Exchange members and persons associated with its members with the rules of the Exchange. The Exchange also believes the proposed rule change furthers the objectives of Section 6(c)(3)[11] of the Act, which authorizes CBOE to prescribe standards of training, experience and competence for persons associated with CBOE members, in that this filing is proposing to extend the deadline for compliance with the standards of training, experience and competence established by the Exchange. CBOE believes that its proposal is reasonable in that it provides a brief, one week extension for those individual Trading Permit Holders or individual associated persons that [sic] comply with the expanded registration and qualification requirements.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change will take effect upon filing with the Commission pursuant to Section 19(b)(3)(A)(i) of the Act[12] and Rule 19b–4(f)(1) thereunder,[13] because it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2011–104 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2011–104. This file number should be included on the subject line if email 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 CBOE. 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–CBOE–2011–104 and should be submitted on or before November 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

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[7] *See* Securities Exchange Act Release No. 63314 (November 12, 2010), 75 FR 70957 (November 19, 2010) (SR–CBOE–2010–084).

[8] *See* Securities Exchange Act Release No. 65224 (August 30, 2011), 76 FR 55447 (September 7, 2011) (SR–CBOE–2011–081).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(1).

[11] 15 U.S.C. 78f(c)(3).

[12] 15 U.S.C. 78s(b)(3)(A)(i).

[13] 17 C.F.R. 240.19b–4(f)(1).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[(Release No. 34–65672; File No. SR–NYSE–2011–55)]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Rule Change Proposing a One-Year Pilot Program Adding New Rule 107C To Establish a Retail Liquidity Program To Attract Additional Retail Order Flow to the Exchange for NYSE-Listed Securities

November 2, 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 October 19, 2011, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 Exchange proposes a one-year pilot program that would add new Rule 107C to establish a Retail Liquidity Program (''Program'' or ''proposed rule change'') to attract additional retail order flow to the Exchange for NYSE-listed securities while also providing the potential for price improvement to such order flow. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

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 self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts 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 Change

1. Purpose

The Exchange is proposing a one-year pilot program that would add new NYSE Rule 107C to establish a Retail Liquidity Program to attract additional retail order flow to the Exchange for NYSE-listed securities while also providing the potential for price improvement to such order flow.

Under the proposed rule change, the Exchange would create two new classes of market participants: (1) Retail Member Organizations (''RMOs''), which would be eligible to submit certain retail order flow (''Retail Orders'') to the Exchange, and (2) Retail Liquidity Providers (''RLPs''), which would be required to provide potential price improvement for Retail Orders in the form of non-displayed interest that is better than the best protected bid or the best protected offer (''PBBO'')[3] (''Retail Price Improvement Order'' or ''RPI''). Member organizations other than RLPs would also be permitted, but not required, to submit Retail Price Improvement Orders.

The Exchange will submit a separate proposal to amend its Price List in connection with the proposed Retail Liquidity Program. Under that proposal, the Exchange would charge RLPs and other member organizations a fee for executions of their Retail Price Improvement Orders against Retail Orders and in turn would provide a credit to RMOs for executions of their Retail Orders against the Retail Price Improvement Orders of RLPs and other member organizations.

Definitions

The Exchange proposes to adopt the following definitions under proposed NYSE Rule 107C(a). First, the term ''Retail Liquidity Provider'' would be defined as a member organization that is approved by the Exchange to act as such and to submit Retail Price Improvement Orders according to certain requirements set forth in proposed Rule 107C.

Second, the term ''Retail Member Organization'' would be defined as a member organization (or a division thereof) that has been approved by the Exchange to submit Retail Orders.

Third, the term ''Retail Order'' would be defined as:

- An agency order that originates from a natural person and is submitted to the Exchange by an RMO, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology; or
- A proprietary order of an RMO that results from liquidating a position acquired from the internalization of an order that satisfies the requirements of the preceding subparagraph.

Finally, the term ''Retail Price Improvement Order'' would be defined as non-displayed interest in NYSE-listed securities that is better than the best protected bid (''PBB'') or best protected offer (''PBO'') by at least $0.001 and that is identified as a Retail Price Improvement Order in a manner prescribed by the Exchange.[4] The price of an RPI would be determined by an RLP's entry of the following into Exchange systems: (1) RPI buy or sell interest; (2) an offset, if any; and (3) a ceiling or floor price. The Exchange expects that RPI sell or buy interest typically would be entered to track the PBBO. The offset would be a predetermined amount by which the RLP is willing to improve the PBBO, subject to a ceiling or floor price. The ceiling or floor price would be the amount above or below which the RLP

[3] The terms protected bid and protected offer would have the same meaning as defined in Regulation NMS Rule 600(b)(57). The PBB is the best-priced protected bid and the PBO is the best-priced protected offer. Generally, the PBB and PBO and the national best bid (''NBB'') and national best offer (''NBO'') will be the same. However, a market center is not required to route to the NBB or NBO if that market center is subject to an exception under Regulation NMS Rule 611(b)(1) or if such NBB or NBO is otherwise not available for an automatic execution. In such case, the PBB or PBO would be the best-priced protected bid or offer to which a market center must route interest pursuant to Regulation NMS Rule 611.

[4] Exchange systems would prevent Retail Orders from interacting with Retail Price Improvement Orders if the RPI is not priced at least $0.001 better than the PBBO. The Exchange notes, however, that price improvement of $0.001 would be a minimum requirement and RLPs and other member organizations could enter Retail Price Improvement Orders that better the PBBO by more than $0.001. Exchange systems will accept Retail Price Improvement Orders without a minimum price improvement value; however, such interest will execute at its floor or ceiling price only if such floor or ceiling price is better than the PBBO by $0.001 or more. Concurrently with this filing, the Exchange has submitted a request for an exemption under Regulation NMS Rule 612 that would permit it to accept and rank the undisplayed Retail Price Improvement Orders. As outlined in the request, the Exchange believes that the minimum price improvement available under the Program, which would amount to $0.05 on a 500 share order, would be meaningful to the small retail investor. *See* Letter from Janet M. McGinness, Senior Vice President—Legal & Corporate Secretary, Office of the General Counsel, NYSE Euronext to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission dated October 19, 2011 (''Sub-Penny Rule Exemption Request'').

does not wish to trade. RPIs in their entirety (the buy or sell interest, the offset, and the ceiling or floor) will remain undisplayed. Exchange systems will monitor whether RPI buy or sell interest, adjusted by any offset and subject to the ceiling or floor price, is eligible to interact with incoming Retail Orders.

RPIs would interact with Retail Orders as follows. Assume an RLP enters RPI sell interest with an offset of $0.001 and a floor of $10.10 while the PBO is $10.11. The RPI could interact with an incoming buy Retail Order at $10.109. If, however, the PBO was $10.10, the RPI could not interact with the Retail Order because the price required to deliver the minimum $0.001 price improvement ($10.099) would violate the RLP's floor of $10.10. If an RLP otherwise enters an offset greater than the minimum required price improvement and the offset would produce a price that would violate the RLP's floor, the offset would be applied only to the extent that it respects the RLP's floor. By way of illustration, assume RPI buy interest is entered with an offset of $0.005 and a ceiling of $10.112 while the PBB is at $10.11. The RPI could interact with an incoming sell Retail Order at $10.112, because it would produce the required price improvement without violating the RLP's ceiling, but it could not interact above the $10.112 ceiling. Finally, if an RLP enters an RPI without an offset, the RPI will interact with Retail Orders at the level of the RLP's floor or ceiling as long as the minimum required price improvement is produced. Accordingly, if RPI sell interest is entered with no offset and a $10.098 floor while the PBO is $10.11, the RPI could interact with the Retail Order at $10.098, producing $0.012 of price improvement. Exchange systems will not cancel RPI interest when it is not eligible to interact with incoming Retail Orders; such RPI interest will remain in Exchange systems and may become eligible again to interact with Retail Orders depending on the PBB or PBO.

An RLP would only be permitted to enter a Retail Price Improvement Order for the particular security or securities to which it is assigned as RLP.

RMO Qualifications and Approval Process

Under proposed NYSE Rule 107C(b), any member organization [5] could qualify as an RMO if it conducts a retail business or handles retail orders on behalf of another broker-dealer. Any member organization that wishes to obtain RMO status would be required to submit: (1) An application form; (2) an attestation, in a form prescribed by the Exchange, that any order submitted by the member organization as a Retail Order would meet the qualifications for such orders under proposed Rule 107C; and (3) supporting documentation sufficient to demonstrate the retail nature and characteristics of the applicant's order flow.[6]

An RMO would be required to have written policies and procedures reasonably designed to assure that it will only designate orders as Retail Orders if all requirements of a Retail Order are met. Such written policies and procedures must require the member organization to (i) exercise due diligence before entering a Retail Order to assure that entry as a Retail Order is in compliance with the requirements of this rule, and (ii) monitor whether orders entered as Retail Orders meet the applicable requirements. If the RMO represents Retail Orders from another broker-dealer customer, the RMO's supervisory procedures must be reasonably designed to assure that the orders it receives from such broker-dealer customer that it designates as Retail Orders meet the definition of a Retail Order. The RMO must (i) obtain an annual written representation, in a form acceptable to the Exchange, from each broker-dealer customer that sends it orders to be designated as Retail Orders that entry of such orders as Retail Orders will be in compliance with the requirements of this rule, and (ii) monitor whether its broker-dealer customer's Retail Order flow continues to meet the applicable requirements.[7]

If the Exchange disapproves the application, the Exchange would provide a written notice to the member organization. The disapproved applicant could appeal the disapproval by the Exchange as provided in proposed Rule 107C(i), and/or reapply for RMO status 90 days after the disapproval notice is issued by the Exchange. An RMO also could voluntarily withdraw from such status at any time by giving written notice to the Exchange.

RLP Qualifications

To qualify as an RLP under proposed NYSE Rule 107C(c), a member organization would be required to: (1) Already be approved as a Designated Market Maker (''DMM'') or Supplemental Liquidity Provider (''SLP''); (2) demonstrate an ability to meet the requirements of an RLP; (3) have mnemonics or the ability to accommodate other Exchange-supplied designations that identify to the Exchange RLP trading activity in assigned RLP securities; and (4) have adequate trading infrastructure and technology to support electronic trading.

Because an RLP would only be permitted to trade electronically, a member organization's technology must be fully automated to accommodate the Exchange's trading and reporting systems that are relevant to operating as an RLP. If a member organization were unable to support the relevant electronic trading and reporting systems of the Exchange for RLP trading activity, it would not qualify as an RLP.

RLP Approval Process

Under proposed Rule 107C(d), to become an RLP, a member organization would be required to submit an RLP application form with all supporting documentation to the Exchange. The Exchange would determine whether an applicant was qualified to become an RLP as set forth above. After an applicant submitted an RLP application to the Exchange with supporting documentation, the Exchange would notify the applicant member organization of its decision. The Exchange could approve one or more member organizations to act as an RLP for a particular security. The Exchange could also approve a particular member organization to act as RLP for one or more securities. Approved RLPs would be assigned securities according to requests made to, and approved by, the Exchange.

If an applicant were approved by the Exchange to act as an RLP, the applicant would be required to establish connectivity with relevant Exchange systems before the applicant would be permitted to trade as an RLP on the Exchange.

If the Exchange disapproves the application, the Exchange would provide a written notice to the member organization. The disapproved applicant could appeal the disapproval by the Exchange as provided in proposed Rule 107C(i) and/or reapply for RLP status 90

[5] An RLP may also act as an RMO for securities to which it is not assigned, subject to the qualification and approval process established by the proposed rule.

[6] For example, a prospective RMO could be required to provide sample marketing literature, Web site screenshots, other publicly disclosed materials describing the retail nature of their order flow, and such other documentation and information as the Exchange may require to obtain reasonable assurance that the applicant's order flow would meet the requirements of the Retail Order definition.

[7] FINRA, on behalf of the Exchange, will review an RMO's compliance with these requirements through an exam-based review of the RMO's internal controls.

days after the disapproval notice is issued by the Exchange.

Voluntary Withdrawal of RLP Status

An RLP would be permitted to withdraw its status as an RLP by giving notice to the Exchange under proposed NYSE Rule 107C(e). The withdrawal would become effective when those securities assigned to the withdrawing RLP are reassigned to another RLP. After the Exchange receives the notice of withdrawal from the withdrawing RLP, the Exchange would reassign such securities as soon as practicable, but no later than 30 days after the date the notice is received by the Exchange. If the reassignment of securities takes longer than the 30-day period, the withdrawing RLP would have no further obligations and would not be held responsible for any matters concerning its previously assigned RLP securities.

RLP Requirements

Under proposed NYSE Rule 107C(f), an RLP would only be permitted to enter Retail Price Improvement Orders electronically and directly into Exchange systems and facilities designated for this purpose and only for the securities to which it is assigned as RLP. In order to be eligible for execution fees that are lower than non-RLP rates, an RLP would be required to maintain (1) a Retail Price Improvement Order that is better than the PBB at least five percent of the trading day for each assigned security; and (2) a Retail Price Improvement Order that is better than the PBO at least five percent of the trading day for each assigned security.

An RLP's five-percent requirements would be calculated by determining the average percentage of time the RLP maintains a Retail Price Improvement Order in each of its RLP securities during the regular trading day, on a daily and monthly basis. The Exchange would determine whether an RLP has met this requirement by calculating the following:

(1) The ''Daily Bid Percentage'' would be calculated by determining the percentage of time an RLP maintains a Retail Price Improvement Order with respect to the PBB during each trading day for a calendar month;

(2) The ''Daily Offer Percentage'' would be calculated by determining the percentage of time an RLP maintains a Retail Price Improvement Order with respect to the PBO during each trading day for a calendar month;

(3) The ''Monthly Average Bid Percentage'' would be calculated for each RLP security by summing the security's ''Daily Bid Percentages'' for each trading day in a calendar month then dividing the resulting sum by the total number of trading days in such calendar month; and

(4) The ''Monthly Average Offer Percentage'' would be calculated for each RLP security by summing the security's ''Daily Offer Percentage'' for each trading day in a calendar month and then dividing the resulting sum by the total number of trading days in such calendar month.

Finally, only Retail Price Improvement Orders would be used when calculating whether an RLP is in compliance with its five-percent requirements.

The Exchange would determine whether an RLP met its five-percent requirement by determining the average percentage of time an RLP maintains a Retail Price Improvement Order in each of its RLP securities during the regular trading day on a daily and monthly basis. The lower fees would not apply during a month in which the RLP did not satisfy the five-percent requirements. Additionally, beginning with the third month of operation as an RLP, an RLP's failure to satisfy the five-percent requirements described above for each of its assigned securities could result in action taken by the Exchange, as described below.

The Exchange will not begin calculating whether an RLP meets the quoting requirement during the first two calendar months that the RLP is participating in the Program. If the Program is implemented mid-month, the Exchange will begin calculating the quoting requirement two calendar months after the end of the month in which the program was implemented.

Failure of RLP To Meet Requirements

Proposed NYSE Rule 107C(g) addresses an RLP's failure to meet its requirements. If, after the first two months an RLP acted as an RLP, an RLP fails to meet any of the requirements of proposed Rule 107C(f) for any assigned RLP security for three consecutive months, the Exchange could, in its discretion, take one or more of the following actions: [8] (1) revoke the assignment of any or all of the affected securities from the RLP; (2) revoke the assignment of unaffected securities from the RLP; or (3) disqualify the member organization from its status as an RLP.

The Exchange, in its sole discretion, would determine if and when a member organization is disqualified from its status as an RLP. One calendar month prior to any such determination, the Exchange would notify an RLP of such impending disqualification in writing. When disqualification determinations are made, the Exchange would provide a written disqualification notice to the member organization.

A disqualified RLP could appeal the disqualification as provided in proposed Rule 107C(i) and/or reapply for RLP status 90 days after the disqualification notice is issued by the Exchange.[9]

Failure of RMO To Abide by Retail Order Requirements

Proposed NYSE Rule 107C(h) addresses an RMO's failure to abide by Retail Order requirements. If an RMO designates orders submitted to the Exchange as Retail Orders and the Exchange determines, in its sole discretion, that those orders fail to meet any of the requirements of Retail Orders, the Exchange may disqualify a member organization from its status as an RMO. When disqualification determinations are made, the Exchange would provide a written disqualification notice to the member organization. A disqualified RMO could appeal the disqualification as provided in proposed Rule 107C(i) and/or reapply for RMO status 90 days after the disqualification notice is issued by the Exchange.[10]

Appeal of Disapproval or Disqualification

Proposed NYSE Rule 107C(i) provides appeal rights to member organizations. If a member organization disputes the Exchange's decision to disapprove it under Rule 107C(b) or (d) or disqualify it under Rule 107C(g) or (h), such member organization (''appellant'') may request, within five business days after notice of the decision is issued by the Exchange, that the Retail Liquidity Program Panel (''RLP Panel'') review the decision to determine if it was correct.[11]

The RLP Panel would consist of the NYSE's Chief Regulatory Officer (''CRO''), or a designee of the CRO, and two officers of the Exchange designated by the Co-Head of U.S. Listings and

[8] As discussed previously, an RLP's failure to satisfy its requirement would result in the RLP no longer being charged the lower fees for execution of its Retail Price Improvement Orders.

[9] The Exchange notes that the Retail Price Improvement Order executions of a member organization disqualified from acting as an RLP would thereafter be subject to the transaction pricing applicable to non-RLP member organizations.

[10] As above for RLPs, the Retail Order executions of a member organization disqualified from RMO status would thereafter be subject to the transaction pricing applicable to non-RMO member organizations.

[11] In the event a member organization is disqualified from its status as an RLP pursuant to proposed Rule 107C(g), the Exchange would not reassign the appellant's securities to a different RLP until the RLP Panel has informed the appellant of its ruling.

Cash Execution. The RLP Panel would review the facts and render a decision within the time frame prescribed by the Exchange. The RLP Panel could overturn or modify an action taken by the Exchange and all determinations by the RLP Panel would constitute final action by the Exchange on the matter at issue.

Retail Liquidity Identifier

Under proposed NYSE Rule 107C(j), the Exchange proposes to disseminate an identifier through proprietary Exchange data feeds when RPI interest priced at least $0.001 better than the PBB or PBO for a particular security is available in Exchange systems (''Retail Liquidity Identifier''). The Retail Liquidity Identifier would not be disseminated to the Consolidated Quote Stream.

Retail Order Designations

Under proposed NYSE Rule 107C(k), an RMO can designate how a Retail Order would interact with available contra-side interest as follows. As proposed, a Type 1-designated Retail Order would interact only with available contra-side Retail Price Improvement Orders and would not interact with other available contra-side interest in Exchange systems or route to other markets. The portion of a Type 1-designated Retail Order that does not execute against contra-side Retail Price Improvement Orders would be immediately and automatically cancelled. A Type 2-designated Retail Order would interact first with available contra-side Retail Price Improvement Orders and any remaining portion of the Retail Order would be executed as a Regulation NMS-compliant Immediate or Cancel Order pursuant to Rule 13. Accordingly, a Type 2-designated Retail Order could interact with other interest in Exchange systems, but would not route to other markets. A Type 3-designated Retail Order would interact first with available contra-side Retail Price Improvement Orders and any remaining portion of the Retail Order would be executed as an NYSE Immediate or Cancel Order pursuant to Rule 13. Accordingly, a Type 3-designated Retail Order could interact with other interest in Exchange systems and, if necessary, would route to other markets in compliance with Regulation NMS.

Priority and Order Allocation

Under proposed NYSE Rule 107C(l), the Exchange proposes that competing Retail Price Improvement Orders in the same security would be ranked and allocated according to price then time of entry into Exchange systems. The Exchange further proposes that executions would occur at the price level that completes the incoming order's execution. Any remaining unexecuted RPI interest will remain available to interact with other incoming Retail Orders if such interest is at an eligible price. Any remaining unexecuted portion of the Retail Order will cancel or execute in accordance with proposed Rule 107C(k). The following example illustrates this proposed method:

PBBO for security ABC is $10.00–$10.05
RLP 1 enters a Retail Price Improvement Order to buy ABC at $10.01 for 500
RLP 2 then enters a Retail Price Improvement Order to buy ABC at $10.02 for 500
RLP 3 then enters a Retail Price Improvement Order to buy ABC at $10.03 for 500

An incoming Retail Order to sell ABC for 1,000 would execute first against RLP 3's bid for 500, because it is the best priced bid, then against RLP 2's bid for 500, because it is the next best priced bid. RLP 1 would not be filled because the entire size of the Retail Order to sell 1,000 would be depleted. The Retail Order executes at the price that completes the order's execution. In this example the entire 1,000 order to sell would execute at $10.02 because it would result in a complete fill.

However, assume the same facts above, except that RLP 2's Retail Price Improvement Order to buy ABC at $10.02 was for 100. The incoming Retail Order to sell 1,000 would execute first against RLP 3's bid for 500, because it is the best priced bid, then against RLP 2's bid for 100, because it is the next best priced bid. RLP 1 would then receive an execution for 400 of its bid for 500, at which point the entire size of the Retail Order to sell 1,000 would be depleted. The Retail Order executes at the price that completes the order's execution, which is $10.01.

Implementation

The Exchange proposes that all NYSE-listed and NYSE Amex Equities traded securities would be eligible for inclusion in the Retail Liquidity Program.[12] In order to provide for an efficient implementation, the Retail Liquidity Program would initially cover only a certain specified list of NYSE-listed securities to which RLPs are assigned, as announced by the Exchange via Information Memo. The Exchange anticipates that the securities included within the Retail Liquidity Program would be expanded periodically as demand for RLP assignments develops in response to increased Retail Order activity on the Exchange.[13]

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[14] in general, and furthers the objectives of Section 6(b)(5),[15] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the proposed rule change is consistent with these principles because it would increase competition among execution venues, encourage additional liquidity, and offer the potential for price improvement to retail investors. The Exchange notes that a significant percentage of the orders of individual investors are executed over-the-counter.[16] The Exchange believes that it is appropriate to create a financial incentive to bring more retail order flow to a public market.

The Exchange understands that Section 6(b)(5) of the Act prohibits an exchange from establishing rules that treat market participants in an unfairly discriminatory manner. However, Section 6(b)(5) of the Act does not prohibit exchange members or other broker-dealers from discriminating, so long as their activities are otherwise consistent with the federal securities laws. Nor does Section 6(b)(5) of the Act

[12] NYSE Amex LLC is filing a companion rule proposal to adopt NYSE Amex Equities Rule 107C. *See* SR–NYSEAmex–2011–84. ''NYSE Amex Equities traded securities'' refers to all securities available to be traded on NYSE Amex Equities, including but not limited to NYSE Amex-listed securities as well as those listed on the Nasdaq Stock Market traded pursuant to unlisted trading privileges. *See* Securities Exchange Act Release 34–62479, 75 Fed. Reg. 41264 (July 15, 2010).

[13] The Exchange would announce any such expansions via Information Memo.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] *See* Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (noting that dark pools and internalizing broker-dealers executed approximately 25.4% of share volume in September 2009). *See also* Mary L. Schapiro, Strengthening Our Equity Market Structure (Speech at the Economic Club of New York, Sept. 7, 2010) (available on the Commission's Web site). In her speech, Chairman Schapiro noted that nearly 30 percent of volume in U.S.-listed equities was executed in venues that do not display their liquidity or make it generally available to the public and the percentage was increasing nearly every month.

require exchanges to preclude discrimination by broker-dealers. Broker-dealers commonly differentiate between customers based on the nature and profitability of their business.

While the Exchange believes that markets and price discovery optimally function through the interactions of diverse flow types, it also believes that growth in internalization has required differentiation of retail order flow from other order flow types. The differentiation proposed herein by the Exchange is not designed to permit unfair discrimination, but instead to promote a competitive process around retail executions such that retail investors would receive better prices than they currently do through bilateral internalization arrangements. The Exchange believes that the transparency and competitiveness of operating a program such as the Retail Liquidity Program on an exchange market would result in better prices for retail investors. The Exchange recognizes that sub-penny trading and pricing could potentially result in undesirable market behavior. The Exchange will monitor the Program in an effort to identify and address any such behavior.

Finally, the Exchange proposes that the Commission approve the proposed rule for a pilot period of twelve months from the date of implementation, which shall occur no later than 90 days after Commission approval of Rule 107C. The Program shall expire on a date that will be determined upon adoption of Rule 107C. The Exchange believes that this pilot period is of sufficient length to permit both the Exchange and the Commission to assess the impact of the rule change described herein.

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 that is 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 solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be 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. The Commission specifically requests comment on the following:

- A stated purpose of this proposal is to attract retail order flow, a significant percentage of which is currently executed over-the-counter, to the exchange. What are the benefits, if any, of executing marketable retail orders on an exchange instead of over-the-counter? To what extent, if any, would this proposal realize those benefits? What other effects, if any, would this proposal have upon the overall market?
- The proposal contemplates that Retail Liquidity Providers may offer price improvement to Retail Orders in sub-penny amounts. In its proposal, the exchange notes that it is concurrently requesting an exemption from the sub-penny rule, Rule 612 of Regulation NMS, to permit the exchange to accept and rank Retail Price Improvement Orders. If the Commission were to approve this proposal and grant the exemption, what impact, positive or negative, would the proposal have upon the market? Would this proposal, if approved, produce a significantly larger volume of sub-penny trades than is currently the case, or would it primarily shift sub-penny trades away from non-exchange venues to the exchange?

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 email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2011–55 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–NYSE–2011–55. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *http://www.nyse.com.* 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–NYSE–2011–55 and should be submitted on or before November 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

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[17] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Notice of Exemption Request Under Section 312 of the Small Business Investment Act, Conflicts of Interest; Contemporary Healthcare Senior Lien Fund I, LP

Notice is hereby given that *Contemporary Healthcare Senior Lien Fund I, LP, License No. 02/02–0649, 1040 Broad Street, Suite 103, Shrewsbury, NJ,* a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, Financings which Constitute

Conflicts of Interest, of the Small Business Administration (''SBA'') Rules and Regulations (13 CFR 107.730). *Contemporary Healthcare Senior Lien Fund I, LP,* proposes to provide a loan to The Greens at Creekside, 12942 Womall Road, Kansas City, Missouri 64145. The financing is contemplated to refinance and discharge a portion of mezzanine financing provided by an Associate (as defined in Sec. 105.50 of the regulations) to pay capitalized interest, to pay closing costs and for working capital purposes.

The financing is brought within the purview of § 107.730(a)(4) and (d)(2) of the Regulations because *Contemporary Healthcare Senior Lien Fund I, LP's* financing will be used to discharge a portion of an Associate's mezzanine financing and represents a financing with an Associate.

Notice is hereby given that any interested person may submit written comments on the transaction to the Associate Administrator for Investment and Innovation, U.S. Small Business Administration, 409 3rd Street SW., Washington, DC 20416.

Dated: October 26, 2011.

Sean J. Greene,

Associate Administrator for Investment.

[FR Doc. 2011–28980 Filed 11–8–11; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Audit and Financial Management Advisory (AFMAC)

AGENCY: U.S. Small Business Administration.

ACTION: Notice of open Federal advisory committee meeting.

SUMMARY: The SBA is issuing this notice to announce the location, date, time, and agenda for the next meeting of the Audit and Financial Management Advisory (AFMAC). The meeting will be open to the public.

DATES: The meeting will be held on November 9, 2011 from 1 p.m. to approximately 3 p.m. Eastern Standard Time.

ADDRESSES: The meeting will be accomplished via teleconference with the U.S. Small Business Administration, 409 3rd Street SW., Office of the Chief Financial Officer, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), SBA announces the meeting of the AFMAC. The AFMAC is tasked with providing recommendation and advice regarding the Agency's financial management, including the financial reporting process, systems of internal controls, audit process and process for monitoring compliance with relevant laws and regulations.

The purpose of the meeting is to discuss SBA's FY 2011 Financial Statements, FY 2011 Agency Financial Report, the Auditor's Anticipated Opinion Letter, Anticipated Report on Significant Control Deficiencies or Material Weaknesses, and Anticipated Comments on SBA Compliance with Laws and Administrative Regulations.

Due to the implementation and testing of the Improper Payments Elimination and Recovery Act, the SBA needs to have an emergency AFMAC meeting to finalize its Fiscal Year 2011 Annual Financial Report (AFR). By law, the AFR must be published by November 15, 2011 and therefore the AFMAC meeting must happen immediately.

FOR FURTHER INFORMATION CONTACT: The meeting is open to the public, however advance notice of attendance is requested. Anyone wishing to attend and/or make a presentation to the AFMAC must contact Jonathan Carver, by fax or email, in order to be placed on the agenda. Jonathan Carver, Chief Financial Officer, 409 3rd Street SW., 6th Floor, Washington, DC 20416, *phone:* (202) 205–6449, *fax:* (202) 205–6969, *email: Jonathan.Carver@sba.gov.*

Additionally, if you need accommodations because of a disability or require additional information, please contact Jeff Brown at (202) 205–6117, *email: Jeffrey.Brown@sba.gov,* SBA, Office of Chief Financial Officer, 409 3rd Street SW., Washington, DC 20416.

For more information, please visit our Web site at *http://www.sba.gov/aboutsba/sbaprograms/cfo/index.html.*

Dan S. Jones,

White House Liaison.

[FR Doc. 2011–28979 Filed 11–8–11; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Sunshine Act Meetings; Unified Carrier Registration Plan Board of Directors

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

TIME AND DATE: December 8, 2011, 12:00 noon to 3 p.m., Eastern Daylight Time.

PLACE: This meeting will take place telephonically. Any interested person may call (877) 820–7831, passcode, 908048 to participate in this meeting.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Board of Directors (the Board) will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement and to that end, may consider matters properly before the Board.

FOR FURTHER INFORMATION CONTACT: Mr. Avelino Gutierrez, Chair, Unified Carrier Registration Board of Directors at (505) 827–4565.

Issued on: November 1, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–29149 Filed 11–7–11; 4:15 pm]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of denials.

SUMMARY: FMCSA announces its denial of 107 applications from individuals who requested an exemption from the Federal vision standard applicable to interstate truck and bus drivers and the reasons for the denials. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemptions does not provide a level of safety that will be equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs, (202) 366–4001, U.S. Department of Transportation, FMCSA, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal vision standard for a renewable 2-year period if it finds ''such an exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be

achieved absent such an exemption.'' The procedures for requesting an exemption are set forth in 49 CFR part 381.

Accordingly, FMCSA evaluated 107 individual exemption requests on their merit and made a determination that these applicants do not satisfy the criteria eligibility or meet the terms and conditions of the Federal exemption program. Each applicant has, prior to this notice, received a letter of final disposition on the exemption request. Those decision letters fully outlined the basis for the denial and constitute final Agency action. The list published in this notice summarizes the Agency's recent denials as required under 49 U.S.C. 31315(b)(4) by periodically publishing names and reasons for denial.

The following 9 applicants lacked sufficient driving experience during the 3-year period prior to the date of their applications:

Mark Seyler
Dwight H. Pease
John F. Monette
Dennis Joe Crandall
Sergio Alvarez Ruiz
Keith Raymond Hughes
Timothy T. Stapleton
Andrew Fletcher Hill
Larry Periman

The following 9 applicants had no experience operating a CMV:

William J. Smith
Drew Buss
A.D. Alexander
Joshua Wayne Crosby
Samuel Brown, Jr.
James Norbert Fisher
Adewale A. Haastrup
David G. Thoroughn
Daniel Ramse

One applicant, William Kraemer, did not have 3 years of experience driving a CMV on public highways with the vision deficiency:

The following 18 applicants did not have 3 years of recent experience driving a CMV with the vision deficiency:

Norman Donald Hursey
Timothy Allen Easter, Sr.
James Muldoon
Jeffrey Roughton
John E. Humphery
Douglas Claxton
James Roscoe Brittain III
Jerry M. Puckett
Larry Dexter
Georgia Marcum
John Darr
Kevin Menard
Christopher Jax
Charles Ray Brittain
Kevin Robert Cowger
Clifford Blaine Thompson
Timothy Garland
Kevin Barker

The following 14 applicants did not have sufficient driving experience during the past 3 years under normal highway operating conditions:

Jose P. Martinez
Phillip Gene Roberts
Dennis Wayne Vaughn
John Gramling
Larry Ventimiglia
Bret Harold Bulcher
Daniel John Hodges
Douglas Stanley
Steven F. Albro
Nathan W. Sears
Michael Wayne Gilley
William C. Miller
Darrell Prather
James Jaramillo

One applicant, Robert J. Moore, Jr., was charged with moving violation(s) in conjunction with a commercial motor vehicle accident(s). This is a disqualifying offense.

One applicant, Gregory Busche, does not have sufficient peripheral vision in the better eye to qualify for an exemption.

The following applicant, Randy Fielder, had a commercial driver's license suspension during the 3-year review period for moving violations. Applicants do not qualify for an exemption with a suspension during the 3-year period.

The following 2 applicants contributed to accident(s) in which the applicant was operating a commercial motor vehicle. This is a disqualifying offense.

David Lynn Ellis
Mark John Cairns

The following 11 applicants were denied for miscellaneous/multiple reasons:

Mark Don Morrishow
Manuel DeJesus Luna
Frank James Means
Cameron M. Chauvin
Jeffery Wayne Vaughan
James Loyde Meisner
David Wayne Trawick
Robert Fortune
Thomas Keith Wagner
William Kenneth Griffin
Erasmus Okonkwo Odili

The following 2 applicants were denied because their vision was not stable for the entire 3-year period.

Barry Lee Crenshaw
Daniel J. Piechocki

The following 2 applicants were denied because they do not meet the vision standard in the better eye:

William R. Connolly
Jose A. Guevara

One applicant, Roger Doyle, was denied because his CDL was suspended during the 3-year period in relation to an accident. The accident may or may not be related to his medical condition.

The following 4 applicants met the current federal vision standards. Exemptions are not required for applicants who meet the current regulations for vision:

Edward A. Bechtel
Donald Class
Terry Alvin Leffler
Terry Lee Engelhardt

The following 22 applicants were denied because they will not be driving interstate, interstate commerce, or not required to carry a DOT medical card:

Kary Lee Montour
Ryan M. Wagner
Shawn Michael Priess
Carlos R. Gonzalez
Jerard David Menyhart
Danny Michael Harris
Kevin Palmer
Moises P. Ibarra
Jeffery O. Nischwitz
Danny Ray Haner
Orenthal Arnelle Kellam
Larry Lee Dorrance
Lloyd Edward Bean
Michael Young
Raymond Miller
Ruben Armando Gallardo
Paul Anthony Castillo
Warren Vernon Hopper
Jose Marisco
Thomas B. Bliven
Michael Jacson
Larry E. Markowski

Finally, the following 9 applicants perform transportation for the federal government, state, or any political sub-division of the state.

Jimmy Dale Johnson, II
Wesley R. Jackson
Hilliard Whitehead
Mark S. Miller
John Matthew Holder
Gerald E. Thomas, Jr.
Edward Lee Talbert
Debra V. Bryant
Alonzo Bailey

Issued on: October 28, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–29048 Filed 11–8–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA–2011–0193]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt twenty-two individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions will enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions are effective November 9, 2011. The exemptions expire on November 11, 2013.

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Room W64–224, Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8–785.pdf.*

Background

On September 7, 2011, FMCSA published a notice of receipt of Federal diabetes exemption applications from twenty-two individuals and requested comments from the public (76 FR 55460). The public comment period closed on October 7, 2011 and no comments were received.

FMCSA has evaluated the eligibility of the twenty-two applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current standard for diabetes in 1970 because several risk studies indicated that drivers with diabetes had a higher rate of crash involvement than the general population. The diabetes rule provides that ''A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control'' (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled ''A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century.'' The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible.

The September 3, 2003 (68 FR 52441) **Federal Register** notice in conjunction with the November 8, 2005 (70 FR 67777) **Federal Register** notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These twenty-two applicants have had ITDM over a range of 1 to 32 years. These applicants report no severe hypoglycemic reactions resulting in loss of consciousness or seizure, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning symptoms, in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the past 5 years. In each case, an endocrinologist verified that the driver has demonstrated a willingness to properly monitor and manage his/her diabetes mellitus, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision standard at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the September 7, 2011, **Federal Register** notice and they will not be repeated in this notice.

Discussion of Comment

FMCSA did not receive any comments in this proceeding.

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes standard in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologists' medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that in each case exempting these applicants from the diabetes standard in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized

Federal, State, or local enforcement official.

Conclusion

Based upon its evaluation of the twenty-two exemption applications, FMCSA exempts, Johnathan A. Akins, Robert G. Bellows, Phillip J. Blake, Mark A. Blanton, Howard T. Cash, Heath J. Chesser, Kevin F. Connacher, Daryl A. Daniels, Carl W. Frentz, Jr., Carie L. Frisby, David A. Gray, Dean M. Keeven, David L. Killen, Christopher A. LaBudde, Brian A. Mankowski, Jimmie L. Parrish, Robert L. Scheetz, John R. Sheaffer, Benjamin D. Skinner, Brian L. Vanlerberg, Robert E. Welling and Keith M. Weymouth from the ITDM standard in 49 CFR 391.41(b)(3), subject to the conditions listed under ''Conditions and Requirements'' above.

In accordance with 49 U.S.C. 31136(e) and 31315 each exemption will be valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if: (1)

The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: October 28, 2011.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2011–29042 Filed 11–8–11; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. DOT–NHTSA–2011–0158, Notice 1]

Notice of Receipt of Petition for Decision That Nonconforming 2002 Jaguar XJ8 Passenger Cars Manufactured for Sale in the Kuwaiti Market Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition.

SUMMARY: This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 2002 Jaguar XJ8 passenger cars manufactured for sale in the Kuwaiti market (nonconforming 2002 Kuwaiti Jaguar XJ8 passenger cars) that were not originally manufactured to comply with all applicable Federal Motor Vehicle Safety Standards (FMVSS), are eligible for importation into the United States because they are substantially similar to vehicles that were originally manufactured for sale in the United States and that were certified by their manufacturer as complying with the safety standards (the U.S.-certified version of the 2002 Jaguar XJ8 passenger cars) and they are capable of being readily altered to conform to the standards.

DATE: The closing date for comments on the petition is December 9, 2011.

ADDRESSES: Comments should refer to the docket and notice numbers above and be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Instructions: Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

How to Read Comments submitted to the Docket: You may read the comments received by Docket Management at the address and times given above. You may also view the documents from the Internet at *http://www.regulations.gov.* Follow the online instructions for accessing the dockets. The docket ID number and title of this notice are shown at the heading of this document notice. Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically search the Docket for new material.

FOR FURTHER INFORMATION CONTACT: George Stevens, Office of Vehicle Safety Compliance, NHTSA (202) 366–8035).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable FMVSS shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable FMVSS.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register.**

J.K. Technologies, LLC (''JK''), of Baltimore, Maryland (Registered Importer 90–006) has petitioned NHTSA to decide whether nonconforming 2002 Kuwaiti Jaguar XJ8 passenger cars are eligible for importation into the United States. The vehicles which JK believes are substantially similar are 2002 Jaguar XJ8 passenger cars that were manufactured for sale in the United States and certified by their manufacturer as conforming to all applicable FMVSS.

The petitioner claims that it compared non-U.S. certified 2002 Kuwaiti Jaguar XJ8 passenger cars to their U.S.-certified

counterparts, and found the vehicles to be substantially similar with respect to compliance with most FMVSS.

JK submitted information with its petition intended to demonstrate that non-U.S. certified 2002 Kuwaiti Jaguar XJ8 passenger cars as originally manufactured, conform to many FMVSS in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 2002 Kuwaiti Jaguar XJ8 passenger cars are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence, Starter Interlock, and Transmission Braking Effect,* 103 *Windshield Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 106 *Brake Hoses,* 109 *New Pneumatic Tires,* 111 *Rearview Mirrors,* 113 *Hood Latch System,* 116 *Motor Vehicle Brake Fluids,* 118 *Power-Operated Window, Partition, and Roof Panel Systems,* 124 *Accelerator Control Systems,* 135 *Light Vehicle Brake Systems,* 201 *Occupant Protection in Interior Impact,* 202 *Head Restraints,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components,* 207 *Seating Systems,* 209 *Seat Belt Assemblies,* 210 *Seat Belt Assembly Anchorages,* 212 *Windshield Mounting,* 214 *Side Impact Protection,* 216 *Roof Crush Resistance,* 219 *Windshield Zone Intrusion,* 225 *Child Restraint Anchorage Systems,* 301 *Fuel System Integrity,* 302 *Flammability of Interior Materials,* and 401 *Interior Trunk Release.*

The petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls Telltales, and Indicators:* installation of U.S. conforming instrument cluster and cruise control lever, and installation or activation of associated U.S.-version software in the vehicle's computer system.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* installation of the following U.S.-model components on vehicles not already so equipped: (a) Front side marker lamps with integral side reflex reflectors; (b) headlamps; (c) integral tail lamp housings that includes rear side marker, rear turn signal, and brake lamps, as well as rear and side reflex reflectors.

Standard No. 110 *Tire Selection and Rims for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or Less:* installation of a tire information placard.

Standard No. 114 *Theft Protection:* installation of a supplemental key warning buzzer, or installation or activation of U.S.-version software to meet the requirements of this standard.

Standard No. 208 *Occupant Crash Protection:* inspection of all vehicles and replacement of any non U.S.-conforming model seat belts, air bag control units, air bags, and sensors with U.S.-model components on vehicles that are not already so equipped; and (b) installation or activation of U.S.-version software to ensure that the seat belt warning system meets the requirements of this standard.

The petitioner additionally states that a vehicle identification plate must be affixed to the vehicles near the left windshield post to meet the requirements of 49 CFR Part 565.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above addresses both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: November 3, 2011.

Claude H. Harris,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2011–29061 Filed 11–8–11; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 1087X]

Grenada Railway LLC—Abandonment Exemption—in Grenada, Montgomery, Carroll, Holmes, Yazoo and Madison Counties, MS.

AGENCY: Surface Transportation Board.

ACTION: Notice of public meeting.

SUMMARY: Staff members of the Surface Transportation Board will hold a public meeting concerning the abandonment petition for exemption in the above-titled docket. The purpose of the meeting is to allow interested persons to comment on the petition for exemption.

DATE/LOCATION: The public meeting will take place on November 16, 2011, beginning at 9 a.m., at the Montgomery County Courthouse, 614 Summit St., Winona, Miss.

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 245–0359. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–(800) 877–8339.

SUPPLEMENTARY INFORMATION: A decision in this docket, served on October 25, 2011, provided that a public meeting conducted by Board staff will be held to permit interested persons to express their views about the petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 filed by Grenada Railway LLC, requesting permission to abandon a 81.3-mile line of railroad extending from milepost 622.5 near Grenada, Miss., to milepost 703.8 near Canton, Miss. (the line).

During the public meeting, Board staff will hear comments regarding the proposed abandonment. The meeting will continue until all interested persons or parties have had an opportunity to speak. Persons wishing to speak should place their names on the list of speakers upon arrival at the Montgomery County Courthouse. A court reporter will transcribe the meeting and prepare a transcript that will be included in the public record of the proceeding.

All decisions, notices, and filings in this proceeding are available on the Board's Web site at *http://www.stb.dot.gov.* A transcript of the meeting will also be posted on the Board's Web site.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Dated: November 4, 2011.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2011–29005 Filed 11–8–11; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Senior Executive Service Departmental Offices Performance Review Board.

AGENCY: Treasury Department.

ACTION: Notice of members of the Departmental Offices Performances Review Board.

SUMMARY: Pursuant to 5 U.S.C. 4314(c)(4), this notice announces the appointment of members of the Departmental Offices Performance Review Board (PRB). The purpose of this Board is to review and make

recommendations concerning proposed performance appraisals, ratings, bonuses and other appropriate personnel actions for incumbents of SES positions in the Departmental Offices, excluding the Legal Division. The Board will perform PRB functions for other bureau positions if requested.

Composition of Departmental Offices PRB: The Board shall consist of at least three members. In the case of an appraisal of a career appointee, more than half the members shall consist of career appointees. The names and titles of the Board members are as follows:

Baukol, Andy P., Deputy Assistant Secretary for Mid-East and Africa
Cavella, Charles J., Deputy Assistant Secretary for Security
Coloretti, Nani Ann, Deputy Assistant Secretary for Management and Budget
Corwin, Manal S., Deputy Assistant Secretary for International Tax Affairs
Dohner, Robert S., Deputy Assistant Secretary for South and East Asia
East, Robyn C., Deputy Assistant Secretary and Chief Information Officer
Fitzpayne, Alistair M., Deputy Chief of Staff and Executive Secretary
Gerardi, Geraldine, Director for Business and International Taxation
Grippo, Gary E., Deputy Assistant Secretary for Government Financial Policy
Hammerle, Barbara C., Deputy Director, Office of Foreign Assets Control
Hampl, Eric E., Director, Executive Office of Asset Forfeiture
Harvey, Mariam G., Associate Chief Human Capital Officer for Civil Rights and Diversity
Isaacs, Michele, Chief Learning Officer
Jaskowiak, Mark M., Deputy Assistant Secretary for Investment Security
Johnson, Nicole, Associate Chief Human Capital Officer for
Human Capital Strategic Management
Madon, Michael P., Deputy Assistant Secretary for Intelligence Community Integration
Mazur, Mark J., Deputy Assistant Secretary for Tax Analysis
McDonald, William L., Deputy Assistant Secretary for Technical Assistance Policy
Ostrowski, Nancy, Director, Office of DC Pensions
Pabotoy, Barbara, Associate Chief Human Capital Officer for Human Capital Services
Patterson, Mark A., Chief of Staff
Reger, Mark Anthony, Deputy Assistant Secretary for Accounting Policy
Roth, Dorrice, Director, Office of Financial Management/Acting Deputy Chief Financial Officer
Rutherford, Matthew S., Deputy Assistant Secretary for Federal Finance
Sharpe, Thomas A., Director, Office of Procurement
Sobel, Mark D., Deputy Assistant Secretary for International Monetary and Financial Policy
Szubin, Adam J., Director, Office of Foreign Assets Control

DATES: *Effective Date:* Membership is effective on the date of this notice.

FOR FURTHER INFORMATION CONTACT: Mario R. Minor, Human Resources Specialist, 1500 Pennsylvania Avenue NW., ATTN: 1801 L Street, NW.—6th Floor, Washington, DC 20220, Telephone: (202) 622–0774.

This notice does not meet the Department's criteria for significant regulations.

Dated: October 20, 2011.

Barbara B. Pabotoy,

Associate Chief Human Capital Officer, Human Capital Services.

[FR Doc. 2011–28967 Filed 11–8–11; 8:45 am]

BILLING CODE 4811–42–P

DEPARTMENT OF THE TREASURY

Senior Executive Service; Departmental Performance Review Board

AGENCY: Treasury Department.

ACTION: Notice of members of the Departmental Performance Review Board (PRB).

SUMMARY: Pursuant to 5 U.S.C. 4314(c)(4), this notice announces the appointment of members of the Departmental PRB. The purpose of this PRB is to review and make recommendations concerning proposed performance appraisals, ratings, bonuses and other appropriate personnel actions for incumbents of SES positions for which the Secretary or Deputy Secretary is the appointing authority. These positions include SES bureau heads, deputy bureau heads and certain other positions. The Board will perform PRB functions for other key bureau positions if requested.

Composition of Departmental PRB: The Board shall consist of at least three members. In the case of an appraisal of a career appointee, more than half the members shall consist of career appointees. The names and titles of the PRB members are as follows:

Daniel M. Tangherlini, Assistant Secretary for Management and Chief Financial Officer
Daniel L. Glaser, Assistant Secretary for Terrorist Financing
Richard L. Gregg, Fiscal Assistant Secretary
Rosa G. Rios, Treasurer of the United States
Nani Ann Coloretti, Deputy Assistant Secretary for Management and Budget
Anita K. Blair, Deputy Assistant Secretary for Human Resources and Chief Human Capital Officer
Christopher J. Meade, Principal Deputy General Counsel
Steven T. Miller, Deputy Commissioner, Services and Enforcement, Internal Revenue Service
Elizabeth Tucker, Deputy Commissioner, Operations Support, Internal Revenue Service
John J. Manfreda, Administrator, Alcohol and Tobacco Tax and Trade Bureau
Mary G. Ryan, Deputy Administrator, Alcohol and Tobacco Tax and Trade Bureau
James H. Freis, Jr., Director, Financial Crimes Enforcement Network
David A. Lebryk, Commissioner, Financial Management Service
Wanda J. Rogers, Deputy Commissioner, Financial Management Service
Frederic Van Zeck, Commissioner, Bureau of the Public Debt
Anita D. Shandor, Deputy Commissioner, Bureau of the Public Debt
Larry R. Felix, Director, Bureau of Engraving and Printing
Pamela J. Gardiner, Deputy Director, Bureau of Engraving and Printing
Richard A. Peterson, Deputy Director, U.S. Mint

DATES: Membership is effective on the date of this notice.

FOR FURTHER INFORMATION CONTACT: Julia J. Markham, Human Resources Specialist (Executive Resources), 1500 Pennsylvania Avenue NW., ATTN: 1801 L Street, NW.—6th Floor, Washington, DC 20220, Telephone: (202) 927–4370.

This notice does not meet the Department's criteria for significant regulations.

Dated: October 28, 2011.

Catherine R. Schmader,

Executive Resources Program Manager.

[FR Doc. 2011–28969 Filed 11–8–11; 8:45 am]

BILLING CODE 4811–42–P

DEPARTMENT OF THE TREASURY

Survey of U.S. Ownership of Foreign Securities as of December 31, 2011

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice of reporting requirements.

SUMMARY: By this Notice and in accordance with 31 CFR 129, the Department of the Treasury is informing the public that it is conducting a mandatory survey of ownership of foreign securities by U.S. residents as of December 31, 2011. This Notice constitutes legal notification to all United States persons (defined below) who meet the reporting requirements set forth in this Notice that they must respond to, and comply with, this survey. The reporting form SHC (2011) and instructions may be printed from the Internet at: *http://www.treasury.gov/resource-center/data-chart-center/tic/Pages/forms-sh.aspx#shc.*

Definition: Pursuant to 22 USC 3102, a United States person is any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization

(whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency), who resides in the United States or is subject to the jurisdiction of the United States.

Who Must Report: The following U.S. persons must report on this survey:

- U.S. persons who manage, as custodians, the safekeeping of foreign securities for themselves and other U.S. persons. These U.S. persons, who include the affiliates in the United States of foreign entities, must report on this survey if the total fair value of the foreign securities whose safekeeping they manage on behalf of U.S. persons—aggregated over all accounts and for all U.S. branches and affiliates of their firm—is $100 million or more as of the close of business on December 31, 2011.
- U.S. persons who own foreign securities and or who invest in foreign securities on behalf of others, such as investment mangers/fund sponsors. These U.S. persons (referred to as ''end-investors''), who include the affiliates in the United States of foreign entities, must report on this survey if the total fair value of these foreign securities—aggregated over all accounts and for all U.S. branches and affiliates of their firm—is $100 million or more as of the close of business on December 31, 2011.
- U.S. persons who are notified by letter from the Federal Reserve Bank of New York. These U.S. persons must file Schedule 1, even if the recipient of the letter is under the reporting threshold of $100 million and need only report ''exempt'' on Schedule 1. These U.S. persons who meet the reporting threshold must also file Schedule 2 and/or Schedule 3.

What to Report: This report will collect information on holdings by U.S. residents of foreign securities, including equities, long-term debt securities, and short-term debt securities (including selected money market instruments).

How to Report: Completed reports can be submitted electronically or mailed to the Federal Reserve Bank of New York, Statistics Function, 4th Floor, 33 Liberty Street, New York, NY 10045–0001. Inquiries can be made to the survey staff of the Federal Reserve Bank of New York at (212) 720–6300 or email: *SHC.help@ny.frb.org.* Inquires can also be made to Dwight Wolkow at (202) 622–1276, email: *comments2TIC@do.treas.gov.*

When to Report: Data must be submitted to the Federal Reserve Bank of New York, acting as fiscal agent for the Department of the Treasury, by March 2, 2012.

Paperwork Reduction Act Notice: This data collection has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act and assigned control number 1505–0146. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. The estimated average annual burden associated with this collection of information is 16 hours per respondent for exempt reporters, 40 hours per respondent reporting U.S-resident custodian information on Schedule 3, 120 hours per U.S-resident end-investor providing detailed information on Schedule 2, and 360 hours per U.S.-resident custodian reporting detailed information on Schedule 2. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Department of the Treasury, Attention Administrator, International Portfolio Investment Data Reporting Systems, Room 5422 MT, Washington, DC 20220, and to OMB, Attention Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Dwight Wolkow,

Administrator, International Portfolio Investment Data Reporting Systems.

[FR Doc. 2011–29060 Filed 11–8–11; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open meeting of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. Several different project committees will hold discussions during this time. For more information, please contact Ms. Susan Gilbert, whose information is below.

DATES: The meeting will be held Tuesday, December 6, 2011 and Wednesday, December 7, 2011.

FOR FURTHER INFORMATION CONTACT: Susan Gilbert at 1–(888) 912–1227 or (515) 564–6638.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel will be held from Tuesday, December 6 to Wednesday, December 7, 2011 at the Capital Hilton Hotel in Washington, DC. Various subcommittee meetings will be held during the following times: Tuesday, December 6, 2011 from 11:05 a.m. to 11:50 a.m. and 1 p.m. to 5:15 p.m., and Wednesday, December 7, 2011 from 11:05 a.m. to 11:50 a.m. and from 1 p.m. to 5:15 p.m. If you would like to have the Taxpayer Advocacy Panel consider a written statement, please contact Susan Gilbert. For more information please contact Ms. Gilbert at 1–(888) 912–1227 or (515) 564–6638 or write: TAP Office, 210 Walnut Street, Stop 5115, Des Moines, IA 50309 or contact us at the Web site: *http://www.improveirs.org.*

Dated: November 2, 2011.

Linda Rivera,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2011–28971 Filed 11–8–11; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

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Part II

Department of Transportation

Federal Railroad Administration

49 CFR Part 242

Conductor Certification; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 242

[Docket No. FRA–2009–0035; Notice No. 2]

2130–AC08

Conductor Certification

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FRA is prescribing regulations for certification of conductors, as required by the Rail Safety Improvement Act of 2008. This rule requires railroads to have a formal program for certifying conductors. As part of that program, railroads are required to have a formal process for training prospective conductors and determining that all persons are competent before permitting them to serve as a conductor. FRA is issuing this regulation to ensure that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents, and to improve railroad safety. Although this rule does not propose any specific amendments to the regulation governing locomotive engineer certification, it does highlight areas in that regulation that may require conforming changes.

DATES: *Effective Date:* The rule is effective January 1, 2012.

FOR FURTHER INFORMATION CONTACT: Mark H. McKeon, Special Assistant to the Associate Administrator for Railroad Safety/Chief Safety Officer, U.S. Department of Transportation, Federal Railroad Administration, RRS–1, Mail Stop 25, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: (202) 493–6350); Joseph D. Riley, Railroad Safety Specialist (OP)-Operating Crew Certification, U.S. Department of Transportation, Federal Railroad Administration, Mail Stop-25, Room W38–323, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: (202) 493–6318); or John Seguin, Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, RCC–10, Mail Stop 10, West Building 3rd Floor, Room W31–217, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: (202) 493–6045).

SUPPLEMENTARY INFORMATION:

I. Statutory Background

Pursuant to § 402 of the Rail Safety Improvement Act of 2008, Public Law 110–432, 122 Stat. 4884 (Oct. 16, 2008) (codified at 49 U.S.C. 20163) (hereinafter ''RSIA''), Congress required the Secretary of Transportation (Secretary) to prescribe regulations to establish a program requiring the certification of train conductors. The Secretary delegated this authority to the Federal Railroad Administrator. 49 CFR 1.49(oo).

Section 20163(a) of 49 U.S.C. (Section 402 of the RSIA) provides that:

> The Secretary of Transportation shall prescribe regulations to establish a program requiring the certification of train conductors. In prescribing such regulations, the Secretary shall require that train conductors be trained, in accordance with the training standards developed pursuant to section 20162.

Section 20163(b) provides that ''[i]n developing the regulations required by subsection (a), the Secretary may consider the requirements of section 20135(b) through (e).'' The requirements in 49 U.S.C. 20135 concern the certification of locomotive engineers.

Section 20162(a)(2) of 49 U.S.C. (Section 401 of the RSIA) provides that:

> (a) In General.—The Secretary of Transportation shall, not later than 1 year after the date of enactment of the Rail Safety Improvement Act of 2008, establish—
>
> * * * * *
>
> (2) a requirement that railroad carriers, contractors, and subcontractors develop and submit training and qualification plans to the Secretary for approval, including training programs and information deemed necessary by the Secretary to ensure that all safety-related railroad employees receive appropriate training in a timely manner.
>
> * * * * *

Section 20162(b) of 49 U.S.C. provides that ''[t]he Secretary shall review and approve the plans required under subsection (a)(2) utilizing an approval process required for programs to certify the qualification of locomotive engineers pursuant to part 240 of title 49, Code of Federal Regulations.''

II. RSAC Overview

In March 1996, FRA established the Railroad Safety Advisory Committee (RSAC), which provides a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency's major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of RSAC members follows:

American Association of Private Railroad Car Owners (AAPRCO);
American Association of State Highway & Transportation Officials (AASHTO);
American Chemistry Council;
American Petroleum Institute;
American Public Transportation Association (APTA);
American Short Line and Regional Railroad Association (ASLRRA);
American Train Dispatchers Association (ATDA);
Association of American Railroads (AAR);
Association of Railway Museums (ARM);
Association of State Rail Safety Managers (ASRSM);
Brotherhood of Locomotive Engineers and Trainmen (BLET);
Brotherhood of Maintenance of Way Employes Division (BMWED);
Brotherhood of Railroad Signalmen (BRS);
Chlorine Institute;
Federal Transit Administration (FTA);*
Fertilizer Institute;
High Speed Ground Transportation Association (HSGTA);
Institute of Makers of Explosives;
International Association of Machinists and Aerospace Workers;
International Brotherhood of Electrical Workers (IBEW);
Labor Council for Latin American Advancement (LCLAA); *
League of Railway Industry Women; *
National Association of Railroad Passengers (NARP);
National Association of Railway Business Women; *
National Conference of Firemen & Oilers;
National Railroad Construction and Maintenance Association;
National Railroad Passenger Corporation (Amtrak);
National Transportation Safety Board (NTSB); *
Railway Supply Institute (RSI);
Safe Travel America (STA);
Secretaria de Comunicaciones y Transporte; *
Sheet Metal Workers International Association (SMWIA);
Tourist Railway Association Inc.;
Transport Canada; *
Transport Workers Union of America (TWU);
Transportation Communications International Union/BRC (TCIU/BRC);
Transportation Security Administration (TSA); and
United Transportation Union (UTU).

* Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. The working group may establish one or more task forces or other subgroups to develop facts and options on a particular aspect of a given task. The task force, or other subgroup, reports to the working group. If a working group comes to consensus on recommendations for action, the package is presented to RSAC for a vote. If the proposal is accepted by a simple

majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, and because the RSAC recommendation constitutes the consensus of some of the industry's leading experts on a given subject, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goals, is soundly supported, and is in accordance with applicable policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. If the working group or RSAC is unable to reach consensus on recommendations for action, FRA resolves the issue(s) through traditional rulemaking proceedings or other action.

III. RSAC Conductor Certification Working Group

On December 10, 2008, the RSAC accepted a task (No. 08–07) entitled ''Conductor Certification.'' The purpose of this task was defined as follows: ''To develop regulations for certification of railroad conductors, as required by the Rail Safety Improvement Act of 2008 (Act), and to consider any appropriate related amendments to existing regulations.'' The task called for the RSAC Conductor Certification Working Group (Working Group) to perform the following:

- Review safety data bearing on opportunities for reducing risk associated with the duties performed by freight and passenger conductors.
- Assist FRA in developing regulations responsive to the legislative mandate.
- Consider any revisions to 49 CFR part 240 appropriate to conform and update the certification programs for locomotive engineers and conductors.

The task also listed issues requiring specific report:

- What requirements for training and experience are appropriate?
- What classifications of conductors should be recognized?
- To what extent do existing requirements and procedures for certification of locomotive engineers provide a model for conductor certification?
- To what extent should unsafe conduct occurring while a locomotive engineer affect certification status as a conductor, and vice versa?
- Starting with the locomotive engineer certification model, what opportunities are available for simplifying appeals from decertification decisions of the railroads?

The Working Group was formed from interested organizations that are members of the RSAC. In addition to FRA, the following organizations contributed members:

AAR, including members from BNSF Railway Company (BNSF), Canadian National Railway (CN), Canadian Pacific Railway (CP), CSX Transportation, Inc. (CSX), Iowa Interstate Railroad, LTD, Kansas City Southern Railway (KCS), Northeast Illinois Regional Commuter Railroad Corporation (METRA), Norfolk Southern Railway Company (NS), and Union Pacific Railroad (UP);

The National Railroad Passenger Corporation (Amtrak);

APTA, including members from Long Island Rail Road (LIRR), Metro-North Railroad (MNCW), Southeastern Pennsylvania Transportation Authority (SEPTA), Southern California Regional Rail Authority (Metrolink), and Transit Solutions Group (TSG);

ASLRRA, including members from Anacostia Rail Holdings (ARH), Genesee & Wyoming Inc. (GNWR), Omnitrax Inc.(Omnitrax), Rio Grande Pacific Corporation (RGP), and WATCO Companies, Inc. (WATCO);

BLET;

National Railroad Construction & Maintenance Association, including members from Herzog Transit Services (Herzog);

NTSB;

TWU; and

UTU.

DOT's John A. Volpe National Transportation Systems Center (Volpe Center) also contributed members to the Working Group.

The Working Group convened 6 times on the following dates and locations:

- July 21–23, 2009 in Washington, DC;
- August 25–27, 2009 in Overland Park, KS;
- September 15–17, 2009 in Colorado Springs, CO;
- October 20–22, 2009 in Arlington, VA;
- November 17–19, 2009 in Scottsdale, AZ; and
- December 16–18, 2009 in Washington, DC.

To aid the Working Group in its development of recommendations for certification of conductors, FRA prepared draft regulatory text, which it distributed prior to the July meeting. The draft text closely followed 49 CFR part 240 which governs the qualification and certification of locomotive engineers.

During each meeting, Working Group members made recommendations regarding changes and additions to the draft text. Following each meeting, FRA considered all of the recommendations and revised the draft text accordingly. Minutes of each of these meetings are part of the docket in this proceeding and are available for public inspection. Having worked closely with the RSAC in developing its recommendations, FRA believes that the RSAC effectively addressed concerns with regard to the certification of conductors. FRA greatly benefited from the open, informed exchange of information during the meetings.

The Working Group reached consensus on all of its recommended regulatory provisions. On March 18, 2010, the Working Group presented its recommendations to the full RSAC for concurrence. All of the members of the full RSAC in attendance at the March meeting accepted the regulatory recommendations submitted by the Working Group. Thus, the Working Group's recommendations became the full RSAC's recommendations to FRA.

Based on the recommendations of the RSAC, FRA published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** on November 10, 2010. *See* 75 FR 69166. In the NPRM, FRA solicited public comment on the proposed rule and notified the public of its option to request a public hearing on the NPRM. In addition, FRA also invited comment on a number of specific issues related to the proposed requirements for the purpose of developing the final rule.

In response to the NPRM, FRA received written comments from AAR, Amsted Rail, Amtrak, APTA, ASLRRA, BLET, NYMTA, SEPTA, and UTU.[1] FRA then met with the Working Group on May 12, 2011 to discuss the comments. Minutes of that meeting are part of the docket in this proceeding and are available for public inspection.

As contemplated by the Working Group's task statement, the promulgation of the conductor certification regulation opens up consideration of conforming changes to 49 CFR part 240, ''Qualification and certification of locomotive engineers.'' Such changes could include amending the program submission process, adding 49 CFR 218, subpart F violations as

[1] BLET and UTU submitted joint comments. Accordingly, those comments will be referred to as BLET/UTU comments.

revocable offenses, and handling engineer and conductor petitions for review with a single FRA board. Although FRA intended for the Working Group to consider changes to part 240 during its meetings, the Working Group was unable to undertake that task. Moreover, members of the Working Group felt that it would be more efficient to discuss changes to part 240 after the conductor certification regulation is finalized. Therefore, FRA expects the Working Group to continue meeting after publication of this final rule and to provide recommendations that address conforming changes to part 240.

In addition to the conductor certification Working Group, interested parties should also be aware that other RSAC working groups are currently meeting to discuss potential FRA regulations which may impact the conductor certification regulation. The Medical Standards for Safety-Critical Personnel Working Group (RSAC Task No.: 06–03), for example, is developing recommendations for a potential FRA medical standards regulation. That regulation, if promulgated, could supersede some of the medically-related requirements in the conductor certification regulation. Further, the Training Standards and Plans Working Group (RSAC Task No.: 10–01) is developing recommendations for a FRA training regulation. While FRA does not expect that such a training regulation would supersede the training requirements in the conductor certification regulation, FRA does not know at this time what the final training regulation will provide. Some modification of the training requirements in this rule may be necessary to conform to the final requirements of the training regulation.

IV. General Summary of the Comments

As noted above, FRA received written comments on the NPRM from various interested parties. Following the submission of those comments, FRA convened the Working Group to consider and discuss the comments. As a result, certain of those comments have been superseded by changes made in the rule text from the NPRM to this final rule, and they should not necessarily be understood to reflect the positions of the commenters with respect to the requirements of the final rule. FRA is summarizing the comments received and is responding to them in this document so that FRA's positions are clearly understood.

A. Definitions

1. Substance Abuse Professional (SAP)

FRA solicited comments whether a SAP should owe a duty to both the employee being evaluated and the railroad. FRA noted that in the NPRM, the duty owed by a SAP did not parallel the duty owed by a ''medical examiner.'' BLET/UTU commented that a SAP should owe a duty to both the employee and the railroad and that the definition should be revised accordingly.

After reviewing the comment regarding SAPs and the comments regarding the drug and alcohol rules proposed in the NPRM, FRA finds that the definition and use of the term ''SAP'' in the NPRM appears to be causing confusion within the industry and may interfere with DOT's drug and alcohol rules contained in parts 40 and 219. Under DOT's alcohol and drug rules, a SAP is only used when referencing the counseling requirements that follow a Federal drug or alcohol violation (*e.g.,* a part 219 violation). In the NPRM, however, a SAP is required both for evaluations stemming from Federal violations and evaluations stemming from incidents that are not the result of a Federal violation (*e.g.,* motor vehicle alcohol or drug incidents indentified pursuant to § 242.111). Moreover, the definition of SAP in the NPRM goes beyond the definition of the term in part 40, which does not reference duties owed by a SAP.

To avoid interfering with the established rules and definitions contained in DOT's drug and alcohol regulations and to avoid confusion in the industry regarding what is required for Federal and non-Federal violations; FRA is making three changes to the regulation proposed in the NPRM. First, FRA is deleting the reference to a duty in the definition of SAP. Second, the term SAP in part 242 will only be used in connection with counseling requirements stemming from a Federal violation. For example, the term SAP will be used in § 242.115(f) which discusses the follow-up that must occur after a part 219 violation, but the term will not be used in § 242.111 which concerns evaluations stemming from motor vehicle alcohol or drug incidents. Third, for those sections of part 242 which address drug and alcohol evaluation requirements not involving a Federal violation, the term SAP will be replaced with the term ''Drug and Alcohol Counselor'' (DAC).[2] As used in the final rule, a DAC will be required to meet the exact same qualifications as a SAP. FRA believes these changes will avoid interfering with parts 40 and 219 while requiring the same qualification and credentialing requirements for persons evaluating substance abuse disorders as that proposed in the NPRM.

2. Medical Examiner

BLET/UTU commented that the proposed definition of ''medical examiner'' should be amended to explicitly state that a medical examiner owes a duty to the employee and the railroad. FRA believes that this revision is unnecessary given the plain language of the regulation and the statement provided in the NPRM preamble addressing this issue. As FRA stated in the NPRM (75 FR 69166, 69170 (Nov. 10, 2010)) and in the section-by-section analysis to this final rule:

> Under this rule, the medical examiner owes a duty to make an honest and fully informed evaluation of the condition of an employee. The only difference between the definition of medical examiner in this rule and the definition in 49 CFR part 240 is that under part 240, the medical examiner owes ''a duty to the railroad.'' In this rule, however, the words ''to the railroad'' have been deleted. This change was made to address a concern of some Working Group members that a medical examiner should not owe a duty to just the railroad but rather should owe a duty to both the railroad and the employee being evaluated.

3. Job Aid

SEPTA raised a concern with FRA's proposed definition of ''job aid.'' According to SEPTA, job aids provide information or guidance on how to perform a multitude of tasks, and railroads must have the flexibility to determine the scope of their use. SEPTA asserts that the specific reference to ''physical characteristics'' in the definition of ''job aid'' is unduly prescriptive and creates the potential for misinterpretations and erroneous limitations on the use of such tools. Based on that reading, SEPTA expressed concern that the proposed definition could be considered a prohibition on railroads from using a job aid for

[2] With respect to employee self-referrals under § 242.115(d), FRA acknowledges that the plain language of 49 CFR 219.403(b)(4) requires a SAP recommendation for the return to service of an employee who has entered a voluntary self-referral program. However, FRA has indicated that either a SAP or an Employee Assistance Program (EAP) Counselor may perform the assessment and provide any necessary recommendations for the return to service of an employee who has entered a voluntary self-referral program. *See* Part 219 Alcohol/Drug Program Compliance Manual at *http://www.fra.dot.gov/downloads/safety/ADComplianceMan.pdf.* Moreover, § 240.119(e) references an EAP in connection with voluntary self-referrals for locomotive engineers. Accordingly, in this final rule, the term DAC will be used with respect to employee self-referrals rather than SAP.

anything other than physical characteristics familiarization.

FRA believes that the commenter is applying the term ''job aid,'' as used in part 242, beyond its intended scope. The term only applies to specific information that would be provided in specific situations (*i.e.,* information regarding other than main track physical characteristics that is required to be provided only in situations where a conductor lacks territorial qualification on other than main track physical characteristics and it is not practicable for the conductor to be assisted by a conductor who meets the territorial qualification requirements). As defined, the term ''job aid'' would not prohibit additional information from being included in a job aid. Moreover, the use of the term ''job aid'' in this rule is not intended to prohibit the use of information or guidance which is not covered by the term's definition, regardless of whether the information or guidance is called a job aid. Because FRA does not believe that the proposed definition could be considered a prohibition on a railroad using a job aid for anything other than physical characteristics familiarization, FRA has adopted the proposed definition in this final rule.

4. On-the-Job Training

SEPTA commented that the proposed definition of ''on-the-job training'' should be replaced by a definition of that term as developed by the RSAC Training Standards and Plans Working Group. At the Working Group meetings, FRA informed the Working Group that it would conform to the requirements developed by the Training Standards and Plans Working Group where appropriate. The proposed definition in the NPRM mirrored the definition developed by the Training Standards and Plans Working Group except the Training Standards definition included ''on-the-job training'' components in the regulatory text rather than in the definition as provided in the NPRM. In this final rule, FRA has adopted the more concise definition of ''on-the-job training'' developed by Training Standards and Plans Working Group and has moved the components to the regulatory text. *See* 49 CFR 242.119(d)(2).

5. Conductor

SEPTA commented that the definition of ''conductor'' should be revised to read: ''Conductor means the crewmember in charge of a train or yard crew as defined in part 218 of this chapter, when the train or yard crew consists of more than one crew member.'' The definition of conductor was the subject of lengthy discussions during the Working Group meetings and the recommendation of the Working Group was adopted in the NPRM. The NPRM is focused on the functions that a person performs and not on the person's job title. SEPTA's definition, however, would diverge significantly from the approach taken in the NPRM. For example, by SEPTA's definition, a one-person remote control operator job would not have a conductor but a two-person job would. Thus, SEPTA's definition would mean that a remote control operator in a one-person job would not have engaged in a revocable event for any 49 CFR part 218, subpart F violation. FRA believes that such a loophole in the regulation could lead to a less safe working environment for railroad employees.

The definition of ''conductor'' is a fundamental element of the conductor certification regulation and FRA does not discern any safety-related reason to modify it. Accordingly, FRA has adopted the definition, as proposed in the NPRM, in this final rule.

6. Ineligible and Ineligibility

SEPTA commented that the use of the terms ''ineligible'' and ''ineligibility'' should be limited to two situations: (1) Initial certification, where an individual is being considered for certification but may not qualify for certification at that time; and (2) recertification, where an individual is currently certified and due for recertification, but certain circumstances outside the scope of ''prohibited conduct'' would prohibit recertification until the situation is resolved.

As used in the NPRM, the terms ''ineligible'' and ''ineligibility'' are catch-all terms that not only encompass revocation and denial of certification (including the two situations highlighted by SEPTA) but also cover other situations. For example, a certified conductor may voluntarily refer him or herself for substance abuse counseling or treatment under 242.115(d). If the conductor refuses to complete a course of action recommended under the provisions of 49 CFR 219.403, that would not be an operating rule or procedure, or type of alcohol or drug violation that would require revocation (nor would it constitute a denial of certification situation). Rather the conductor would simply remain ''ineligible'' until a railroad determined that the person no longer had a substance abuse disorder, or the person re-entered a substance abuse program and it had been determined under the provisions of 49 CFR 219.403 that the person could safely return to duty under certain conditions. Thus, to capture all situations where a conductor may be legally disqualified from serving as a conductor, FRA believes it is useful to define and use the terms ''ineligible'' and ''ineligibility.''

BLET/UTU commented that the definition of ''ineligible'' and ''ineligibility'' should be revised to state that a period of ineligibility ''shall begin only after a person has been afforded the applicable due process established by either § 242.109(e), § 242.115(f) or Subpart E and shall end when the condition or conditions contained therein are met.'' FRA believes that BLET/UTU's proposal could have an adverse impact on railroad safety because the proposal could potentially allow a conductor, involved in a revocable event, to continue to serve as a conductor until the railroad concludes its hearing and issues a decision. Accordingly, FRA declines to implement the proposal and determines that the definition of ''ineligible'' and ''ineligibility'' as proposed in the NPRM will be adopted in this final rule.

7. Qualified Instructor

SEPTA commented that the definition of ''qualified instructor'' should be replaced with the definition of ''designated instructor'' developed by the RSAC Training Standards and Plans Working Group. In the alternative, SEPTA commented that: FRA needs to provide references validating the correlation of 12 months of experience with instructional competency, craft qualifications or subject matter expertise; and define or clarify whether the term ''train service'' is limited to certified conductors or whether the term also includes engineers, brakeman, assistant conductors, *etc.*

The definition of ''designated instructor'' developed by the RSAC Training Standards and Plans Working Group refers to:

> A person designated as such by an employer, training organization, or learning institution, who has demonstrated, pursuant to the training program submitted by the employer, training organization, or learning institution, an adequate knowledge of the subject matter under instruction and, where applicable, has the necessary experience to effectively provide formal training.

Although this final rule generally conforms to the provisions and terms developed by the Training Standards and Plans Working Group, FRA believes that it is appropriate to go beyond those requirements with respect to definition of a ''qualified instructor.'' The definitions of ''qualified instructor'' in the NPRM and ''designated instructor''

developed by the Training Standards and Plans Working Group are similar to one another with two exceptions. Unlike ''designated instructor,'' the definition of ''qualified instructor'' requires the instructor to be a certified conductor, and in the case of a railroad that has designated employee representation, to be designated by the railroad with concurrence of the designated employee representative or have a minimum of 12 months service working as a train service employee. As stated in the NPRM, these additional requirements were included here to address the concerns of some Working Group members that employees, through their representatives, should have input in the selection of instructors who might be viewed as inexperienced (*i.e.,* a person with less than 12 months service working as a train service employee). FRA believes that the requirements will help contribute to a better trained, and thus safer, workforce. Accordingly, FRA declines to modify the definition of ''qualified instructor'' to the definition of ''designated instructor'' that was developed by the RSAC Training Standards and Plans Working Group.

SEPTA's comment demonstrates the need to clarify the meaning of the term ''train service employee.'' For purposes of the definition of ''qualified instructor'' in this final rule, FRA intends for the term ''train service employee'' to include those persons that have traditionally been known as certified engineers, conductors, brakemen, yard helpers, and yardmen. The minimum of 12 months service working as a train service employee may be at any time during that person's career.

B. Waivers

FRA solicited comments whether § 242.9 of the NPRM dealing with waivers should be removed as unnecessary in light of the fact that 49 CFR part 211 addresses the waiver process. While all three commenters on this section; SEPTA, AAR and BLET/UTU, agreed that the waiver process was covered by part 211, AAR and SEPTA indicated that they were indifferent to the elimination of § 242.9. However, UTU/BLET suggested that it may be helpful to laypeople, who may not be aware of the contents of 49 CFR part 211, to retain the reference to the waiver process in § 242.9. FRA agrees that § 242.9 may be helpful to some people and therefore, has retained that section in this final rule.

C. Certification Program

FRA solicited comments as to whether the amount of time proposed for implementing a conductor certification program (based on the dates provided) is appropriate. FRA did not receive any written comments on this issue but did receive feedback during the May 12, 2011 Working Group meeting regarding an extension of the effective date of the rule. However, FRA believes its proposed approach is reasonable and thus, the time periods proposed in the NPRM will be adopted in this final rule.

D. Schedule of Implementation

AAR seeks confirmation that: ''Any employee can be designated as a conductor under the grandfather provision through June 1, 2012. Any employee designated as a conductor under the grandfather provision can serve as a conductor until June 1, 2015, without being tested and evaluated pursuant to subpart B and issued a certificate pursuant to section 242.207.'' AAR's summary of the designation provisions in § 242.105 is not entirely accurate. With respect to the time period for designating conductors, only persons authorized by a railroad to perform the duties of conductor between January 1, 2012 and June 1, 2012 for Class I and II railroads and January 1, 2012 and October 1, 2012 for Class III railroads, will be designated as conductors. With respect to the time period a person designated as a conductor may serve without being tested and evaluated, a person designated as a conductor pursuant to § 242.105 may not serve as a conductor after June 1, 2015 for Class I and II railroads and October 1, 2015 for Class III railroads without being tested and evaluated pursuant to Subpart B. However, after March 1, 2012, each railroad must issue a certificate that complies with § 242.207 to each person that it designates. Moreover, subject to the provisions of § 242.105(c)(1)–(3), a railroad may test and evaluate its designated conductors under subpart B before the 36-month designation period has expired. Railroads should note that they may not test and evaluate a designated conductor or conductor candidate under subpart B of this rule or revoke a conductor's certificate, including a designated conductor's certificate, until they have a certification program approved by the FRA pursuant to § 242.103.

E. Prior Safety Conduct as a Motor Vehicle Operator

SEPTA commented that additional language should be added to the regulation that specifies that a delay in receipt of the required driving records be due to acts or omissions by the driver licensing agency, and the 60-day extension is limited to those cases where delays are beyond the control of the individual. According to SEPTA, the absence of such language could force railroads to impose more severe time restrictions on the driving record information requirements, effectively penalizing the majority of employees for the sake of the few who attempt to beat the system and remain in a safety-critical environment while affected by an active substance abuse disorder. While FRA acknowledges SEPTA's concern, FRA has not seen any evidence that the submission of incorrect or misleading information to driver's license agencies is a common problem. If FRA finds such evidence, FRA will consider amending part 242 to address the issue. Interested parties should note that any person who knowingly and willfully falsifies a record or report required by part 242 may be subject to criminal penalties. See § 242.11.

BLET/UTU commented that they expect that, in the application of proposed § 242.111(f) which addresses petitions to the waive motor vehicle check requirements, the Railroad Safety Board would require a notarized declaration, affidavit or some other form of sworn statement that no § 242.111(n) incident has occurred within the preceding 36 months as a condition precedent for granting the waiver petition. Based on that expectation, BLET/UTU suggested that such a requirement could be written directly into the rule, thereby relieving the Railroad Safety Board of the burden of having to handle these matters. FRA declines to adopt this suggestion as FRA cannot speak to what the Railroad Safety Board may require with respect to a waiver of certain requirements of § 242.111. Moreover, it is beyond the scope of this rulemaking to remove a railroad's right to petition the Railroad Safety Board for a waiver of the FRA's regulatory requirements.

AAR commented that a paragraph (o)(5) should be added to § 242.111 that would permit railroads to offer the assistance of a licensed counselor, social worker, or psychologist with expertise in the assessment of people with substance abuse disorders as an alternative to a SAP. According to AAR, the employee could use a SAP if the employee so desired, but the railroad

would be able to offer the employee a choice.

Pursuant to § 242.111 of the NPRM, railroad employees would be evaluated for substance abuse disorders by a person (*i.e.,* a Drug and Alcohol Counselor who meets the credentialing and qualification requirements of a SAP) with more stringent credentialing and knowledge requirements than an EAP Counselor (currently used in part 240) or the type of person proposed by AAR. FRA believes that requiring more stringent credentialing and knowledge requirements will improve employee confidence in the evaluation process. Moreover, AAR's proposal could open up the possibility of harassment and intimidation of an employee who does not choose to be evaluated by a person who has less stringent credentialing and knowledge requirements than a SAP. Accordingly, FRA declines to adopt the paragraph proposed by AAR.

AAR commented that it appears that FRA intends for DOT's requirement for direct observation of urine collection to apply to follow-up testing required as a result of motor vehicle alcohol and drug violations. AAR would agree with that position and suggested that FRA should make clear, both in this regulation and Part 240, that where follow-up testing is required by federal rules, all federal testing requirements, including direct observation, apply.

It is not FRA's intention for DOT's requirement for direct observation of urine collection to apply to follow-up testing required as a result of motor vehicle alcohol and drug violations. A motor vehicle alcohol/drug incident requiring follow-up testing is not a Federal part 219 violation. As such, this incident does not meet the criteria justifying direct observation as provided by 49 CFR 40.67. Interested parties should note, however, that direct observation of urine collection for follow-up testing may be recommended by a Drug and Alcohol Counselor as necessary.

F. Substance Abuse

BLET/UTU commented that the guidance provided in the NPRM concerning circumstances which may indicate the need for a SAP evaluation (*i.e.,* ''declining job performance, extreme mood swings, [and] irregular attendance'') should be removed from the preamble. BLET/UTU assert that the circumstances identified are ambiguous and/or subjective concepts which could be exploited by the railroads. FRA acknowledges that there could be legitimate reasons why someone might exhibit some or all of the conditions identified in the preamble to the NPRM. However, those conditions, to the extent not immediately explicable, may also indicate a need for an evaluation. The purpose of the preamble language is not to require (and does not require) the railroads to order an evaluation anytime a listed condition is exhibited. Rather, FRA is simply providing guidance as to conditions that may, given the context, call for an evaluation under internal railroad policies. Moreover, FRA remains vigilant of harassment and intimidation and will take appropriate action where such conduct is discovered. Accordingly, the guidance in the NPRM has been carried over into the final rule.

BLET/UTU commented that § 242.115(e) of the NPRM contains several references to the certification consequence for an employee who ''refuses or fails'' to provide a breath or body fluid sample. BLET/UTU disagrees that a failure to provide a breath or body fluid sample should trigger a revocation consequence. According to BLET/UTU, there are legitimate medical reasons why a person may be unable to provide a breath or body fluid sample citing 49 CFR 40, subpart I which provides the medical conditions under which an individual's failure to provide an sufficient sample is not deemed a refusal. In addition, BLET/UTU notes that subpart G of part 219 excuses a covered employee from compliance with the requirement to participate in random drug and alcohol testing ''in the case of a documented medical or family emergency.'' *See* 49 CFR 219.603 and 219.609. BLET/UTU understands the reference to part 219 in proposed section 242.115(e)(2) as incorporating the exceptions set forth in subpart G, and requests that the section-by-section analysis for the Final Rule clarify that their understanding is correct.

FRA confirms that the exceptions in part 40, subpart I, and part 219, subpart G, are included in this final rule's use of the word ''refuses.'' In other words, there is no ''refusal'' if the failure to provide a sufficient sample was the result of a legitimate medical explanation under part 40 or if it was a random test and the employee had a documented medical or family emergency under part 219. Further, to clarify the issue, FRA has removed the words ''or fails'' in the final rule. Use of the word ''refuses'' rather than the phrase ''refuses or fails'' more accurately tracks the provisions of parts 40 and 219.

G. Vision and Hearing Acuity

BLET/UTU commented that proposed § 242.117(k) should be amended to address concerns that if it is discovered after an incident that a conductor's vision or hearing acuity had deteriorated below the standard set forth in the NPRM, that conductor, even though he or she may not have been aware of the deterioration, may be subjected to penalties or enforcement actions for failing to notify the railroad of the deterioration prior to the incident. FRA understands BLET/UTU's concern and believes it is obvious that a conductor could not have enforcement action taken against them for failing to notify the railroad of a condition he or she was not aware existed. That is why the preamble discussion of this section in the NPRM noted that the paragraph at issue ''would address the issue of how soon *after learning* of a deterioration * * * a conductor would have to notify the railroad of the deterioration.'' 75 FR 69166, 69176 (Nov. 10, 2010) (emphasis added). Because the proposed regulation would not permit enforcement action against a conductor for failing to notify a railroad when they are not aware that their vision or hearing acuity had deteriorated below the standard set forth in the regulation, FRA declines to adopt BLET/UTU's proposed amendment.

H. Training

FRA solicited comments whether to require each railroad to provide for the continuing education of certified conductors in § 242.119(o). Since FRA did not receive any comments on this issue and because FRA sees no reason to change its approach, the proposed continuing education requirement contained in the NPRM (*see* 75 FR 69166, 69176–69177, 69204–69205 (Nov. 10, 2010)) will be adopted in this final rule.

NYMTA, SEPTA and AAR commented that the proposed language in § 242.119(d)(1) specifying the development of a task analysis should be removed. In the Working Group meetings and the preamble to the NPRM, FRA indicated that, to the extent possible and appropriate, it would conform the training requirements in part 242 to the training requirements being developed by the RSAC Training Standards and Plans Working Group. Because the RSAC recommendation from the Training Standards and Plans Working Group did not require a task analysis and FRA believes that the more comprehensive on-the-job training requirement included in the final rule (*see* section-by-section analysis of 242.119 below) adequately substitutes for a task analysis requirement, FRA has removed the proposed task analysis requirement from the final rule.

NYMTA, SEPTA and AAR commented that FRA should remove paragraphs (l) and (m) in proposed § 242.119 of the NPRM. Those paragraphs proposed to require railroads to perform initial instructional briefings with their conductors. In the Working Group meetings and the preamble to the NPRM, FRA indicated that, to the extent possible and appropriate, it would conform the training requirements in part 242 to the training requirements being developed by the RSAC Training Standards and Plans Working Group. Because the RSAC recommendation from the Training Standards and Plans Working Group did not require initial instructional briefings and FRA believes that the initial training program requirements included in the final rule (*see* section-by-section analysis of 242.119 below) adequately cover the requirements in the proposed paragraphs at issue, FRA has removed paragraphs (l) and (m) in proposed § 242.119 of the NPRM from the final rule.

BLET/UTU commented that § 242.119(n), providing an exception to the initial briefing requirements of § 242.119(l) and (m) should be deleted and replaced in its entirety with the following: ''Initial training shall be conducted in accordance with the requirements of Part 243.'' Since FRA has not even issued a NPRM relating to part 243, FRA cannot use BLET/UTU's proposed language. However, since the RSAC Training Standards and Plans Working Group's recommendation to FRA does not require initial instructional briefings and FRA believes that the initial training program requirements included in the final rule (*see* section-by-section analysis of 242.119 below) adequately cover the substance of proposed paragraph (n), FRA has removed paragraph (n) in proposed § 242.119 of the NPRM from the final rule.

I. Knowledge Testing

SEPTA commented that proposed § 242.121(c)(4)(v), which requires testing on use of job aids, should be deleted since this section includes requirements for an examination on operating rules and timetable instructions which would presumably demonstrate an individual's ability to use those documents. FRA believes it is an important safety measure to ensure that conductors be able to use any job aid, as defined by this part, that they may be given. Moreover, FRA does not believe that testing on operating rules and timetable instructions would necessarily demonstrate an individual's ability to use a job aid. Accordingly, FRA declines to delete § 242.121(c)(4)(v) as proposed in the NPRM.

BLET/UTU commented that § 242.121(c)(6) of the NPRM, which would have required knowledge testing to be conducted without open reference books or other materials except to the degree the person is being tested on his or her ability to use such reference books or materials, should be deleted. While one would expect a conductor to refer to his or her written rules and instructions whenever there is any uncertainty about what is required by a particular rule, instruction or practice, FRA believes that some rules are so fundamental to railroad safety, such as compliance with stop signals, that a conductor would be expected to know the rule without referring to reference materials. Accordingly, FRA declines to delete § 242.121(c)(6) as proposed in the NPRM.

J. Monitoring Operational Performance

NYMTA seeks confirmation that: ''Training may be used as a substitute to satisfy the annual unannounced test for persons certified as passenger conductors pursuant to § 242.107(b)(2) who do not require compliance with Part 218, subpart F, except under emergency circumstances.'' FRA confirms that training may be used as a substitute pursuant to § 242.123(d)(2)(i).

SEPTA and NYMTA commented that it is not feasible to test each of its certified conductors on one or more of the provisions in 49 CFR 218.99–218.109 because the majority of passenger conductors do not have the opportunity to perform part 218 tasks on a regular basis. SEPTA recommends revising § 242.123(d)(2)(i) to allow annual training to substitute for annual test for all passenger conductors. FRA declines to adopt NYMTA and SEPTA's comments in this final rule. FRA believes that § 242.123(d)(2)(i) addresses SEPTA and NYMTA's concerns about passenger conductors who rarely engage in activities covered by part 218, subpart F. FRA expects that most passenger conductors will never have to engage in activities covered by part 218, subpart F (which is what FRA means by the phrase ''compliance with part 218, subpart F'') except in emergency circumstances. Accordingly, FRA expects that most passenger conductors will be permitted to be given annual training in lieu of an unannounced compliance test.

While not revising § 242.123(d)(2)(i) based on the comment, FRA is revising the paragraph to clarify its intent. FRA intended for § 242.123(d)(2)(i) to state that the annual training exception only applies to part 218, subpart F, testing and that a railroad will still have to test on § 217.9. The final rule has been revised accordingly.

SEPTA and NYMTA commented that the time limit proposed in § 242.123(b)(1) and (f) for testing conductors who are returning to service should be extended from 30 days to 60 days. They contend that this will provide for increased quality observations thereby allowing the manager extra opportunities to observe the employee on different job assignments. As provided in the preamble to the NPRM, proposed paragraphs (b)(1) and (f) address the problem that some certified conductors may not be performing a service that requires conductor certification and thus, a railroad may not be able to provide those conductors with the annual, unannounced compliance test. Unlike part 240, which requires railroads to seek a waiver from FRA's Safety Board for engineers that they are unable to annually test, the proposed paragraphs would not require railroads to give an unannounced compliance test to conductors who are not performing service requiring certification. Moreover, the railroads are given approximately a month to test those conductors returning to service.

BLET/UTU commented that the rule should make it clear that the employee may work for the 30 days pending the unannounced test and thus, asserted that 242.123(f) should be amended as follows: ''However, when the certified conductor returns to a service that requires certification pursuant to this part, that certified conductor *shall not be deemed ineligible but* must be tested pursuant to this section within 30 days of his or her return.'' (emphasis added). FRA declines to adopt the revisions suggested in the comment. Just as with locomotive engineers under part 240, a failure to conduct an unannounced test does not affect a conductor's certification (*i.e.,* a railroad's failure to give the test to a person would not render that person ineligible to serve as a conductor). However, that does not mean the person would not be ineligible for another reason. For example, a conductor who is determined to have an active substance abuse disorder would be ineligible to serve as a conductor regardless of whether the conductor had received an unannounced compliance test within 30 days of his or her return to conductor service. Since the BLET/UTU's proposed revision could be read to prevent a railroad from deeming a person ineligible for any reason upon that person's return to conductor service, FRA declines to adopt the revision.

K. Time Limitations for Certification

BLET/UTU commented that the conductor certification rules should be consistent with the potential medical standards that are being considered by FRA. It is FRA's expectation that where possible and appropriate, part 242 will be consistent with any potential medical standards rulemaking.

L. Certificate Components

FRA solicited comments whether to require a conductor's certificate to include a physical description or photograph of the conductor. As stated in the NPRM, locomotive engineer certificates are required to include a physical description or photograph of the engineer pursuant to part 240. Moreover, FRA believes that this requirement would enable FRA inspectors, railroad officers, and police officers to quickly verify that the person in possession of the certificate is in fact the person listed on the certificate. Since FRA did not receive any comments on this issue and because FRA believes it will assist in monitoring railroad compliance with certification of conductors, the proposed physical description or photograph requirement in the NPRM will be adopted in this final rule.

M. Multiple Certifications

In the NPRM, FRA solicited comments regarding whether to add a provision to § 242.213 that would require railroads to make the determination as to which certification to revoke, where a person who is serving as both the conductor and the engineer is involved in a revocable event, based on the work the person was performing at the time the conduct occurred. FRA noted that such a determination would be similar to the one made under § 242.215(f) and under part 225 in which railroads determine whether an accident was caused by poorly performing what is traditionally considered a conductor's job function or what is traditionally considered a locomotive engineer's job function. BLET/UTU supported the addition of the provision, while AAR commented that a railroad should be able to revoke both certificates.

FRA has included the additional provision in § 242.213 of this final rule. FRA believes that the provision is necessary to bring additional continuity to the revocation process. Moreover, this type of determination is not new to the railroads as they already make similar determinations under part 225 and agreed to the inclusion of similar language in § 242.215(f) of the NPRM. FRA does not believe it is necessary to revoke both certificates in such situations because a person certified as a conductor and an engineer will not be permitted to serve in either position if one of the certificates has been revoked for anything other than a part 218, subpart F, violation. With respect to part 218, subpart F violations, AAR's comment is not feasible since part 240 does not currently permit a person certified as an engineer to have his or her engineer certification revoked for a violation of part 218, subpart F.

Amtrak, SEPTA, and NYMTA commented on § 242.213's proposed requirement that a locomotive engineer, including a RCO, who is operating without an assigned certified conductor must be certified as both a locomotive engineer and a conductor or be accompanied by a certified conductor who will attach to the crew ''in a manner similar to that of an independent assignment.'' Amtrak, SEPTA, and NYMTA's comments asserted that that requirement should be amended to provide exceptions for passenger railroads and train operations in certain areas and contexts.

Amtrak, SEPTA, and NYMTA's comments concern the very definition of a conductor. That definition was the subject of lengthy discussions during the Working Group meetings and the recommendation of the Working Group was adopted in the NPRM. The definition is a fundamental element of the conductor certification regulation and FRA does not discern any safety-related reason to modify it. Moreover, an exception is built into the final rule which address some of the concerns raised in the comments. For example, if a conductor is removed from a train for a medical, police or other such emergency after the train departs from an initial terminal, the train may proceed without the locomotive engineer being a certified conductor to the first location where the conductor can be replaced without incurring undue delay. Interested parties should also note that movement of a locomotive within the confines of a locomotive repair or servicing area or movement of a locomotive less than 100 feet for inspection or maintenance purposes would not require a certified conductor. Accordingly, Amtrak, SEPTA, and NYMTA's comments have not been adopted in this final rule.

BLET/UTU commented that § 242.213(h)(1) should be amended to make clear that when both an engineer and conductor certification are revoked for different lengths of time, the revocation periods shall run concurrently. BLET/UTU recommended amending § 242.213(h)(1) to read as follows:

> For purposes of determining the period for which a person may not work as a certified locomotive engineer due to a revocation of his or her conductor certification, only violations of § 242.403(e)(1) through (e)(5) or (e)(12) will be counted. Thus, a person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked three times in less than 36 months for two violations of § 242.403(e)(6) and one violation of § 242.403(e)(1) would have his or her conductor certificate revoked for 1 year, but would not be permitted to work as a locomotive engineer for *the first* month *of that revocation period* (*i.e.,* the period of revocation for one violation of § 242.403(e)(1)).

(emphasis added).

FRA declines to adopt BLET/UTU's amendment. Section 242.213(h) and the chart in Appendix E already make clear that the period a person cannot not work as an engineer occurs during the period that the conductor certification is revoked (*i.e.,* concurrently). Moreover, FRA cannot say that the person in the example given in § 242.213(h)(1) would not be permitted to work as an engineer for the first month of the one year revocation period because the example does not provide the exact order of the revocations. Nonetheless, it is FRA's intent that the period a conductor could not work as an engineer would occur at the beginning of the revocation period. Thus, a person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked twice within 24 months—first for a violation of § 242.403(e)(6) and second for a violation of § 242.403(e)(1)—would have his or her conductor certificate revoked for 6 months, but would not be permitted to work as a locomotive engineer for the first month of that 6-month revocation period (*i.e.,* the period of revocation for one violation of § 242.403(e)(1)).

N. Territorial Qualification

BLET/UTU commented that the provision proposed in § 242.301(c) should be amended to state that a person who assists a conductor lacking territorial qualification on main track physical characteristics may not be an assigned crew member. In support of its comment, the BLET/UTU notes that under part 240, a pilot who assists a locomotive engineer lacking qualifications on the physical characteristics of a territory may not be an assigned crew member. As proposed in the NPRM, § 242.301(c) would permit the locomotive engineer of a train, who is also certified as a conductor and

qualified on the physical characteristics of the territory, to assist the assigned conductor if the conductor lacks qualification on the physical characteristics. BLET/UTU asserts that could lead to a situation in which an engineer would be required to simultaneously perform the safety-critical responsibilities of two people, including some that may be performed in two different physical locations. AAR opposed BLET/UTU's amendment. According to AAR, the proposed amendment ignores the distinction between an engineer's duties and a conductor's duties and that for a move requiring the engineer to assist the conductor, the engineer can conduct a job safety briefing that provides the conductor with any information necessary to allow a safe move. In addition, AAR asserts that the lack of need for a non-crew member pilot is supported by the fact that job aids may be used on other than main track where it is not practicable to provide an assistant—''whether an engineer is providing necessary information pertaining to the territory or the conductor is using a job aid, the conductor will have sufficient information available to allow for safe operation of the train.''

Based on the comments received and after further review of the issue, FRA has revised the requirements in § 242.301 regarding when a conductor lacking territorial qualification on main track physical characteristics must be assisted by a person who meets those qualifications. The revisions, derived in large part from the pilot requirements for locomotive engineers in part 240, provide differing requirements depending on whether a conductor has never been qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor or whether the conductor was previously qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor, but whose qualification has expired.

For a conductor who has never been qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor, the final rule requires that the assistant must be a person who is certified as a conductor, meets the territorial qualification requirements for main track physical characteristics, and is not an assigned crew member. For a conductor who was previously qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor, but whose qualification has expired, the Final Rule allows the assistant to be any person, including an assigned crewmember other than the locomotive engineer so long as serving as the assistant would not conflict with that crewmember's other safety sensitive duties, who meets the territorial qualification requirements for main track physical characteristics.

In addition to the revisions as to when an assistant is required on main track, the Final Rule includes exceptions as to when an assistant is not required on main track. Those exceptions, which are derived from 49 CFR 240.231(c), apply to movements on a section of main track with an average grade of less than 1% over 3 continuous miles and: (1) The maximum distance the locomotive or train will be operated does not exceed one mile; or (2) the maximum authorized speed for any operation on the track does not exceed 20 miles per hour; or (3) operations are conducted under operating rules that require every locomotive and train to proceed at a speed that permits stopping within one half the range of vision of the locomotive engineer.

FRA believes that these changes will serve the interests of safety, address the concerns of the BLET/UTU, provide flexibility for the railroads in handling situations which require an assistant, and make this Final Rule more consistent with the main track pilot requirements in part 240.

The BLET/UTU also commented that the proposed job aid provision in § 242.301(d) should be mandatory and suggested that the last sentence of that section should read: ''Where not practicable, the conductor shall be provided an accurate job aid prior to entering the track.'' It was FRA's intent that the job aid provision of § 242.301(d) be mandatory and it has been revised accordingly in this final rule. FRA declines to adopt the additional suggested revisions as it believes that the phrase ''appropriate up-to-date'' used in the NPRM encompasses the suggested term ''accurate'' and the ''prior to entering the track'' language is unnecessary because a conductor who lacks territorial qualification on a segment of track will not be permitted to enter that track until they are, where practicable, assisted by a certified conductor who is qualified or provided an appropriate up-to-date job aid.

O. Denial of Certification

In the NPRM, FRA solicited comments on whether to add two provisions to § 242.401. *See* 75 FR 69166, 69181 (Nov. 10, 2010). The first provision proposed to add the following sentence to paragraph (a) of that section: ''The railroad shall provide the conductor candidate with any written documents or records, including written statements, which support its pending denial decision.'' The second provision proposed to add the following sentence to paragraph (c) of this section: ''The basis for a railroad's denial decision shall address any explanation or rebuttal information that the conductor candidate may have provided in writing pursuant to paragraph (a) of this section.'' AAR commented that they oppose the first proposal because the supporting documentation could include privileged documents and documents that will be used in litigation.

As stated in the NPRM, the intent of the first proposed provision is to improve the transparency of the certification denial process and improve FRA's ability to adjudicate petitions seeking review of a railroad's denial decision pursuant to subpart E of this rule. Denial decisions are not accompanied by a hearing transcript and often contain little or no documentary record. The issue that FRA is trying to address is the situation where a conductor candidate does not get enough information regarding a denial decision to draft an appropriate rebuttal. FRA wants to avoid the delay and cost of a conductor candidate having to petition the Operating Crew Review Board (OCRB) to obtain the documents they need to rebut the denial decision. If conductor candidates are provided better information upfront, FRA expects that fewer petitions will be filed with the OCRB. FRA is not requiring documentation regarding employment or personal issues but rather is only interested in documents related to a failure to meet a requirement of part 242. For example, FRA would expect that locomotive download printouts, Form Bs, and/or transcripts of railroad communications that support the pending denial decision would be provided to the conductor candidate. Under this final rule, the OCRB already has the authority to order a railroad to produce those types of documents and FRA would not expect that they would be privileged. Accordingly, FRA is adopting the first proposal, with some modification, in this final rule.

Since FRA did not receive any comments objecting to the second proposed provision and FRA sees no reason to change its approach, the second proposed provision will also be adopted in this final rule.

In the NPRM, FRA also asked whether the intervening cause exception in proposed paragraph (d) of § 242.401 should be modified to include

certification and recertification requirements in addition to the revocable events in § 242.403. FRA provided an example of how paragraph (d) could be modified: ''A railroad shall not determine that a person failed to meet the eligibility requirements of this part and shall not deny the person's certification if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with the railroad operating rule or practice or certification or recertification requirement which forms the basis for denying the person certification or recertification.'' *See* 75 FR 69166, 69181 (Nov. 10, 2010). AAR commented that they did not understand what FRA was trying to do and stated that FRA appeared to be contemplating that there could be an intervening event on which to base denial of certification independent of the events listed in § 242.403. BLET/UTU agreed that § 242.401(d) should be modified as proposed by FRA.

Contrary to AAR's comment, FRA is not suggesting that an intervening cause could serve as a basis for denial. Rather, FRA's proposal provides that an intervening cause could serve as a basis for not denying certification. At the May 12th Working Group meeting, AAR stated that they were opposed to extending the intervening cause provision to denials of certification. At that meeting, a member of the Working Group expressed concern that under the proposal, a conductor candidate who was not able to hold themselves up on the side of a car which in turn led to a violation of § 242.403(e)(1) through (e)(11) could assert an intervening cause argument.

Because the proposed modification appears to have caused confusion, could lead to unintended consequences, and merely clarifies FRA's existing authority, FRA has decided not to modify § 242.401(d) as proposed in the NPRM. Rather, FRA has clarified paragraph (d) in this final rule to reflect more accurately what was said in the NPRM. Interested parties should note, however, that like the LERB under part 240, the OCRB has the authority, if petitioned, to review the basis for denial of certification or recertification by the railroad to determine if substantial evidence supports the decision.

P. Criteria for Revoking Certification

In the NPRM, FRA solicited comments whether a violation of the final rule in 49 CFR part 220 (''Restrictions on Railroad Operating Employees' Use of Cellular Telephones and Other Electronic Devices'') should constitute a revocable event for conductors and locomotive engineers. In particular, FRA asked whether it should use its other enforcement tools (*e.g.,* monetary civil penalty for individual liability, disqualification, *etc.*) instead of mandating revocation and how a railroad would acquire the necessary evidence to revoke a conductor's and/or locomotive engineer's certification for violation of 49 CFR part 220. AAR and SEPTA commented that a violation of part 220 should constitute a revocable event and AAR stated that it would expect that FRA would provide assistance and support, as necessary, including the invocation of its subpoena power when appropriate.

BLET/UTU commented that they are opposed to including a violation of part 220 as a revocable event under part 240 and 242 because: FRA's data shows that cell phone violations are qualitatively different than a violation of the cardinal sins; there is no indication that there is a pattern of cell phone violations requiring the imposition of revocation; there are numerous questions regarding FRA's data are unanswered; and FRA currently has sufficient tools at its disposal (*e.g.,* subpoenas, individual liability, *etc.*) to detect and punish violations. Alternatively, BLET/UTU commented that if FRA makes it a revocable offense, then the regulation should state that revocation is appropriate only when an electronic device is improperly used while performing safety related duties and the use contributed to an event identified in § 219.201.

At this time, FRA had decided not to include part 220 violations as revocable events in this final rule. FRA already has a new regulation, 49 CFR part 220, to address cell phone use and believes that time should be allowed to study what impact that regulation has on the improper use of electronic devices on the railroads. In addition, FRA has numerous enforcement tools against individuals available to address misuse of electronic devices—warning letters, civil penalties, disqualifications, *etc.* Moreover, requiring revocation for part 220 violations would be incredibly difficult for railroads to enforce and apply. FRA cannot legally use its subpoena powers to gather information for a railroad which is what AAR expects to happen. Therefore, FRA expects that most cases would simply be one person's statement versus another.

Railroads appear to have rules and policies in place to address the misuse of electronic devices. A survey of Class I railroads indicates that they generally have rules and policies in effect that are more comprehensive than the federal minimums contained in part 220. Discipline for non-compliance is typically governed by the specific nature of the offense and the discipline record of the employee and ranges from coaching or counseling to dismissal.

Although FRA is not including part 220 violations as revocable events, FRA will continue to monitor the use of electronic devices and, if necessary, will consider amending the regulations to include misuse of such as a revocable event.

Moreover, FRA expects to use its disqualification authority under part 211 in instances where improper use of electronic devices is found under part 220. FRA will be taking a zero tolerance view of such violations and, in addition to its civil penalty authority against a railroad, will also utilize its disqualification authority against an individual employee to the extent practicable in any such instance of misuse by an employee.

NYMTA and SEPTA commented that a conductor who is called to perform the duty of a train crew member other than that of conductor or locomotive engineer should have his or her certification revoked based on actions taken or not taken while performing that duty. That suggestion, however, runs counter to § 242.403(c)(3), and what was agreed to by the Working Group. Paragraph (c)(3) of section 242.403 states that a ''certified conductor who is called by a railroad to perform the duty of a train crew member other than that of conductor or locomotive engineer shall not have his or her certification revoked based on actions taken or not taken while performing that duty.'' FRA believes that the paragraph explains the status quo and conforms to the approach taken in part 240 for locomotive engineers. *See* 240.117(c)(3). FRA also expects that the paragraph will help keep down the number of railroad hearings and petitions to FRA for review pursuant to the dispute resolution process. Accordingly, FRA has adopted the paragraph in this final rule.

BLET/UTU commented that the explanation of the phrase ''appropriate action'' in § 242.403(c)(2) and 242.403(e)(2)(i) should be amended to state that ''the duty is met'' (rather than ''the duty may be met'') by warning the conductor or engineer of a potential or foreseeable violation. FRA declines to adopt that change due to the fact that ''appropriate action'' depends on the situation. For example, if a conductor provides a warning with plenty of distance, then the conductor has likely met his or her duty. However, the conductor of a train who provides a warning for the first time one second

before the train passes a stop signal that the conductor was aware of 3 miles back, likely has not met his or her duty.

Q. Periods of Ineligibility

NYMTA and SEPTA commented regarding proposed § 242.405(a)(3)(i) which provides that on other than main track where restricted speed or the operational equivalent thereof is in effect, the period of revocation for a violation of § 242.403(e)(6) through (e)(8), (e)(10), or (e)(11) shall be reduced by one half if another revocable event has not occurred within the previous 12 months. NYMTA commented that FRA should leave the ability to assess the appropriate discipline for speeding violations on other-than-main-track with the controlling railroad. SEPTA commented that proposed § 242.405(a)(3)(i) should be eliminated because all violations should be treated consistently regardless of where they occur.

As explained in the NPRM, § 242.405(a)(3)(i) recognizes that some violations which occur on other than main track where slower speeds are in effect are likely to pose less of a danger to safety than violations that occur on main track and thus, a reduced period of revocation is warranted. Nothing in the comments submitted has altered FRA's view on this and therefore, FRA has adopted the provision as proposed in this final rule.

SEPTA commented that the title of the § 242.405 should be changed to ''Periods of Revocation or Denial of Certification'' consistent with their comment regarding the definition of ''ineligible'' and ''ineligibility.'' FRA declines to adopt SEPTA's comment for the reasons it declined to adopt their comment regarding the definition of ''ineligible'' and ''ineligibility.'' *See* the discussion of the definition of ''ineligible'' and ''ineligibility'' in the General Summary of the Comments to this final rule.

In its comments, ASLRRA recommended an alternative procedure for Class III railroads to address a situation where disqualification of a conductor would result in a disruption to service because there is no other available certified conductor as a replacement. In that situation, ASLRRA suggested that a decertified conductor on a Class III railroad, who had never previously been decertified, would be required to undergo remedial training and testing, but would be allowed to continue functioning for that railroad as a conductor under specific restrictions to match the event triggering the decertification. FRA declines to adopt the alternative procedure for Class III railroads because: (1) The procedure would result in disparate treatment of conductors across the three classes of railroads (*i.e.,* a conductor for a Class I railroad would not be permitted to serve as a conductor following a decertifiable event whereas a conductor on a Class III railroad, who was involved in the same type of decertifiable event, may be permitted to serve as a conductor); (2) there is no less a safety risk if a person is a conductor for a Class III railroad as opposed to a conductor for a Class I or Class II railroad; and (3) the procedure appears to leave open the possibility that a conductor involved in a revocable event on a Class III railroad could immediately go to work for a Class I railroad due to the fact that restrictions were placed on the conductor's certificate rather than having the certificate revoked.

R. Process for Revoking Certification

FRA solicited comments regarding its understanding of proposed § 242.407(b)(4) in the NPRM. Pursuant to that proposed section, a railroad would, among other things, provide a conductor subject to a railroad revocation hearing with a list of witnesses the railroad will present at the hearing. The NPRM noted that it is FRA's understanding that, except for an employee of the convening railroad whose statements led to a suspension under § 242.407(b)(1), the railroad would not have to call every witness it puts on the list. *See* 75 FR 69166, 69184 (Nov. 10, 2010). Since FRA did not receive any comments regarding its understanding and FRA has not discovered anything to change its understanding, FRA adopts its understanding as part of the final rule.

BLET/UTU commented that the phrase ''just prior'' in proposed § 242.407(b)(4) is ambiguous and should be changed to a definitive time (*i.e.,* 48 hours) and that telephonic testimony should be limited to general subject matter testimony. FRA acknowledges ''just prior'' is somewhat ambiguous but railroads need some flexibility with the timing since railroads do not always have a copy of the written information nor do they know exactly who will serve as a witness 48 hours in advance. Although FRA declines to adopt the comment, FRA notes that a party to a railroad hearing may ask for a recess if they do not believe they have had sufficient time to prepare their case. Moreover, the OCRB, if petitioned, can consider the time a party had to prepare his or her defense in determining whether an appropriate defense was possible.

BLET/UTU's comment regarding telephonic testimony would narrow the scope of proposed § 242.407(b)(4) in a manner not agreed to by the Working Group or intended by FRA. The intent of that section as proposed in the NPRM was to allow a railroad to telephonically examine an employee of the railroad whose statements, regardless of subject matter, formed the information that the railroad would be presenting at the hearing if it is impracticable to provide the employee at the hearing. The section was narrowly tailored to not only acknowledge that it is important for a conductor at a railroad hearing to be provided with the information that the railroad will present prior to the convening of the hearing but also to acknowledge that in some cases it is impractical to provide a witness at the hearing. To retain that balance, FRA is adopting § 242.407(b)(4) as proposed in the NPRM.

BLET/UTU commented that the examples provided in the preamble to illustrate the term ''minimal nature'' as used in proposed § 242.407(i)(2) should be modified because they are not realistic. Although FRA declines to modify the examples provided in the NPRM, additional examples have been added to the section-by-section analysis of § 242.407 in this final rule.

FRA solicited comments on whether a railroad decision issued pursuant to proposed § 242.407(c) should include the following: (1) State whether the railroad official found that a revocable event occurred and the applicable period of revocation with a citation to 49 CFR 242.405 (Periods of revocation); (2) contain an explanation of the factual findings and citations to all applicable railroad rules and practices; (3) not cite a railroad rule or practice that was not cited in the written notice of suspension; and (4) be served on the employee and the employee's representative, if any, with the railroad to retain proof of that service. AAR commented that there is no need for the third proposal. According to AAR, at least one railroad's labor agreement provides that a specific rule violation shall not be cited in the initial charge letter and many other railroads have long-standing practices that are similar. A comment from a Working Group member also indicated that the rule cited would have to be changed if evidence developed at a railroad hearing required it. Thus, in that instance, the railroad would need the flexibility to cite a rule not cited in the written notice of suspension. AAR also commented that the fourth proposal is unnecessary.

As stated in the preamble to the NPRM, FRA proposed the language to

ensure that clearer and more detailed decisions are issued. Clearer and more detailed decisions would allow a conductor to understand exactly why his or her certification was revoked and would allow the OCRB to have a more detailed understanding of the case if asked to review the revocation decision pursuant to subpart E of this rule. Moreover, the service proposal would help eliminate disputes as to when the conductor was notified of the railroad decision. FRA understands that a railroad may, under certain circumstances, need to change the rule being cited. Accordingly, FRA has adopted the first, second and fourth but not the third proposal in this final rule. However, FRA is concerned about conductors preparing their defense for the railroad hearing based on the rule cited in the written notice of suspension only to have the railroad change the rule cited during the hearing or in the decision. Railroads must take actions to avoid this and should grant a recess, if appropriate, to allow a conductor to prepare a defense to the violation being cited. Railroads should also note that the OCRB may grant a petition on review if the OCRB finds that citing a different violation caused the petitioner substantial harm.

BLET/UTU commented that FRA must provide immunity from civil enforcement for a railroad that makes a good faith determination pursuant to § 242.407(k) that a conductor's certification should not be suspended. FRA understands BLET/UTU concerns and has strengthened the preamble language in this final rule to address those concerns.

S. Review Board

BLET/UTU commented that the OCRB should be comprised of at least three members and that one of the members should be an attorney. As stated in the NPRM, the creation of the OCRB will require issuance of an internal FRA order. The make-up of the OCRB will be determined in that Order. However, FRA expects that the OCRB will mirror the make-up of the Locomotive Engineer Review Board (LERB) which is currently used by FRA to adjudicate disputes under part 240. FRA expects that a FRA attorney will serve as counsel to the OCRB just as they do to the LERB.

T. Appeals Process

FRA solicited comments whether to add a provision to proposed § 242.503(b) providing that: ''If the petitioner is requesting review of a railroad decision which is based on a failure to comply with any drug or alcohol related rules or a return-to-service agreement, then the petitioner shall supplement his or her petition with all relevant written documents, including the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees. The petitioner should provide written explanation in the petition if written documents that should be reasonably available to the petitioner are not supplied.'' *See* 75 FR 69166, 69185 (Nov. 10, 2010). AAR supported the provision. BLET/UTU commented that FRA should add a requirement for the railroad to notify conductors in writing of their right to acquire the litigation package from the laboratories, MRO, and other service agents and that it be disclosed to the conductor on the record of revocation hearings conducted in compliance with § 242.407(b)(4) for charges of violating § 242.403(e)(12). BLET/UTU suggested that, at a minimum, the notification should contain the exact language contained in 49 CFR 40.329.

Because the OCRB may not need the information listed in 49 CFR 40.329 in all cases and because there may be some cost associated with obtaining the information, FRA is adopting a modified version of the proposal for this final rule which clarifies that petitioners will be responsible for obtaining the information listed in 49 CFR 40.329 if requested by the OCRB. Thus, it will not be mandatory for a petitioner to submit the information listed in 49 CFR 40.329 to the OCRB in all cases involving a violation of § 242.403(e)(12) and FRA expects that, in those cases where the OCRB does want information listed in 49 CFR 40.329, the OCRB will explain to the petitioner what information it is looking to obtain from the petitioner and how the petitioner can get it. Consequently, FRA declines to adopt BLET/UTU's additional requirement.

BLET/UTU submitted numerous comments regarding changes they wanted to see made to the appeals process contained in proposed §§ 242.501, 503, 505, 507, 509 and 511. According to BLET/UTU the changes ''will create a more expeditious process to resolve disputes that may arise from the conductor certification rules.'' The suggested changes include eliminating the opportunity for parties to appeal FRA decisions to the Administrator, incorporating the Administrative Hearing Officer level of appeal into the OCRB process, requiring the OCRB to grant a decision if any procedural error by the railroad is shown, adding an attorney as a member to the OCRB and making the OCRB decision final agency action.

FRA declines to adopt BLET/UTU's proposed revisions to the appeals process. The proposed appeals process was thoroughly discussed during the Working Group meetings and most of BLET/UTU's suggestions were rejected at those meetings. As explained to the Working Group, due process requirements and issues concerning trials *de novo* necessitate that FRA retain the OCRB and AHO as distinct levels of review.

Contrary to BLET/UTU's claims, FRA believes that BLET/UTU's suggested revisions would actually increase the amount of time and cost it takes to resolve the average case on appeal to the FRA. Under the BLET/UTU proposal, FRA expects a significant increase in the number of cases/issues handled by the AHO and the federal courts. For example, under the BLET/UTU proposal, it appears that a decision by the OCRB to deny a petition as untimely would be appealed to Federal court as that decision would constitute final agency action and the opportunity to appeal the decision to the Administrator, as provided for in the NPRM, would be eliminated. As a result, cases would take much longer to resolve and would involve increased costs for all parties involved. Moreover, the BLET/UTU proposal advocates for extending the time for filing a petition of review with the FRA from 4 months as provided in the NPRM to 6 months. That extension would only add to the time required for a case to be resolved by FRA following a railroad's decision to deny or revoke certification.

Although FRA is not adopting BLET/UTU's proposals, FRA is taking steps to make the appeals process more efficient. Over the past two years, the average length of time for the AHO to render a decision in a locomotive engineer case under part 240 has dropped by 6 months due in part to the fact that the AHO is no longer allowing parties to hold cases in abeyance. FRA expects that the AHO will not hold conductor cases in abeyance thereby eliminating one of the main obstacles in achieving faster case processing times. In addition, FRA has revised the requirements proposed in the NPRM to require petitions to be submitted to the Docket Clerk of DOT rather than FRA's Docket Clerk. With that change, the process for submitting petitions to the OCRB will parallel the process for requesting an administrative hearing under part 240 and § 242.507. FRA believes this change will make the process more efficient as DOT Dockets is better equipped to process, scan, and store these types of filings.

U. Civil Penalty Schedule

In the NPRM, FRA noted that Appendix A to the final rule would contain a penalty schedule similar to that FRA has issued for all of its existing rules and that such schedules are statements of policy and therefore not subject to notice and comment requirements. Nevertheless, interested parties were welcomed to submit their views on what penalties may be appropriate. BLET/UTU submitted comments which were considered in developing the penalty schedule found in Appendix A to this final rule.

V. Procedures for Submission of Programs

FRA solicited comments whether to require each railroad to provide its program submission required under § 242.101 and 242.103 electronically. Since FRA did not receive any comments on this issue and because FRA believes that such an option will allow FRA to review submissions more efficiently and eliminate the need to store hardcopies of the numerous submissions, FRA has included such an option in Appendix B to this final rule.

W. Vision Color Tests

In the NPRM, FRA solicited comments regarding which vision color tests should be included in Appendix D to this rule. Since FRA did not receive any comments on this issue and because any changes to the list of vision color tests would appear to fall within the purview of the medical standards working group, the proposed vision color tests contained in the NPRM will be adopted in this final rule.

V. Section-by-Section Analysis

Subpart A—General

Subpart A of the rule contains the general provisions of the rule, including a formal statement of the rule's purpose and scope. The subpart also provides that this rule does not constrain a railroad's ability to prescribe additional or more stringent requirements for its conductors that are not inconsistent with this rule.

Section 242.1 Purpose and Scope

This section, derived from 49 CFR 240.1, prescribes minimum standards for the eligibility, training, testing, certification and monitoring of persons who serve as ''conductors.'' This section indicates that the purpose of the rule is to ensure that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents, and to improve railroad safety.

Despite the fact that a person may have a job classification title other than that of conductor, the conductor certification requirements of this rule apply to that person if he or she meets the definition of conductor. The definition of ''conductor'' and an explanation of who is covered by the definition is discussed in more detail in the section analysis for § 242.7 below.

Section 242.3 Application and Responsibility for Compliance

This section is derived from 49 CFR 240.3. The section provides that the rule applies to all railroads with three exclusions. The first two exclusions address several types of operations that occur on tracks that are not part of the general railroad system. These exclusions encompass operations commonly described as tourist, scenic, or excursion service to the extent that they occur on tracks that are not part of the general railroad system. These exclusions also address operations that occur within the confines of industrial installations commonly referred to as ''plant railroads'' and typified by operations such as those in steel mills that do not go beyond the plant's boundaries and that do not involve the switching of rail cars for entities other than themselves. In other regulations, FRA did not define plant railroad because it was assumed that FRA's jurisdictional policy statement provided sufficient clarification. In 2010, FRA became aware of certain operations that called themselves plant railroads but that were exceeding the limitations required to maintain plant railroad status in accordance with FRA's policy statement. FRA would like to avoid any confusion as to what it means to be a plant railroad by defining the term in this final rule, thereby saving interested persons the effort necessary to cross-reference FRA's jurisdictional policy statement. A further discussion of what is meant by the term ''plant railroad'' is offered in the section-by-section analysis for section 242.7.

FRA also excludes ''tourist, scenic, historic, and excursion operations that are not part of the general railroad system of transportation'' (as defined in § 242.7) from compliance with this rule. In section 242.7, FRA defines these operations as ''a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (*i.e.,* there is no freight, intercity passenger, or commuter passenger railroad operation on the track).'' Excluding these types of operations from this rule is consistent with FRA's jurisdictional policy that already excludes these operations from all but a limited number of Federal safety laws, regulations, and orders.

The third exclusion covers rapid transit operations in an urban area that are not connected to the general system. It should be noted, however, that some rapid transit type operations, given their links to the general system, are within FRA's jurisdiction and FRA specifically intends to have this rule apply to those rapid transit type operations. This rule is not intended to have any effect on FRA's jurisdiction. Since this rule is intended to apply to the same railroads covered by part 240, one should refer to the preamble discussions of 49 CFR 240.3 in 64 FR 60966, 60974 (Nov. 8, 1999), 63 FR 50626, 50636–50637 (Sept. 22, 1998), and 56 FR 28228, 28240 (June 19, 1991) for a more detailed analysis of the applicability of this rule.

Section 242.5 Effect and Construction

This section addresses several legal issues. Paragraph (a) addresses the relationship of this rule to preexisting legal relationships. Paragraph (b) states that FRA does not intend to alter the authority of a railroad to initiate disciplinary sanctions against its employees by issuance of this rule.

Paragraph (c) of this section addresses the issue of ''flowback.'' The term flowback has been used in the industry to describe a situation where an employee leaves his or her current position to return to a previously held position or craft. An example of flowback occurs when a person who holds the position of a conductor subsequently qualifies for the position of locomotive engineer, and at some later point in time the person finds it necessary or preferable to revert back to a conductor position. The reasons for reverting back to the previous craft may derive from personal choice or a less voluntary nature; *e.g.,* downsizing.

Many collective bargaining agreements address the issue of flowback. As a general matter, FRA does not intend to create or prohibit the right to flowback or take a position on whether flowback is desirable. However, paragraph (c) of this section must be read in conjunction with § 242.213, which limits flowback in certain situations. As described in the section analysis for that section below, a person who holds a conductor and locomotive engineer certificate and who has had his or her locomotive engineer certificate revoked could not work as a conductor during the period of revocation. In addition, a person who holds a conductor and locomotive engineer certificate and who has had his or her conductor certification revoked for certain violations could not work as a

locomotive engineer during the period of revocation.

Paragraph (d) of this section addresses employee rights. The intent of the rule is to explicitly preserve any remedy already available to the person and not to create any new entitlements. FRA expects that employees would benefit from this paragraph by referring to it should a railroad use this regulation as an inappropriate explanation for ignoring an employee's rights or remedies. A railroad must consider whether any procedural rights or remedies available to the employee would be inconsistent with this part.

Section 242.7 Definitions

This section contains the definitions that FRA employs in this rule. Most of the definitions are taken essentially verbatim from 49 CFR part 240 and have been thoroughly analyzed in that rulemaking. Parties seeking a detailed analysis of those definitions should refer to the part 240 rulemaking documents. *See,* 54 FR 50890 (Dec. 11, 1989), 56 FR 28228 (June 19, 1991), 58 FR 18982 (Apr. 9, 1993), 60 FR 53133 (Oct. 12, 1995), 63 FR 50626 (Sept. 22, 1998), 73 FR 80349 (Dec. 31, 2008), and 74 FR 68173 (Dec. 23, 2009). Some of the definitions in this rule, however, are not found in part 240 or have been substantively modified from their use in part 240. Those definitions are analyzed below.

As mentioned above, potential rulemakings involving medical standards and 49 CFR part 219 (Control of Alcohol and Drug Use) may impact many of the definitions in part 240 and part 242. For example, definitions relating to medical standards (*e.g.,* ''medical examiner'') and drug and alcohol control (*e.g.,* ''substance abuse disorder'') in parts 240 and 242 may be superseded by definitions provided in those rulemakings. However, until those rulemakings are promulgated, the definitions in parts 240 and 242 will control.

Conductor

Although the RSIA requires FRA to establish a program for the certification of conductors, the Act does not define the term ''conductor.'' Without guidance from the Act, FRA proposed, and RSAC recommended, that the definition of ''conductor'' be based on the generally understood responsibilities of that position, similar to part 240's approach to defining locomotive engineer. This rule defines conductor as ''the crewmember in charge of a train or yard crew as defined in part 218 of this chapter.'' Part 218 defines ''train or yard crew'' as:

''one or more railroad employees assigned a controlling locomotive, under the charge and control of one crew member; called to perform service covered by Section 2 of the Hours of Service Act; involved with the train or yard movement of railroad rolling equipment they are to work with as an operating crew; reporting and working together as a unit that remains in close contact if more than one employee; and subject to the railroad operating rules and program of operational tests and inspections required in §§ 217.9 and 217.11 of this chapter.''

As the use of the singular form of ''crewmember'' suggests, FRA's definition mandates that only one person can be in charge of the train or yard crew and that person is deemed the conductor for purposes of this regulation only. Moreover, in some circumstances, a locomotive engineer, including a remote control operator, will be required to be certified as both a locomotive engineer under 49 CFR part 240 and as a conductor under this rule. *See* 49 CFR 242.213(d). All other train or yard crew members (*e.g.,* assistant conductors, brakemen, hostlers, trainmen, switchmen, utility persons, flagmen, yard helpers, and others who might have different job titles but perform similar duties and are not in charge of a train or yard crew) do not fall within the definition of ''conductor'' for purposes of this rule.

Drug and Alcohol Counselor

The term ''drug and alcohol counselor'' means a person who meets the credentialing and qualification requirements of a ''Substance Abuse Professional'' (SAP), as provided in 49 CFR part 40.

Ineligible or Ineligibility

The term ''ineligible'' or ''ineligibility,'' which is not used in part 240, means that a person is legally disqualified from serving as a certified conductor. The term is broadly defined to cover a number of circumstances in which a person may not serve as a certified conductor. Revocation of certification pursuant to § 242.407 and denial of certification pursuant to § 242.401 are two examples in which a person will be ineligible to serve as a conductor. A period of ineligibility may end when a condition or conditions are met—for example, when a person meets the conditions to serve as a conductor following an alcohol or drug violation pursuant to § 242.115.

Job Aid

The term ''job aid,'' which is not used in part 240, is defined as information regarding other than main track physical characteristics that supplements the operating instructions of the territory over which the locomotive or train movement will occur. The terms ''main track'' and ''physical characteristics'' are discussed below.

The term ''job aid'' is broadly defined in this rule. A job aid consists of information that can be obtained from a variety of sources, including but not limited to, training on the territory pursuant to § 242.119, maps, charts or visual aids of the territory, or a person or persons to contact who are qualified on the territory and who can describe the physical characteristics of the territory. While each railroad will have flexibility in how it conveys the information in a job aid to a conductor, the job aid will, at a minimum have to cover the characteristics of the territory over which the locomotive or train movement will occur including: permanent close clearances, location of permanent derails and switches, assigned radio frequencies in use and special instructions required for movement, if any, and railroad-identified unique operating conditions.

Pursuant to § 242.121(c)(4)(v), each railroad will be required to test conductors and conductor candidates on the use of any job aid that a railroad could provide a conductor. Section 242.301(d) describes the conditions under which a railroad shall provide a conductor with a job aid.

Main Track

The term ''main track'' is defined as a track upon which the operation of trains is governed by one or more of the following methods of operation: Timetable; mandatory directive; signal indication; positive train control as defined in 49 CFR part 236; or any form of absolute or manual block system. That definition mirrors the definition of ''main track'' in 49 CFR part 240, but also includes a reference to positive train control.

Medical Examiner

The term ''medical examiner'' is defined as a person licensed as a doctor of medicine or doctor of osteopathy. A medical examiner may be a qualified full-time salaried employee of a railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis, or a qualified practitioner designated by the railroad to perform functions in connection with medical evaluations of employees. Under this rule, the medical examiner owes a duty to make an honest and fully informed evaluation of the condition of an employee.

The only difference between the definition of medical examiner in this

rule and the definition in 49 CFR part 240 is that under part 240, the medical examiner owes ''a duty to the railroad.'' In this rule, however, the words ''to the railroad'' have been deleted. This change was made to address a concern of some Working Group members that a medical examiner should not owe a duty to just the railroad but rather should owe a duty to both the railroad and the employee being evaluated.

On-the-Job Training

The term ''on-the-job training,'' which is not defined in part 240, means job training that occurs in the workplace, *i.e.,* the employee learns the job while doing the job.

Passenger Conductor

The term ''passenger conductor'' is defined as a conductor who has also received emergency preparedness (EPREP) training under 49 CFR part 239. Interested parties should note that nothing in this rule requires a conductor for private/non-revenue movements (*e.g.,* business car specials) to have the EPREP training. This position is consistent with 49 CFR 239.3(b).

Physical Characteristics

The term ''physical characteristics,'' which is not defined in part 240, means the actual track profile of and physical location for points within a specific yard or route that affect the movement of a locomotive or train. ''Physical characteristics'' include both main track physical characteristics (the term ''main track'' is analyzed above) and other than main track physical characteristics. Examples of physical characteristics could include permanent close clearances, location of permanent derails and switches, and grade.

Plant Railroad

FRA includes a definition of plant railroad in this final rule to aid in the understanding of the application of this part pursuant to § 242.3. The definition coincides with FRA's longstanding explanation of how the agency will not exercise its jurisdiction over a plant railroad that does not operate on the general system and does not move cars for other entities. *See* 49 CFR 209, app. A.

Qualified

The term ''qualified'' is defined as a person who has successfully completed all instruction, training and examination programs required by the employer, and the applicable parts of this chapter and therefore could reasonably be expected to be proficient on all safety related tasks the person is assigned to perform. The definition of ''qualified'' in this rule differs from its definition in part 240 in that part 240's definition focuses on a person's knowledge whereas the definition in this rule focuses not only on knowledge but also on whether the person could reasonably be expected to be proficient at performing all assigned tasks. The update to the definition of ''qualified'' is an attempt to ensure that a railroad's instruction and training program not only provide knowledge of how to perform a task but also the ability to proficiently perform the task.

Qualified Instructor

The term ''qualified instructor,'' which is derived from the definition of ''instructor engineer'' in part 240, means a person who has demonstrated, pursuant to the railroad's written program, an adequate knowledge of the subjects under instruction and, where applicable, has the necessary operating experience to effectively instruct in the field. A qualified instructor is required to have the following qualifications:

(1) Is a certified conductor under this part; and

(2) Has been selected as such by a designated railroad officer, in concurrence with the designated employee representative, where present; or

(3) In absence of concurrence provided in paragraph (2) of this definition, has a minimum of 12 months service working as a train service employee.

If a railroad does not have designated employee representation, then a person employed by the railroad need not comply with items (2) or (3) of this definition to be a ''qualified instructor.''

Items (2) and (3), while not found in part 240's definition of ''instructor engineer,'' are included here to address the concerns of some Working Group members that employees, through their representatives, should have input in the selection of instructors who might be viewed as inexperienced (*i.e.,* a person with less than 12 months service working as a train service employee).

Railroad Rolling Stock

The term ''railroad rolling stock'' means on-track equipment that is either a ''railroad freight car'' (as defined in § 215.5 of this chapter) or a ''passenger car'' (as defined in § 238.5 of this chapter). The term matches the definition of ''railroad rolling stock'' in the NPRM and part 240 except that the word ''railroad'' has been added to the term ''freight car'' to mirror the defined term (''railroad freight car'') in § 215.5 of this chapter.

Remote Control Operator

The term ''remote control operator'' (RCO) means a certified locomotive engineer, as defined in § 240.7 of this chapter, certified by a railroad to operate remote control locomotives pursuant to § 240.107 of this chapter. Although this term is not defined in part 240, FRA intends for the term to have the same meaning in this rule as it does in part 240. FRA defines the term in this rule to avoid any confusion as to who this rule is referring to when it references a remote control operator.

Substance Abuse Disorder [3]

The term ''substance abuse disorder'' refers to a psychological or physical dependence on alcohol or a drug or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. FRA intends for this definition to include drug and alcohol users who engage in abuse patterns which result in ongoing safety risks and violations of FRA drug and alcohol prohibitions. These types of substance abusers may demonstrate compulsive, excessive, or self-damaging use of drugs or alcohol such as may manifest as a DUI or DWI, a violation of FRA drug or alcohol prohibitions, substance-related accidents or incidents, or substance-related behavior which has resulted in a significant safety breach while under the influence or impaired (including hangover effect). Often these patterns of abuse may eventually result in dependence, physiological injury, or psychological harm, but are not necessarily defined by a diagnosis offered by a health care professional.

A substance abuse disorder is ''active'' within the meaning of this rule if the person (1) Is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or (2) has failed to successfully complete primary treatment or successfully participate in aftercare as directed by a Substance Abuse Professional (SAP) or Drug and Alcohol Counselor (DAC).

The definition of substance abuse disorder in this rule is the same as the definition in part 240 except in two respects. First, part 240's definition refers to an ''EAP Counselor'' rather than a SAP or DAC. Since SAPs and DACs often have more stringent credential, knowledge, training, and

[3] The section-by-section analysis of the term ''substance abuse disorder'' in the NPRM has been revised in this final rule to reflect more accurately the approach taken by FRA to substance abuse disorders in parts 219 and 240.

continuing education requirements relating to substance abuse than EAPs, SAPs and DACs may be better qualified to direct a person's treatment or aftercare. Second, part 240 uses the phrase ''is currently using alcohol and other drugs'' when describing active substance abuse disorders. The rule revises that phrase to read ''is currently using alcohol or other drugs.'' FRA made that revision to clarify its intent that a person with an active substance abuse disorder could be using alcohol *or* other drugs.

The definition for ''substance abuse disorder'' is similar to the language employed to govern disposition of employees referred to an employee assistance program under the ''co-worker report'' (bypass) provision of the alcohol/drug regulations. It describes the condition of substance abuse or chemical dependency which requires intervention and/or treatment as determined by an appropriate professional. FRA's intent is that a person with uncontrolled use of alcohol or drugs is not a suitable candidate for the highly sensitive duties entrusted to a conductor.

The definition explains that the disorder is considered ''active'' within the meaning of the rule if the person is not currently abstaining from use of alcohol and drugs (except under medical supervision consistent with FRA's alcohol/drug regulations), has failed to successfully participate in aftercare as directed by a SAP or DAC, or has failed to successfully complete the assigned course of education, counseling, or treatment as required. FRA is aware that many individuals abuse alcohol and drugs, with consequent ill-effects on their health and potential implications for fitness, without fitting within common definitions of chemical dependency. The critical point here with respect to safety is that conductors not be in the grip of uncontrolled abuse patterns that, if addressed through treatment and permanent abstinence, could be put behind them.

Substance Abuse Professional (SAP)

The term ''Substance Abuse Professional'' (SAP) means a person who meets the qualifications of a SAP, as provided in 49 CFR part 40. To avoid interfering with the established rules and definitions in DOT's drug and alcohol regulations, the reference to a duty found in the NPRM's definition of SAP has been deleted.

Territorial Qualifications

The term ''territorial qualifications'' means possessing the necessary knowledge concerning a railroad's operating rules and timetable special instructions including; familiarity with applicable *main track and other than main track physical characteristics* of the territory over which the locomotive or train movement will occur. Although not defined in part 240, the term is derived from part 240's requirement that, with certain exceptions, a locomotive engineer may not operate a locomotive over a territory unless the engineer is ''qualified on the physical characteristics of the territory.'' *See* 49 CFR 240.231. Pursuant to § 242.301 of this rule, a person, with certain exceptions, could not serve as a conductor unless the person was certified and possessed the necessary territorial qualifications for the applicable territory.

Tourist, Scenic, Historic, or Excursion Operations That Are Not Part of the General Railroad System of Transportation

The final rule offers a definition for the phrase ''tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation'' in order to explain the plain meaning of that phrase as used in the section. *See* § 242.3. The phrase means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (*i.e.,* there is no freight, intercity passenger, or commuter passenger railroad operation on the track). If there is any freight, intercity passenger, or commuter passenger railroad operation on the track, the track would be considered part of the general system. *See* 49 CFR part 209, app. A. In the analysis for the applicability section, there is an explanation for why FRA is proposing not to exercise its jurisdiction over these types of railroad operations.

Section 242.9 Waivers

This section tracks the regulatory language in 49 CFR 240.9 and provides the requirements for a person seeking a waiver of any section of this rule.

Section 242.11 Penalties and Consequences for Noncompliance

This section tracks the regulatory language in 49 CFR 240.11 and provides minimum and maximum civil penalty amounts determined in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410 Stat. 890, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996 Public Law 104–134, April 26, 1996, and the RSIA.

Section 242.13 Information Collection Requirements

This section lists the sections of the rule which contain information collection requirements.

Subpart B—Program and Eligibility Requirements

This subpart contains the basic elements of the conductor certification program required by this rule. Based on the RSIA's requirement for ''certification'' of conductors and FRA's experience with certification of locomotive engineers, this rulemaking adopts a certification system (*i.e.,* FRA sets eligibility criteria but leaves it to the railroads to evaluate candidates by those standards) rather than a traditional licensing system (*i.e.,* a government agency sets eligibility criteria and evaluates candidates). As with part 240, this rule affords railroads considerable discretion in the daily administration of their certification programs.

Section 242.101 Certification Program Required

This section requires railroads to have a written program composed of six elements, each of which comports with specific provisions relating to that element. The effective date of the final rule is January 1, 2012. The rest of the dates provided in this rule (*e.g.,* dates by which each railroad must designate its eligible conductors in § 242.105) are based on that effective date.

Section 242.103 Approval of Design of Individual Railroad Programs by FRA

This section requires each railroad to submit its certification program to FRA for approval in accordance with the schedule provided in the final rule. The schedule for submissions in paragraph (a) requires Class I railroads, Amtrak, the commuter railroads, and Class II railroads to submit their programs at an earlier date than the Class III railroads or others not classified elsewhere. The format and contents of the submission are discussed at length in appendix B to this rule.

Unlike part 240, this rule requires railroads to serve a copy of their submissions, resubmissions and material modifications on the president of each labor organization that represents the railroad's certified conductors. Within 45 days of the filing of any of those submissions with FRA, any designated representative of certified conductors could submit comments on the railroad's submissions to FRA. Although FRA, and not the commenters, will determine whether a railroad's submission is approved, FRA

expects that comments will be useful in determining whether the railroad's program conforms to the criteria set forth in this rule.

This section also requires each railroad to indicate how it intends to employ future conductors. If a railroad accepts the responsibility for training a previously uncertified person to become a conductor, the railroad must explain its training regimen for such trainees, including provisions for relying on an outside training organization to provide the actual training.

The rule provides 30 days for FRA review and approval of railroad programs. FRA is proceeding in this manner because most railroads have existing programs, including locomotive engineer certification programs, intended to accomplish a similar goal that can be easily modified. The quality of such programs is generally good and the problems that may be encountered would not likely involve basic design flaws and generally would not surface until FRA has had time to observe the actual administration of the program. In screening all submissions, FRA should be able to quickly detect any substantial deficiencies. Given the quality of existing programs, FRA sees little value in delaying implementation of the programs for time-consuming agency review. FRA may, of course, disapprove any program during the review cycle or at a later date. FRA will explain any deficiencies in writing. This section requires a timely railroad response to an FRA disapproval action as a railroad will have no more than 30 days to revise and resubmit its program.

Paragraph (g)(2) of this section, which has been modified from the NPRM, provides that if the Administrator informs a railroad of deficiencies in its program more than 30 days after the initial filing date, the original program may remain in effect until 30 days after approval of the revised program is received so long as the railroad has complied with the requirements for resubmitting a program that was deemed deficient.

Section 242.105 Schedule for Implementation

This section contains the timetable for implementation of the rule. Paragraphs (a) and (b) of this section require that railroads, in writing, designate as certified conductors all persons authorized by the railroad to perform the duties of a conductor as of the effective date of the final rule, or authorized between the effective date of the final rule and dates specified in paragraph (d) or (f) of this section, and to issue a certificate to each person it designates. The mandatory designation requirement of this section is included to address the concerns of some Working Group members that railroads should not be given the discretion to potentially engage in disparate treatment of its employees (*i.e.,* designate and provide a certificate to some people who are authorized to perform the duties of a conductor as of the effective date of the final rule but not others).

Paragraph (c) of this section requires each railroad to make formal determinations concerning those employees it has designated as conductors within 36 months of the date for compliance by its class of railroad. Pursuant to this paragraph, a designated conductor may serve as a conductor for up to 36 months from the date of compliance for the railroad (*i.e.,* the date specified in paragraph (d) or (e) of this section). At the end of the 36 months, however, the designated conductor can no longer serve as a conductor unless he or she successfully completes the tests and evaluations provided in subpart B of this rule (*i.e.,* the full certification process). Railroads should note that they may not test and evaluate a designated conductor or conductor candidate under subpart B of this rule until they have a certification program approved by the FRA pursuant to § 242.103.

In order to test and evaluate all of its designated conductors by the end of the 36-month period, a large railroad will likely have to begin that process well in advance of the end of the 36 months. For example, paragraph (c), which is derived from part 240's designation provision, would permit a railroad to test and evaluate one third of its designated conductors within 12 months of the railroad's date of compliance; another one third within 24 months of its date of compliance; and the final one third within 36 months of its date of compliance.

Some of the Working Group members raised concerns about designated conductors who would be eligible to retire within 36 months of the date for compliance by their class of railroad. Specifically, some members did not believe it was an efficient use of resources to perform the full certification process on a designated conductor who was going to retire before the end of the 36-month designation period. To address those concerns, paragraph (c)(1) provides that a designated conductor, who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or with the terms of the Railroad Retirement Act (45 U.S.C. 231) within 36 months prior to the date they would be required to be tested and evaluated under subpart B of this rule, may request, in writing, that the railroad not perform the full certification process on that designated conductor until 36 months from the date of required testing and evaluation.

Paragraph (c)(2) provides that, upon receipt of that written request, a railroad may wait to perform the full certification process on the person making the request until the end of the 36-month designation period. Thus, paragraphs (c)(1) and (c)(2) allow designated conductors to serve as conductors for the full 36-month designation period and then retire before being subjected to the full certification process.

While it is in the railroads' interest not to perform the full certification process for a person who is going to retire once the designation period expires and thus in their interest to grant as many requests as possible, it may not be feasible to accommodate every request that is made. If, for example, a significant number of designated conductors on a railroad properly request that the railroad wait to recertify them at the end of the designation period, but then do not, in fact, retire by the expiration of the 36-month designation period, the railroad might not be able to certify everyone in time and would risk violating this final rule. In recognition of that risk and the need to give the railroads some flexibility to comply with the rule, paragraph (c)(2) also provides that a railroad that grants any request must grant the request of all eligible persons ''to every extent possible.''

In addition, paragraph (c)(3) provides that a designated conductor who is also subject to recertification under part 240 may not make a request under paragraph (c)(1) of this section. That provision recognizes that railroads would likely want to have concurrent certification processes for certifying a person who will be both a certified locomotive engineer and a conductor and thus it would not be appropriate, in that instance, for a designated conductor who is already subject to recertification under part 240 to make a request to delay the full conductor certification process.

Paragraphs (d), (e), and (f) provide that after specified dates, no railroad may certify or recertify a person as a conductor and no person may serve as a conductor unless that person had been tested and evaluated in accordance with the procedures provided in subpart B of the rule and issued a certificate. Interested parties should note that the

month provided in paragraph (e) has changed from September 2012 (as provided in the NPRM) to October 2012 so that Class III railroads would have approximately the same amount of time (*i.e.,* two months) as Class I, II, and commuter railroads between submission of the program to FRA and the time for having an approved program in place.

Section 242.107 Types of Service

This section creates two types of conductor service: conductor and passenger conductor. As indicated in the definition section of this rule, a ''passenger conductor'' is a ''conductor'' who has also received emergency preparedness training under 49 CFR part 239.

Paragraph (c) of this section, derived from 49 CFR 240.107(e), prohibits a railroad from reclassifying the certification of any type of certified conductor to a different type of conductor certification during the period in which the certification is otherwise valid except when a conductor completes 49 CFR part 239 emergency training and is certified as a passenger conductor. For example, this rule prohibits a railroad from requiring a passenger conductor to exchange his or her passenger conductor certificate for a conductor certificate during the period in which the passenger conductor certificate is otherwise valid.

While this rule prohibits the practice of reclassification, it does not prevent the railroads from pursuing other measures to ensure the safe performance of conductor service. For example, the rule does not prevent a railroad from placing restrictions on a certificate pursuant to paragraph (d) of this section. It should be noted, however, that while paragraph (d) permits a railroad to place restrictions on a certificate, any restrictions would be applied and reviewed in accordance with internal railroad rules, procedures and processes. Part 242 does not govern the issuance or review of restrictions as that would be a matter handled under a railroad's internal discipline system or collective bargaining agreement. *See* § 242.5(a), (b), and (d).

Section 242.109 Determinations Required for Certification and Recertification

This section lists the determinations required for evaluating a candidate's eligibility to be certified or recertified. The reference to § 242.403 in paragraph (a) of this section is to ensure that railroads determine that a candidate is not currently ineligible to hold a certification due to a revocation addressed in subpart E of this rule.

Paragraph (b)(1) has been modified to clarify the intent of that section. FRA deleted references to ''railroad employment'' records and ''railroad safety conduct'' since the paragraph also applies to non-railroad conduct such as motor vehicle operation. Interested parties should note that despite the provisions in §§ 242.111 and 242.115 requiring a review of safety conduct information from the preceding 5 years, paragraph (b)(1) of this section does not permit a railroad to consider information concerning safety conduct that occurred prior to the effective date of this final rule. Although that paragraph may result in an evaluation of less than 5-years's worth of information for some conductors, it is included in part 242 for the reasons the provision was also included in the part 240 rulemaking. *See* 56 FR 28228, 28242 (June 19, 1991).

Since motor vehicle data is required to be sent to the railroad rather than to the candidate, paragraphs (d) and (e) of this section require a railroad to provide a candidate for certification or recertification an opportunity to review and comment on any record which contains adverse information. This review will avoid the potential for reliance on records that were somehow erroneously associated with a candidate.

Paragraph (g) of this section provides flexibility to railroads and conductors or conductor candidates in obtaining the information required by §§ 242.111 and 242.113. For example, paragraph (g) would permit a conductor and a railroad to enter into an agreement allowing a railroad to request the conductor's service record from a previous employing railroad pursuant to § 242.113(c).

Section 242.111 Prior Safety Conduct as Motor Vehicle Operator

This section, derived from 49 CFR 240.111 and 240.115, provides the requirements and procedures that a railroad must follow when evaluating a conductor or conductor candidate's prior conduct as a motor vehicle operator. Although some members of the Working Group suggested that information regarding the prior safety conduct as a motor vehicle operator was unnecessary in determining whether a person should be certified as a conductor, FRA believes that the prior safety conduct of a motor vehicle operator is one indicator of that person's drug and/or alcohol use and therefore an important piece of information for a railroad to consider.

Pursuant to this section, each person seeking certification or recertification as a conductor must request in writing that the chief of each driver licensing agency that issued him or her a driver's license within the preceding five years provide a copy of the person's driving record to the railroad. Unlike part 240, this rule would not require individuals to also request motor vehicle operator information from the National Driver Registry (NDR). It is FRA's understanding that, based on the NDR statute and regulation (*see* 49 U.S.C. chapter 303 and 23 CFR part 1327), railroads are prohibited from running NDR checks or requesting NDR information from individuals seeking employment as certified conductors.

During the Working Group meetings, members of the Working Group raised concerns about conductor candidates who had properly requested motor vehicle operator information but were unable to be certified or recertified as conductors because of a delay or mix-up by a driver licensing agency in sending the required information to the railroad. To address that concern, paragraphs (c) and (d) of this section require a railroad to certify or recertify a person for 60 days if the person: (1) Requested the required information at least 60 days prior to the date of the decision to certify or recertify; and (2) otherwise meets the eligibility requirements provided in § 242.109 of this rule. If a railroad certifies or recertifies a person for 60 days pursuant to paragraphs (c) or (d) but is unable to obtain and evaluate the required information during those 60 days, the person is ineligible to perform as a conductor until the information can be evaluated. However, if a person is simply unable to obtain the required information, that person or the certifying or recertifying railroad could petition for a waiver from FRA (*see* 49 CFR part 211). During the pendency of the waiver request, a railroad would have to certify or recertify a person if the person otherwise meets the eligibility requirements of § 242.109 of this final rule.

Paragraph (l) of this section requires certified conductors or persons seeking initial certification to notify the employing railroad of motor vehicle incidents described in paragraph (n) of this section within 48 hours of the conviction or completed state action to cancel, revoke, suspend, or deny a motor vehicle driver's license. The paragraph also provides that, for purposes of conductor certification, a railroad cannot have a more restrictive company rule requiring an employee to report a conviction or completed state action to cancel, revoke, or deny a motor vehicle drivers license in less than 48 hours.

The reasoning behind paragraph (l) involves several intertwined objectives. As a matter of fairness, a railroad should not revoke, deny, or otherwise make a person ineligible for certification until that person had received due process from the state agency taking the action against the motor vehicle license. Otherwise, action pursuant to this part might be deemed premature since the American criminal justice system is based on the concept of a person being innocent until proven guilty. Further, by not requiring reporting until 48 hours after the completed state action, the rule will have the practical effect of ensuring that a required referral to a DAC under paragraph (o) of this section would not occur prematurely. Interested parties should note however, that paragraph (l) does not prevent an eligible person from choosing to voluntarily self-refer pursuant to § 242.115(d)(3). Nor does it prevent the railroad from referring the person for an evaluation under an internal railroad policy if other information exists that identifies the person as possibly having a substance abuse disorder. Further, the restriction applies only to actions taken against a person's certificate and does not effect on a person's right to be employed by that railroad.

As mentioned above, paragraph (o) of this section provides that if such a motor vehicle incident described in paragraph (n) is identified, the railroad is required to provide the data to its DAC along with ''any information concerning the person's railroad service record.'' Furthermore, the person would have to be referred for evaluation to determine if the person had an active substance abuse disorder. If the person has such a disorder, the person could not be currently certified. Alternatively, even if the person is evaluated as not currently affected by an active substance abuse disorder, the railroad would be required, if recommended by a DAC, to condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs, or both. The intent of this provision is to use motor vehicle records to expose conductors or conductor candidates who may have active substance abuse disorders and make sure they are referred for evaluation and any necessary treatment before allowing them to perform safety sensitive service. Interested parties should note that any testing performed as a result of a DAC's recommendation under paragraph (o) will be done under company authority, not Federal, although the testing will still be required to comply with the ''technical standards'' of part 219, subpart H, and part 40.

Paragraph (o)(5) has been added to the final rule to clarify that a failure to cooperate in the DAC evaluation will result in the person being ineligible to perform as a conductor until such time as the person cooperates in the evaluation.

Section 242.113 Prior Safety Conduct as an Employee of a Different Railroad

This section of the rule, which is derived from 49 CFR 240.113 and 240.205, provides a process for requesting information regarding the candidate's prior safety conduct, if any, as an employee of a different railroad.

Section 242.115 Substance Abuse Disorders and Alcohol/Drug Rules Compliance

This section, which is derived from 49 CFR 240.119 and 240.205, addresses two separate dimensions of the alcohol/drug problem in relation to conductors—(1) Active substance abuse disorders and (2) specific alcohol/drug regulatory violations. This section and § 242.111 address certain situations in which inquiry must be made into the possibility that the individual has an active substance abuse disorder if the individual is to obtain or retain a certificate. The fact that specific instances are cited in this section would not exclude the general duty of the railroad to take reasonable and proportional action in other appropriate cases. Declining job performance, extreme mood swings, irregular attendance and other indicators may, to the extent not immediately explicable, indicate the need for an evaluation under internal railroad policies.

FRA acknowledges that there could be legitimate reasons why someone might exhibit some or all of the conditions identified above. However, those conditions, to the extent not immediately explicable, may also indicate a need for an evaluation. The purpose of identifying conditions is not to require (and does not require) the railroads to order an evaluation anytime a listed condition is exhibited. Rather, FRA is simply providing guidance as to conditions that may, given the context, call for an evaluation under internal railroad policies. Moreover, FRA remains vigilant of harassment and intimidation and will take appropriate action where such conduct is discovered.

Paragraph (a) requires each railroad to address both dimensions of this issue in its program. Paragraphs (b) and (c) require each railroad to determine that a person initially certifying or a conductor recertifying meets the eligibility requirements of this section. Additionally, each railroad is required to retain the documents used to make that determination.

Paragraph (d) provides that a person with an active substance abuse disorder cannot be currently certified as a conductor. This means that appropriate action must be taken with respect to a certificate (whether denial or suspension) whenever the existence of an active substance abuse disorder comes to the official attention of the railroad, with the exception discussed below. Paragraph (d) also provides a mechanism for an employee to voluntarily self-refer for substance abuse counseling or treatment.

Paragraph (e) addresses conduct constituting a violation of § 219.101 or § 219.102 of the alcohol/drug regulations. Section 219.101 prohibits any employee from going on or remaining on duty in covered service while using, possessing, or being under the influence of or impaired by alcohol or a controlled substance or with a blood alcohol concentration of .04 or more. An employee may also not use alcohol either within four hours of reporting for covered service or after receiving notice to report for covered service, whichever is lesser. This is conduct that specifically and directly threatens safety in a way that is wholly unacceptable, regardless of its genesis and regardless of whether it has occurred previously. In its more extreme forms, such conduct is punishable as a felony under the criminal laws of the United States (18 U.S.C. 341 *et seq.*) and a number of states.

Section 219.102 prohibits use of a controlled substance by a covered employee, at any time, on or off duty, except under the exception for approved medical use. Abuse of marijuana, cocaine, amphetamines, and other controlled substances poses unacceptable risks to safety.

Under the alcohol/drug regulations, whenever a violation of § 219.101 or § 219.102 is established based on authorized or mandated chemical testing, the employee must be removed from service and may not return until after a SAP evaluation, any needed treatment, or a negative return-to-duty test, and is subject to follow-up testing (as required by § 219.104). This structure suggests an absolute minimum for action when a conductor is determined to have violated one of these prohibitions. Considering the need both for general and specific deterrence with respect to future unsafe conduct, additional action should be premised on

the severity of the violation and whether the same individual has prior violations.

One key consideration in evaluating this conduct and appropriate responses is the duration of retrospective review. This rule requires railroads to consider conduct that occurred within the period of 60 consecutive months prior to the review. This is the same period provided in this rule as the maximum period of ineligibility for certification following repeated alcohol/drug violations and is the same period used in part 240. Use of a 5-year cycle reflects anecdotal experience in the railroad industry indicating that conduct committed as much as 5 years before may tend to predict future alcohol or drug abuse behavior (and recognizes the reality that most individual violations are probably not detected). It also reflects a certain confidence in the resilience of human nature—*i.e.,* a reasonable expectation that the person who remains in compliance for that period of time will not again be found in violation. Of course, railroads retain the flexibility to consider prior conduct (including conduct more than 5 years prior) in determining whom they will hire as conductors.

Interested parties should note that conduct violative of the FRA proscriptions against alcohol and drugs need not occur while the person is serving in the capacity of a conductor in order to be considered. For instance, an employee who violated § 219.101 while working as a brakeman and then sought conductor certification six months later (under the provision described below) would not be currently eligible for certification. The same is true under part 240—an employee who violates § 219.101 while working as a brakeman and then seeks locomotive engineer certification six months later would not be eligible for certification at that time. The railroad's responsibility would not be limited to periodic recertification. This rule requires a review of certification status for any conduct in violation of § 219.101 or § 219.102.

The rule requires a determination of ineligibility for a period of 9 months for an initial violation of § 219.101. This parallels the 9-month disqualification in § 240.119(c)(4)(iii). FRA does not believe that a conductor should be able to seek the shelter of a collective bargaining agreement or more lenient company policy in the case of a clear on-the-job violation, insofar as Federal eligibility to serve as a conductor is concerned.

Specifying a period of ineligibility serves the interest of deterrence while giving further encouragement to co-workers to deal with the problem before it is detected by management. In order to preserve and encourage co-worker referrals, the 9-month period can only be waived in the case of a qualifying co-worker report (*see* § 219.405). FRA believes that this distinction in treatment is warranted as a strong inducement to participation because co-worker referral programs help identify troubled employees prior to those employees getting into accidents and incidents. A strong inducement to refer a co-worker is a worthy goal if it may contribute to a reduction in accidents and incidents. Although FRA does not know how many actual co-worker reports may be generated, the intended result would be served if an atmosphere of intolerance for drug and/or alcohol abusing behavior is reinforced in the workplace and violators know that they may be reported by their colleagues if they report for duty impaired.

In the case of a second violation of § 219.101, the conductor would be ineligible for a period of 5 years. Given railroad employment practices and commitment to alcohol/drug compliance, it is likely, of course, that any individual so situated may also be permanently dismissed from employment. However, it is important that the employing railroad also follow through and revoke the certificate under this rule so that the conductor could not go to work for another railroad within the 5-year period using the unexpired certificate issued by the first railroad as the basis for certification. These sanctions mirror the sanctions in § 240.119.

Under this rule, one violation of § 219.102 within the 5-year window would require only temporary suspension and the minimum response described in § 242.115(f) (referral for evaluation, treatment as necessary, negative return-to-duty test, and appropriate follow-up). This parallels the approach taken in part 240 and reflects FRA's wish not to undercut the therapeutic approach to drug abuse employed by many railroads. This approach permits first-time positive drug tests to be handled in a non-punitive manner that concentrates on remediation of any underlying substance abuse problem and avoids the adversarial process associated with investigations, grievances and arbitrations under the Railway Labor Act and collective bargaining agreements. A second violation of § 219.102 would subject the employee to a mandatory 2-year period of ineligibility. A third violation within 5 years would lead to a 5-year period of ineligibility.

This rule also addresses violations of §§ 219.101 and 219.102 in combination. A person violating § 219.101 after a prior § 219.102 violation would be ineligible for 3 years; and the same would be true for the reverse sequence.

Refusals to participate in chemical tests are treated as if the test were positive. A refusal to provide a breath or body fluid sample for testing under the requirements of 49 CFR part 219 when instructed to do so by a railroad representative are treated, for purposes of ineligibility under this section, in the same manner as a violation of: (1) § 219.101, in the case of a refusal to provide a breath sample, or a blood specimen for mandatory post-accident toxicological testing; or (2) § 219.102, in the case of a refusal to provide a urine specimen for testing. Interested parties should note that 49 CFR 40, subpart I, provides the medical conditions under which an individual's failure to provide an sufficient sample is not deemed a refusal. Moreover, subpart G of FRA's Control of Alcohol and Drug Use Regulation excuses a covered employee from compliance with the requirement to participate in random drug and alcohol testing ''in the case of a documented medical or family emergency.'' *See* 49 CFR 219.603 and 219.609. Those provisions are incorporated into this rule's use of the word ''refuses.''

Interested parties should also note that if a person, covered by 49 CFR part 219, refuses to provide a breath or a body fluid specimen or specimens when required to by the railroad under a mandatory provision of 49 CFR part 219, then the railroad, apart from any action it takes under part 242, is required to remove that person from covered service and disqualify that person from working in covered service for 9 months. *See,* 49 CFR 219.104 and 219.107; *see also,* 49 CFR part 219 subpart H and 49 CFR 40.191 and 40.261. Paragraph 242.115(e)(4(iv)(B) has been modified in this final rule by removing the subpart citations and adding the phrase ''for alcohol testing.'' Those modifications are simple clarifications to conform the final rule to the provisions of part 219.

Paragraph (f) prescribes the conditions under which employees may be certified or recertified after a determination that the certification should be denied, suspended, or revoked, due to a violation of § 219.101 or § 219.102 of the alcohol/drug regulations. These conditions are derived from the conditions in § 240.119(d) and closely parallel the return-to-duty provisions of the alcohol/drug rule. Interested parties should note

that 242.115(f)(1)(iii) has been clarified in this final rule with respect to alcohol concentration to more accurately reflect the provisions of FRA's alcohol/drug rule. Interested parties should also note that the regulation does not require compensation of the employee for the time spent in this testing, which is a condition precedent to retention of the certificate; but the issue of compensation would ultimately be resolved by reference to the collective bargaining agreement or other terms and conditions of employment under the Railway Labor Act. Moreover, a railroad that intends to withdraw its conditional certification must afford the conductor the hearing procedures provided by § 242.407 if the conductor does not waive his or her right to the hearing.

Paragraph (g) ensures that a conductor, like any other covered employee, can self-refer for treatment under the alcohol/drug rule (§ 219.403) before being detected in violation of alcohol/drug prohibitions and would be entitled to confidential handling of that referral and subsequent treatment. This means that a railroad would not normally receive notice from the DAC of any substance abuse disorder identified as a result of a voluntary self-referral under 49 CFR 219.403. However, the paragraph also requires that the railroad policy must (rather than may) provide that confidentiality is waived if the conductor fails to participate successfully in treatment as directed by the DAC pursuant to 49 CFR 219.403, to the extent that the railroad must receive notice that the employee has an active substance abuse disorder so that appropriate certificate action can be taken. The effect of this provision is that the certification status of a conductor who seeks help and cooperates in treatment will not be affected, unless the conductor fails to follow through.

Section 242.117 Vision and Hearing Acuity

This section contains the requirements for visual and hearing acuity testing that a railroad must incorporate in its conductor certification program. The visual requirements are the same as those provided in 49 CFR 240.121. Although the testing procedures and standards for the hearing requirements are more stringent than those contained in 49 CFR 240.121 and were derived from the procedures and standards provided in 49 CFR part 227, the criteria that must be met to pass the hearing test is identical to the criteria in part 240.

Paragraph (f), is intended to address, among other things, situations in which a conductor's certificate states that he or she is required to use a corrective device, such as glasses, but the conductor then undergoes a corrective procedure, such as laser eye surgery, which eliminates the need for the corrective device. If that conductor wants to serve as a conductor without using the corrective device listed on the card, then, following the corrective procedure, he or she should obtain a written determination from the railroad's medical examiner that the conductor can safely perform without using the corrective device. In addition, the certificate should be updated to reflect that the conductor is no longer required to use the corrective device while serving as a conductor.

Although some individuals may not be able to meet the threshold acuity levels in this rule, they may be able to compensate in other ways that will permit them to function at an appropriately safe level despite their physical limitations. Paragraph (j) of this section permits a railroad to have procedures whereby doctors can evaluate such individuals and make discrete determinations about each person's ability to compensate for his or her physical limitations. If the railroad's medical examiner concluded that an individual had compensated for his or her limitations and could safely serve as a conductor on that railroad, the railroad could certify that person under this regulation once the railroad possesses the medical examiner's professional medical opinion to that effect.

Paragraph (k) of this section addresses the issue of how soon after learning of a deterioration of his or her best correctable vision or hearing a certified conductor would have to notify the railroad of the deterioration. FRA is concerned with the safe performance of conductor service, not whether a person can notify a railroad within a set time frame. Thus, paragraph (k) requires notification ''prior to any subsequent performance as a conductor.'' Certified conductors should note that willful noncompliance with this requirement could result in enforcement action.

As mentioned above, it is possible that a regulation recommended by the Medical Standards Working Group and adopted by FRA could contain requirements that supersede the hearing and vision standards and requirements in this rule.

Section 242.119 Training

This section, in compliance with the training requirements of the RSIA, requires railroads to provide initial and periodic training of conductors. That training is necessary to ensure the conductors have the knowledge, skills, and abilities necessary to competently and safely perform all of the safety-related duties mandated by Federal laws, regulations, and orders.

Paragraph (c) of this section requires railroads to document a conductor's knowledge of, and ability to comply with, Federal railroad safety laws and regulations, and railroad rules used to implement them. In addition, that paragraph requires railroads to document that a conductor demonstrated that he or she is qualified on the physical characteristics of the railroad, or its pertinent segments, over which that person will perform service. This section also requires railroads to review and modify their training program whenever new safety-related railroad laws, regulations, technologies, procedures, or equipment are introduced into the workplace.

Under this section, railroads have latitude to design and develop the training and delivery methods they will employ; but paragraphs (d), (e), and (f) provide requirements for railroads that elect to train a previously untrained person to be a conductor. Pursuant to paragraph (d), a railroad that makes this election would be required to determine how training must be structured, developed, and delivered, including an appropriate combination of classroom, simulator, computer-based, correspondence, on-the-job training, or other formal training.

Paragraphs (g), (h), (i), (j), and (k) of this section contain the requirements with respect to acquiring familiarity with the physical characteristics of a territory. Except for the requirements in paragraphs (j) and (k), the requirements parallel those in part 240. Paragraphs (j) and (k) of this section require railroads to designate in their programs the time period in which a conductor must be absent from a territory or yard, before requalification on physical characteristics is required and the procedures used to qualify or requalify a person on the physical characteristics.

Paragraph (l) requires each railroad to provide for the continuing education of certified conductors to ensure that each conductor maintains the necessary knowledge concerning railroad safety and operating rules and compliance with all applicable Federal regulations, including, but not limited to, hazardous materials, passenger train emergency preparedness, brake system safety standards, pre-departure inspection procedures, and passenger equipment safety standards, and physical characteristics of a territory. This paragraph is derived from 49 CFR 240.123(b).

As mentioned above it is possible that a regulation recommended by the Training Standards and Plans Working Group and adopted by FRA might include different or additional training requirements than those found in this rule. To the extent possible and appropriate, FRA conformed the training requirements in this rule to the recommendations developed by Training Standards and Plans Working Group. However, FRA does not know at this time what the final training regulation will provide. Therefore, some modification of the training requirements in this rule may be necessary to conform to the final requirements of any training regulation.

Section 242.121 Knowledge Testing

This section, derived from 49 CFR 240.125 and 240.209, requires railroads to provide for the initial and periodic testing of conductors. That testing will have to effectively examine and measure a conductor's knowledge of five subject areas: Safety and operating rules; timetable instructions; compliance with all applicable Federal regulations; the physical characteristics of the territory on which a person will be or is currently serving as a conductor; and the use of any job aid that a railroad may provide a conductor.

Under this section, railroads have discretion to design the tests that will be employed; for most railroads that will entail some modification of their existing ''book of rules'' examination to include new subject areas. This section does not specify things like the number of questions to be asked or the passing score to be obtained. However, it does require that the test not be conducted with open reference books unless use of such materials is part of a test objective and that the test be in written or electronic form. Interested parties should note that a railroad may not give an all open book exam. Some portion of the test must be closed book. Since the testing effort selected by the railroad must be submitted to FRA for approval, the exercise of the discretion being afforded railroads by this section will be monitored by FRA.

To address a concern of some of the members of the Working Group that persons being tested were unable to obtain clarification of test questions by someone who possessed knowledge of a relevant territory, paragraph (e) of this section requires railroads to provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.

Section 242.123 Monitoring Operational Performance

This section, derived from 49 CFR 240.129 and 240.303, contains the requirements for conducting unannounced compliance tests.

Paragraph (b) of this section requires each railroad to have a program to monitor the conduct of its conductors by performing unannounced operating rules compliance tests. The paragraph also provides procedures to address the testing of certified conductors who are not performing a service that requires certification under this part. FRA understands that railroads may not be able to provide those conductors with the annual, unannounced compliance test. Unlike part 240, which requires railroads to seek a waiver from FRA's Safety Board for engineers their unable to annually test, this paragraph does not require railroads to give an unannounced compliance test to conductors who are not performing service requiring certification. Moreover, the railroads are given approximately a month to test those conductors returning to service.

Paragraph (c) provides that each conductor must be given at least one unannounced compliance test in each calendar year by a railroad officer who meets the requirements of 49 CFR 217.9(b)(1).

Paragraph (d) provides the operational tests that conductors and passenger conductors must be tested on. That paragraph also allows passenger conductors who do not require compliance with 49 CFR 218 subpart F, except under emergency circumstances, to meet the annual, unannounced test requirement with annual training. Interested parties should note that this paragraph has been revised from the NPRM to clarify that the annual training exception in paragraph (d)(2)(i) only applies to part 218 subpart F testing and that a railroad will still have to test on § 217.9.

Paragraph (e) of this section requires railroads to indicate the types of actions they will take in the event they find deficiencies with a conductor's performance during an unannounced compliance test. FRA believes it is up to each railroad to decide the appropriate action to take in light of various factors, including collective bargaining agreements. Further, FRA believes that the vast majority of railroads have adequate policies to deal with deficiencies with a conductor's performance and have handled them appropriately for many years.

To avoid restricting the options available to the railroads and employee representatives to develop processes for handling test failures, FRA designed this regulation to be as flexible as possible. There are a variety of actions and approaches that a railroad could take in response to a test failure and FRA does not want to stifle a railroad's ability to adopt an approach that is best for its organization. Some of the actions railroads could consider include: Develop and provide formal remedial training for conductors who fail tests or have deficiencies in their performance; automatically download event recorder data, if relevant, upon a test failure or deficient performance in order to preserve evidence of the failure/deficiency; and require two supervisors to accompany a retest. Each railroad could also consider implementing a formal procedure whereby a conductor is given the opportunity to explain, in writing, the factors that he or she believes caused their test failure or performance deficiencies. This explanation may allow a railroad to determine what areas of training to focus on or perhaps discover that the reason for the failure/deficiency was due to something other than a lack of skills. FRA believes there are numerous other approaches that could and should be considered and evaluated by railroads and their employees. FRA realizes that a railroad's list of actions it will take in response to a test failure or deficient performance could be expansive given the various circumstances that could contribute to a test failure or deficient performance.

Paragraphs (b) and (f) of this section recognize that some certified conductors may not be performing a service that requires conductor certification, and thus, a railroad may not be able to provide those conductors with the annual, unannounced compliance test. For example, a certified conductor may be on furlough, in military service, off with an extended illness, or working in another service. Unlike part 240, which requires railroads to seek a waiver from FRA's Safety Board for engineers it is unable to annually test, this section does not require railroads to give an unannounced compliance test to conductors who are not performing service requiring certification. However, when the certified conductor returns to conductor service, he or she will have to be tested within 30 days of their return. Moreover, the railroad will have to retain a written record documenting certain dates regarding a conductor's service.

Section 242.125 Certification Determinations Made by Other Railroads

This section, derived from 49 CFR 240.225, provides the requirements that apply when a certified or previously certified conductor is about to begin service for a different railroad. The section permits the hiring railroad to rely on determinations made by another railroad concerning a person's certification. However, the section requires a railroad's certification program to address how the railroad will administer the training of previously uncertified conductors with extensive operating experience or previously certified conductors who have had their certification expire. In both these instances, FRA is providing a railroad with the opportunity to shorten the on-the-job training that might be required if a person is treated as having no operational experience. If a railroad's certification program fails to specify how to train a previously certified engineer hired from another railroad, then the railroad must require the newly hired conductor to take the hiring railroad's entire training program.

Section 242.127 Reliance on Qualification Requirements of Other Countries

This section, derived from 49 CFR 240.227, provides Canadian railroads that operate in the United States and U.S. railroads that conduct joint operations with Canadian railroads the option to rely on the system of conductor certification established by the Canadian Government as long as the conductor is employed by a Canadian railroad.

Subpart C—Administration of the Certification Program

Section 242.201 Time Limitations for Certification

This section, derived from 49 CFR 240.217, contains various time constraints that preclude railroads from relying on stale information when evaluating a candidate for certification or recertification. Although some members of the Working Group advocated for extending the certification period from 3 years to 5 years, FRA could not discern the safety justification for doing so. FRA has, however, extended the period provided in § 240.217(a)(2) upon which a railroad could rely on a visual and hearing acuity examination from 366 days to 450 days. The 450 days corresponds to the requirement in § 227.109 that railroads must offer employees included in a hearing conservation program a hearing test at an interval not to exceed 450 days.

Section 242.203 Retaining Information Supporting Determinations

This section, derived from 49 CFR 240.215, contains the record keeping requirements for railroads that certify conductors. While both § 240.215 and this section permit railroads to retain records electronically, paragraph (g) of this section provides more specific requirements regarding the electronic storage system used to retain the records than those found in § 240.215. In paragraph (g), FRA provides minimum standards for electronic record-keeping provisions that a railroad will have to utilize to maintain the records required by this section electronically. FRA recognizes the growing prevalence of electronic records, and acknowledges the unique challenges that electronic transmission, storage, and retrieval of records can present. FRA also recognizes the need to maintain the integrity and security of records stored electronically. Thus, FRA believes that more specific requirements for electronic storage systems than those found in § 240.215 are needed. Further, to allow for future advances in technology, the electronic record storage provisions in paragraph (g) are technology-neutral.

Section 242.205 Identification of Certified Persons and Record Keeping

This section, derived from 49 CFR 240.221, requires each railroad to maintain a list of its certified conductors. Although derived from § 240.221, this section also contains some significant differences. Unlike § 240.221(c) which requires the railroad responsible for controlling joint operations territory to maintain a list of all engineers certified to operate in the joint operations, paragraph (b) of this section requires the railroad that employs conductors working in joint operations territory to maintain the list.

With respect to engineers, FRA has found that, under actual industry practices, the controlling railroad seldom qualifies foreign engineers over its trackage. Rather, the controlling railroad usually qualifies the employing railroad's designated supervisor of locomotive engineers (DSLEs) on its territory and allows those DSLEs to qualify their own engineers on the controlling railroad's trackage. Considering that practice, the employing railroad would be better able to maintain the list of conductors it qualifies on the controlling railroad. Additionally, the employing railroad has more of an interest in keeping track of its conductors that are qualified on the controlling railroad. Should an employing railroad order a crew for a train that will operate over the controlling railroad, and the crew is not qualified, the train would have to stop at the controlling railroad. Moreover, it is much easier for the employing railroad to keep the list updated as it qualifies conductors or it removes conductors who have lost qualification because of time limitations. This section also differs from § 240.221 in that this section makes it unlawful for a railroad to knowingly or an individual to willfully make a false entry on the list or to falsify the list. Similar language is found in § 240.215(i) but not in § 240.221.

While both § 240.221 and this section permit railroads to retain records electronically, paragraph (e) of this section provides more specific requirements regarding the electronic storage system used to retain the records than those found in § 240.215(f) and does not require a railroad to obtain FRA approval to maintain the records electronically. The electronic storage requirements in paragraph (e) of this section track those in § 242.203(g).

Section 242.207 Certificate Components

This section, derived from 49 CFR 240.223, contains the requirements for the certificate that each conductor must carry. To address the privacy concerns of some Working Group members, FRA's requirements for what must be on the certificate slightly differ from the certificate requirements in part 240. While § 240.223(a)(3) requires locomotive engineer certificates to include the full date of birth, § 242.207(a)(3) requires conductor certificates to include only the year of birth. While FRA expects that, in the future, § 240.223(a)(3) will be amended to conform to § 242.207(a)(3), FRA notes that pursuant to § 242.213(n), a single certificate issued to a person that is certified as both a conductor and a locomotive engineer will have to comply, for now, with § 242.207 and § 240.223.

Section 242.209 Maintenance of the Certificate

This section, derived from 49 CFR 240.305(b), (c) and (e), requires conductors to: Have their certificates in their possession while on duty as a conductor; display their certificates when requested to do so by FRA representatives, State inspectors authorized under 49 CFR part 212, and certain railroad officers; and notify a railroad if he or she is called to serve as

a conductor in a service that would cause them to exceed their certificate limits. Although State inspectors authorized under 49 CFR part 212 could be considered ''FRA representatives,'' they are mentioned separately in this section to ensure that there would be no dispute regarding their authority.

Section 242.211 Replacement of Certificates

This section, derived from 49 CFR 240.301, requires railroads to have a system for the prompt replacement of certificates when necessary. Unlike § 240.301, which does not address the question of who will bear the cost of a replacement certificate, this section provides that certificates will be replaced by the railroad at no cost to the conductor. While FRA expected that the railroad would bear the cost for a replacement locomotive engineer certificate under part 240, a few Working Group members indicated that some locomotive engineers had been charged (or asked by a railroad to pay) for replacement certificates. The provision in this part clarifies that the railroad would bear the cost of replacement certificates.

To address the concerns of some Working Group members that a full replacement certificate can take some time to generate and provide to a conductor, paragraph (b) of this section permits railroads to issue temporary replacement certificates. The paragraph describes what the certificate must contain and who can authorize the temporary replacement. The temporary replacement certificate may be delivered electronically (*e.g.,* faxed, emailed, *etc.*) and may be valid for no more than 30 days.

Section 242.213 Multiple Certifications

This section permits a person to hold certification for multiple types of conductor service and/or certification for both conductor and locomotive engineer service. A railroad only needs to issue one certificate to a person with multiple certifications. However, a certificate issued to a person certified as a conductor and locomotive engineer will not only have to comply with § 242.207 but also with § 240.223. To the extent possible, a railroad that issues multiple certificates to a person will have to coordinate the expiration date of those certificates.

With the exception of a situation in which a conductor is removed from a train for a medical, police, or other such emergency, this section requires that a locomotive engineer, including a RCO, who is operating without an assigned certified conductor to either be: (1) Certified as both a locomotive engineer and a conductor; or (2) accompanied by a certified conductor who will attach to the crew ''in a manner similar to that of an independent assignment.'' Since a lone engineer or RCO would be serving as and performing duties as both locomotive engineer and conductor, FRA believes, and the Working Group and full RSAC voted to recommend, that the engineer or RCO must hold dual certification or be accompanied by a certified conductor. The language concerning how an accompanying conductor would attach to the crew conveys FRA's intent that this regulation be neutral on the issue of crew consist (*i.e.,* how many crewmembers must be on a train).

During the RSAC process, representatives of FRA, the railroads, and labor engaged in extensive discussions regarding the potential effect of § 242.213 (''Multiple certifications'') on the issue of crew consist. It is FRA's intent that this conductor certification regulation, including § 242.213, be neutral on the crew consist issue. Nothing in part 242 should be read as FRA's endorsement of any particular crew consist arrangement.

In instances where a person, who is serving as both the conductor and the engineer (*i.e.,* a lone engineer or RCO), is involved in a revocable event, railroads may be faced with determining which certification to revoke. For example, a railroad that finds that a RCO, who is certified both as an engineer and as a conductor but who was not accompanied by a certified conductor, has failed to comply with prohibitions against tampering with a locomotive mounted safety device would have to determine whether to revoke the person's conductor certification pursuant to § 242.403(e)(5) or the person's locomotive engineer certification pursuant to § 240.117(e)(5). To address that situation, § 242.213(o) requires railroads to make the determination as to which certification to revoke based on the work the person was performing at the time the conduct occurred. This determination would be similar to the determination made under the reporting requirements in this rule (§ 242.215(f)) and under part 225 in which railroads determine whether an accident was caused by poorly performing what is traditionally considered a conductor's job function (*e.g.,* switch handling, derail handling, *etc.*) or whether it was caused by poorly performing what is traditionally considered a locomotive engineer's job function (*e.g.,* operation of the locomotive, braking, *etc.*). Interested parties should note however, the preamble discussion of § 242.403(f) which discusses situations in which multiple revocable events occur within a single tour of duty.

This section also addresses the consequences of certification denial or revocation for a conductor who is certified to perform multiple types of conductor service or both conductor and locomotive engineer service. A person who holds a current conductor and/or locomotive engineer certificate from more than one railroad must immediately notify the other certifying railroad(s) if he or she is denied engineer or conductor recertification or has his or her conductor or engineer certification revoked by another railroad.

Pursuant to this section, a person certified to perform multiple types of conductor service and who has had any of those certifications revoked cannot perform any type of conductor service during the period of revocation. Likewise, a person who holds a conductor and locomotive engineer certificate and has his or her engineer certificate revoked cannot work as a conductor during the period of revocation. Similarly, a person who holds a conductor and engineer certificate and has his or her conductor certification revoked for violation of §§ 242.403(e)(1)–(e)(5) or (e)(12) cannot work as an engineer during the period of revocation. However, a person who holds a conductor and engineer certificate and has his or her conductor certification revoked for a violation of §§ 242.403(e)(6)–(e)(11) (*i.e.,* violations involving provisions of part 218, subpart F) can work as an engineer during the period of revocation. To aid interested parties, FRA has included a table in Appendix E to this rule which explains, in a spreadsheet-style form, when a person certified as both an engineer and conductor will be permitted to work following a certification revocation.

Currently under part 240, an engineer cannot have his or her certificate revoked for violations of part 218, subpart F. While part 240 may be amended in the future to include part 218, subpart F violations as revocable events, this rule recognizes that it would be unfair to prohibit a person from working as an engineer for a violation that currently would not result in the revocation of his or her engineer certificate. This section also provides that, in determining the period in which a person may not work as a locomotive engineer due to a revocation of his or her conductor certification, only

violations of §§ 242.403(e)(1)–(e)(5) or (e)(12) may be counted. To assist railroads in determining the correct period, paragraph (h)(1) of this section provides a hypothetical scenario and an explanation of how the period would be calculated.

To avoid treating a person who only holds one certification differently than a person who holds multiple certifications, this section prohibits a person who has had his or her locomotive engineer certification revoked from obtaining a conductor certificate during the revocation. Likewise, a person who has had his or her conductor certification revoked for violations of §§ 242.403(e)(1)–(e)(5) or (e)(12) is prohibited from obtaining a locomotive engineer certificate during the period of revocation. With respect to denial of certification or recertification, this section provides that a railroad that denies a person locomotive engineer certification or recertification shall not, solely on the basis of the denial, deny or revoke that person's conductor certification or recertification and vice versa.

Section 242.215 Railroad Oversight Responsibilities

This section, derived from 49 CFR 240.309, requires Class I (including the National Railroad Passenger Corporation and a railroad providing commuter service) and Class II railroads to conduct an annual review and analysis of its program for responding to detected instances of poor safety conduct by certified conductors. FRA has formulated the information collection requirements of this section to ensure that railroads collect data on conductor safety behavior and feed that information into its operational monitoring efforts, thereby enhancing safety.

This section requires Class I (including the National Railroad Passenger Corporation and a railroad providing commuter service) and II railroads to have an internal auditing plan to keep track of eight distinct kinds of events that involve poor safety conduct by conductors. For each event, the railroad shall indicate what response it took to that situation. The railroad will evaluate this information, together with data showing the results of annual operational testing and the causation of FRA reportable train accidents, to determine what additional or different efforts, if any, are needed to improve the safety performance of that railroad's certified conductors. FRA is not requiring a railroad to furnish this data or its analysis of the data to FRA. Instead, FRA is requiring that the railroad be prepared to submit such information when requested.

For purposes of the reporting requirement in this section, an instance of poor safety conduct involving a person who holds both a conductor and engineer certification need only be reported once (*i.e.,* either under 49 CFR 240.309 or this section). The determination as to where to report the instance of poor safety conduct will be based on the work the person was performing at the time the conduct occurred. This determination is similar to the determination made under part 225 in which railroads determine whether an accident was caused by poorly performing what is traditionally considered a conductor's job function (*e.g.,* switch handling, derail handling, *etc.*) or whether it was caused by poorly performing what is traditionally considered a locomotive engineer's job function (*e.g.,* operation of the locomotive, braking, *etc.*).

Paragraph (g)(2) has been modified slightly from the NPRM to acknowledge that punishments may not always be imposed by a hearing officer. Accordingly, FRA has replaced the specific term ''hearing officer'' with the more general term ''railroad.''

Paragraph (i)(2) has been modified slightly from the NPRM to clarify what accident/incident report FRA is referring to in that paragraph. Further the paragraph that was labeled as ''(ii) [Reserved]'' has been removed as unnecessary.

Subpart D—Territorial Qualification and Joint Operations

Section 242.301 Requirements for Territorial Qualification

This section, derived from 49 CFR 240.229 and 240.231, explains the requirements for territorial qualification. Paragraph (a) of this section provides that, except for three circumstances, a railroad, including a railroad that employs conductors working in joint operations territory, cannot permit or require a person to serve as a conductor unless that railroad determines that the person is a certified conductor and possesses the necessary territorial qualifications.

Paragraph (a) reflects the Working Group and full RSAC recommendation to realign the burden for determining which party is responsible for allowing an unqualified person to operate in joint operations. While part 240 puts the burden on the controlling railroad, this rule puts the burden on the employing railroad. This change is based on the experiences of the Working Group members who believe that an inordinate amount of the liability currently rests with the controlling railroad. The perceived unfairness rests on the fact that it is not always feasible for the controlling railroad to make all of the determinations required by § 242.119. The employing railroad may provide the controlling railroad with a long list of hundreds or thousands of locomotive engineers that it deems eligible for joint operations; following up on a long, and ever-changing list is made much more difficult since a controlling railroad would not control the personnel files of the conductors on this list.

The realignment will lead to a sharing of the burden among a controlling railroad, an employing railroad and an employing railroad's conductor. Although a controlling railroad is obligated to make sure the person is qualified, paragraph (a) requires that an employing railroad make these same determinations before calling a person to serve in joint operations. Paragraph (b) of this section requires a conductor to notify a railroad when the person is being asked to exceed his or her territorial qualifications. That paragraph parallels § 242.209(b) of this rule.

Paragraph (c), which as discussed in the preamble above, has been modified from the NPRM. The paragraph provides requirements for situations where a conductor lacks territorial qualification on main track physical characteristics. It provides differing requirements depending on whether a conductor has never been qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor or whether the conductor was previously qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor, but whose qualification has expired. For a conductor who has never been qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor, paragraph (c)(1) of this final rule requires that the assistant must be a person who is certified as a conductor, meets the territorial qualification requirements for main track physical characteristics, and is not an assigned crew member. For a conductor who was previously qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor, but whose qualification has expired, paragraph (c)(2) of this Final Rule allows the assistant to be any person, including an assigned crewmember other than the locomotive engineer so long as serving as the assistant would not conflict with that crewmember's other safety sensitive duties, who meets the territorial

qualification requirements for main track physical characteristics.

Paragraph (d) provide requirements for situations where a conductor lacks territorial qualification on other than main track physical characteristics. On other than main track, the conductor, where practicable, must be assisted by a person who is a certified conductor and meets the territorial qualification requirements for other than main track physical characteristics. Where not practicable, the conductor must be provided with an appropriate, up-to-date job aid. Two points should be made about the other than main track requirements in paragraph (d) of this section. First, the person assisting the conductor may be the locomotive engineer as long as the engineer is also a certified conductor and meets the territorial qualification requirements for the other than main track physical characteristics. Second, FRA does not intend for the requirements of § 242.301(d) to apply to sidings.

Paragraph (e), which was not included in the NPRM, provides exceptions as to when an assistant is not required on main track. Those exceptions, which are derived from 49 CFR 240.231(c), apply to movements on a section of main track with an average grade of less than 1% over 3 continuous miles and: (1) The maximum distance the locomotive or train will be operated does not exceed one mile; or (2) the maximum authorized speed for any operation on the track does not exceed 20 miles per hour; or (3) operations are conducted under operating rules that require every locomotive and train to proceed at a speed that permits stopping within one half the range of vision of the locomotive engineer.

Subpart E—Denial and Revocation of Certification

This subpart parallels part 240's approach to adverse decisions concerning certification (*i.e.,* decisions to deny certification or recertification and revoke certification). With respect to denials, the approach of this rule is predicated principally on the theory that decisions to deny certification or recertification will come at the conclusion of a prescribed evaluation process which will be conducted in accordance with the provisions set forth in this subpart. Thus, this rule and part 240 contain specific procedures designed to assure that a person, in jeopardy of being denied certification or recertification, will be given a reasonable opportunity to explore and respond to the negative information that might serve as the basis for being denied certification or recertification.

When considering revocation, this rule contemplates that decisions to revoke certification will only occur for the reasons specified in this subpart. Since revocation decisions by their very nature involve a clear potential for factual disagreement, this subpart is structured to ensure that such decisions will come only after a certified conductor had been afforded an opportunity for an investigatory hearing at which the presiding officer will determine whether there is sufficient evidence to establish that the conductor's conduct warranted revocation of his or her certification.

This subpart also includes the concept of certificate suspension. Certificate suspension will be employed in instances where there is reason to think the certificate should be revoked or made conditional but time is needed to resolve the situation. Certificate suspension is applicable in instances where a person is awaiting an investigatory hearing to determine whether that person violated certain provisions of FRA's alcohol and drug control rules or engaged in operational misconduct and situations in which the person is being evaluated or treated for an active substance abuse disorder.

While this subpart follows part 240's approach to adverse decisions concerning certification, it does include some modifications to the processes in part 240. Those modifications are discussed below.

Section 242.401 Denial of Certification

This section, derived from 49 CFR 240.219, provides minimum procedures that must be accorded to a certification candidate before a railroad denies the candidate certification or recertification. The requirements in this section parallel the key provisions in § 240.219 including: Providing a certification candidate with a reasonable opportunity to explain or rebut adverse information; and notifying a candidate of an adverse decision and providing a written explanation of the basis for its decision within 10 days.

This section also includes some additional provisions in paragraphs (a), (c), and (d) not found in § 240.219 which FRA believes will improve the transparency of the certification denial process and improve FRA's ability to adjudicate petitions seeking review of a railroad's denial decision pursuant to subpart E of this rule. Paragraph (a) of this section requires a railroad to provide the conductor candidate with any written documents or records, including written statements, related to a failure to meet a requirement of this part which support its pending denial decision. Paragraph (c) of this section requires that a written explanation of an adverse decision be ''served'' on a certification candidate (*see* definition of *service* in § 242.7). Use of the defined term, rather than part 240's more general phrase ''mailed or delivered,'' not only makes this rule internally consistent but will help FRA in determining whether a petition seeking review of a denial decision is filed within 120 days of the date the denial is served on the petitioner (*see* § 242.503(c)). Paragraph (c) also requires that the basis for a railroad's denial decision shall address any explanation or rebuttal information that the conductor candidate may have provided in writing pursuant to paragraph (a) of this section.

Paragraph (d) of this section, which is also not included in § 240.219, prohibits a railroad from denying certification based on a failure to comply with § 242.403(e)(1)–(11) if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with those sections. Paragraph (d) is derived from the intervening cause exception for revocation in § 242.407(i)(1).

Section 242.403 Criteria for Revoking Certification

This section, derived from 49 CFR 240.117 and 240.305, provides the circumstances under which a conductor may have his or her certification revoked. In addition, paragraph (b) of this section makes it unlawful to fail to comply with any of the events listed in paragraph (e) of this section (*i.e.,* events which would require a railroad to initiate revocation action). Paragraph (b) is needed so that FRA could initiate enforcement action. For example, FRA might want to initiate enforcement action in the event that a railroad fails to initiate revocation action or a person is not a certified conductor under this part. Railroads should note that they may not revoke a conductor's certificate, including a designated conductor's certificate, until they have a certification program approved by the FRA pursuant to § 242.103.

Paragraph (c)(1) of this section provides that a certified conductor who fails to comply with the events listed in paragraph (e) of this section would have his or her conductor certification revoked. Paragraph (c)(2) provides that a certified conductor, who is monitoring, piloting, or instructing a conductor, could have his or her certification revoked if he or she fails to

take ''appropriate action'' to prevent a violation of paragraph (e) of this section. As explained in paragraph (c)(2), ''appropriate action'' does not mean that a supervisor, pilot, or instructor must prevent a violation from occurring at all costs, but rather the duty may be met by warning the conductor or engineer, as appropriate, of a potential or foreseeable violation. The term ''appropriate action'' is also used in paragraph (e) of this section as well as § 240.117(c)(2).

Paragraph (c)(3) provides that a person who is a certified conductor but is called by a railroad to perform the duty of a train crew member other than that of conductor or locomotive engineer would not have his or her certification revoked based on actions taken or not taken while performing that duty. For example, a person who is called to be the crew's brakeman and who does not serve as a conductor or locomotive engineer during that tour of duty could not have his or her certification revoked for a violation listed in paragraph (e) of this section. Interested parties should note that the exemption does not apply to violations of paragraph (e)(12) so that conductors working in other capacities who violate certain alcohol and drug rules would have their certification revoked for the appropriate period pursuant to §§ 242.403 and 242.115.

Paragraph (d) provides that the time frame for considering operating rule compliance only applies to conduct described in paragraphs (e)(1) through (e)(11) of this section and not paragraph (e)(12). When alcohol and drug violations are at issue, the window in which prior operating rule misconduct will be evaluated will be dictated by § 242.115 and not limited to the 36-month period prescribed in this paragraph. This rule requires that certification reviews consider alcohol and drug misconduct that occurred within a period of 60 consecutive months prior to the review pursuant to § 242.115(e).

Paragraph (e) provides the 12 types of rule infractions that could result in certification revocation. The infractions listed in paragraphs (e)(1)–(e)(5) and (e)(12) derive from the revocable events provided in 49 CFR 240.117(e) but have been modified to account for a conductor's duties. For example, paragraphs (e)(1) and (e)(2) recognize that a conductor does not operate the train and thus those paragraphs only require a conductor to take ''appropriate action'' to prevent an engineer from failing to control a locomotive or train in accordance with a signal or to adhere to speed limitations. As explained in those paragraphs, ''appropriate action'' does not mean that a conductor must prevent a violation from occurring at all costs; but rather the duty may be met by warning the engineer of a potential or foreseeable violation. Moreover, paragraph (e)(2) recognizes that a conductor who is not in the operating cab should not be held to held to the same responsibility with respect to monitoring train speed as a conductor who is located in the operating cab.

The language of paragraph (e)(4) has been modified from the version proposed in the NPRM. In this final rule, paragraph (e)(4) requires a conductor to take ''appropriate action'' to prevent an engineer from occupying main track or a segment of main track without proper authority or permission. As explained in that paragraph, ''appropriate action'' does not mean that a conductor must prevent a violation from occurring at all costs; but rather the duty may be met by warning the engineer of a potential or foreseeable violation.

As written in the NPRM, paragraph (e)(4), a conductor could have had his or her certification revoked for occupying main track or a segment of main track without proper authority or permission even if the conductor repeatedly warned the engineer about the potential violation. FRA does not believe that was the intent of paragraph (e)(4) and thus, FRA has modified the paragraph in this final rule. Interested parties should note that with respect to paragraph (e)(4), a conductor will be considered to have failed to take appropriate action to prevent an engineer from occupying main track or a segment of main track without proper authority or permission if the conductor fails to warn the engineer to stop and protect/flag a crossing on main track when required to do so pursuant to a railroad operating rule or practice, including a mandatory directive.

The infractions listed in paragraphs (e)(6) through (e)(11) of this section describe violations of part 218, subpart F, which are not listed as revocable events in part 240. For the reasons listed below, FRA proposed, and the RSAC recommended, that violations of part 218, subpart F, should be revocable events for conductors. In the future, FRA expects to review whether those violations should also be revocable events for locomotive engineers. Subpart F of part 218 requires that each railroad have in effect certain operating rules concerning shoving or pushing movements, equipment left out to foul a track, switches, and derails.[4] The operating rules identified in part 218, subpart F, are not only considered core competencies for conductors but are also designed to address the most frequently caused human factor accidents. Human factors are the leading cause of train accidents, accounting for 38 percent of the total in 2005. Human factors also contribute to employee injuries. Subpart F violations account for approximately 43 percent of all human factor caused accidents. From 2005–2009, there were approximately 2,227 accidents due to Subpart F violations. Those accidents resulted in approximately 13 fatalities, 363 injuries, and $104,855,224 in damages.

Paragraph (f) of this section provides that if a single incident contravenes more than one operating rule or practice listed in paragraph (e) of this section, that event is to be treated as a single violation. A single incident is a unique identifiable occurrence caused by an error of a conductor and/or engineer. It is possible for a person to be involved in more than one single incident during a tour of duty if the incidents are separated by time, distance or circumstance. If, for example a person, who is certified as both an engineer and a conductor and is serving as a lone engineer, violates a stop signal rule and in so doing, enters main track without authority, that person could only be charged as an engineer with one rule violation. However, if that same person fails to properly secure a switch after operating the switch in violation of § 218.103(b)(8) and then violates a stop signal rule, that would be considered two separate incidents and thus the person's conductor certification could be revoked for the part 218 violation and the person's engineer certification could be revoked for the stop signal violation.

Paragraph (f) also provides that a conductor may have his or her certification revoked for violations that occur during properly conducted operational compliance tests. However, FRA notes that violations that occur during an improperly conducted operational compliance test will not be considered for revocation purposes.

Paragraph (f)(4) of this section was previously paragraph (e)(13) in the NPRM. Since the paragraph does not deal with a revocable event like paragraphs (e)(1) through (e)(12), FRA moved it to paragraph (f) to avoid confusion. Paragraph (f)(4), which does not have a counterpart in part 240,

[4] For a detailed analysis of part 218, interested parties should review the notice of proposed rulemaking (71 FR 60372 (Oct. 12, 2006)), the final rule (73 FR 8442 (Feb. 13, 2008)), and the response to petitions for reconsideration (73 FR 33888 (June 16, 2008)) issued in that rulemaking.

prohibits a railroad from denying or revoking an employee's certification based upon additional conditions or operational restrictions imposed pursuant to § 242.107(d). Thus, a railroad could not revoke a conductor's certificate for an alleged violation of a railroad rule or practice that is more stringent than the condition or restrictions required by this part. In the future, FRA expects to review whether a similar provision should also apply to locomotive engineers.

Section 242.405 Periods of Ineligibility

This section, derived from § 240.117, describes how a railroad will determine the period of ineligibility (*e.g.,* for revocation or denial of certification) that a conductor or conductor candidate will have to undergo. With respect to revocation, this section provides that once a railroad determines that a conductor has failed to comply with its safety rule concerning one or more events listed in § 242.403(e), two consequences will occur. First, the railroad is required to revoke the conductor's certification for a period of time provided in this section. Second, that revocation will initiate a period during which the conductor will be subject to an increasingly more severe action if additional revocable events occur in the next 24 to 36 months.

Except for incidents occurring on other than main track where restricted speed or the operational equivalent is in effect, the standard periods of revocation provided in this section track the periods provided in part 240: 1 event = revocation for 30 days; 2 events within 24 months of each other = revocation for 6 months; 3 events within 36 months of each other = revocation for 1 year; and 4 events within 36 months of each other = revocation for 3 years. This section notes, however, that violations of § 219.101 could result in different periods of ineligibility and in those cases, the longest period of revocation will control. FRA has included a table in Appendix E to this rule which provides the revocation periods in a spreadsheet-style form. The table should be useful to regulated entities in determining the correct period of revocation.

The period of revocation in both part 240 and this rule is based on a floating window. Hence, under this rule and part 240, if a second offense occurs 25 months after the first offense, the revocation period would be the same as a first offense; however, if a third offense occurs within 36 months of the first offense, the revocation period would be one year. The anomaly will be that a person's certificate could be revoked twice for one month under paragraph (a)(3)(ii) of this section but that the third incident could result in a one year revocation under paragraph (a)(3)(iv) of this section without the benefit of the interim six month revocation period under paragraph (a)(3)(iii).

This section also contains two provisions which will reduce the period of ineligibility if certain criteria are met. The first provision, which is contained in paragraph (a)(3)(i) of this section, provides that ''on other than main track where restricted speed or the operational equivalent thereof is in effect,'' the periods of revocation for violations of certain provisions of § 242.403(e) [5] shall be reduced by one half provided that another revocable event has not occurred within the previous 12 months. That provision, which does not have an equivalent provision in part 240, recognizes that some violations which occur on other than main track where slower speeds are in effect may pose less of a danger to safety than violations that occur on main track and thus a reduced period of revocation is warranted. The second provision, which may reduce the period of ineligibility if certain criteria are met, is contained in paragraph (c) of this section. That provision, which parallels § 240.117(h), provides that a person whose conductor certification is denied or revoked will be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of revocation if, among other things, at least one half of the initial period of ineligibility has elapsed.

In certain instances, both provisions may apply to a conductor who has had his or her certification revoked. For example, if a conductor's certification is revoked for a violation of § 242.403(e)(6) which occurred on other than main track where restricted speed is in effect and it is the only revocation that the conductor has ever had, then, under § 242.405(a)(3)(i), the revocation period would be 15 days. Moreover, if the conductor meets the criteria in § 242.405(c), then the conductor would be eligible for reinstatement of his or her certificate in 8 days.[6]

Paragraph (b) of this section provides that all periods of revocation may consist of training. While that provision is not explicitly stated in part 240, it is certainly not prohibited and is included in this rule to make FRA's intent clear.

Section 242.407 Process for Revoking Certification

This section, derived from 49 CFR 240.307, provides the procedures a railroad must follow if it acquires reliable information regarding a conductor's violation of § 242.115(e) or § 242.403(e).

Paragraph (b)(1) of this section provides that upon receipt of reliable information regarding a violation of § 242.403(e), a railroad must suspend the person's certificate. Paragraph (b)(2) provides that prior to or upon suspending the person's certificate, the railroad will have to provide either oral or written notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing. If the initial notice was verbal, then the notice will have to be promptly confirmed in writing. The amount of time the railroad has to confirm the notice in writing will depend on whether or not a collective bargaining agreement is in effect and applicable. In the absence of such an agreement, a railroad will have 96 hours to provide this important information. Interested parties should note that if a notice of suspension is amended after a hearing is convened and/or does not contain citations to all railroad rules and practices that may apply to a potentially revocable event, the Operating Crew Review Board, if asked to review the revocation decision, might subsequently find that this constitutes procedural error pursuant to § 242.505.

Paragraphs (b)(3)–(b)(7) and paragraphs (c), (d), (e), and (f) of this section provide the requirements and procedures for conducting or waiving a railroad hearing regarding the alleged revocable event. Except for paragraphs (b)(4) and (c)(11), discussed below, those requirements mirror the hearing requirements currently contained in part 240.

Pursuant to paragraph (b)(4) of this section, no later than the convening of a hearing, the railroad convening the hearing must provide the person with a copy of the written information and list of witnesses the railroad will present at the hearing. If requested, a recess to the start of the hearing shall be granted if the copy of the written information and list of witnesses is not provided until just prior to the convening of the hearing. If the information that led to the suspension of a conductor's certificate pursuant to paragraph (b)(1)

[5] The provisions are § 242.403(e)(6) through (e)(8), (e)(10), and (e)(11). Section 242.403(e)(9) is not included in the list because the reduction provided for in § 242.403(a)(3)(i) only applies on other than main track where restricted speed or the operational equivalent thereof is in effect. Section 242.403(e)(9), however, addresses violations of § 218.105 which only applies to main track switches.

[6] If, as in the example, the revocation calculation results in any fraction of a day (*e.g.,* 7.5 days), then round the number up. Thus, the conductor in the example would be eligible for reinstatement in 8 days.

of this section is provided through statements of an employee of the convening railroad, the railroad must make that employee available for examination during the hearing. Examination may be telephonic where it is impractical to provide the witness at the hearing.

The provisions in paragraph (b)(4) of this section were added to address the concerns of some members of the Working Group that engineers were not being provided with information and/or witnesses necessary to defend themselves at the hearing under part 240. Interested parties should note that even if a railroad conducts a hearing pursuant to the procedures in an applicable collective bargaining agreement pursuant to paragraph (d) of this section, the railroad will still have to comply with the provisions of paragraph (b)(4). It is FRA's understanding that, except for an employee of the convening railroad whose statements led to a suspension under paragraph (b)(1) of this section, a railroad will not, in fact, be required to call to testify every witness that it includes on the list provided pursuant to paragraph (b)(4). If, for example, a railroad believes that it has provided sufficient evidence during a hearing to prove its case and that calling a witness on its list to testify would be unduly repetitive, then the railroad will not be obligated to call that witness. Of course, the opposing party could request that the witness be produced to testify but the hearing officer would have the authority pursuant to paragraph (c)(6) to determine whether the witness' testimony would be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

While paragraph (c)(1) provides a conductor with significant input into when the hearing is held, that paragraph must read in conjunction with paragraph (c)(3) which provides the presiding officer with the powers necessary to regulate the conduct of the hearing. Thus, a presiding officer would be permitted to deny excessive hearing request delays by the conductor. Moreover, a presiding officer could find implied consent to postpone a hearing where a conductor's witnesses are not available within 10 days of the date the certificate is suspended. However, interested parties should note that the OCRB may grant a petition on review if the OCRB finds that the hearing schedule caused the petitioner substantial harm.

Paragraph (c)(11) contains requirements regarding the written decision issued in a railroad hearing beyond those contained in part 240. Specifically, the final rule requires the decision to: (1) State whether the railroad official found that a revocable event occurred and the applicable period of revocation with a citation to § 242.405 (Periods of revocation); (2) contain an explanation of the factual findings and citations to all applicable railroad rules and practices; and (3) be served on the employee and the employee's representative, if any, with the railroad to retain proof of that service. FRA believes these additional requirements will ensure that clearer and more detailed decisions are issued. In turn, clearer and more detailed decisions will allow a conductor to understand exactly why his or her certification was revoked and will allow the Operating Crew Review Board to have a more detailed understanding of the case if it is asked to review the revocation decision pursuant to subpart E of this rule.

Paragraph (g) requires a railroad to revoke an employee's conductor certification if it discovers that another railroad has revoked that person's conductor certification. The hearing requirement in this rule is satisfied when any single railroad holds a revocation hearing.

Paragraph (h) credits the period of certificate suspension prior to the commencement of a hearing required under this section towards satisfying any applicable revocation period imposed in accordance with the provisions of § 242.405.

Paragraph (i) provides two specific defenses for railroad supervisors and hearing officers to consider when deciding whether to suspend or revoke a person's certificate due to an alleged revocable event. Pursuant to paragraph (i), either defense will have to be proven by sufficient evidence. Paragraph (i)(1) of this section provides that a person's certificate will not be revoked when there is sufficient evidence of an intervening cause that prevented or materially impaired the person's ability to comply. For example, a railroad should consider assertions that a conductor in the operating cab failed to take appropriate action to prevent the engineer from failing to control the locomotive in accordance with a signal indication that requires a complete stop before passing it because of defective equipment. Similar to the defense of defective equipment, the actions of other people could sometimes be an intervening cause. For instance, a dispatcher or a train crew member could relay incorrect information to the conductor who reasonably relied on it in causing a prohibited train movement. Conductors and railroad managers should note that not all equipment failures or errors caused by others will serve to absolve the person from certification action under this rule. The factual issues of each circumstance will have to be analyzed on a case-by-case basis. For example, a broken speedometer would not be an intervening factor in a violation of § 242.403(e)(3) (failure to perform certain required brake tests).

Paragraph (i)(2) of this section provides a railroad with the discretion necessary to decide not to revoke a conductor's certification for an event that violates § 242.403(e)(1) through (e)(11) under certain limited circumstances. FRA promulgated the discretionary provision allowing a railroad to decide not to revoke when the incident ''was of a minimal nature and had no direct or potential effect on rail safety'' with the express understanding that some railroads would exercise the discretion and others would not. The decision of whether an incident meets that criteria may often be subject to different interpretations. For that reason, FRA is requiring that for each instance that a railroad chooses to exercise this discretion, the railroad must record its actions. *See* 49 CFR 242.407(j). Unless a railroad fails to record its actions or acts in bad faith, FRA will not take enforcement action even if FRA believes the railroad could have revoked the certification.

Paragraph (i)(2) does not permit a railroad to use its discretion to dismiss violations indiscriminately. FRA will only permit railroads to excuse violations when two criteria are met. First, the violation would have to be of a minimal nature; for example, on high speed track at the bottom of a steep grade, the engineer communicates to the conductor, who is in the cab, that the engineer knows the correct speed limit on a portion of restricted track without requiring the conductor to say anything about speed, but the front of the lead unit in a four unit consist hauling 100 cars enters a speed restriction at 10 miles per hour over speed while the third unit and the balance of the train enters the speed restriction at the proper speed, and maintains that speed until the entire train clears the speed restriction. If a railroad is willing to consider mitigating circumstances, it would need to consider whether the violation was truly of a minimal nature. Other suggestions of the types of incidents that a railroad may find to be of a minimal nature under certain circumstances include:

• A train is required to reduce speed past a signal and most of the train gets by the signal at a faster speed but the back of the train does get below 10 MPH above the maximum authorized speed;

• During an unannounced operating rules compliance test, a train gets by a flag, banner, lantern or other non-fixed stop signal that requires a complete stop before passing it for a short distance. The test is conducted according to the railroad's 49 CFR 217.9 operational testing program with sufficient safeguards in place. Although a violation occurred, it may be deemed minimal in nature since there may be no direct or potential effect on rail safety; or

• A train occupies main track or a segment of main track without authority but the lack of authority or mistake is corrected by the crewmembers and no actual harm is caused by the mistake. For example, the conductor contacts the dispatcher to roll up or obtain new authority. During the radio conversation, the wrong milepost or train number is given and the train is no longer on track for which it previously had authority. After that radio conversation, the crew realizes the error and successfully contacts the dispatcher to correct it.

In contrast, a violation could not be considered of a minimal nature if a conductor fundamentally violates the operating rules. For example, if a conductor fails to perform or have knowledge that a required brake test was performed, even if the train was only traveling a short distance, then the event may not be considered of a minimal nature. In situations where the rule had been fundamentally violated, a railroad would not have the discretion to excuse the violation.

Second, for paragraph (i)(2) to apply, sufficient evidence must be presented to prove that the violation did not have either a direct or potential effect on rail safety. That defense would certainly not apply to a violation that actually caused a collision or injury because that would be a direct effect on rail safety. It would also not apply to a violation that, given the factual circumstances surrounding the violation, could have resulted in a collision or injury because that would be a potential effect on rail safety. An example illustrating the term ''minimal nature'' involves a situation where a train has the first two locomotives enter a speed restriction too fast, yet the balance of the train is in compliance with the speed restriction. The train in this example is not endangering other trains because it had the authority to travel on that track at a particular speed. Thus, the railroad could find that there was no direct or potential effect on rail safety caused by the violation.

In contrast, if a train fails to stop short of a banner, which is acting as a signal requiring a complete stop before passing it, during a locomotive engineer efficiency test, the passing of a banner might have no direct effect on rail safety but it has a potential effect since a banner is simulating a railroad car or another train. Meanwhile, there would be a difference between passing a banner versus making an incidental touching of the banner. If a locomotive or train barely touches a banner so that the locomotive or train does not run over the banner, break the banner, or cause the banner to fall down, that incidental touching could be considered a minimal nature violation that does not have any direct or potential effect on rail safety. This is because such an incidental touching is not likely to cause damage to equipment or injuries to crew members even if the banner was another train. Although it is arguable that if the banner were a person the touching could be fatal, FRA is willing to allow railroads the discretion to consider this type of scenario in the context of excusing a violation pursuant to paragraph (i)(2). Of course, if the banner is in fact a person in the manner described in the example, the railroad would not have the discretion to apply paragraph (i)(2).

Similarly, if a train has received oral and written authority to occupy a segment of main track, the oral authority refers to the correct train number but refers to the wrong locomotive because someone transposed the numbers, the conductor's violation in not catching this error before entering the track without proper authority could be considered of a minimal nature with no direct or potential effect on rail safety. Since the railroad would be aware of the whereabouts of this train, the additional risk to safety of this paperwork mistake may practically be zero. Under the same scenario, where there are no other trains or equipment operating within the designated limits, there may be no potential effect on rail safety as well as no direct effect.

Paragraph (j) of this section requires railroads to keep records of those violations in which they must not or elect not to revoke a conductor's certificate pursuant to paragraph (i) of this section. Paragraph (j)(1) requires railroads to keep records even when they decide not to suspend a conductor's certificate due to a determination pursuant to paragraph (i). Paragraph (j)(2) requires railroads to keep records even when they make their determination prior to the convening of the hearing held pursuant to § 242.407.

Paragraph (k) addresses concerns that problems could arise if FRA disagrees with a railroad's decision not to suspend a conductor's certificate for an alleged misconduct event pursuant to § 242.403(e). As long as a railroad makes a good faith determination after a reasonable inquiry, the railroad will have immunity from civil enforcement for making what the agency believes to be an incorrect determination. However, railroads should note that if they do not conduct a reasonable inquiry or act in good faith, they could be subject to civil penalty enforcement under this rule. In addition, even if a railroad does not take what FRA considers appropriate revocation action, FRA could still take enforcement action against an individual responsible for the non-compliance by assessing a civil penalty against the individual or issuing an order prohibiting an individual from performing safety-sensitive functions in the rail industry for a specified period pursuant to part 209, subpart D.

Subpart F—Dispute Resolution Procedures

This subpart details the opportunities and procedures for a person to appeal a decision by a railroad to deny certification or recertification or to revoke a conductor's certification. As stated in the RSAC Task Statement, one of the issues requiring specific report from the Working Group was ''[s]tarting with the locomotive engineer certification model, what opportunities are available for simplifying appeals from decertification decisions of the railroads?'' Since its first meeting in July of 2009, the Working Group devoted a considerable amount of time to researching, discussing and proposing ideas to simplify the appeals process. While the appeals process provided in this subpart essentially follows the appeals process in part 240, some important modifications have been made. Those modifications are discussed below.

Section 242.501 Review Board Established

This section, derived from 49 CFR 240.401, provides that a person who is denied certification or recertification or has his or her conductor certification revoked may petition FRA to review the railroad's decision. Pursuant to this section, FRA delegates initial responsibility for adjudicating such disputes to an internal FRA Operating Crew Review Board (OCRB). Although creation of the OCRB will require issuance of an internal FRA order, FRA

expects that the OCRB will mirror the make-up of the Locomotive Engineer Review Board (LERB), which is currently used by FRA to adjudicate disputes under part 240.[7] As mentioned above, FRA expects that, if and when conforming changes are made to part 240, all references to the LERB in part 240 will be changed to the OCRB and the OCRB will handle both conductor and locomotive engineer disputes.

Section 242.503 Petition Requirements

This section, derived from 49 CFR 240.403, provides the requirements for obtaining FRA review of a railroad's decision to deny certification, deny recertification, or revoke certification. The requirements contained in paragraphs (a) through (c) include the need to seek review in a timely fashion once the adverse decision is rendered by the railroad. Interested parties should note that the ''petitioner'' referred to paragraph (b) of this section is the person who had his or her certificate revoked, not an employee representative who may respond on petitioner's behalf. If the petitioner is represented by someone, the petitioner is encouraged to also provide the representative's name, mailing address, daytime telephone number, and email address (if available) in the petition.

Paragraph (b)(2) revises the requirements proposed in the NPRM and differs from § 240.403 in that petitions will be submitted to the Docket Clerk of DOT rather than FRA's Docket Clerk. With this change, the process for submitting petitions to the OCRB will parallel the process for requesting an administrative hearing under part 240 and § 242.507. FRA believes this change will make the process more efficient as DOT Dockets is better equipped to process, scan and store these types of filings. In addition, filings in OCRB proceedings will become more accessible because they will be posted on www.regulations.gov. Interested parties should note that anyone is able to search the electronic form of all filings received into any of DOT's dockets by the name of the individual submitting the filing (or signing the filing, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement published in the *Federal Register* on April 11, 2000 (Volume 65, Number 70, Pages 19477–78), or you may visit *http://www.regulations.gov/#!privacyNotice.*

Paragraph (b)(3) requires petitioners to provide certain information, including an email address if available. Petitioners should note that if FRA receives an email address, it expects to conduct any or all correspondence regarding the petition or case by email.

Paragraph (b)(5) of this section requires a petitioner to supplement his or her petition with ''a copy of all written documents in the petitioner's possession or reasonably available to the petitioner that document'' the railroad's decision. Paragraph (b)(7) of this section which provides that, if requested by the OCRB, a petitioner must supplement the petition with ''a copy of the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees.'' That paragraph also provides that a petitioner must provide a written explanation in response to an OCRB request if written documents that should be reasonably available to the petitioner are not supplied. The requirements in paragraph (b)(7) were added to clarify a petitioner's responsibilities, if requested by the OCRB, with respect to a petition seeking review of a railroad decision which is based on a failure to comply with any drug or alcohol related rules or a return-to-service agreement.

Paragraph (c) of this section gives the OCRB discretion to grant a request for additional time that is made prior to the expiration of the period originally prescribed. As the OCRB can exercise its discretion under this rule only for ''cause shown,'' a party will have to demonstrate some justification for the OCRB to grant an extension of time. Similarly, if the deadline in paragraph (c) is completely missed, the movant, under paragraph (c)(2), would have to allege facts constituting ''excusable neglect'' and the mere assertion of excusable neglect, unsupported by facts, would be insufficient. Excusable neglect requires a demonstration of good faith on the part of the party seeking an extension of time and some reasonable basis for noncompliance within the time frame specified in the rules. Absent a showing along these lines, relief will be denied.

Paragraph (d) of this section explains that a decision by the OCRB to deny a petition for untimeliness or lack of compliance with the requirements of § 242.503 may be appealed directly to the Administrator. Ordinarily, an appeal to the Administrator can occur only after a case has been heard by FRA's hearing officer.

One difference between this section and § 240.403 is the time by which a petition seeking review of a railroad's decision would have to be filed. Part 240 contains different times depending on whether a person is seeking review of a revocation decision (120 days) or a denial decision (180 days). This section, however, provides that a petition seeking review of a revocation or denial decision will have to be filed with FRA within 120 days of the date the decision was served on the petitioner. Another difference between this section and § 240.403 is that, under this section, the OCRB's discretion to consider untimely filed petitions is now extended to petitions seeking review of a railroad's decision to deny certification or recertification.

Section 242.505 Processing Certification Review Petitions

This section, derived from 49 CFR 240.405, details how petitions for review will be handled by FRA. Upon receipt of the petition, FRA will provide the person written acknowledgement of the filing. The railroad will then have 60 days from its date of receipt to respond, if it desires to comment on the matter. If the railroad comments on the matter, any material will have to be submitted in writing and a copy served on the petitioner and petitioner's representative, if any. As discussed in the section-by-section analysis of § 242.503, OCRB petitions will be accessible on *www.regulations.gov.* Therefore, FRA will no longer automatically provide copies of the petitions to railroads. The railroads will be responsible for accessing the petitions online.

Paragraph (d)(1) has been revised from the NPRM to require railroads to provide FRA with an email address if available. Railroads should note that if FRA receives an email address, it expects to conduct any and all correspondence regarding a petition or case by email.

Paragraph (d)(3) has revised the requirements proposed in the NPRM and differs from § 240.405 in that railroad responses to a petition will be submitted to the Docket Clerk of DOT rather than FRA's Docket Clerk. FRA believes this change will make the process more efficient as DOT Dockets is better equipped to process, scan and store these types of filings. In addition, filings in OCRB proceedings will become more accessible because they will be posted on *www.regulations.gov.* Interested parties should note that anyone is able to search the electronic form of all filings received into any of DOT's dockets by the name of the individual submitting the filing (or signing the filing, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement published in the

[7] The number of board members will be provided by FRA order.

Federal Register on April 11, 2000 (Volume 65, Number 70, Pages 19477–78), or you may visit *http://www.regulations.gov/#!privacyNotice.*

Based on the written record, FRA staff will analyze the railroad decision and make a recommendation to the OCRB. The ORCB will determine whether the denial or revocation of certification was improper under the regulation. As indicated in paragraph (a), it will be FRA's goal to issue OCRB decisions within 180 days from the date FRA has received all the information from the parties. FRA's ability to achieve that goal will depend on the number of petitions filed and agency resources available to handle those petitions in any given period. Further, that goal will depend on whether FRA receives all available evidence. If the petition and/or railroad's response do not contain all available evidence, including but not limited to, the complete hearing transcript with exhibits and color copies of all photographic evidence (if available), then it is FRA's intention that the OCRB will render a decision within 180 days from the date that all available evidence is received.

While the handling of petitions by FRA will be the same under § 240.405 and this section, this section, unlike § 240.405, includes, in paragraphs (f)–(j), the process and standards of review that the OCRB will utilize when considering a petition. Those standards are the same standards used by the LERB to review locomotive engineer petitions. The standards were added to this rule to address a concern of some members of the Working Group that railroads and petitioners did not know what standard of review the OCRB would use in considering petitions.

Like the LERB, the OCRB will only determine whether a railroad's decision was based on an incorrect determination. If a railroad conducted hearing was so unfair that it causes a petitioner substantial harm, the OCRB could grant the petition; however, the OCRB's review is not intended to correct all procedural wrongs committed by a railroad. Also like the LERB, the decision-making power of the OCRB is limited to approving the railroad decision, overturning the railroad decision, or returning the case to the railroad for additional fact finding. The OCRB is not empowered to mitigate the consequences of a railroad decision, if the decision was valid under this regulation. The OCRB is only empowered to make determinations concerning qualifications under this regulation. The contractual consequences, if any, of these determinations would have to be resolved under dispute resolution mechanisms that do not directly involve FRA. For example, FRA cannot order a railroad to alter its seniority rosters or make an award of back pay to accommodate a finding that a railroad wrongfully denied certification.

Interested parties should note that promulgation of this rule necessarily requires the OCRB and LERB to determine whether a railroad revoked the correct certificate of a person who holds both an engineer and conductor certification. For example, in a case in which a railroad finds that a person, who holds both a conductor and engineer certification, violates a railroad rule involving a failure to comply with the provisions of 49 CFR 218.99 (*i.e.,* a part 218, subpart F violation) but revoked that person's engineer certification, the OCRB, if petitioned, would have to find that the revocation decision was improper because, currently, an engineer cannot have his or her part 240 certification revoked for violations of part 218, subpart F.

Paragraph (l) of this section requires the OCRB's written decision to be served on the petitioner, including the petitioner's representative, if any, and the railroad. Moreover, the paragraph does not contain a requirement that every decision include findings of fact which may not be appropriate or relevant to some decisions.

Section 242.507 Request for a Hearing

This section, which parallels 49 CFR 240.407, provides that a party who has been adversely affected by an OCRB decision will have the opportunity to request an administrative proceeding as prescribed in § 242.509. In addition, this section details the requirements for requesting such a proceeding.

Paragraph (c) of this section provides that a party who fails to request an administrative hearing in a timely fashion will lose the right to further administrative review and the OCRB's decision will constitute final agency action.

As noted in paragraph (e) of this section, FRA will not schedule hearings or set an agenda for the proceeding. FRA will merely arrange for the appointment of a presiding officer and it will be the presiding officer's duty to schedule a hearing for the earliest practicable date.

Section 242.509 Hearings

This section, which parallels 49 CFR 240.409, describes the authority of the presiding officer to conduct an administrative hearing and the procedures by which the administrative hearing will be governed. Like § 240.409, the proceeding provided by this section will afford an aggrieved party a *de novo* hearing at which the relevant facts will be adduced and the correct application of this part will be determined.

In instances when the issues are purely legal, or when only limited factual matters are necessary to determine issues, paragraph (c) of this section provides that the presiding officer may determine the issues following an evidentiary hearing only on the disputed factual issues, if any. The presiding officer can therefore grant full or partial summary judgment.

Paragraph (d) of this section provides that the presiding officer may authorize discovery. It also authorizes the presiding officer to sanction willful noncompliance with permissible discovery requests. Paragraph (e) requires that documents in the nature of pleadings be signed. This signature will constitute a certification of factual and legal good faith. Paragraph (f) provides the requirement for service and for certificates of service. The presiding officer's authority to address noncompliance with a law or directive is expressed in paragraph (g). This provision is intended to ensure that the presiding officer will have the authority to control the proceeding so that an efficient and fair hearing will result.

Paragraph (h) states the right of each party to appear and be represented. Paragraph (i) protects witnesses by ensuring their right of representation and their right to have their representative question them. Paragraph (j) allows any party to request consolidation or separation of hearings of two or more petitions when to do so would be appropriate under established jurisprudential standards. This option is intended to allow more efficient determination of petitions in cases where a joint hearing would be advantageous.

Under paragraph (k), the presiding officer could, with certain exceptions, extend periods for action required in the proceedings, provided substantial prejudice would not result to a party. The authority to deny a request for extension submitted after the expiration of the period involved shows the preference for use of this authority as a tool to alleviate unforeseen or unnecessary burdens, and not as a remedy for inexcusable neglect.

Paragraph (l) establishes a motion as the appropriate method for requesting action by the presiding officer. This paragraph also provides the form of motions and the response period for written motions.

Paragraph (m) provides rules for the mode of hearing and record

maintenance, including requirements for sworn testimony, verbatim record (including oral testimony and argument), and inclusion of evidence or substitutes therefor in the record. Paragraph (n) directs the presiding officer to employ specific rules of evidence as guidelines for the introduction of evidence and permits the presiding officer to determine what evidence may be received. Further, paragraph (o) provides additional powers the presiding officer may exercise during the proceedings.

Paragraph (p) provides that the petitioner before the OCRB, the railroad that took the certification action at issue, and the FRA are mandatory parties to the administrative proceeding. Paragraph (q) requires the party requesting the hearing to carry the burden of proof. The actions of the conductor and the railroad will be at issue in the hearing—not the actions of the OCRB. Thus, it is appropriate that the conductor and the railroad fill the roles of petitioner and respondent for the hearing. In addition, the burden each party will have if they were the hearing petitioner is articulated in paragraph (q).

Paragraph (r) provides that FRA will be a mandatory party in the proceeding. In all proceedings, FRA will initially be considered a respondent. If, based on evidence acquired after the filing of a petition for hearing, FRA were to conclude that the public interest in safety was more closely aligned with the position of the petitioner than the respondent, FRA can request that the hearing officer exercise his or her inherent authority to realign parties for good cause shown. However, FRA anticipates that such a situation would occur rarely, if ever. Since FRA could realign itself, FRA wants to caution future parties that FRA represents the interests of the government; hence, parties and their representatives will have to be careful to avoid ethical dilemmas that might arise due to FRA's ability to realign itself.

Paragraphs (s) through (u) provide the presiding officer with authority to close the record and issue a decision.

Section 242.511 Appeals

This section, derived from 49 CFR 240.411, permits any party aggrieved by the presiding officer's decision to file an appeal with the FRA Administrator. Paragraph (a) provides that if no appeal is timely filed, the presiding officer's decision will constitute final agency action.

Paragraphs (b) through (f) allow for a reply to the appeal and describe the Administrator's authority to conduct the proceedings. Interested parties should note that the phrase ''except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted'' in paragraph (e) of this section is included in this rule so that parties understand that a remand, or other intermediate decision, will not constitute final agency action. The inclusion of this phrase is made in deference to those parties that are not represented by an attorney or who might otherwise be confused as to whether any action taken by the Administrator should be considered final agency action.

Appendices

FRA has included four appendices with this rule. Appendix A contains a civil penalty schedule similar to those that FRA has issued for all of its existing rules.

Appendix B provides both the organizational requirements and a narrative description of the submission required under §§ 242.101 and 242.103. FRA is not requiring railroad submissions to be made on a Federally mandated form. Instead, FRA is prescribing only minimal constraints on the organization and manner of presenting information. FRA requires that the submission be divided into six sections. FRA requires that each section deal with a different subject matter and that the railroad identify the appropriate person to be contacted in the event FRA needs to discuss some aspect of the railroad's program. While Appendix B is derived from Appendix B to part 240, one major difference is that Appendix B of part 242 makes clear that, pursuant to § 242.103, a railroad must serve a copy of its submission on the president of each labor organization that represents the railroad's employees subject to part 242.

Appendix B provides the railroads with the option to file their program submissions electronically. FRA intends to create a secure document submission site and will need basic information from each company before setting up the user's account. In order to provide secure access, information regarding the points of contact is required. It is anticipated that FRA will be able to approve or disapprove all or part of a program and generate automated notifications by email to a railroad's points of contact. Thus, FRA wants each point of contact to understand that by providing any email addresses, the railroad is consenting to receive approval and disapproval notices from FRA by email. Railroads that allow notice from FRA by email would gain the benefit of receiving such notices quickly and efficiently.

Those railroads that choose to submit printed materials to FRA must deliver them directly to the specified address. Some railroads may choose to deliver a CD, DVD, or other electronic storage format to FRA rather than requesting access to upload the documents directly to the secure electronic database. Although that will be an acceptable method of submission, FRA would encourage each railroad to utilize the electronic submission capabilities of the system. Of course, if FRA does not have the capability to read the type of electronic storage format sent, FRA can reject the submission.

FRA may be able to develop its secure document submission site so that confidential materials are identified and not shared with the general public. However, FRA does not expect the information in a program to be of such a confidential or proprietary nature, particularly since each railroad is required to share the program submission, resubmission, or material modification with the president of each labor organization that represents the railroad's certified conductors. *See* 242.103(c). Accordingly, FRA does not at this time believe it is necessary to develop a document submission system which addresses confidential materials at this time.

Appendix C, derived from Appendix C to part 240, provides a narrative discussion of the procedures that a person seeking certification or recertification will have to follow to furnish a railroad with information concerning his or her motor vehicle driving record.

Appendix D, derived from Appendix F to part 240, provides a narrative discussion of the procedures that a railroad is required to employ in administering the vision and hearing requirements of § 242.117. The main issue addressed in this Appendix is the acceptable test methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry.

Appendix E provides a table describing the application of revocable events. The table lists: The revocation periods; whether a person would be eligible for a reduction of the revocation period; and whether a person who is certified as both a conductor and an engineer could work in either position following a certification revocation.

VI. Regulatory Impact and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule has been evaluated in accordance with existing policies and procedures and determined to be non-significant under both Executive Order 12866 and DOT policies and procedures. *See* 44 FR 11034; February 26, 1979. FRA has prepared and placed in the docket a regulatory impact analysis addressing the economic impact of this final rule.

As part of the regulatory impact analysis, FRA has assessed quantitative measurements of the cost streams expected to result from the adoption of this final rule. For the twenty-year period analyzed, the estimated quantified cost imposed on industry totals $86.3 million with a present value (PV, 7%) of $43.2 million. In addition, FRA would incur administrative costs totaling about $15.2 million, with a PV of $7.6 million. Although there are numerous costs or burdens in this final rule, the requirements that are expected to impose the largest burdens relate to the initial and periodic training, knowledge testing, and operational testing. In addition, the dispute resolution process associated with the denial and revocation of conductor certification would be a new requirement that would impose burdens on the railroad industry and FRA.

As part of the regulatory impact analysis, FRA has explained what the likely benefits for this final rule would be, and provided numerical assessments of the potential value of such benefits. The final rule is expected to improve railroad safety by ensuring that all trains have certified and trained conductors. Thus, in general, the final rule should decrease train accidents and incidents and associated casualties and damages. FRA also anticipates that this regulation will decrease switching operation casualties and human factor-caused train crew injuries. FRA believes the value of the anticipated safety benefits will meet or exceed the cost of implementing the final rule.

The table below presents the cost associated with implementation of the final rule.

Costs for Final Rule	
[Note dollars are discounted (7 %)]	
Subpart B: Program and Eligibility Requirements	
Development of Programs	$884,676
Prior Conduct of Employee	$2,571,461
Vision and Hearing Acuity	$495,929
Training	$13,093,044
Knowledge Testing	$3,755,303
Operational Tests	$3,911,774
Miscellaneous Subpart B costs	$370,025
Subpart C: Administration of the Certificate Program	
Certificates	$1,010,397
Sections 242.203 - 242.213	$2,135,625
Railroad Oversight Responsibilities	$699,711
Subpart D: Territorial Qualifications & Joint Operations	
Section 242.301	$10,080,954
Subpart E: Denial and Revocation of Certification	
Sections 242.401 & 242.407	$2,017,187
Subpart F: Dispute Resolution Procedures	
Petitions to FRA Review Board	$1,813,783
Requests for Administrative Hearings	$321,000
Appeals to FRA Administrator	$48,000
Total Non-Government Cost	**$43,208,868**
Government Costs: Subpart F	
Sections 242.501-511	$7,572,000

B. Regulatory Flexibility Act and Executive Order 13272

To ensure potential impacts of rules on small entities are properly considered, FRA developed this final rule in accordance with Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant impact on a substantial number of small entities.

As discussed earlier, FRA has initiated this rulemaking as a requirement of the Rail Safety Improvement Act of 2008. This final rule enhances the safety of railroad operations by ensuring that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents, and to improve railroad safety.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), FRA certifies that this final rule would not have a significant impact on a substantial number of small entities. Although a substantial number of small railroads would be affected by this final rule, few, if any, would be significantly impacted. FRA invited all interested parties to submit data and information regarding the potential economic impact that would result from the adoption of the final rule. FRA received one comment pertinent to this (see below) and considered it in making the determination for certification of this final rule.

1. Description of Regulated Entities and Impacts

The ''universe'' of the entities to be considered generally includes only those small entities that are reasonably expected to be directly regulated by this action. For this rulemaking, there is one type of small entity that is potentially affected by this rulemaking: Small railroads.

FRA estimates that approximately 5 contractors will be developing conductor certification programs and contracting conductors to railroads. The cost associated with certifying conductors is a cost that these contractors will pass on to the railroads contracting their services.

''Small entity'' is defined in 5 U.S.C. 601 as having the same meaning as ''small business concern'' under Section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) includes nonprofit enterprises that are independently owned and operated, and are not dominant in their field of operations within the definition of ''small entities.'' Additionally, 5 U.S.C. 601(5) defines ''small entities'' as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

The U.S. Small Business Administration (SBA) stipulates ''size standards'' for small entities. It provides that the largest a for-profit railroad business firm may be (and still classify as a ''small entity'') is 1,500 employees for ''line-haul operating'' railroads, and 500 employees for ''shortline operating'' railroads.

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to the authority provided to it by SBA, FRA has published a final policy, which formally establishes small entities as railroads that meet the line haulage revenue requirements of a Class III railroad. Currently, the revenue requirements are $20 million or less in annual operating revenue, adjusted annually for inflation. The $20 million limit (adjusted annually for inflation) is based on the Surface Transportation Board's threshold of a Class III railroad carrier, which is adjusted by applying the railroad revenue deflator adjustment. The same dollar limit on revenues is established to determine whether a railroad shipper or contractor is a small entity. Governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000 are also considered small entities under FRA's policy. FRA proposed using this definition for this rulemaking in the proposed rule. No comments were received pertinent to its use.

2. Small Railroads

There are approximately 682 railroads meeting the definition of ''small entity'' as described above. FRA estimates that approximately 627 of these small entities, would be impacted by this final rule. FRA estimates that approximately 55 of the 682 small railroads would not be impacted because they would be exempt from the final rule. Note, however, that approximately 125 of the small railroads that would be impacted are subsidiaries of large shortline holding companies with the expertise and resources comparable to larger railroads. Many small railroads that will be impacted by this rulemaking are members of the American Shortline and Regional Railroad Association (ASLRRA), which actively participated in the development of this regulatory action. It is very likely that the ASLRRA will develop a generic conductor certification program for their members to use. FRA would assist with this effort.

Small railroads will be required to have written programs for certifying conductors in accordance with this regulation. Given the nature of how most small railroads operate and the fact that they operate fewer types and numbers of trains than larger railroads, this regulation should be less burdensome for small railroads than larger railroads. Thus, given the more limited territory, equipment types, number of conductors and/or the commodities transported by small railroads relative to Class II and Class I railroads, implementing and maintaining a program for the certification of conductors would be significantly less burdensome for small railroads both overall and on a per conductor basis. While FRA does recognize that some small railroads do not currently have formal conductor training and certification programs, FRA believes that most small railroads currently have informal programs with the necessary elements of a formal program. FRA requested information regarding the number and type of Class III railroads that do not have formal conductor training and certification programs as well as the number of conductors employed by such railroads in the Notice of Proposed Rulemaking (NPRM) and Initial Regulatory Flexibility Assessment (IRFA). However, FRA did not receive comments specific to that request.

In general, this final rule will likely burden all small railroads that are not exempt from its scope or application. However, it would significantly burden few if any, of these entities. FRA invited commenters to submit information that might assist us in assessing the cost impacts on small railroads in the NPRM. However, FRA only received comments from one commenter addressing the cost to small railroads. The ASLRRA noted in its comments of January 10, 2011, that it was working to generate data and if and when it was available, would post it to the docket. FRA has received no additional data on this issue.

FRA disagrees with ASLRRA's cost assessment in their comments. In general, it should be noted that the final

rule is not a ''stand alone'' regulation. It is conjoined with numerous existing regulations, such as parts 217 and 218. However, the shortline railroads have been responsible for complying with the Locomotive Engineering Certification Regulation (49 CFR part 240) for over 20 years. Many of the compliance requirements in this final rule are identical or very similar to part 240. Thus, these railroads likely already have assigned personnel and filing procedures in place to comply with this final rule. Since this final rule requires three of the four certification components required by part 240 (hearing and visual acuity, motor vehicle operator history check, and knowledge test), the shortline railroads would only need to satisfy these requirements once for individuals who will work as both a conductor and an engineer. FRA believes that many of the Train and Engine employees on shortlines will be dual certified. Thus, these employees can work either a conductor's position or an engineer's position as service demands.

The ASLRRA commented that the proposed rule will also impose significant new costs on small railroads. In addition, ASLRRA noted that ''appropriate and ongoing training is [the] centerpiece of the proposed conductor certification rules, and certification itself is a reflection that the conductor has been properly trained and has demonstrated the ability to apply that training in the safe performance of job duties.'' However, FRA notes that the conductor training required by this final rule should not be new to shortlines. Most, if not all, shortlines currently afford training to employees who fill a conductor's position. A majority of this training has been in the form of on-the-job (OJT) training followed by formal or informal classroom training on safety and operating rules. Historically, OJT is peer training provided by a qualified, per this rulemaking, certified employee. Hence, there is no major change to existing practices or additional cost, excluding the time required to compile a list of qualified instructors. In addition, the final rule has placed a greater emphasis on OJT and removed the task analysis requirement in the training section. Thus, the training provided by most small railroads would not change much if any under the final rule. It will likely be more formalized and ensure that conductors receive appropriate training in all areas of responsibility. Thus, the additional cost for training should not be significant. FRA has met with and will continue to work with ASLRRA to develop a generic conductor certification program that can be used for small railroads. This should help to reduce the cost of conductor certification programs and the cost of training development for small railroads. As noted above, this final rule is complementary with several other FRA regulations. It is conjoined with Section 217.9, Subpart F of Part 218, Section 238.109, and Section 239.101(a)(2). Thus, there will be cost savings due to the fact that some of its requirements are current burdens under other federal regulations.

The ASLRRA's comments noted that ''one training cost for some small railroads which FRA has completely dismissed is the cost of training Remote Control Operators (RCO's).'' It should be noted that RCO operation is a practice that provides value based on the reduction of train crew numbers. ASLRRA is correct that FRA dismissed the costs related to the RCO in the Initial Regulatory Flexibility Assessment (IRFA) and the Regulatory Impact Assessment (RIA) to the NPRM. FRA's IRFA and RIA dismissed such costs for all railroads, including small railroads, due to the fact that there are no FRA regulations requiring the use of remote controlled locomotives (RCL). The use of RCL by any railroad is a choice and usually a business decision. Training for RCO is covered in part 240. Multiple certifications are addressed in this final rule and the only difference regarding the locomotive engineer training and the conductor training are the additional modules that cover Subpart F of part 218, and part 239.

The ASLRRA also noted concern over the economic impact of decertifying a conductor on a small railroad with limited personnel. While FRA recognizes ASLRRA's concerns, FRA notes that small railroads have successfully dealt with a similar issue under part 240 for many years without excessive financial burdens being incurred. Further, FRA notes that there is a significant safety concern involved with treating a conductor for a small railroad differently than a conductor for a large railroad with respect to certificate revocation. Such treatment would result in the disparate treatment of conductors across the three classes of railroads (*i.e.,* a conductor for a Class I railroad would not be permitted to serve as a conductor following a decertifiable event whereas a conductor on a Class III railroad, who was involved in the same type of decertifiable event, may be permitted to serve as a conductor) even thought there is no less a safety risk if a person is a conductor for a Class III railroad as opposed to a conductor for a Class I or Class II railroad. Moreover, treating small railroads differently in this instance would leave open the possibility that a conductor involved in a revocable event on a Class III railroad could immediately go to work for a Class I railroad due to the fact that restrictions were placed on the conductor's certificate rather than having the certificate revoked.

3. Economic Impacts on Small Entities (Railroads)

This certification is not intended to be a stand-alone document. In order to get a better understanding of the total costs for the railroad industry, which forms the base for these estimates or more cost detail on any specific requirement, a review of FRA's RIA is recommended. FRA has placed a copy of the RIA in the docket for this rulemaking.

Based on information currently available, FRA estimates that about 8 percent of the total railroad cost associated with implementing the final rule will be borne by small entities. FRA has estimated the total cost for this regulation to be $86.3 million for the railroad industry. FRA estimates that $6.4 million of this burden will be borne by small railroads. In addition, FRA will incur costs totaling approximately $15.2 million. FRA also estimates that small railroads comprise over 90 percent of the number of entities impacted directly by this regulation. Small railroads generally have fewer conductors and operate over smaller territories allowing them to meet the requirements at lower overall cost as well as lower cost per conductor. Thus, although a substantial number of small entities will likely be impacted, the economic impact on them will likely not be significant.

4. Significant Economic Impact Criteria

Previously, FRA sampled small railroad and found that revenue averaged approximately $4.7 million (not discounted) in 2006. One percent of average annual revenue per small railroad is $47,000. FRA estimates that the average small railroad will spend less than $11,000 over 20 years to comply with the additional requirements of this final rule. Based on this, FRA concludes that the expected burden of this final rule will not have a significant impact on the competitive position of small entities, or on the small entity segment of the railroad industry as a whole.

5. Substantial Number Criteria

This final rule will likely burden all small railroads that are not exempt from its scope or application. Thus, as noted

above this rule will impact a substantial number of small railroads.

6. Certification

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), FRA certifies that this final rule will not have a significant impact on a substantial number of small entities. Although a substantial number of small railroads will be affected by this final rule, none of these entities will be significantly impacted.

C. Paperwork Reduction Act

The information collection requirements in this final rule are being submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq*. The sections that contain the new information collection requirements are duly designated, and the estimated time to fulfill each requirement is as follows:

CFR Section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
242.9—Waivers—Petitions	677 railroads	10 petitions	3 hours	30
242.101/103—Certification Program: Written Program for Certifying Conductors.	677 railroads	678 programs	160 hrs./581 Hrs./15.5 hrs	16,799
Approval of Design of Programs:				
—Certification Programs for New RRs	6 railroads	6 new prog	15.5 hours	93
—Conductor Certification Submission Copies to Rail Labor Organizations.	677 railroads	200 copies	15 minutes	50
—Affirmative Statements that Copies of Submissions Sent to RLOs.	677 railroads	200 statements	15 minutes	50
—Certified Comments on Submissions	677 railroads	35 comments	4 hours	140
—Certification Programs Disapproved by FRA and then Revised.	677 railroads	10 programs	4 hours	40
—Revised Certification Programs Still Not Conforming and Then Resubmitted.	677 railroads	3 programs	2 hours	6
—Certification Programs Materially Modified After Initial FRA Approval.	677 railroads	50 programs	2 hours	100
—Materially Modified Programs Disapproved by FRA & Then Revised.	677 railroads	3 programs	2 hours	6
—Revised programs Disapproved and Then Resubmitted.	677 railroads	1 program	2 hours	2
242.105—Implementation Schedule:				
—Designation of Certified Conductors (Class I Railroads).	677 railroads	48,600 designations	5 minutes	4,050
—Issued Certificates (1/3 each year)	677 railroads	16,200 certif	1 hour	16,200
—Designation of Certified Conductors (Class II and III Railroads).	677 railroads	5,400 design	5 minutes	450
—Issued Certificates (1/3 each year)	677 railroads	1,800 certif	1 hour	1,800
—Requests for Delayed Certification	677 railroads	5,000 request	30 minutes	2,500
—Testing/Evaluation to Certify Persons	677 railroads	1,000 tests	560 hours	560,000
—Testing/Evaluation to Certify Conductors (Class III).	627 railroads	100 tests	400 hours	40,000
242.107—Types of Service—Reclassification to Diff. Type of Cert.	677 railroads	25 conductor Tests/ Evaluations.	8 hours	200
242.109—Opportunity by RRs for Certification Candidates to Review and Comment on Prior Safety Record.	677 Railroads	200 records + 200 comment.	30 minutes + 10 minutes.	133
242.111—Prior Safety Conduct As Motor Vehicle Operator:				
—Eligibility Determinations	677 Railroads	1,100 dtrmin	10 minutes	183
—Initial Certification for 60 Days	677 Railroads	75 certific	10 minutes	13
—Recertification for 60 Days	677 Railroads	125 recertif	10 minutes	21
—Driver Info. Not Provided and Request for Waiver by Persons/RR.	677 Railroads	25 requests	2 hours	50
—Request to Obtain Driver's License Information From Licensing Agency.	54,000 Conductors/Persons.	18,000 req	15 minutes	4,500
—Requests for Additional Information From Licensing Agency.	54,000 Conductors/Persons.	25 requests	10 minutes	4
—Notification to RR by Persons of Never Having a License.	54,000 Conductors/Persons.	2 notification	10 minutes	.33
—Report of Motor Vehicle Incidents	54,000 Conductors	200 reports	10 minutes	33
—Evaluation of Driving Record	54,000 conductors	18,000 eval	15 minutes	4,500
—DAC Referral by RR After Report of Driving Drug/Alcohol Incident.	677 Railroads	180 referrals	5 minutes	15
—DAC Request and Supply by Persons of Prior Counseling or Treatment.	677 Railroads	5 requests/Records	30 minutes	3
—Conditional Certifications Recommended by DAC.	677 Railroads	50 certificat	4 hours	200
242.113—Prior Safety Conduct As Employee of a Different Railroad.	54,000 conductors	360 requests/360 records.	15 minutes + 30 minutes.	270
242.115—Substance Abuse Disorders and Alcohol Drug Rules Compliance:				
—Meeting Section's Eligibility Reqmnt	54,000 conductors	18,000 determination	2 minutes	600

CFR Section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Written Documents from DAC Person Not Affected by a Disorder.	677 railroads	400 docs	30 minutes	200
—Self-Referral by Conductors for Substance Abuse Counseling.	54,000 conductors	10 self-referrals	10 minutes	2
—Certification Reviews for Occurrence/Documentation of Prior Alcohol/Drug Conduct by Persons/Conductors.	677 railroads	18,000 reviews	10 minutes	3,000
—Written Determination That Most Recent Incident Has Occurred.	677 railroads	150 determin	60 minutes	150
—Notification to Person That Recertification Has Been Denied.	677 railroads	150 notific	10 minutes	25
—Persons/Conductors Waiving Investigation	54,000 Conductors	100 waivers	10 minutes	17
242.117—Vision and Hearing Acuity:				
—Determination Vision Standards Met	677 railroads	18,000 deter	20 minutes	6,000
—Determination Hearing Stds. Met	677 railroads	18,000 deter	20 minutes	6,000
—Additional Gap Hearing Tests	677 railroads	200 deter	20 minutes	67
—Medical Examiner Certificate that Person Has Been Examined/Passed Test.	677 railroads	18,000 certif	2 hours	36,000
—Document Standards Met with Conditions	677 railroads	50 document	30 minutes	25
—Document Standards Not Met	677 railroads	25 document	30 minutes	13
—Notation Person Needs Corrective Device (Glasses/Hearing Aid):	677 railroads	10,000 notes	10 minutes	1,667
—Request for Further Medical Evaluation for New Determination.	677 railroads	100 request + 100 Evals.	60 minutes + 2 hours	300
—Request for Second Retest and Another Medical Evaluation.	677 railroads	25 requests + 25 Evals.	60 minutes + 2 hours	75
—Copies of part 242 Provided to RR Medical Examiners.	677 railroads	677 copies	60 minutes	677
—Consultations by Medical Examiners with Railroad Officer and Issue of Conditional Certification.	677 railroads	100 consults + 100 certif.	2 hours + 10 minutes	217
—Notification by Certified Conductor of Deterioration of Vision/Hearing.	677 railroads	10 notific.	10 minutes	2
242.119—Training:				
—Completion of Training Program	677 railroads	678 Program	36 hours/70 hrs/3 hrs	3,751
—Modification to Training Program	677 railroads	678 Program	12 hrs/20 hrs/30 min	34
—Completion of Training Program by Conductors/Persons + Documents.	54,000 Conductors	18,000 Docs/18,000 Cond.	1 hour/560 hours	10,098,000
—Modification of Training Program Due to New Laws/Regulations.	677 railroads	30 programs	4 hours	120
—Consultation with Supervisory Employee During Written Test.	677 railroads	1,000 consult	15 minutes	250
—Familiarization Training Upon Transfer of RR Ownership.	677 railroads	10 trained Conductors	8 hours	80
—Continuing Education of Conductors	677 railroads	18,000 cont. trained cond.	8 hours	144,000
242.121—Knowledge Testing:				
—Determining Eligibility	677 railroads	18,000 deter.	30 minutes	9,000
—Retests/Re-Examinations	677 railroads	500 Retests	8 hours	4,000
242.123—Monitoring Operational Performance:				
—Unannounced Compliance Tests and Records.	677 railroads	18,000 tests + 18,000 recd.	10 minutes + 5 minutes	4,500
—Return to Service That Requires Unannounced Compliance Test/Record.	677 railroads	1,000 tests + 1,000 records.	10 minutes + 5 minutes	250
242.125/127—Certificate Determination by Other Railroads/Other Country:				
—Determination Made by RR Relying on Another RR's Certification.	677 railroads	100 determin	30 minutes	50
—Determination by Another Country	677 railroads	200 determin	30 minutes	100
242.203—Retaining Information Supporting Determination—Records:	677 railroads	18,000 recds	15 minutes	4,500
—Amended Electronic Records	677 railroads	20 records	60 minutes	20
242.205—List of Certified Conductors Working in Joint Territory.	677 railroads	625 lists	60 minutes	625
242.209—Maintenance of Certificates:				
—Request to Display Certificate	677 railroads	2,000 request/displays	2 minutes	67
—Notification That Request to Serve Exceeds Certification.	677 railroads	1,000 notif	10 minutes	167
242.211—Replacement of Certificates	677 railroads	500 certific	5 minutes	42
242.213—Multiple Certificates:				
—Notification to Engineer That No Conductor Is On Train.	677 railroads	5 notification	10 minutes	1

CFR Section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Notification of Denial of Certification by Individuals Holding Multiple Certifications.	677 railroads	10 notific	10 minutes	2
242.215—RR Oversight Responsibility:				
—RR Review and Analysis of Administration of Certification Program.	677 railroads	44 reviews/Analyses	40 hours	1,760
—Report of Findings by RR to FRA	677 railroads	36 reports	4 hours	144
242.301—Determinations—Territorial Qualification and Joint Operations.	320 railroads	1,080 Deter	15 minutes	270
—Notification by Persons Who Do Not Meet Territorial Qualification.	320 railroads	500 notific	10 minutes	83
242.401—Notification to Candidate of Information That Forms Basis for Denying Certification and Candidate Response.	677 railroads	40 notific + 40 responses.	60 minutes/60 minutes	80
—Written Notification of Denial of Certification.	677 railroads	40 notific	60 minutes	40
242.403/405—Criteria for Revoking Certification: Periods of Ineligibility:				
—Review of Compliance Conduct	677 railroads	950 reviews	10 minutes	158
—Written Determination That the Most Recent Incident Has Occurred.	677 railroads	950 determin	60 minutes	950
242.407—Process for Revoking Certification:				
—Revocation for Violations of Section 242.115(e).	677 railroads	950 Revoked Certificates.	8 hours	7,600
—Immediate Suspension of Certificate	677 railroads	950 suspend Certificate	1 hour	950
—Determinations Based on RR Hearing Record.	677 railroads	950 determin	15 minutes	238
—Hearing Record	677 railroads	950 records	30 minutes	475
—Written Decisions by RR Official	677 railroads	950 decions	2 hours	1,900
—Service of Written Decision on Employee by RR + RR Service Proof.	677 railroads	950 decisions + 950 proofs.	10 minutes + 5 minutes	238
—Written Waiver of Right to Hearing	54,000 Conductors	425 waivers	10 minutes	71
—Revocation of Certification Based on Information That Another Railroad Has Done So.	677 railroads	15 revoked Certifications.	10 minutes	3
—Placing Relevant Information in Record Prior to Suspending Certification/Convening Hearing.	677 railroads	100 updated records	1 hour	100

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan at (202) 493–6292 or Ms. Kimberly Toone at (202) 493–6132 or via email at the following addresses: *Robert.Brogan@dot.gov; Kimberly.Toone@dot.gov.*

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th St. NW., Washington, DC 20503, attn: FRA Desk Officer. Comments may also be sent via email to the Office of Management and Budget at the following address: *oira_submission@omb.eop.gov.*

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

FRA cannot impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of this final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Federalism Implications

Executive Order 13132, ''Federalism'' (64 FR 43255, Aug. 10, 1999), requires FRA 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'' are 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.'' Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. The rule will not have a substantial effect on the States or their political subdivisions; it will not impose any compliance costs; and it will not affect the relationships between the

Federal government and the States or their political subdivisions, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

However, this rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the ''essentially local safety or security hazard'' exception to section 20106.

In sum, FRA has analyzed this rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this rule is not required.

E. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards.

This rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

F. Environmental Impact

FRA has evaluated this rule in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. *See* 64 FR 28547 (May 26, 1999).

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this rule is not a major Federal action significantly affecting the quality of the human environment.

G. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $140,800,000 or more in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. The rule will not result in the expenditure, in the aggregate, of $140,800,000 or more in any one year, and thus preparation of such a statement is not required.

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355 (May 22, 2001). Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this rule in accordance with Executive Order 13211. FRA has determined that this rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this rule is not a ''significant energy action'' within the meaning of Executive Order 13211.

I. Privacy Act

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

List of Subjects in 49 CFR Part 242

Administrative practice and procedure, Conductor, Penalties, Railroad employees, Railroad operating procedures, Railroad safety, Reporting and recordkeeping requirements.

The Rule

For the reasons discussed in the preamble, FRA amends chapter II, subtitle B of title 49 of the Code of Federal Regulations by adding part 242 to read as follows:

PART 242—QUALIFICATION AND CERTIFICATION OF CONDUCTORS

Subpart A—General

Sec.
242.1 Purpose and scope.
242.3 Application and responsibility for compliance.
242.5 Effect and construction.
242.7 Definitions.
242.9 Waivers.
242.11 Penalties and consequences for noncompliance.
242.13 Information collection requirements.

Subpart B—Program and Eligibility Requirements

242.101 Certification program required.
242.103 Approval of design of individual railroad programs by FRA.
242.105 Schedule for implementation.
242.107 Types of service.

242.109 Determinations required for certification and recertification.
242.111 Prior safety conduct as motor vehicle operator.
242.113 Prior safety conduct as an employee of a different railroad.
242.115 Substance abuse disorders and alcohol drug rules compliance.
242.117 Vision and hearing acuity.
242.119 Training.
242.121 Knowledge testing.
242.123 Monitoring operational performance.
242.125 Certification determinations made by other railroads.
242.127 Reliance on qualification requirements of other countries.

Subpart C—Administration of the Certification Program

242.201 Time limitations for certification.
242.203 Retaining information supporting determinations.
242.205 Identification of certified persons and recordkeeping.
242.207 Certificate components.
242.209 Maintenance of the certificate.
242.211 Replacement of certificates.
242.213 Multiple certifications.
242.215 Railroad oversight responsibilities.

Subpart D—Territorial Qualification and Joint Operations

242.301 Requirements for territorial qualification.

Subpart E—Denial and Revocation of Certification

242.401 Denial of certification.
242.403 Criteria for revoking certification.
242.405 Periods of ineligibility.
242.407 Process for revoking certification.

Subpart F—Dispute Resolution Procedures

242.501 Review board established.
242.503 Petition requirements.
242.505 Processing certification review petitions.
242.507 Request for a hearing.
242.509 Hearings.
242.511 Appeals.
Appendix A to Part 242—Schedule of Civil Penalties
Appendix B to Part 242—Procedures for Submission and Approval of Conductor Certification Programs
Appendix C to Part 242—Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data
Appendix D to Part 242—Medical Standards Guidelines
Appendix E to Part 242—Application of Rrevocable Events

Authority: 49 U.S.C. 20103, 20107, 20135, 20138, 20162, 20163, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

Subpart A—General

§ 242.1 Purpose and scope.

(a) The purpose of this part is to ensure that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents and to improve railroad safety.

(b) This part prescribes minimum Federal safety standards for the eligibility, training, testing, certification and monitoring of all conductors to whom it applies. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements consistent with this part.

(c) The conductor certification requirements prescribed in this part apply to any person who meets the definition of conductor contained in § 242.7, regardless of the fact that the person may have a job classification title other than that of conductor.

§ 242.3 Application and responsibility for compliance.

(a) This part applies to all railroads, except:

(1) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.,* plant railroads, as defined in § 242.7);

(2) Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation as defined in § 242.7; or

(3) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(b) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, each person, including a contractor for a railroad, who performs any function covered by this part, must perform that function in accordance with this part.

§ 242.5 Effect and construction.

(a) FRA does not intend, by use of the term conductor in this part, to alter the terms, conditions, or interpretation of existing collective bargaining agreements that employ other job classification titles when identifying a person who is the crew member in charge of a movement that requires a locomotive engineer.

(b) FRA does not intend by issuance of these regulations to alter the authority of a railroad to initiate disciplinary sanctions against its employees, including managers and supervisors, in the normal and customary manner, including those contained in its collective bargaining agreements.

(c) Except as provided in § 242.213, nothing in this part shall be construed to create or prohibit an eligibility or entitlement to employment in other service for the railroad as a result of denial, suspension, or revocation of certification under this part.

(d) Nothing in this part shall be deemed to abridge any additional procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to removal from service or other adverse action taken as a consequence of this part.

§ 242.7 Definitions.

As used in this part—

Administrator means the Administrator of the FRA or the Administrator's delegate.

Alcohol means ethyl alcohol (ethanol) and includes use or possession of any beverage, mixture, or preparation containing ethyl alcohol.

Conductor means the crewmember in charge of a ''train or yard crew'' as defined in part 218 of this chapter. *See also* the definition of ''passenger conductor'' in this section.

Controlled substance has the meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR parts 1301–1316).

Drug means any substance (other than alcohol) that has known mind or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances.

Drug and alcohol counselor (DAC) means a person who meets the credentialing and qualification requirements of a ''Substance Abuse Professional'' (SAP), as provided in 49 CFR part 40.

Dual purpose vehicle means a piece of on-track equipment that is capable of moving railroad rolling stock and may also function as roadway maintenance equipment.

File, filed and *filing* mean submission of a document under this part on the date when the Docket Clerk receives it, or if sent by mail, the date mailing was completed.

FRA means the Federal Railroad Administration.

FRA representative means the FRA Associate Administrator for Railroad Safety/Chief Safety Officer and the Associate Administrator's delegate, including any safety inspector employed by the Federal Railroad Administration and any qualified state railroad safety inspector acting under part 212 of this chapter.

Ineligible or *ineligibility* means that a person is legally disqualified from serving as a certified conductor. The term covers a number of circumstances in which a person may not serve as a certified conductor. Revocation of certification pursuant to § 242.407 and

denial of certification pursuant to § 242.401 are two examples in which a person would be ineligible to serve as a conductor. A period of ineligibility may end when a condition or conditions are met. For example, when a person meets the conditions to serve as a conductor following an alcohol or drug violation pursuant to § 242.115.

Job aid means information regarding *other than main track physical characteristics* that supplements the operating instructions of the territory over which the locomotive or train movement will occur. See definitions of ''main track'' and ''physical characteristics'' in this section. A *job aid* may consist of training on the territory pursuant to § 242.119, maps, charts or visual aids of the territory, or a person or persons to contact who are qualified on the territory and who can describe the physical characteristics of the territory. At a minimum, a *job aid* must cover characteristics of a territory including: permanent close clearances, location of permanent derails and switches, assigned radio frequencies in use and special instructions required for movement, if any, and railroad-identified unique operating conditions.

Joint operations means rail operations conducted by more than one railroad on the same track regardless of whether such operations are the result of—

(1) Contractual arrangement between the railroads,

(2) Order of a governmental agency or a court of law, or

(3) Any other legally binding directive.

Knowingly means having actual knowledge of the facts giving rise to the violation or that a reasonable person acting in the circumstances, exercising due care, would have had such knowledge.

Locomotive means a piece of on-track equipment (other than specialized roadway maintenance equipment or a dual purpose vehicle operating in accordance with § 240.104(a)(2) of this chapter):

(1) With one or more propelling motors designed for moving other equipment;

(2) With one or more propelling motors designed to carry freight or passenger traffic or both; or

(3) Without propelling motors but with one or more control stands.

Locomotive engineer means any person who moves a locomotive or group of locomotives regardless of whether they are coupled to other rolling equipment except:

(1) A person who moves a locomotive or group of locomotives within the confines of a locomotive repair or servicing area as provided for in §§ 218.5 and 218.29(a)(1) of this chapter; or

(2) A person who moves a locomotive or group of locomotives for distances of less than 100 feet and this incidental movement of a locomotive or locomotives is for inspection or maintenance purposes.

Locomotive engineer certificate means a certificate issued pursuant to part 240 of this chapter.

Main track means a track upon which the operation of trains is governed by one or more of the following methods of operation: timetable; mandatory directive; signal indication; positive train control as defined in part 236 of this chapter; or any form of absolute or manual block system.

Medical examiner means a person licensed as a doctor of medicine or doctor of osteopathy. A medical examiner can be a qualified full-time salaried employee of a railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis, or a qualified practitioner designated by the railroad to perform functions in connection with medical evaluations of employees. As used in this rule, the medical examiner owes a duty to make an honest and fully informed evaluation of the condition of an employee.

On-the-job training means job training that occurs in the workplace, *i.e.,* the employee learns the job while doing the job.

Passenger conductor means a conductor who has also received emergency preparedness training under part 239 of this chapter. *See also* the definition of ''conductor'' in this section.

Person means an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

Physical characteristics means the actual track profile of and physical location for points within a specific yard or route that affect the movement of a locomotive or train. *Physical characteristics* includes both *main track physical characteristics* (see definition of ''main track'' in this section) and other than main track physical characteristics.

Plant railroad means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, will not be considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

Qualified means a person who has successfully completed all instruction, training and examination programs required by the employer, and the applicable parts of this chapter and that the person therefore may reasonably be expected to be proficient on all safety related tasks the person is assigned to perform.

Qualified instructor means a person who has demonstrated, pursuant to the railroad's written program, an adequate knowledge of the subjects under instruction and, where applicable, has the necessary operating experience to effectively instruct in the field, and has the following qualifications:

(1) Is a certified conductor under this part; and

(2) Has been selected as such by a designated railroad officer, in concurrence with the designated employee representative, where present; or

(3) In absence of concurrence provided in paragraph (2) of this definition, has a minimum of 12 months service working as a train service employee.

If a railroad does not have designated employee representation, then a person employed by the railroad need not comply with paragraphs (2) or (3) of this definition to be a *qualified instructor.*

Railroad means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways and any entity providing such transportation, including:

(1) Commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Railroad officer means any supervisory employee of a railroad.

Railroad rolling stock is on-track equipment that is either a ''railroad freight car'' (as defined in § 215.5 of this chapter) or a ''passenger car'' (as defined in § 238.5 of this chapter).

Remote control operator (RCO) means a certified locomotive engineer, as defined in § 240.7 of this chapter, certified by a railroad to operate remote control locomotives pursuant to § 240.107 of this chapter.

Roadway maintenance equipment is on-track equipment powered by any means of energy other than hand power which is used in conjunction with maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems.

Serve or *service,* in the context of serving documents, has the meaning given in Rule 5 of the Federal Rules of Civil Procedure as amended. Similarly, the computation of time provisions in Rule 6 of the Federal Rules of Civil Procedure as amended are also applicable in this part. *See also* the definition of ''filing'' in this section.

Specialized roadway maintenance equipment is roadway maintenance equipment that does not have the capability to move railroad rolling stock. Any alteration of such equipment that enables it to move railroad rolling stock will require that the equipment be treated as a dual purpose vehicle.

Substance abuse disorder refers to a psychological or physical dependence on alcohol or a drug, or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. A substance abuse disorder is ''active'' within the meaning of this part if the person is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or has failed to successfully complete primary treatment or successfully participate in aftercare as directed by a DAC or SAP.

Substance Abuse Professional (SAP) means a person who meets the qualifications of a substance abuse professional, as provided in part 40 of this title.

Territorial qualifications means possessing the necessary knowledge concerning a railroad's operating rules and timetable special instructions including familiarity with applicable *main track and other than main track physical characteristics* of the territory over which the locomotive or train movement will occur.

Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (*i.e.,* there is no freight, intercity passenger, or commuter passenger railroad operation on the track).

§ 242.9 Waivers.

(a) A person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for a waiver under this section must be filed in the manner and contain the information required by part 211 of this chapter.

(c) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions the Administrator deems necessary.

§ 242.11 Penalties and consequences for noncompliance.

(a) A person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $650 and not more than $25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $100,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. *See* Appendix A to this part for a statement of agency civil penalty policy.

(b) A person who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from all safety-sensitive service in accordance with part 209 of this chapter.

(c) A person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

(d) In addition to the enforcement methods referred to in paragraphs (a), (b), and (c) of this section, FRA may also address violations of this part by use of the emergency order, compliance order, and/or injunctive provisions of the Federal rail safety laws.

§ 242.13 Information collection requirements.

(a) The information collection requirements of this Part are being reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have not yet been assigned an OMB control number.

(b) The information collection requirements are found in the following sections: §§ 242.9, 242.101, 242.103, 242.105, 242.107, 242.109, 242.111, 242.113, 242.115, 242.117, 242.119, 242.121, 242.123, 242.125, 242.127, 242.203, 242.205, 242.209, 242.211, 242.213, 242.215, 242.301, 242.401, 242.403, 242.405, and 242.407.

Subpart B—Program and Eligibility Requirements

§ 242.101 Certification program required.

(a) After the pertinent date specified in § 242.105(d) or (e), each railroad shall have a certification program approved in accordance with § 242.103 that includes:

(1) A designation of the types of service that it determines will be used in compliance with the criteria established in § 242.107;

(2) A procedure for evaluating prior safety conduct that complies with the criteria established in § 242.109;

(3) A procedure for evaluating visual and hearing acuity that complies with the criteria established in § 242.117;

(4) A procedure for training that complies with the criteria established in § 242.119;

(5) A procedure for knowledge testing that complies with the criteria established in § 242.121; and

(6) A procedure for monitoring operational performance that complies with the criteria established in § 242.123.

(b) [Reserved].

§ 242.103 Approval of design of individual railroad programs by FRA.

(a) Each railroad shall submit its written certification program and request for approval in accordance with the procedures contained in appendix B of this part according to the following schedule:

(1) A Class I railroad (including the National Railroad Passenger

Corporation), Class II railroad, or railroad providing commuter service shall submit a program no later than March 30, 2012; and

(2) A Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall submit a program no later than July 30, 2012.

(b) A railroad commencing operations after the pertinent date specified in paragraph (a) of this section shall submit its written certification program and request for approval in accordance with the procedures contained in appendix B to this part at least 60 days prior to commencing operations.

(c) Each railroad shall:

(1) Simultaneous with its filing with the FRA, serve a copy of the submission filed pursuant to paragraph (a) or (b) of this section, a resubmission filed pursuant to paragraph (h) of this section, or a material modification filed pursuant to paragraph (i) of this section on the president of each labor organization that represents the railroad's employees subject to this part; and

(2) Include in its submission filed pursuant to paragraph (a) or (b) of this section, a resubmission filed pursuant to paragraph (h) of this section, or a material modification filed pursuant to paragraph (i) of this section a statement affirming that the railroad has served a copy on the president of each labor organization that represents the railroad's employees subject to this part, together with a list of the names and addresses of persons served.

(d) Not later than 45 days from the date of filing a submission pursuant to paragraph (a) or (b) of this section, a resubmission pursuant to paragraph (h) of this section, or a material modification pursuant to paragraph (i) of this section, any designated representative of railroad employees subject to this part may comment on the submission, resubmission, or material modification:

(1) Each comment shall set forth specifically the basis upon which it is made, and contain a concise statement of the interest of the commenter in the proceeding;

(2) Each comment shall be submitted to the Associate Administrator for Railroad Safety/Chief Safety Officer, FRA, 1200 New Jersey Avenue SE., Washington, DC 20590; and

(3) The commenter shall certify that a copy of the comment was served on the railroad.

(e) The submission required by paragraph (a) or (b) of this section shall state the railroad's election either:

(1) To accept responsibility for the training of conductors and thereby obtain authority for that railroad to initially certify a person as a conductor in an appropriate type of service; or

(2) To recertify only conductors previously certified by other railroads.

(f) A railroad that elects to accept responsibility for the training of conductors shall state in its submission whether it will conduct the training program or employ a training program conducted by some other entity on its behalf but adopted and ratified by that railroad.

(g) A railroad's program is considered approved and may be implemented 30 days after the required filing date (or the actual filing date) unless the Administrator notifies the railroad in writing that the program does not conform to the criteria set forth in this part.

(1) If the Administrator determines that the program does not conform, the Administrator will inform the railroad of the specific deficiencies.

(2) If the Administrator informs the railroad of deficiencies more than 30 days after the initial filing date, the original program may remain in effect until 30 days after approval of the revised program is received so long as the railroad has complied with the requirements of paragraph (h) of this section.

(h) A railroad shall resubmit its program within 30 days after the date of such notice of deficiencies. A failure to resubmit the program with the necessary revisions will be considered a failure to implement a program under this part.

(1) The Administrator will inform the railroad in writing whether its revised program conforms to this part.

(2) If the program does not conform, the railroad shall resubmit its program.

(i) A railroad that intends to materially modify its program after receiving initial FRA approval shall submit a description of how it intends to modify the program in conformity with the specific requirements of this part at least 60 days prior to implementing such a change.

(1) A modification is material if it would affect the program's conformance with this part.

(2) The modification submission shall contain a description that conforms to the pertinent portion of the procedures contained in appendix B of this part.

(3) The modification submission will be handled in accordance with the procedures of paragraphs (g) and (h) of this section as though it were a new program.

§ 242.105 Schedule for implementation.

(a) By March 1, 2012, each railroad shall:

(1) In writing, designate as certified conductors all persons authorized by the railroad to perform the duties of a conductor as of January 1, 2012; and

(2) Issue a certificate that complies with § 242.207 to each person that it designates.

(b) After March 1, 2012, each railroad shall:

(1) In writing, designate as a certified conductor any person who has been authorized by the railroad to perform the duties of a conductor between January 1, 2012 and the pertinent date in paragraph (d) or (e) of this section; and

(2) Issue a certificate that complies with § 242.207 to each person that it designates.

(c) No railroad shall permit or require a person, designated as a certified conductor under the provisions of paragraph (a) or (b) of this section, to perform service as a certified conductor for more than a 36-month period beginning on the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of paragraph (d) or (e) of this section unless that person has been certified in accordance with procedures that comply with subpart B of this part.

(1) Except as provided in paragraph (c)(3) of this section, a person who has been designated as a certified conductor under the provisions of paragraph (a) or (b) of this section and who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or in accordance with the terms of the Railroad Retirement Act (45 U.S.C. 231) within 36 months from the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of paragraph (d) or (e) of this section, may request, in writing, that a railroad not recertify that person, pursuant to subpart B of this part, until 36 months from the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of paragraph (d) or (e) of this section.

(2) Upon receipt of a written request pursuant to paragraph (c)(1) of this section, a railroad may wait to recertify the person making the request until the end of the 36-month period described in paragraph (c) of this section. If a railroad grants any request, it must grant the request of all eligible persons to every extent possible.

(3) A person who is subject to recertification under part 240 of this chapter may not make a request

pursuant to paragraph (c)(1) of this section.

(d) After June 1, 2012, no Class I railroad (including the National Railroad Passenger Corporation), Class II railroad, or railroad providing commuter service shall initially certify or recertify a person as a conductor unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part and issued a certificate that complies with § 242.207.

(e) After October 1, 2012, no Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall initially certify or recertify a person as a conductor unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part and issued a certificate that complies with § 242.207.

(f) After the applicable dates specified in paragraphs (d) and (e) of this section, no person shall serve as a conductor in any type of service and no railroad shall require or permit any person to serve as a conductor in any type of service unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part and issued a certificate that complies with § 242.207.

§ 242.107 Types of service.

(a) Each railroad's program shall state which of the two types of service (conductor and passenger conductor), provided for in paragraph (b) of this section, that it will cover.

(b) A railroad may issue certificates for either of the following types of service:

(1) Conductor; and

(2) Passenger conductor.

(c) A railroad shall not reclassify the certification of any type of certified conductor to a different type of conductor certification during the period in which the certification is otherwise valid except when a conductor completes the emergency training identified in part 239 of this chapter and is certified as a passenger conductor.

(d) Each railroad is authorized to impose additional conditions or operational restrictions on the service a conductor may perform beyond those identified in this section provided those conditions or restrictions are not inconsistent with this part.

§ 242.109 Determinations required for certification and recertification.

(a) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor, shall, in accordance with its FRA-approved program, determine in writing that:

(1) The individual meets the eligibility requirements of §§ 242.111, 242.113, 242.115, and 242.403; and

(2) The individual meets the vision and hearing acuity standards of § 242.117 (''Vision and hearing acuity'');

(3) The individual has the necessary knowledge, as demonstrated by successfully completing a test that meets the requirements of § 242.121 (''Knowledge testing''); and

(4) Where a person has not previously been certified, that the person has completed a training program that meets the requirements of § 242.119 (''Training'').

(b) When evaluating a person's prior safety conduct, a railroad shall not consider information concerning prior conduct that:

(1) Occurred prior to the effective date of this rule; or

(2) Occurred at a time other than that specifically provided for in §§ 242.111, 242.115 or 242.403.

(c) In order to make the determination required under paragraph (a) of this section, a railroad shall have on file documents pertinent to those determinations.

(d) A railroad's program shall provide a candidate for certification or recertification a reasonable opportunity to review and comment in writing on any record which contains information concerning the person's prior safety conduct, including information pertinent to determinations required under § 242.115, if the railroad believes the record contains information that could be sufficient to render the person ineligible for certification under this subpart.

(e) The opportunity for comment shall be afforded to the person prior to the railroad's rendering its eligibility decision based on that information. Any responsive comment furnished shall be retained by the railroad in accordance with § 242.203.

(f) The program shall include a method for a person to advise the railroad that he or she has never been a railroad employee or obtained a license to drive a motor vehicle. Nothing in this section shall be construed as imposing a duty or requirement that a person have prior railroad employment experience or obtain a motor vehicle driver's license in order to become a certified conductor.

(g) Nothing in this section, § 242.111 or § 242.113 shall be construed to prevent persons subject to this part from entering into an agreement that results in a railroad's obtaining the information needed for compliance with this subpart in a different manner than that prescribed in § 242.111 or § 242.113.

§ 242.111 Prior safety conduct as motor vehicle operator.

(a) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) Except as provided in paragraphs (c), (d), (e), and (f) of this section, after the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall determine that the person meets the eligibility requirements of this section involving prior conduct as a motor vehicle operator.

(c) A railroad shall initially certify a person as a conductor for 60 days if the person:

(1) Requested the information required by paragraph (h) of this section at least 60 days prior to the date of the decision to certify that person; and

(2) Otherwise meets the eligibility requirements provided in § 242.109.

(d) A railroad shall recertify a person as a conductor for 60 days from the expiration date of that person's certification if the person:

(1) Requested the information required by paragraph (h) of this section at least 60 days prior to the date of the decision to recertify that person; and

(2) Otherwise meets the eligibility requirements provided in § 242.109.

(e) Except as provided in paragraph (f) of this section, if a railroad who certified or recertified a person pursuant to paragraph (c) or (d) of this section does not obtain and evaluate the information required pursuant to paragraph (h) of this section within 60 days of the pertinent dates identified in paragraph (c) or (d) of this section, that person will be ineligible to perform as a conductor until the information can be evaluated.

(f) If a person requests the information required pursuant to paragraph (h) of this section but is unable to obtain it, that person or the railroad certifying or recertifying that person may petition for a waiver of the requirements of paragraph (b) of this section in accordance with the provisions of part 211 of this chapter. A railroad shall

certify or recertify a person during the pendency of the waiver request if the person otherwise meets the eligibility requirements provided in § 242.109.

(g) *Individual's duty.* Except for persons designated as conductors under § 242.105(a) or (b) or for persons covered by § 242.109(f), each person seeking certification or recertification under this part shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

(1) Take the actions required by paragraphs (h) through (j) of this section to make information concerning his or her driving record available to the railroad that is considering such certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State, Federal, or foreign law to make information concerning his or her driving record available to that railroad.

(h) Each person seeking certification or recertification under this part shall request, in writing, that the chief of each driver licensing agency identified in paragraph (i) of this section provide a copy of that agency's available information concerning his or her driving record to the railroad that is considering such certification or recertification.

(i) Each person shall request the information required under paragraph (h) of this section from:

(1) The chief of the driver licensing agency of any jurisdiction, including a state or foreign country, which last issued that person a driver's license; and

(2) The chief of the driver licensing agency of any other jurisdiction, including states or foreign countries, that issued or reissued the person a driver's license within the preceding five years.

(j) If advised by the railroad that a driver licensing agency has informed the railroad that additional information concerning that person's driving history may exist in the files of a state agency or foreign country not previously contacted in accordance with this section, such person shall:

(1) Request in writing that the chief of the driver licensing agency which compiled the information provide a copy of the available information to the prospective certifying railroad; and

(2) Take any additional action required by State, Federal, or foreign law to obtain that additional information.

(k) Any person who has never obtained a motor vehicle driving license is not required to comply with the provisions of paragraph (h) of this section but shall notify the railroad of that fact in accordance with procedures of the railroad that comply with § 242.109(f).

(l) Each certified conductor or person seeking initial certification shall report motor vehicle incidents described in paragraphs (n)(1) and (2) of this section to the employing railroad within 48 hours of being convicted for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle drivers license for, such violations. For purposes of this paragraph and paragraph (n) of this section, ''state action'' means action of the jurisdiction that has issued the motor vehicle driver's license, including a foreign country. For the purposes of conductor certification, no railroad shall require reporting earlier than 48 hours after the conviction, or completed state action to cancel, revoke, or deny a motor vehicle drivers license.

(m) *Evaluation of record.* When evaluating a person's motor vehicle driving record, a railroad shall not consider information concerning motor vehicle driving incidents that occurred:

(1) Prior to the effective date of this rule;

(2) More than 36 months before the month in which the railroad is making its certification decision; or

(3) At a time other than that specifically provided for in §§ 242.111, 242.115, or 242.403.

(n) A railroad shall only consider information concerning the following types of motor vehicle incidents:

(1) A conviction for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle drivers license for, operating a motor vehicle while under the influence of or impaired by alcohol or a controlled substance; or

(2) A conviction for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle driver's license for, refusal to undergo such testing as is required by State or foreign law when a law enforcement official seeks to determine whether a person is operating a vehicle while under the influence of alcohol or a controlled substance.

(o) If such an incident is identified:

(1) The railroad shall provide the data to the railroad's DAC, together with any information concerning the person's railroad service record, and shall refer the person for evaluation to determine if the person has an active substance abuse disorder;

(2) The person shall cooperate in the evaluation and shall provide any requested records of prior counseling or treatment for review exclusively by the DAC in the context of such evaluation; and

(3) If the person is evaluated as not currently affected by an active substance abuse disorder, the subject data shall not be considered further with respect to certification. However, the railroad shall, on recommendation of the DAC, condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs deemed necessary by the DAC consistent with the technical standards specified in § 242.115(f)(3).

(4) If the person is evaluated as currently affected by an active substance abuse disorder, the provisions of § 242.115(d) will apply.

(5) If the person fails to comply with the requirements of paragraph (o)(2) of this section, the person shall be ineligible to perform as a conductor until such time as the person complies with the requirements.

§ 242.113 Prior safety conduct as an employee of a different railroad.

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall determine that the person meets the eligibility requirements of this section.

(c) Except for persons designated as conductors under § 242.105(a) or (b) or for persons covered by § 242.109(f), each person seeking certification or recertification under this part shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

(1) Request, in writing, that the chief operating officer or other appropriate person of the former employing railroad provide a copy of that railroad's available information concerning his or her service record pertaining to compliance or non-compliance with §§ 242.111, 242.115, and 242.403 to the railroad that is considering such certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State or Federal law to make information concerning his or her service record available to that railroad.

§ 242.115 Substance abuse disorders and alcohol drug rules compliance.

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person, including, but not limited to, each railroad, railroad officer, supervisor, and employee, violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall determine that the person meets the eligibility requirements of this section.

(c) In order to make the determination required under paragraph (d) of this section, a railroad shall have on file documents pertinent to that determination, including a written document from its DAC which states his or her professional opinion that the person has been evaluated as not currently affected by a substance abuse disorder or that the person has been evaluated as affected by an active substance abuse disorder.

(d) *Fitness requirement.* (1) A person who has an active substance abuse disorder shall be denied certification or recertification as a conductor.

(2) Except as provided in paragraph (g) of this section, a certified conductor who is determined to have an active substance abuse disorder shall be ineligible to hold certification. Consistent with other provisions of this part, certification may be reinstated as provided in paragraph (f) of this section.

(3) In the case of a current employee of the railroad evaluated as having an active substance abuse disorder (including a person identified under the procedures of § 242.111), the employee may, if otherwise eligible, voluntarily self-refer for substance abuse counseling or treatment under the policy required by § 219.403 of this chapter; and the railroad shall then treat the substance abuse evaluation as confidential except with respect to ineligibility for certification.

(e) *Prior alcohol/drug conduct; Federal rule compliance.* (1) In determining whether a person may be or remain certified as a conductor, a railroad shall consider conduct described in paragraph (e)(2) of this section that occurred within a period of 60 consecutive months prior to the review. A review of certification shall be initiated promptly upon the occurrence and documentation of any incident of conduct described in this paragraph.

(2) A railroad shall consider any violation of § 219.101 or § 219.102 of this chapter and any refusal to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative.

(3) A period of ineligibility described in this section shall begin:

(i) For a person not currently certified, on the date of the railroad's written determination that the most recent incident has occurred; or

(ii) For a person currently certified, on the date of the railroad's notification to the person that recertification has been denied or certification has been revoked; and

(4) The period of ineligibility described in this section shall be determined in accordance with the following standards:

(i) In the case of a single violation of § 219.102 of this chapter, the person shall be ineligible to hold a certificate during evaluation and any required primary treatment as described in paragraph (f) of this section. In the case of two violations of § 219.102 of this chapter, the person shall be ineligible to hold a certificate for a period of two years. In the case of more than two such violations, the person shall be ineligible to hold a certificate for a period of five years.

(ii) In the case of one violation of § 219.102 of this chapter and one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of three years.

(iii) In the case of one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of 9 months (unless identification of the violation was through a qualifying ''co-worker report'' as described in § 219.405 of this chapter and the conductor waives investigation, in which case the certificate shall be deemed suspended during evaluation and any required primary treatment as described in paragraph (f)). In the case of two or more violations of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of five years.

(iv) A refusal to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative shall be treated, for purposes of ineligibility under this paragraph, in the same manner as a violation of:

(A) Section 219.102 of this chapter, in the case of a refusal to provide a urine specimen for testing; or

(B) Section 219.101 of this chapter, in the case of a refusal to provide a breath sample for alcohol testing or a blood specimen for mandatory post-accident toxicological testing.

(f) *Future eligibility to hold certificate following alcohol/drug violation.* The following requirements apply to a person who has been denied certification or who has had certification suspended or revoked as a result of conduct described in paragraph (e) of this section:

(1) The person shall not be eligible for grant or reinstatement of the certificate unless and until the person has:

(i) Been evaluated by a SAP to determine if the person currently has an active substance abuse disorder;

(ii) Successfully completed any program of counseling or treatment determined to be necessary by the SAP prior to return to service; and

(iii) In accordance with the testing procedures of subpart H of part 219 of this chapter, has had an alcohol test with an alcohol concentration of less than .02 and presented a urine sample that tested negative for controlled substances assayed.

(2) A conductor placed in service or returned to service under the above-stated conditions shall continue in any program of counseling or treatment deemed necessary by the SAP and shall be subject to a reasonable program of follow-up alcohol and drug testing without prior notice for a period of not more than 60 months following return to service. Follow-up tests shall include not fewer than 6 alcohol tests and 6 drug tests during the first 12 months following return to service.

(3) Return-to-service and follow-up alcohol and drug tests shall be performed consistent with the requirements of subpart H of part 219 of this chapter.

(4) This paragraph does not create an entitlement to utilize the services of a railroad SAP, to be afforded leave from employment for counseling or treatment, or to employment as a conductor. Nor does it restrict any discretion available to the railroad to take disciplinary action based on conduct described herein.

(g) *Confidentiality protected.* Nothing in this part shall affect the responsibility of the railroad under § 219.403 of this chapter (''Voluntary referral policy'') to treat voluntary referrals for substance abuse counseling and treatment as confidential; and the certification status of a conductor who is successfully assisted under the procedures of that section shall not be adversely affected. However, the railroad shall include in its voluntary referral policy required to be issued pursuant to § 219.403 of this chapter a provision that, at least with

respect to a certified conductor or a candidate for certification, the policy of confidentiality is waived (to the extent that the railroad shall receive from the SAP or DAC official notice of the substance abuse disorder and shall suspend or revoke the certification, as appropriate) if the person at any time refuses to cooperate in a recommended course of counseling or treatment.

§ 242.117 Vision and hearing acuity.

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any class of service, shall determine that the person meets the standards for visual acuity and hearing acuity prescribed in this section.

(c) In order to make the determination required under paragraph (b) of this section, a railroad shall have on file either:

(1) A medical examiner's certificate that the individual has been medically examined and meets these acuity standards; or

(2) A written document from its medical examiner documenting his or her professional opinion that the person does not meet one or both acuity standards and stating the basis for his or her determination that:

(i) The person can nevertheless be certified under certain conditions; or

(ii) The person's acuity is such that the person cannot safely perform as a conductor even with conditions attached.

(d) Any examination required for compliance with this section shall be performed by or under the supervision of a medical examiner or a licensed physician's assistant such that:

(1) A licensed optometrist or a technician responsible to that person may perform the portion of the examination that pertains to visual acuity; and

(2) A licensed or certified audiologist or a technician responsible to that person may perform the portion of the examination that pertains to hearing acuity.

(e) If the examination required under this section discloses that the person needs corrective lenses or a hearing aid, or both, either to meet the threshold acuity levels established in this section or to meet a lower threshold determined by the railroad's medical examiner to be sufficient to perform as a conductor, that fact shall be noted on the certificate issued in accordance with the provisions of this part.

(f) Any person with such a certificate notation shall use the relevant corrective device(s) while performing as a conductor unless the railroad's medical examiner subsequently determines in writing that the person can safely perform without using the device.

(g) Fitness requirement: In order to be currently certified as a conductor, except as permitted by paragraph (j) of this section, a person's vision and hearing shall meet or exceed the standards prescribed in this section and Appendix D to this part. It is recommended that each test conducted pursuant to this section should be performed according to any directions supplied by the manufacturer of such test and any American National Standards Institute (ANSI) standards that are applicable.

(h) Except as provided in paragraph (j) of this section, each person shall have visual acuity that meets or exceeds the following thresholds:

(1) For distant viewing, either:

(i) Distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses; or

(ii) Distant visual acuity separately corrected to at least 20/40 (Snellen) with corrective lenses and distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses;

(2) A field of vision of at least 70 degrees in the horizontal meridian in each eye; and

(3) The ability to recognize and distinguish between the colors of railroad signals as demonstrated by successfully completing one of the tests in Appendix E to this part.

(i) Except as provided in paragraph (j) of this section, each person shall have a hearing test or audiogram that shows the person's hearing acuity meets or exceeds the following thresholds: The person does not have an average hearing loss in the better ear greater than 40 decibels with or without use of a hearing aid, at 500 Hz, 1,000 Hz, and 2,000 Hz. The hearing test or audiogram shall meet the requirements of one of the following:

(1) As required in 29 CFR 1910.95(h) (OSHA);

(2) As required in § 227.111 of this chapter; or

(3) Conducted using an audiometer that meets the specifications of and are maintained and used in accordance with ANSI S3.6–2004 ''Specifications for Audiometers.''

(j) A person not meeting the thresholds in paragraphs (h) and (i) of this section shall, upon request, be subject to further medical evaluation by a railroad's medical examiner to determine that person's ability to safely perform as a conductor. In accordance with the guidance prescribed in Appendix D to this part, a person is entitled to one retest without making any showing and to another retest if the person provides evidence substantiating that circumstances have changed since the last test to the extent that the person could now safely perform as a conductor. The railroad shall provide its medical examiner with a copy of this part, including all appendices. If, after consultation with a railroad officer, the medical examiner concludes that, despite not meeting the threshold(s) in paragraphs (h) and (i) of this section, the person has the ability to safely perform as a conductor, the person may be certified as a conductor and such certification conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(k) As a condition of maintaining certification, each certified conductor shall notify his or her employing railroad's medical department or, if no such department exists, an appropriate railroad official if the person's best correctable vision or hearing has deteriorated to the extent that the person no longer meets one or more of the prescribed vision or hearing standards or requirements of this section. This notification is required prior to any subsequent performance as a conductor.

§ 242.119 Training.

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to the initial issuance of a certificate to any person as a conductor, shall determine that the person has, in accordance with the requirements of this section, the knowledge to safely perform as a conductor in each type of service that the person will be permitted to perform.

(c) In making this determination, a railroad shall have written documentation showing that:

(1) The person completed a training program that complies with paragraph (d) of this section;

(2) The person demonstrated his or her knowledge by achieving a passing grade under the testing and evaluation procedures of that training program; and

(3) The person demonstrated that he or she is qualified on the physical characteristics of the railroad, or its pertinent segments, over which that person will perform service.

(d) A railroad that elects to train a previously untrained person to be a conductor shall develop an initial training program which, at a minimum, includes the following:

(1) Determine how training must be structured, developed, and delivered, including an appropriate combination of classroom, simulator, computer-based, correspondence, on-the-job training, or other formal training. The curriculum shall be designed to impart knowledge of, and ability to comply with applicable Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those applicable Federal railroad safety laws, regulations, and orders. This training shall document a person's knowledge of, and ability to comply with, Federal railroad safety laws, regulations, and orders, as well as railroad rules and procedures.

(2) The on-the-job portion of the training program shall consist of the following three key components:

(i) A brief statement describing the tasks and related steps the employee learning the job shall be able to perform;

(ii) A statement of the conditions (*e.g.,* prerequisites, tools, equipment, documentation, briefings, demonstrations, and practice) necessary for learning transfer; and

(iii) A statement of the standards by which proficiency is measured through a combination of task/step accuracy, completeness, and repetition.

(3) Prior to beginning the initial safety-related tasks associated with on-the-job exercises, employers shall make any relevant information or materials, such as operating rules, safety rules, or other rules available to employees involved for referencing.

(4) The tasks and related steps associated with on-the-job exercises for a particular type of conductor service (*e.g.,* passenger conductor) shall be maintained together in one manual, checklist, or similar document. This reference shall be made available to all employees involved in those on-the-job exercises.

(5) When new safety-related railroad laws, regulations, orders, technologies, procedures, or equipment are introduced into the workplace, the railroad must review its training program and modify its training plan accordingly.

(e) Prior to a previously untrained person being certified as a conductor, a railroad shall require the person to:

(1) Successfully complete the formal initial training program developed pursuant to paragraph (d) of this section and any associated examinations covering the skills and knowledge the person will need to possess in order to perform the tasks necessary to be a conductor; and

(2) Demonstrate, to the satisfaction of the railroad with input from a qualified instructor, on-the-job proficiency by successfully completing the tasks necessary to be a conductor. However, a person may perform such tasks under the direct onsite supervision of a person, who has the necessary operating experience, as part of the on-the-job training process prior to completing such training and passing the field evaluation; and

(3) Demonstrate knowledge of the physical characteristics of any assigned territory by successfully completing a test created by a person qualified on the physical characteristics of the territory.

(f) If a railroad uses a written test for purposes of paragraph (e)(3) of this section, the railroad must provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.

(g) A person may acquire familiarity with the physical characteristics of a territory through the following methods:

(1) The methods used by a railroad for familiarizing its conductors with new territory while starting up a new railroad;

(2) The methods used by a railroad for starting operations over newly acquired rail lines; or

(3) The methods used by a railroad for reopening of a long unused route.

(h) The methods listed in paragraph (g) of this section shall be described in the railroad's conductor qualification program required under this part and submitted according to the procedures described in Appendix B to this part.

(i) If ownership of a railroad is being transferred from one company to another, the conductor(s) of the acquiring company may receive familiarization training from the selling company prior to the acquiring railroad commencing operation.

(j) A railroad shall designate in its program required by this section the time period in which a conductor must be absent from a territory or yard, before requalification on physical characteristics is required.

(k) A railroad's program shall include the procedures used to qualify or requalify a person on the physical characteristics.

(l) A railroad shall provide for the continuing education of certified conductors to ensure that each conductor maintains the necessary knowledge concerning railroad safety and operating rules and compliance with all applicable Federal regulations, including, but not limited to, hazardous materials, passenger train emergency preparedness, brake system safety standards, pre-departure inspection procedures, and passenger equipment safety standards, and physical characteristics of a territory.

§ 242.121 Knowledge testing.

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall determine that the person has, in accordance with the requirements of this section, demonstrated sufficient knowledge of the railroad's rules and practices for the safe movement of trains.

(c) In order to make the knowledge determination required by paragraph (b) of this section, a railroad shall have procedures for testing a person being evaluated for certification as a conductor that shall be:

(1) Designed to examine a person's knowledge of the railroad's operating rules and practices for the safe movement of trains;

(2) Objective in nature;

(3) Administered in written or electronic form;

(4) Cover the following subjects:

(i) Safety and operating rules;

(ii) Timetable instructions;

(iii) Compliance with all applicable Federal regulations;

(iv) Physical characteristics of the territory on which a person will be or is currently serving as a conductor; and

(v) Use of any job aid that a railroad may provide a conductor;

(5) Sufficient to accurately measure the person's knowledge of the covered subjects; and

(6) Conducted without open reference books or other materials except to the degree the person is being tested on his or her ability to use such reference books or materials.

(d) The conduct of the test shall be documented in writing and the documentation shall contain sufficient information to identify the relevant facts relied on for evaluation purposes.

(e) For purposes of paragraph (c) of this section, the railroad must provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.

(f) The documentation shall indicate whether the person passed or failed the test.

(g) If a person fails to pass the test, no railroad shall permit or require that person to function as a conductor prior to that person's achieving a passing score during a reexamination of the person's knowledge.

§ 242.123 Monitoring operational performance.

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) Each railroad shall have a program to monitor the conduct of its certified conductors by performing unannounced operating rules compliance tests. The program shall include procedures to address the testing of certified conductors who are not given an unannounced compliance test in a calendar year pursuant to paragraph (f) of this section. At a minimum, such procedures shall include the following:

(1) A requirement that an unannounced compliance test must be conducted within 30 days of a return to conductor service; and

(2) The railroad must retain a written record indicating the date that the conductor stopped performing service that requires certification pursuant to this part, the date that the conductor returned to performing service that requires certification pursuant to this part, and the date that the unannounced compliance test was performed.

(c) Except as provided in paragraph (f) of this section, each conductor shall be given at least one unannounced compliance test in each calendar year by a railroad officer who meets the requirements of § 217.9(b)(1) of this chapter.

(d) The unannounced test program shall:

(1) Test those persons certified as a conductor pursuant to § 242.107(b)(1) for compliance with one or more operational tests in accordance with the provisions of § 217.9 of this chapter; and one or more provisions of §§ 218.99 through 218.109 of this chapter; and

(2) Test those persons certified as a passenger conductor pursuant to § 242.107(b)(2) for compliance with one or more operational tests in accordance with the provisions of § 217.9 of this chapter.

(i) For persons certified as passenger conductors pursuant to § 242.107(b)(2) who do not require compliance with part 218, subpart F of this chapter except under emergency circumstances, the requirement for an annual, unannounced test on the requirements of part 218, subpart F may be satisfied by annual training.

(ii) [Reserved]

(e) Each railroad's program shall indicate the action the railroad will take in the event that it finds deficiencies with a conductor's performance during an unannounced compliance test administered in accordance with this section.

(f) A certified conductor who is not performing a service that requires certification pursuant to this part need not be given an unannounced compliance test. However, when the certified conductor returns to a service that requires certification pursuant to this part, that certified conductor must be tested pursuant to this section within 30 days of his or her return.

§ 242.125 Certification determinations made by other railroads.

(a) A railroad that is considering certification of a person as a conductor may rely on determinations made by another railroad concerning that person's certification. The railroad's certification program shall address how the railroad will administer the training of previously uncertified conductors with extensive operating experience or previously certified conductors who have had their certification expire. If a railroad's certification program fails to specify how it will train a previously certified conductor hired from another railroad, then the railroad shall require the newly hired conductor to take the hiring railroad's entire training program.

(b) A railroad relying on another railroad's certification shall determine that:

(1) The prior certification is still valid in accordance with the provisions of §§ 242.201 and 242.407;

(2) The prior certification was for the same type of service as the certification being issued under this section;

(3) The person has received training on the physical characteristics of the new territory in accordance with § 242.119; and

(4) The person has demonstrated the necessary knowledge concerning the railroad's operating rules in accordance with § 242.121.

§ 242.127 Reliance on qualification requirements of other countries.

A Canadian railroad that is required to comply with this regulation or a railroad that conducts joint operations with a Canadian railroad may certify that a person is eligible to be a conductor provided it determines that:

(a) The person is employed by the Canadian railroad; and

(b) The person meets or exceeds the qualifications standards issued by Transport Canada for such service.

Subpart C—Administration of the Certification Program

§ 242.201 Time limitations for certification.

(a) After the pertinent date in § 242.105(d) or (e), a railroad shall not certify or recertify a person as a conductor in any type of service, if the railroad is making:

(1) A determination concerning eligibility under §§ 242.111, 242.113, 242.115, and 242.403 and the eligibility data being relied on was furnished more than 366 days before the date of the railroad's certification decision;

(2) A determination concerning visual and hearing acuity and the medical examination being relied on was conducted more than 450 days before the date of the railroad's certification decision;

(3) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than 366 days before the date of the railroad's certification decision; or

(4) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than 24 months before the date of the railroad's recertification decision if the railroad administers a knowledge testing program pursuant to § 242.121 at intervals that do not exceed 24 months.

(b) The time limitations of paragraph (a) of this section do not apply to a

railroad that is making a certification decision in reliance on determinations made by another railroad in accordance with paragraph (c)(3) of this section, § 242.125, or § 242.127.

(c) No railroad shall:

(1) Permit or require a person, designated under § 242.105(a) or (b), to perform service as a certified conductor for more than the 36-month period beginning on the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of § 242.105(d) or (e) unless that person has been determined to be eligible in accordance with procedures that comply with subpart B of this part.

(2) Certify a person as a conductor for an interval of more than 36 months; or

(3) Rely on a certification issued by another railroad that is more than 36 months old.

(d) Except as provided for in § 242.105 concerning initial implementation of the program, a railroad shall issue each person designated as a certified conductor a certificate that complies with § 242.207 no later than 30 days from the date of its decision to certify or recertify that person.

§ 242.203 Retaining information supporting determinations.

(a) After the pertinent date in § 242.105(d) or (e), a railroad that issues, denies, or revokes a certificate after making the determinations required under § 242.109 shall maintain a record for each certified conductor or applicant for certification that contains the information the railroad relied on in making the determinations.

(b) A railroad shall retain the following information:

(1) Relevant data from the railroad's records concerning the person's prior safety conduct;

(2) Relevant data furnished by another railroad;

(3) Relevant data furnished by a governmental agency concerning the person's motor vehicle driving record;

(4) Relevant data furnished by the person seeking certification concerning his or her eligibility;

(5) The relevant test results data concerning hearing and vision acuity;

(6) If applicable, the relevant data concerning the professional opinion of the railroad's medical examiner on the adequacy of the person's hearing or vision acuity;

(7) Relevant data from the railroad's records concerning the person's success or failure of the passage of knowledge test(s) under § 242.121;

(8) A sample copy of the written knowledge test or tests administered; and

(9) The relevant data from the railroad's records concerning the person's success or failure on unannounced operating rules compliance tests the railroad performed to monitor the conductor's performance in accordance with § 242.123.

(c) If a railroad is relying on successful completion of an approved training program conducted by another entity, the relying railroad shall maintain a record for each certified conductor that contains the relevant data furnished by the training entity concerning the person's demonstration of knowledge and relied on by the railroad in making its determinations.

(d) If a railroad is relying on a certification decision initially made by another railroad, the relying railroad shall maintain a record for each certified conductor that contains the relevant data furnished by the other railroad which it relied on in making its determinations.

(e) All records required under this section shall be retained for a period of six years from the date of the certification, recertification, denial or revocation decision and shall be made available to FRA representatives upon request during normal business hours.

(f) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on the record(s) required by this section; or

(2) Otherwise falsify such records through material misstatement, omission, or mutilation.

(g) Nothing in this section precludes a railroad from maintaining the information required to be retained under this section in an electronic format provided that:

(1) The railroad maintains an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or individual records;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) A record cannot be deleted or altered by any individual after the record is certified by the employee who created the record;

(3) Any amendment to a record is either:

(i) Electronically stored apart from the record that it amends; or

(ii) Electronically attached to the record as information without changing the original record;

(4) Each amendment to a record uniquely identifies the person making the amendment;

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information in usable format when requested to furnish data by FRA representatives; and

(6) Information retrieved from the system can be easily produced in a printed format which can be readily provided to FRA representatives in a timely manner and authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by FRA representatives.

§ 242.205 Identification of certified persons and recordkeeping.

(a) After March 1, 2012, a railroad shall maintain a list identifying each person designated as a certified conductor. That list shall indicate the types of service the railroad determines each person is authorized to perform and date of the railroad's certification decision.

(b) If a railroad employs conductors working in joint operations territory, the list shall include person(s) determined by that railroad to be certified as conductor(s) and possessing the necessary territorial qualifications for the applicable territory in accordance with § 242.301.

(c) The list required by paragraphs (a) and (b) of this section shall:

(1) Be updated at least annually;

(2) Be available at the divisional or regional headquarters of the railroad; and

(3) Be available for inspection or copying by FRA during regular business hours.

(d) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on the list required by this section; or

(2) Otherwise falsify such list through material misstatement, omission, or mutilation.

(e) Nothing in this section precludes a railroad from maintaining the list required this section in an electronic format provided that:

(1) The railroad maintains an information technology security

program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or the list;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) An entry on the list cannot be deleted or altered by any individual after the entry is certified by the employee who created the entry;

(3) Any amendment to the list is either:

(i) Electronically stored apart from the entry on the list that it amends; or

(ii) Electronically attached to the entry on the list as information without changing the original entry;

(4) Each amendment to the list uniquely identifies the person making the amendment;

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information in usable format when requested to furnish data by FRA representatives; and

(6) Information retrieved from the system can be easily produced in a printed format which can be readily provided to FRA representatives in a timely manner and authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by FRA representatives.

§ 242.207 Certificate components.

(a) At a minimum, each certificate issued in compliance with this part shall:

(1) Identify the railroad or parent company that is issuing it;

(2) Indicate that the railroad, acting in conformity with this part, has determined that the person to whom it is being issued has been determined to be eligible to perform as a conductor or as a passenger conductor;

(3) Identify the person to whom it is being issued (including the person's name, employee identification number, the year of birth, and either a physical description or photograph of the person);

(4) Identify any conditions or limitations, including the type of service or conditions to ameliorate vision or hearing acuity deficiencies, that restrict the person's operational authority;

(5) Show the effective date of each certification held;

(6) Be signed by an individual designated in accordance with paragraph (b) of this section; and

(7) Be of sufficiently small size to permit being carried in an ordinary pocket wallet.

(b) Each railroad shall designate in writing any person that it authorizes to sign the certificates described in this section. The designation shall identify such persons by name or job title.

(c) Nothing in paragraph (a) of this section shall prohibit any railroad from including additional information on the certificate or supplementing the certificate through other documents.

(d) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on that certificate; or

(2) Otherwise falsify that certificate through material misstatement, omission, or mutilation.

§ 242.209 Maintenance of the certificate.

(a) Each conductor who has received a certificate required under this part shall:

(1) Have that certificate in his or her possession while on duty as a conductor; and

(2) Display that certificate upon the receipt of a request to do so from:

(i) A representative of the Federal Railroad Administration,

(ii) A State inspector authorized under part 212 of this chapter,

(iii) An officer of the issuing railroad, or

(iv) An officer of another railroad when serving as a conductor in joint operations territory.

(b) Any conductor who is notified or called to serve as a conductor and such service would cause the conductor to exceed certificate limitations, set forth in accordance with subpart B of this part, shall immediately notify the railroad that he or she is not authorized to perform that anticipated service and it shall be unlawful for the railroad to require such service.

(c) Nothing in this section shall be deemed to alter a certified conductor's duty to comply with other provisions of this chapter concerning railroad safety.

§ 242.211 Replacement of certificates.

(a) A railroad shall have a system for the prompt replacement of lost, stolen or mutilated certificates at no cost to conductors. That system shall be reasonably accessible to certified conductors in need of a replacement certificate or temporary replacement certificate.

(b) At a minimum, a temporary replacement certificate must identify the person to whom it is being issued (including the person's name, identification number and year of birth); indicate the date of issuance; and be authorized by a designated supervisor. Temporary replacement certificates may be delivered electronically and are valid for a period no greater than 30 days.

§ 242.213 Multiple certifications.

(a) A person may hold certification for multiple types of conductor service.

(b) A person may hold both conductor and locomotive engineer certification.

(c) A railroad that issues multiple certificates to a person, shall, to the extent possible, coordinate the expiration date of those certificates.

(d) Except as provided in paragraph (e) of this section, a locomotive engineer, including a remote control operator, who is operating a locomotive without an assigned certified conductor must either be:

(1) Certified as both a locomotive engineer under part 240 of this chapter and as a conductor under this part; or

(2) Accompanied by a person certified as a conductor under this part but who will be attached to the crew in a manner similar to that of an independent assignment.

(e) Passenger railroad operations: If the conductor is removed from a train for a medical, police or other such emergency after the train departs from an initial terminal, the train may proceed to the first location where the conductor can be replaced without incurring undue delay without the locomotive engineer being a certified conductor. However, an assistant conductor or brakeman must be on the train and the locomotive engineer must be informed that there is no certified conductor on the train prior to any movement.

(f) During the duration of any certification interval, a person who holds a current conductor and/or locomotive engineer certificate from more than one railroad shall immediately notify the other certifying railroad(s) if he or she is denied conductor or locomotive engineer recertification under § 242.401 or § 240.219 of this chapter or has his or her conductor or locomotive engineer certification revoked under § 242.407 or § 240.307 of this chapter by another railroad.

(g) A person who is certified to perform multiple types of conductor service and who has had any of those certifications revoked under § 242.407 may not perform any type of conductor service during the period of revocation.

(h) A person who holds a current conductor and locomotive engineer

certificate and who has had his or her conductor certification revoked under § 242.407 for a violation of § 242.403(e)(1) through (5) or (e)(12) may not work as a locomotive engineer during the period of revocation. However, a person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked under § 242.407 for a violation of § 242.403(e)(6) through (11) may work as a locomotive engineer during the period of revocation.

(1) For purposes of determining the period for which a person may not work as a certified locomotive engineer due to a revocation of his or her conductor certification, only violations of § 242.403(e)(1) through (5) or (e)(12) will be counted. Thus, a person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked three times in less than 36 months for two violations of § 242.403(e)(6) and one violation of § 242.403(e)(1) would have his or her conductor certificate revoked for 1 year, but would not be permitted to work as a locomotive engineer for one month (*i.e.,* the period of revocation for one violation of § 242.403(e)(1)).

(i) A person who holds a current conductor and locomotive engineer certificate and who has had his or her locomotive engineer certification revoked under § 240.307 of this chapter may not work as a conductor during the period of revocation.

(j) A person who has had his or her locomotive engineer certification revoked under § 240.307 of this chapter may not obtain a conductor certificate pursuant to this part during the period of revocation.

(k) A person who had his or her conductor certification revoked under § 242.407 for violations of § 242.403(e)(1) through (5) or (e)(12) may not obtain a locomotive engineer certificate pursuant to part 240 of this chapter during the period of revocation.

(l) A railroad that denies a person conductor certification or recertification under § 242.401 shall not, solely on the basis of that denial, deny or revoke that person's locomotive engineer certification or recertification.

(m) A railroad that denies a person locomotive engineer certification or recertification under § 240.219 of this chapter shall not, solely on the basis of that denial, deny or revoke that person's conductor certification or recertification.

(n) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified to perform multiple types of conductor service or is certified as a conductor and a locomotive engineer. The certificate must comply with § 240.223 of this chapter and § 242.207.

(o) A person who holds a current conductor and locomotive engineer certificate and who is involved in a revocable event under § 242.407 or § 240.307 of this chapter may only have one certificate revoked for that event. The determination by the railroad as to which certificate to revoke for the revocable event must be based on the work the person was performing at the time the event occurred.

§ 242.215 Railroad oversight responsibilities.

(a) No later than March 31 of each year (beginning in calendar year 2013), each Class I railroad (including the National Railroad Passenger Corporation and a railroad providing commuter service) and each Class II railroad shall conduct a formal annual review and analysis concerning the administration of its program for responding to detected instances of poor safety conduct by certified conductors during the prior calendar year.

(b) Each review and analysis shall involve:

(1) The number and nature of the instances of detected poor safety conduct including the nature of the remedial action taken in response thereto;

(2) The number and nature of FRA reported train accidents attributed to poor safety performance by conductors;

(3) The number and type of operational monitoring test failures recorded by railroad officers who meet the requirements of § 217.9(b)(1) of this chapter; and

(4) If the railroad conducts joint operations with another railroad, the number of conductors employed by the other railroad(s) which: were involved in events described in this paragraph and were determined to be certified and to have possessed the necessary territorial qualifications for joint operations purposes by the controlling railroad.

(c) Based on that review and analysis, each railroad shall determine what action(s) it will take to improve the safety of railroad operations to reduce or eliminate future incidents of that nature.

(d) If requested in writing by FRA, the railroad shall provide a report of the findings and conclusions reached during such annual review and analysis effort.

(e) For reporting purposes, information about the nature of detected poor safety conduct shall be capable of segregation for study and evaluation purposes into the following categories:

(1) Incidents involving noncompliance with part 218 of this chapter;

(2) Incidents involving noncompliance with part 219 of this chapter;

(3) Incidents involving noncompliance with the procedures for the safe use of train or engine brakes when the procedures are required for compliance with the Class I, Class IA, Class II, Class III, or transfer train brake test provisions of part 232 of this chapter or when the procedures are required for compliance with the Class 1, Class 1A, Class II, or running brake test provisions of part 238 of this chapter;

(4) Incidents involving noncompliance with the railroad's operating rules involving operation of a locomotive or train to operate at a speed that exceeds the maximum authorized limit;

(5) Incidents involving noncompliance with the railroad's operating rules resulting in operation of a locomotive or train past any signal, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it;

(6) Incidents involving noncompliance with the provisions of restricted speed, and the operational equivalent thereof, that must be reported under the provisions of part 225 of this chapter;

(7) Incidents involving occupying main track or a segment of main track without proper authority or permission; and

(8) Incidents involving the failure to comply with prohibitions against tampering with locomotive mounted safety devices, or knowingly operating or permitting to be operated a train with an unauthorized or disabled safety device in the controlling locomotive.

(f) For reporting purposes, an instance of poor safety conduct involving a person who holds both conductor certification pursuant to this part and locomotive engineer certification pursuant to part 240 of this chapter need only be reported once (either under 49 CFR 240.309 of this chapter or this section). The determination as to where to report the instance of poor safety conduct should be based on the work the person was performing at the time the conduct occurred.

(g) For reporting purposes each category of detected poor safety conduct identified in paragraph (b) of this section shall be capable of being annotated to reflect the following:

(1) The nature of the remedial action taken and the number of events subdivided so as to reflect which of the following actions was selected:

(i) Imposition of informal discipline;

(ii) Imposition of formal discipline;

(iii) Provision of informal training; or

(iv) Provision of formal training; and

(2) If the nature of the remedial action taken was formal discipline, the number of events further subdivided so as to reflect which of the following punishments was imposed by the railroad:

(i) The person was withheld from service;

(ii) The person was dismissed from employment or

(iii) The person was issued demerits. If more than one form of punishment was imposed only that punishment deemed the most severe shall be shown.

(h) For reporting purposes each category of detected poor safety conduct identified in paragraph (b) of this section which resulted in the imposition of formal or informal discipline shall be annotated to reflect the following:

(1) The number of instances in which the railroad's internal appeals process reduced the punishment initially imposed at the conclusion of its hearing; and

(2) The number of instances in which the punishment imposed by the railroad was reduced by any of the following entities: The National Railroad Adjustment Board, a Public Law Board, a Special Board of Adjustment or other body for the resolution of disputes duly constituted under the provisions of the Railway Labor Act.

(i) For reporting purposes, each category of detected poor safety conduct identified in paragraph (b) of this section shall be capable of being annotated to reflect the following:

(1) The total number of incidents in that category;

(2) The number of incidents within that total which reflect incidents requiring an FRA accident/incident report under part 225 of this chapter; and

(3) The number of incidents within that total which were detected as a result of a scheduled operational monitoring effort.

Subpart D—Territorial Qualification and Joint Operations

§ 242.301 Requirements for territorial qualification.

(a) Except as provided in paragraph (c), (d), or (e) of this section, a railroad, including a railroad that employs conductors working in joint operations territory, shall not permit or require a person to serve as a conductor unless that railroad determines that the person is certified as a conductor and possesses the necessary territorial qualifications for the applicable territory pursuant to § 242.119.

(b) Each person who is called to serve as a conductor shall:

(1) Meet the territorial qualification requirements on the segment of track upon which he or she will serve as a conductor; and

(2) Immediately notify the railroad upon which he or she is employed if he or she does not meet the required territorial qualifications.

(c) Except as provided in paragraph (e) of this section, if a conductor lacks territorial qualification on main track physical characteristics required by paragraph (a) of this section, he or she shall be assisted by a person who meets the territorial qualification requirements for main track physical characteristics.

(1) For a conductor who has never been qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor, the assistant shall be a person who is certified as a conductor, meets the territorial qualification requirements for main track physical characteristics, and is not an assigned crew member.

(2) For a conductor who was previously qualified on main track physical characteristics of the territory over which he or she is to serve as a conductor, but whose qualification has expired, the assistant may be any person, including an assigned crewmember other than the locomotive engineer so long as serving as the assistant would not conflict with that crewmember's other safety sensitive duties, who meets the territorial qualification requirements for main track physical characteristics.

(d) If a conductor lacks territorial qualification on other than main track physical characteristics required by paragraph (a) of this section, where practicable, he or she shall be assisted by a person who is a certified conductor and meets the territorial qualification requirements for other than main track physical characteristics. Where not practicable, the conductor shall be provided an appropriate up-to-date job aid.

(e) An assistant is not required if the movement is on a section of main track with an average grade of less than 1% over 3 continuous miles, and

(1) The maximum distance the locomotive or train will be operated does not exceed one mile; or

(2) The maximum authorized speed for any operation on the track does not exceed 20 miles per hour; or

(3) Operations are conducted under operating rules that require every locomotive and train to proceed at a speed that permits stopping within one half the range of vision of the locomotive engineer.

Subpart E—Denial and Revocation of Certification

§ 242.401 Denial of certification.

(a) A railroad shall notify a candidate for certification or recertification of information known to the railroad that forms the basis for denying the person certification and provide the person a reasonable opportunity to explain or rebut that adverse information in writing prior to denying certification. A railroad shall provide the conductor candidate with any written documents or records, including written statements, related to failure to meet a requirement of this part which support its pending denial decision.

(b) This section does not require further opportunity to comment if the railroad's denial is based solely on factors addressed by §§ 242.111, 242.115, or 242.403 and the opportunity to comment afforded by § 242.109 has been provided.

(c) If a railroad denies a person certification or recertification, it shall notify the person of the adverse decision and explain, in writing, the basis for its denial decision. The basis for a railroad's denial decision shall address any explanation or rebuttal information that the conductor candidate may have provided in writing pursuant to paragraph (a) of this section. The document explaining the basis for the denial shall be served on the person within 10 days after the railroad's decision and shall give the date of the decision.

(d) A railroad shall not deny the person's certification for failing to comply with a railroad operating rule or practice which constitutes a violation under § 242.403(e)(1) through (11) of this part if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with that railroad operating rule or practice.

§ 242.403 Criteria for revoking certification.

(a) Each railroad shall adopt and comply with a program which meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any

requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) It shall be unlawful to fail to comply with any of the railroad rules and practices described in paragraph (e) of this section.

(c)(1) A certified conductor who has demonstrated a failure to comply with railroad rules and practices described in paragraph (e) of this section shall have his or her certification revoked.

(2) A certified conductor who is monitoring, piloting, or instructing a conductor and fails to take appropriate action to prevent a violation of paragraph (e) of this section shall have his or her certification revoked. Appropriate action does not mean that a supervisor, pilot, or instructor must prevent a violation from occurring at all costs; the duty may be met by warning the conductor or the engineer, as appropriate, of a potential or foreseeable violation.

(3) A certified conductor who is called by a railroad to perform the duty of a train crew member other than that of conductor or locomotive engineer shall not have his or her certification revoked based on actions taken or not taken while performing that duty.

(d) Limitations on consideration of prior operating rule compliance data: In determining whether a person may be or remain certified as a conductor, a railroad shall consider as operating rule compliance data only conduct described in paragraphs (e)(1) through (e)(11) of this section that occurred within a period of 36 consecutive months prior to the determination. A review of an existing certification shall be initiated promptly upon the occurrence and documentation of any conduct described in this section.

(e) A railroad shall only consider violations of its operating rules and practices that involve:

(1) Failure to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from failing to control a locomotive or train in accordance with a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it, when the conductor is located in the operating cab, or otherwise has knowledge of the signal indication. Appropriate action does not mean that a conductor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation.

(2) Failure to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from failing to adhere to the following limitations concerning train speed:

(i) When the conductor is located in the operating cab and the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour. Where restricted speed is in effect, railroads shall consider only those violations of the conditional clause of restricted speed rules (*i.e.,* the clause that requires stopping within one half of the locomotive engineer's range of vision), or the operational equivalent thereof, which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as ''covered data'' under § 225.5 of this chapter. Appropriate action does not mean that a conductor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation.

(ii) When not in the operating cab, the conductor is deemed to have taken appropriate action when in compliance with all applicable Railroad Operating Rules and Special Instructions.

(3) Failure to perform or have knowledge that a required brake test was performed pursuant to the Class I, Class IA, Class II, Class III, or transfer train brake test provisions of part 232 of this chapter or the Class 1, Class 1A, Class II, or running brake test provisions of part 238 of this chapter.

(4) Failure to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from occupying main track or a segment of main track without proper authority or permission. Appropriate action does not mean that a conductor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation.

(5) Failure to comply with prohibitions against tampering with locomotive mounted safety devices; knowingly fail to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from failing to comply with prohibitions against tampering with locomotive mounted safety devices; or knowingly fail to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from operating or permitting to be operated a train with an unauthorized disabled safety device in the controlling locomotive. (*See* 49 CFR part 218, subpart D and appendix C to part 218);

(6) Failure to comply with the provisions of § 218.99 of this chapter (Shoving or pushing movements). Railroads shall only consider those violations of § 218.99 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as ''covered data'' under § 225.5 of this chapter.

(7) Failure to comply with the provisions of § 218.101 of this chapter (Leaving rolling and on-track maintenance-of-way equipment in the clear). Railroads shall only consider those violations of § 218.101 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as ''covered data'' under § 225.5 of this chapter.

(8) Failure to comply with the provisions of § 218.103 of this chapter (Hand-operated switches, including crossover switches). Railroads shall only consider those violations of § 218.103 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as ''covered data'' under § 225.5 of this chapter.

(9) Failure to comply with the provisions of § 218.105 of this chapter (Additional operational requirements for hand-operated main track switches). Railroads shall only consider those violations of § 218.105 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as ''covered data'' under § 225.5 of this chapter.

(10) Failure to comply with the provisions of § 218.107 of this chapter (Additional operational requirements for hand-operated crossover switches). Railroads shall only consider those violations of § 218.107 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as ''covered data'' under § 225.5 of this chapter.

(11) Failure to comply with the provisions of § 218.109 of this chapter (Hand-operated fixed derails). Railroads shall only consider those violations of § 218.109 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as ''covered data'' under § 225.5 of this chapter.

(12) Failure to comply with § 219.101 of this chapter; however such incidents shall be considered as a violation only for the purposes of § 242.405(a)(2) and (3).

(f)(1) If in any single incident the person's conduct contravened more than one operating rule or practice, that

event shall be treated as a single violation for the purposes of this section.

(2) A violation of one or more operating rules or practices described in paragraphs (e)(1) through (11) of this section that occurs during a properly conducted operational compliance test subject to the provisions of this chapter shall be counted in determining the periods of ineligibility described in § 242.405.

(3) An operational test that is not conducted in compliance with this part, a railroad's operating rules, or a railroad's program under § 217.9 of this chapter, will not be considered a legitimate test of operational skill or knowledge, and will not be considered for certification, recertification or revocation purposes.

(4) A railroad shall not be permitted to deny or revoke an employee's certification based upon additional conditions or operational restrictions imposed pursuant to § 242.107(d).

§ 242.405 Periods of ineligibility.

(a) A period of ineligibility described in this paragraph shall:

(1) Begin, for a person not currently certified, on the date of the railroad's written determination that the most recent incident has occurred; or

(2) Begin, for a person currently certified, on the date of the railroad's notification to the person that recertification has been denied or certification has been revoked; and

(3) Be determined according to the following standards:

(i) On other than main track where restricted speed or the operational equivalent thereof is in effect, the period of revocation for a violation of § 242.403(e)(6) through (8), (10), or (11) shall be reduced by one half provided that another revocable event has not occurred within the previous 12 months.

(ii) In the case of a single incident involving violation of one or more of the operating rules or practices described in § 242.403(e)(1) through (11), the person shall have his or her certificate revoked for a period of 30 calendar days.

(iii) In the case of two separate incidents involving a violation of one or more of the operating rules or practices described in § 242.403(e)(1) through (11), that occurred within 24 months of each other, the person shall have his or her certificate revoked for a period of six months.

(iv) In the case of three separate incidents involving violations of one or more of the operating rules or practices, described in § 242.403(e)(1) through (12), that occurred within 36 months of each other, the person shall have his or her certificate revoked for a period of one year.

(v) In the case of four separate incidents involving violations of one or more of the operating rules or practices, described in § 242.403(e)(1) through (12), that occurred within 36 months of each other, the person shall have his or her certificate revoked for a period of three years.

(vi) Where, based on the occurrence of violations described in § 242.403(e)(12), different periods of ineligibility may result under the provisions of this section and § 242.115, the longest period of revocation shall control.

(b) Any or all periods of revocation provided in paragraph (a) of this section may consist of training.

(c) Reduction in period of ineligibility: A person whose certification is denied or revoked shall be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of ineligibility only if:

(1) The denial or revocation of certification in accordance with the provisions of paragraph (a)(3) of this section is for a period of one year or less;

(2) Certification is denied or revoked for reasons other than noncompliance with § 219.101 of this chapter;

(3) The person is evaluated by a railroad officer and determined to have received adequate remedial training;

(4) The person successfully completes any mandatory program of training or retraining, if that is determined to be necessary by the railroad prior to return to service; and

(5) At least one half the pertinent period of ineligibility specified in paragraph (a)(3) of this section has elapsed.

§ 242.407 Process for revoking certification.

(a) Except as provided for in § 242.115(g), a railroad that certifies or recertifies a person as a conductor and, during the period that certification is valid, acquires reliable information regarding violation(s) of § 242.403(e) or § 242.115(e) of this chapter shall revoke the person's conductor certificate.

(b) Pending a revocation determination under this section, the railroad shall:

(1) Upon receipt of reliable information regarding violation(s) of § 242.403(e) or § 242.115(e) of this chapter, immediately suspend the person's certificate;

(2) Prior to or upon suspending the person's certificate, provide notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing before a presiding officer other than the investigating officer. The notice may initially be given either orally or in writing. If given orally, it must be confirmed in writing and the written confirmation must be made promptly. Written confirmation which conforms to the notification provisions of an applicable collective bargaining agreement shall be deemed to satisfy the written confirmation requirements of this section. In the absence of an applicable collective bargaining agreement provision, the written confirmation must be made within 96 hours.

(3) Convene the hearing within the deadline prescribed by either paragraph (c)(1) of this section or the applicable collective bargaining agreement as permitted under paragraph (d) of this section;

(4) No later than the convening of the hearing and notwithstanding the terms of an applicable collective bargaining agreement, the railroad convening the hearing shall provide the person with a copy of the written information and list of witnesses the railroad will present at the hearing. If requested, a recess to the start of the hearing will be granted if that information is not provided until just prior to the convening of the hearing. If the information was provided through statements of an employee of the convening railroad, the railroad will make that employee available for examination during the hearing required by paragraph (b)(3) of this section. Examination may be telephonic where it is impractical to provide the witness at the hearing.

(5) Determine, on the record of the hearing, whether the person no longer meets the certification requirements of this part stating explicitly the basis for the conclusion reached;

(6) When appropriate, impose the pertinent period of revocation provided for in § 242.405 or § 242.115; and

(7) Retain the record of the hearing for 3 years after the date the decision is rendered.

(c) Except as provided for in paragraphs (d), (f), (i), and (j) of this section, a hearing required by this section shall be conducted in accordance with the following procedures:

(1) The hearing shall be convened within 10 days of the date the certificate is suspended unless the conductor requests or consents to delay in the start of the hearing.

(2) The hearing shall be conducted by a presiding officer, who can be any proficient person authorized by the railroad other than the investigating officer.

(3) The presiding officer will exercise the powers necessary to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

(4) The presiding officer shall convene and preside over the hearing.

(5) Testimony by witnesses at the hearing shall be recorded verbatim.

(6) All relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(7) The presiding officer may:

(i) Adopt any needed procedures for the submission of evidence in written form;

(ii) Examine witnesses at the hearing;

(iii) Convene, recess, adjourn or otherwise regulate the course of the hearing; and

(iv) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

(8) Parties may appear and be heard on their own behalf or through designated representatives. Parties may offer relevant evidence including testimony and may conduct such examination of witnesses as may be required for a full disclosure of the relevant facts.

(9) The record in the proceeding shall be closed at the conclusion of the hearing unless the presiding officer allows additional time for the submission of information. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.

(10) No later than 10 days after the close of the record, a railroad official, other than the investigating officer, shall prepare and sign a written decision in the proceeding.

(11) The decision shall:

(i) Contain the findings of fact as well as the basis therefor, concerning all material issues of fact presented on the record and citations to all applicable railroad rules and practices;

(ii) State whether the railroad official found that a revocable event occurred and the applicable period of revocation with a citation to 49 CFR 242.405 (Periods of revocation); and

(iii) Be served on the employee and the employee's representative, if any, with the railroad to retain proof of that service.

(12) The railroad shall have the burden of proving that the conductor's conduct was not in compliance with the applicable railroad operating rule or practice or part 219 of this chapter.

(d) A hearing required by this section which is conducted in a manner that conforms procedurally to the applicable collective bargaining agreement shall be deemed to satisfy the procedural requirements of this section.

(e) A hearing required under this section may be consolidated with any disciplinary or other hearing arising from the same facts, but in all instances a railroad official, other than the investigating officer, shall make separate findings as to the revocation required under this section.

(f) A person may waive the right to the hearing provided under this section. That waiver shall:

(1) Be made in writing;

(2) Reflect the fact that the person has knowledge and understanding of these rights and voluntarily surrenders them; and

(3) Be signed by the person making the waiver.

(g) A railroad that has relied on the certification by another railroad under the provisions of § 242.127 or § 242.301, shall revoke its certification if, during the period that certification is valid, the railroad acquires information which convinces it that another railroad has revoked its certification in accordance with the provisions of this section. The requirement to provide a hearing under this section is satisfied when any single railroad holds a hearing and no additional hearing is required prior to a revocation by more than one railroad arising from the same facts.

(h) The period of certificate suspension prior to the commencement of a hearing required under this section shall be credited towards satisfying any applicable revocation period imposed in accordance with the provisions of § 242.405.

(i) A railroad:

(1) Shall not revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with the railroad operating rule or practice which constitutes a violation under § 242.403(e)(1) through (e)(11); or

(2) May decide not to revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that the violation of § 242.403(e)(1) through (11) was of a minimal nature and had no direct or potential effect on rail safety.

(j) The railroad shall place the relevant information in the records maintained in compliance with § 242.215 for Class I (including the National Railroad Passenger Corporation) and Class II railroads, and § 242.203 for Class III railroads if sufficient evidence meeting the criteria provided in paragraph (i) of this section, becomes available either:

(1) Prior to a railroad's action to suspend the certificate as provided for in paragraph (b)(1) of this section; or

(2) Prior to the convening of the hearing provided for in this section;

(k) Provided that the railroad makes a good faith determination after a reasonable inquiry that the course of conduct provided for in paragraph (i) of this section is appropriate, the railroad which does not suspend a conductor's certification, as provided for in paragraph (b) of this section, is not in violation of paragraph (a) of this section.

Subpart F—Dispute Resolution Procedures

§ 242.501 Review board established.

(a) Any person who has been denied certification, denied recertification, or has had his or her certification revoked and believes that a railroad incorrectly determined that he or she failed to meet the certification requirements of this regulation when making the decision to deny or revoke certification, may petition the Federal Railroad Administrator to review the railroad's decision.

(b) The Administrator has delegated initial responsibility for adjudicating such disputes to the Operating Crew Review Board.

(c) The Operating Crew Review Board shall be composed of employees of the Federal Railroad Administration selected by the Administrator.

§ 242.503 Petition requirements.

(a) To obtain review of a railroad's decision to deny certification, deny recertification, or revoke certification, a person shall file a petition for review that complies with this section.

(b) Each petition shall:

(1) Be in writing;

(2) Be filed with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M–30), West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. The form of such request may be in written or electronic form consistent with the standards and requirements established by the Federal Docket Management System and posted on its Web site at *http://www.regulations.gov.*

(3) Contain all available information that the person thinks supports the

person's belief that the railroad acted improperly, including:

(i) The petitioner's full name;

(ii) The petitioner's current mailing address;

(iii) The petitioner's daytime telephone number;

(iv) The petitioner's email address (if available);

(v) The name and address of the railroad; and

(vi) The facts that the petitioner believes constitute the improper action by the railroad, specifying the locations, dates, and identities of all persons who were present or involved in the railroad's actions (to the degree known by the petitioner);

(4) Explain the nature of the remedial action sought;

(5) Be supplemented by a copy of all written documents in the petitioner's possession or reasonably available to the petitioner that document that railroad's decision; and

(6) Be filed in a timely manner.

(7) Be supplemented, if requested by the Operating Crew Review Board, with a copy of the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees. The petitioner must provide written explanation in response to an Operating Crew Review Board request if written documents that should be reasonably available to the petitioner are not supplied.

(c) A petition seeking review of a railroad's decision to deny certification or recertification or revoke certification in accordance with the procedures required by § 242.407 filed with FRA more than 120 days after the date the railroad's denial or revocation decision was served on the petitioner will be denied as untimely except that the Operating Crew Review Board for cause shown may extend the petition filing period at any time in its discretion:

(1) Provided the request for extension is filed before the expiration of the period provided in this paragraph; or

(2) Provided that the failure to timely file was the result of excusable neglect.

(d) A party aggrieved by a Board decision to deny a petition as untimely or not in compliance with the requirements of this section may file an appeal with the Administrator in accordance with § 242.511.

§ 242.505 Processing certification review petitions.

(a) Each petition shall be acknowledged in writing by FRA. The acknowledgment shall contain the docket number assigned to the petition and a statement of FRA's intention that the Board will attempt to render a decision on this petition within 180 days from the date that the railroad's response is received or from the date upon which the railroad's response period has lapsed pursuant to paragraph (c) of this section.

(b) Upon receipt of the petition, FRA will notify the railroad that it has received the petition and where the petition may be accessed.

(c) Within 60 days from the date of the notification provided in paragraph (b) of this section, the railroad may submit to FRA any information that the railroad considers pertinent to the petition. Late filings will only be considered to the extent practicable.

(d) A railroad that submits such information shall:

(1) Identify the petitioner by name and the docket number of the review proceeding and provide the railroad's email address (if available);

(2) Serve a copy of the information being submitted to FRA to the petitioner and petitioner's representative, if any; and

(3) File the information with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M–30), West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. The form of such information may be in written or electronic form consistent with the standards and requirements established by the Federal Docket Management System and posted on its Web site at *http://www.regulations.gov.*

(e) Each petition will then be referred to the Operating Crew Review Board for a decision.

(f) Based on the record, the Board shall have the authority to grant, deny, dismiss or remand the petition.

(g) If the Board finds that there is insufficient basis for granting or denying the petition, the Board shall issue an order affording the parties an opportunity to provide additional information or argument consistent with its findings.

(h) Standard of review for factual issues: When considering factual issues, the Board will determine whether there is substantial evidence to support the railroad's decision, and a negative finding is grounds for granting the petition.

(i) Standard of review for procedural issues: When considering procedural issues, the Board will determine whether substantial harm was caused the petitioner by virtue of the failure to adhere to the dictated procedures for making the railroad's decision. A finding of substantial harm is grounds for reversing the railroad's decision. To establish grounds upon which the Board may grant relief, Petitioner must show:

(1) That procedural error occurred, and

(2) The procedural error caused substantial harm.

(j) Standard of review for legal issues: Pursuant to its reviewing role, the Board will consider whether the railroad's legal interpretations are correct based on a *de novo* review.

(k) The Board will determine whether the denial or revocation of certification or recertification was improper under this regulation (*i.e.,* based on an incorrect determination that the person failed to meet the certification requirements of this regulation) and grant or deny the petition accordingly. The Board will not otherwise consider the propriety of a railroad's decision, *i.e.,* it will not consider whether the railroad properly applied its own more stringent requirements.

(l) The Board's written decision shall be served on the petitioner, including the petitioner's representative, if any, and the railroad.

§ 242.507 Request for a hearing.

(a) If adversely affected by the Operating Crew Review Board's decision, either the petitioner before the Board or the railroad involved shall have a right to an administrative proceeding as prescribed by § 242.509.

(b) To exercise that right, the adversely affected party shall, within 20 days of service of the Board's decision on that party, file a written request with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M–30), West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. The form of such request may be in written or electronic form consistent with the standards and requirements established by the Federal Docket Management System and posted on its Web site at *http://www.regulations.gov.*

(c) If a party fails to request a hearing within the period provided in paragraph (b) of this section, the Operating Crew Review Board's decision will constitute final agency action.

(d) If a party elects to request a hearing, that person shall submit a written request to the Docket Clerk containing the following:

(1) The name, address, telephone number, and email address (if available) of the respondent and the requesting party's designated representative, if any;

(2) The specific factual issues, industry rules, regulations, or laws that the requesting party alleges need to be examined in connection with the certification decision in question; and

(3) The signature of the requesting party or the requesting party's representative, if any.

(e) Upon receipt of a hearing request complying with paragraph (d) of this section, FRA shall arrange for the appointment of a presiding officer who shall schedule the hearing for the earliest practicable date.

§ 242.509 Hearings.

(a) An administrative hearing for a conductor certification petition shall be conducted by a presiding officer, who can be any person authorized by the Administrator, including an administrative law judge.

(b) The presiding officer may exercise the powers of the Administrator to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

(c) The presiding officer shall convene and preside over the hearing. The hearing shall be a de novo hearing to find the relevant facts and determine the correct application of this part to those facts. The presiding officer may determine that there is no genuine issue covering some or all material facts and limit evidentiary proceedings to any issues of material fact as to which there is a genuine dispute.

(d) The presiding officer may authorize discovery of the types and quantities which in the presiding officer's discretion will contribute to a fair hearing without unduly burdening the parties. The presiding officer may impose appropriate non-monetary sanctions, including limitations as to the presentation of evidence and issues, for any party's willful failure or refusal to comply with approved discovery requests.

(e) Every petition, motion, response, or other authorized or required document shall be signed by the party filing the same, or by a duly authorized officer or representative of record, or by any other person. If signed by such other person, the reason therefor must be stated and the power of attorney or other authority authorizing such other person to subscribe the document must be filed with the document. The signature of the person subscribing any document constitutes a certification that he or she has read the document; that to the best of his or her knowledge, information and belief every statement contained in the document is true and no such statements are misleading; and that it is not interposed for delay or to be vexatious.

(f) After the request for a hearing is filed, all documents filed or served upon one party must be served upon all parties. Each party may designate a person upon whom service is to be made when not specified by law, regulation, or directive of the presiding officer. If a party does not designate a person upon whom service is to be made, then service may be made upon any person having subscribed to a submission of the party being served, unless otherwise specified by law, regulation, or directive of the presiding officer. Proof of service shall accompany all documents when they are tendered for filing.

(g) If any document initiating, filed, or served in, a proceeding is not in substantial compliance with the applicable law, regulation, or directive of the presiding officer, the presiding officer may strike or dismiss all or part of such document, or require its amendment.

(h) Any party to a proceeding may appear and be heard in person or by an authorized representative.

(i) Any person testifying at a hearing or deposition may be accompanied, represented, and advised by an attorney or other representative, and may be examined by that person.

(j) Any party may request to consolidate or separate the hearing of two or more petitions by motion to the presiding officer, when they arise from the same or similar facts or when the matters are for any reason deemed more efficiently heard together.

(k) Except as provided in § 242.507(c) and paragraph (u)(4) of this section, whenever a party has the right or is required to take action within a period prescribed by this part, or by law, regulation, or directive of the presiding officer, the presiding officer may extend such period, with or without notice, for good cause, provided another party is not substantially prejudiced by such extension. A request to extend a period which has already expired may be denied as untimely.

(l) An application to the presiding officer for an order or ruling not otherwise specifically provided for in this part shall be by motion. The motion shall be filed with the presiding officer and, if written, served upon all parties. All motions, unless made during the hearing, shall be written. Motions made during hearings may be made orally on the record, except that the presiding officer may direct that any oral motion be reduced to writing. Any motion shall state with particularity the grounds therefor and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon which is not already part of the record. Any matter submitted in response to a written motion must be filed and served within fourteen (14) days of the motion, or within such other period as directed by the presiding officer.

(m) Testimony by witnesses at the hearing shall be given under oath and the hearing shall be recorded verbatim. The presiding officer shall give the parties to the proceeding adequate opportunity during the course of the hearing for the presentation of arguments in support of or in opposition to motions, and objections and exceptions to rulings of the presiding officer. The presiding officer may permit oral argument on any issues for which the presiding officer deems it appropriate and beneficial. Any evidence or argument received or proffered orally shall be transcribed and made a part of the record. Any physical evidence or written argument received or proffered shall be made a part of the record, except that the presiding officer may authorize the substitution of copies, photographs, or descriptions, when deemed to be appropriate.

(n) The presiding officer shall employ the Federal Rules of Evidence for United States Courts and Magistrates as general guidelines for the introduction of evidence. Notwithstanding paragraph (m) of this section, all relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(o) The presiding officer may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided for in § 209.7 of this chapter;

(3) Adopt any needed procedures for the submission of evidence in written form;

(4) Examine witnesses at the hearing;

(5) Convene, recess, adjourn or otherwise regulate the course of the hearing; and

(6) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

(p) The petitioner before the Operating Crew Review Board, the railroad involved in taking the certification action, and FRA shall be parties at the hearing. All parties may participate in the hearing and may appear and be heard on their own behalf or through designated representatives. All parties may offer relevant evidence, including testimony, and may conduct such cross-examination of witnesses as may be required to make a record of the relevant facts.

(q) The party requesting the administrative hearing shall be the ''hearing petitioner.'' The hearing petitioner shall have the burden of proving its case by a preponderance of the evidence. Hence, if the hearing petitioner is the railroad involved in taking the certification action, that railroad will have the burden of proving that its decision to deny certification, deny recertification, or revoke certification was correct. Conversely, if the petitioner before the Operating Crew Review Board is the hearing petitioner, that person will have the burden of proving that the railroad's decision to deny certification, deny recertification, or revoke certification was incorrect. The party who is not the hearing petitioner will be a respondent.

(r) FRA will be a mandatory party to the administrative hearing. At the start of each proceeding, FRA will be a respondent.

(s) The record in the proceeding shall be closed at the conclusion of the evidentiary hearing unless the presiding officer allows additional time for the submission of additional evidence. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.

(t) At the close of the record, the presiding officer shall prepare a written decision in the proceeding.

(u) The decision:

(1) Shall contain the findings of fact and conclusions of law, as well as the basis for each concerning all material issues of fact or law presented on the record;

(2) Shall be served on the hearing petitioner and all other parties to the proceeding;

(3) Shall not become final for 35 days after issuance;

(4) Constitutes final agency action unless an aggrieved party files an appeal within 35 days after issuance; and

(5) Is not precedential.

§ 242.511 Appeals.

(a) Any party aggrieved by the presiding officer's decision may file an appeal. The appeal must be filed within 35 days of issuance of the decision with the Federal Railroad Administrator, 1200 New Jersey Avenue SE., Washington, DC 20590 and with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M–30), West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. A copy of the appeal shall be served on each party. The appeal shall set forth objections to the presiding officer's decision, supported by reference to applicable laws and regulations and with specific reference to the record. If no appeal is timely filed, the presiding officer's decision constitutes final agency action.

(b) A party may file a reply to the appeal within 25 days of service of the appeal. The reply shall be supported by reference to applicable laws and regulations and with specific reference to the record, if the party relies on evidence contained in the record.

(c) The Administrator may extend the period for filing an appeal or a response for good cause shown, provided that the written request for extension is served before expiration of the applicable period provided in this section.

(d) The Administrator has sole discretion to permit oral argument on the appeal. On the Administrator's own initiative or written motion by any party, the Administrator may grant the parties an opportunity for oral argument.

(e) The Administrator may remand, vacate, affirm, reverse, alter or modify the decision of the presiding officer and the Administrator's decision constitutes final agency action except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted.

(f) An appeal from an Operating Crew Review Board decision pursuant to § 242.503(d) must be filed within 35 days of issuance of the decision with the Federal Railroad Administrator, 1200 New Jersey Avenue SE., Washington, DC 20590 and with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M–30), West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. A copy of the appeal shall be served on each party. The Administrator may affirm or vacate the Board's decision, and may remand the petition to the Board for further proceedings. An Administrator's decision to affirm the Board's decision constitutes final agency action.

Appendix A to Part 242—Schedule of Civil Penalties

A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $100,000 for any violation where circumstances warrant. *See* 49 CFR part 209, Appendix A.

APPENDIX A TO PART 242—SCHEDULE OF CIVIL PENALTIES [1]

Section	Violation	Willful violation
Subpart B—Program and Eligibility Requirements:		
242.101—Program failures:		
(a) Failure to have program	$10,000	$20,000
(a)(1)–(6) Program that fails to address a subject	2,500	5,000
242.103—Program approval:		
(a)–(b) Failure to follow Appendix B	1,000	2,000
(c) Failure to comply with filing requirements	1,000	2,000
(h) to resubmit, when directed by FRA	1,000	2,000
242.105—Schedule for implementation:		
(a)–(b) Failure to designate conductors	2,000	4,000
(c) Allowing uncertified person to serve as conductor	7,500	15,000
(d)–(e) Certifying without complying with subpart B or failure to issue a certificate	2,500	5,000
(f) Serving as a conductor without complying with subpart B or being issued a certificate	7,500	15,000
242.107—Types of service:		
(a) Failure to designate types of service	2,000	4,000
(c) Reclassifying a certificate	2,500	5,000
242.109—Certification and recertification determinations:		
(a) Failure to determine in writing the requirements of (a)(1), (a)(2), (a)(3), and/or (a)(4)	2,500	5,000
(b) Considering excluded data	2,000	4,000
(c) Failure to have required documents on file	1,000	2,000
(d), (e) Failure to provide timely review opportunity	2,000	4,000
242.111—Motor vehicle operator records:		
(a) Failure to implement program meeting requirements	6,000	.....

APPENDIX A TO PART 242—SCHEDULE OF CIVIL PENALTIES [1]—Continued

Section	Violation	Willful violation
(b) Failure to determine eligibility requirements met	5,000	7,500
(c) Failure to initially certify	2,000	4,000
(d) Failure to recertify	2,000	4,000
(e) Allowing person to serve as conductor before information is evaluated	7,500	15,000
(f) Failure to certify or certify during pendency of waiver request	2,000	4,000
(g) Failure to take action to make information available	1,000	2,000
(h), (i), (j) Failure to request record	1,000	2,000
(k) Failure to notify of absence of license	1,000	2,000
(l) Failure to report in timely manner or railroad taking certification action for not reporting earlier than 48 hours	1,000	2,000
(m), (n) Considering excluded data	2,000	4,000
(o) Failure to:		
(1) Consider data	6,000	10,000
(3), (4) Properly act in response to data	2,500	5,000
242.113—Prior safety conduct:		
(a) Failure to implement program meeting requirements	6,000	
(b) Failure to determine eligibility requirements met	5,000	7,500
(c) Failure to request record or take required action	2,000	2,000
242.115—Substance abuse/rules:		
(a) Failure to implement program meeting requirements	6,000	
(b) Failure to determine eligibility requirements met	5,000	7,500
(c) Failure to have basis for taking action	2,500	5,000
(d)–(g) Failure to comply with requirements	2,500	5,000
242.117—Vision and hearing acuity:		
(a) Failure to implement program meeting requirements	6,000	
(b) Failure to determine eligibility requirements met	5,000	7,500
(c) Failure to have basis for finding proper acuity	1,000	2,000
(d) Acuity examination performed by unauthorized person	1,000	2,000
(e) Failure to note need for device to achieve acuity	1,000	2,000
(f) Failure to use device needed for proper acuity	1,000	2,000
(h)–(j) Failure to comply with requirements	2,500	5,000
(k) Failure of conductor to notify	2,500	5,000
242.119—Training:		
(a) Failure to implement program meeting requirements	6,000	
(b) Failure to determine eligibility requirements met	5,000	7,500
(c) Failure to determine in writing the requirements of (c)(1), (c)(2), and/or (c)(3)	2,500	5,000
(d) Failure to:		
(1) Make determination, include proper curriculum, and/or document knowledge and ability	2,500	5,000
(2) Failure to include component	1,000	2,000
(3) Failure to make information available	1,000	2,000
(4) Failure to maintain steps or tasks in one manual or make available	1,000	2,000
(5) Failure to review and modify training plan	1,000	2,000
(e) Failure to require person to meet requirements	2,500	5,000
(f) Failure to provide opportunity to consult	1,000	2,000
(g)–(k) Failure to have adequate procedures or include procedures in program	2,500	5,000
(l) Failure to have adequate procedures for or provide continuing education	2,500	5,000
242.121—Knowledge testing:		
(a) Failure to implement program meeting requirements	6,000	
(b) Failure to determine eligibility requirements met	5,000	7,500
(c) Failure to have adequate procedures for testing knowledge	2,500	5,000
(d) Failure to properly document testing	2,500	5,000
(e) Failure to provide opportunity to consult	2,500	5,000
(f) Failure to document whether test was passed or failed	2,500	5,000
(g) Allowing person to serve as a conductor despite test failure	2,500	5,000
242.123—Monitoring operational performance:		
(a)–(b) Failure to implement program meeting requirements	6,000	
(c) Failure to test each conductor annually	2,500	5,000
(d) Failure to test properly	2,500	5,000
(e) Failure to indicate the action to be take	2,500	5,000
(f) Failure to test within time limits	2,500	5,000
242.125—Reliance on determination of another:		
(a) Failure to address in program or require newly hired conductor to take entire training program	5,000	7,500
(b) Failure to make any required determinations	2,500	5,000
242.127—Relying on requirements of a country:		
(a)–(b) Failure to determine person employed and meets Canadian standards	2,500	5,000
Subpart C—Administration of the Certification Program:		
242.201—Time limitations:		
(a), (c), and (d) Exceeding time limit	2,000	4,000
242.203—Supporting information:		
(a), (c)–(e) Failure to have a record	2,500	5,000
(b) Failure to have a complete record	2,000	4,000
(f) Falsification of a record	(–)	10,000

APPENDIX A TO PART 242—SCHEDULE OF CIVIL PENALTIES [1]—Continued

Section	Violation	Willful violation
(g) Failure to comply with requirements if records maintained electronically	2,000	4,000
242.205—Identification of persons:		
(a)–(b) Failure to have a record	2,500	5,000
(c) Failure to update or make a record available	2,000	4,000
(d) Falsification of a record	(–)	10,000
(e) Failure to comply with requirements if records maintained electronically	2,000	4,000
242.207—Certificate components:		
(a) Improper certificate	1,000	2,000
(b) Failure to designate those with signing authority	1,000	2,000
(d) Falsification of a certificate	(–)	10,000
242.209—Maintenance of the certificate:		
(a) Failure of conductor to carry certificate or display certificate when requested	1,000	2,000
(b) Failure of conductor to notify railroad of limitations or railroad requiring conductor to exceed limitations	4,000	8,000
242.211—Replacement of certificates:		
(a) Failure to have a reasonably accessible system for certificate replacement	2,000	4,000
(b) Failure to comply with requirements for temporary replacement certificates	1,000	2,000
242.213—Multiple certifications:		
(d) Allowing an engineer to operate without a conductor where the engineer is not certified as a conductor or not accompanied by a certified conductor	7,500	15,000
(e) Failure to comply with emergency restrictions	2,500	5,000
(f) Failure of conductor to notify railroad of denial or revocation	4,000	8,000
(g) Performing conductor service with a revoked conductor certificate	7,500	15,000
(h), (k) Performing work as an engineer or obtaining an engineer certificate with a conductor certification revoked for a violation of 242.403(e)(1)–(e)(5) or (e)(12)	7,500	15,000
(i), (j) Performing work as a conductor or obtaining a conductor certificate with an engineer certification revoked under 240.307	7,500	15,000
(l) Denying or revoking engineer certification or recertification based solely on the denial of conductor certification	4,000	8,000
(m) Denying or revoking conductor certification or recertification based solely on the denial of engineer certification	4,000	8,000
242.215—Oversight responsibility:		
(a) Failure to perform annual review and analysis or perform on time	2,000	4,000
(b)–(i) Incomplete or inaccurate report	2,500	5,000
Subpart D—Territorial Qualification and Joint Operations		
242.301—Territorial qualification:		
(a) Allowing uncertified person or person not territorially qualified to serve as a conductor	7,500	15,000
(b) Failure to notify railroad of lack of qualifications	4,000	8,000
(c) Failure to provide required assistance	4,000	8,000
(d) Failure to provide assistance or up-to-date job aid	4,000	8,000
Subpart E—Denial and Revocation of Certification		
242.401—Denial of certification:		
(a) Failure to notify or provide opportunity for comment	2,000	4,000
(c) Failure to notify, provide data, or untimely notification	2,000	4,000
242.403—Revocation criteria:		
(a) Failure to implement program meeting requirements	6,000	.....
(b) Unlawful failure to comply with rules and practices	2,500	5,000
(c) Failure to revoke certification	2,500	5,000
(d) Considering excluded data	2,500	5,000
(e) Considering unlisted violations of operating rules and practices	2,500	5,000
(f) Improperly counting or considering violations	2,500	5,000
242.405—Periods of ineligibility:		
(a)–(c) Imposition of incorrect period of ineligibility	2,500	5,000
242.407—Revocation of certification:		
(a) Failure to revoke certification	7,500	15,000
(b) Failure to suspend, notify, provide hearing opportunity, or improper procedures	2,500	5,000
(c)–(h) Failure of railroad to comply with hearing or waiver procedures	2,500	5,000
(j) Failure of railroad to make record	1,000	2,000
(k) Failure of railroad to conduct reasonable inquiry or make good faith determination	5,000	10,000

[1] A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $100,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A.

Appendix B to Part 242—Procedures for Submission and Approval of Conductor Certification Programs

This appendix establishes procedures for the submission and approval of a railroad's program concerning the training, testing, and evaluating of persons seeking certification or recertification as a conductor in accordance with the requirements of this part. It also contains guidance on how FRA will exercise its review and approval responsibilities.

Submission by a Railroad

As provided for in § 242.101, each railroad must have a program for determining the certification of each person it permits or requires to perform as a conductor or as a passenger conductor. Each railroad must

submit its individual program to FRA for approval as provided for in § 242.103. Each program must be accompanied by a request for approval organized in accordance with this appendix. Requests for approval must contain appropriate references to the relevant portion of the program being discussed. Requests should be submitted in writing on standard sized paper (8½ x 11) and can be in letter or narrative format. The railroad's submission shall be sent to the Associate Administrator for Railroad Safety/Chief Safety Officer, FRA. The mailing address for FRA is 1200 New Jersey Avenue SE., Washington, DC 20590. Simultaneous with its filing with the FRA, each railroad must serve a copy of its submission on the president of each labor organization that represents the railroad's employees subject to this part.

Each railroad is authorized to file by electronic means any program submissions required under this part. Prior to any person submitting a railroad's first program submission electronically, the person shall provide the Associate Administrator with the following information in writing:

(1) The name of the railroad;

(2) The names of two individuals, including job titles, who will be the railroad's points of contact and will be the only individuals allowed access to FRA's secure document submission site;

(3) The mailing addresses for the railroad's points of contact;

(4) The railroad's system or main headquarters address located in the United States;

(5) The email addresses for the railroad's points of contact; and

(6) The daytime telephone numbers for the railroad's points of contact.

A request for electronic submission or FRA review of written materials shall be addressed to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Upon receipt of a request for electronic submission that contains the information listed above, FRA will then contact the requestor with instructions for electronically submitting its program.

A railroad that electronically submits an initial program or new portions or revisions to an approved program required by this part shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email. FRA may electronically store any materials required by this part regardless of whether the railroad that submits the materials does so by delivering the written materials to the Associate Administrator and opts not to submit the materials electronically. A railroad that opts not to submit the materials required by this part electronically, but provides one or more email addresses in its submission, shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email or mail.

Organization of the Submission

Each request should be organized to present the required information in the following standardized manner. Each section must begin by giving the name, title, telephone number, and mailing address of the person to be contacted concerning the matters addressed by that section. If a person is identified in a prior section, it is sufficient to merely repeat the person's name in a subsequent section.

Section 1 of the Submission: General Information and Elections

The first section of the request must contain the name of the railroad, the person to be contacted concerning the request (including the person's name, title, telephone number, and mailing address) and a statement electing either to accept responsibility for educating previously untrained persons to be certified conductors or recertify only conductors previously certified by other railroads. *See* § 242.103(b).

If a railroad elects not to provide initial conductor training, the railroad is obligated to state so in its submission. A railroad that makes this election will be limited to recertifying persons initially certified by another railroad. A railroad that makes this election can rescind it by obtaining FRA approval of a modification of its program. *See* § 242.103(f).

If a railroad elects to accept responsibility for training persons not previously trained to be conductors, the railroad is obligated to submit information on how such persons will be trained but has no duty to actually conduct such training. A railroad that elects to accept the responsibility for the training of such persons may authorize another railroad or a non-railroad entity to perform the actual training effort. The electing railroad remains responsible for assuring that such other training providers adhere to the training program the railroad submits. This section must also state which types of service the railroad will employ. *See* § 242.107.

Section 2 of the Submission: Training Persons Previously Certified

The second section of the request must contain information concerning the railroad's program for training previously certified conductors. As provided for in § 242.119(l) each railroad must have a program for the ongoing education of its conductors to assure that they maintain the necessary knowledge concerning operating rules and practices, familiarity with physical characteristics, and relevant Federal safety rules.

Section 242.119(l) provides a railroad latitude to select the specific subject matter to be covered, duration of the training, method of presenting the information, and the frequency with which the training will be provided. The railroad must describe in this section how it will use that latitude to assure that its conductors remain knowledgeable concerning the safe discharge of their responsibilities so as to comply with the performance standard set forth in § 242.119(l). This section must contain sufficient detail to permit effective evaluation of the railroad's training program in terms of the subject matter covered, the frequency and duration of the training sessions, the training environment employed (for example, use of classroom, use of computer based training, use of film or slide presentations, and use of on-job-training) and which aspects of the program are voluntary or mandatory.

Time and circumstances have the capacity to diminish both abstract knowledge and the proper application of that knowledge to discrete events. Time and circumstances also have the capacity to alter the value of previously obtained knowledge and the application of that knowledge. In formulating how it will use the discretion being afforded, each railroad must design its program to address both loss of retention of knowledge and changed circumstances, and this section of the submission to FRA must address these matters.

For example, conductors need to have their fundamental knowledge of operating rules and procedures refreshed periodically. Each railroad needs to advise FRA how that need is satisfied in terms of the interval between attendance at such training, the nature of the training being provided, and methods for conducting the training. A matter of particular concern to FRA is how each railroad acts to assure that conductors remain knowledgeable about the territory over which a conductor is authorized to perform but from which the conductor has been absent. The railroad must have a plan for the familiarization training that addresses the question of how long a person can be absent before needing more education and, once that threshold is reached, how the person will acquire the needed education. Similarly, the program must address how the railroad responds to changes such as the introduction of new technology, new operating rule books, or significant changes in operations including alteration in the territory conductors are authorized to work over.

Section 3 of the Submission: Testing and Evaluating Persons Previously Certified

The third section of the request must contain information concerning the railroad's program for testing and evaluating previously certified conductors. As provided for in § 242.121, each railroad must have a program for the ongoing testing and evaluating of its conductors to assure that they have the necessary knowledge and skills concerning operating rules and practices, familiarity with physical characteristics of the territory, and relevant Federal safety rules. Similarly, each railroad must have a program for ongoing testing and evaluating to assure that its conductors have the necessary vision and hearing acuity as provided for in § 242.117.

Section 242.121 requires that a railroad rely on written procedures for determining that each person can demonstrate his or her knowledge of the railroad's rules and practices and skill at applying those rules and practices for the safe performance as a conductor. Section 242.121 directs that, when seeking a demonstration of the person's knowledge, a railroad must employ a written test that contains objective questions and answers and covers the following subject matters: (i) Safety and operating rules; (ii) timetable instructions; (iii) physical characteristics of the territory; and (iv) compliance with all applicable Federal regulations. The test must accurately measure the person's knowledge of all of these areas.

Section 242.121 provides a railroad latitude in selecting the design of its own testing policies (including the number of questions each test will contain, how each required subject matter will be covered, weighting (if any) to be given to particular subject matter responses, selection of passing scores, and the manner of presenting the test information). The railroad must describe in this section how it will use that latitude to assure that its conductors will demonstrate their knowledge concerning the safe discharge of their responsibilities so as to comply with the performance standard set forth in § 242.121.

Section 242.117 provides a railroad latitude to rely on the professional medical opinion of the railroad's medical examiner concerning the ability of a person with substandard acuity to safely perform as a conductor. The railroad must describe in this section how it will assure that its medical examiner has sufficient information concerning the railroad's operations to effectively form appropriate conclusions about the ability of a particular individual to safely perform as a conductor.

Section 4 of the Submission: Training, Testing, and Evaluating Persons Not Previously Certified

Unless a railroad has made an election not to accept responsibility for conducting the initial training of persons to be conductors, the fourth section of the request must contain information concerning the railroad's program for educating, testing, and evaluating persons not previously trained as conductors. As provided for in § 242.119(d), a railroad that is issuing an initial certification to a person to be a conductor must have a program for the training, testing, and evaluating of its conductors to assure that they acquire the necessary knowledge and skills concerning operating rules and practices, familiarity with physical characteristics of the territory, and relevant Federal safety rules.

Section 242.119 establishes a performance standard and gives a railroad latitude in selecting how it will meet that standard. A railroad must describe in this section how it will use that latitude to assure that its conductors will acquire sufficient knowledge and skill and demonstrate their knowledge and skills concerning the safe discharge of their responsibilities. This section must contain the same level of detail concerning initial training programs as that described for each of the components of the overall program contained in sections 2 through 4 of this Appendix. A railroad that plans to accept responsibility for the initial training of conductors may authorize another railroad or a non-railroad entity to perform the actual training effort. The authorizing railroad may submit a training program developed by that authorized trainer but the authorizing railroad remains responsible for assuring that such other training providers adhere to the training program submitted. Railroads that elect to rely on other entities, to conduct training away from the railroad's own territory, must indicate how the student will be provided with the required familiarization with the physical characteristics for its territory.

Section 5 of the Submission: Monitoring Operational Performance by Certified Conductors

The fifth section of the request must contain information concerning the railroad's program for monitoring the operation of its certified conductors. As provided for in § 242.123, each railroad must have a program for the ongoing monitoring of its conductors to assure that they perform in conformity with the railroad's operating rules and practices and relevant Federal safety rules.

Section 6 of the Submission: Procedures for Routine Administration of the Conductor Certification Program

The final section of the request must contain a summary of how the railroad's program and procedures will implement the various specific aspects of the regulatory provisions that relate to routine administration of its certification program for conductors. At a minimum this section needs to address the procedural aspects of the rule's provisions identified in the following paragraph.

Section 242.109 provides that each railroad must have procedures for review and comment on adverse prior safety conduct, but allows the railroad to devise its own system within generalized parameters. Sections 242.111, 242.115 and 242.403 require a railroad to have procedures for evaluating data concerning prior safety conduct as a motor vehicle operator and as railroad workers, yet leave selection of many details to the railroad. Sections 242.109, 242.201, and 242.401 place a duty on the railroad to make a series of determinations but allow the railroad to select what procedures it will employ to assure that all of the necessary determinations have been made in a timely fashion; who will be authorized to conclude that person will or will be not certified; and how it will communicate adverse decisions. Documentation of the factual basis the railroad relied on in making determinations under §§ 242.109, 242.117, 242.119 and 242.121 is required, but these sections permit the railroad to select the procedures it will employ to accomplish compliance with these provisions. Sections 242.125 and 242.127 permit reliance on certification/qualification determinations made by other entities and permit a railroad latitude in selecting the procedures it will employ to assure compliance with these provisions. Similarly, § 242.301 permits the use of railroad selected procedures to meet the requirements for certification of conductors performing service in joint operations territory. Sections 242.211 and 242.407 allow a railroad a certain degree of discretion in complying with the requirements for replacing lost certificates or the conduct of certification revocation proceedings.

This section of the request should outline in summary fashion the manner in which the railroad will implement its program so as to comply with the specific aspects of each of the rule's provisions described in the preceding paragraph.

FRA Review

The submissions made in conformity with this appendix will be deemed approved within 30 days after the required filing date or the actual filing date whichever is later. No formal approval document will be issued by FRA. FRA has taken the responsibility for notifying a railroad when it detects problems with the railroad's program. FRA retains the right to disapprove a program that has obtained approval due to the passage of time as provided for in section § 242.103.

Rather than establish rigid requirements for each element of the program, FRA has given railroads discretion to select the design of their individual programs within a specified context for each element. The rule, however, provides a good guide to the considerations that should be addressed in designing a program that will meet the performance standards of this rule.

In reviewing program submissions, FRA will focus on the degree to which a particular program deviates from the norms identified in its rule. To the degree that a particular program submission materially deviates from the norms set out in its rule, FRA's review and approval process will be focused on determining the validity of the reasoning relied on by a railroad for selecting its alternative approach and the degree to which the alternative approach is likely to be effective in producing conductors who have the knowledge and ability to safely perform as conductors.

Appendix C to Part 242—Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data

The purpose of this appendix is to outline the procedures available to individuals and railroads for complying with the requirements of §§ 242.109 and 242.111 of this part. Those provisions require that railroads consider the motor vehicle driving record of each person prior to issuing him or her certification or recertification as a conductor.

To fulfill that obligation, a railroad must review a certification candidate's recent motor vehicle driving record. Generally, that will be a single record on file with the state agency that issued the candidate's current license. However, it can include multiple records if the candidate has been issued a motor vehicle driving license by more than one state agency or foreign country.

Access to State Motor Vehicle Driving Record Data

The right of railroad workers, their employers, or prospective employers to have access to a state motor vehicle licensing agency's data concerning an individual's driving record is controlled by state law. Although many states have mechanisms through which employers and prospective employers such as railroads can obtain such data, there are some states in which privacy concerns make such access very difficult or impossible. Since individuals generally are entitled to obtain access to driving record data that will be relied on by a state motor vehicle licensing agency when that agency is taking action concerning their driving privileges, FRA places responsibility on individuals, who want to serve as conductors to request that their current state drivers

licensing agency or agencies furnish such data directly to the railroad considering certifying them as a conductor. Depending on the procedures adopted by a particular state agency, this will involve the candidate's either sending the state agency a brief letter requesting such action or executing a state agency form that accomplishes the same effect. It will normally involve payment of a nominal fee established by the state agency for such a records check. In rare instances, when a certification candidate has been issued multiple licenses, it may require more than a single request.

Once the railroad has obtained the motor vehicle driving record(s), the railroad must afford the prospective conductor an opportunity to review that record and respond in writing to its contents in accordance with the provisions of § 242.401. The review opportunity must occur before the railroad evaluates that record. The railroad's required evaluation and subsequent decision making must be done in compliance with the provisions of this part.

Appendix D to Part 242—Medical Standards Guidelines

(1) The purpose of this appendix is to provide greater guidance on the procedures that should be employed in administering the vision and hearing requirements of § 242.117.

(2) In determining whether a person has the visual acuity that meets or exceeds the requirements of this part, the following testing protocols are deemed acceptable testing methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry. The acceptable test methods are shown in the left hand column and the criteria that should be employed to determine whether a person has failed the particular testing protocol are shown in the right hand column.

Accepted tests	Failure criteria
Pseudoisochromatic Plate Tests	
American Optical Company 1965	5 or more errors on plates 1–15.
AOC—Hardy-Rand-Ritter plates—second edition	Any error on plates 1–6 (plates 1–4 are for demonstration—test plate 1 is actually plate 5 in book).
Dvorine—Second edition	3 or more errors on plates 1–15.
Ishihara (14 plate)	2 or more errors on plates 1–11.
Ishihara (16 plate)	2 or more errors on plates 1–8.
Ishihara (24 plate)	3 or more errors on plates 1–15.
Ishihara (38 plate)	4 or more errors on plates 1–21.
Richmond Plates 1983	5 or more errors on plates 1–15.
Multifunction Vision Tester	
Keystone Orthoscope	Any error.
OPTEC 2000	Any error.
Titmus Vision Tester	Any error.
Titmus II Vision Tester	Any error.

(3) In administering any of these protocols, the person conducting the examination should be aware that railroad signals do not always occur in the same sequence and that ''yellow signals'' do not always appear to be the same. It is not acceptable to use ''yarn'' or other materials to conduct a simple test to determine whether the certification candidate has the requisite vision. No person shall be allowed to wear chromatic lenses during an initial test of the person's color vision; the initial test is one conducted in accordance with one of the accepted tests in the chart and § 242.117(h)(3).

(4) An examinee who fails to meet the criteria in the chart, may be further evaluated as determined by the railroad's medical examiner. Ophthalmologic referral, field testing, or other practical color testing may be utilized depending on the experience of the examinee. The railroad's medical examiner will review all pertinent information and, under some circumstances, may restrict an examinee who does not meet the criteria for serving as a conductor at night, during adverse weather conditions or under other circumstances. The intent of § 242.117(j) is not to provide an examinee with the right to make an infinite number of requests for further evaluation, but to provide an examinee with at least one opportunity to prove that a hearing or vision test failure does not mean the examinee cannot safely perform as a conductor. Appropriate further medical evaluation could include providing another approved scientific screening test or a field test. All railroads should retain the discretion to limit the number of retests that an examinee can request but any cap placed on the number of retests should not limit retesting when changed circumstances would make such retesting appropriate. Changed circumstances would most likely occur if the examinee's medical condition has improved in some way or if technology has advanced to the extent that it arguably could compensate for a hearing or vision deficiency.

(5) Conductors who wear contact lenses should have good tolerance to the lenses and should be instructed to have a pair of corrective glasses available when on duty.

APPENDIX E TO PART 242—APPLICATION OF REVOCABLE EVENTS

Revocable Event		Application of Revocable Events						
		Periods of Revocation					Employees with Multiple Certifications	
		Main Track				Other than Main Track Where Restricted Speed or the Operational Equivalent Is in Effect	Main Track or Other than Main Track	
		1st Offense	2nd Offense Within 24 Months	3rd Offense Within 36 Months	4th Offense Within 36 Months	No Offense Within Previous 12 Months	Offense (as a Conductor)	Offense (as an Engineer)
1	Signal requiring complete stop before passing	30 Days	6 Months	1 Year	3 Years	Not Applicable	Employee May Not Work as an Engineer During the Period of Revocation	Employee May Not Work as a Conductor During the Period of Revocation
2	Restricted Speed & Speed; 10 mph over							
3	Required Air Brake Test							
4	Occupying Main Track without Authority							
5	Disabling a Safety Device							
6	Shoving Movements					Half Revocation Period	Employee May Work as an Engineer During the Period of Revocation	Not applicable
7	Equipment Fouling Adjacent Tracks							
8	Hand Operated Switches (Crossovers)							
9	Hand Operated Switches Connected to Main Track					Not Applicable		
10	Hand Operated Crossover Switches (before & after movement)					Half Revocation Period		
11	Hand Operated Derails							
12	Drug & Alcohol	Different periods of revocation may be applied (see 242.403 & 242.115)				Not Applicable	Employee May Not Work as an Engineer During the Period of Revocation	Employee May Not Work as a Conductor During the Period of Revocation

Issued in Washington, DC, on October 26, 2011.

Joseph C. Szabo,

Administrator.

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Part III

Department of Energy

10 CFR Parts 429 and 430

Energy Conservation Program: Test Procedures for Residential Clothes Washers; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 430

[Docket No. EERE–2010–BT–TP–0021]

RIN 1904–AC08r

Energy Conservation Program: Test Procedures for Residential Clothes Washers

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: In this supplemental notice of proposed rulemaking (SNOPR), the U.S. Department of Energy (DOE) proposes to revise its test procedure for residential clothes washers established under the Energy Policy and Conservation Act (EPCA). DOE proposes to amend the definition of the energy test cycle to provide further clarity to ensure that the test procedure is representative of consumer behavior and repeatable among different test laboratories. This proposal incorporates suggestions received from interested parties in response to the September 21, 2010 notice of proposed rulemaking (NOPR) and the August 9, 2011 SNOPR.

DATES: DOE will accept comments, data, and information regarding this SNOPR no later than December 9, 2011. See section V, ''Public Participation,'' for details.

ADDRESSES: Any comments submitted must identify the SNOPR for Test Procedures for residential clothes washers (energy test cycle), and provide docket number EERE–2011–BT–TP–0021 and/or regulatory information number (RIN) number 1904–AC08. Comments may be submitted using any of the following methods:

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

2. *Email: RES-CW-2010-TP-0021@ee.doe.gov.* Include the docket number and/or RIN in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. If possible, please submit all items on a CD. It is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Telephone: (202) 586–2945. If possible, please submit all items on a CD. It is not necessary to include printed copies.

For detailed instructions on submitting comments and additional information on the rulemaking process, see section V of this document (Public Participation).

Docket: The docket is available for review at *http://www.regulations.gov/#!docketDetail;D=EERE-2010-BT-TP-0021,* including **Federal Register** notices, framework documents, public meeting attendee lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the regulations.gov index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure. The regulations.gov web page contains instructions on how to access all documents, including public comments, in the docket. See section V for information on how to submit comments through regulations.gov.

For further information on how to submit a comment or review other public comments and the docket, contact Ms. Brenda Edwards at (202) 586–2945 or by email: *Brenda.Edwards@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Stephen L. Witkowski, 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) 586–7463. Email: *Stephen.Witkowski@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–7796. Email: *Elizabeth.Kohl@hq.doe.gov.*

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I. Authority and Background

The statutory authority and background for this SNOPR are the same as that published in: (1) DOE's notice of proposed rulemaking (NOPR) to amend the test procedure for residential clothes washers, published in September 2010 (75 FR 57556, Sept. 21, 2010) (September 2010 NOPR); and (2) DOE's recent SNOPR to address the incorporation of certain provisions of IEC 62301 (Second Edition) into the test procedure (76 FR 49238, Aug. 9, 2011) (August 2011 SNOPR). Please see the September 2010 NOPR and August 2011 SNOPR for further details.

II. Summary of the Supplemental Notice of Proposed Rulemaking

The revised clothes washer test procedure amendments DOE is proposing in today's SNOPR would update the definition of the energy test cycle. The proposed definition would apply to the revised test procedure to be published at appendix J2 at 10 CFR 430 subpart B. At the end of this SNOPR, DOE sets forth the proposed regulatory text from DOE's proposed test procedure amendments in the September 2010 NOPR, as amended by the August 2011 SNOPR and today's proposals.

Today's SNOPR covers only the energy test cycle definition. DOE will discuss all other aspects of the proposed test procedure revisions, and respond to comments received from interested parties on those aspects of the proposed revisions, in the final rule.

III. Discussion

A. Today's Proposed Revision for Part (B) of the Energy Test Cycle

Based on the discussion of comments in the following sections, DOE proposes in today's SNOPR to modify the definition of the energy test cycle as follows:

Energy test cycle for a basic model means:

(A) The cycle setting recommended by the manufacturer for washing cotton or linen clothes, and includes all wash/rinse temperature selections offered in that cycle setting, and

(B) if the cycle setting described in (A) does not include all wash/rinse temperature combinations available on the clothes

washer, the energy test cycle shall also include the alternate cycle setting(s) offering these wash/rinse temperature combination(s), tested at the wash/rinse temperature combinations not available on the cycle setting described in (A).

Where multiple alternate cycle settings offer a wash/rinse temperature combination that is not available on the cycle setting recommended by the manufacturer for washing cotton or linen clothes, the cycle setting certified by the manufacturer to have the highest energy consumption, as measured according to section 2.13, shall be included in the energy test cycle.

(C) All cycle settings included under part (A) and part (B) shall be tested using each appropriate load size as defined in section 2.8 and Table 5.1.

(D) For any cycle setting tested under (A) or (B), the manufacturer default settings shall be used, except for the temperature selection, if necessary. This includes wash conditions such as agitation/tumble operation, soil level, spin speed(s), wash times, rinse times, and all other wash parameters or optional features applicable to that cycle, including water heating time for water heating clothes washers. Each wash cycle included as part of the energy test cycle shall comprise the entire active washing mode and exclude any delay start or cycle finished modes.

DOE also proposes to add a new section 2.13 to the revised test procedure as follows:

2.13 Energy Consumption for the Purpose of Certifying the Cycle Setting(s) To Be Included in Part (B) of the Energy Test Cycle Definition

Where multiple alternate cycle settings offer a wash/rinse temperature combination not available on the cycle setting recommended by the manufacturer for washing cotton or linen clothes, the cycle setting with the highest energy consumption, as measured according to this section, shall be included in the energy test cycle.

To determine which cycle setting has the highest energy consumption, establish the testing conditions set forth in section 2 of this test procedure. Select the applicable cycle setting and temperature combination. Use the manufacturer default settings for agitation/tumble operation, soil level, spin speed(s), wash times, rinse times, and all other wash parameters or optional features applicable to that cycle, including water heating time for water heating clothes washers. Each wash cycle tested under this section shall comprise the entire active washing mode and exclude any delay start or cycle finished modes.

To identify the cycle setting with the highest energy consumption, use the clothes washer's maximum test load size, determined from Table 5.1. For clothes washers with a manual water fill control system, user-adjustable adaptive water fill control system, or adaptive water fill control system with alternate manual water fill control system, use the water fill selector setting resulting in the maximum water level available for each cycle setting.

Measure each cycle setting's electrical energy consumption (E_B) and hot water consumption (H_B). Calculate the total energy consumption for each cycle setting (E_{TB}), as follows:

$$E_{TB} = E_B + (H_B \times T \times K)$$

Where:

E_B is the electrical energy consumption, expressed in kilowatt-hours per cycle.

H_B is the hot water consumption, expressed in gallons per cycle.

T = temperature rise = 75 °F (41.7 °C)

K = Water specific heat in kilowatt-hours per gallon per degree F = 0.00240 (0.00114 kWh/L-°C)

The provisions proposed in today's rule would be set forth in appendix J2 and would become effective 30 days after the date of publication in the **Federal Register** of the final rule in this test procedure rulemaking. DOE would clarify in the published amended test procedures, however, that manufacturers would be required to use amended appendix J1 until the compliance date of any final rule establishing amended energy conservation standards that addresses standby and off mode power consumption for these products. 42 U.S.C. 6295(gg)(2)(C). At such time, manufacturers would begin using the test procedures in appendix J2. DOE notes that until use of appendix J2 is required, DOE's guidance on warm rinse and capacity measurement, available at *http://www1.eere.energy.gov/buildings/appliance_standards/residential/clothes_washers.html,* is still applicable.

B. Discussion of Energy Test Cycle Definition

The following sections summarize DOE's previous proposals regarding the energy test cycle definition as well as comments received from interested parties. Section III.B.1 provides background on the definition of the energy test cycle. Section III.B.2 summarizes DOE's proposal published in the September 2010 NOPR and the comments received from interested parties on the energy test cycle definition. Section III.B.3 summarizes DOE's proposal published in the August 2011 SNOPR and the comments received from interested parties on the energy test cycle definition. Section III.B.4 provides DOE's responses to all comments received from both the September 2010 NOPR and August 2011 SNOPR that resulted in the proposal stated in section III.A.

1. Background

The ''energy test cycle'' comprises all the wash/rinse temperature selections currently used in determining the modified energy factor (MEF) and water factor (WF) for a clothes washer, and proposed to be used for determining integrated modified energy factor (IMEF) and integrated water consumption factor (IWF). The energy test cycle is defined in section 1.7 of the current clothes washer test procedure as follows:

1.7 *Energy test cycle* for a basic model means (A) The cycle recommended by the manufacturer for washing cotton or linen clothes, and includes all wash/rinse temperature selections and water levels offered in that cycle, and (B) for each other wash/rinse temperature selection or water level available on that basic model, the portion(s) of other cycle(s) with that temperature selection or water level that, when tested pursuant to these test procedures, will contribute to an accurate representation of the energy consumption of the basic model as used by consumers. Any cycle under (A) or (B) shall include the agitation/tumble operation, spin speed(s), wash times, and rinse times applicable to that cycle, including water heating time for water heating clothes washers.

10 CFR Part 430, Subpart B, Appendix J1

The cycle setting recommended for washing cotton or linen clothes is commonly referred to as the ''Normal'' setting. DOE has observed that on clothes washers with electronic control panels, certain wash/rinse temperature combinations are commonly ''locked out'' of the Normal setting. In such cases, these wash/rinse temperatures can be accessed only by switching the control panel selection dial to one of the other settings (*e.g.* ''Whites'', ''Heavy Duty'', ''Casual'', ''Permanent Press'', *etc.*). DOE has observed that the extra-hot wash/cold rinse and/or warm wash/warm rinse temperature combinations are locked out of the Normal setting on some clothes washer models that offer such selections.

In cases where certain wash/rinse combinations are locked out of the Normal setting, manufacturers may test only the temperature selections available on the Normal setting, despite being able to access other wash/rinse temperature selections on other settings. Testing only the wash temperature selections available in the Normal setting may neglect part (B) of the energy test cycle definition, which requires manufacturers to switch out of the Normal setting to a different setting that allows the other temperature

combinations to be selected and tested, if such testing ''will contribute to an accurate representation of energy consumption as used by consumers.'' Because the temperature selections typically locked out of the Normal setting are those that use greater quantities of hot water and thus have higher water heating energy consumption, excluding them from the energy test cycle could increase a clothes washer's MEF, while not accurately representing the energy consumption of a particular machine as used by the consumer.

2. September 2010 NOPR Proposal and Comments Received

In the September 2010 NOPR, DOE noted that the specific language requiring manufacturers to test different temperature selections if such testing ''contribute[s] to an accurate representation of energy consumption as used by consumers'' has caused some confusion and differences in interpretation among manufacturers and independent test laboratories. DOE believes the energy test cycle definition must be clear, uniformly understood, and able to be interpreted consistently by manufacturers, competitors, and independent test laboratories without subjective judgment or reliance on proprietary data.

In the September 2010 NOPR, DOE proposed to amend part (B) of the energy test cycle definition to provide clarity in determining whether to test temperature selections that are available on the clothes washer but locked out of the Normal setting. Specifically, DOE proposed modifying part (B) as follows:

''* * * (B) if the cycle described in (A) Does not include all wash/rinse temperature settings available on the clothes washer and required for testing as described in this test procedure, the energy test cycle shall also include the portions of a cycle setting offering these wash/rinse temperature settings with agitation/tumble operation, spin speed(s), wash times, and rinse times that are largely comparable to those for the cycle recommended by the manufacturer for washing cotton or linen clothes. Any cycle under (A) or (B) shall include the default agitation/tumble operation, soil level, spin speed(s), wash times, and rinse times applicable to that cycle, including water heating time for water heating clothes washers.'' 75 FR 57556, 57575–76 (Sept. 21, 2010).

The Association of Home Appliance Manufacturers (AHAM) commented that DOE's proposal in the September 2010 NOPR to amend part (B) of the energy test cycle definition was vague, undefined, and included a significant amount of variability. AHAM noted that variability in a test procedure has substantial consequences for manufacturers, and that the test procedure must be clear and be uniformly understood to avoid significant variations in testing across laboratories or technicians. (AHAM, No. 14 at p. 15) [1]

Alliance Laundry Systems (ALS) commented that DOE's proposal is vague and the proposal would require applying consumer usage factors to all available settings other than the Normal setting. ALS believes that different certification test laboratories could not apply part (B) in any meaningful and consistent manner. Further, ALS believes the burden on manufacturers and test laboratories to try to utilize part (B) would be significant and likely unbearable. (ALS, No. 10 at p. 5)

Whirlpool Corporation (Whirlpool) commented that the term ''largely comparable'' in the proposed part (B) definition is not clear and is open to the same type of interpretation and confusion that currently exists, and strongly urged DOE to revise its proposed definition. (Whirlpool, No. 13 at p. 13)

BSH Home Appliances (BSH) commented that, while it generally agrees with the proposal to measure a complete warm wash/warm rinse cycle, the problems suggested by DOE that prompted the proposed revision of part (B) would return with the proposed wording of the energy test cycle definition. BSH stated that numerous portions of cycles without defined start and end points would need to be incorporated into energy data depending on the interpretation of the words ''largely comparable.'' According to BSH, assembling portions of cycles to test under part (B) would not represent a cycle setting that a consumer could ever select, and thus would not be representative of actual consumer usage. (BSH, No. 20 at p. 4; BSH, Public Meeting Transcript, No. 20 at pp. 188–189) BSH further stated that it opposes the proposed definition of the energy test cycle for the following reasons: (1) The proposed definition would lead to questions about which of the ''largely comparable'' cycle settings is the ''worst case'' (*e.g.,* the cycle setting with the highest energy consumption but not the highest water consumption, the cycle setting with the highest water consumption but not the highest energy consumption, *etcetera*); (2) the uncertainty in interpreting the phrase ''contributes to an accurate representation of the energy consumption'' would be replaced with similar uncertainty in interpreting the phrase ''largely comparable.'' Accordingly, BSH questioned what threshold criteria would be used to determine whether a setting is close enough to the Normal setting to be considered comparable. BSH believes that the proposed definition could lead to every cycle setting having to be measured, with ''largely comparable'' being interpreted differently by manufacturers, certification bodies, and verification bodies. (BSH, No. 13 at p. 5; BSH, Public Meeting Transcript. No. 20 at pp. 188, 190, 193)

GE Appliances & Lighting (GE) agreed with AHAM's comments and offered an alternative definition for the energy test cycle, as follows:

Energy test cycle for a basic model means (A) The cycle recommended by the manufacturer for washing cotton or linen clothes, and includes all wash/rinse temperature selections and water levels offered in that cycle; and (B) If the cycle described in (A) does not include all wash/rinse temperature selections available on the clothes washer, and these selections are required for testing as described in this test procedure, then the energy test cycle shall include the other cycles available on the clothes washer tested only at the wash/rinse temperature selections which are not available on the cycle described in (A). If a wash/rinse temperature selection not available in the cycle described in (A) is available on multiple other cycles provided on the clothes washer, then each cycle with that wash/rinse temperature selection must be tested and the cycle resulting in the most energy usage will be included in the energy test cycle.'' (GE, No. 15 at pp. 1–2)

GE expressed concern that the proposed definition supplied in the September 2010 NOPR may result in different interpretations of what should be included in the energy test cycle. Specifically, GE commented that the interpretation of what would be considered ''largely comparable to a cottons or linens cycle'' could be variable and affect the results of an energy test. GE stated that its proposed definition would clarify the definition and remove as much interpretation as possible. (GE, No. 15 at pp. 1–2)

Springboard Engineering (Springboard) interpreted the proposed definition in part (B) as requiring the warm wash/warm rinse temperature combination to be tested, but questioned whether the proposed definition provides enough direction such that different test laboratories would select similar cycle settings on the same clothes washer. Springboard noted, for example, that some clothes washers

[1] A notation in the form ''AHAM, No. 14 at p. 5'' identifies a written comment made by AHAM; recorded in document number 14 that is filed in the docket of the clothes washer test procedure rulemaking (Docket No. EERE–2010–BT–TP–0021); that appears on page 5 of document number 14.

have three or more warm wash/warm rinse settings to choose among, and different laboratories might use different criteria to select which setting to include in the energy test cycle. Springboard stated that it would choose the cycle setting similar in time and agitation to the Normal setting; however, Springboard noted that the possibility that one laboratory could select the ''Colors'' setting, for example, while another might select the ''Permanent Press'' setting, which could produce different measured performance. According to Springboard, different settings may not have the same wash and rinse temperatures or spin speeds, but such information would not be known without first testing each setting on the clothes washer and comparing the hot water usage. Springboard believes that these tests could increase the test burden. (Springboard, No. 11 at pp. 1–2) Springboard also noted that the different warm wash/warm rinse settings on a clothes washer may have different spin speeds, which will affect the remaining moisture content (RMC) and MEF calculation. *Id.* Furthermore, Springboard commented that some laboratories may interpret that a ''Sanitize'' setting with extra-hot wash would not have to be tested because it is not comparable to the Normal setting. Springboard questioned whether the intention of part (B) is to test the extra-hot wash temperature combination, even if it has to be selected with a different setting such as the ''Sanitize'' setting. (Springboard, No. 11 at p. 2)

The Northwest Energy Efficiency Alliance (NEEA) supports DOE's proposal to account for temperature options available outside the ''Normal'' setting. NEEA believes DOE clarified this provision in the proposed language change for part (B) of the energy test cycle. (NEEA, No. 12 at p. 14)

3. August 2011 SNOPR Proposal and Comments Received

In testing conducted since the September 2010 NOPR, DOE observed that some clothes washers retain in memory the most recent options selected for a cycle setting the next time that cycle is run. To ensure repeatability of test results, particularly for cycles under part (B) of the energy test cycle definition, DOE proposed in the August 2011 SNOPR to further clarify that the manufacturer default conditions for each cycle setting shall be used, except for the temperature selection, if necessary. For example, if the extra-hot temperature selection was only available on the ''Whites'' setting, the manufacturer would use the Whites setting to test that temperature option. If the default wash temperature for the Whites setting was warm or hot, however, the manufacturer would have to manually adjust the temperature to obtain the extra-hot wash temperature. For certification testing in this illustrative case, the manufacturer would use the default settings on the Whites setting for all options except the temperature selection, which would be manually adjusted to achieve the desired temperature.

In addition, DOE proposed in the August 2011 SNOPR to delete the phrase, ''and required for testing as described in this test procedure'' from part (B) as redundant and unnecessary.

In response to the revised proposal in the August 2011 SNOPR, AHAM stated that it opposes including the phrase, ''the manufacturer default settings for each cycle setting shall be used, except for the temperature selection'' in the energy test cycle definition. AHAM believes the proposed clarification is vague because it is open to interpretation by manufacturers. (AHAM, No. 24 at p. 5) AHAM further stated generally that the proposed clarification to the energy test cycle definition, as well as the existing part (B) of the definition, represent significant test burden with no corresponding benefit because the results are not representative of actual consumer use. (AHAM, No. 24 at p. 5)

ALS opposed the proposed clarification to part (B) of the energy test cycle definition, stating that the phrase ''largely comparable'' is vague and open to interpretation. (ALS, No. 22 at p. 2) ALS proposed eliminating part (B) of the energy test cycle definition entirely, due to the test burden associated with measuring energy use in every possible cycle option. ALS proposed implementing only part (A) of the energy test cycle definition, which is ''the cycle recommended by the manufacturer for washing cotton or linen clothes, and includes all the wash/rinse temperature selections and water levels offered in that cycle.'' (ALS, No. 22 at p. 2) ALS supports DOE's proposal to clarify that the manufacturer's default settings be utilized in the energy test cycle definition. (ALS, No. 22 at p. 2)

Whirlpool disagreed with part (B) of the energy test cycle definition as proposed in the August 2011 SNOPR. Whirlpool stated that part (B) would require including temperature/water level options not recommended by the manufacturer for washing cotton and linen clothing because they may lead to clothing damage such as shrinkage, dye transfer, puckering, or other outcomes unacceptable to the consumer. (Whirlpool, No. 27 at p. 2) Whirlpool stated that it possesses proprietary consumer data suggesting that steam and Sanitize cycle settings are used infrequently, warranting their exclusion from the energy test cycle definition. (Whirlpool, No. 27 at p. 2) Whirlpool proposes the following definition for the energy test cycle:

> ''*Energy test cycle* for a basic model means the cycle recommended by the manufacturer for washing cotton or linen clothes, and includes all wash/rinse temperature selections and water levels offered in that cycle. If a particular wash/rinse temperature selection or water level is available on the basic model, but is not available for selection in the cycle recommended by the manufacturer for washing cotton or linen clothes (*i.e.,* is locked out of the cycle), then that temperature selection and/or water level shall not be included in the energy test cycle.'' (Whirlpool, No. 27 at p. 2).

Whirlpool, ALS, and GE (hereafter referred to as the ''Joint Manufacturers'') submitted a joint comment on the August 2011 SNOPR. The Joint Manufacturers agree with AHAM that DOE's proposed amendment to part (B) in the August 2011 SNOPR is vague because it is open to a significant amount of interpretation by manufacturers. (Joint Manufacturers, No. 28 at p. 1) The Joint Manufacturers further agree with AHAM that the cycle setting recommended for washing cotton or linen clothes is the cycle setting that is most representative of consumer use, and if the consumer cannot select a temperature for that cycle setting, then it is not representative to arbitrarily select other settings that have that temperature option. The Joint Manufacturers stated that requiring arbitrary selection of temperatures adds ambiguity to the test procedure, which results in variability. The Joint Manufacturers urged DOE to eliminate part (B) from the proposed definition of the energy test cycle. *Id.*

The Joint Manufacturers further stated that if DOE nevertheless decides to retain part (B) of the energy test cycle definition, the following revised language should be used for part (B):

> ''* * * (B) if the cycle described in (A) does not include a water heating option and the clothes washer has a water heating temperature selection or cycle available, the cycle and temperature selection recommended by the manufacturer for sanitization, disinfection or similar must be included in the energy test cycle. In the case of multiple such cycles, the cycle using the most energy at the manufacturer default setting must be chosen. If the clothes washer has a water heating option and the manufacturer does not recommend a cycle for sanitization, disinfection, or similar, the energy test cycle shall include the water

heating cycle and temperature selection with the manufacturer's default cycle time. Again, in the case of multiple such cycles the cycle using the most energy at the manufacturer default setting must be chosen. Any cycle under (A) or (B) shall include the manufacturer's default agitation/tumble operation, soil level, spin speeds, wash times, and rinse times applicable to that cycle, including water heating time for water heating clothes washers.'' (Joint Manufacturers, No. 28 at pp. 1–2; Whirlpool, No. 27 at pp. 2–3).

NEEA agrees with DOE's proposed changes to the energy test cycle definition. However, NEEA believes that the point at which the test cycle starts and ends is not defined in the clothes washer test procedure. (NEEA, No. 26 at p. 4) NEEA questioned whether the beginning of the energy test cycle could be defined as the beginning of the delayed wash cycle, if any; and whether the end of the energy test cycle could be defined as the beginning of the ''inactive'' mode. (NEEA, No. 26 at p. 4) NEEA stated that defining the energy test cycle as starting with the activation of the ''delay start'' mode, if any (with the duration specified) and ending with the beginning of the inactive mode (with the duration of the ''cycle finished'' mode, if any, specified, either in minutes or number of cycles, or both), would simplify and clarify the test procedure. NEEA believes that while this could lengthen the energy test cycle itself, a greater amount of testing time could be saved by not having to set up and measure the ''delay start'' and ''cycle finished'' modes separately. (NEEA, No. 26 at p. 4).

4. DOE Response to All Comments

As outlined in the previous sections, the comments DOE received from interested parties collectively identify seven concerns related to its proposed energy test cycle definition:

(1) *Vague language.* The proposed definition is vague and would lead to significant variability in interpretation; particularly the phrase ''largely comparable.''

(2) *Elimination of part (B).* Including part (B) may not provide benefit to the public interest and should be eliminated entirely.

(3) *Representativeness.* The cycles required to be tested under the proposed part (B) are not representative of typical consumer usage patterns.

(4) *Test burden.* Third party laboratories could be required to test numerous alternate cycle settings to determine which cycles are largely comparable to the normal cycle, which could significantly increase test burden.

(5) *Manufacturer default settings.* The energy test cycle definition should clearly specify whether the manufacturer default settings should be used, and if so, should clarify which default settings to use.

(6) *Suggested alternative definitions.* Interested parties suggested several alternatives for defining the energy test cycle.

(7) *Definition of the start and end of each cycle.* The energy test cycle definition should clearly define what constitutes the start and end of each active wash cycle.

The following sections provide DOE's responses to each of these issues.

a. Vague Language

Interested parties generally commented that DOE's proposed change to part (B) of the energy test cycle definition would create just as much confusion as the current definition. Specifically, interested parties believe that the proposed definition does not provide clear enough guidance on how to determine whether a cycle setting is ''largely comparable'' to the Normal setting, which would lead to significant variability in interpretation and test results.

DOE intended the proposed definition to specify that the determination of whether to include a cycle setting under part (B) of the energy test cycle should be made by comparing the agitation/tumble operation, spin speeds, wash times, and rinse times to those of the Normal setting. DOE acknowledges, however, that the proposed definition does not clearly define the boundaries of term ''largely comparable,'' leaving this determination to the subjective judgment of the test laboratory.

As stated earlier, DOE believes the energy test cycle definition must be clear, uniformly understood, and able to be interpreted consistently by manufacturers, competitors, and independent test laboratories without subjective judgment or reliance on proprietary data. DOE notes that under the alternative definitions proposed by the Joint Manufacturers, the determination of which cycle settings to include under part (B) would be based on an objective numerical criterion readily determined by any test laboratory: The cycle setting using the most energy.

DOE recognizes that there are other possible numerical criteria for determining whether a cycle setting should be included in the energy test cycle under part (B) of the definition, including the cycle setting using the least energy, the cycle setting with energy consumption most similar to that of the Normal setting, or cycle settings above or below a certain energy consumption threshold.

DOE proposes, however, that including the cycle setting that uses the most energy would be the most appropriate, objective criterion for determining which cycle setting should be included under part (B) of the energy test cycle. This approach would ensure that clothes washers requiring testing under part (B) of the energy test cycle meet the applicable energy conservation standard when the maximum energy consumption representative of average consumer use is tested. This approach would also provide clarity by requiring only a single variable to be considered to make the determination. Therefore, DOE proposes in today's SNOPR that for each wash/rinse temperature combination not available under the Normal setting, the alternate cycle setting that uses the most energy must be chosen in the case where multiple alternate cycle settings offer that wash/rinse temperature combination.

DOE notes that this criterion requires a clear definition of which components of energy consumption should be included in the measurement of each cycle setting's energy consumption—*e.g.* electrical energy, hot water energy, energy required for moisture removal (*i.e.,* dryer energy), or a combination of these three energy components. DOE proposes that the machine electrical energy be included because this is a direct measure of a form of energy consumption by the clothes washer. DOE also proposes that the hot water energy be included for the following reasons: (1) Water temperature is the key characteristic that determines the need for testing under part (B) of the energy test cycle definition; (2) water temperature is often one of the primary parameters that consumers consider when selecting a wash/rinse cycle; (3) water heating energy represents a significant portion of a cycle's total energy consumption; (4) the test procedure already requires measuring hot water consumption for each tested cycle; and (5) a simple equation can be used to translate hot water quantity into hot water heating energy.

DOE does not propose to include the drying energy in the determination of which cycle settings should be tested under part (B) of the energy test cycle. DOE lacks information on whether an RMC value that would be measured in alternate cycle settings would be comparable or analogous to the current RMC metric from which drying energy is calculated. Currently, RMC is determined for a clothes washer based on the results of only the cold wash/cold rinse cycle and the warm wash/

warm rinse cycle (if available), at minimum and maximum spin speeds (if available), using the maximum load size. Depending on the clothes washer, this corresponds to between one and four dedicated RMC tests and could significantly increase the test burden if required to be performed for each alternate cycle setting. The weighted-average value obtained from these RMC tests is calculated and considered to be the average RMC value for the clothes washer, across all cycles. Requiring the measurement of RMC for the individual cycles comprising the energy test cycle would be inconsistent with this methodology. Determining the energy required for moisture removal would require weighing the test cloth before and after each cycle to determine its remaining moisture content, which would also impose additional test burden. DOE further believes that in many circumstances, consumers may not be aware of variations in spin speed if that information is not displayed on the front panel of the clothes washer.

For these reasons, DOE does not believe that the drying energy should be included in determining whether a cycle setting should be tested under part (B) of the energy test cycle. Therefore, DOE proposes in today's SNOPR to include the machine electrical energy consumption and hot water energy consumption when determining each cycle setting's total energy consumption, in the identification of the cycle setting that uses the most energy for each wash/rinse temperature combination to be tested under part (B) of the energy test cycle.

Further, DOE notes that in sections 4.1.3 and 4.1.6 of the current test procedure, machine electrical energy and hot water energy are calculated as the weighted averages of each tested load size. Requiring the testing of multiple load sizes for the purpose of determining which cycle setting to select for part (B) of the energy test cycle, however, would unduly increase the test burden. Therefore, DOE proposes in today's SNOPR to require testing only the clothes washer's maximum load size, determined from Table 5.1, for the purpose of comparing the energy consumption of the alternate cycle settings considered under part (B) of the energy test cycle. Using the maximum load size will produce the most consistent, repeatable, and conservative results.

In addition, DOE notes inconsistent usage of the word ''cycle'' in the energy test cycle definition. In some instances, the word ''cycle'' refers to the labeled program setting on the clothes washer (*e.g.* ''Normal'', ''Whites'', ''Colors'', *etc.*). In other instances, the word ''cycle'' refers to an individual wash/rinse cycle performed during active wash mode (*e.g.* a cold wash/cold rinse cycle). To help reduce this ambiguity, DOE proposes in today's SNOPR to modify the nomenclature by using the term ''cycle setting'' to indicate the labeled program setting on the clothes washer, and the term ''cycle'' to indicate an individual wash/rinse cycle.

b. Elimination of Part (B)

As described in previous sections, manufacturers and AHAM commented that DOE should eliminate part (B) of the energy test cycle definition, while NEEA supports keeping part (B) to account for temperature options available outside the Normal setting.

Wash/rinse temperature combinations locked out of the Normal setting should also be included in the energy test cycle, and doing so is representative of average consumer use according to the temperature use factors (TUFs) in the test procedure. DOE is unaware of any publicly available data indicating the frequency with which consumers select the Normal setting versus other cycle settings. However, DOE notes that the TUFs in the test procedure were developed to represent consumer selection of different temperature options available on a clothes washer. Each TUF represents the frequency with which consumers select a particular temperature option on machines offering that temperature option. The TUFs do not represent the frequency with which consumers select a particular temperature option among all clothes washers on the market. For example, if a particular clothes washer offers a warm rinse option, the warm rinse TUF indicates that the typical consumer using that clothes washer will select the warm rinse option for 27 percent of all wash loads. DOE believes that the energy test cycle proposed in section III.A, which requires use of part (B) of the definition if part (A) does not include all wash/rinse temperature combinations available on the machine, should include any temperature combination for which a TUF has been developed.

If part (B) of the energy test cycle were to be eliminated, only the temperature options available in the Normal setting would be required for testing. Under this scenario, if one clothes washer offered all available temperature options in the Normal setting, while a second clothes washer offered the same temperature options but with a subset of those temperatures locked out of the Normal setting, the locked out temperature options on the second clothes washer would not be factored into its energy efficiency rating. This would imply that consumer behavior would differ for these two clothes washers; *i.e.,* that consumers would select the locked out temperature combinations less frequently on the second machine. DOE is not aware of any data that quantifies how consumers may adjust their behavior based on the cycle setting for which a particular temperature option is available (*e.g.* ''Normal'', ''Whites'', ''Colors'', etc.) rather than on the desired temperature option itself.

In addition, if DOE eliminated part (B) from the energy test cycle definition, manufacturers could arbitrarily exclude temperatures from the Normal setting, thus excluding them from being tested under the DOE test procedure. In the most extreme case, a manufacturer could create a Normal setting that offers only cold water temperatures, and move all heated water cycles to alternate cycle settings on the machine. In this case, consumers would likely select the alternate cycle settings for a significant portion of wash cycles, yet only the cold cycle would be required for testing under the DOE test procedure.

In summary, DOE believes that if a temperature combination is ''locked out'' of the Normal cycle setting but exists on at least one alternate cycle setting, it should be included in the energy test cycle under the assumption that a consumer will switch to one of the alternate cycles to obtain that wash/rinse temperature combination. For the reasons stated above, DOE proposes in today's SNOPR to keep part (B) of the energy test cycle definition, and to require testing of all temperature combinations available on the machine, including any temperature options locked out of the Normal setting.

c. Representativeness

Manufacturers and AHAM expressed concern that the wash cycles, or portions of wash cycles, required to be tested under part (B) are not representative of consumer usage patterns. As described in the previous section, DOE does not have data to verify how consumers may adjust their behavior based on the particular cycle setting for which a temperature option is available, rather than the desired temperature option itself.

DOE acknowledges that the wording of part (B) in the current test procedure and DOE's proposals in the September 2010 NOPR and August 2011 SNOPR include language referring to ''portion(s) of other cycle(s) with that temperature selection or water level * * *'' that may be interpreted in different ways. DOE

does not believe that the energy test cycle should include portions of individual wash cycles. DOE concurs with BSH that assembling portions of cycles to test under part (B) (*i.e.* testing the wash portion of one cycle in combination with the rinse portion of another cycle) would not represent a cycle that a consumer could select, and thus would not be representative of actual consumer usage. As a result, the energy test cycle should include only complete wash/rinse cycles as programmed on the clothes washer. Accordingly, DOE proposes in today's SNOPR to remove the phrase ''portion(s) of other cycles'' from the definition of energy test cycle.

d. Test Burden

DOE acknowledges that the language it proposed in the September 2010 NOPR and August 2011 SNOPR for part (B) of the energy test cycle could significantly increase test burden if a laboratory is required to test numerous alternate cycle settings to determine which cycles are largely comparable to the normal cycle. Under today's proposal, manufacturers would test all wash/rinse temperature combinations not available under part (A) of the energy test cycle definition. Where multiple cycle settings offer these wash/rinse temperature combinations, DOE proposes a clear, objective way for manufacturers to determine of which cycle(s) to include in the energy test cycle. DOE proposes that for each of these wash/rinse temperature combinations, manufacturers include the cycle setting that uses the most energy in the energy test cycle. DOE further proposes to require manufacturers to certify to DOE the specific cycle settings comprising the energy test cycle for each basic model of its clothes washer. This list of cycle settings would be provided to DOE and any test laboratory used by the manufacturer or DOE, so that neither DOE nor the test laboratory would be required to independently determine which cycles should be included. DOE believes that this proposal would eliminate a major source of ambiguity and inconsistency of test results among various laboratories.

This proposal would require a manufacturer to provide to DOE as part of its certification the cycle settings that a manufacturer used to determine each clothes washer's energy efficiency rating. Under DOE's certification, compliance, and enforcement program in 10 CFR part 429, subpart C, DOE can conduct assessment or enforcement testing to determine whether the manufacturer's declared energy test cycles are those cycles for a particular wash/rinse temperature combination that use the most energy.

e. Manufacturer Default Settings

A typical clothes washer may allow the consumer to adjust certain parameters of a given cycle setting, such as wash/rinse temperature, water fill levels, soil level, agitation/tumble operation, spin speed, wash time, rinse time, and other optional features such as delay start, cycle-finished activity, steam injection, chemical dispensers, and signal sounds. For any active wash mode cycle included in the energy test cycle, the default manufacturer settings should be used for any parameter not explicitly specified by the test procedure because DOE is not aware of any data quantifying how often consumers select these optional features or deviate from the default manufacturer cycle settings. The test procedure specifies wash/rinse temperatures and water fill levels for all test cycles, and spin speeds for the RMC test cycles. DOE proposes in today's SNOPR to clarify in the definition of the energy test cycle that for any cycle setting tested under part (A) or (B), the manufacturer default parameters shall be used, except for the temperature selection, if necessary.

f. Suggested Alternative Definitions

Several manufacturers suggested alternate definitions for the energy test cycle, including specific suggestions for part (B), as described previously in sections III.B.2 and III.B.3. In response to the August 2011 SNOPR, the Joint Manufacturers proposed language for part (B) that would require testing the extra-hot cycle on water heating clothes washers. The proposal suggested that in the case of multiple such cycles, the cycle using the most energy at the manufacturer default setting must be chosen.

As described in the previous sections, DOE proposes that a cycle setting's energy consumption be used to determine whether that setting should be included under part (B). However, the definition proposed by the Joint Manufacturers would require testing only the extra-hot temperature setting under part (B). Under this proposal, if other wash/rinse temperature combinations such as warm wash/warm rinse or hot wash/cold rinse were also locked out of the Normal setting, they would not be required for testing. In contrast, GE's proposed definition for part (B), submitted in response to the September 2010 NOPR, as discussed previously, would require testing all wash/rinse temperature selections available on the machine and not included in the Normal setting.

DOE's proposed definition of energy test cycle would require testing of all wash/rinse temperature combinations available on the machine, not just the extra-hot temperature setting, to ensure that the definition is representative of average consumer use. As stated previously, DOE's proposed definition of energy test cycle would include any temperature combination for which a TUF has been developed. As stated above, if a ''locked out'' temperature combination exists on at least one alternate cycle setting, a setting with that temperature combination should be included in the energy test cycle because the TUFs indicate that a consumer will switch to one of the alternate settings to obtain that wash/rinse temperature combination.

Therefore, DOE proposes in today's SNOPR to use the criteria suggested by the Joint Manufacturers for determining which cycle setting to choose under part (B), and to use language suggested by GE to require testing all wash/rinse temperature combinations available on the machine not included in the Normal setting. DOE's revised proposal for part (B) of the energy test cycle definition is set forth in section III.A.

g. Definition of the Start and End of Each Cycle

As described previously, NEEA commented that the energy test cycle does not clearly define the start and end of each wash cycle tested under the energy test cycle. DOE has observed through its own testing that delay start and cycle finished features are typically available as optional features which are not activated by default. Thus, they would not be activated during the energy test cycle, and the start and finish of each wash cycle would be unambiguous. DOE acknowledges that as delay start and cycle finished features become more prevalent in the market, however, clothes washers could be manufactured that activate some of these features by default during any of the wash cycles comprising the energy test cycle. Therefore, DOE proposes to define the start and end of the energy test cycle more clearly.

In the August 2011 SNOPR, DOE proposed adding definitions for active washing mode, delay start mode, and cycle finished mode. DOE believes that these three definitions can be used to clarify the start and end of the energy test cycle. DOE proposes in today's SNOPR to specify that each cycle included as part of the energy test cycle comprises the entire active washing

mode, and excludes any delay start or cycle finished modes.

C. Compliance With Other EPCA Requirements

1. Test Burden

EPCA requires that any test procedures prescribed or amended under this section be reasonably designed to produce test results that measure energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use. Test procedures must also not be unduly burdensome to conduct.'' (42 U.S.C. 6293(b)(3))

DOE determined that the proposed test procedure amendments in the September 2010 NOPR and August 2011 SNOPR satisfy these EPCA requirements, as described in those rulemaking documents. The proposals in today's SNOPR also satisfy these requirements, as described in the following paragraphs.

Commenters stated that the proposed definition of energy test cycle in the September 2010 NOPR and August 2011 SNOPR would be vague and could significantly increase the testing burden. Today's proposal is intended to provide a clear, objective definition of energy test cycle and would require manufacturers to certify to DOE the list of cycle settings comprising the energy test cycle for each basic model of its clothes washers, so that testing laboratories would know which cycles to test. While the proposed definition of the energy test cycle would require testing additional wash cycles under part (B) to determine which cycle setting has the highest energy consumption, the manufacturer already possesses in-depth knowledge about the energy characteristics of each wash/rinse cycle offered on its clothes washers. Other test laboratories would not be required to conduct multiple tests to determine which cycle settings should be included under part (B) of the energy test cycle. Therefore, compared to the current test procedure, DOE expects that today's proposal could reduce the test burden, because it would remove the existing uncertainty as to which cycle settings should be selected.

2. Commercial Clothes Washers

The test procedure for commercial clothes washers is required to be the same test procedure established for residential clothes washers. (42 U.S.C. 6314(a)(8)) Thus, the test procedure set forth in appendix J1 of subpart B of 10 CFR part 430 is also currently used to test commercial clothes washers. (10 CFR part 431.154) The definition of the energy test cycle proposed in today's SNOPR could affect the measurement of active mode energy use. DOE notes that 42 U.S.C. 6293(e)(3) provides that models of covered products in use before the date on which an amended energy conservation standard (developed using the amended test procedure pursuant to 42 U.S.C. 6293(e)(2)) becomes effective that comply with the energy conservation standard applicable to such covered products on the day before such date are deemed to comply with the amended standard. The same is true of revisions of such models that come into use after such date and have the same energy efficiency, energy use or water use characteristics.

IV. Procedural Issues and Regulatory Review

The regulatory reviews conducted for this proposed rule are identical to those conducted for the August 2011 SNOPR. An update to the Regulatory Flexibility Act certification is set forth below. Please see the August 2011 SNOPR for further details.

Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IFRA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site: *http://www.gc.doe.gov.*

DOE reviewed today's supplemental proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE tentatively concluded that the September 2010 NOPR and August 2011 SNOPR would not have a significant impact on a substantial number of small entities, and today's SNOPR contains no revisions to that proposal that would result in a significant impact on a substantial number of small entities. The factual basis for this certification is as follows:

The Small Business Administration (SBA) considers a business entity to be small business, if, together with its affiliates, it employs less than a threshold number of workers specified in 13 CFR part 121. These size standards and codes are established by the North American Industry Classification System (NAICS). The threshold number for NAICS classification code 335224, which applies to household laundry equipment manufacturers and includes clothes washer manufacturers, is 1,000 employees. Searches of the SBA Web site [2] to identify clothes washer manufacturers within these NAICS codes identified, out of approximately 17 manufacturers supplying clothes washers in the United States, only one small business. This small business manufactures laundry appliances, including clothes washers. The other manufacturers supplying clothes washers are large, multinational corporations.

The proposed rule would amend DOE's test procedure by revising the definition of energy test cycle to more precisely define which cycles are required for testing under part (B) of the definition.

DOE believes these additional requirements would not be expected to impose a significant economic burden on entities subject to the applicable testing requirements. Today's proposal is intended to provide a clear, objective definition of energy test cycle, which is expected to reduce the testing burden. The provisions in today's SNOPR would also require manufacturers to report to DOE the cycle settings comprising the complete energy test cycle for each basic model. Manufacturers already possess in-depth knowledge about the energy characteristics of each wash/rinse cycle offered on their clothes washers, so DOE expects manufacturers to experience little or no additional test burden due to today's proposed revisions.

For these reasons, DOE certifies that if adopted, the September 2010 NOPR, as modified by the August 2011 SNOPR and today's SNOPR, would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE has previously transmitted the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b).

[2] A searchable database of certified small businesses is available online at: *http://dsbs.sba.gov/dsbs/search/dsp_dsbs.cfm.*

DOE seeks comment on the updated certification set forth above.

V. Public Participation

A. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this notice.

Submitting comments via regulations.gov. The *http://www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to regulations.gov information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through regulations.gov cannot be claimed as CBI. Comments received through the Web site will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through regulations.gov before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that regulations.gov provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or mail. Comments and documents submitted via email, hand delivery, or mail also will be posted to regulations.gov. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English, and are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. 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 via email, postal mail, or hand delivery two well-marked copies: One copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about 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) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure). Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects

10 CFR Part 429

Confidential business information, Energy conservation, Household appliances, Imports, Reporting and recordkeeping requirements.

10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on October 27, 2011.

Kathleen B. Hogan,

Deputy Assistant Secretary of Energy Efficiency, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE proposes to amend parts 429 and 430 of title 10 of the Code of Federal Regulations, as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

2. Section 429.20 is amended by revising paragraphs (a)(2)(i) introductory text, (a)(2)(ii) introductory text, and (b)(2) to read as follows:

§ 429.20 Residential clothes washers.

(a) * * *

(2) * * *

(i) Any represented value of the water factor, integrated water factor, the estimated annual operating cost, the energy or water consumption, or other measure of energy or water consumption of a basic model for which consumers would favor lower values shall be greater than or equal to the higher of:

* * * * *

(ii) Any represented value of the modified energy factor, integrated modified energy factor, or other measure of energy or water consumption of a basic model for which consumers would favor higher values shall be less than or equal to the lower of:

* * * * *

(b) * * *

(2) Pursuant to § 429.12(b)(13), a certification report shall include the following public product-specific information: The modified energy factor (MEF) in cubic feet per kilowatt hour per cycle (cu ft/kWh/cycle), and the capacity in cubic feet (cu ft). For standard-size residential clothes washers, a water factor (WF) in gallons per cycle per cubic feet (gal/cycle/cu ft). After the use of appendix J2 becomes mandatory, a list of all cycle settings comprising the complete energy test cycle for each basic model.

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

3. The authority citation for Part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

4. Section 430.3 is amended by:

a. Redesignating paragraphs (c) through (o) as paragraphs (d) through (p);

b. Adding new paragraph (c);

c. Revising newly designated paragraph (m)(2).

The additions read as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(c) *AATCC.* American Association of Textile Chemists and Colorists, P.O. Box 1215, Research Triangle Park, NC 27709, 919–549–8141, or go to *http://www.aatcc.org.*

(1) AATCC Test Method 79–2010, Absorbency of Textiles, Revised 2010, IBR approved for appendix J2 to subpart B.

(2) AATCC Test Method 118–2007, Oil Repellency: Hydrocarbon Resistance Test, Revised 2007, IBR approved for appendix J2 to Subpart B.

(3) AATCC Test Method 135–2010, Dimensional Changes of Fabrics after Home Laundering, Revised 2010, IBR approved for appendix J2 to subpart B.

* * * * *

(m) * * *

(2) IEC Standard 62301 (''IEC 62301''), *Household electrical appliances—Measurement of standby power,* Edition 2.0, 2011–01, IBR approved for appendix J2 to subpart B.

* * * * *

5. Section 430.23 is amended by revising paragraph (j) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(j) *Clothes washers.* (1) The estimated annual operating cost for automatic and semi-automatic clothes washers must be rounded off to the nearest dollar per year and is defined as follows:

(i) Before use of appendix J2 becomes mandatory,

(A) When electrically heated water is used,

$$(N_1 \times E_{TE1} \times C_{KWH})$$

Where,

N_1 = the representative average residential clothes washer use of 392 cycles per year according to appendix J1,

E_{TE1} = the total per-cycle energy consumption when electrically heated water is used, in kilowatt-hours per cycle, determined according to section 4.1.7 of appendix J1, and

C_{KWH} = the representative average unit cost, in dollars per kilowatt-hour, as provided by the Secretary.

(B) When gas-heated or oil-heated water is used,

$$N_1 \times ((ME_{T1} \times C_{KWH}) + (HE_{TG1} \times C_{BTU})))$$

Where,

N_1 and C_{KWH} are defined in paragraph (j)(1)(i)(A) of this section,

ME_{T1} = the total weighted per-cycle machine electrical energy consumption, in kilowatt-hours per cycle, determined according to section 4.1.6 of appendix J1,

HE_{TG1} = the total per-cycle hot water energy consumption using gas-heated or oil-heated water, in Btu per cycle, determined according to section 4.1.4 of appendix J1, and

C_{BTU} = the representative average unit cost, in dollars per Btu for oil or gas, as appropriate, as provided by the Secretary.

(ii) After use of appendix J2 becomes mandatory (see the note at the beginning of appendix J2),

(A) When electrically heated water is used,

$$(N_2 \times (E_{TE2} + E_{TSO}) \times C_{KWH})$$

Where,

N_2 = the representative average residential clothes washer use of 295 cycles per year according to appendix J2,

E_{TE2} = the total per-cycle energy consumption when electrically heated water is used, in kilowatt-hours per cycle, determined according to section 4.1.7 of appendix J2,

E_{TSO} = the per-cycle combined low-power mode energy consumption, in kilowatt-hours per cycle, determined according to section 4.4 of appendix J2, and

C_{KWH} is defined in paragraph (j)(1)(i)(A) of this section.

(B) When gas-heated or oil-heated water is used,

$$(N_2 \times ((ME_{T2} + E_{TSO}) \times C_{KWH}) + (HE_{TG2} \times C_{BTU}))$$

Where,

N_2 and E_{TSO} are defined in (j)(1)(ii)(A) of this section,

ME_{T2} = the total weighted per-cycle machine electrical energy consumption, in kilowatt-hours per cycle, determined according to section 4.1.6 of appendix J2,

C_{KWH} is defined in (j)(1)(i)(A) of this section,

HE_{TG2} = the total per-cycle hot water energy consumption using gas-heated or oil-heated water, in Btu per cycle, determined according to section 4.1.4 of appendix J2,

C_{BTU} is defined in (j)(1)(i)(B) of this section.

(2) (i) The modified energy factor for automatic and semi-automatic clothes washers is determined according to section 4.4 of appendix J1 before appendix J2 becomes mandatory and section 4.5 of appendix J2 when appendix J2 becomes mandatory. The result shall be rounded off to the nearest 0.01 cubic foot per kilowatt-hour per cycle.

(ii) The integrated modified energy factor for automatic and semi-automatic clothes washers is determined according to section 4.6 of appendix J2 when appendix J2 becomes mandatory. The result shall be rounded off to the nearest 0.01 cubic foot per kilowatt-hour per cycle.

(3) Other useful measures of energy consumption for automatic or semi-automatic clothes washers shall be those measures of energy consumption which the Secretary determines are likely to assist consumers in making purchasing decisions and which are derived from the application of appendix J1 before the date that appendix J2 becomes mandatory or appendix J2 upon the date that appendix J2 becomes mandatory. In addition, the annual water consumption of a clothes washer can be determined by the product of:

(i) Before appendix J2 becomes mandatory, the representative average-use of 392 cycles per year and the total weighted per-cycle water consumption in gallons per cycle determined according to section 4.2.2 of appendix

J1. The water consumption factor can be determined according to section 4.2.3 of appendix J1, with the result rounded off to the nearest 0.1 gallon per cycle per cubic foot. The remaining moisture content can be determined according to section 3.8 of appendix J1, with the result rounded off to the nearest 0.1 percent.

(ii) After appendix J2 becomes mandatory, the representative average-use of 295 cycles per year and the total weighted per-cycle water consumption for all wash cycles, in gallons per cycle, determined according to section 4.2.11 of appendix J2. The water consumption factor can be determined according to section 4.2.12 of appendix J2, with the result rounded off to the nearest 0.1 gallon per cycle per cubic foot. The integrated water consumption factor can be determined according to section 4.2.13 of appendix J2, with the result rounded off to the nearest 0.1 gallon per cycle per cubic foot. The remaining moisture content can be determined according to section 3.8 of appendix J2, with the result rounded off to the nearest 0.1 percent.

* * * * *

Appendix J to Subpart B of Part 430—[Removed]

6. Appendix J to subpart B of part 430 is removed.

Appendix J1 to Subpart B of Part 430—[Amended]

7. Appendix J1 to subpart B of part 430 is amended by:

a. Revising the introductory text after the appendix heading;

b. Revising section 1.22;

c. Removing sections 2.6.1.1 through 2.6.1.2.4;

d. Revising section 2.6.3.1;

e. Revising section 2.10;

f. Revising section 3.6;

g. Revising section 4.1.4;

h. Revising section 4.2; and

i. Revising section 5.

The revisions read as follows:

Appendix J1 to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Automatic and Semi-Automatic Clothes Washers

Appendix J1 is effective until the compliance date of any amended standards that address standby and off mode power consumption for residential clothes washers. After this date, all residential clothes washers shall be tested using the provisions of Appendix J2.

* * * * *

1.22 *Cold rinse* means the coldest rinse temperature available on the machine.

* * * * *

2.6.3.1 Perform 5 complete normal wash-rinse-spin cycles, the first two with current AHAM Standard detergent Formula 3 and the last three without detergent. Place the test cloth in a clothes washer set at the maximum water level. Wash the load for ten minutes in soft water (17 ppm hardness or less) using 27.0 grams + 4.0 grams per lb of cloth load of AHAM Standard detergent Formula 3. The wash temperature is to be controlled to 135 °F ± 5 °F (57.2 °C ± 2.8 °C) and the rinse temperature is to be controlled to 60 °F ± 5 °F (15.6 °C ± 2.8 °C). Repeat the cycle with detergent and then repeat the cycle three additional times without detergent, bone drying the load between cycles (total of five wash and rinse cycles).

* * * * *

2.10 *Wash time setting.* If one wash time is prescribed in the energy test cycle, that shall be the wash time setting; otherwise, the wash time setting shall be the higher of either the minimum or 70 percent of the maximum wash time available in the energy test cycle, regardless of the labeling of suggested dial locations. If the clothes washer is equipped with an electromechanical dial controlling wash time, reset the dial to the minimum wash time and then turn it in the direction of increasing wash time to reach the appropriate setting. If the appropriate setting is passed, return the dial to the minimum wash time and then turn in the direction of increasing wash time until the setting is reached.

* * * * *

3.6 *''Cold Wash'' (Minimum Wash Temperature Selection).* Water and electrical energy consumption shall be measured for each water fill level or test load size as specified in sections 3.6.1 through 3.6.3 of this appendix for the coldest wash temperature selection available. For a clothes washer that offers two or more wash temperature settings labeled as cold, such as ''Cold'' and ''Tap Cold'', the setting with the minimum wash temperature shall be considered the cold wash. If any of the other cold wash temperature settings add hot water to raise the wash temperature above the cold water supply temperature, as defined in section 2.3 of this appendix, those setting(s) shall be considered warm wash setting(s), as defined in section 1.18 of this appendix. If none of the cold wash temperature settings add hot water for any of the water fill levels or test load sizes required for the energy test cycle, the wash temperature setting labeled as ''Cold'' shall be considered the cold wash, and the other wash temperature setting(s) labeled as cold shall not be required for testing.

* * * * *

4. Calculation of Derived Results From Test Measurements.

* * * * *

4.1.4 *Total per-cycle hot water energy consumption using gas-heated or oil-heated water.* Calculate for the energy test cycle the per-cycle hot water consumption, HE_{TG}, using gas-heated or oil-heated water, expressed in Btu per cycle (or megajoules per cycle) and defined as:

$HE_{TG} = HE_T \times 1/e \times 3412$ Btu/kWh or $HE_{TG} = HE_T \times 1/e \times 3.6$ MJ/kWh

Where:

e = Nominal gas or oil water heater efficiency = 0.75.

HE_T = As defined in 4.1.3.

* * * * *

4.2 *Water consumption of clothes washers.*

* * * * *

5. Test Loads

TABLE 5.1—TEST LOAD SIZES

Container volume		Minimum load		Maximum load		Average load	
cu. ft. ≥ <	liter ≥ <	lb	kg	lb	kg	lb	kg
0–0.80	0–22.7	3.00	1.36	3.00	1.36	3.00	1.36
0.80–0.90	22.7–25.5	3.00	1.36	3.50	1.59	3.25	1.47
0.90–1.00	25.5–28.3	3.00	1.36	3.90	1.77	3.45	1.56
1.00–1.10	28.3–31.1	3.00	1.36	4.30	1.95	3.65	1.66
1.10–1.20	31.1–34.0	3.00	1.36	4.70	2.13	3.85	1.75
1.20–1.30	34.0–36.8	3.00	1.36	5.10	2.31	4.05	1.84
1.30–1.40	36.8–39.6	3.00	1.36	5.50	2.49	4.25	1.93
1.40–1.50	39.6–42.5	3.00	1.36	5.90	2.68	4.45	2.02
1.50–1.60	42.5–45.3	3.00	1.36	6.40	2.90	4.70	2.13
1.60–1.70	45.3–48.1	3.00	1.36	6.80	3.08	4.90	2.22
1.70–1.80	48.1–51.0	3.00	1.36	7.20	3.27	5.10	2.31
1.80–1.90	51.0–53.8	3.00	1.36	7.60	3.45	5.30	2.40
1.90–2.00	53.8–56.6	3.00	1.36	8.00	3.63	5.50	2.49
2.00–2.10	56.6–59.5	3.00	1.36	8.40	3.81	5.70	2.59

TABLE 5.1—TEST LOAD SIZES—Continued

Container volume		Minimum load		Maximum load		Average load	
cu. ft. ≥ <	liter ≥ <	lb	kg	lb	kg	lb	kg
2.10–2.20	59.5–62.3	3.00	1.36	8.80	3.99	5.90	2.68
2.20–2.30	62.3–65.1	3.00	1.36	9.20	4.17	6.10	2.77
2.30–2.40	65.1–68.0	3.00	1.36	9.60	4.35	6.30	2.86
2.40–2.50	68.0–70.8	3.00	1.36	10.00	4.54	6.50	2.95
2.50–2.60	70.8–73.6	3.00	1.36	10.50	4.76	6.75	3.06
2.60–2.70	73.6–76.5	3.00	1.36	10.90	4.94	6.95	3.15
2.70–2.80	76.5–79.3	3.00	1.36	11.30	5.13	7.15	3.24
2.80–2.90	79.3–82.1	3.00	1.36	11.70	5.31	7.35	3.33
2.90–3.00	82.1–85.0	3.00	1.36	12.10	5.49	7.55	3.42
3.00–3.10	85.0–87.8	3.00	1.36	12.50	5.67	7.75	3.52
3.10–3.20	87.8–90.6	3.00	1.36	12.90	5.85	7.95	3.61
3.20–3.30	90.6–93.4	3.00	1.36	13.30	6.03	8.15	3.70
3.30–3.40	93.4–96.3	3.00	1.36	13.70	6.21	8.35	3.79
3.40–3.50	96.3–99.1	3.00	1.36	14.10	6.40	8.55	3.88
3.50–3.60	99.1–101.9	3.00	1.36	14.60	6.62	8.80	3.99
3.60–3.70	101.9–104.8	3.00	1.36	15.00	6.80	9.00	4.08
3.70–3.80	104.8–107.6	3.00	1.36	15.40	6.99	9.20	4.17
3.80–3.90	107.6–110.4	3.00	1.36	15.80	7.16	9.40	4.26
3.90–4.00	110.4–113.3	3.00	1.36	16.20	7.34	9.60	4.35
4.00–4.10	113.3–116.1	3.00	1.36	16.60	7.53	9.80	4.45
4.10–4.20	116.1–118.9	3.00	1.36	17.00	7.72	10.00	4.54
4.20–4.30	118.9–121.8	3.00	1.36	17.40	7.90	10.20	4.63
4.30–4.40	121.8–124.6	3.00	1.36	17.80	8.09	10.40	4.72
4.40–4.50	124.6–127.4	3.00	1.36	18.20	8.27	10.60	4.82
4.50–4.60	127.4–130.3	3.00	1.36	18.70	8.46	10.85	4.91
4.60–4.70	130.3–133.1	3.00	1.36	19.10	8.65	11.05	5.00
4.70–4.80	133.1–135.9	3.00	1.36	19.50	8.83	11.25	5.10
4.80–4.90	135.9–138.8	3.00	1.36	19.90	9.02	11.45	5.19
4.90–5.00	138.8–141.6	3.00	1.36	20.30	9.20	11.65	5.28
5.00–5.10	141.6–144.4	3.00	1.36	20.70	9.39	11.85	5.38
5.10–5.20	144.4–147.2	3.00	1.36	21.10	9.58	12.05	5.47
5.20–5.30	147.2–150.1	3.00	1.36	21.50	9.76	12.25	5.56
5.30–5.40	150.1–152.9	3.00	1.36	21.90	9.95	12.45	5.65
5.40–5.50	152.9–155.7	3.00	1.36	22.30	10.13	12.65	5.75
5.50–5.60	155.7–158.6	3.00	1.36	22.80	10.32	12.90	5.84
5.60–5.70	158.6–161.4	3.00	1.36	23.20	10.51	13.10	5.93
5.70–5.80	161.4–164.2	3.00	1.36	23.60	10.69	13.30	6.03
5.80–5.90	164.2–167.1	3.00	1.36	24.00	10.88	13.50	6.12
5.90–6.00	167.1–169.9	3.00	1.36	24.40	11.06	13.70	6.21

Notes: (1) All test load weights are bone dry weights. (2) Allowable tolerance on the test load weights are ± 0.10 lbs (0.05 kg).

* * * * *

6. Add a new appendix J2 to subpart B of part 430 to read as follows:

Appendix J2 to Subpart B of Part 430–Uniform Test Method for Measuring the Energy Consumption of Automatic and Semi-Automatic Clothes Washers

Appendix J1 is effective until the compliance date of any amended standards for residential clothes washers. After this date, all residential clothes washers shall be tested using the provisions of Appendix J2.

1. Definitions and Symbols

1.1 *Active mode* means a mode in which the clothes washer is connected to a main power source, has been activated, and is performing one or more of the main functions of washing, soaking, tumbling, agitating, rinsing, and/or removing water from the clothing, or is involved in functions necessary for these main functions, such as admitting water into the washer or pumping water out of the washer. Active mode also includes delay start, cycle finished, and self-clean modes.

1.2 *Active washing mode* means a mode in which the clothes washer is performing any of the operations included in a complete cycle intended for washing a clothing load, including the main functions of washing, soaking, tumbling, agitating, rinsing, and/or removing water from the clothing.

1.3 *Adaptive control system* means a clothes washer control system, other than an adaptive water fill control system, which is capable of automatically adjusting washer operation or washing conditions based on characteristics of the clothes load placed in the clothes container, without allowing or requiring consumer intervention or actions. The automatic adjustments may, for example, include automatic selection, modification, or control of any of the following: Wash water temperature, agitation or tumble cycle time, number of rinse cycles, and spin speed. The characteristics of the clothes load, which could trigger such adjustments, could, for example, consist of or be indicated by the presence of either soil, soap, suds, or any other additive laundering substitute or complementary product.

Note: Appendix J2 does not provide a means for determining the energy consumption of a clothes washer with an adaptive control system. A waiver must be obtained pursuant to 10 CFR 430.27 to establish an acceptable test procedure for each such clothes washer.

1.4 *Adaptive water fill control system* means a clothes washer water fill control system which is capable of automatically adjusting the water fill level based on the size or weight of the clothes load placed in the clothes container, without allowing or requiring consumer intervention or actions.

1.5 *Bone-dry* means a condition of a load of test cloth which has been dried in a dryer at maximum temperature for a minimum of 10 minutes, removed and weighed before cool down, and then dried again for 10 minute periods until the final weight change of the load is 1 percent or less.

1.6 *Clothes container* means the compartment within the clothes washer that

holds the clothes during the operation of the machine.

1.7 *Cold rinse* means the coldest rinse temperature available on the machine.

1.8 *Combined low-power mode* means the aggregate of available modes other than active washing mode and self-clean mode, including inactive mode, off mode, delay start mode, and cycle finished mode.

1.9 *Compact* means a clothes washer which has a clothes container capacity of less than 1.6 ft^3 (45 L).

1.10 *Cycle finished mode* means an active mode which provides continuous status display following operation in active washing mode.

1.11 *Deep rinse cycle* means a rinse cycle in which the clothes container is filled with water to a selected level and the clothes load is rinsed by agitating it or tumbling it through the water.

1.12 *Delay start mode* means an active mode in which activation of active washing mode is facilitated by a timer.

1.13 *Energy test cycle* for a basic model means:

(A) The cycle setting recommended by the manufacturer for washing cotton or linen clothes, and includes all wash/rinse temperature selections offered in that cycle setting, and

(B) If the cycle setting described in (A) does not include all wash/rinse temperature combinations available on the clothes washer, the energy test cycle shall also include the alternate cycle setting(s) offering these wash/rinse temperature combination(s), tested at the wash/rinse temperature combinations not available on the cycle setting described in (A).

Where multiple alternate cycle settings offer a wash/rinse temperature combination not available on the cycle setting recommended by the manufacturer for washing cotton or linen clothes, the cycle setting certified by the manufacturer to have the highest energy consumption, as measured according to section 2.13, shall be included in the energy test cycle.

(C) All cycle settings included under part (A) and part (B) shall be tested using each appropriate load size as defined in section 2.8 and Table 5.1.

(D) For any cycle setting tested under (A) or (B), the manufacturer default settings shall be used, except for the temperature selection, if necessary. This includes wash conditions such as agitation/tumble operation, soil level, spin speed(s), wash times, rinse times, and all other wash parameters or optional features applicable to that cycle, including water heating time for water heating clothes washers. Each wash cycle included as part of the energy test cycle shall comprise the entire active washing mode and exclude any delay start or cycle finished modes.

1.14 *IEC 62301* means the test standard published by the International Electrotechnical Commission, entitled ''Household electrical appliances—Measurement of standby power,'' Publication 62301, Edition 2.0 2011–01 (incorporated by reference; see § 430.3).

1.15 *Inactive mode* means a standby mode that facilitates the activation of active mode by remote switch (including remote control), internal sensor, or timer, or that provides continuous status display.

1.16 *Integrated modified energy factor* means the quotient of the cubic foot (or liter) capacity of the clothes container divided by the total clothes washer energy consumption per cycle, with such energy consumption expressed as the sum of:

(a) The machine electrical energy consumption;

(b) The hot water energy consumption;

(c) The energy required for removal of the remaining moisture in the wash load;

(d) The combined low-power mode energy consumption; and

(e) The self-clean energy consumption, as applicable.

1.17 *Integrated water consumption factor* means the quotient of the total clothes washer water consumption per cycle in gallons, with such water consumption expressed as the sum of the total weighted per-cycle water consumption and the per-cycle self-clean water consumption, divided by the cubic foot (or liter) capacity of the clothes washer.

1.18 *Load use factor* means the percentage of the total number of wash loads that a user would wash a particular size (weight) load.

1.19 *Manual control system* means a clothes washer control system which requires that the consumer make the choices that determine washer operation or washing conditions, such as, for example, wash/rinse temperature selections, and wash time before starting the cycle.

1.20 *Manual water fill control system* means a clothes washer water fill control system which requires the consumer to determine or select the water fill level.

1.21 *Modified energy factor* means the quotient of the cubic foot (or liter) capacity of the clothes container divided by the total clothes washer energy consumption per cycle, with such energy consumption expressed as the sum of the machine electrical energy consumption, the hot water energy consumption, and the energy required for removal of the remaining moisture in the wash load.

1.22 *Non-water-heating clothes washer* means a clothes washer which does not have an internal water heating device to generate hot water.

1.23 *Off mode* means a mode in which the clothes washer is connected to a mains power source and is not providing any active or standby mode function, and where the mode may persist for an indefinite time. An indicator that only shows the user that the product is in the off position is included within the classification of an off mode.

1.24 *Self-clean mode* means an active clothes washer operating mode that is:

(a) Dedicated to cleaning, deodorizing, or sanitizing the clothes washer by eliminating sources of odor, bacteria, mold, and mildew;

(b) Recommended to be run intermittently by the manufacturer; and

(c) Separate from clothes washing cycles.

1.25 *Spray rinse cycle* means a rinse cycle in which water is sprayed onto the clothes for a period of time without maintaining any specific water level in the clothes container.

1.26 *Standard* means a clothes washer which has a clothes container capacity of 1.6 ft^3 (45 L) or greater.

1.27 *Standby mode* means any modes in which the clothes washer is connected to a mains power source and offers one or more of the following user oriented or protective functions that may persist for an indefinite time:

(a) To facilitate the activation of other modes (including activation or deactivation of active mode) by remote switch (including remote control), internal sensor, or timer;

(b) Continuous functions, including information or status displays (including clocks) or sensor-based functions. A timer is a continuous clock function (which may or may not be associated with a display) that provides regular scheduled tasks (*e.g.,* switching) and that operates on a continuous basis.

1.28 *Steam cycle* means a wash cycle in which steam is injected into the clothes container.

1.29 *Symbol usage.* The following identity relationships are provided to help clarify the symbology used throughout this procedure.

B—Part B of the Energy Test Cycle
C—Capacity
C (with subscripts)—Cold Water Consumption
D—Energy Consumption for Removal of Moisture from Test Load
E—Electrical Energy Consumption
F—Load Usage Factor
H—Hot Water Consumption
HE—Hot Water Energy Consumption
ME—Machine Electrical Energy Consumption
P—Power
Q—Water Consumption
RMC—Remaining Moisture Content
S—Annual Hours
TUF—Temperature Use Factor
V—Temperature-Weighted Hot Water Consumption
W—Mass of Water
WC—Weight of Test Load After Extraction
WI—Initial Weight of Dry Test Load

Subscripts:

a or avg—Average Test Load
c—Cold Wash (minimum wash temp.)
corr—Corrected (RMC values)
h—Hot Wash (maximum wash temp. ≤ 135 °F (57.2 °C))
ia—Inactive Mode
LP—Combined Low-Power Mode
m—Extra Hot Wash (maximum wash temp. > 135 °F (57.2 °C))
n—Minimum Test Load
o—Off Mode
oi—Combined Off and Inactive Modes
T—Total
w—Warm Wash
ww—Warm Wash/Warm Rinse
x—Maximum Test Load

The following examples are provided to show how the above symbols can be used to define variables:

Em_x = ''Electrical Energy Consumption'' for an ''Extra Hot Wash'' and ''Maximum Test Load''

R_a = ''Hot Water Consumed by Warm Rinse'' for the ''Average Test Load''

TUF_m = ''Temperature Use Factor'' for an ''Extra Hot Wash''
HE_{min} = ''Hot Water Energy Consumption'' for the ''Minimum Test Load''
Q_{sc} = ''Total Water Consumption'' for ''Self Clean''
P_{ia} = ''Power'' in ''Inactive Mode''
S_o = ''Annual Hours'' in ''Off Mode''

1.30 *Temperature use factor* means, for a particular wash/rinse temperature setting, the percentage of the total number of wash loads that an average user would wash with that setting.

1.31 *Thermostatically controlled water valves* means clothes washer controls that have the ability to sense and adjust the hot and cold supply water.

1.32 *Uniformly distributed warm wash temperature selection(s)* means (A) Multiple warm wash selections for which the warm wash water temperatures have a linear relationship with all discrete warm wash selections when the water temperatures are plotted against equally spaced consecutive warm wash selections between the hottest warm wash and the coldest warm wash. If the warm wash has infinite selections, the warm wash water temperature has a linear relationship with the distance on the selection device (*e.g.,* dial angle or slide movement) between the hottest warm wash and the coldest warm wash. The criteria for a linear relationship as specified above is that the difference between the actual water temperature at any warm wash selection and the point where that temperature is depicted on the temperature/selection line formed by connecting the warmest and the coldest warm selections is less than ±5 percent. In all cases, the mean water temperature of the warmest and the coldest warm selections must coincide with the mean of the ''hot wash'' (maximum wash temperature ≤135 °F (57.2 °C)) and ''cold wash'' (minimum wash temperature) water temperatures within ±3.8 °F (±2.1 °C); or (B) on a clothes washer with only one warm wash temperature selection, a warm wash temperature selection with a water temperature that coincides with the mean of the ''hot wash'' (maximum wash temperature ≤135 °F (57.2 °C)) and ''cold wash'' (minimum wash temperature) water temperatures within ± 3.8 °F (±2.1 °C).

1.33 *Warm rinse* means the hottest rinse temperature available on the machine.

1.34 *Warm wash* means all wash temperature selections that are below the maximum wash temperature ≤135 °F (57.2 °C) and above the minimum wash temperature.

1.35 *Water consumption factor* means the quotient of the total weighted per-cycle water consumption divided by the cubic foot (or liter) capacity of the clothes washer.

1.36 *Water-heating clothes washer* means a clothes washer where some or all of the hot water for clothes washing is generated by a water heating device internal to the clothes washer.

2. Testing Conditions

2.1 *Installation.* Install the clothes washer in accordance with manufacturer's instructions. For combined low-power mode testing, the product shall be installed in accordance with Section 5, Paragraph 5.2 of IEC 62301 (incorporated by reference; see § 430.3), disregarding the provisions regarding batteries and the determination, classification, and testing of relevant modes.

2.2 *Electrical energy supply.*

2.2.1 *Supply voltage and frequency.* Maintain the electrical supply at the clothes washer terminal block within 2 percent of 120, 120/240, or 120/208Y volts as applicable to the particular terminal block wiring system and within 2 percent of the nameplate frequency as specified by the manufacturer. If the clothes washer has a dual voltage conversion capability, conduct test at the highest voltage specified by the manufacturer.

2.2.2 *Supply voltage waveform.* For the combined low-power mode testing, maintain the electrical supply voltage waveform indicated in Section 4, Paragraph 4.3.2 of IEC 62301. If the power measuring instrument used for testing is unable to measure and record the total harmonic content during the test measurement period, it is acceptable to measure and record the total harmonic content immediately before and after the test measurement period.

2.3 *Supply Water.*

2.3.1 *Clothes washers in which electrical energy consumption or water energy consumption are affected by the inlet water temperature. (For example, water heating clothes washers or clothes washers with thermostatically controlled water valves.)* The temperature of the hot water supply at the water inlets shall not exceed 135 °F (57.2 °C) and the cold water supply at the water inlets shall not exceed 60 °F (15.6 °C). A water meter shall be installed in both the hot and cold water lines to measure water consumption.

2.3.2 *Clothes washers in which electrical energy consumption and water energy consumption are not affected by the inlet water temperature.* The temperature of the hot water supply shall be maintained at 135 °F ± 5 °F (57.2 °C ± 2.8 °C) and the cold water supply shall be maintained at 60 °F ± 5 °F (15.6 °C ± 2.8 °C). A water meter shall be installed in both the hot and cold water lines to measure water consumption.

2.4 *Water pressure.* The static water pressure at the hot and cold water inlet connection of the clothes washer shall be maintained at 35 pounds per square inch gauge (psig) ± 2.5 psig (241.3 kPa ± 17.2 kPa) when the water is flowing. The static water pressure for a single water inlet connection shall be maintained at 35 psig ± 2.5 psig (241.3 kPa ± 17.2 kPa) when the water is flowing. A water pressure gauge shall be installed in both the hot and cold water lines to measure water pressure.

2.5 *Instrumentation.* Perform all test measurements using the following instruments as appropriate:

2.5.1 *Weighing scales.*

2.5.1.1 *Weighing scale for test cloth.* The scale shall have a resolution of no larger than 0.2 oz (5.7 g) and a maximum error no greater than 0.3 percent of the measured value.

2.5.1.2 *Weighing scale for clothes container capacity measurement.* The scale should have a resolution no larger than 0.50 lbs (0.23 kg) and a maximum error no greater than 0.5 percent of the measured value.

2.5.2 *Watt-hour meter.* The watt-hour meter shall have a resolution no larger than 1 Wh (3.6 kJ) and a maximum error no greater than 2 percent of the measured value for any demand greater than 50 Wh (180.0 kJ).

2.5.3 *Watt meter.* The watt meter used to measure combined low-power mode power consumption shall comply with the requirements specified in Section 4, Paragraph 4.4 of IEC 62301. If the power measuring instrument used for testing is unable to measure and record the crest factor, power factor, or maximum current ratio during the test measurement period, it is acceptable to measure and record the crest factor, power factor, and maximum current ratio immediately before and after the test measurement period.

2.5.4 *Temperature measuring device.* The device shall have an error no greater than ± 1 °F (± 0.6 °C) over the range being measured.

2.5.5 *Water meter.* The water meter shall have a resolution no larger than 0.1 gallons (0.4 liters) and a maximum error no greater than 2 percent for the water flow rates being measured.

2.5.6 *Water pressure gauge.* The water pressure gauge shall have a resolution of 1 pound per square inch gauge (psig) (6.9 kPa) and shall have an error no greater than 5 percent of any measured value.

2.6 *Test cloths.*

2.6.1 *Energy Test Cloth.* The energy test cloth shall be made from energy test cloth material, as specified in section 2.6.4 of this appendix, that is 24 ± ½ inches by 36 ± ½ inches (61.0 ± 1.3 cm by 91.4 ± 1.3 cm) and has been hemmed to 22 ± ½ inches by 34 ± ½ inches (55.9 ± 1.3 cm by 86.4 ± 1.3 cm) before washing. The energy test cloth shall be clean and shall not be used for more than 60 test runs (after preconditioning as specified in 2.6.3 of this appendix). All energy test cloth must be permanently marked identifying the lot number of the material. Mixed lots of material shall not be used for testing the clothes washers.

2.6.2 *Energy Stuffer Cloth.* The energy stuffer cloth shall be made from energy test cloth material, as specified in section 2.6.4 of this appendix, and shall consist of pieces of material that are 12 ± ¼ inches by 12 ± ¼ inches (30.5 ± 0.6 cm by 30.5 ± 0.6 cm) and have been hemmed to 10 ± ¼ inches by 10 ± ¼ inches (25.4 ± 0.6 cm by 25.4 ± 0.6 cm) before washing. The energy stuffer cloth shall be clean and shall not be used for more than 60 test runs (after preconditioning as specified in section 2.6.3 of this appendix). All energy stuffer cloth must be permanently marked identifying the lot number of the material. Mixed lots of material shall not be used for testing the clothes washers.

2.6.3 *Preconditioning of Test Cloths.* The new test cloths, including energy test cloths and energy stuffer cloths, shall be pre-conditioned in a clothes washer in the following manner:

2.6.3.1 Perform 5 complete normal wash-rinse-spin cycles, the first two with current AHAM Standard detergent Formula 3 and the last three without detergent. Place the test cloth in a clothes washer set at the maximum water level. Wash the load for ten minutes in soft water (17 ppm hardness or less) using 27.0 grams + 4.0 grams per lb of cloth load

of AHAM Standard detergent Formula 3. The wash temperature is to be controlled to 135 °F ± 5 °F (57.2 °C ± 2.8 °C) and the rinse temperature is to be controlled to 60 °F ± 5 °F (15.6 °C ± 2.8 °C). Repeat the cycle with detergent and then repeat the cycle three additional times without detergent, bone drying the load between cycles (total of five wash and rinse cycles).

2.6.4 *Energy test cloth material.* The energy test cloths and energy stuffer cloths shall be made from fabric meeting the following specifications. The material should come from a roll of material with a width of approximately 63 inches and approximately 500 yards per roll. However, other sizes may be used if they fall within the specifications.

2.6.4.1 *Nominal fabric type.* Pure finished bleached cloth made with a momie or granite weave, which is nominally 50 percent cotton and 50 percent polyester.

2.6.4.2 The fabric weight specification shall be 5.60 ± 0.25 ounces per square yard (190.0 ± 8.4 g/m^2).

2.6.4.3 The thread count shall be 65 × 57 per inch (warp × fill), ± 2 percent.

2.6.4.4 The warp yarn and filling yarn shall each have fiber content of 50 percent ±4 percent cotton, with the balance being polyester, and be open end spun, 15/1 ± 5 percent cotton count blended yarn.

2.6.4.5 Water repellent finishes, such as fluoropolymer stain resistant finishes shall not be applied to the test cloth. The absence of such finishes shall be verified by:

2.6.4.5.1 AATCC Test Method 118–2007, (incorporated by reference; see § 430.3), for each new lot of test cloth (when purchased from the mill) to confirm the absence of Scotchguard ™ or other water repellent finish (required scores of ''D'' across the board).

2.6.4.5.2 AATCC Test Method 79–2010, (incorporated by reference; see § 430.3), for each new lot of test cloth (when purchased from the mill) to confirm the absence of Scotchguard ™ or other water repellent finish (time to absorb one drop should be on the order of 1 second).

2.6.4.6 The moisture absorption and retention shall be evaluated for each new lot of test cloth by the Standard Extractor Remaining Moisture Content (RMC) Test specified in section 2.6.5 of this appendix.

2.6.4.6.1 Repeat the Standard Extractor RMC Test in section 2.6.5 of this appendix three times.

2.6.4.6.2 An RMC correction curve shall be calculated as specified in section 2.6.6 of this appendix.

2.6.4.7 The maximum shrinkage after preconditioning shall not be more than 5 percent on the length and width. Measure per AATCC Test Method 135–2010, (incorporated by reference; see § 430.3).

2.6.5 *Standard Extractor RMC Test Procedure.* The following procedure is used to evaluate the moisture absorption and retention characteristics of a lot of test cloth by measuring the RMC in a standard extractor at a specified set of conditions. Table 2.6.5 of this appendix is the matrix of test conditions. When this matrix is repeated 3 times, a total of 60 extractor RMC test runs are required. For the purpose of the extractor RMC test, the test cloths may be used for up to 60 test runs (after preconditioning as specified in section 2.6.3 of this appendix).

TABLE 2.6.5—MATRIX OF EXTRACTOR RMC TEST CONDITIONS

	Warm soak		Cold soak	
	15 min. spin	4 min. spin	15 min. spin	4 min. spin
100				
200				
350				
500				
650				

2.6.5.1 The standard extractor RMC tests shall be run in a North Star Engineered Products Inc. (formerly Bock) Model 215 extractor (having a basket diameter of 19.5 inches, length of 12 inches, and volume of 2.1 ft^3), with a variable speed drive (North Star Engineered Products, P.O. Box 5127, Toledo, OH 43611) or an equivalent extractor with same basket design (*i.e.* diameter, length, volume, and hole configuration) and variable speed drive.

2.6.5.2 *Test Load.* Test cloths shall be preconditioned in accordance with section 2.6.3 of this appendix. The load size shall be 8.4 lbs, consistent with section 3.8.1 of this appendix.

2.6.5.3 *Procedure.*

2.6.5.3.1 Record the ''bone-dry'' weight of the test load (WI).

2.6.5.3.2 Prepare the test load for soak by grouping four test cloths into loose bundles. Bundles are created by hanging four cloths vertically from one corner and loosely wrapping the test cloth onto itself to form the bundle. Bundles are then placed into the water for soak. Eight to nine bundles will be formed depending on the test load. The ninth bundle may not equal four cloths but can incorporate energy stuffer cloths to help offset the size difference.

2.6.5.3.3 Soak the test load for 20 minutes in 10 gallons of soft (< 17 ppm) water. The entire test load shall be submerged. The water temperature shall be 100 °F ± 5 °F (38 °C ± 3 °C)

2.6.5.3.4 Remove the test load and allow each of the test cloth bundles to drain over the water bath for a maximum of 5 seconds.

2.6.5.3.5 Manually place the test cloth bundles in the basket of the extractor, distributing them evenly by eye. The draining and loading process should take less than 1 minute. Spin the load at a fixed speed corresponding to the intended centripetal acceleration level (measured in units of the acceleration of gravity, g) ± 1g for the intended time period ± 5 seconds.

2.6.5.3.6 Record the weight of the test load immediately after the completion of the extractor spin cycle (WC).

2.6.5.3.7 Calculate the RMC as (WC–WI)/WI.

2.6.5.3.8 It is not necessary to drain the soak tub if the water bath is corrected for water level and temperature before the next extraction.

2.6.5.3.9 It is not necessary to dry the test load in between extraction runs. However, the bone dry weight shall be checked after every 12 extraction runs to make sure the bone dry weight is within tolerance (8.4 ± 0.1 lb).

2.6.5.3.10 The RMC of the test load shall be measured at five g levels: 100 g, 200 g, 350 g, 500 g, and 650 g, using two different spin times at each g level: 4 minutes and 15 minutes.

2.6.5.4 Repeat section 2.6.5.3 of this appendix using soft (< 17 ppm) water at 60 °F ± 5 °F.

2.6.6 *Calculation of RMC correction curve.*

2.6.6.1 Average the values of 3 test runs and fill in Table 2.6.5 of this appendix. Perform a linear least-squares fit to relate the standard RMC ($RMC_{standard}$) values (shown in Table 2.6.6.1 of this appendix) to the values measured in section 2.6.5 of this appendix:

(RMC_{cloth}): $RMC_{standard} - A \times RMC_{cloth} + B$

where A and B are coefficients of the linear least-squares fit.

TABLE 2.6.6.1—STANDARD RMC VALUES (RMC STANDARD)

"g Force"	RMC percentage			
	Warm soak		Cold soak	
	15 min. spin	4 min. spin	15 min. spin	4 min. spin
100	45.9	49.9	49.7	52.8
200	35.7	40.4	37.9	43.1
350	29.6	33.1	30.7	35.8
500	24.2	28.7	25.5	30.0
650	23.0	26.4	24.1	28.0

2.6.6.2 Perform an analysis of variance test using two factors, spin speed and lot, to check the interaction of speed and lot. Use the values from Table 2.6.5 and Table 2.6.6.1 of this appendix in the calculation. The ''P'' value in the variance analysis shall be greater than or equal to 0.1. If the ''P'' value is less than 0.1, the test cloth is unacceptable. ''P'' is a theoretically based probability of interaction based on an analysis of variance.

2.6.7 *Application of the RMC correction curve.*

2.6.7.1 Using the coefficients A and B calculated in section 2.6.6.1 of this appendix:

$RMC_{corr} = A \times RMC + B$

2.6.7.2 Substitute RMC_{corr} values in calculations in section 3.8 of this appendix.

2.7 *Test Load Sizes.* Maximum, minimum, and, when required, average test load sizes shall be determined using Table 5.1 of this appendix and the clothes container capacity as measured in sections 3.1.1 through 3.1.5 of this appendix. Test loads shall consist of energy test cloths, except that adjustments to the test loads to achieve proper weight can be made by the use of energy stuffer cloths with no more than 5 stuffer cloths per load.

2.8 *Use of Test Loads.* Table 2.8 of this appendix defines the test load sizes and corresponding water fill settings which are to be used when measuring water and energy consumptions. Adaptive water fill control system and manual water fill control system are defined in section 1 of this appendix:

TABLE 2.8—TEST LOAD SIZES AND WATER FILL SETTINGS REQUIRED

Manual water fill control system		Adaptive water fill control system	
Test load size	Water fill setting	Test load size	Water fill setting
Max	Max	Max	As determined by the Clothes Washer.
Min	Min	Avg. Min.	

2.8.1 The test load sizes to be used to measure RMC are specified in section 3.8.1 of this appendix.

2.8.2 Test loads for energy and water consumption measurements shall be bone dry prior to the first cycle of the test, and dried to a maximum of 104 percent of bone dry weight for subsequent testing.

2.8.3 Load the energy test cloths by grasping them in the center, shaking them to hang loosely and then put them into the clothes container prior to activating the clothes washer.

2.9 *Pre-conditioning.*

2.9.1 *Non-water-heating clothes washer.* If the clothes washer has not been filled with water in the preceding 96 hours, pre-condition it by running it through a cold rinse cycle and then draining it to ensure that the hose, pump, and sump are filled with water.

2.9.2 *Water-heating clothes washer.* If the clothes washer has not been filled with water in the preceding 96 hours, or if it has not been in the test room at the specified ambient conditions for 8 hours, pre-condition it by running it through a cold rinse cycle and then draining it to ensure that the hose, pump, and sump are filled with water.

2.10 *Wash time setting.* If one wash time is prescribed in the energy test cycle, that shall be the wash time setting; otherwise, the wash time setting shall be the higher of either the minimum or 70 percent of the maximum wash time available in the energy test cycle, regardless of the labeling of suggested dial locations. If the clothes washer is equipped with an electromechanical dial controlling wash time, reset the dial to the minimum wash time and then turn it in the direction of increasing wash time to reach the appropriate setting. If the appropriate setting is passed, return the dial to the minimum wash time and then turn in the direction of increasing wash time until the setting is reached.

2.11 *Test room temperature.*

2.11.1 *Non-water-heating clothes washer.* For combined low-power mode testing, maintain room ambient air temperature conditions as specified in Section 4, Paragraph 4.2 of IEC 62301 (incorporated by reference; see § 430.3).

2.11.2 *Water-heating clothes washer.* Maintain the test room ambient air temperature at 75 °F ± 5 °F (23.9 °C ± 2.8 °C). For combined low-power mode testing, maintain room ambient air temperature conditions as specified in Section 4, Paragraph 4.2 of IEC 62301 (incorporated by reference; see § 430.3).

2.12 *Bone dryer temperature.* The dryer used for bone drying must heat the test cloth and energy stuffer cloths above 210 °F (99 °C).

2.13 *Energy consumption for the purpose of certifying the cycle setting(s) to be included in part (B) of the energy test cycle definition.* Where multiple alternate cycle settings offer a wash/rinse temperature combination not available on the cycle setting recommended by the manufacturer for washing cotton or linen clothes, the cycle setting with the highest energy consumption, as measured according to this section, shall be included in the energy test cycle.

To determine which cycle setting has the highest energy consumption, establish the testing conditions set forth in section 2 of this test procedure. Select the applicable cycle setting and temperature combination. Use the manufacturer default settings for agitation/tumble operation, soil level, spin speed(s), wash times, rinse times, and all other wash parameters or optional features applicable to that cycle, including water heating time for water heating clothes washers. Each wash cycle tested under this section shall comprise the entire active washing mode and exclude any delay start or cycle finished modes.

To identify the cycle setting with the highest energy consumption, use the clothes washer's maximum test load size, determined from Table 5.1. For clothes washers with a manual water fill control system, user-adjustable adaptive water fill control system, or adaptive water fill control system with alternate manual water fill control system, use the water fill selector setting resulting in the maximum water level available for each cycle setting.

Measure each cycle setting's electrical energy consumption (E_B) and hot water consumption (H_B). Calculate the total energy

consumption for each cycle setting (E_{TB}), as follows:

$E_{TB} = E_B + (H_B \times T \times K)$

where:

E_B is the electrical energy consumption, expressed in kilowatt-hours per cycle.
H_B is the hot water consumption, expressed in gallons per cycle.
T = temperature rise = 75 °F (41.7 °C)
K = Water specific heat in kilowatt-hours per gallon per degree F = 0.00240 (0.00114 kWh/L-°C)

3. Test Measurements

3.1 *Clothes container capacity.* Measure the entire volume which a dry clothes load could occupy within the clothes container during washer operation according to the following procedures:

3.1.1 Place the clothes washer in such a position that the uppermost edge of the clothes container opening is leveled horizontally, so that the container will hold the maximum amount of water.

3.1.2 Line the inside of the clothes container with 2 mil (0.051 mm) plastic sheet. All clothes washer components which occupy space within the clothes container and which are recommended for use with the energy test cycle shall be in place and shall be lined with 2 mil (0.051 mm) plastic sheet to prevent water from entering any void space.

3.1.3 Record the total weight of the machine before adding water.

3.1.4 Fill the clothes container manually with either 60 °F ± 5 °F (15.6 °C ± 2.8 °C) or 100 °F ± 10 °F (37.8 °C ± 5.5 °C) water, with the door open. For a top-loading, vertical-axis clothes washer, fill the clothes container to the uppermost edge of the rotating portion, including any balance ring. For a front-loading, horizontal-axis clothes washer, fill the clothes container to the uppermost edge that is in contact with the door seal. For all clothes washers, any volume which cannot be occupied by the clothing load during operation must be excluded from the measurement. Measure and record the weight of water, W, in pounds.

3.1.5 The clothes container capacity is calculated as follows:

$C = W/d$

where:

C = Capacity in cubic feet (liters).
W = Mass of water in pounds (kilograms).
d = Density of water (62.0 lbs/ft^3 for 100 °F (993 kg/m^3 for 37.8 °C) or 62.3 lbs/ft^3 for 60 °F (998 kg/m^3 for 15.6 °C)).

3.2 *Procedure for measuring water and energy consumption values on all automatic and semi-automatic washers.* All energy consumption tests shall be performed under the energy test cycle(s), unless otherwise specified. Table 3.2 of this appendix defines the sections below which govern tests of particular clothes washers, based on the number of wash/rinse temperature selections available on the model, and also, in some instances, method of water heating. The procedures prescribed are applicable regardless of a clothes washer's washing capacity, loading port location, primary axis of rotation of the clothes container, and type of control system.

3.2.1 *Inlet water temperature and the wash/rinse temperature settings.*

3.2.1.1 For automatic clothes washers set the wash/rinse temperature selection control to obtain the wash water temperature selection control to obtain the wash water temperature desired (extra hot, hot, warm, or cold) and cold rinse, and open both the hot and cold water faucets.

3.2.1.2 For semi-automatic washers: (1) For hot water temperature, open the hot water faucet completely and close the cold water faucet; (2) for warm inlet water temperature, open both hot and cold water faucets completely; (3) for cold water temperature, close the hot water faucet and open the cold water faucet completely.

3.2.1.3 *Determination of warm wash water temperature(s) to decide whether a clothes washer has uniformly distributed warm wash temperature selections.* The wash water temperature, Tw, of each warm water wash selection shall be calculated or measured.

For non-water heating clothes washers, calculate Tw as follows:

$Tw\ (°F) = ((Hw \times 135\ °F) + (Cw \times 60\ °F))/(Hw + Cw)$

or

$Tw\ (°C) = ((Hw \times 57.2\ °C) + (Cw \times 15.6\ °C))/(Hw + Cw)$

where:

Hw = Hot water consumption of a warm wash.
Cw = Cold water consumption of a warm wash.

For water-heating clothes washers, measure and record the temperature of each warm wash selection after fill.

3.2.2 Total water consumption during the energy test cycle shall be measured, including hot and cold water consumption during wash, deep rinse, and spray rinse.

3.2.3 *Clothes washers with adaptive water fill/manual water fill control systems*

3.2.3.1 *Clothes washers with adaptive water fill control system and alternate manual water fill control systems.* If a clothes washer with an adaptive water fill control system allows consumer selection of manual controls as an alternative, then both manual and adaptive modes shall be tested and, for each mode, the energy consumption (HE_T, ME_T, and D_E) and water consumption (Q_T), values shall be calculated as set forth in section 4 of this appendix. Then the average of the two values (one from each mode, adaptive and manual) for each variable shall be used in section 4 of this appendix for the clothes washer.

3.2.3.2 *Clothes washers with adaptive water fill control system.*

3.2.3.2.1 Not user adjustable. The maximum, minimum, and average water levels as defined in the following sections shall be interpreted to mean that amount of water fill which is selected by the control system when the respective test loads are used, as defined in Table 2.8 of this appendix. The load usage factors which shall be used when calculating energy consumption values are defined in Table 4.1.3 of this appendix.

3.2.3.2.2 User adjustable. Four tests shall be conducted on clothes washers with user adjustable adaptive water fill controls which affect the relative wash water levels. The first test shall be conducted with the maximum test load and with the adaptive water fill control system set in the setting that will give the most energy intensive result. The second test shall be conducted with the minimum test load and with the adaptive water fill control system set in the setting that will give the least energy intensive result. The third test shall be conducted with the average test load and with the adaptive water fill control system set in the setting that will give the most energy intensive result for the given test load. The fourth test shall be conducted with the average test load and with the adaptive water fill control system set in the setting that will give the least energy intensive result for the given test load. The energy and water consumption for the average test load and water level shall be the average of the third and fourth tests.

3.2.3.3 *Clothes washers with manual water fill control system.* In accordance with Table 2.8 of this appendix, the water fill selector shall be set to the maximum water level available on the clothes washer for the maximum test load size and set to the minimum water level for the minimum test load size. The load usage factors which shall be used when calculating energy consumption values are defined in Table 4.1.3 of this appendix.

TABLE 3.2—TEST SECTION REFERENCE

Max. wash temp. available	≤135 °F (57.2 °C)			>135 °F (57.2 °C)**	
Number of Wash Temp. Selections	1	2	>2	3	>3
Test Sections Required To Be Followed	.....	.....	.....	3.3	3.3
	.....	3.4	3.4	.....	3.4
	.....	.....	3.5	3.5	3.5
	3.6	3.6	3.6	3.6	3.6
	.....	.....	*3.7	*3.7	*3.7
	3.8	3.8	3.8	3.8	3.8

TABLE 3.2—TEST SECTION REFERENCE—Continued

	.....	.....	.....	†3.9	†3.9

* Only applicable to machines with warm rinse.
** Only applicable to water heating clothes washers on which the maximum wash temperature available exceeds 135 °F (57.2 °C).
† Only applicable to machines equipped with a steam cycle.

3.3 *''Extra Hot Wash'' (Max Wash Temp > 135 °F (57.2 °C)) for water heating clothes washers only.* Water and electrical energy consumption shall be measured for each water fill level and/or test load size as specified in sections 3.3.1 through 3.3.3 of this appendix for the hottest wash setting available.

3.3.1 *Maximum test load and water fill.* Hot water consumption (Hm_x), cold water consumption (Cm_x), and electrical energy consumption (Em_x) shall be measured for an extra hot wash/cold rinse energy test cycle, with the controls set for the maximum water fill level. The maximum test load size is to be used and shall be determined per Table 5.1 of this appendix.

3.3.2 *Minimum test load and water fill.* Hot water consumption (Hm_n), cold water consumption (Cm_n), and electrical energy consumption (Em_n) shall be measured for an extra hot wash/cold rinse energy test cycle, with the controls set for the minimum water fill level. The minimum test load size is to be used and shall be determined per Table 5.1 of this appendix.

3.3.3 *Average test load and water fill.* For clothes washers with an adaptive water fill control system, measure the values for hot water consumption (Hm_a), cold water consumption (Cm_a), and electrical energy consumption (Em_a) for an extra hot wash/cold rinse energy test cycle, with an average test load size as determined per Table 5.1 of this appendix.

3.4 *''Hot Wash'' (Max Wash Temp ≤ 135 °F (57.2 °C)).* Water and electrical energy consumption shall be measured for each water fill level or test load size as specified in sections 3.4.1 through 3.4.3 of this appendix for a *135 °F (57.2 °C)* wash, if available, or for the hottest selection less than *135 °F (57.2 °C).*

3.4.1 *Maximum test load and water fill.* Hot water consumption (Hh_x), cold water consumption (Ch_x), and electrical energy consumption (Eh_x) shall be measured for a hot wash/cold rinse energy test cycle, with the controls set for the maximum water fill level. The maximum test load size is to be used and shall be determined per Table 5.1 of this appendix.

3.4.2 *Minimum test load and water fill.* Hot water consumption (Hh_n), cold water consumption (Ch_n), and electrical energy consumption (Eh_n) shall be measured for a hot wash/cold rinse energy test cycle, with the controls set for the minimum water fill level. The minimum test load size is to be used and shall be determined per Table 5.1 of this appendix.

3.4.3 *Average test load and water fill.* For clothes washers with an adaptive water fill control system, measure the values for hot water consumption (Hh_a), cold water consumption (Ch_a), and electrical energy consumption (Eh_a) for a hot wash/cold rinse energy test cycle, with an average test load size as determined per Table 5.1 of this appendix.

3.5 *''Warm Wash.''* Water and electrical energy consumption shall be determined for each water fill level and/or test load size as specified in sections 3.5.1 through 3.5.2.3 of this appendix for the applicable warm water wash temperature(s) with a cold rinse.

3.5.1 *Clothes washers with uniformly distributed warm wash temperature selection(s).* The reportable values to be used for the warm water wash setting shall be the arithmetic average of the measurements for the hot and cold wash selections. This is a calculation only, no testing is required.

3.5.2 *Clothes washers that lack uniformly distributed warm wash temperature selections.* For a clothes washer with fewer than four discrete warm wash selections, test all warm wash temperature selections. For a clothes washer that offers four or more warm wash selections, test at all discrete selections, or test at 25 percent, 50 percent, and 75 percent positions of the temperature selection device between the hottest hot (≤ 135 °F (57.2 °C)) wash and the coldest cold wash. If a selection is not available at the 25, 50 or 75 percent position, in place of each such unavailable selection use the next warmer setting. Each reportable value to be used for the warm water wash setting shall be the arithmetic average of all tests conducted pursuant to this section.

3.5.2.1 *Maximum test load and water fill.* Hot water consumption (Hw_x), cold water consumption (Cw_x), and electrical energy consumption (Ew_x) shall be measured with the controls set for the maximum water fill level. The maximum test load size is to be used and shall be determined per Table 5.1 of this appendix.

3.5.2.2 *Minimum test load and water fill.* Hot water consumption (Hw_n), cold water consumption (Cw_n), and electrical energy consumption (Ew_n) shall be measured with the controls set for the minimum water fill level. The minimum test load size is to be used and shall be determined per Table 5.1 of this appendix.

3.5.2.3 *Average test load and water fill.* For clothes washers with an adaptive water fill control system, measure the values for hot water consumption (Hw_a), cold water consumption (Cw_a), and electrical energy consumption (Ew_a) with an average test load size as determined per Table 5.1 of this appendix.

3.6 *''Cold Wash'' (Minimum Wash Temperature Selection).* Water and electrical energy consumption shall be measured for each water fill level or test load size as specified in sections 3.6.1 through 3.6.3 of this appendix for the coldest wash temperature selection available. For a clothes washer that offers two or more wash temperature settings labeled as cold, such as ''Cold'' and ''Tap Cold'', the setting with the minimum wash temperature shall be considered the cold wash. If any of the other cold wash temperature settings add hot water to raise the wash temperature above the cold water supply temperature, as defined in section 2.3 of this appendix, those setting(s) shall be considered warm wash setting(s), as defined in section 1.34 of this appendix. If none of the cold wash temperature settings add hot water for any of the water fill levels or test load sizes required for the energy test cycle, the wash temperature setting labeled as ''Cold'' shall be considered the cold wash, and the other wash temperature setting(s) labeled as cold shall not be required for testing.

3.6.1 *Maximum test load and water fill.* Hot water consumption (Hc_x), cold water consumption (Cc_x), and electrical energy consumption (Ec_x) shall be measured for a cold wash/cold rinse energy test cycle, with the controls set for the maximum water fill level. The maximum test load size is to be used and shall be determined per Table 5.1 of this appendix.

3.6.2 *Minimum test load and water fill.* Hot water consumption (Hc_n), cold water consumption (Cc_n), and electrical energy consumption (Ec_n) shall be measured for a cold wash/cold rinse energy test cycle, with the controls set for the minimum water fill level. The minimum test load size is to be used and shall be determined per Table 5.1 of this appendix.

3.6.3 *Average test load and water fill.* For clothes washers with an adaptive water fill control system, measure the values for hot water consumption (Hc_a), cold water consumption (Cc_a), and electrical energy consumption (Ec_a) for a cold wash/cold rinse energy test cycle, with an average test load size as determined per Table 5.1 of this appendix.

3.7 *''Warm Wash/Warm Rinse.''* Water and electrical energy consumption shall be determined for each water fill level and/or test load size as specified in sections 3.7.2.1 through 3.7.2.3 of this appendix for the applicable warm wash temperature selection as described in section 3.7.1 or 3.7.2 of this appendix and the hottest available rinse temperature selection.

3.7.1 *Clothes washers with uniformly distributed warm wash temperature selection(s).* Test the warm wash/warm rinse cycle at the wash temperature selection with the temperature selection device at the 50 percent position between the hottest hot (≤ 135 °F (57.2 °C)) wash and the coldest cold wash.

3.7.2 *Clothes washers that lack uniformly distributed warm wash temperature selections.* For a clothes washer with fewer than four discrete warm wash selections, test all warm wash temperature selections. For a clothes washer that offers four or more warm wash selections, test at all discrete selections, or test at 25 percent, 50 percent, and 75 percent positions of the temperature

selection device between the hottest hot (≤ 135 °F (57.2 °C)) wash and the coldest cold wash. If a selection is not available at the 25, 50, or 75 percent position, in place of each such unavailable selection use the next warmer setting. Each reportable value to be used for the warm water wash setting shall be the arithmetic average of all tests conducted pursuant to this section.

3.7.2.1 *Maximum test load and water fill.* Hot water consumption (Hww_X), cold water consumption (Cww_X), and electrical energy consumption (Eww_X) shall be measured with the controls set for the maximum water fill level. The maximum test load size is to be used and shall be determined per Table 5.1 of this appendix.

3.7.2.2 *Minimum test load and water fill.* Hot water consumption (Hww_n), cold water consumption (Cww_n), and electrical energy consumption (Eww_n) shall be measured with the controls set for the minimum water fill level. The minimum test load size is to be used and shall be determined per Table 5.1 of this appendix.

3.7.2.3 *Average test load and water fill.* For clothes washers with an adaptive water fill control system, measure the values for hot water consumption (Hww_a), cold water consumption (Cww_a), and electrical energy consumption (Eww_a) with an average test load size as determined per Table 5.1 of this appendix.

3.8 *Remaining Moisture Content:*

3.8.1 The wash temperature will be the same as the rinse temperature for all testing. Use the maximum test load as defined in Table 5.1 and section 3.1 of this appendix for testing.

3.8.2 *For clothes washers with cold rinse only:*

3.8.2.1 Record the actual ''bone dry'' weight of the test load (WI_{max}), then place the test load in the clothes washer.

3.8.2.2 Set water level selector to maximum fill.

3.8.2.3 Run the energy test cycle.

3.8.2.4 Record the weight of the test load immediately after completion of the energy test cycle (WC_{max}).

3.8.2.5 Calculate the remaining moisture content of the maximum test load, RMC_{max}, expressed as a percentage and defined as:

$$RMC_{max} = ((WC_{max} - WI_{max})/WI_{max}) \times 100\%$$

3.8.3 *For clothes washers with cold and warm rinse options:*

3.8.3.1 Complete sections 3.8.2.1 through 3.8.2.4 of this appendix for cold rinse. Calculate the remaining moisture content of the maximum test load for cold rinse, RMC_{COLD}, expressed as a percentage and defined as:

$$RMC_{COLD} = ((WC_{max} - WI_{max})/WI_{max}) \times 100\%$$

3.8.3.2 Complete sections 3.8.2.1 through 3.8.2.4 of this appendix for warm rinse. Calculate the remaining moisture content of the maximum test load for warm rinse, RMC_{WARM}, expressed as a percentage and defined as:

$$RMC_{WARM} = ((WC_{max} - WI_{max})/WI_{max}) \times 100\%$$

3.8.3.3 Calculate the remaining moisture content of the maximum test load, RMC_{max}, expressed as a percentage and defined as:

$$RMC_{max} = RMC_{COLD} \times (1 - TUF_r) + RMC_{WARM} \times (TUF_r)$$

where:

TUF_r is the temperature use factor for warm rinse as defined in Table 4.1.1 of this appendix.

3.8.4 Clothes washers that have options such as multiple selections of spin speeds or spin times that result in different RMC values and that are available in the energy test cycle, shall be tested at the maximum and minimum extremes of the available options, excluding any ''no spin'' (zero spin speed) settings, in accordance with requirements in section 3.8.2 or 3.8.3 of this appendix. The calculated $RMC_{max,max\ extraction}$ and $RMC_{max,min\ extraction}$ at the maximum and minimum settings, respectively, shall be combined as follows and the final RMC to be used in section 4.3 of this appendix shall be:

$$RMC = 0.75 \times RMC_{max,max\ extraction} + 0.25 \times RMC_{max,min\ extraction}$$

3.9 *''Steam Wash'' for clothes washers equipped with a steam cycle.* Water and electrical energy consumption shall be measured for each water fill level and/or test load size as specified in sections 3.9.1 through 3.9.3 of this appendix for the hottest wash setting available with steam.

3.9.1 *Maximum test load and water fill.* Hot water consumption (Hs_x), cold water consumption (Cs_x), and electrical energy consumption (Es_x) shall be measured for a steam energy test cycle, with the controls set for the maximum water fill level. The maximum test load size is to be used and shall be determined per Table 5.1 of this appendix.

3.9.2 *Minimum test load and water fill.* Hot water consumption (Hs_n), cold water consumption (Cs_n), and electrical energy consumption (Es_n) shall be measured for a steam energy test cycle, with the controls set for the minimum water fill level. The minimum test load size is to be used and shall be determined per Table 5.1 of this appendix.

3.9.3 *Average test load and water fill.* For clothes washers with an adaptive water fill control system, measure the values for hot water consumption (Hs_a), cold water consumption (Cs_a), and electrical energy consumption (Es_a) for a steam energy test cycle using an average test load size as determined per Table 5.1 of this appendix.

3.10 *Self-clean.* Set the controls to obtain the self-clean cycle. Hot water consumption (H_{sc}), cold water consumption (C_{sc}), and electric energy consumption (E_{sc}) shall be measured for the self-clean cycle. Do not use a test load.

3.11 *Combined low-power mode power.* Connect the clothes washer to a watt meter as specified in section 2.5.3 of this appendix. Establish the testing conditions set forth in sections 2.1, 2.2 and 2.11 of this appendix. For clothes washers that take some time to enter a stable state from a higher power state as discussed in Section 5, Paragraph 5.1, note 1 of IEC 62301 (incorporated by reference; see § 430.3), allow sufficient time for the clothes washer to reach the lower power state before proceeding with the test measurement. Follow the test procedure for the sampling method specified in Section 5, Paragraph 5.3.2 of IEC 62301 for testing in each possible mode as described in sections 3.11.1 and 3.11.2 of this appendix.

3.11.1 If a clothes washer has an inactive mode as defined in section 1.15 of this appendix, measure and record the average inactive mode power of the clothes washer, P_{ia}, in watts.

3.11.2 If a clothes washer has an off mode as defined in section 1.23 of this appendix, measure and record its average off mode power, P_o, in watts.

4. Calculation of Derived Results from Test Measurements

4.1 *Hot water and machine electrical energy consumption of clothes washers.*

4.1.1 *Per-cycle temperature-weighted hot water consumption for maximum, average, and minimum water fill levels using each appropriate load size as defined in section 2.8 and Table 5.1 of this appendix.* Calculate for the cycle under test the per-cycle temperature weighted hot water consumption for the maximum water fill level, Vh_x, the average water fill level, Vh_a, and the minimum water fill level, Vh_n, expressed in gallons per cycle (or liters per cycle) and defined as:

(a) $Vh_x = [Hs_x \times TUF_s] + [Hm_x \times TUF_m] + [Hh_x \times TUF_h] + [Hw_x \times TUF_w] + [Hww_x \times TUF_{ww}] + [Hc_x \times TUF_c]$

(b) $Vh_a = [Hs_a \times TUF_s] + [Hm_a \times TUF_m] + [Hh_a \times TUF_h] + [Hw_a \times TUF_w] + [Hww_a \times TUF_{ww}] + [Hc_a \times TUF_c]$

(c) $Vh_n = [Hs_n \times TUF_s] + [Hm_n \times TUF_m] + [Hh_n \times TUF_h] + [Hw_n \times TUF_w] + [Hww_n \times TUF_{ww}] + [Hc_n \times TUF_c]$

where:

Hs_x, Hs_a, and Hs_n, are reported hot water consumption values, in gallons per cycle (or liters per cycle), at maximum, average, and minimum water fill, respectively, for the steam cycle with the appropriate test loads as defined in section 2.8 of this appendix.

Hm_x, Hm_a, and Hm_n, are reported hot water consumption values, in gallons per-cycle (or liters per cycle), at maximum, average, and minimum water fill, respectively, for the extra hot wash cycle with the appropriate test loads as defined in section 2.8 of this appendix.

Hh_x, Hh_a, and Hh_n, are reported hot water consumption values, in gallons per-cycle (or liters per cycle), at maximum, average, and minimum water fill, respectively, for the hot wash cycle with the appropriate test loads as defined in section 2.8 of this appendix.

Hw_x, Hw_a, and Hw_n, are reported hot water consumption values, in gallons per-cycle (or liters per cycle), at maximum, average, and minimum water fill, respectively, for the warm wash cycle with the appropriate test loads as defined in section 2.8 of this appendix.

Hww_x, Hww_a, and Hww_n, are reported hot water consumption values, in gallons per-cycle (or liters per cycle), at maximum, average, and minimum water fill, respectively, for the warm wash/warm rinse cycle with the appropriate test loads as defined in section 2.8 of this appendix.

Hc_x, Hc_a, and Hc_n, are reported hot water consumption values, in gallons per-cycle (or liters per cycle), at maximum, average, and minimum water fill, respectively, for the cold wash cycle with the appropriate test loads as defined in section 2.8 of this appendix.

TUF_s, TUF_m, TUF_h, TUF_w, TUF_{ww}, and TUF_c are temperature use factors for steam wash, extra hot wash, hot wash, warm wash, warm wash/warm rinse, and cold wash temperature selections, respectively, and are as defined in Table 4.1.1 of this appendix.

TABLE 4.1.1—TEMPERATURE USE FACTORS

Max wash temp available	≤135 °F (57.2 °C)	≤135 °F (57.2 °C)	≤135 °F (57.2 °C)	>135 °F (57.2 °C)	>135 °F (57.2 °C)	Steam	Steam
No. Wash Temp Selections.	Single	2 Temps	>2 Temps	3 Temps	>3 Temps	3 Temps	>3 Temps.
TUF_s (steam)	NA	NA	NA	NA	NA	0.02	0.02.
TUF_m (extra hot)	NA	NA	NA	0.14	0.05	0.12	0.03.
TUF_h (hot)	NA	0.63	0.14	NA	0.09	NA	0.09.
TUF_{ww} (warm/warm).	NA	NA	0.27*	0.27*	0.27*	0.27*	0.27*.
TUF_w (warm)	NA	NA	0.22	0.22	0.22	0.22	0.22.
TUF_c (cold)	1.00	0.37	0.37	0.37	0.37	0.37	0.37.

* Only applicable to machines offering a warm/warm cycle. For machines with no warm/warm cycle, this value should be zero and TUF_w (warm) should be 0.49.

4.1.2 *Total per-cycle hot water energy consumption for all maximum, average, and minimum water fill levels tested.* Calculate the total per-cycle hot water energy consumption for the maximum water fill level, HE_{max}, the minimum water fill level, HE_{min}, and the average water fill level, HE_{avg}, expressed in kilowatt-hours per cycle and defined as:

(a) $HE_{max} = [Vh_x \times T \times K]$ = Total energy when a maximum load is tested.
(b) $HE_{avg} = [Vh_a \times T \times K]$ = Total energy when an average load is tested.
(c) $HE_{min} = [Vh_n \times T \times K]$ = Total energy when a minimum load is tested.

where:

T = Temperature rise = 75 °F (41.7 °C).
K = Water specific heat in kilowatt-hours per gallon degree F = 0.00240 kWh/gal-°F (0.00114 kWh/L-°C).
Vh_x, Vh_a, and Vh_n are as defined in section 4.1.1 of this appendix.

4.1.3 *Total weighted per-cycle hot water energy consumption.* Calculate the total weighted per-cycle hot water energy consumption, HE_T, expressed in kilowatt-hours per cycle and defined as:

$$HE_T = [HE_{max} \times F_{max}] + [HE_{avg} \times F_{avg}] + HE_{min} \times F_{min}]$$

where:

HE_{max}, HE_{avg}, and HE_{min} are as defined in section 4.1.2 of this appendix.
F_{max}, F_{avg}, and F_{min} are the load usage factors for the maximum, average, and minimum test loads based on the size and type of the control system on the washer being tested. The values are as shown in Table 4.1.3 of this appendix.

TABLE 4.1.3—LOAD USAGE FACTORS

Water fill control system	Manual	Adaptive
F_{max} =	[1]0.72	[2]0.12
F_{avg} =	.....	[2]0.74
F_{min} =	[1]0.28	[2]0.14

[1] Reference 3.2.3.3.

[2] Reference 3.2.3.2.

4.1.4 *Total per-cycle hot water energy consumption using gas-heated or oil-heated water.* Calculate for the energy test cycle the per-cycle hot water consumption, HE_{TG}, using gas-heated or oil-heated water, expressed in Btu per cycle (or megajoules per cycle) and defined as:

$$HE_{TG} = HE_T \times 1/e \times 3412 \text{ Btu/kWh or } HE_{TG} = HE_T \times 1/e \times 3.6 \text{ MJ/kWh}$$

where:

e = Nominal gas or oil water heater efficiency = 0.75.
HE_T = As defined in section 4.1.3 of this appendix.

4.1.5 *Per-cycle machine electrical energy consumption for all maximum, average, and minimum test load sizes.* Calculate the total per-cycle machine electrical energy consumption for the maximum water fill level, ME_{max}, the average water fill level, ME_{avg}, and the minimum water fill level, ME_{min}, expressed in kilowatt-hours per cycle and defined as:

(a) $ME_{max} = [Es_x \times TUF_s] + [Em_x \times TUF_m] + [Eh_x \times TUF_h] + [Ew_x \times TUF_w] + [Eww_x \times TUF_{ww}] + [Ec_x \times TUF_c]$
(b) $ME_{avg} = [Es_a \times TUF_s] + [Em_a \times TUF_m] + [Eh_a \times TUF_h] + [Ew_a \times TUF_w] + [Eww_a \times TUF_{ww}] + [Ec_a \times TUF_c]$
(c) $ME_{min} = [Es_n \times TUF_s] + [Em_n \times TUF_m] + [Eh_n \times TUF_h] + [Ew_n \times TUF_w] + [Eww_n \times TUF_{ww}] + [Ec_n \times TUF_c]$

where:

Es_x, Es_a, and Es_n, are reported electrical energy consumption values, in kilowatt-hours per cycle, at maximum, average, and minimum test loads, respectively, for the steam cycle.
Em_x, Em_a, and Em_n, are reported electrical energy consumption values, in kilowatt-hours per cycle, at maximum, average, and minimum test loads, respectively, for the extra hot wash cycle.
Eh_x, Eh_a, and Eh_n, are reported electrical energy consumption values, in kilowatt-hours per cycle, at maximum, average, and minimum test loads, respectively, for the hot wash cycle.
Ew_x, Ew_a, and Ew_n, are reported electrical energy consumption values, in kilowatt-hours per cycle, at maximum, average, and minimum test loads, respectively, for the warm wash cycle.
Eww_x, Eww_a, and Eww_n, are reported electrical energy consumption values, in kilowatt-hours per cycle, at maximum, average, and minimum test loads, respectively, for the warm wash/warm rinse cycle.
Ec_x, Ec_a, and Ec_n, are reported electrical energy consumption values, in kilowatt-hours per cycle, at maximum, average, and minimum test loads, respectively, for the cold wash cycle.
TUF_s, TUF_m, TUF_h, TUF_w, TUF_{ww}, and TUF_c are as defined in Table 4.1.1 of this appendix.

4.1.6 *Total weighted per-cycle machine electrical energy consumption.* Calculate the total per-cycle load size weighted energy consumption, ME_T, expressed in kilowatt-hours per cycle and defined as:

$$ME_T = [ME_{max} \times F_{max}] + [ME_{avg} \times F_{avg}] + [ME_{min} \times F_{min}]$$

where:

ME_{max}, ME_{avg}, and ME_{min} are as defined in section 4.1.5 of this appendix.
F_{max}, F_{avg}, and F_{min} are as defined in Table 4.1.3 of this appendix.

4.1.7 *Total per-cycle energy consumption when electrically heated water is used.* Calculate for the energy test cycle the total per-cycle energy consumption, E_{TE}, using electrically heated water, expressed in kilowatt-hours per cycle and defined as:

$$E_{TE} = HE_T + ME_T$$

where:

ME_T = As defined in section 4.1.6 of this appendix.
HE_T = As defined in section 4.1.3 of this appendix.

4.1.8 *Per-cycle self-clean hot water energy consumption when electrically heated water is used.* Calculate the per-cycle self-clean hot

water energy consumption, HE_{sc}, expressed in kilowatt-hours per cycle, and defined as:

$HE_{sc} = [H_{sc} \times T \times K] \times 12/295$

where:

H_{sc} = reported hot water consumption value, in gallons per-cycle, for the self-clean cycle as defined in section 3.10 of this appendix.
T = Temperature rise = 75 °F (41.7 °C).
K = Water specific heat in kilowatt-hours per gallon degree F = 0.00240 (0.00114 kWh/L-°C).
12 = Representative average number of clothes washer self-clean cycles in a year.
295 = Representative average number of clothes washer cycles in a year.

4.1.9 *Per-cycle self-clean hot water energy consumption using gas-heated or oil-heated water.* Calculate the per-cycle self-clean hot water energy consumption, HE_{SCG}, using gas-heated or oil-heated water, expressed in Btu per cycle (or megajoules per cycle) and defined as:

$HE_{SCG} = [HE_{SC} \times 1/e \times 3412 \text{ Btu/kWh}] \times 12/295$ or $HE_{SCG} = [HE_T \times 1/e \times 3.6 \text{ MJ/kWh}] \times 12/295$

where:

e = Nominal gas or oil water heater efficiency = 0.75.
HE_{sc} = As defined in section 4.1.8 of this appendix.
12 = Representative average number of clothes washer self-clean cycles in a year.
295 = Representative average number of clothes washer cycles in a year.

4.1.10 *Per-cycle self-clean machine electrical energy consumption.* Calculate the per-cycle self-clean machine electrical energy consumption, ME_{sc}, expressed in kilowatt-hours per cycle, and defined as:

$ME_{sc} = E_{sc} \times 12/295$

where:

E_{sc} = Reported electrical energy consumption value, in gallons per-cycle, for the self-clean cycle as defined in section 3.10 of this appendix.
12 = Representative average number of clothes washer self-clean cycles in a year.
295 = Representative average number of clothes washer cycles in a year.

4.2 *Water consumption of clothes washers.*

4.2.1 *Per-cycle water consumption for steam wash.* Calculate the maximum, average, and minimum total water consumption, expressed in gallons per cycle (or liters per cycle), for the steam cycle and defined as:

$Qs_{max} = [Hs_x + Cs_x]$
$Qs_{avg} = [Hs_a + Cs_a]$
$Qs_{min} = [Hs_n + Cs_n]$

where:

Hs_x, Cs_x, Hs_a, Cs_a, Hs_n, and Cs_n are defined in section 3.9 of this appendix.

4.2.2 *Per-cycle water consumption for extra hot wash.* Calculate the maximum, average, and minimum total water consumption, expressed in gallons per cycle (or liters per cycle), for the extra hot wash cycle and defined as:

$Qm_{max} = [Hm_x + Cm_x]$
$Qm_{avg} = [Hm_a + Cm_a]$
$Qm_{min} = [Hm_n + Cm_n]$

where:

Hm_x, Cm_x, Hm_a, Cm_a, Hm_n, and Cm_n are defined in section 3.3 of this appendix.

4.2.3 *Per-cycle water consumption for hot wash.* Calculate the maximum, average, and minimum total water consumption, expressed in gallons per cycle (or liters per cycle), for the hot wash cycle and defined as:

$Qh_{max} = [Hh_x + Ch_x]$
$Qh_{avg} = [Hh_a + Ch_a]$
$Qh_{min} = [Hh_n + Ch_n]$

where:

Hh_x, Ch_x, Hh_a, Ch_a, Hh_n, and Ch_n are defined in section 3.4 of this appendix.

4.2.4 *Per-cycle water consumption for warm wash with cold rinse.* Calculate the maximum, average, and minimum total water consumption, expressed in gallons per cycle (or liters per cycle), for the warm wash/cold rinse cycle and defined as:

$Qw_{max} = [Hw_x + Cw_x]$
$Qw_{avg} = [Hw_a + Cw_a]$
$Qw_{min} = [Hw_n + Cw_n]$

where:

Hw_x, Cw_x, Hw_a, Cw_a, Hw_n, and Cw_n are defined in section 3.5 of this appendix.

4.2.5 *Per-cycle water consumption for warm wash with warm rinse.* Calculate the maximum, average, and minimum total water consumption, expressed in gallons per cycle (or liters per cycle), for the warm wash/warm rinse cycle and defined as:

$Qww_{max} = [Hww_x + Cww_x]$
$Qww_{avg} = [Hww_a + Cww_a]$
$Qww_{min} = [Hww_n + Cww_n]$

where:

Hww_x, Cww_x, Hww_a, Cww_a, Hww_n, and Cww_n are defined in section 3.7 of this appendix.

4.2.6 *Per-cycle water consumption for cold wash.* Calculate the maximum, average, and minimum total water consumption, expressed in gallons per cycle (or liters per cycle), for the cold wash cycle and defined as:

$Qc_{max} = [Hc_x + Cc_x]$
$Qc_{avg} = [Hc_a + Cc_a]$
$Qc_{min} = [Hc_n + Cc_n]$

where:

Hc_x, Cc_x, Hc_a, Cc_a, Hc_n, and Cc_n are defined in section 3.6 of this appendix.

4.2.7 Total weighted per-cycle water consumption for steam wash. Calculate the total weighted per cycle consumption, Qs_T, expressed in gallons per cycle (or liters per cycle) and defined as:

$Qs_T = [Qs_{max} \times F_{max}] + [Qs_{avg} \times F_{avg}] + [Qs_{min} \times F_{min}]$

where:

Qs_{max}, Qs_{avg}, Qs_{min} are defined in section 4.2.1 of this appendix.
F_{max}, F_{avg}, F_{min} are defined in Table 4.1.3 of this appendix.

4.2.8 Total weighted per-cycle water consumption for extra hot wash. Calculate the total weighted per cycle consumption, Qm_T, expressed in gallons per cycle (or liters per cycle) and defined as:

$Qm_T = [Qm_{max} \times F_{max}] + [Qm_{avg} \times F_{avg}] + [Qm_{min} \times F_{min}]$

where:

Qm_{max}, Qm_{avg}, Qm_{min} are defined in section 4.2.2 of this appendix.
F_{max}, F_{avg}, F_{min} are defined in Table 4.1.3 of this appendix.

4.2.9 *Total weighted per-cycle water consumption for hot wash.* Calculate the total weighted per cycle consumption, Qh_T, expressed in gallons per cycle (or liters per cycle) and defined as:

$Qh_T = [Qh_{max} \times F_{max}] + [Qh_{avg} \times F_{avg}] + [Qh_{min} \times F_{min}]$

where:

Qh_{max}, Qh_{avg}, Qh_{min} are defined in section 4.2.3 of this appendix.
F_{max}, F_{avg}, F_{min} are defined in Table 4.1.3 of this appendix.

4.2.10 *Total weighted per-cycle water consumption for warm wash with cold rinse.* Calculate the total weighted per cycle consumption, Qw_T, expressed in gallons per cycle (or liters per cycle) and defined as:

$Qw_T = [Qw_{max} \times F_{max}] + [Qw_{avg} \times F_{avg}] + [Qw_{min} \times F_{min}]$

where:

Qw_{max}, Qw_{avg}, Qw_{min} are defined in section 4.2.4 of this appendix.
F_{max}, F_{avg}, F_{min} are defined in Table 4.1.3 of this appendix.

4.2.11 Total weighted per-cycle water consumption for warm wash with warm rinse. Calculate the total weighted per cycle consumption, Qw_T, expressed in gallons per cycle (or liters per cycle) and defined as:

$Qww_T = [Qww_{max} \times F_{max}] + [Qww_{avg} \times F_{avg}] + [Qww_{min} \times F_{min}]$

where:

Qww_{max}, Qww_{avg}, Qww_{min} are defined in section 4.2.5 of this appendix.
F_{max}, F_{avg}, F_{min} are defined in Table 4.1.3 of this appendix.

4.2.12 *Total weighted per-cycle water consumption for cold wash.* Calculate the total weighted per cycle consumption, Qc_T, expressed in gallons per cycle (or liters per cycle) and defined as:

$Qc_T = [Qc_{max} \times F_{max}] + [Qc_{avg} \times F_{avg}] + [Qc_{min} \times F_{min}]$

where:

Qc_{max}, Qc_{avg}, Qc_{min} are defined in section 4.2.6 of this appendix.
F_{max}, F_{avg}, F_{min} are defined in Table 4.1.3 of this appendix.

4.2.13 *Total weighted per-cycle water consumption for all wash cycles.* Calculate the total weighted per cycle consumption, Q_T, expressed in gallons per cycle (or liters per cycle) and defined as:

$Q_T = [Qs_T \times TUF_s] + [Qm_T \times TUF_m] + [Qh_T \times TUF_h] + [Qw_T \times TUF_w] + [Qww_T \times TUF_{ww}] + [Qc_T \times TUF_c]$

where:

Qs_T, Qm_T, Qh_T, Qw_T, Qww_T, and Qc_T are defined in sections 4.2.7 through 4.2.12 of this appendix.

TUF_s, TUF_m, TUF_h, TUF_w, TUF_{ww}, and TUF_c are defined in Table 4.1.1 of this appendix.

4.2.14 *Per-cycle self-clean water consumption.* Calculate the total per-cycle self-clean water consumption, Q_{sc}, in gallons per cycle (or liters per cycle) and defined as:

$Q_{sc} = [H_{sc}+C_{sc}] \times 12/295$

where:

H_{sc} = As defined in section 3.10 of this appendix.

C_{sc} = As defined in 3.10 of this appendix.

12 = Representative average number of clothes washer self-clean cycles in a year.

295 = Representative average number of clothes washer cycles in a year.

4.2.15 *Water consumption factor.* Calculate the water consumption factor, WCF, expressed in gallons per cycle per cubic feet (or liter per cycle per liter), as:

$WCF = Qc_T/C$

where:

Qc_T = As defined in section 4.2.12 of this appendix.

C = As defined in section 3.1.5 of this appendix.

4.2.16 *Integrated water consumption factor.* Calculate the integrated water consumption factor, IWF, expressed in gallons per cycle per cubic feet (or liter per cycle per liter), as:

$IWF = [Q_T + Q_{sc}]/C$

where:

Q_T = As defined in section 4.2.13 of this appendix.

Q_{sc} = As defined in section 4.2.14 of this appendix.

C = As defined in section 3.1.5 of this appendix.

4.3 *Per-cycle energy consumption for removal of moisture from test load.* Calculate the per-cycle energy required to remove the moisture of the test load, D_E, expressed in kilowatt-hours per cycle and defined as:

$D_E = [(F_{max} \times \text{Maximum test load weight}) + (F_{avg} \times \text{Average test load weight}) + (F_{min} \times \text{Minimum test load weight})] \times (RMC–4\%) \times (DEF) \times (DUF)$

where:

F_{max}, F_{avg}, and F_{min} are as defined in Table 4.1.3 of this appendix

Maximum, average, and minimum test load weights are as defined in Table 5.1 of this appendix.

RMC = As defined in section 3.8.2.5, 3.8.3.3, or 3.8.4 of this appendix.

DEF = Nominal energy required for a clothes dryer to remove moisture from clothes = 0.5 kWh/lb (1.1 kWh/kg).

DUF = Dryer usage factor, percentage of washer loads dried in a clothes dryer = 0.91.

4.4 *Per-cycle combined low-power mode energy consumption.* Calculate the clothes washer combined low-power mode energy consumption per cycle, E_{TLP}, expressed in kilowatt-hours per cycle and defined as:

$E_{TLP} = [(P_{ia} \times S_{ia}) + (P_o \times S_o)] \times K_p/295$

where:

P_{ia} = Washer inactive mode power, in watts, as defined in section 3.11.1 of this appendix for clothes washers capable of operating in inactive mode; otherwise, $P_{ia} = 0$.

P_o = Washer off mode power, in watts, as defined in section 3.11.2 of this appendix for clothes washers capable of operating in off mode; otherwise, $P_o = 0$.

S_{ia} = Annual hours in inactive mode as defined as S_{oi} if no off mode is possible, $[S_{oi}/2]$ if both inactive mode and off mode are possible, and 0 if no inactive mode is possible.

S_o = Annual hours in off mode as defined as S_{oi} if no inactive mode is possible, $[S_{oi}/2]$ if both inactive mode and off mode are possible, and 0 if no off mode is possible.

S_{oi} = Combined annual hours for off and inactive mode = 8,465.

K_p = Conversion factor of watt-hours to kilowatt-hours = 0.001.

295 = Representative average number of clothes washer cycles in a year.

4.5 *Per-cycle self-clean energy consumption.* Calculate the clothes washer self-clean energy per cycle, E_{TSC}, expressed in kilowatt-hours per cycle and defined as:

$E_{TSC} = HE_{sc} + ME_{sc}$

where:

HE_{sc} = As defined in section 4.1.8 of this appendix.

ME_{sc} = As defined in section 4.1.10 of this appendix.

4.6 *Modified energy factor.* Calculate the modified energy factor, MEF, expressed in cubic feet per kilowatt-hour per cycle (or liters per kilowatt-hour per cycle) and defined as:

$MEF = C/(E_{TE} + D_E)$

where:

C = As defined in section 3.1.5 of this appendix.

E_{TE} = As defined in section 4.1.7 of this appendix.

D_E = As defined in section 4.3 of this appendix.

4.7 *Integrated modified energy factor.* Calculate the integrated modified energy factor, IMEF, expressed in cubic feet per kilowatt-hour per cycle (or liters per kilowatt-hour per cycle) and defined as:

$IMEF = C/(E_{TE} + D_E + E_{TLP} + E_{TSC})$

where:

C = As defined in section 3.1.5 of this appendix.

E_{TE} = As defined in section 4.1.7 of this appendix.

D_E = As defined in section 4.3 of this appendix.

E_{TLP} = As defined in section 4.4 of this appendix.

E_{TSC} = As defined in section 4.5 of this appendix.

5. Test Loads

TABLE 5.1—TEST LOAD SIZES

Container volume		Minimum load		Maximum load		Average load	
cu. ft. ≥ <	liter ≥ <	lb	kg	lb	kg	lb	kg
0–0.8	0–22.7	3.00	1.36	3.00	1.36	3.00	1.36
0.80–0.90	22.7–25.5	3.00	1.36	3.50	1.59	3.25	1.47
0.90–1.00	25.5–28.3	3.00	1.36	3.90	1.77	3.45	1.56
1.00–1.10	28.3–31.1	3.00	1.36	4.30	1.95	3.65	1.66
1.10–1.20	31.1–34.0	3.00	1.36	4.70	2.13	3.85	1.75
1.20–1.30	34.0–36.8	3.00	1.36	5.10	2.31	4.05	1.84
1.30–1.40	36.8–39.6	3.00	1.36	5.50	2.49	4.25	1.93
1.40–1.50	39.6–42.5	3.00	1.36	5.90	2.68	4.45	2.02
1.50–1.60	42.5–45.3	3.00	1.36	6.40	2.90	4.70	2.13
1.60–1.70	45.3–48.1	3.00	1.36	6.80	3.08	4.90	2.22
1.70–1.80	48.1–51.0	3.00	1.36	7.20	3.27	5.10	2.31
1.80–1.90	51.0–53.8	3.00	1.36	7.60	3.45	5.30	2.4
1.90–2.00	53.8–56.6	3.00	1.36	8.00	3.63	5.50	2.49
2.00–2.10	56.6–59.5	3.00	1.36	8.40	3.81	5.70	2.59
2.10–2.20	59.5–62.3	3.00	1.36	8.80	3.99	5.90	2.68
2.20–2.30	62.3–65.1	3.00	1.36	9.20	4.17	6.10	2.77

TABLE 5.1—TEST LOAD SIZES—Continued

Container volume		Minimum load		Maximum load		Average load	
cu. ft. ≥ <	liter ≥ <	lb	kg	lb	kg	lb	kg
2.30–2.40	65.1–68.0	3.00	1.36	9.60	4.35	6.30	2.86
2.40–2.50	68.0–70.8	3.00	1.36	10.00	4.54	6.50	2.95
2.50–2.60	70.8–73.6	3.00	1.36	10.50	4.76	6.75	3.06
2.60–2.70	73.6–76.5	3.00	1.36	10.90	4.94	6.95	3.15
2.70–2.80	76.5–79.3	3.00	1.36	11.30	5.13	7.15	3.24
2.80–2.90	79.3–82.1	3.00	1.36	11.70	5.31	7.35	3.33
2.90–3.00	82.1–85.0	3.00	1.36	12.10	5.49	7.55	3.42
3.00–3.10	85.0–87.8	3.00	1.36	12.50	5.67	7.75	3.52
3.10–3.20	87.8–90.6	3.00	1.36	12.90	5.85	7.95	3.61
3.20–3.30	90.6–93.4	3.00	1.36	13.30	6.03	8.15	3.7
3.30–3.40	93.4–96.3	3.00	1.36	13.70	6.21	8.35	3.79
3.40–3.50	96.3–99.1	3.00	1.36	14.10	6.40	8.55	3.88
3.50–3.60	99.1–101.9	3.00	1.36	14.60	6.62	8.80	3.99
3.60–3.70	101.9–104.8	3.00	1.36	15.00	6.80	9.00	4.08
3.70–3.80	104.8–107.6	3.00	1.36	15.40	6.99	9.20	4.17
3.80–3.90	107.6–110.4	3.00	1.36	15.80	7.16	9.40	4.26
3.90–4.00	110.4–113.3	3.00	1.36	16.20	7.34	9.60	4.35
4.00–4.10	113.3–116.1	3.00	1.36	16.60	7.53	9.80	4.45
4.10–4.20	116.1–118.9	3.00	1.36	17.00	7.72	10.00	4.54
4.20–4.30	118.9–121.8	3.00	1.36	17.40	7.90	10.20	4.63
4.30–4.40	121.8–124.6	3.00	1.36	17.80	8.09	10.40	4.72
4.40–4.50	124.6–127.4	3.00	1.36	18.20	8.27	10.60	4.82
4.50–4.60	127.4–130.3	3.00	1.36	18.70	8.46	10.85	4.91
4.60–4.70	130.3–133.1	3.00	1.36	19.10	8.65	11.05	5.00
4.70–4.80	133.1–135.9	3.00	1.36	19.50	8.83	11.25	5.10
4.80–4.90	135.9–138.8	3.00	1.36	19.90	9.02	11.45	5.19
4.90–5.00	138.8–141.6	3.00	1.36	20.30	9.20	11.65	5.28
5.00–5.10	141.6–144.4	3.00	1.36	20.70	9.39	11.85	5.38
5.10–5.20	144.4–147.2	3.00	1.36	21.10	9.58	12.05	5.47
5.20–5.30	147.2–150.1	3.00	1.36	21.50	9.76	12.25	5.56
5.30–5.40	150.1–152.9	3.00	1.36	21.90	9.95	12.45	5.65
5.40–5.50	152.9–155.7	3.00	1.36	22.30	10.13	12.65	5.75
5.50–5.60	155.7–158.6	3.00	1.36	22.80	10.32	12.90	5.84
5.60–5.70	158.6–161.4	3.00	1.36	23.20	10.51	13.10	5.93
5.70–5.80	161.4–164.2	3.00	1.36	23.60	10.69	13.30	6.03
5.80–5.90	164.2–167.1	3.00	1.36	24.00	10.88	13.50	6.12
5.90–6.00	167.1–169.9	3.00	1.36	24.40	11.06	13.70	6.21

Notes: (1) All test load weights are bone dry weights.
(2) Allowable tolerance on the test load weights are ± 0.10 lbs (0.05 kg).

6. Waivers and Field Testing

6.1 *Waivers and Field Testing for Nonconventional Clothes Washers.* Manufacturers of nonconventional clothes washers, such as clothes washers with adaptive control systems, must submit a petition for waiver pursuant to 10 CFR 430.27 to establish an acceptable test procedure for that clothes washer if the washer cannot be tested pursuant to the DOE test procedure or the DOE test procedure yields results that are so unrepresentative of the clothes washer's true energy consumption characteristics as to provide materially inaccurate comparative data. In such cases, field testing may be appropriate for establishing an acceptable test procedure. The following are guidelines for field testing which may be used by manufacturers in support of petitions for waiver. These guidelines are not mandatory and the Department may determine that they do not apply to a particular model. Depending upon a manufacturer's approach for conducting field testing, additional data may be required. Manufacturers are encouraged to communicate with the Department prior to the commencement of field tests which may be used to support a petition for waiver. Section 6.3 of this appendix provides an example of field testing for a clothes washer with an adaptive water fill control system. Other features, such as the use of various spin speed selections, could be the subject of field tests.

6.2 *Nonconventional Wash System Energy Consumption Test.* The field test may consist of a minimum of 10 of the nonconventional clothes washers (''test clothes washers'') and 10 clothes washers already being distributed in commerce (''base clothes washers''). The tests should include a minimum of 50 energy test cycles per clothes washer. The test clothes washers and base clothes washers should be identical in construction except for the controls or systems being tested. Equal numbers of both the test clothes washer and the base clothes washer should be tested simultaneously in comparable settings to minimize seasonal or consumer laundering conditions or variations. The clothes washers should be monitored in such a way as to accurately record the total energy consumption per cycle. At a minimum, the following should be measured and recorded throughout the test period for each clothes washer: Hot water usage in gallons (or liters), electrical energy usage in kilowatt-hours, and the cycles of usage.

The field test results would be used to determine the best method to correlate the rating of the test clothes washer to the rating of the base clothes washer. If the base clothes washer is rated at A kWh per year, but field tests at B kWh per year, and the test clothes washer field tests at D kWh per year, the test unit would be rated as follows:

$A \times (D/B) = G$ kWh per year

6.3 *Adaptive water fill control system field test.* Section 3.2.3.1 of this appendix defines the test method for measuring energy consumption for clothes washers which incorporate control systems having both adaptive and alternate cycle selections. Energy consumption calculated by the method defined in section 3.2.3.1 of this appendix assumes the adaptive cycle will be used 50 percent of the time. This section can be used to develop field test data in support of a petition for waiver when it is believed that the adaptive cycle will be used more

than 50 percent of the time. The field test sample size should be a minimum of 10 test clothes washers. The test clothes washers should be representative of the design, construction, and control system that will be placed in commerce. The duration of field testing in the user's house should be a minimum of 50 energy test cycles, for each unit. No special instructions as to cycle selection or product usage should be given to the field test participants, other than inclusion of the product literature pack which would be shipped with all units, and instructions regarding filling out data collection forms, use of data collection equipment, or basic procedural methods. Prior to the test clothes washers being installed in the field test locations, baseline data should be developed for all field test units by conducting laboratory tests as defined by section 1 through section 5 of this appendix to determine the energy consumption, water consumption, and remaining moisture content values. The following data should be measured and recorded for each wash load during the test period: wash cycle selected, the mode of the clothes washer (adaptive or manual), clothes load dry weight (measured after the clothes washer and clothes dryer cycles are completed) in pounds, and type of articles in the clothes load (*e.g.,* cottons, linens, permanent press). The wash loads used in calculating the in-home percentage split between adaptive and manual cycle usage should be only those wash loads which conform to the definition of the energy test cycle.

Calculate:

T = The total number of energy test cycles run during the field test.

T_a = The total number of adaptive control energy test cycles.

T_m = The total number of manual control energy test cycles.

The percentage weighting factors:

$P_a = (T_a/T) \times 100$ (the percentage weighting for adaptive control selection)

$P_m = (T_m/T) \times 100$ (the percentage weighting for manual control selection)

Energy consumption (HE_T, ME_T, and D_E) and water consumption (Q_T), values calculated in section 4 of this appendix for the manual and adaptive modes, should be combined using P_a and P_m as the weighting factors.

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Part IV

Environmental Protection Agency

40 CFR Part 50

Approval and Promulgation of Implementation Plans; California; 2008 San Joaquin Valley $PM_{2.5}$ Plan and 2007 State Strategy; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2010–0516; FRL–9482–2]

Approval and Promulgation of Implementation Plans; California; 2008 San Joaquin Valley $PM_{2.5}$ Plan and 2007 State Strategy

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving in part and disapproving in part state implementation plan (SIP) revisions submitted by California to provide for attainment of the 1997 fine particulate matter ($PM_{2.5}$) national ambient air quality standards in the San Joaquin Valley (SJV). These SIP revisions are the SJV 2008 $PM_{2.5}$ Plan (revised 2010 and 2011) and SJV-related provisions of the 2007 State Strategy (revised 2009 and 2011). EPA is approving the emissions inventory, the reasonably available control measures/reasonably available control technology demonstration, reasonable further progress demonstration, attainment demonstration and associated air quality modeling, and the transportation conformity motor vehicle emissions budgets. EPA is also granting California's request to extend the attainment deadline for the SJV to April 5, 2015 and approving commitments to measures and reductions by the SJV Unified Air Pollution Control District and the California Air Resources Board. Finally, it is disapproving the SIP's contingency provisions and issuing a protective finding for transportation conformity determinations under 40 CFR 93.120(a)(3) for this disapproval.

DATES: The rule is effective January 9, 2012.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2010–0516 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region 9, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some may be publicly available only at the hard copy location (*e.g.,* copyrighted material) and some may not be publicly available at either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section below.

Copies of the SIP materials are also available for inspection at the following locations:

- California Air Resources Board, 1001 I Street, Sacramento, California 95812
- San Joaquin Valley Air Pollution Control District, 1990 E. Gettysburg, Fresno, California 93726.

The SIP materials are also electronically available at: *http://www.valleyair.org/Air_Quality_Plans/PM_Plans.htm* and *http://www.arb.ca.gov/planning/sip/sip.htm.*

FOR FURTHER INFORMATION CONTACT: Frances Wicher, Air Planning Office (AIR–2), U.S. Environmental Protection Agency, Region 9, (415) 972–3957, *wicher.frances@epa.gov*

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

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I. Summary of EPA's Proposed and Final Actions on the 2008 State Implementation Plan for Attainment of the 1997 $PM_{2.5}$ Standards in the San Joaquin Valley

On July 13, 2011, EPA proposed to approve in part and disapprove in part California's state implementation plan (SIP) for attaining the 1997 fine particulate ($PM_{2.5}$) national ambient air quality standards (NAAQS) in the San Joaquin Valley (SJV). *See* 76 FR 41338. California developed this SIP to provide for expeditious attainment of the $PM_{2.5}$ standards in the SJV and to meet other applicable $PM_{2.5}$ planning requirements in Clean Air Act (CAA) section 172(c) and EPA's $PM_{2.5}$ implementation rule.[1]

In all, California has made six submittals to address the $PM_{2.5}$ SIP planning requirements for the SJV. The two principal ones are the SJV Unified Air Pollution Control District's (SJVUAPCD or District) 2008 $PM_{2.5}$ Plan (amended 2010 and 2011) and the California Air Resources Board's (CARB) State Strategy for California's 2007 State Implementation Plan (amended 2009 and 2011).[2] Together, the 2008 $PM_{2.5}$ Plan and the 2007 State Strategy present a comprehensive and innovative strategy for attaining the 1997 $PM_{2.5}$ standards in the SJV.

In our July 2011 notice, EPA proposed multiple approval actions on the SJV 2008 $PM_{2.5}$ SIP. First, we proposed to approve the SIP's reasonably available control measure/reasonably available control technology (RACM/RACT) demonstration, reasonable further progress (RFP) demonstration, attainment demonstration and associated air quality modeling, base year emissions inventory; air quality modeling; and motor vehicle emissions budgets.[3] Second, we proposed to approve enforceable commitments by both the District and CARB to certain measures and specific amounts of emissions reductions. Third, we proposed to concur with the State's determination that volatile organic compounds (VOC) and ammonia are not attainment plan precursors for attainment of the 1997 $PM_{2.5}$ NAAQS in

[1] ''The Clean Air Fine Particle Implementation Rule for the 1997 $PM_{2.5}$ NAAQS,'' 72 FR 20586 (April 25, 2007) and codified at 40 CFR part 51, subpart Z ($PM_{2.5}$ implementation rule).

[2] These SIP submittals are:

1. SJVUAPCD, *2008 $PM_{2.5}$ Plan,* adopted on April 30, 2008 by the SJVUAPCD and on May 22, 2008 by CARB, submitted on June 30, 2008.
2. CARB, *Proposed State Strategy for California's 2007 State Implementation Plan,* as amended and adopted on September 27, 2007 by CARB, submitted on November 16, 2007.
3. CARB, *Status Report on the State Strategy for California's 2007 State Implementation Plan (SIP) and Proposed Revisions to the SIP Reflecting Implementation of the 2007 State Strategy* (pages 11–27 only), adopted on April 24, 2009 by CARB, submitted on August 12, 2009.
4. SJVUAPCD, *2008 $PM_{2.5}$ Plan Amendment to Extend the Rule 4905 Amendment Schedule,* adopted on June 17, 2010 by the SJVUAPCD, submitted on September 15, 2010
5. CARB, *Progress Report on Implementation of $PM_{2.5}$ State Implementation Plans (SIP) for the South Coast and San Joaquin Valley Air Basins and Proposed SIP Revisions* (Appendices B, C and D only), adopted on April 28, 2011 by CARB, submitted on May 18, 2011. ''2011 Progress Report.''
6. CARB, *8-Hour Ozone State Implementation Plan Revisions and Technical Revisions to the $PM_{2.5}$ State Implementation Plan Transportation Conformity Budgets for the South Coast and San Joaquin Valley Air Basins,* adopted on July 21, 2011 by CARB and submitted on July 29, 2011. (''2011 Ozone SIP Revisions'') Only the $PM_{2.5}$ motor vehicle emissions budgets in this submittal are addressed in today's action.

[3] The 2011 Progress Report contained budgets that were not approvable because they included emissions reductions from a rule that was ineligible for SIP credit. These budgets also included data entry errors. See 76 FR 41338, 41360. We proposed instead to approve alternative budgets that CARB had developed and posted for public comment as part of its 2011 Ozone SIP Revisions and stated that the approval was contingent on our receipt of the SIP revision containing the revised budgets. *Id.* CARB submitted that SIP revision on July 29, 2011.

the SJV. Lastly, we proposed to grant California's request to extend the attainment date for the San Joaquin Valley $PM_{2.5}$ nonattainment area to April 5, 2015. *See* 76 FR 41338, 41361.

EPA also proposed to disapprove the contingency measures provisions of the SJV 2008 $PM_{2.5}$ SIP for failing to provide sufficient emissions reductions.[4] *Id.*

A more detailed discussion of each of California's SIP submittals for the SJV area, the CAA and EPA requirements applicable to them, and our evaluation and proposed actions can be found in our July 2011 proposal (76 FR 41338) and the technical support document (TSD) for this final action.[5]

Our July 2011 proposal was the second time that EPA proposed action on California's SJV 2008 $PM_{2.5}$ SIP. On November 30, 2010 (75 FR 74518), EPA proposed to disapprove the majority of the provisions in this SIP. During the comment period for the November 2010 proposal, we received several comment letters from the public as well as comment letters from CARB and the District. Subsequent to the close of the comment period, CARB adopted and submitted revisions to the SJV $PM_{2.5}$ Plan and 2007 State Strategy. After considering information contained in the comment letters and the supplemental SIP submittals, we issued the July 2011 proposed rule which substantially amended our November 2010 proposal.

EPA is today approving most elements of the SJV 2008 $PM_{2.5}$ SIP based on our conclusion that they comply with applicable CAA requirements and provides for expeditious attainment of the 1997 $PM_{2.5}$ standards in the San Joaquin Valley. We are also today disapproving the SIP's contingency measure provisions because they do not provide sufficient emissions reductions. We are continuing to working with the State and District to identify additional control measures and incentive programs that meet the CAA's requirements for contingency measures consistent with EPA regulations and policy.

II. Response to Public Comments Received on the Proposals

As part of this final action, EPA has considered and provided responses to the comments submitted in response to both the November 2010 and the July 2011 proposals. Comments on our proposals were received from:

The Center on Race, Poverty & the Environment on behalf of the Association of Irritated Residents (AIR) and other San Joaquin Valley-based environmental and community organizations. AIR submitted comments on both proposals.

Earthjustice, on behalf of Medical Advocates for Healthy Air and other San Joaquin Valley-based environmental and community organizations. Earthjustice submitted comments on both proposals.

SJVUAPCD provided comments on the November 2010 proposal.

CARB provided two comment letters on our November 2010 proposal. The first transmitted air quality modeling documentation and the second provided comments on the proposal.[6]

Tom Frantz, President, AIR, submitted comments on our November 2010 proposal.

Arthur D. Unger submitted comments on our November 2010 proposal.

A copy of these comment letters and their attachments can be found in the docket for this final rule.

In the following sections, we summarize our responses to the most significant comments received on the proposals. Our full responses to all comments received can be found in the ''Response to Comments'' section (section III) of the TSD for this final rule.

A. Comments on the Proposed Action on the Emissions Inventory

Comment: Earthjustice comments on the importance of emissions inventories, noting that CAA section 172(c)(3) requires that nonattainment plans ''include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area.'' Earthjustice objects to EPA's proposal to approve the inventories in the 2008 $PM_{2.5}$ SIP because they were current and accurate ''at the time the Plan was developed and submitted,'' arguing that such language is not in the CAA and is not a reasonable extension of Congress's intent, which is to ensure the adoption and approval of SIPs that will achieve clean air meeting the NAAQS. Earthjustice argues that an inventory that is ''known to be wrong'' undermines the modeling demonstration of the emissions reductions needed to attain, and that EPA's interpretation suggests that revisions to an inventory are needed only when it is found that the inventory is not current or accurate as of the date it is submitted. Earthjustice argues that such an interpretation undermines any assurance that ''the requirements of [Part D of the CAA] are met.'' Finally, Earthjustice asserts that ''EPA cannot approve these inventories as complying with the requirements of section 172(c)(3) knowing that the data are not valid for purposes of building an attainment plan.''

Response: EPA does not dispute the importance of emissions inventories. We evaluated the emissions inventories in the 2008 $PM_{2.5}$ Plan to determine whether they satisfy the requirements of CAA section 172(c)(3) and adequately support the Plan's RACM, RFP and attainment demonstrations. Based on this evaluation, we have concluded that the Plan's 2005 base year emissions inventory was based on the most current and accurate information available to the State and District at the time the Plan was developed and submitted and comprehensively addresses all source categories in the SJV area, consistent with applicable CAA requirements and EPA guidance. *See* 76 FR 41338 at 41342–41343 and 2011 Proposal TSD[7] at section IIA; see also ''General Preamble for Implementation of Title I of the Clean Air Act Amendments of 1990,'' 57 FR 13498 at 13502 (April 16, 1992) (''General Preamble'').

We do not agree with Earthjustice's suggestion that EPA interprets the CAA to require revisions to an emissions inventory only when it is found that such inventory is not current or accurate as of the date it is submitted. Significant changes to a base year inventory that undermine the assumptions in an attainment demonstration may, on a case by case basis, call for a reevaluation of the modeling or other planning analyses supporting that demonstration. In this case, however, as discussed in the proposed rule (76 FR 41562, 41567) and in section II.A. below, we have concluded that the State's changes to its methodologies for estimating future

[4] We also proposed to disapprove a commitment by the District to adopt revisions to its Rule 4702 ''Reciprocating Internal Combustion Engines'' by December 2010 because that date had passed and the District had not adopted revisions to the rule. We stated in the proposal that we would not finalize this proposed disapproval if the District adopted revisions to the rule by the time of our final action on the SIP. See 76 FR 41338, 41361. On August 18, 2011, the District adopted the revisions to Rule 4702; therefore, we are not finalizing our proposed disapproval of this commitment.

[5] ''Technical Support Document and Response to Comments Final Rule on the San Joaquin Valley 2008 $PM_{2.5}$ State Implementation Plan,'' Air Division, U.S. EPA Region 9, September 30, 2011. The TSD can be found in the docket for this rulemaking.

[6] The majority of CARB's and the District's comments addressed the November 2010 proposed disapprovals and EPA's grounds for them. These comments were, for the most part, addressed by our July 2011 amended proposal.

[7] ''Technical Support Document for the Revised Proposed Rulemaking Action on the San Joaquin Valley 2008 $PM_{2.5}$ Plan and the San Joaquin Valley Portions of the Revised 2007 State Strategy,'' Air Division, U.S. EPA, Region 9, June 29, 2011, ''2011 Proposal TSD.''

emissions do not significantly affect the 2002 base year inventories and, consequently, do not undermine the modeling or other analyses that rely on those inventories and that support the attainment demonstration in the Plan. Based on this technical assessment, we have concluded that it is not necessary in this case for the State to submit a revised base year inventory. We note that states are required to report comprehensive emissions inventories to EPA every three years under the Air Emissions Reporting Requirements in 40 CFR part 51, subpart A. *See* 40 CFR 51.30(b).

CAA section 172(b) provides that ''the State containing [a nonattainment] area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of [section 172(c) and section 110]'' on the schedule established by EPA, and section 172(c) contains, inter alia, the requirement that nonattainment plans ''shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area.'' We believe it is reasonable to read these provisions together as requiring that the State submit an inventory that is ''comprehensive, accurate, [and] current'' at the time the State submitted it to EPA, rather than requiring that the State continually revise its plan as new emissions data becomes available. *See* Brief of Respondents, EPA, in *Sierra Club, et al.* v. *U.S. EPA, et al.,* Case Nos. 10–71457 and 10–71458 (consolidated), May 5, 2011. States could never effectively plan for air quality improvements if they had to constantly revise their inventories as new data became available. Air quality planning is an iterative process and states and EPA must rely on the best available data at the time the plans are created.

Comment: Throughout its comments, AIR uses the term ''recession reductions'' which it defines as ''the emissions reductions the [C]ARB claims have occurred as a result of the recession.''

Response: In its comments, AIR calculates what it considers ''the total reductions from baseline reductions without recession reductions'' as 11 tpd of $PM_{2.5}$, 195 tons per day (tpd) of nitrogen oxides (NO_X), and 0.9 tpd of sulfur oxides (SO_X). These figures are the same as the calculated reductions from the baseline measures prior to the updates to the 2014 baseline inventory.[8] Based on these calculations, AIR seems to consider the ''recession reductions'' to be the difference between the 2014 baseline inventory submitted with the 2008 $PM_{2.5}$ Plan in 2008 and the revised 2014 baseline inventory submitted with the 2011 Progress Report in 2011. By labeling this difference as ''recession reductions,'' AIR attributes the differences entirely to revisions to the economic forecasts. This is not entirely correct.

Changes to the 2014 baseline inventory include revisions not only to the economic forecasts but also to a variety of other factors (out-of-state vehicle miles traveled (VMT) estimates, cumulative mileage, equipment populations, load factors, and hours of use, *etc.*) used to calculate emissions from trucks, buses, and certain off-road equipment categories. *See* 2011 Progress Report, Appendix E. CARB estimates that revisions to the truck inventory excluding recession impacts reduced truck emissions statewide by 10 percent from the 2014 baseline levels estimated when the Truck rule was adopted in 2008 while recession impacts reduced the baseline level by a further 7 percent. *See* 2010 Truck Rule ISOR, p. 19.[9] For off-road equipment, CARB estimates that inventory changes independent of the recession were responsible for half the overall reduction in projected statewide emissions. *See* 2010 Off Road Rule ISOR, p. 17.[10] We note that these figures are average statewide figures and not specific to the SJV.

Comment: AIR contends that in the 2011 Progress Report, CARB first claims that the reduced economic activity caused by the recession has reduced 2014 emissions levels in the SJV by 2.7 tpd of $PM_{2.5}$, 63.1 tpd of NO_X and 0.1 tpd of SO_X. AIR further contends that CARB claims that the recession has caused current inventories of the goods movement and construction sectors to be lower than projected in the 2008 $PM_{2.5}$ Plan. Finally, citing EPA's statement in the 2011 Proposal TSD about the effect of the 2007–2009 economic recession on activity levels in the State's construction and goods movement sectors, AIR asserts that accounting for the recession through inventory adjustments is improper.

Response: CARB does not claim that the recession alone has reduced the projected 2014 baseline emissions in the SJV nor did it provide the numbers cited by AIR. As discussed in the response to the preceding comment, revisions to the baseline inventory took into account not only changes to the State's economic forecasts but also updated information on out-of-state VMT estimates, cumulative mileage, equipment populations, and other data used to calculate emissions from trucks, buses, and certain off-road equipment. The emissions reduction figures that AIR ascribes to CARB are figures EPA calculated using data provided by CARB.

EPA uses the phrase ''adjustments to the baseline'' to refer to the difference between the 2014 baseline initially submitted in the 2008 SJV $PM_{2.5}$ Plan and the recently revised 2014 baseline as submitted in the 2011 Progress Report. This ''adjustments to baseline'' figure is nothing more than EPA's summary of the overall impact of both recession and non-recession related changes between the two projected inventories. EPA calculated this adjustment from summary data CARB provided in Appendix E of the 2011 Progress Report. The adjustment represents the net results of CARB's changes to its inventories rather than the changes themselves.

CARB revised its inventories for trucks and diesel off-road equipment to incorporate new and better data including new research on truck travel within California. *See* 2010 Truck Rule ISOR, Appendix G. These revisions were not mere adjustments to previous inventories but thorough reviews of much of the data that goes into estimating emissions from these sources. *See* 2010 Truck Rule ISOR, Appendix G and 2010 Off-Road Rule ISOR, Appendix D.[11] These inventory revisions also included review of current and future activity data (such as fuel consumption, diesel fuel sales,

[8] See line D on Table 7 in the November 30, 2010 proposed action on the SJV $PM_{2.5}$ SIP at 75 FR 74518. On this table, the baseline NO_X reductions are listed as 199.2 tpd but include 4.2 tpd of uncreditable reductions that are not included in AIR's numbers. By ''baseline inventories'' or ''projected baseline inventories,'' we mean projected emissions inventories for future years that account for, among other things, the ongoing effects of economic growth and adopted emissions control requirements. A 2014 baseline inventory is important because this year is the ''attainment year,'' the year by which all reductions needed for attainment need to be in place for the SJV. See 40 CFR 51.1007(b).

[9] CARB, ''Staff Report: Initial State of Reasons for Proposed Rulemaking, Proposed Amendments to the Truck and Bus Regulations, The Drayage Truck Regulation and the Tractor-Trailer Greenhouse Gas Regulation,'' October 2010 (''2010 Truck Rule ISOR'').

[10] CARB Staff Report: Initial Statement of Reasons for Proposed Amendments to the Regulation for In-Use Off-Road Diesel-Fueled Fleets and the Off-Road Large Spark-Ignition Fleet Requirements, October 2010, including Appendix D1 (''2010 Off-Road Rule ISOR'').

[11] For an overview of these changes and their results, *see* the presentation to the CARB Board by CARB's Planning and Technical Support Division on November 18, 2010, entitled, ''Diesel Inventory Improvements for Regulatory Development,'' available at *http://www.arb.ca.gov/board/books/2010/111810/10-10-9pres.pdf* and in the docket for this rule.

trucking industry tonnage reports, truck sales trends, and truck registration data) for these categories as well as economic forecasts from a number of reputable sources.[12] Throughout its development of these revisions, CARB held workshops seeking public review and input into its work. *See* 2010 Truck Rule ISOR, p. 13.

Emissions projections are a function of change in activity (growth or decline) combined with changes in the emissions rate or controls applicable to emissions sources. Projected inventories are, therefore, necessarily affected by forecasts of industrial growth, population growth, and transportation growth, among other factors.[13] EPA guidance emphasizes the importance of developing reliable methods for estimating future source activity levels as part of the SIP planning process.[14]

We disagree with AIR's assertion that ''EPA claims that the ARB has opted to take credit for the decrease in the inventory in the attainment demonstration as 'a line-item adjustment to the baseline inventories.' '' EPA stated in the 2011 Proposal TSD (pg. 18) that ''California is reflecting these recession impacts as a line-item adjustment to the baseline inventories.'' This statement was incorrect and should have read that EPA (not CARB) is reflecting the recession impacts as a line-item adjustment to the baseline inventories. EPA believes this adjustment is appropriate in light of the impact of these emissions changes on the baseline. We should have also been clearer that the 2014 adjustments included the technical revisions to the inventory that are discussed on page 19 of the 2011 Proposal TSD.

Finally, we note that although AIR objects categorically to the revisions to the projected emissions inventories based on CARB's revised economic forecasts, it provides no information to refute CARB's extensive documentation of the impact of the economic recession on air pollution generating activity. It also provides no information to refute CARB's non-recession related revisions to the projected inventories.

B. Comments on the Proposed Action on the Air Quality Modeling

Comment: Earthjustice and AIR comment that CARB's emissions inventory update necessitates new attainment demonstration modeling. AIR alleges that EPA's 2011 Proposal TSD stated that updates should trigger new modeling. AIR notes EPA's statement in that TSD that the model underpredicts. In addition, AIR questions EPA's reliance on unreviewed model sensitivity results from CARB as the basis for not requiring new modeling. Earthjustice comments that the difficulty of performing new modeling is not a valid reason for approving an erroneous attainment demonstration. It adds that EPA's method for assessing the effect of the inventory update has the ''obvious flaw'' that it relies on design value changes to within hundredths of a percent, starting from design values that are, according to Earthjustice, acknowledged to be erroneous.

Response: While some large emissions inventory changes might indeed necessitate new modeling, EPA does not agree that the inventory changes were large enough to substantially affect the SJV modeling conclusions, or to invalidate the SJV attainment demonstration. As EPA stated in the 2011 Proposal TSD (p. 47), ideally new modeling would be performed when an area's emissions inventory is changed. However, since the cost in time and resources of remodeling and consequent reworking of a plan is not trivial, administrative necessity requires a judgment call about when changes are large enough to merit new modeling; there is no automatic trigger. An important criterion in making this judgment is whether the changes would affect the conclusion that the plan's emissions reductions are adequate for attaining the NAAQS. Another consideration is the uncertainty inherent in modeling; although model results may be reported to several decimal places, model performance goals for fractional bias are typically in the range of 30 percent. Plan's Regional Model Performance Analysis,[15] p.12, and EPA Guidance [16] Appendix B. Small changes in the emissions inventory could be in the range of the ''noise'' of the model. This is not to discount the importance of an accurate emissions inventory, but rather to make the point that relatively small changes in inventory estimates do not necessarily invalidate a model application. EPA finds that the 5–6 percent base year emissions decreases due to the inventory updates in this case are relatively small.

EPA did assess the effect of the emissions inventory improvements on the attainment demonstration, using a procedure described in the 2011 Proposal TSD and other supporting documents. EPA did note in the 2011 Proposal TSD (p. 48) that the emissions update revealed some model bias. The model appears to be underpredicting (biased low): Its emissions inputs are now known to be too high, so its predicted concentrations should have been higher, too. Model bias is an important issue that modelers address in developing the model application for a specific area and pollution episode, through testing and refinement of a model's many inputs. The bias problem is somewhat ameliorated by the use of models in a relative sense via ''relative reduction factors'' (RRFs), as recommended in EPA Guidance (p. 20). The various influences that lead to model underestimation in the base year would also be expected to cause underestimation in the attainment year, and these tend to cancel out in the RRF ratio calculation used to project the future effect of controls. In other words, the effect of model bias is minimized when it is accounted for at both end points, the base and attainment years. In a similar vein, EPA assessed the effect of the emissions update on the attainment demonstration, essentially by removing the bias revealed by the update from both the base year and the attainment year.[17] The bias was estimated by combining the emissions changes with an estimate of model $PM_{2.5}$ sensitivity per unit of emissions change. The effect of removing the bias by this procedure was to increase predicted attainment year annual $PM_{2.5}$ design values by 1–2 percent. EPA finds that this is small enough to be considered

[12] *See* CARB, ''ARB Staff Assessment of the Impact of the Economy on California Trucking Activity and Emissions 2006–2014,'' draft December 2009, available in the docket for this rule. Sources of economic data included California Department of Finance, California Legislative Analyst's Office, California Energy Commission, UCLA Anderson School, Beacon Economics, University of the Pacific, Congressional Budget Office, and US Energy Information Agency. *Id.* pp. 11–12.

[13] *See* ''Emission Projections,'' STAPPA/ALAPCO/EPA Emissions Inventory Improvement Project, Volume X (December 1999) at 1–1 (available at *http://www.epa.gov/ttnchie1/eiip/techreport/volume10/x01.pdf*).

[14] See ''Procedures for Preparing Emissions Projections,'' EPA Office of Air Quality Planning and Standards, EPA–450/4–91–019 (July 1991) at p. 6 and section III.

[15] The ''Regional Model Performance Analysis'' is an appendix to the 2008 $PM_{2.5}$ Plan.

[16] EPA ''Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for the 8-Hour Ozone and $PM_{2.5}$ NAAQS and Regional Haze,'' April 2007. (''EPA Guidance'').

[17] This procedure is in some ways parallel to but not the same as the RRF calculation and could be applied even if the model were not used in a relative sense. The inventory estimates the emissions reduction between the base and future years. An RRF scales the monitored design value using the relative model response to a given emissions reduction estimate, in order to account for that reduction. The procedure here scales the model's future predictions using model sensitivity, in order to account for changes in the emissions reduction estimate.

within the ''noise'' of the model and does not change the overall modeling conclusions. But even with this increase added in, the predicted concentrations meet the NAAQS. This is a quantitative showing that the emissions updates are small enough that they do not invalidate the attainment demonstration.

As described in the 2011 Proposal TSD (section II.B), EPA reviewed the development of the model application, the procedures used to develop the model inputs, model testing methods and performance statistics, and the methods used to compute RRFs and attainment year $PM_{2.5}$ design values. EPA finds that CARB applied these methods appropriately, including to the sensitivity results and believes that these modeling inputs and RRF calculations were carried out as described by CARB. As a result, we find that the sensitivity results provide a reasonable basis for assessing the effect of the inventory update on the attainment demonstration.

EPA does not agree with Earthjustice that starting from the Plan's modeled design values and ending with small design value changes constitute flaws in the procedure for estimating the effect of the baseline inventory revisions. All modeling has uncertainty and bias including any new modeling that would be done using the updated emissions inventory estimates. Every modeling result is an approximation and is likely to contain errors. Administrative necessity, therefore, requires a judgment call about whether such problems are substantial enough to impact regulatory decisions. Modeling experts from regulatory agencies, academia, and consulting firms were involved in developing the SJV modeling. It underwent successful diagnostic testing and performs well. EPA finds that it continues to constitute an adequate basis for the attainment demonstration.

Further, EPA believes that the original modeling is basically sound in how it portrays SJV atmospheric chemistry and transport and that results derived from model sensitivity tests are a reasonable approximation to what would result from new modeling with the updated inventory. EPA's procedure for estimating the effect of the inventory changes using model sensitivity results does make a number of assumptions: Emissions changes are small enough that the model response is linear, model sensitivity is similar in the starting and ending years, and the spatial and temporal distribution of emissions is little changed with the inventory update. EPA believes that these assumptions are reasonable and that the procedure it used provides strong evidence for the attainment demonstration's validity.

As for the smallness of the design value changes resulting from the procedure, EPA does not believe this is a substantive issue. Any procedure (even new modeling) that starts with small emissions changes will necessarily result in small design value changes. Within a small range, over which the chemistry does not shift fundamentally, ambient concentrations are approximately proportional to emissions, by the law of conservation of matter. This is not a case of an overly precise tiny number being added to a large erroneous random number, but rather of an adjustment ratio applied to a number derived from extensive data and analysis. Some intermediate steps in the calculation procedure that EPA used to evaluate the emissions inventory change did involve tenths of a percent (not hundredths as stated by the commenter), but this is largely an artifact of showing the procedure in multiple steps for comprehensibility. EPA could have done the calculation in a single step to avoid this artifact. When modeling a 10 percent change in NO_X emissions results in a design value change of 1.4 percent, a calculation using this model sensitivity result will necessarily involve fractions of 1 percent or less. In this case, the emissions inventory update involved a change in NO_X emissions of less than 10 percent, and thus, would also be expected to yield relatively small design value changes.

Comment: Earthjustice comments that a simple screening analysis cannot substitute for an unmonitored area analysis, as it is inadequate to address the sharp ambient concentration gradients that occur in near-highway areas.

Response: EPA agrees that the simple screening analysis in the Plan as originally submitted in June 2008 is not an adequate substitute for an unmonitored area analysis (UAA) and noted this deficiency in our November 2010 proposal. *See* 75 FR 74518, 74530. As noted in the 2011 proposal (76 FR 41388, 41348), CARB subsequently submitted a modeling supplement that included a UAA that follows EPA Guidance. *See* CARB modeling supplement, p. 139.[18] The UAA led to the conclusion that there would not be any NAAQS violations at locations away from monitors, and EPA has evaluated and accepted that conclusion.

As for whether the UAA itself adequately addresses the commenter's underlying concern about sharp concentration gradients, the EPA Guidance states:

> ''The unmonitored area analysis is intended to be the primary means for identifying high $PM_{2.5}$ concentrations outside of traditionally monitored locations. * * * Based on the monitoring guidance, we believe that an unmonitored area analysis conducted at 12 km or finer resolution is sufficient to address unmonitored $PM_{2.5}$ for the annual NAAQS. Conducting the unmonitored analysis at 4 km or finer resolution will provide an even more detailed analysis of the spatial gradients of primary $PM_{2.5}$, especially when evaluating violations of the 24-hr. NAAQS.''

This modeling guidance recommendations are consistent with the requirements of the EPA's $PM_{2.5}$ monitoring rules. The modeling guidance UAA spatial scale recommendations are intended to capture neighborhood scale and larger areas, since the monitoring rules do not require micro or middle scale monitors for either the annual or 24-hr $PM_{2.5}$ standards. CARB's UAA was conducted at a resolution of 4 km, so it is more detailed than EPA's recommended approach for UAA. In addition, it is intended for areas with a large primary $PM_{2.5}$ contribution (that is, directly emitted rather than formed chemically over time), and relying on local primary PM controls to reach attainment. EPA Guidance, p.100. By contrast, the attainment demonstration in the 2008 p.m.2.5 Plan mainly relies on area-wide control of NO_X, a $PM_{2.5}$ precursor, rather than on control of local primary $PM_{2.5}$.

Comment: Earthjustice comments that air quality worsened after 2005 despite the economic downturn, so that new air quality modeling should be performed to account for this upward trend.

Response: EPA did review the evaluation of air quality progress presented in the Plan and also independently examined air quality data. *See* 2011 Proposal TSD, p.6 and p.45. Air quality monitoring data is useful for a general understanding of the SJV's air quality problem, as well as for use in supplemental analyses that accompany the modeled attainment demonstration. Downward trending emissions and ambient concentrations would tend to support the conclusion that the area is on track toward attainment of the NAAQS, although evaluation of such trends should account for the particular location, time period, and air quality metric examined. In addition, overall trends may be hard

[18] Letter and enclosure, John DaMassa, Chief, Modeling and Meteorology Branch; California Air Resources Board, January 28, 2011 (''CARB modeling supplement'').

to discern given the year-to-year variability of meteorology and other factors.

The Plan used the data that was available at the time it was developed, focusing on 2001–2006, for which the Plan's Weight of Evidence analysis makes a strong case for air quality progress according to several metrics, including design value concentrations, frequency of high concentrations, concentration of $PM_{2.5}$ component species, and emissions. We conclude that these analyses adequately support the attainment demonstration. EPA also looked at a longer period, 2000–2010, and found that the slight $PM_{2.5}$ concentration increase shown in the Plan for 2006 continued through 2008 and flattened in 2009. Although $PM_{2.5}$ concentrations continued to improve in 2010, the Bakersfield area's annual and 24-hour $PM_{2.5}$ design values calculated from 2008–2010 data were the highest in the U.S. *See* 76 FR 41338, 41339. We note, however, that data over the longer time frame shows there has been substantial air quality progress over the past decade. *See* TSD, section I.B.1.

The concentration increases during 2006–2009 are not well understood but may have been partly a result of unfavorable meteorology during that time. District and CARB efforts to evaluate the effect of meteorology on air quality trends are under way. The higher values during that period do weaken the case made in the Plan's Weight of Evidence analysis, which is a supplemental analysis to the attainment demonstration itself, but are not themselves grounds for disapproving the attainment demonstration or the Plan.

Comment: Citing 40 CFR 51.1000 and 72 FR at 20600, Earthjustice asserts that attainment of the $PM_{2.5}$ NAAQS by April 5, 2015 will require review of ambient data from 2012, 2013, and 2014. Earthjustice also asserts that the majority of emissions reductions in the Plan are delayed until 2014 and argues that modeling ambient concentration in 2014 does not provide an accurate picture of what emissions will be in 2012 and 2013. It further states that the modeling year must be adjusted to give a more reasonable prediction of what a 3-year average concentration from 2012–2014 will be since it is this concentration that will determine if the Valley has attained the $PM_{2.5}$ standards by the attainment date. Finally, Earthjustice asserts that the fact that the majority of reductions are in 2014 violates the reasonable further progress requirement.

Response: We disagree with Earthjustice's assertion that the Plan delays the majority of emissions reductions until 2014 and therefore fails to satisfy RFP requirements. As explained in our amended proposal (76 FR 41338 at 41355–41357) and further in section II.H. of the TSD, the majority of the reductions needed for attainment occur well before 2014. The Plan's RFP demonstration shows that more than 87 percent of the NO_X, 80 percent of the $PM_{2.5}$ and all the SO_X reductions needed for attainment will occur by 2012. *See* 2011 Progress Report, Appendix C, p. 1. We explain further in section II.H. of the TSD our reasons for concluding that the 2008 $PM_{2.5}$ SIP provides for RFP consistent with the CAA and the $PM_{2.5}$ implementation rule.[19] We also explain in section II.D. our reasons for concluding that the Plan demonstrates that all control measures needed for attainment of the 1997 $PM_{2.5}$ standards will be in place as expeditiously as practicable and no later than the beginning of 2014, consistent with the CAA and 40 CFR 51.1007(b) (requiring ''implementation of all control measures needed for attainment as expeditiously as practicable, but no later than the beginning of the year prior to the attainment date''). *See* section II.G. and II.D. of the TSD.

We also concluded that the attainment demonstration in the Plan was developed consistent with procedures in EPA's modeling guidance. In addition, to a degree the modeling procedures already reflect the expected continuing emissions decreases during the years before the attainment year. The monitored base year design value reflects an emissions decrease over the three years of 2004–2006, not just the single 2005 emissions year. The projected design value reflects a modeled change to that monitored design value, so it too is consistent with some decreases occurring over multiple years, not just the single year of 2014.

Finally, we note that Earthjustice conflates the requirements governing EPA's action on an attainment demonstration under CAA section 172(c)(1) with those governing an attainment determination under CAA section 179(c). Earthjustice appears to assume that a demonstration of attainment by April 5, 2015, requires a demonstration that the area will have air quality measurements at or below the levels of the standards three years prior to that date. This is incorrect. An attainment determination under CAA 179(c) is a fact-based determination made after the attainment date based on air quality monitoring data.[20] An attainment demonstration, on the other hand, is a predictive tool for assessing what air quality will be at a future time. An attainment demonstration is based on air quality modeling showing that the projected design value of the relevant pollutant in attainment year will be at or below the level of the relevant ambient air quality standard. *See* 72 FR from 20605 to 20609.

Additionally, for a $PM_{2.5}$ nonattainment area subject only to the requirements of subpart 1 of title I, part D of the CAA, a State may demonstrate that in the attainment year, the area will have air quality such that the area could be eligible for the first of two one-year extensions allowed under CAA section 172(a)(2)(C). Under CAA section 172(a)(2)(C), an area that does not have three years of monitored data demonstrating attainment of the $PM_{2.5}$ NAAQS but has complied with all requirements and commitments pertaining to the area in the applicable SIP, and that has no more than minimal number of exceedances of the NAAQS in the attainment year, may receive a one-year extension of its attainment date. If the same conditions are met in the following year, the area may receive an additional one-year extension. Should the SJV area qualify for both of these extensions, the relevant 3-year period for determining whether the area has attained the $PM_{2.5}$ NAAQS would be 2014–2016.[21]

Comment: Earthjustice comments that given the problems it has described with the air quality modeling, the 9:1 NO_X to $PM_{2.5}$ relative effectiveness ratio cannot be used for transportation conformity or other purposes, unless it is supported with new modeling.

Response: EPA does not agree with Earthjustice that the modeling problems are substantial enough to invalidate the 9:1 ratio for NO_X to direct $PM_{2.5}$ emissions trading in the transportation

[19] Clean Air Fine Particulate Implementation Rule, 72 FR 20586 (April 25, 2007), codified at 40 CFR part 51, subpart Z ''$PM_{2.5}$ implementation rule.''

[20] A determination of attainment of the 1997 annual $PM_{2.5}$ standard is based on monitoring data that shows a 3-year average of annual mean $PM_{2.5}$ concentrations of less than 15 microgram per cubic meter (μ/m^3), and a determination of the attainment of the 1997 24-hour $PM_{2.5}$ standard is based on monitoring data that shows the 3-year average of 98th percentile 24-hour concentrations is less than 65 μ/m^3. *See* 40 CFR 50.7.

[21] EPA has long interpreted analogous provisions for ozone nonattainment areas in CAA sections 181(a)(5) and 182(c)(2) in this same manner. *See* Brief of Respondents, EPA, in *Sierra Club, et al.* v. *U.S. EPA, et al.,* Case Nos. 10–71457 and 10–71458 (consolidated), May 5, 2011; *see also Environmental Defense* v. *U.S .EPA,* 369 F.3d 193 (2nd Cir. 2004) (denying petition for review of EPA's approval of New York's 1-hour ozone attainment plan based on, *inter alia,* EPA's reasonable interpretation of the extension provision in CAA section 181(a)(5)).

conformity context. As discussed above, EPA believes that the modeling is basically sound, including the model's (relative) sensitivity to emissions changes. There is no established method for determining trading ratios in conformity, but as discussed in the 2011 Proposal TSD (p.148), EPA finds that the model sensitivity-based method used by CARB for determining an equivalency or relative effectiveness ratio is adequate for assessing the effect of area-wide emissions changes, such as are used in conformity budgets. The method modeled ''across the board'' emissions changes over the entire modeling domain; emissions considered in transportation conformity are also domain-wide. Trading in other contexts could involve additional consideration of spatial and temporal variation of the emissions, and would require an additional technical demonstration by the State and evaluation by EPA. EPA is not approving the trading ratio for any other purpose than in conformity budgets.

C. Comments on the Identification of $PM_{2.5}$ Attainment Plan Precursors

Comment: Earthjustice comments that EPA should rely on the November 2010 proposal's technical demonstration that VOC should be considered a $PM_{2.5}$ plan precursor and should disapprove the Plan for its failure to address control of VOC emissions. The commenter states that EPA reversed its earlier VOC finding without receiving any new credible evidence on the issue.

Response: The $PM_{2.5}$ implementation rule establishes a presumption that VOC is not a $PM_{2.5}$ plan precursor requiring controls. *See* 40 CFR 51.1002(c)(3). This presumption may be overturned if either EPA or the State provides an appropriate technical demonstration showing that VOC emissions from sources in the State significantly contribute to $PM_{2.5}$ concentrations in the nonattainment area. *See* 40 CFR 51.1002(c)(3)(i) and (ii). The preamble to the implementation rule suggests various analyses that could be part of such a demonstration, such as emissions inventory, speciation data, modeling information, or other special studies. But the preamble is not prescriptive on required technical demonstrations, and neither the preamble nor the rule defines ''significantly.'' Under the rule, excluding VOC as an attainment plan precursor does not require a showing that VOC controls are ineffective or counterproductive. Rather, since VOC is already excluded by presumption, the lack of a clear showing that VOC controls are effective is sufficient for it to remain excluded.

For the November 2011 proposal, EPA reviewed various monitoring and modeling studies on the role of VOC as a $PM_{2.5}$ precursor in the SJV. EPA proposed to find that these studies constitute a technical demonstration that VOC is a $PM_{2.5}$ attainment plan precursor, and used that as a basis to propose disapproval of the Plan, which lacks VOC controls.

Earthjustice correctly notes that CARB did not submit any new study results *per se* in response to our 2010 proposal but rather reinterpretation of the same modeling studies that EPA had already examined. For the 2011 proposal, EPA reviewed and accepted several of CARB's arguments made in its VOC supplement.[22] CARB noted the importance of considering simultaneous VOC and NO_X reductions, a more realistic scenario than VOC-only or NO_X-only reductions, given the various controls that are already in place for the ozone plan. The only study to consider simultaneous reductions found a disbenefit from VOC control, while NO_X control continued to be beneficial. CARB discounted one study that had found VOC control to be beneficial by noting that it had used artificially doubled VOC emissions in order to perform reasonably well at predicting $PM_{2.5}$. For another study, CARB pointed out some features of the multi-day model response to VOC reductions that are inconsistent with the photochemical VOC pathway to $PM_{2.5}$ formation and that the benefits from VOC reduction were seen only at high $PM_{2.5}$ concentrations that are seldom seen today.

EPA found these arguments persuasive enough to raise questions about the efficacy of VOC controls for reducing $PM_{2.5}$ levels in the SJV. Even setting aside the concern that VOC control could worsen $PM_{2.5}$ concentrations in some circumstances, EPA finds that the evidence of the effectiveness of VOC controls is at this time not clear enough to overcome the presumption in the $PM_{2.5}$ implementation rule that VOC should not be an attainment plan precursor. However, EPA also believes it is important that reductions of VOC, ammonia, and other $PM_{2.5}$ precursors be more thoroughly explored with realistic model sensitivity and other analyses as part of future modeling efforts in the SJV.

In its comment letter, Earthjustice also included additional information in favor of VOC as a precursor. We have reviewed this information (which mainly duplicates information EPA has already reviewed) and concluded that it does not provide sufficient grounds to reverse the presumption that VOC is not a $PM_{2.5}$ attainment plan precursor in the SJV. Our complete analysis of Earthjustice's information can be found in the response to comments section (section III.D.) of the TSD.

D. Comments on the Proposed Action on the Reasonably Available Control Measures/Reasonably Available Control Technology Demonstration

Comment: Earthjustice asserts that EPA must disapprove the Plan's RACM/RACT demonstration because many of the rules that the District and CARB rely on have not been approved as satisfying RACT requirements. Earthjustice also states that the demonstration fails to address VOC controls or to provide adequate air quality modeling documentation. Finally, Earthjustice asserts that several of the rules intended to provide the majority of NO_X and PM reductions from stationary sources in the Valley were adopted with substantially weakened controls from what was anticipated during plan development and will now provide only a fraction of what is needed to bring the area into attainment by 2014.

Response: Section 172(c)(1) of the CAA requires that each attainment plan ''provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology), and shall provide for attainment of the national primary ambient air quality standards.'' For over 30 years, EPA has consistently interpreted this provision to require that States adopt only those ''reasonably available'' measures necessary for expeditious attainment and to meet RFP requirements. 40 CFR 51.1010; *see also* 44 FR 20372 (April 4, 1979) (Part D of title I of the CAA ''does not require that all sources apply RACM if less than all RACM will suffice for [RFP] and attainment''); 57 FR 13498 at 13560 (April 16, 1992) (''where measures that might in fact be available for implementation in the nonattainment area could not be implemented on a schedule that would advance the date for attainment in the area, EPA would not consider it reasonable to require

[22] Letter, James N. Goldstene, Executive Officer, CARB, to Frances Wicher, Office of Air Planning, EPA Region 9, January 28, 2011, Attachment 4, ''Air Resources Board comments on U.S. EPA's November 30, 2010 proposal that VOC be considered a significant $PM_{2.5}$ Precursor for the San Joaquin Valley 2008 $PM_{2.5}$ State Implementation Plan (SIP).'' (''CARB VOC supplement'').

implementation of such measures''); ''Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas,'' November 30, 1999 (1999 Seitz Memo) (a State may justify rejection of a measure as not ''reasonably available'' for that area based on technological or economic grounds); and 70 FR 71612 (November 29, 2005) at 71661 (noting that States ''need adopt measures only if they are both economically and technologically feasible and will advance the attainment date or are necessary for RFP''). EPA's interpretation of section 172(c)(1) has been upheld by several courts. *See, e.g., Sierra Club* v. *EPA, et al.,* 294 F. 3d 155 (DC Cir. 2002); *Sierra Club* v. *EPA,* 314 F.3d 735 (5th Cir. 2002).

Under the $PM_{2.5}$ implementation rule at 40 CFR 51.1010, a RACM demonstration must include ''the list of the potential measures considered by the State, and information and analysis sufficient to support the State's judgment that it has adopted all RACM, including RACT.'' 40 CFR 51.1010(a). In addition, ''[p]otential measures that are reasonably available considering technical and economic feasibility must be adopted as RACM if, considered collectively, they would advance the attainment date by one year or more.'' As explained in the preamble to the $PM_{2.5}$ implementation rule, Congress provided EPA and States broad discretion to determine what measures to include in an attainment plan, and the language in section 172(c)(1) requiring only ''reasonably available'' measures and implementation of these measures ''as expeditiously as practicable'' indicates that Congress intended for the RACT/RACM requirement to be driven by an overall requirement that the measure be ''reasonable.'' 72 FR 20586 at 20610 (April 25, 2007). Thus, the rule of ''reason'' drives the decisions on what controls to apply, what should be controlled, by when emissions must be reduced, and finally, the rigor required in a State's RACT/RACM analysis. *See id.* States may, as part of a RACM analysis, consider the costs of potential control measures and whether the measures can be readily and effectively implemented without undue administrative burden. *See id.* (*citing* 55 FR 38327 and 66 FR 26969).

As a threshold matter, we note that VOC controls are not a required element of the RACM demonstration in the 2008 $PM_{2.5}$ Plan because EPA agrees with the State's determination that VOCs are not attainment plan precursors for purposes of the 1997 $PM_{2.5}$ NAAQS in the SJV area. *See* 76 FR at 41343 (citing 40 CFR 51.1002(c) and 51.1010) and our responses to comments on attainment plan precursors, in section II.C. above.

Second, as to air quality modeling documentation, we explain in section II.B. above in our responses to comments on the air quality modeling our reasons for concluding that the modeling in the 2008 $PM_{2.5}$ Plan adequately supports the Plan's RACM and attainment demonstration.

Third, as to Earthjustice's assertions about RACT, we note that although CAA section 182(b)(2) requires States to implement RACT for specific types of sources in ozone nonattainment areas classified as moderate or above, there is no specific RACT control mandate for $PM_{2.5}$ purposes that applies to specific sources in $PM_{2.5}$ nonattainment areas. Rather, under the $PM_{2.5}$ implementation rule, RACT and RACM are those measures that a state finds are both reasonably available and contribute to attainment as expeditiously as practicable in the specific nonattainment area. *See* 76 FR at 41343 (citing 40 CFR 51.1010 and 72 FR 20586 at 20612). EPA has, therefore, evaluated the collection of reasonably available control measures that CARB and the District have adopted and submitted with the attainment demonstration in the 2008 $PM_{2.5}$ Plan to meet the RACM/RACT requirement in CAA section 172(c)(1) and 40 CFR 51.1010. *See* 76 FR 41338 at 41343–41346 and 2011 Proposal TSD at section II.D.

Finally, as to the specific NO_X and PM control options that Earthjustice asserts should also be required as RACM, we have considered whether these additional control options are reasonably available for implementation in SJV considering technical and economic feasibility, and as to those measures that are potentially reasonable, whether they would considered collectively would advance the attainment date in the SJV by one year or more. For the reasons discussed below, we conclude that the control options identified by Earthjustice are not required RACM for purposes of the 1997 $PM_{2.5}$ NAAQS in the SJV area.

Comment: Earthjustice states that EPA should not approve Rule 4692 (Commercial Charbroiling) as RACT because there is no justification for the District's decision to exclude control requirements for under-fired charbroilers (UFC) from the rule. In support of this assertion, Earthjustice states, among other things, that: (1) SJVUAPCD had initially found certain control options for UFC units to be cost-effective and that its later revisions to these cost estimates in response to comments were based on inappropriate criteria, such as its ''10 percent of the industry's profits'' test; (2) that BAAQMD's adoption of UFC control requirements in 2007 indicates that such controls are considered feasible; and (3) that SJVUAPCD's failure to control UFCs means that PM emissions reductions from this rule are reduced from more than 2 tons per day (tpd) to just 0.02 tpd.

Response: EPA recently determined that Rule 4692 satisfied applicable CAA requirements and fully approved the rule into the SJV portion of the California SIP.[23] *See* 76 FR 38340 (June 30, 2011) (proposed rule) and ''Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District'' final rule, pre-publication notice signed September 30, 2011 (Rule 4692). As part of that action, EPA reviewed the District's evaluation of potential UFC controls and concurred with the District's conclusion that those controls are not reasonably available for implementation in the SJV area at this time, considering technological and economic feasibility (see EPA's June 9, 2011 Proposal TSD at pp. 4–5). Given EPA's long-standing position that States may justify rejection of certain control measures as not ''reasonably available'' based on economic grounds (among others), we believe that it is appropriate for the District to consider the cost of controls at sources actually located within the specific area to determine if they are economically feasible with respect to those sources. Although we do not endorse the District's use of a ''10 percent of the industry's profit'' test for economic feasibility, we agree with the District's conclusion that UFC controls are not economically feasible based on the facts and circumstances related to actual cost of those controls in the SJV area. For the reasons stated in our separate proposed and final rules on Rule 4692, we conclude in this final action on the 2008 $PM_{2.5}$ Plan that Rule 4692 requires all RACM for charbroilers in SJV, and that the additional controls for UFC identified by Earthjustice are not required RACM for purposes of the 2008 $PM_{2.5}$ Plan because they are not

[23] As explained in our June 30, 2011 proposal to approve Rule 4692 (76 FR 38340), the specific ozone RACT requirement in CAA section 182(b)(2) does not apply to this rule because there are no Control Techniques Guideline (CTG) documents for this source category and no major sources of NO_X or VOC subject to this rule in the SJV area. *See* 76 FR at 38341. We therefore interpret the commenters' reference to RACT as referring to the general requirement for reasonably available control measures (including RACT for stationary sources) in CAA section 172(c)(1). *See* 40 CFR 51.1010.

reasonably available considering technological and economic feasibility.

Comment: Earthjustice asserts that Rule 4103 (Open Burning) achieves far less than what was anticipated in the Plan, and that the District had inappropriately relied on the 10 percent of profits test to exempt from control the three largest source categories of NO_X, PM, and VOC covered by the Rule. Earthjustice asserts that this resulted in foregone emissions reductions of 1,030 tpy NO_X, 1,262 tpy $PM_{2.5}$ and 1,138 tpy VOC.

Response: EPA recently determined that Rule 4103 satisfied applicable CAA requirements and fully approved the rule into the SJV portion of the California SIP. *See* 76 FR 40660 (July 11, 2011) (proposed rule) and ''Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District;'' final rule, pre-publication notice signed September 30, 2011 (Rule 4103)). As part of that action, EPA reviewed the District's evaluation of the postponements of certain burning prohibitions for certain agricultural crop categories and concurred with the District's conclusion that alternatives to open burning for these crop categories are not reasonably available for implementation in the SJV area at this time, considering technological and economic feasibility (see, *e.g.,* EPA's June 2011 TSD at pp. 5–7). For the reasons stated in those separate proposed and final rules on Rule 4103, we conclude in this final action on the 2008 $PM_{2.5}$ Plan that Rule 4103 requires all RACM for open burning in SJV, and that the additional controls identified by Earthjustice are not required RACM for purposes of the 2008 $PM_{2.5}$ Plan because they are not reasonably available considering technological and economic feasibility.

Comment: Earthjustice stated that SJVUAPCD added a contingency provision to Rule 4901 (Wood Burning Fireplaces and Wood Burning Heaters) stating that, should the Valley fail to attain the 1997 $PM_{2.5}$ standards by the attainment date, the $PM_{2.5}$ concentration triggering a mandatory wood burning curtailment would be lowered from 30 to 20 $\mu g/m^3$. Earthjustice contends that, given the underperformance of other SJVUAPCD rules, this ''contingency'' should be adopted now to achieve additional reductions before the attainment date.

Response: EPA determined that Rule 4901 satisfied applicable CAA requirements and fully approved the rule into the SJV portion of the California SIP. *See* 74 FR 57907 (November 10, 2009). As part of that action, EPA reviewed the District's evaluation of available controls and concluded that Rule 4901 requires implementation of Best Available Control Measures under CAA section 189(b) for particulate matter of 10 microns or less (PM–10) in the SJV area. This conclusion was based in part on our finding that SJV's 30 $\mu g/m^3$ threshold for mandatory wood burning curtailment is more stringent than the 35 $\mu g/m^3$ threshold adopted in other areas such as Sacramento, South Coast and Bay Area. *See* SJVUAPCD, ''Final Draft Staff Report, Proposed Amendments to Rule 4901 ''Wood Burning Fireplaces and Wood Burning Heaters,'' October 16, 2008, at pp. 5–6.

Earthjustice has provided no information to support an argument that reducing the threshold for mandatory wood burning curtailment in the SJV from 30 to 20 $\mu g/m^3$ is a ''reasonably available'' control measure, nor any information to support an argument that such a measure would, individually or in combination with other reasonable measures, advance attainment of the 1997 $PM_{2.5}$ standards in the SJV by at least a year. We have, nonetheless, evaluated in the section entitled ''Evaluation of potential to advance attainment'' below the additional PM emissions reductions that could be achieved by implementing a mandatory wood burning curtailment at a 20 $\mu g/m^3$ threshold (1.6 tons per winter average day, *see* 76 FR at 41358) to determine whether this measure could, in combination with other potentially reasonable measures, advance attainment in the SJV area.

Comment: Earthjustice asserts that the exemption in Rule 4354 (Glass Melting Furnaces) for furnaces that actually emit less than 8 tons per year of NO_X or VOC (but are located at major sources) is ''illegal'' because the CAA requires that RACT be implemented for all major sources. Earthjustice states that this exemption cost the Valley 1.6 tons per day of SO_X reductions and 2.9 tons per day of PM reductions. Earthjustice also states that the District had adopted a previous version of Rule 4354 that had earlier compliance deadlines than the version EPA ultimately approved into the SIP. Earthjustice asserts that the District should have removed the exemption for small furnaces at large facilities and should not have delayed compliance requirements, and that ''it is unacceptable for the District to forego any emissions reductions in the years leading up to attainment.''

Response: EPA recently determined that Rule 4354 satisfied applicable CAA requirements and fully approved the rule into the SJV portion of the California SIP. [24] *See* 76 FR 53640 (August 29, 2011). As part of that action, we determined that the VOC and NO_X emission limits in Rule 4354 meet the CAA section 182(b)(2) and (f) RACT requirements for major sources of VOC and NO_X. The compliance schedule for NO_X and VOC limits in the SIP-approved rule requires implementation of all technologically and economically feasible controls by January 2014. *See* SJVUAPCD, Final Draft Staff Report, ''Proposed Amendments to Rule 4354 (Glass Melting Furnaces),'' August 19, 2010, at pp. 10–12. We conclude, therefore, that this rule implements all VOC and NO_X controls that are reasonably available for this source category in the SJV. We did not fully evaluate in that action the stringency of the rule's requirements for SO_X and PM_{10} emissions, as there is no specific RACT control mandate for SO_X or PM_{10} purposes that necessarily applies to sources covered by this rule.[25] We disagree with Earthjustice's assertion that the exemption from the SO_X and PM_{10} limits for certain furnaces that actually emit less than 8 tpy of VOC or NO_X (see Rule 4354, section 4.3) is ''illegal,'' as the CAA does not establish a specific RACT control mandate for major sources of SO_X or PM_{10}. Under CAA section 172(c)(1), however, the State/District are required to adopt all RACM necessary to demonstrate attainment as expeditiously as practicable and to meet RFP requirements. 40 CFR 51.1010. Given the need for substantial NO_X and $PM_{2.5}$ emissions reductions in the SJV to meet both the 1997 $PM_{2.5}$ standards and the more stringent 2006 $PM_{2.5}$ standard by the applicable attainment dates, we encourage the SJVUAPCD to reevaluate the PM_{10} control requirements in Rule 4354 and to adopt, as expeditiously as practicable, any additional PM_{10} and $PM_{2.5}$ control requirements that are reasonably available for implementation in the Valley. For purposes of the 2008 $PM_{2.5}$ Plan, additional PM control requirements for glass melting facilities

[24] As explained in our June 30, 2011 proposal to approve Rule 4692 (76 FR 38340), the specific ozone RACT requirement in CAA section 182(b)(2) does not apply to this rule because there are no Control Techniques Guideline (CTG) documents for this source category and no major sources of NO_X or VOC subject to this rule in the SJV area. *See* 76 FR at 38341. We therefore interpret the commenters' reference to RACT as referring to the general requirement for reasonably available control measures (including RACT for stationary sources) in CAA section 172(c)(1). *See* 40 CFR 51.1010.

[25] The CAA requires implementation of RACT at any major source of NO_X or VOC in ozone nonattainment areas classified as moderate or above (see CAA 182(b)(2)(C) and 182(f)) but does not contain such a major source RACT control mandate for SO_X or PM purposes.

may, upon SIP approval, be credited toward the District's remaining enforceable commitments. *See* 76 FR at 41354, Table 8.

Earthjustice asserts that the exemption in Rule 4354 for furnaces emitting less than 8 tpy of NO_X or VOC cost the Valley 1.6 tons per day of SO_X reductions and 2.9 tons per day of PM reductions. For purposes of the 2008 $PM_{2.5}$ Plan, the foregone SO_X emissions reductions do not affect the RACM and attainment demonstration because SJV has exceeded its target level of SO_X reductions needed for attainment. *See* 76 FR at 41354, Table 8. As to PM, we have evaluated the additional emissions reductions that Earthjustice claims could have been achieved from glass melting facilities [26] in our evaluation below of the potential for such additional controls, in combination with other potential control options, to advance attainment of the 1997 $PM_{2.5}$ standards in the SJV. *See* section ''Evaluation of potential to advance attainment'' below.

Comment: Earthjustice states that EPA recently rejected all of the NO_X emission limits in Rule 4352 (Solid Fuel-Fired Boilers, Steam Generators and Process Heaters) for failing to satisfy RACT and asserts that substantial NO_X reductions could be achieved if the District amended this rule to meet the stringent limits in place in other areas of the Country.

Response: Earthjustice correctly notes that EPA recently disapproved all of the NO_X emission limits in Rule 4352 based on our conclusion that the District had failed to adequately demonstrate that these limits satisfy CAA section 182 RACT requirements. *See* 75 FR 60623 (October 1, 2010). Earthjustice did not provide any specific information about additional control measures that are reasonably available, nor has it provided information about the amount of emissions reductions that might be achieved by such controls. We have, however, developed a conservative (high) estimate of the additional NO_X reductions that could be achieved under this rule if the emission limits are strengthened. We developed this estimate based on the NO_X emission limits in the SIP-approved version of Rule 4352, the emissions attributed in the 2008 $PM_{2.5}$ plan to solid fuel-fired boilers, steam generators, and process heaters in the SJV, emissions data from existing solid fuel-fired boilers in the SJV, and technical information about available control options from EPA's 1994 Alternative Control Techniques Document for NO_X Emissions from Industrial/Commercial/Institutional Boilers, U.S. EPA 453/R–94–022 (1994 Boiler ACT). Based on this information, we have conservatively estimated that more stringent control requirements for solid fuel-fired boilers, steam generators, and process heaters in SJV could achieve an additional 3.16 tpd of NO_X reductions.[27]

Comment: Earthjustice states that EPA's proposal fails to address the fact that the RACM/RACT analysis ''does not include reasonable controls for condensable [$PM_{2.5}$] emissions'' and contains no discussion of such controls. Earthjustice references 40 CFR 51.1002(c) to support its assertion that ''[t]he transition period allowing agencies to ignore controls on condensable emissions ended on January 1, 2011,'' and also quotes EPA's statement in the preamble to the $PM_{2.5}$ implementation rule (72 FR at 20652) that ''[w]e expect States to address the control of direct $PM_{2.5}$ emissions, including condensables with any new actions taken after January 1, 2011.'' Earthjustice asserts that EPA must disapprove the RACM demonstration for failure to assess reasonably available controls on condensable emissions.

Response: EPA's $PM_{2.5}$ implementation rule states that ''[a]fter January 1, 2011, for purposes of establishing emission limits under 51.1009 and 51.1010, States must establish such limits taking into consideration the condensable fraction of direct $PM_{2.5}$ emissions.'' 40 CFR 51.1002(c). Prior to this date, the rule required that nonattainment area SIPs identify and evaluate sources of $PM_{2.5}$ direct emissions and $PM_{2.5}$ attainment plan precursors as part of the RFP and RACM/RACT demonstrations but did not specifically require states to address condensable $PM_{2.5}$. *See id.*[28] Because the attainment, RFP and RACM demonstrations in the 2008 $PM_{2.5}$ Plan were adopted on May 22, 2008 (*see* 76 FR at 41340), California was not required to address condensable PM in establishing the emission limits contained in these demonstrations as originally submitted, or in adopting any other PM emission limits under 40 CFR sections 51.1009 and 51.1010 prior to January 1, 2011. Consistent with these requirements, EPA has evaluated the RFP and RACM demonstrations in the 2008 $PM_{2.5}$ Plan and concluded that these elements of the Plan appropriately address all sources of direct $PM_{2.5}$ emissions and $PM_{2.5}$ attainment plan precursors (SO_2 and NO_X) in the SJV. *See* 76 FR 41338 at 41343.[29]

The 2008 $PM_{2.5}$ Plan relies on several rules regulating direct $PM_{2.5}$ emissions as part of the $PM_{2.5}$ control strategy (*e.g.,* Rule 4692 (Commercial Charbroiling, adopted 9/17/09), Rule 4103 (Open Burning, adopted 4/15/10), Rule 4354 (Glass Melting Furnaces, adopted 9/16/10) and Rule 4901 (Wood Burning Fireplaces and Wood Burning Heaters, adopted 10/16/08)) as well as rules controlling NO_X and SO_X emissions. *See* 2011 Proposal TSD at Tables F–2, F–3, and F–4. Of the rules that control direct $PM_{2.5}$ emissions, only two establish emission limits for particulate matter (Rule 4692 (Commercial Charbroiling) and Rule 4354 (Glass Melting Furnaces)). EPA has not yet acted on any District rule adopted or revised after January 1, 2011 that regulates direct $PM_{2.5}$ emissions. As part of our action on any such rule, we will evaluate the emission limits in the rule to ensure that they appropriately address CPM as required by 40 CFR 51.1002(c). We note that the revised version of Rule 4692 (Commercial Charbroiling) that EPA has recently proposed to approve (*see* 76 FR 38340 (June 30, 2011)) requires testing in accordance with the SCAQMD Protocol, which requires measurement of both condensable and filterable PM in accordance with South Coast Air Quality Management District (SCAQMD) Test Method 5.1.[30] We also note that the SIP-approved version of Rule 4354 (Glass Melting Furnaces) requires testing for condensable PM emissions using EPA Method 202. *See* 76 FR 53640 (August 29, 2011).

[26] For this assessment, we use Earthjustice's estimate of the foregone PM reductions and assume conservatively that all such PM reductions are $PM_{2.5}$ reductions.

[27] Documentation of this estimate can be found in the TSD, section III.E.

[28] *See also* Letter dated April 25, 2011, from Lisa P. Jackson, EPA, to Paul Cort, Earthjustice, denying Petition for Reconsideration with respect to the deferral of the requirement to establish emission limits for condensable particulate matter (CPM) until January 1, 2011.

[29] In our proposed rule, we noted that the SJVUAPCD has deferred limits for CPM in its rules but that this limited deferral does not affect the Plan's RACM/RACT and expeditious attainment demonstrations. 76 FR 41338 at 41342, n. 12. We also noted that we would evaluate any $PM_{2.5}$ rule adopted or revised by the District after January 1, 2011 to assure that it appropriately addresses CPM. *See id.*

[30] *See* SCAQMD Protocol, *Determination of Particulate and Volatile Organic Compound Emissions From Restaurant Operations,* November 14, 1997 (available at *http://yosemite.epa.gov/R9/R9Testmethod.nsf/0/3D4DEB4D21AB4AAF882570AD005DFF69/$file/SC%20Rest%20emiss.pdf*) and SCAQMD Test Method 5.1, *Determination of Particulate Matter Emissions From Stationary Sources Using a Wet Impingement Train,* March 1989 (available at *http://aqmd.gov/tao/methods/stm/stm-005-1.pdf*).

Evaluation of Potential to Advance Attainment

Table E–2 of our 2011 Proposal TSD indicates that to advance attainment of the 1997 $PM_{2.5}$ standards in the SJV by one year, *i.e.,* from 2014 to 2013, the area would need an additional 15.6 tpd of NO_X reductions and an additional 3.9 tpd of direct $PM_{2.5}$ reductions. These figures represent the difference between the 2013 ''controlled inventory'' and the 2014 ''NO_X emissions level needed for $PM_{2.5}$ attainment.'' *See* 2011 Proposal TSD at Table E–2 (pg. 80).[31] The 2013 ''controlled inventory'' figures were based on the District's expected emissions reductions from individual measures as identified in the 2008 $PM_{2.5}$ Plan. *See* Plan at pp. 6–11 and 6–12 (Table 6–3).[32] Following adoption of these measures, however, the District updated its estimates of the emissions reductions associated with several of these measures. *See* 2011 Proposal TSD at Table F–4 (pg. 91). Based on these updated estimates of the reductions associated with specific control measures, which alter the 2013 ''controlled inventory'' estimates, we have re-calculated the amount of $PM_{2.5}$ reductions needed to advance attainment by one year as 6.4 tpd.[33]

As discussed above, with respect to Rule 4692 (Charbroiling) and Rule 4103 (Open Burning), we have concluded that the additional PM emissions control options that Earthjustice identified are not reasonably available considering economic and technical feasibility. Therefore, these potential control measures are not required RACM for purposes of the 1997 $PM_{2.5}$ standards in the Valley. With respect to Rule 4901 (Wood Burning), Rule 4354 (Glass Melting Furnaces), and Rule 4352 (Solid Fuel-Fired Boilers), we assume for purposes of this analysis that additional control options are reasonably available for implementation in the SJV. We therefore evaluate whether the emissions reductions from these additional control options would, collectively, advance attainment of the 1997 $PM_{2.5}$ standards in the SJV by at least one year.

Our estimate of the total reductions of direct $PM_{2.5}$ that could be achieved by the potential control options for wood burning (1.6 tpd) and glass melting furnaces (2.9 tpd) identified by Earthjustice is 4.5 tpd. As to NO_X reductions, although Earthjustice did not provide any estimate of the reductions that could be achieved by more stringent requirements for solid fuel-fired boilers, steam generators, and process heaters, we have conservatively estimated that such controls could result in an additional 3.12 tpd of NO_X reductions from existing emissions units in the SJV. These combined emissions reductions (4.5 tpd of direct $PM_{2.5}$ and 3.12 tpd of NO_X) are significantly lower than the total reductions necessary to advance attainment by one year in the SJV (6.4 tpd of direct $PM_{2.5}$ and 15.6 tpd of NO_X). Therefore, even assuming that additional control options for these three source categories are reasonably available for implementation in the SJV, they are not required RACM for purposes of the 1997 $PM_{2.5}$ standards because they would not advance the attainment date in SJV by at least one year. *See* 40 CFR 51.1010(b).

Conclusion on RACM Demonstration

For all of these reasons and as discussed in our proposed rule (76 FR 41338) and 2011 Proposal TSD, we conclude that the 2008 $PM_{2.5}$ Plan includes all RACM (including RACT for stationary sources) necessary for RFP and expeditious attainment of the 1997 $PM_{2.5}$ standards in the SJV and, therefore, satisfies the requirements of CAA section 172(c)(1) and 40 CFR 51.1010.

E. Comments on the Proposed Actions on the Control Strategy and Enforceable Commitments

1. Baseline Measures

Comment: Earthjustice and AIR assert that the baseline inventories are flawed because they include emissions reduction credit from both ''waiver measures'' and ''non-waiver measures'' adopted before December 2006 (together referred to as ''baseline measures'') that have not been approved into the SIP, and that the inclusion of credit for these baseline measures undermines the attainment and progress demonstrations attached to these inventories. For example, both commenters object to the inclusion of credit for CARB's anti-idling requirements in the baseline inventories because these requirements have never been submitted for SIP approval, and Earthjustice suggests that EPA should have adjusted the credit for these anti-idling requirements based on CARB's failure to enforce them. Both commenters assert that EPA has not specifically evaluated these baseline measures to determine how they should be credited in the baseline inventories, and Earthjustice asserts that the measures upon which the attainment and progress demonstrations rely must be enforceable, creditable controls approved into the SIP subject to the CAA's anti-backsliding provisions.

In addition, based on information provided in Table 7 of the 2011 Proposal and tables F–7 and F–9 of the 2011 Proposal TSD, AIR provides its own calculations of the total amount of emissions reduction credits attributed to baseline measures and requests that EPA confirm the accuracy of AIR's calculations.

Finally, AIR asserts that these additional ''non-waiver'' baseline measures should also be SIP-approved:

- Heavy Duty Diesel Chip Reflash (adopted March 27, 2004);
- Diesel Particulate Matter Control Measure for On-Road Heavy-Duty Diesel-Fueled Vehicles Owned or Operated by Public Agencies and Utilities (adopted December 8, 2005);
- Solid Waste Collection Vehicle Rule (adopted September 24, 2003);
- Fork Lifts and Other Industrial Equipment (adopted May 26, 2006);
- Pesticides—Field Fumigant Limits (submitted to EPA October 12, 2009).

Response: We disagree that there is any inadequacy in the emissions projections that undermines the RACM, RFP or attainment demonstrations in the 2008 $PM_{2.5}$ Plan. We explained in our 2011 proposal (76 FR 41338 at 41342, 41343) our reasons for concluding both that the 2005 base year inventory in the 2008 $PM_{2.5}$ Plan is comprehensive, accurate, and current as required by CAA section 172(c)(3) and that the projected baseline inventories for 2009, 2012 and 2014 provide adequate bases for the RACM, RFP and attainment demonstrations in the Plan.

With respect to mobile source emissions, we believe that credit for emissions reductions from implementation of California mobile source rules that are subject to CAA section 209 waivers (''waiver measures'') is appropriate notwithstanding the fact that such rules are not approved as part of the California SIP. In the TSD supporting our 2011 proposal, we explained why we believe such credit is appropriate. *See* 2011 Proposal TSD at section

[31] For NO_X, 15.6 tpd represents the difference between the 2013 ''controlled inventory'' (306.8 tpd) and the 2014 ''NO_X emissions level needed for $PM_{2.5}$ attainment'' (291.2 tpd). For $PM_{2.5}$, 3.9 tpd represents the difference between the 2013 ''controlled inventory'' (67.2 tpd) and the 2014 ''Direct $PM_{2.5}$ emissions level needed for $PM_{2.5}$ attainment'' (63.3 tpd).

[32] For example, the 2013 ''controlled inventory'' for $PM_{2.5}$ (67.2 tpd) is the sum of the expected emissions reductions from four $PM_{2.5}$ control measures identified in Table F–2. *See* 2011 Proposal TSD at Table E–2 (pg. 87).

[33] The updates to the $PM_{2.5}$ emissions reduction estimates reduced the creditable reductions from 6.7 tpd to 4.2 tpd, which in turn increased the 2013 ''controlled inventory'' from 67.2 tpd to 69.7 tpd. 6.4 tpd is the difference between the updated 2013 ''controlled inventory'' (69.7 tpd) and the 2014 ''Direct $PM_{2.5}$ emissions level needed for $PM_{2.5}$ attainment'' (63.3 tpd).

II.F.4.a.i. Historically, EPA has granted credit for the waiver measures because of special Congressional recognition, in establishing the waiver process in the first place, of the pioneering California motor vehicle control program and because amendments to the CAA (in 1977) expanded the flexibility granted to California in order ''to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare'' (H.R. Rep. No. 294, 95th Congr., 1st Sess. 301–2 (1977)). In allowing California to take credit for the waiver measures notwithstanding the fact that the underlying rules are not part of the California SIP, EPA treated the waiver measures similarly to the Federal motor vehicle control requirements, which EPA has always allowed States to credit in their SIPs without submitting the program as a SIP revision.

EPA's historical practice has been to give SIP credit for motor-vehicle-related waiver measures by allowing California to include motor vehicle emissions estimates made by using California's EMFAC (and its predecessors) motor vehicle emissions factor model in SIP inventories. EPA verifies the emissions reductions from motor-vehicle-related waiver measures through review and approval of EMFAC, which is updated from time to time by California to reflect updated methods and data, as well as newly-established emissions standards. (Emissions reductions from EPA's motor vehicle standards are reflected in an analogous model known as MOVES.[34]) The 2008 $PM_{2.5}$ Plan was developed using a version of the EMFAC model referred to as EMFAC2007, which EPA has approved for use in SIP development in California. See 73 FR 3464 (January 18, 2008). Thus, the emissions reductions that are from the California on-road ''waiver measures'' and that are estimated through use of EMFAC are as verifiable as are the emissions reductions relied upon by states other than California in developing their SIPs based on estimates of motor vehicle emissions made through the use of the MOVES model. All other states use the MOVES model (and prior to release of MOVES, the MOBILE model) in their baseline inventories without submitting the federal motor vehicle regulations for incorporation into their SIPs.

Similarly, emissions reductions that are from California's waiver measures for non-road engines and vehicles (*e.g.,* agricultural, construction, lawn and garden and off-road recreation equipment) are estimated through use of CARB's OFFROAD emissions factor model.[35] (Emissions reductions from EPA's non-road engine and vehicle standards are reflected in an analogous model known as NONROAD). Since 1990, EPA has treated California non-road standards for which EPA has issued waivers in the same manner as California motor vehicle standards, *i.e.,* allowing credit for standards subject to the waiver process without requiring submittal of the standards as part of the SIP. In so doing, EPA has treated the California non-road standards similarly to the Federal non-road standards, which are relied upon, but not included in, various SIPs. *See* generally 2011 Proposal TSD at section II.F.4.a.i.

CARB's EMFAC and OFFROAD models employ complex routines that predict vehicle fleet turnover by vehicle model years and include control algorithms that account for all adopted regulatory actions which, when combined with the fleet turnover algorithms, provide future baseline projections. *See* 2007 State Strategy, Appendix F at 7–8. For stationary sources, the California Emissions Forecasting System (CEFS) projects future emissions from stationary and area sources (in addition to aircraft and ships) using a forecasting algorithm that applies growth factors and control profiles to the base year inventory.[36] *See id.* at 7. The CEFS model integrates the projected inventories for both stationary and mobile sources into a single database to provide a comprehensive statewide forecast inventory, from which nonattainment area inventories are extracted for use in establishing future baseline planning inventories. *See id.* In 2011, CARB updated the baseline emissions projections for several source categories to account for, among other things, more recent economic forecasts and improved methodologies for estimating emissions from the heavy duty truck and construction source categories. *See* 2011 Progress Report at Appendix E. These methodologies for projecting future emissions based on growth factors and existing Federal, State, and local controls were consistent with EPA guidance on developing projected baseline inventories. *See* 2011 Proposal TSD at section II.A; *see also* ''Procedures for Preparing Emissions Projections,'' EPA Office of Air Quality Planning and Standards, EPA–450/4–91–019, July 1991; ''Emissions Projections,'' STAPPA/ALAPCO/EPA Emissions Inventory Improvement Project, Volume X, December 1999 (available at *http://www.epa.gov/ttnchie1/eiip/techreport/volume10/x01.pdf).*

In sum, the 2005 base year and future projected baseline inventories in the 2008 $PM_{2.5}$ Plan were prepared using a complex set of CARB methodologies to estimate and project emissions from stationary sources, in addition to the most recent emissions factors and models and updated activity levels for emissions associated with mobile sources, including: (1) The latest EPA-approved California motor vehicle emissions factor model (EMFAC2007) and the most recent motor vehicle activity data from each of the metropolitan planning organizations (MPOs) in the San Joaquin Valley; (2) improved methodologies for estimating emissions from specific source categories; and (3) CARB's non-road mobile source model (the OFFROAD model). *See* TSD Section II.A (referencing, *inter alia,* 2007 State Strategy at Appendix F) and 2011 Progress Report. EPA has approved numerous California SIPs that rely on base year and projected baseline inventories including emissions estimates derived from the EMFAC, OFFROAD, and CEFS models. *See, e.g.,* 65 FR 6091 (February 8, 2000) (proposed rule to approve 1-hour ozone plan for South Coast) and 65 FR 18903 (April 10, 2000) (final rule); 70 FR 43663 (July 28, 2005) (proposed rule to approve PM–10 plan for South Coast and Coachella Valley) and 70 FR 69081 (November 14, 2005) (final rule); 74 FR 66916 (December 17, 2009) (direct final rule to approve ozone plan for Monterey Bay). The commenter has provided no information to support a claim that these methodologies for developing base year inventories and projecting future emissions in the SJV are inadequate to support the RACM, RFP, and attainment demonstrations in the 2008 $PM_{2.5}$ Plan.

For all of these reasons and as discussed in our 2011 proposal (76 FR 41338 at 41342, 41343), we have concluded that the 2005 base year inventory in the 2008 $PM_{2.5}$ Plan is a ''comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants'' in the SJV area, consistent

[34] MOVES replaced the MOBILE model as EPA's on-road mobile source emissions estimation model for use in SIPs and conformity in 2010.

[35] Information about CARB's emissions inventories for on-road and non-road mobile sources, and the EMFAC and OFFROAD models used to project changes in future inventories, is available at *http://www.arb.ca.gov/msei/msei.htm.*

[36] Information on base year emissions from stationary point sources is obtained primarily from the districts, while CARB and the districts share responsibility for developing and updating information on emissions from various area source categories. *See* 2007 State Strategy, Appendix F at 21.

with the requirements for emissions inventories in CAA section 172(c)(3), 40 CFR 51.1008, and 40 CFR part 51, subpart A. In addition, we conclude that the projected baseline inventories for 2009, 2012 and 2014 were prepared consistent with EPA's guidance on development of emissions inventories and attainment demonstrations and, therefore, provide an adequate basis for the RACM, RFP and attainment demonstrations in the Plan. *See* 2011 Proposal TSD at section II.A.

As to the six specific baseline measures that CRPE asserts should be SIP-approved, we note first that the SJV 2008 $PM_{2.5}$ SIP does not rely on credit for emissions reductions from the Pesticides regulations (Field Fumigant Limits) as those regulations address only VOC and therefore do not apply to any pollutant that is a $PM_{2.5}$ attainment plan precursor in the SJV ($PM_{2.5}$, NO_X, or SO_2).

Second, both the Requirements to Reduce Idling Emissions from New and In-Use Trucks (effective November 15, 2006) [37] and the Fork Lifts and Other Industrial Equipment measure (adopted May 26, 2006) are pending EPA waiver determinations under CAA section 209(b) or section 209(e).[38] We expect that EPA will act on these requests for waivers of preemption or authorization under CAA section 209 in the near term, and that our final approval of the 2008 $PM_{2.5}$ Plan based in part on its reliance on the emissions reductions associated with these rules is, therefore, reasonable and appropriate. If, however, EPA either denies or does not issue the State's requested waiver for any of these measures prior to the effective date of today's action, we will take appropriate remedial action to ensure that our action on the plan is fully supportable or to reconsider that action.

Third, as to the Diesel Particulate Matter Control Measure for On-Road Heavy-Duty Diesel-Fueled Vehicles Owned or Operated by Public Agencies and Utilities (adopted December 8, 2005), CARB's staff report on this measure indicates that the projected baseline inventories have attributed emissions reductions of 0.1 tpd $PM_{2.5}$ and 0.18 tpd NO_X *statewide* to this measure. *See* Staff Report: Proposed Diesel Particulate Matter Control Measure for On-Road Heavy-Duty Diesel-Fueled Vehicles Owned or Operated by Public Agencies and Utilities, October 2005, at pg. 55. Assuming less than 25 percent of these reductions are attributed to the SJV area, the *de minimis* amounts of emissions reductions attributed to this measure in the 2008 $PM_{2.5}$ SIP do not affect our evaluation of the attainment and RFP demonstrations in the 2008 $PM_{2.5}$ SIP.

Similarly, as to the Solid Waste Collection Vehicle Rule (adopted September 24, 2003), CARB's staff report on this measure indicates that the projected baseline inventories have attributed emissions reductions of 0.17 tpd $PM_{2.5}$ and 2.3 tpd NO_X *statewide* to this measure. *See* Supplemental Staff Report: Proposed Diesel Particulate Matter Control Measure for On-Road Heavy-Duty Residential and Commercial Solid Waste Collection Vehicles, August 8, 2003, at pg. 18. Assuming less than 25 percent of these reductions are attributed to the SJV area, the *de minimis* amounts of emissions reductions attributed to this measure in the 2008 $PM_{2.5}$ SIP also do not affect our evaluation of the attainment and RFP demonstrations in the 2008 $PM_{2.5}$ SIP.

Finally, the Heavy Duty Diesel Engine-Chip Reflash rule (adopted March 27, 2004) (''Chip Reflash'' rule) was intended to ensure expeditious compliance with CARB's NO_X emissions standard for heavy-duty diesel (HDD) engines by requiring installation of ''Low-NO_X Software.'' The Chip Reflash rule was invalidated in part by a California State Court, and CARB repealed the related regulations in June 2007. The emissions reduction credit attributed to Chip Reflash in CARB's baseline inventories is limited to vehicles that have been ''reflashed,'' *i.e.,* physically installed the Low-NO_X Software,[39] removal of which would constitute a violation of the CAA and/or California state law. *See* the statutory anti-tampering laws in CAA section 203(a)(3) and California Vehicle Code section 27156. Thus, the NO_X emissions reductions attributed to ''reflashed'' engines are enforceable under the CAA and/or California state law.

As to AIR's calculation of the reductions from baseline measures, AIR calculates what it considers ''the total reductions from baseline reductions without recession reductions'' to be 11 tpd of $PM_{2.5}$, 195 tpd of NO_X, and 0.9 tpd of SO_X. These figures are not correct because they do not take into account CARB's recent updates to the projected 2014 inventory.

For the 2008 $PM_{2.5}$ SIP, ''baseline reductions'' are calculated by subtracting the 2005 base year inventory form the projected 2014 pre-control-strategy inventory. As we have discussed above, CARB revised its projected 2014 inventories to incorporate not only the continuing effects of the recent economic recession but also many non-recession related changes. These revisions have resulted in a more accurate projected 2014 inventory.

As we have discussed previously, projected emissions inventories are a function in part of changes in activity. Projected inventories are, therefore, necessarily affected by forecasts of industrial growth, population growth, and transportation growth, among other factors. EPA guidance emphasizes the importance of developing reliable methods for estimating future source activity levels as part of the SIP planning process. We believe that CARB has done this.

[37] EPA is currently reviewing a request from CARB for a determination as to whether certain requirements of these anti-idling rules are preempted by section 209(a) of the CAA; certain provisions are conditions precedent pursuant to section 209(a) of the Act; certain provisions are within-the-scope of previous waivers and authorizations issued pursuant to sections 209(b) and 209(e) of the Act, respectively; and at least one provision requires and merits a full authorization pursuant to section 209(e) of the Act. *See* 75 FR 43975 (July 27, 2010). CARB estimates that the operational requirement of the anti-idling rule, which is not subject to a CAA section 209 waiver, achieves 0.2 tpd of NO_X in the SJV. *See Memorandum,* Doris Lo, Air Division, Planning Office (AIR–2); to the San Joaquin Valley $PM_{2.5}$ Docket No. EPA–R09–OAR–2010–0516, ''SIP Credit for Heavy-Duty Diesel Engine Low-NO_X Software (''Chip Reflash'')''; from, September 28, 2011.

[38] *See* letter, James Goldstene, Executive Officer, CARB to Stephen L. Johnson, Administrator, EPA RE: Request for Authorization Determination Pursuant to Clean Air Act Section 209(e) for Amendments to California's Off-Road Emissions Standards Regulation for large Spark-Ignition (LSI) Engines and Fleet Requirement for In-Use LSI Forklifts and Other Industrial Equipment and California State Motor Vehicle and Nonroad Engine Pollution Control Standards; Truck Idling Requirements; Opportunity for Public Hearing and Request for Public Comment; Notice Of Opportunity For Public Hearing And Comment. 75 FR 43975 (July 27, 2010).

[39] The 2007 State Strategy, Appendix A, ''Emissions Inventory Output Tables'' documents the adjustment in the baseline that CARB made to account for Chip Reflash (or Heavy-Duty Diesel Engine Software Upgrade). As described in appendix A, CARB staff estimates that the overall benefits of the software upgrade regulation plus related actions provided approximately 38 tons per day of NO_X emissions reductions statewide in year 2007. CARB also indicates that it took into account the fact that the software upgrade regulation had been invalidated by including no additional emissions reductions from chip reflash other than those that had already occurred due to compliance with the regulation (prior to invalidation by the court), voluntary upgrade programs, ongoing engine rebuilds, engine upgrades by manufacturers exempt from the regulation, and interstate trucks. CARB staff recently confirmed that the baseline adjustment for chip reflash in the 2007 State Strategy reflects emissions reduction credit only for engines that have been ''reflashed''. *See Memorandum,* Doris Lo, Air Division, Planning Office (AIR–2); to the San Joaquin Valley $PM_{2.5}$ Docket No. EPA–R09–OAR–2010–0516, ''SIP Credit for Heavy-Duty Diesel Engine Low-NO_X Software (''Chip Reflash'')''; from September 28, 2011.

2. Waiver Measures

Comment: Earthjustice and CRPE object to our proposal to grant emissions reduction credit to California's mobile source control measures that have received a waiver of preemption under CAA section 209 without first approving them into the SIP. Both commenters argue that our reliance for this proposal on the general savings clause in CAA section 193 is inappropriate for several reasons.

First, the commenters assert that CAA section 193 only saves those ''formal rules, notices, or guidance documents'' that are not inconsistent with the CAA. They argue that both the CAA and EPA's long-standing policies and regulations require SIPs to contain the state and local emission limitations and control measures that are necessary for attainment and RFP and to meet other CAA requirements. They assert that our position on the treatment of California's waived measures is inconsistent with this requirement. CRPE asserts that EPA has, in contrast, approved other (non-mobile source) state measures into the SIP, *e.g.,* the consumer products rules and fuel standards. Earthjustice also argues that only SIP approval provides for the CAA's enforcement oversight (CAA sections 179 and 304) and anti-backsliding (CAA section 110(l) and 193) safeguards.

Second, the commenters argue that we cannot claim that our position was ratified by Congress because section 193 saves only regulations, standards, rules, notices, orders and guidance ''promulgated or issued'' by the Administrator and we have not identified documents promulgated or issued by EPA that establish our position here. Earthjustice further asserts that our interpretation has not been expressed through any affirmative statements and the only statements of relevant statutory interpretations are contrary to our position on California's waived measures.

Third, Earthjustice argues that there is no automatic presumption that Congress is aware of an agency's interpretations and we have not provided any evidence that Congress was aware of our interpretation regarding the SIP treatment of California's mobile source control measures. Similarly, CRPE argues that our positions that Congress must expressly disapprove of EPA's long-standing interpretation and Congressional silence equates to a ratification of EPA's interpretation are incorrect.

Finally, CRPE argues that waiver measures may not be used in attainment demonstrations because EPA makes no finding during the waiver process that the rules achieve the reductions claimed or that the measures are SIP creditable. CRPE also notes that these issues are the subject of litigation in the 9th Circuit U.S. Court of Appeals in *Sierra Club* v. *EPA,* Consolidated Case Nos. 10–71457 and 10–71458.

Response: We continue to believe that credit for emissions reductions from implementation of California mobile source rules that are subject to CAA section 209 waivers (''waiver measures'') is appropriate notwithstanding the fact that such rules are not approved as part of the California SIP. In our 2011 proposal and the 2011 Proposal TSD, we explained why we believe such credit is appropriate. *See* 76 FR 41338 at 41345 and 2011 Proposal TSD at section II.F.4.a.i. Historically, EPA has granted credit for the waiver measures because of special Congressional recognition, in establishing the waiver process in the first place, of the pioneering California motor vehicle control program and because amendments to the CAA (in 1977) expanded the flexibility granted to California in order ''to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare,'' (H.R. Rep. No. 294, 95th Congr., 1st Sess. 301–2 (1977)). In allowing California to take credit for the waiver measures notwithstanding the fact that the underlying rules are not part of the California SIP, EPA treated the waiver measures similarly to the Federal motor vehicle control requirements, which EPA has always allowed States to credit in their SIPs without submitting the program as a SIP revision. As we explained in the 2011 Proposal TSD (pp. 100–102), credit for Federal measures, including those that establish on-road and nonroad standards, notwithstanding their absence in the SIP, is justified by reference to CAA section 110(a)(2)(A), which establishes the following content requirements for SIPs: ''* * * enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), * * *, as may be *necessary or appropriate* to meet the applicable requirements of this chapter.'' (emphasis added). Federal measures are permanent, independently enforceable (by EPA and citizens), and quantifiable without regard to whether they are approved into a SIP, and thus EPA has never found such measures to be ''necessary or appropriate'' for inclusion in SIPs to meet the applicable requirements of the Act. Section 209 of the CAA establishes a process under which EPA allows California's waiver measures to substitute for Federal measures, and like the Federal measures for which they substitute, EPA has historically found, and continues to find, based on considerations of permanence, enforceability, and quantifiability, that such measures are not ''necessary or appropriate'' for California to include in its SIP to meet the applicable requirements of the Act.

First, with respect to permanence, we note that, to maintain a waiver, CARB's on-road waiver measures can be relaxed only to a level of aggregate equivalence to the Federal Motor Vehicle Control Program (FMVCP). See section 209(b)(1). In this respect, the FMVCP acts as a partial backstop to California's on-road waiver measures (*i.e.,* absent a waiver, the FMVCP would apply in California). Likewise, Federal nonroad vehicle and engine standards act as a partial backstop for corresponding California nonroad waiver measures. The constraints of the waiver process thus serve to limit the extent to which CARB can relax the waiver measures for which there are corresponding EPA standards, and thereby serve an anti-backsliding function similar in substance to those established for SIP revisions in CAA sections 110(l) and 193.[40] Meanwhile, the growing convergence between California and EPA mobile source standards diminishes the difference in the emissions reductions reasonably attributed to the two programs and strengthens the role of the Federal program in serving as an effective backstop to the State program. In other words, with the harmonization of EPA mobile source standards with the corresponding State standards, the Federal program is becoming essentially a full backstop to most parts of the California program.

Second, as to enforceability, we note that the waiver process itself bestows enforceability onto California to enforce the on-road or nonroad standards for which EPA has issued the waiver. CARB has as long a history of enforcement of

[40] In addition, the commenters' concerns over the potential for relaxation by the State of the waiver measures because the underlying regulations are not subject to EPA review and approval as a SIP revision are not a practical concern for this particular plan given that the plan's horizon is very short term (next couple of years), and the on-road and nonroad vehicles that in part will determine whether the area attains the standard are already in operation or in dealer showrooms. There is no practical means for the State to relax the standards of vehicles already manufactured, even if the State wanted to relax the standards.

vehicle/engine emissions standards as EPA, and CARB's enforcement program is equally as rigorous as the corresponding EPA program. The history and rigor of CARB's enforcement program lends assurance to California SIP revisions that rely on the emissions reductions from CARB's rules in the same manner as EPA's mobile source enforcement program lends assurance to other state's SIPs in their reliance on emissions reductions from the FMVCP. While it is true that citizens and EPA are not authorized to enforce California waiver measures under the Clean Air Act (*i.e.,* because they are not in the SIP), citizens and EPA are authorized to enforce EPA standards in the event that vehicles operate in California without either California or EPA certification.

As to quantifiability, EPA's historical practice has been to give SIP credit for motor-vehicle-related waiver measures by allowing California to include motor vehicle emissions estimates made by using California's EMFAC (and its predecessors) motor vehicle emissions factor model in SIP inventories. EPA verifies the emissions reductions from motor-vehicle-related waiver measures through review and approval of EMFAC, which is updated from time to time by California to reflect updated methods and data, as well as newly-established emissions standards. (Emissions reductions from EPA's motor vehicle standards are reflected in an analogous model known as MOVES.) The EMFAC model is based on the motor vehicle emissions standards for which California has received waivers from EPA but accounts for vehicle deterioration and many other factors. The motor vehicle emissions estimates themselves combine EMFAC results with vehicle activity estimates, among other considerations. *See* the 1982 Bay Area Air Quality Plan, and the related EPA rulemakings approving the plan (see 48 FR 5074 (February 3, 1983) for the proposed rule and 48 FR 57130 (December 28, 1983) for the final rule) as an example of how the waiver measures have been treated historically by EPA in California SIP actions. The San Joaquin Valley plan was developed using a version of the EMFAC model referred to as EMFAC2007, which EPA has approved for use in SIP development in California. *See* 73 FR 3464 (January 18, 2008). Thus, the emissions reductions that are from the California on-road ''waiver measures'' and that are estimated through use of EMFAC are as verifiable as are the emissions reductions relied upon by states other than California in developing their SIPs based on estimates of motor vehicle emissions made through the use of the MOVES model.

Moreover, EPA's waiver review and approval process is analogous to the SIP approval process. First, CARB adopts its emissions standards following notice and comment procedures at the state level, and then submits the rules to EPA as part of its waiver request. When EPA receives new waiver requests from CARB, EPA publishes a notice of opportunity for public hearing and comment and then publishes a decision in the **Federal Register** following the public comment period. Once again, in substance, the process is similar to that for SIP approval and supports the argument that one hurdle (the waiver process) is all Congress intended for California standards, not two (waiver process plus SIP approval process). Second, just as SIP revisions are not effective until approved by EPA, changes to CARB's rules (for which a waiver has been granted) are not effective until EPA grants a new waiver, unless the changes are ''within the scope'' of a prior waiver and no new waiver is needed. Third, both types of final actions by EPA—*i.e.,* final actions on California requests for waivers and final actions on state submittals of SIPs and SIP revisions may be challenged under section 307(b)(1) of the CAA in the appropriate United States Court of Appeals.

In the 2011 Proposal TSD (pp. 102–103), we indicated that we believe that section 193 of the CAA, the general savings clause added by Congress in 1990, effectively ratified our long-standing practice of granting credit for the California waiver rules because Congress did not insert any language into the statute rendering EPA's treatment of California's motor vehicle standards inconsistent with the Act. Rather, Congress extended the California waiver provisions to most types of nonroad vehicles and engines, once again reflecting Congressional intent to provide California with the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare. Requiring the waiver measures to undergo SIP review in addition to the statutory waiver process is not consistent with providing California with the broadest possible discretion as to on-road and nonroad vehicle and engine standards, but rather, would add to the regulatory burden California faces in establishing and modifying such standards, and thus would not be consistent with Congressional intent. In short, we believe that Congress intended California's mobile source rules to undergo only one EPA review process (*i.e.,* the waiver process), not two.

In summary, we disagree that our interpretation of CAA section 193 is fundamentally flawed. EPA has historically given SIP credit for waiver measures in our approval of attainment demonstrations and other planning requirements such as reasonable further progress and contingency measures submitted by California. We continue to believe that section 193 ratifies our long-standing practice of allowing credit for California's waiver measures notwithstanding the fact they are not approved into the SIP, and correctly reflects Congressional intent to provide California with the broadest possible discretion in the development and promulgation of on-road and nonroad vehicle and engine standards.[41]

CRPE correctly notes that EPA's treatment of California waiver measures in SIP actions is the subject of current litigation in *Sierra Club* v. *EPA,* Consolidated Case Nos. 10–71457 and 10–71458 (9th Circuit).

3. Enforceable Commitments

Comment: AIR argues that EPA cannot make a finding that the ''recession reductions'' are an ''enforceable'' measure within the meaning of CAA section 110(a)(2)(A) and 172(c)(6) because ''recession reductions'' are only voluntary behavior to reduce activity for economic reasons and nothing prevents such an increase in activity as the economy improves. Based on this argument, AIR asserts that EPA's approval of the attainment demonstration is arbitrary and capricious and not in accordance with the law. AIR asserts that CARB concedes that the reductions coming from reduced activity may change in the future.

Response: EPA is not making a finding that emissions ''reductions'' related to the economic recession are ''enforceable'' measures under CAA sections 110(a)(2)(A) and 172(c)(6). As explained in our amended proposal (76 FR 41338 at 41354–41356), we are concluding that CARB's 2011 SIP revisions, which updated the State's projected (''baseline'') emissions inventories based on improved

[41] In this regard, we disagree that we are treating the waiver measures inconsistently with other California control measures, such as consumer products and fuels rules, for the simple reason that, unlike the waiver measures, there is no history of past practice or legislative history supporting treatment of other California measures, such as consumer products rules and fuels rules, in any manner differently than is required as a general rule under CAA section 110(a)(2)(A), *i.e.,* state and local measures that are relied upon for SIP purposes must be approved into the SIP.

methodologies for estimating emissions and more recent growth factors, reduced the total amount of emissions reductions needed for attainment and that the control strategy in the 2008 $PM_{2.5}$ Plan, as revised in 2011, demonstrates expeditious attainment of the 1997 $PM_{2.5}$ NAAQS in the SJV from the revised baseline.

Section 110(a)(2)(A) of the CAA requires that each implementation plan submitted by a State include ''enforceable emission limitations and other control measures, means, or techniques * * * as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of [the CAA].'' Section 172(c)(6) contains substantively identical requirements for all nonattainment area plans. Baseline emissions inventories, however, are not ''enforceable emission limitations and other control measures, means, or techniques'' or ''schedules and timetables for compliance'' that are necessary or appropriate to meet CAA requirements. *See El Comite Para El Bienestar de Earlimart* v. *Warmerdam,* 539 F.3d 1062 (9th Cir. 2008) (concluding that a baseline inventory is not an enforceable ''standard or limitation'' as defined by the CAA and is not, therefore, an independently enforceable aspect[] of the SIP''). Rather, baseline emissions inventories provide the basis for, among other things, the demonstrations of attainment and progress toward attainment required by CAA sections 172(c)(1) and 172(c)(2). Specifically, CAA section 172(c)(3) requires that each plan for a nonattainment area include ''a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area * * *''). After developing this ''base year'' emissions inventory, States use modeling and other analyses to calculate future emissions projections and ''target'' emissions levels, which then inform the State's development of progress milestones and control strategies for attaining the NAAQS. *See* General Preamble at 13507–13510. In short, emissions inventories provide estimates of current and future emissions that, in turn, provide the starting point for the State's attainment demonstration and enforceable control strategy.

Nothing in the CAA precludes a State from revising a submitted plan to take into account revised emissions estimates and projections. All projections of future emissions-generating activity (including the original projections in the 2008 $PM_{2.5}$ Plan that AIR would have CARB and EPA continue to use) are based on projections of population and employment and other growth factors that reflect voluntary behavior, all of which can increase or decrease as economic conditions change. However, reliance on projections from reputable sources of economic behavior based on established methods of predicting such behavior is the historic practice for development of emissions inventories. CARB's revised projections of future emissions-generating activity are based on reputable sources, represent the most current understanding of expected economic conditions through at least 2014, and were subject to extensive public review and comment before CARB adopted its 2011 SIP revisions containing these updated projections. Given the magnitude of the economic recession's impact on emissions-generating activity in SJV and other parts of California, and the resulting impact on the State's assessment of the control strategy necessary to demonstrate attainment of the 1997 $PM_{2.5}$ standards, we conclude that it is appropriate to take these updated emissions projections into account as part of our action on the 2008 $PM_{2.5}$ Plan. Other than asserting generally that CARB and EPA should not rely on the revised economic data to determine the reductions needed for attainment and that future conditions may change, AIR provides no information that undermines the State's revised economic data or the related changes to the projected inventories.

We disagree with AIR's unsupported assertion that ''CARB concedes that the reductions coming from reduced activity may change in the future.'' CARB has stated that it will continue to track emissions trends to ensure that the 2014 emissions targets are met and maintains its commitment to adopt and implement additional control requirements, incentive programs, or other measures as appropriate to reduce emissions to the levels necessary to attain. *See* 2011 Progress Report, p. 4.

Moreover, as discussed above, the revisions to the 2014 baseline inventory that AIR characterizes as ''recession reductions'' took into account not only the State's revised economic forecasts but numerous other factors, including updated activity data and growth projections. *See* section II.A (''Comments on the Proposed Actions on the Emissions Inventory'') above.

Comment: AIR asserts that the Plan relies on emissions reductions caused by the recent economic recession to demonstrate attainment, rather than requiring reductions from diesel trucks and other diesel equipment in 2014. Noting CARB's recent revisions to five of its in-use rules,[42] AIR argues that these rule revisions ''reduc[ed] the amount of reductions that those five in-use rules would have achieved by 2014,'' and that CARB has equated recession-related emissions reductions with the reductions necessary to meet the 2014 tonnage targets. AIR asserts that the difference between the pre-recession and recession inventories in the Valley is 40 tons per day of NO_X.

Response: As discussed above, CARB's revisions to the 2014 baseline inventories took into account not only the State's revised economic forecasts but numerous other factors, including updated activity data and growth projections. *See* section II.A above. These improvements to the emissions estimates reduced the projected 2014 emissions levels for trucks, buses and certain off-road equipment compared to the levels expected when CARB initially adopted its rules for these sources in 2007 and 2008. These revised projections, in turn, reduced the State's assessment of the amount of emissions reductions needed from these emissions sources to provide for attainment of the 1997 $PM_{2.5}$ NAAQS in the SJV and allowed CARB to provide some economic relief to the affected industries.[43] We note that because EPA has not previously approved California's in-use truck rules into the SIP, EPA's approval of these rules strengthens the SIP and meets the requirements of CAA section 110(l). *See* CAA 110(l) (prohibiting EPA from approving a revision of a plan ''if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress * * * or any other applicable requirement of [the Act]'').

Both the revised Truck rule and the revised Off-Road rule continue to require reductions from diesel trucks

[42] These five in-use rules are CARB's Truck rule, Heavy-Duty Vehicle Greenhouse Gas Emission Reduction Regulation, In-Use On-Road Diesel-Fueled Heavy-Duty Drayage Trucks Regulation, Off-Road rule), and the LSI regulation (collective ''in-use rules'').

[43] To determine the extent to which it could revise its in-use rules to provide economic relief and still meet the attainment target, CARB evaluated whether the lower emissions from the revised inventories for both trucks, buses and off-road equipment, when combined with the effects of the recession, provided greater emissions reductions from the in-use rules than were initially expected. CARB referred to these greater-than-expected emissions reductions as the ''emission margin.'' Because the in-use diesel rules reduced both direct $PM_{2.5}$ and NO_X and both pollutants contribute to ambient levels of $PM_{2.5}$, CARB calculated the margin on a ''NO_X equivalent'' basis and found that the margin for the SJV was 40 tpd of NO_X equivalents. See 2010 Truck Rule ISOR, p. 23.

and other diesel equipment in 2014 and future years. *See* 2010 Truck Rule ISOR, p. 45 and 2010 Off-Road Equipment ISOR, p. 38; see also, 76 FR 41338, 41346 (Table 6).

Comment: AIR claims that the 2011 Progress Report shows CARB considers ''recession reductions'' as a part of its ''global'' emissions reduction commitment. In support of this claim, AIR quotes the 2011 Progress Report at page 4:

> As a result of the recession, actual emissions decreases moved California closer to the emissions levels needed for attainment in 2014. The recession has reduced economic activity and emissions, most notably in the goods movement sector. This has allowed ARB to maintain the State's SIP commitments in the South Coast and San Joaquin Valley while also providing some near-term economic relief to affected industries.
>
> As the economy recovers, ARB will continue to track emissions trends to ensure the 2014 emissions targets are met. If future emissions were to exceed the SIP target, the State's commitment could be made up with additional controls, incentive programs, or other programs to bring emissions down to the necessary levels. A discussion of how ARB accounted for the recession is found later in this report.

Response: EPA is not treating any ''recession reductions'' as part of the State's enforceable commitments. As explained above, we are approving the attainment demonstration and control strategy in the 2008 $PM_{2.5}$ Plan based on our conclusion that the Plan, as revised by CARB's 2011 revisions to the projected baseline inventories, demonstrates expeditious attainment of the $PM_{2.5}$ standards in the SJV. EPA interprets the quoted language as a statement of CARB's future plans to revise the SIP as necessary should economic activity change significantly in the future.

Comment: AIR claims that in proposing to disapprove the CARB's global commitment in November 2010, EPA recognized that the Truck rule could reduce that percentage of reductions remaining as commitments below 10 percent. It then asserts that EPA cannot now approve the commitment and the attainment demonstration because CARB's relaxation of the Truck rule and the Off-Road rule to delay reductions beyond 2014 mean that the percentages of $PM_{2.5}$ and NO_X reductions needed for attainment that remain as commitments are still well above the 10 percent threshold. AIR states that based on its calculations, the percentage of total reductions remaining as commitments, if adjustments to the baseline are not included, would be 25.1 percent for $PM_{2.5}$ and 26.7 percent for NO_X.

Response: EPA did not propose to disapprove CARB's aggregate commitments in its 2010 proposal. We proposed then and again in our 2011 proposal to approve CARB's aggregate emissions reductions commitments as described in CARB Resolution 07–28, Attachment B. *See* 75 FR 74518 at 74541 and 76 FR 41338 at 41361. EPA did initially propose to disapprove the attainment demonstration based in part on our finding that the percentage of the emissions reductions needed for attainment that remained as commitments was too high. *See* 75 FR at 74541. As explained in our 2011 proposal, however, additional submittals from CARB have reduced the percentages of emissions reductions remaining as commitments to 13.2 percent for direct $PM_{2.5}$ and 4.5 percent for NO_X. These percentages are reasonably close to the 10 percent range that EPA has historically accepted as appropriate for enforceable commitments in approving attainment demonstrations. *See* 76 FR at 41355, 41356. Because the State's revisions to the projected baseline inventories in the SJV 2008 $PM_{2.5}$ SIP have reduced the total tonnage of emissions reductions necessary to attain the 1997 $PM_{2.5}$ standards (*see* section II.A above), we disagree with AIR's calculation of the percentage of total reductions remaining as commitments.

Comment: Earthjustice comments that EPA has outlined a three-factor test to assess whether the commitments in the SJV 2008 $PM_{2.5}$ SIP are reasonable but has not documented, under the first factor, how we determine the level of remaining reductions and what is meant by ''reasonably close.''

Response: In our 2011 proposal we provide a detailed discussion of the emissions reductions needed for attainment and how they have been or will be achieved. *See* generally 76 FR 41339, 41344–41347 and 41354–41357 and 2011 Proposal TSD, sections II.F. and G. These reductions include those from measures adopted prior to 2007 (baseline measures), measures adopted since 2007 and measures that are yet to be adopted (*i.e.,* enforceable commitments). The expected reductions from each of these sets of measures are provided in the 2011 proposal, as are EPA's calculations of the percentages of needed reductions remaining as commitments. *See* 76 FR 41338 at 41354, Table 8; *see also* 2011 Proposal TSD at pp. 105–106 and 113–114. As provided in the tables in our 2011 proposal and 2011 Proposal TSD, the reductions remaining as commitments are 12.9 tpd of NO_X and 3.0 tpd of $PM_{2.5}$. *Id.* These reductions represent 4.5 percent and 13.2 percent of the total NO_X and $PM_{2.5}$ emissions reductions (respectively) needed for attainment. *Id.*

In support of our statement that these percentages (4.5 percent of NO_X and 13.2 percent of $PM_{2.5}$) are ''reasonably close to the 10 percent range that EPA has historically accepted in approving attainment demonstrations,'' we referenced several prior EPA approvals of SIPs relying on similar enforceable commitments. *See* 76 FR 41339 at 41355 and n. 30. We also explained our legal rationale for approving such enforceable commitments and referenced several court decisions that support our interpretation of the CAA. *See id.* at n. 27 and 28. Based on our evaluations, we proposed to allow the State to rely on these limited enforceable commitments as part of the attainment demonstration in the 2008 $PM_{2.5}$ Plan and 2007 State Strategy. *Id.* at 41356. Earthjustice does not explain why these explanations were not adequate or why reliance on enforceable commitments consistent with these court cases is inappropriate.

Comment: Earthjustice comments that it is not reasonable to approve a ''plan to make a plan,'' which is what they believe the District and CARB have provided. Earthjustice states that the District and CARB are asking EPA to trust them that they will find emissions reductions needed to meet the standards by 2015. Earthjustice states that this is not what the CAA contemplates, citing section 110(a)(2)(A) of the CAA (requiring plans to include ''enforceable emission limitations and other control measures * * * necessary or appropriate to meet the applicable requirements of this Act''). Earthjustice states that there is no point in having a plan which does not specifically identify how it plans to accomplish the needed reductions.

Response: We disagree with Earthjustice's assertion that the 2008 $PM_{2.5}$ SIP does not identify how CARB and the SJVUAPCD plan to accomplish the reductions needed for attainment of the 1997 $PM_{2.5}$ standards in the SJV by 2015. As discussed in our amended proposal, the 2008 $PM_{2.5}$ Plan relies principally on adopted measures approved into the SIP or given waivers under CAA section 209 rules to achieve the emissions reductions needed to attain the 1997 $PM_{2.5}$ standards in the SJV by April 5, 2015, including baseline (pre-2007) measures that continue to achieve emissions reductions through 2014. *See* 76 FR at 41356. The balance of the needed reductions is currently in the form of enforceable commitments that account for 13.2 percent of the

direct $PM_{2.5}$ and 4.5 percent of the NO_X emissions reductions needed from 2005 levels to attain. *See id.* These SIP-approved or CAA-waived control measures and enforceable commitments satisfy the requirement in CAA section 110(a)(2)(A) to include ''enforceable emission limitations and other control measures, means or techniques * * * as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements'' of the CAA. *See id.* at 41355, n. 27. Although CARB's and the District's enforceable commitments to achieve additional emissions reductions are expressed in aggregate tonnages and not tied to specific measures, both CARB and the District have provided a list of potential measures that may achieve the additional reductions needed to attain the standards, together with expeditious rule development, adoption, and implementation schedules consistent with EPA's policy on acceptable enforceable commitments. *See id.* at 41355, 41356. Both CARB and the District have also made significant progress to date in meeting their enforceable commitments. *Id.*

Comment: AIR notes that one of EPA's criteria for evaluating an attainment demonstration that relies on commitments is whether the state is capable of fulfilling the commitment. AIR argues that CARB is not capable of fulfilling its commitment given CARB's alleged use of ''recession reductions'' instead of actual measures to meet its commitment when diesel emissions can change based on economic forces that the State cannot control. It also claims that CARB's decision to revise its five in-use rules is evidence that CARB can and likely will amend rules in the future that may undermine its commitment.

Response: We disagree with AIR's assertion that CARB's revisions to the in-use rules or to its projected emissions levels based on updated economic forecasts undermine its commitments or demonstrate that the State is not capable of fulfilling its commitment. We discussed above in section II.A our reasons for concluding that the revisions to the 2014 baseline emissions inventories are legitimate.

Contrary to AIR's assertions, CARB's rulemaking record for the revisions to its in-use rules indicate that the State intends to ensure that any future revisions to the rules will not undermine its SIP commitment. See, *e.g.,* 2010 Truck Rule ISOR, p. 2 and 2010 Off-Road Rule ISOR, p. 2 (stating that rule revisions should ''continue progress toward cleaner air'' and ''meet state implementation plan (SIP) commitments''). Before revising its in-use rules, CARB calculated the maximum level of relief it could provide without violating it SIP commitment. This ''SIP margin'' was calculated as 40 tpd in NO_X equivalent (a weighted combination of NO_X and $PM_{2.5}$ emissions) in the SJV. *See* 2010 Truck Rule ISOR, p. 23 and 2010 Off-Road Rule ISOR, p. 20. The revisions to the in-use rules did not decrease their combined benefits by more this amount. *See* 2010 Truck Rule ISOR, p. 51 and 2010 Off-Road Rule ISOR, p. 43. Thus, CARB's actions did not reflect any lack of intention to fully meet its enforceable commitments to provide emissions reductions sufficient for timely attainment.

Comment: Earthjustice also contends that the second factor for determining whether to approve an attainment demonstration that relies on commitments, whether the state is capable of meeting its commitment, is not met because CARB has repeatedly fallen short of achieving its estimated emissions reduction from its rules and has not begun to develop its Agricultural Equipment Rule which was to achieve 5 to 10 tons per day of NO_X in the SJV and be adopted by 2009. To support its argument, it points to the methodology changes associated with the Truck Rule and Off-Road Rule and the ''massive recession reductions'' that have resulted in fewer reductions being needed from these rules. Earthjustice concludes that it does not believe that CARB is capable of meeting the ''massive, last-minute commitments'' relied upon in the Plan given CARB's history of avoiding satisfying its commitments. It also argues that CARB cannot rely on changes to the inventory to lessen the reductions from its rules without reassessing the relationship between emissions and ambient concentrations of fine particulates and that the ''massive recession reductions'' are neither permanent nor enforceable.

Response: We disagree with Earthjustice's assertion that CARB has a history of not satisfying its commitments or that the State's recent revisions to its future emissions projections indicate it is not capable of meeting its commitments. We discussed above in section II.A. our reasons for concluding that the revisions to the 2014 baseline emissions inventories are valid. We also note that Earthjustice has provided no information or data to undermine CARB's revisions to its future emissions projections based on its revised economic forecasts and updated methodologies for estimating emissions.

In addition, Earthjustice's assertion that CARB's actions with respect to regulation of in-use agricultural equipment indicate it will not meet its enforceable commitment is unsupported. CARB recently adopted changes to its rulemaking schedule to establish an adoption date of 2013 for regulation of in-use agricultural equipment. *See* 2011 Ozone SIP Revisions, p. 3. The 2007 State Strategy indicates that this measure is expected to achieve 5 to 10 tpd NO_X reductions in 2017, well after the period covered by the 2008 $PM_{2.5}$ SIP. *See* 2009 State Strategy Status Report, p. 18. CARB did not quantify emissions reductions for this measure for 2014. *See id.* at 16. The fact that the State revised its adoption schedule for a measure that is not relied on for attainment or RFP in the SJV 2008 $PM_{2.5}$ SIP does not establish that the State is generally incapable of meeting its enforceable commitments in that SIP. As discussed in the 2011 proposal and its TSD and in our response to comments on the air quality modeling above in section II.B., EPA has concluded as a technical matter that the revisions to the base year inventory are not significant enough to change the basic conclusions drawn from the air quality modeling or to warrant a new air quality modeling assessment at this time. *See* 76 FR 41338, 41349 and 2011 Proposal TSD, section II.B.

Comment: Earthjustice states that CAA sections 110(a)(2)(A) and 172(c)(6) require SIPs to contain ''enforceable limitations * * * as may be necessary or appropriate'' to achieve attainment. Earthjustice further states that, while section 110(k)(4) allows EPA to grant ''conditional approval'' of a SIP lacking certain statutory elements ''based on a commitment of the state to adopt specific enforceable measures'' by a date certain, the statute provides that the conditional approval automatically becomes a disapproval if the state fails to comply with the commitment within one year. Earthjustice then claims that EPA appears to be trying to avoid this limitation by treating open-ended promises of the State to reduce emissions as enforceable commitments even though the State has never specified exactly what it commits to do. Earthjustice states that courts have rejected similar attempts to circumvent the statute's limitations on conditional approval and cites *Sierra Club* v. *EPA,* 356 F.3d 296, 298 (DC Cir. 2004) as overturning EPA's conditional approval of SIPs based in part on the fact that the commitments identified no specific measures the state would implement.

Response: As pertinent to the comment, *Sierra Club* involved EPA's conditional approval under section 110(k)(4) of SIPs lacking in their entirety

RACM and rate-of-progress (ROP) demonstrations and contingency measures based on letters submitted by states that committed to cure these deficiencies. The court rejected EPA's construction of section 110(k)(4) as contrary to the unambiguous statutory language requiring the state to commit to adopt *specific* enforceable measures. *Sierra Club* at 302. The court found that EPA's construction turned the section 110(k)(4) conditional approval into a means of circumventing SIP deadlines. *Id.* at 303.

EPA does not dispute the holding of *Sierra Club.* However that case is not germane to EPA's approval of CARB's and the District's commitments here because the Agency is not approving those commitments under section 110(k)(4). The relevant precedent is instead *BCCA Appeal Group* v. *EPA,* 355 F.3d 817 (5th Cir. 2003). The facts in *BCCA* were very similar to those presented here. In *BCCA,* EPA approved an enforceable commitment in the Houston ozone SIP to adopt and implement unspecified NO_X controls on a fixed schedule to achieve aggregate emissions reductions. Petitioners claimed that EPA lacked authority under the CAA to approve a SIP containing an enforceable commitment to adopt unspecified control measures in the future. The court disagreed and found that section 110(k)(4) conditional approvals do not supplant EPA's practice of fully approving enforceable commitments:

> Nothing in the CAA speaks directly to enforceable commitments. The CAA does, however, provide EPA with great flexibility in approving SIPs. A SIP may contain ''enforceable emission limitations and other control measures, means, or techniques * * * as well as schedules and timetables for compliance, as may be necessary or appropriate'' to meet the CAA's requirements * * *. Thus, according to the plain language of the statute, SIPs may contain ''means,'' ''techniques'' and/or ''schedules and timetables for compliance'' that the EPA considers ''appropriate'' for attainment so long as they are ''enforceable.'' *See id. § 7410(a)(2)(A).* ''Schedules and timetables'' is broadly defined as ''a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, prohibition or standard.'' *42 U.S.C. 7602(p).* The remaining terms are not defined by the Act. Because the statute is silent on the issue of whether enforceable commitments are appropriate means, techniques, or schedules for attainment, EPA's interpretation allowing limited use of an enforceable commitment in the Houston SIP must be upheld if reasonable.

BCCA at 839–840. The court upheld EPA's approval of the commitment, finding that ''EPA reasonably concluded that an enforceable commitment to adopt additional control measures on a fixed schedule was an 'appropriate' means, technique, or schedule or timetable for compliance'' under sections 110(a)(2)(A) and 172(c)(6). *Id.* at 841. Thus the court recognized that sections 110(a)(2)(A) and 172(c)(6) provide a basis for EPA to approve enforceable commitments as distinct from the commitments contemplated by section 110(k)(4), which are not in fact enforceable but instead lead to SIP disapproval if not honored. *See* also *Environmental Defense* v. *EPA,* 369 F.3d 193, 209–210 (2nd Cir. 2004) (similarly upholding enforceable SIP commitments). As a result, contrary to Earthjustice's contention, section 110(k)(4) is not a bar to EPA's approval of CARB's and the District's enforceable commitments and that approval under section 110(k)(3) is permissible as an appropriate means, technique or schedule or timetable for compliance under sections 110(a)(2)(A) and 172(c)(6).

Comment: Earthjustice states that the commitments are ''absurd'' because CARB may claim credit toward its aggregate commitments from everything from new regulations to unenforceable incentive programs to ''actual decreases occurring in any air basin for which emissions reduction commitments have been made.'' Earthjustice states this is arbitrary and that EPA needs to explain how the commitments offered in the plan would be enforced, what relief EPA or the public could demand, and when a suit could be brought. Earthjustice states that it does not see how these open-ended commitments are practically enforceable in a court of law and asserts that EPA must lay out a roadmap that can be followed by courts in the future to ensure that meaningful emissions reductions are achieved.

Response: As discussed in our amended proposal (76 FR at 41355), the CAA allows approval of enforceable commitments that are limited in scope where circumstances warrant the use of such commitments in place of adopted control measures. Commitments approved by EPA under section 110(k)(3) of the CAA are enforceable by EPA and citizens under, respectively, sections 113 and 304 of the CAA. In the past, EPA has approved enforceable commitments and courts have enforced these actions against states that failed to comply with those commitments: See, *e.g., American Lung Ass'n of N.J.* v. *Kean,* 670 F. Supp. 1285 (D.N.J. 1987), aff'd, 871 F.2d 319 (3rd Cir. 1989); *NRDC, Inc.* v. *N.Y. State Dept. of Env. Cons.,* 668 F. Supp. 848 (S.D.N.Y. 1987); *Citizens for a Better Env't* v. *Deukmejian,* 731 F. Supp. 1448, recon. granted in par, 746 F. Supp. 976 (N.D. Cal. 1990); *Coalition for Clean Air* v. *South Coast Air Quality Mgt. Dist.,* No. CV 97–6916–HLH, (C.D. Cal. Aug. 27, 1999). *See* 76 FR at 41355, n. 27.

In response to Earthjustice's comment, we are clarifying in this final action that we are not providing SIP credit for ''actual decreases'' in air pollution emissions or ''recession-related reductions'' in approving the 2008 $PM_{2.5}$ Plan. Rather, we are approving the 2008 $PM_{2.5}$ Plan taking into account CARB's revisions to the control strategy based on the revisions to its projected baseline inventories.

Specifically, as explained in our 2011 proposal, CARB's aggregate emissions reduction commitment in the 2008 $PM_{2.5}$ Plan as submitted in 2008 is to achieve 76 tpd of NO_X reductions and 5 tpd of $PM_{2.5}$ reductions by 2014. *See* 76 FR at 41346; CARB Resolution 07–28, Attachment B at pp. 3–6 and 2009 State Strategy Status Report, p. 21.[44] The District's aggregate emissions reduction commitment in the Plan as submitted in 2008 is to achieve 8.97 tpd of NO_X reductions, 6.7 tpd of $PM_{2.5}$ reductions, and 0.92 tpd of SO_2 reductions by 2014. *See* 76 FR at 41345, Table 3. More broadly, however, CARB's emissions reduction commitment is to achieve the ''total emissions reductions necessary to attain Federal standards'' through ''the implementation of control measures; the expenditure of local, State, or federal incentive funds; or through other enforceable measures.'' *See* CARB Resolution 07–28, Attachment B at pp. 3–6. The updates and improvements to the inventories as presented in CARB's 2011 Progress Report altered the calculation of the reductions needed for attainment of the 1997 $PM_{2.5}$ standards in SJV by reducing the total reductions needed from control strategy measures to 9 tpd (for $PM_{2.5}$), 26.1 tpd (for NO_X), and 0.8 tpd (for SO_2). *See* 76 FR at 41354, Table 7. We therefore interpret CARB's emissions reduction commitment, together with the adjustments to the 2014 baseline inventories provided in CARB's 2011 SIP revision and the District's commitments, as adjusting CARB's total emission reduction commitment such that the CARB is now obligated to achieve 2.3 tpd of $PM_{2.5}$ reductions and

[44] In our proposed rule (76 FR 41338, 41346) we reference the 2007 State Strategy, p. 63 and CARB Resolution 07–28, Attachment B. p.6. Note that page 63 of the 2007 State Strategy was replaced with information in the 2009 State Strategy Status Report, pp. 20–21.

17.1 tpd of NO_X reductions [45] by 2014 through enforceable control measures to provide for attainment of the 1997 $PM_{2.5}$ NAAQS in SJV. The District's aggregate emissions reduction commitment in the Plan as submitted in 2008 (8.97 tpd of NO_X reductions, 6.7 tpd of $PM_{2.5}$ reductions, and 0.92 tpd of SO_2 reductions by 2014) remains unchanged. *See* Table 3 below.

We also note that we do not agree with CARB's position that ''actual decreases occurring in any air basin for which emissions reduction commitments have been made'' or incentive programs may be counted as SIP credit toward CARB's enforceable commitment, unless the State provides a demonstration that such emissions decreases are actually enforceable or otherwise meet EPA's requirements for SIP creditability.

CARB's commitment is to adopt and implement measures that will achieve specific reductions of NO_X and $PM_{2.5}$ emissions and are, as such, specific strategies designed to achieve the SIP's overall objectives. Further, if CARB fails to meet its commitments, EPA could make a finding of failure to implement the SIP under CAA Section 179(a), which starts an 18-month period for the State to correct the non-implementation before mandatory sanctions are imposed, or alternatively either EPA or citizens could enforce the commitments directly against CARB under CAA section 113 or 304, respectively.

Comment: Earthjustice states that courts ''may only enforce SIP strategies'' and that ''[m]ere approval of an aspirational goal or non-specific promise into the SIP does not convert that goal or promise into an enforceable commitment.'' In support of these assertions, Earthjustice cites *Bayview Hunters Point Community Advocates* v. *Metropolitan Transp. Comm'n,* 366 F.3d 692, 701 (9th Cir. 2004) and *Citizens for a Better Environment* v. *Metropolitan Tranp. Comm'n,* 746 F. Supp. 976, 980 (N.D.Cal. 1990) [known as CBE II]. In addition, Earthjustice singles out *El Comite Para El Bienstar de Earlimart* v. *Warmerdam,* 539 F.3d 1062, 1067 (9th Cir. 2008), stating that in *El Comite* the court explained that because an inventory in a SIP is not a ''standard or limitation'' as defined by the CAA, it was not an independently enforceable aspect of the SIP. Thus, Earthjustice reasons, in order to be enforceable, not only must a state's commitment to adopt additional measures to attain emission standards be specific and announced in plain language, but any data or rubric that will be used to determine when and how the state will adopt those measures must be enforceable.

Similarly, citing *Bayview* and *El Comite,* AIR characterizes CARB's and the District's commitments to achieve aggregate emissions reductions by the attainment year as ''global commitments'' that could be interpreted as ''goals'' unenforceable by citizens under Ninth Circuit precedent, rather than enforceable ''strategies'' to achieve those goals. AIR argues that the plans' global commitments are not enforceable for two reasons. First, enforcement is not practical because it is virtually impossible for citizens or EPA to determine whether the CARB and the District have, in fact, met the global commitments. Second, the manner in which CARB and the District determine compliance with the tonnage target is left to their discretion, and citizens and EPA would be placed in the situation held by the plaintiffs in *Warmerdam.*

AIR adds that even if the commitments are viewed as ''strategies'' enforcement is not practical because when no measures are submitted to EPA for inclusion into the SIP, citizens have no idea which measures CARB has used to satisfy the total tonnage commitments. AIR also states that there are no provisions for CARB and the District to report to EPA and the public what actions they have taken to comply with the tonnage commitments. EPA and citizens are left to determine, based on information collected by CARB and the District, whether the commitments have in fact been met.

Response: Under CAA section 110(a)(2)(A), SIPs must include enforceable emission limitations and other control measures, means or techniques necessary to meet the requirements of the Act, as well as timetables for compliance. Similarly, section 172(c)(6) provides that nonattainment area SIPs must include enforceable emission limitations and such other control measures, means or techniques ''as may be necessary or appropriate to provide for attainment'' of the NAAQS by the applicable attainment date.

Control measures, including commitments in SIPs, are enforced directly by EPA under CAA section 113 and also through CAA section 304(a) which provides for citizen suits to be brought against any person who is alleged ''to be in violation of * * * an emission standard or limitation* * *.'' ''Emission standard or limitation'' is defined in subsection (f) of section 304. As observed in *Conservation Law Foundation, Inc.* v. *James Busey et al.,* 79 F.3d 1250, 1258 (1st Cir. 1996):

> Courts interpreting citizen suit jurisdiction have largely focused on whether the particular standard or requirement plaintiffs sought to enforce was sufficiently specific. Thus, interpreting citizen suit jurisdiction as limited to claims ''for violations of specific provisions of the act or specific provisions of an applicable implementation plan,'' the Second Circuit held that suits can be brought to enforce specific measures, strategies, or commitments designed to ensure compliance with the NAAQS, but not to enforce the NAAQS directly. See, *e.g., Wilder, 854 F.2d at 613–14.* Courts have repeatedly applied this test as the linchpin of citizen suit jurisdiction. See, *e.g., Coalition Against Columbus Ctr.* v. *City of New York,* 967 F.2d 764, 769–71 (2d Cir. 1992); *Cate* v. *Transcontinental Gas Pipe Line Corp.,* 904 F. Supp. 526, 530–32 (W.D. Va. 1995); *Citizens for a Better Env't* v. *Deukmejian,* 731 F. Supp. 1448, 1454–59 (N.D. Cal.), modified, 746 F. Supp. 976 (1990).

Thus courts have found that the citizen suit provision cannot be used to enforce the aspirational goal of attaining the NAAQS, but can be used to enforce specific strategies to achieve that goal, including enforceable commitments to develop future emissions controls.

We describe CARB's and the District's commitments in the 2007 State Strategy (revised in 2009 and 2011) and the 2008 $PM_{2.5}$ Plan in detail in our amended proposal. *See* 76 FR at 41343–41347. The 2007 State Strategy includes commitments to propose defined new measures and an enforceable commitment for emissions reductions sufficient, in combination with existing measures and the District's commitments, to attain the $PM_{2.5}$ NAAQS in the SJV by April 5, 2015. *See* CARB Resolution 07–28, Attachment B at pp. 3–6 and 2009 State Strategy Status Report, p. 21. For the SJV, the CARB's emissions reductions commitments as submitted in 2008 were to achieve 76 tpd NO_X and 5 tpd of direct $PM_{2.5}$ by 2014. *Id.*

SJVUAPCD's commitments as submitted in 2008 were to achieve 9 tpd NO_X and 6.7 tpd direct $PM_{2.5}$ by 2014. *See* 76 FR at 41345–41346, See also 2008 $PM_{2.5}$ Plan, p. 6–9, Table 6–2. The language used in the Board's resolution adopting the 2008 $PM_{2.5}$ Plan at page 5 to describe its commitment is mandatory and unequivocal in nature:

> 9. The District Governing Board *commits to adopt and implement* the rules and measures in the 2008 $PM_{2.5}$ Plan by the dates specified in Chapter 6 *to achieve the emissions reductions shown in Chapter 6,* and to submit these rules and measures to the ARB within one month of adoption for transmittal to EPA as a revision to the State Implementation Plan. If the total emissions reductions from the adopted rules are less than those

[45] Note that the District has already achieved all of the SO_X reductions necessary to attain. *See* 76 FR 41338, 41354, Table 8.

committed to in the Plan, the District Governing Board *commits to adopt, submit, and implement* substitute rules and measures that will achieve equivalent reductions in emissions of direct $PM_{2.5}$ or $PM_{2.5}$ precursors in the same adoption and implementation timeframes or in the timeframes needed to meet CAA milestones. (emphasis added).

SJVUAPCD Board Resolution No. 08–04–10, p. 5.

As discussed above, the 2011 SIP revisions reduced the reductions needed from new measures in 2014 to attain to 9 tpd of $PM_{2.5}$ reductions, 26.1 tpd of NO_X reductions, and 0.8 tpd of SO_X. *See* 76 FR at 41354, Table 7. The District's aggregate emissions reduction commitment in the Plan as submitted in 2008 remains unchanged (8.97 tpd of NO_X reductions, 6.7 tpd of $PM_{2.5}$ reductions, and 0.92 tpd of SO_2 reductions by 2014). Thus, CARB remains obligated to achieve through the adoption of enforceable measures by 2014, 2.3 tpd of $PM_{2.5}$ and 17.1 tpd of NO_X. The District's commitments remain as submitted in 2008 at 9 tpd NO_X, 6.7 tpd direct $PM_{2.5}$ and 0.9 tpd SO_X by 2014. *See* Table 3 below.

Thus, CARB's and the District's commitments here are to adopt and implement measures that will achieve specific amounts of NO_X and direct $PM_{2.5}$ emissions reductions by 2014. These are not mere aspirational goals to ultimately achieve the standards or emissions inventories as mentioned by Earthjustice. Rather, the State and District have committed to adopt enforceable measures no later than 2014 that will achieve these specific amounts of emissions reductions prior to the attainment date of April 5, 2015. All of these control measures are subject to State and local rulemaking procedures and public participation requirements, through which EPA and the public may track the State/District's progress in achieving the requisite emissions reductions. EPA and citizens may enforce these commitments under CAA sections 113 and 304(a), respectively, should the State/District fail to adopt measures that achieve the requisite amounts of emissions reductions by the beginning of 2014. *See* 40 CFR 51.1007(b) (requiring implementation of all control measures needed for expeditious attainment no later than the beginning of the year prior to the attainment date). We conclude that these enforceable commitments to adopt and implement additional control measures to achieve aggregate emissions reductions on a fixed schedule are appropriate means, techniques, or schedules for compliance under sections 110(a)(2)(A) and 172(c)(6) of the Act.

Both Earthjustice and AIR cite *Bayview* as support for their contention that the plan's commitments are unenforceable aspirational goals. *Bayview* does not, however, provide any such support. That case involved a provision of the 1982 Bay Area 1-hour ozone SIP, known as TCM 2, which states in pertinent part:

Support post-1983 improvements identified in transit operator's 5-year plans, after consultation with the operators adopt ridership increase target for 1983–1987.

Emission Reduction Estimates: These emission reduction estimates are predicated on a 15% ridership increase. The actual target would be determined after consultation with the transit operators.

Following a table listing these estimates, TCM 2 provided that ''[r]idership increases would come from productivity improvements * * *.''

Ultimately the 15 percent ridership estimate was adopted by the Metropolitan Transportation Commission (MTC), the implementing agency, as the actual target. Plaintiffs subsequently attempted to enforce the 15 percent ridership increase. The court found that the 15 percent ridership increase was an unenforceable estimate or goal. In reaching that conclusion, the court considered multiple factors, including the plain language of TCM 2 (*e.g.,* ''[a]greeing to establish a ridership 'target' is simply not the same as promising to attain that target,'' *Bayview* at 698); the logic of TCM 2, *i.e.,* the drafters of TCM 2 were careful not to characterize any given increase as an obligation because the TCM was contingent on a number of factors beyond MTC's control, *id.* at 699; and the fact that TCM 2 was an extension of TCM 1 that had as an enforceable strategy the improvement of transit services, specifically through productivity improvements in transit operators' five-year plans, *id.* at 701. As a result of all of these factors, the Ninth Circuit found that TCM 2 clearly designated the productivity improvements as the only enforceable strategy. *Id.* at 703.

The commitments in the 2007 State Strategy (revised in 2009 and 2011) and 2008 $PM_{2.5}$ Plan are in stark contrast to the ridership target that was deemed unenforceable in *Bayview.* The language in CARB's and the District's commitments, as stated multiple times in multiple documents, is specific; the intent of the commitments is clear; and the strategy of adopting measures to achieve the required reductions is completely within CARB's and the District's control. Furthermore, as stated previously, CARB and the District identify specific emissions reductions that they will achieve, how they will be achieved and the time by which these reductions could be achieved, *i.e.,* by 2014.

Earthjustice also cites *CBE II* at 980 for the proposition that courts can only enforce ''express'' or ''specific'' strategies. However, as discussed below, there is nothing in the *CBE* cases that supports the commenter's view that the CARB and District commitments are neither express nor specific. In fact, these cases support our interpretation of CARB's and the District's commitments.

Citizens for a Better Environment v. *Deukmejian,* 731 F.Supp.1448 (N.D. Cal. 1990), known as *CBE I,* concerned in part contingency measures for the transportation sector in the 1982 Bay Area 1-hour ozone SIP. The provision states: ''If a determination is made that RFP is not being met for the transportation sector, MTC will adopt additional TCMs within 6 months of the determination. These TCMs will be designed to bring the region back within the RFP line.'' The court found that ''[o]n its face, this language is both specific and mandatory.'' *Id.* at 1458. In *CBE I,* CARB and MTC argued that TCM 2 could not constitute an enforceable strategy because the provision fails to specify exactly what TCMs must be adopted. The court rejected this argument, finding that ''[w]e discern no principled basis, consistent with the Clean Air Act, for disregarding this unequivocal commitment simply because the particulars of the contingency measures are not provided. Thus we hold that the basic commitment to adopt and implement additional measures, should the identified conditions occur, constitutes a specific strategy, fully enforceable in a citizens action, although the exact contours of those measures are not spelled out.'' *Id.* at 1457.[46] In concluding that the transportation and stationary source contingency provisions were enforceable, the court stated: ''Thus, while this Court is not empowered to enforce the Plan's overall objectives [footnote omitted; attainment of the NAAQS]—or NAAQS—directly, it can and indeed, must, enforce specific strategies committed to in the Plan.'' *Id.* at 1454.

Earthjustice's reliance on *CBE II* is misplaced. It also involves in part the

[46] In this passage, the court was referring specifically to the stationary source contingency measures in the Bay Area plan which contained a commitment to adopt such measures if emissions targets were not met. The Plan identified a number of potential stationary sources but did not commit to any particular one. In discussing the transportation contingency measures, the court applied this same reasoning. *Id.* at 1456–1457.

contingency measures in the 1982 Bay Area Plan. In *CBE II,* defendants argued that RFP and the NAAQS are coincident because, had the plan's projections been accurate, then achieving RFP would have resulted in attainment of the NAAQS. The court rejected this argument, stating that:

> the Court would be enforcing the *contingency plan,* an express strategy for attaining NAAQS. Although enforcement of this strategy might possibly result in attainment, it is distinct from simply ordering that NAAQS be achieved without anchoring that order on any specified strategy. Plainly, the fact that a specified strategy might be successful and lead to attainment does not render that strategy unenforceable.

(Emphasis in original). *CBE II* at 980.

CARB's and the District's commitments here are analogous to the terms of the contingency measures in the *CBE* cases. CARB and the District commit to adopt measures, which are not specifically identified, to achieve a specific tonnage of emissions reductions. Thus, the commitment to a specific tonnage reduction is comparable to a commitment to achieve RFP. Similarly, a commitment to achieve a specific amount of emissions reductions through adoption and implementation of unidentified measures is comparable to the commitments to adopt unspecified TCMs and stationary source measures. The key is that commitment must be clear in terms of what is required, *e.g.,* a specified amount of emissions reductions or the achievement of a specified amount of progress (*i.e.,* RFP). ARB's and the District's commitments are thus clearly a specific enforceable strategy rather than an unenforceable aspirational goal.

Earthjustice's reliance on *El Comite* is also misplaced. The plaintiffs in the district court attempted to enforce a provision of the 1994 California 1-hour ozone SIP known as the Pesticide Element. The Pesticide Element relied on an inventory of pesticide VOC emissions to provide the basis to determine whether additional regulatory measures would be needed to meet the SIP's pesticides emissions target. To this end, the Pesticide Element provided that ''ARB will develop a baseline inventory of estimated 1990 pesticidal VOC emissions based on 1991 pesticide use data * * *.'' *El Comite Para El Bienestar de Earlimart* v. *Helliker,* 416 F. Supp. 2d 912, 925 (E.D. Cal. 2006). CARB subsequently employed a different methodology that it deemed more accurate to calculate the baseline inventory. The plaintiffs sought to enforce the commitment to use the original methodology, claiming that the calculation of the baseline inventory constitutes an ''emission standard or limitation.'' The district court disagreed:

> By its own terms, the baseline identifies emission sources and then quantifies the amount of emissions attributed to those sources. As defendants argue, once the sources of air pollution are identified, control strategies can then be formulated to control emissions entering the air from those sources. From all the above, I must conclude that the baseline is not an emission ''standard'' or ''limitation'' within the meaning of *42 U.S.C. 7604 (f)(1)–(4).*

Id. at 928. In its opinion, the court distinguished *Bayview* and *CBE I,* pointing out that in those cases ''the measures at issue were designed to reduce emissions.'' *Id.*

On appeal, the plaintiffs shifted their argument to claim that the baseline inventory and the calculation methodology were necessary elements of the overall enforceable commitment to reduce emissions in nonattainment areas. The Ninth Circuit agreed with the district court's conclusion that the baseline inventory was not an emission standard or limitation and rejected plaintiffs' arguments attempting ''to transform the baseline inventory into an enforceable emission standard or limitation by bootstrapping it to the commitment to decide to adopt regulations, if necessary.'' *Id.* at 1073.

While Earthjustice cites the Ninth Circuit's *El Comite* opinion, its utility in analyzing the CARB and District commitments here is limited to that court's agreement with the district court's conclusion that neither the baseline nor the methodology qualifies as an independently enforceable aspect of the SIP. Rather, it is the district court's opinion, in distinguishing the commitments in *CBE* and *Bayview,* that provides insight into the situation at issue in our action. As the court recognized, a baseline inventory or the methodology used to calculate it, is not a measure to reduce emissions. It instead ''identifies emissions sources and then quantifies the amount of emissions attributed to those sources.'' In contrast, as stated previously, in the 2007 State Strategy (revised 2009 and 2011) and SJV 2007 $PM_{2.5}$ Plan, ARB and the District commits to adopt and implement measures sufficient to achieve specified emissions reductions by a date certain. As described above, a number of courts have found commitments substantially similar to ARB's here to be enforceable under CAA section 304(a).

Comment: Earthjustice comments that before EPA can approve the commitments in the $PM_{2.5}$ plan it must explain how the promise to reduce emissions by some amount is a ''standard or limitation'' enforceable under section 113 or 304 of the Act. Moreover, citing CAA section 110(a)(2)(A), Earthjustice asserts that EPA must explain how enforcement of these commitments, which arguably could not even be considered until after the attainment deadline has come and gone, is adequate to assure the requirements of the Act (including timely attainment) are met. Earthjustice contends that the strategy of relying on these open-ended commitments is a recipe for failure and is not a reasonable substitute for the detailed, enforceable plan envisioned and required by the Act.

Response: We disagree. As discussed above, EPA believes that CARB's and the District's commitments to adopt and implement control measures to achieve the specified aggregate tonnage by 2014 are enforceable as an emission standard or limitation under CAA section 304. The fact that the State may meet its SIP obligation by adopting measures that are not specifically identified in the SIP, or through one of several available techniques, does not render the requirement to achieve the aggregate emissions reductions unenforceable. State and local control measures are subject to rulemaking procedures and public participation requirements, through which EPA and the public may track the State/District's progress in achieving the requisite emissions reductions in the years leading up to 2014 and before the attainment date of April 5, 2015. Should the State/District fail to adopt measures that achieve the requisite amounts of emissions reductions by the beginning of 2014 (*see* 40 CFR 51.1007(b)), EPA and citizens may enforce these commitments under CAA sections 113 and 304(a), respectively.

F. Comments on the Proposed Action on the Attainment Demonstration and Attainment Date Extension

Comment: Earthjustice comments that EPA cannot grant an extension of the attainment date to April 5, 2015 because the flaws Earthjustice alleges are in the 2008 $PM_{2.5}$ Plan's attainment modeling and RACM/RACT analysis meant that the demonstration required to grant a 5-year extension have not been met. Earthjustice asserts that the alleged flaws include the exemptions for significant sources of emissions from the charbroiling, glass melting and open burning rules; the delay in the implementation of certain control requirements (glass melting and agricultural equipment), and the

exclusion of controls for VOC and condensable $PM_{2.5}$ emissions in the Plan

Response: We have evaluated Earthjustice's comments on the RACM/RACT analysis, VOC as an attainment plan precursor, and condensable particulate and have determined that none change our conclusion that the SJV 2008 $PM_{2.5}$ Plan provides for RACM as required by CAA section 172(c)(1).

Under the $PM_{2.5}$ implementation rule, states that request an extension of the attainment date under CAA section 172(a)(2) must provide sufficient information to show that attainment by April 5, 2010 is impracticable due to the severity of the nonattainment problem in the area and the lack of available and feasible control measures to provide for faster attainment. 40 CFR 51.1004(b). States must also demonstrate that all RACM and RACT for the area are being implemented to bring about attainment of the standard by the most expeditious alternative date practicable for the area. 72 FR 20586 at 20601. As discussed in our 2011 proposal, we believe that California has met the relevant tests for granting an extension of the attainment date under CAA section 172(a)(2). *See* 76 FR 41388, 41341.

Comment: Earthjustice comments that EPA should not approve the attainment demonstration, because of its ''heavy'' reliance on State commitments to adopt last-minute control measures and because the emissions reductions and the attainment targets are not valid given the problems in the inventory and the modeling analysis. Furthermore, the defective modeling results in inaccurate attainment target levels.

Response: The SJV 2008 $PM_{2.5}$ SIP does not rely heavily on State commitment to ''adopt last-minute controls.'' As noted previously, the bulk of the emissions reductions needed for attainment are from measures adopted prior to 2007. 76 FR 41338, 41354. Moreover, one of EPA's criteria for approving attainment demonstrations that rely on commitments is that the commitments represent a limited portion of the reductions needed for attainment. As we have shown, CARB's and the District's remaining commitments account for only 4.5 percent (12.9 tpd) of the NO_X and 13.2 percent (3.0 tpd) of the $PM_{2.5}$ reductions needed for attainment. *Id.* In comparison, already achieved reductions are 271 tpd of NO_X and 19.7 tpd of $PM_{2.5}$. See 76 FR 41338, 41354 (Table 8) (numbers are the sum of lines B and C). Finally, we have determined that the SJV $PM_{2.5}$ Plan provides for a generally linear reduction in emissions demonstrating reasonable further progress as required by CAA 172(c)(2).

G. Comments on the Proposed Actions on the Reasonable Further Progress Demonstration

Comment: Earthjustice comments that EPA should disapprove the RFP demonstration because it fails to address VOC and to show generally linear progress in reducing emissions. It also argues that because of the alleged defects in the inventory and the alleged failure of the modeling analysis to identify the target level of emissions reductions, it is impossible to assess progress. It further argues that the RFP demonstration must also be updated to reflect corrections to the inventory.

Response: For the reasons discussed in the 2011 proposal and response to comments on the precursor issue above, EPA has found that insufficient data exist to reverse the presumption in the $PM_{2.5}$ implementation rule that VOC is not a $PM_{2.5}$ attainment plan precursor for attainment of the 1997 $PM_{2.5}$ standards in the SJV. *See* 76 FR 41350 and 2011 Proposal TSD, p. 50. Because VOC is not considered an attainment plan precursor, it need not be addressed in the RFP demonstration. *See* 40 CFR 51. 1009(c).

For the reasons discussed in the 2011 proposal and response to comments on the air quality modeling above in section II.B., EPA has found that the air quality modeling in the SJV 2007 $PM_{2.5}$ SIP is adequate to support the attainment demonstration and thus to establish the target level of emissions. *See* 76 FR 41338, 41348 and 2011 Proposal TSD, section II.B. As discussed in the 2011 proposal, EPA evaluated the effect of the changes in the base year inventory on the RFP demonstration and determined that it did not revise our conclusion that the Plan provided for RFP. *See* 76 FR 41338, 41357 (ftn. 32) and 2011 Proposal TSD, p. 122.

H. Comments on the Proposed Actions on the Contingency Measures

Comment: Earthjustice states that EPA's analysis of the contingency measures in the 2008 Plan is generally sound. Earthjustice, however, contends that our analysis relies on an RFP analysis that in turn relies on invalid NO_X to $PM_{2.5}$ interpollutant equivalency ratios. It further argues that because these ratios are invalid, the assessment of the excess reductions in the RFP demonstration is also invalid and the shortfall targets must be recalculated using valid methods and results.

Response: EPA's calculation of the excess reductions in the RFP demonstration is done on a per pollutant basis and does not assume any interpollutant trading. *See* 76 FR 41339, 41359 (Table 10) and 2011 Proposal TSD, p. 130. In the 2011 Progress Report, CARB states that these reductions are equal to at least one-year's worth of RFP when considered on a $PM_{2.5}$ equivalency basis (see 2011 Progress Report, p. 2); however, to make this statement, the State relies in part on an interpollutant trading ratio of 1 ton of SO_X reductions to 1 ton of $PM_{2.5}$ reductions. As discussed in section II.B.4. of the 2011 Proposal TSD, EPA found that there was insufficient technical support for this ratio and EPA did not allow its use in the RFP demonstration or for any other purpose. *Id.* at 42358 and p. 129.

Comment: In its comments on the 2010 proposal, Earthjustice notes that the District proposes to rely on emissions reductions achieved by the ozone nonattainment fee and other incentive programs. It argues that the District does not have criteria for how these monies will be spent and does not provide a mechanism for ensuring that any claimed emissions reductions are enforceable and that any future reliance on funding programs to reduce emissions must demonstrate that the emissions reductions meet statutory creditability requirements including an explanation of how these agreements between the District and the subsidized source can be enforced by EPA or the public.

Response: We are not approving reductions from the District's incentive grant programs as part of the 2008 $PM_{2.5}$ SIP's contingency measures provisions; therefore, comments related to them are not germane to this action. In both its 2010 and 2011 proposals EPA proposed to disapprove the Plan's contingency measures provisions and is disapproving those provisions in today's action. *See* 75 FR 74518, 74539 and 76 FR 41338, 41358. Those provisions include the District's ozone nonattainment fee program and other incentive programs as potential contingency measures.

In both proposals, we noted that while neither the CAA nor EPA policy bar the use of emissions reductions from incentive programs to meet all or part of an area's contingency measure obligation, the incentive programs must assure that the reductions are surplus, quantifiable, enforceable, and permanent in accordance with EPA's guidance. *See* ''Improving Air Quality with Economic Incentive Programs,'' EPA–452/R–01–001 (January 2001). We also noted that the 2008 $PM_{2.5}$ Plan does not identify the incentive grant programs expected to generate the emissions reductions. The Plan also does not identify the quantity of these

emissions reductions that the District intended to use to meet the contingency measure requirement. Therefore, we are unable to determine if they are SIP creditable or sufficient to provide in combination with other measures the roughly one-year's worth of RFP needed. For these reasons, we determined that programs did not currently meet the CAA requirements for contingency measures. *See* 75 FR 74518, 74538 and 76 FR 41338, 41358.

Comment: While AIR agrees with EPA's proposed disapproval of the contingency measures, it argues against the use of waiver measures and on-road fleet turnover as contingency measures because waiver measures are not in the SIP and there are no control measures that require fleet turnover. It further argues that reductions from fleet turnover are derived from assumptions based on voluntary future activity that fail to meet the Act's requirements for enforceable measures. Finally, it asserts that EPA has made no finding that such fleet turnover reductions have actually occurred.

Response: As discussed previously, we believe that reductions from CAA 209 waiver measures can be used to meet CAA requirements including the contingency measure requirement even though they are not in the SIP.

The measures relied on in part for contingency measure emissions reductions are the State and federal on- and off-road new engines standards. Fleet turnover is the mechanism by which these new engine standards are implemented, and it is how these standards actually result in emissions reductions in an area. CARB calculates reductions from its mobile sources, including base year and future projected year, using its EMFAC2007 and OFFROAD models. These models included assumptions regarding fleet turnover based on historical records.[47] Recent updates to the truck, bus, and offroad equipment inventories included review and adjustments of fleet turnover rates which are also based on available records. *See* 2010 Truck Rule ISOR, section F.

Comment: SJVUACPD commented that EPA's current requirement that contingency measures provide for one-year's worth of emissions reductions is not practical for areas like the SJV and that EPA should work towards realistic and specific solutions for future implementation rules. It also stated that it would continue to work with EPA to incorporate reductions from the District's incentive programs into the SIP so that they may be used satisfy the contingency measures requirement.

Response: EPA recognizes the difficulty of identifying contingency measures and appreciates the District's concerns. We will continue to work with the District to identify potential contingency measures including incentive programs that produce reductions that are surplus, quantifiable, enforceable, and permanent in accordance with EPA guidance.

I. Comments on the Proposed Actions on the Motor Vehicle Emissions Budgets and Trading Mechanism

Comment: Earthjustice comments that EPA cannot approve the revised motor vehicle emissions budgets because they are derived from attainment and RFP demonstrations that Earthjustice asserts are not approvable because they are based on invalid modeling. It also claims the issues with the modeling also affect the conformity analysis because it depends on interpollutant equivalency ratio between NO_X and $PM_{2.5}$ that is derived from the modeling. Earthjustice notes that CARB derived this ratio by conducting a sensitivity analysis with the model which according to Earthjustice, EPA acknowledged was not a legitimate basis for determining interpollutant equivalency ratios, citing the 2011 Proposal TSD at p. 47. Earthjustice further claims that these ''defective ratios'' were used to demonstrate RFP and conformity.

Response: We agree that EPA would not be able to approve budgets that are derived from unapprovable or disapproved attainment or RFP demonstrations. However, we are approving these demonstrations in the SJV 2008 $PM_{2.5}$ Plan and, because they are derived from those demonstrations and otherwise meet all applicable requirements for transportation conformity budgets, EPA's is also approving the budgets. For the reasons discussed above in our response to comments on the air quality modeling, we do not agree with Earthjustice that the modeling is invalid.

CARB included a trading mechanism to be used in transportation conformity analyses that use the proposed budgets as allowed for under 40 CFR 93.124. This trading mechanism allows future decreases in NO_X emissions from on-road mobile sources to offset any on-road increases in $PM_{2.5}$, using a NO_X: $PM_{2.5}$ ratio of 9:1. As proposed by CARB and proposed for approval by EPA, the trading mechanism would only be used, if needed, for conformity analyses for years after 2014. Also, to ensure that the trading mechanism does not impact the ability of the SJV to meet the NO_X budget, the NO_X emissions reductions available to supplement the $PM_{2.5}$ budget would only be those remaining after the 2014 NO_X budget has been met. *See* 2011 Progress Report, Appendix D, p. 2 and 76 FR 41338, 41361. We found that the method CARB used to derive the 9:1 NO_X to $PM_{2.5}$ ratio, which was based on the SIP's photochemical modeling, is adequate for purposes of assessing the effect of area-wide emissions changes, such as are used in RFP, contingency measures, and conformity budgets. *See* 76 FR 41338, 41349 and 2011 Proposal TSD, p. 46.

EPA did find that the method used by CARB and the District (a modified rollback approach) to derive the 1:1 SO_X to $PM_{2.5}$ is inadequate for determining interpollutant equivalency ratios and stated that this issue would be better explored with a photochemical model. *See* 76 FR 41338, 41349 and 2011 Proposal TSD, p. 47. It is this latter discussion that Earthjustice incorrectly cites as its basis for claiming that EPA rejected the interpollutant trading ratio used in establishing the trading mechanism for transportation conformity analyses. The 2008 $PM_{2.5}$ SIP does not establish motor vehicle emissions budgets for SO_2 and therefore does not establish an SO_2: $PM_{2.5}$ trading mechanism for transportation conformity purposes.

Comment: Earthjustice claims that a transportation agency cannot rely on budgets derived from what it considers to be the unapprovable SJV 2008 $PM_{2.5}$ SIP without violating CAA section 176(c)(1) because they would not be able to assure that their actions would not interfere with timely attainment or reasonable further progress.

Response: As documented in the TSD and our 2011 proposed rule, EPA has found that the SJV 2008 $PM_{2.5}$ SIP demonstrates reasonable further progress and expeditious attainment of the 1997 $PM_{2.5}$ standards consistent with the requirements of the CAA and EPA's implementing regulations. We have also concluded that the budgets in this SIP are consistent with these demonstrations and are both adequate and approvable. Therefore, the SJV MPOs must use these budgets in their transportation conformity determinations.

J. Comments on Other Topics Not Covered Previously

Comment: AIR claims that EPA fails to list the 2009 State Strategy Status Report (pages 11–23) among the documents which it proposes to include

[47] *See* CARB, ''Public Meeting to Consider Approval of Revisions to the State's On-Road Motor Vehicle Emissions Inventory, Technical Support Document,'' May 2000, section 7.3 ''Retention Rates'' which can be found at *http://www.arb.ca.gov/msei/onroad/doctable_test.htm.*

as part of the SIP, citing 76 FR 41338, 41361, and that this is an error given CARB's intent in the 2009 State Strategy Status Report (citing p. 11). AIR requests that EPA clarify its intent to approve a CARB commitment for staff to propose a rule to regulate in-use mobile agricultural equipment. AIR notes that this commitment was part of the 2007 State Strategy (citing CARB Resolution 07–28, Attachment B, p. 7), included in the 2009 State Strategy Status Report, and was a component of EPA's previous proposed approval of the 2007 State Strategy (citing 75 FR 74518, 74541 (November 30, 2011)), but is not included in the updated rulemaking schedule in 2011 Progress Report.

Response: EPA lists the 2009 State Strategy Status Report as one of five submittals that comprise the 2007 $PM_{2.5}$ SIP for the SJV. *See* 76 FR 41338, 41340. We also state in section VI. (EPA's proposed Actions and Potential Consequences) that we were proposing to approve the SJV portions of CARB's 2007 State Strategy as revised in 2009 and 2011 addressing CAA and EPA regulations for attainment of the 1997 $PM_{2.5}$ NAAQS in the SJV. We specifically proposed to approve CARB's commitments to propose certain defined measures as listed in Table B–1 on page 1 of Appendix B of the 2011 Progress Report submittal based on CARB's own characterization of that submittal as its updates to its rulemaking schedule for the $PM_{2.5}$ measures in the 2007 State Strategy. *See* 2011 Progress Report, p. 8, Table 1.

On June 20, 2011 CARB provided public notice of proposed revisions to the ozone portions of the 2007 State Strategy including revisions to the rulemaking schedule for in-use agricultural equipment. *See* CARB, Notice of Public Hearing to Consider a Status Report on the State Strategy for California's 2007 State Implementation Plan and Consider Approval of Proposed Revisions for the 8-Hour Ozone and Minor Technical Revisions to the $PM_{2.5}$ SIP Transportation Conformity Budgets,'' June 20, 2011. As stated in the proposed revisions, CARB does not consider the in-use agricultural measures to be part of its $PM_{2.5}$ control strategy and therefore did not include updates to the schedule for that measure in its $PM_{2.5}$ SIP revision.[48] 2011 Ozone SIP Revisions, p. 3. These revisions were adopted by the Board on July 21, 2011, submitted to EPA on July 29, 2011 and proposed for approval by EPA on September 16, 2011 at 76 FR 57846. This proposed approval includes the revised schedule for the in-use agricultural equipment measure. *See* 76 FR at 57846, 57853.[49]

Comment: AIR requests clarification from EPA on whether the omission of the proposed commitment in the 2011 Progress Report is an administrative error, or whether CARB intentionally removed that commitment from the 2007 State Strategy. AIR notes that based on CARB's Web site, it appears that the omission was in error, because CARB continues to represent to the public that it is working on the in-use agricultural equipment rule. AIR asserts that to the extent that CARB intentionally removed the commitment, such action violates 40 CFR 51.102 because CARB did not provide adequate notice to the public of this fundamental change to CARB's strategy and that the public should not be expected to search through ''voluminous SIP-related material, searching out stealth amendments by omission.''

Response: As required by 40 CFR 51.102, CARB posted the draft 2011 Progress Report including the proposed revisions to the rulemaking schedule in the 2007 State Strategy 30 days prior to the public hearing and requested public comments. *See* CARB, Notice of Public Hearing to Consider the Approval of a Progress Report and Proposed State Implementation Plan Revisions for $PM_{2.5}$, March 29, 2011. Questions and comments on the State's proposed revisions to its rulemaking schedule, including changes to the in-use agricultural equipment measure, should be directed to CARB during the State's public comment periods or at the public hearings.

Comment: AIR comments that the 2008 $PM_{2.5}$ Plan and the 2007 State Strategy fail to demonstrate a monitoring program for CARB mobile source measures and the pesticide regulation, stating EPA regulations specifically require each plan to make this demonstration, citing 40 CFR 51.111. It provides as an example, CARB's anti-idling rules.

Response: EPA's regulation at 40 CFR 51.111 requires each plan include a description of enforcement methods including, but not limited to, procedures for monitoring compliance with each of the selected control measures and procedures for handling violations. These requirements apply to the control measures that are in the SIP. For the reasons discussed previously, we do not believe that California's mobile source measures that receive waivers under CAA section 209 need to be submitted for inclusion into the SIP; therefore, California need not include a description of the enforcement and or monitoring program for these measures in its SIP.[50] As noted previously, CARB's anti-idling regulations are pending a section 209 waiver decision. Should any of these provisions need to be submitted for SIP approval, we will evaluate their monitoring procedures at the time we take action to incorporate them into the SIP. As we have also noted previously, the pesticide regulation is not part of the 2008 $PM_{2.5}$ SIP's control strategy; therefore, the lack of any monitoring procedures is not material to our approval of this SIP.

As a practical matter, to be effective, monitoring procedures (which includes monitoring and recordkeeping requirements and testing procedures) must be tailored to the specific emission limitation for which they are to be used. For example, the procedures for monitoring NO_X emissions from utility boilers are very different from the procedures for monitoring the VOC content of paints. Compare, for example, Rule 4601 (Boilers > 5 million BTU per hour), sections 5.4 ''Monitoring Requirements'' and 6.0 ''Administrative Requirements'' requiring continuous emissions monitoring and annual source testing using specific test procedures to Rule 4601 (Architectural Coatings), section 6.0 ''Administrative Requirements'' specifying label requirements, requiring maintenance of annual sales records, and specifying test methods for determining the VOC content of coatings. Because of the need to tailor monitoring procedures to the emission limit, EPA evaluates a prohibitory rule's monitoring, recordkeeping, and testing procedures at the time it reviews the rule for incorporation into the SIP. We note that we are not approving any rules or regulations as part of this specific action on the SJV 2008 $PM_{2.5}$ SIP.

III. Approval Status of the Control Strategy Measures and Final Actions on the Attainment Demonstration and Enforceable Commitments

A. Approval Status of Control Strategy Measures

As part of its control strategy for attaining the $PM_{2.5}$ standards in the SJV, the District made specific commitments

[48] As discussed previously, CARB provided emissions reductions estimates for the in-use agricultural equipment measure only for 2017, which is three years after the 2014 attainment year for $PM_{2.5}$.

[49] AIR notes that Table F–8 in EPA's 2011 Proposal TSD lists the agricultural equipment rule as a defined measure in the 2011 Progress Report. This was an error and has been corrected in the final TSD.

[50] For a description of CARB's source monitoring and enforcement programs including its procedures for handling violations, *See http://www.arb.ca.gov/enf/enf.htm.*

to adopt thirteen measures on the schedule identified in the Plan. *See* 2008 $PM_{2.5}$ Plan, Table 6–2 (revised June 17, 2010). The District has now completed its actions on all measures except for revisions to Rule 4905 (Natural Gas-Fired, Fan Type Residential Central Furnaces) which is not scheduled for adoption until 2014. *See* Table 1 below. As Table 1 shows, EPA has approved all of the adopted rules with the exception of three, none of which is credited with emissions reductions in the demonstrations.

TABLE 1—SAN JOAQUIN VALLEY AIR POLLUTION CONTROL DISTRICT 2008 $PM_{2.5}$ PLAN SPECIFIC RULE COMMITMENTS

District rule	Adoption date	Current SIP approval status
4103—Open Burning	April 2010	Final approval signed: September 30, 2011.
4320—Advanced Emissions Reductions for Boilers, Steam Generators and Process Heaters (> 5 MMBtu/hr).	October 2008	Approved. 75 FR 1715 (January 13, 2010).
4307—Boilers, Steam Generators and Process Heaters (2 to 5 MMBtu/hr).	October 2008	Approved. 76 FR 5276 (January 31, 2011).
4308—Boilers, Steam Generators and Process Heaters (0.075 to < 2 MM Btu/hr).	December 2009	Approved. 76 FR 16696 (March 25, 2011).
4703—Stationary Gas Turbines	September 2007	Approved. 74 FR 53888 (October 21, 2009).
4702—Reciprocating Internal Combustion Engines	August 2011	Submittal pending.
4354—Glass Melting Furnaces	October 2008	Approved. 76 FR 37044 (June 24, 2011).
4902—Residential Water Heaters	March 2009	Approved. 75 FR 24408 (May 5, 2010).
4905—Natural Gas-Fired, Fan Type Residential Central Furnaces.	Adoption scheduled for 2014.	Most current revision of rule approved: October 20, 2005 at 72 FR 29886 (May 30, 2007).
4901—Wood Burning Fireplaces and Wood Burning Heaters.	October 2008	Approved. 74 FR 57907 (November 10, 2009).
4692—Commercial Charbroiling	September 2009	Final approval signed: September 30, 2011.
4311—Flares	June 2009	Proposed for approval 76 FR 52623 August 23, 2011).
9410—Employer Based Trip Reduction Program	December 2009	Action pending. Emissions reductions from this rule revision are not currently included in the attainment or RFP demonstration.

As part of its control strategy for attaining the $PM_{2.5}$ standards in the SJV, CARB committed to propose certain measures on the schedule identified in the 2007 State Strategy. These commitments, which were updated in the 2011 Progress Report, and their current approval status are shown in Table 2. Of the measures listed in the 2007 State Strategy's updated rulemaking schedule, we note that only reductions from the ''SmogCheck Improvement,'' ''Cleaner In-Use Heavy Duty Trucks,'' and ''Cleaner In-Use Off-Road Engines'' measures are currently credited with reductions in the attainment demonstration. *See* 76 FR 41338, 41346 (Table 6).

Generally speaking, EPA will approve a State plan that takes emissions reduction credit for a control measure only where EPA has approved the measure as part of the SIP, or in the case of certain on-road and nonroad measures, where EPA has issued the related waiver of preemption or authorization under CAA section 209(b) or section 209(e). In our July 2011 proposed rule, in calculating and proposing to approve the State's aggregate emissions reductions commitment in connection with our proposed approval of the attainment demonstration, we assumed that full final approval, waiver, or authorization of a number of CARB rules would occur prior to our final action on the San Joaquin Valley $PM_{2.5}$ Plan. *See* 76 FR 41338, 41346 (table 6). Two specific CARB rules on which the attainment demonstration relies include the Truck Rule and the Drayage Truck Rule (that collectively are included in a State measure referred to as ''Cleaner In-Use Heavy Duty Trucks''). We proposed approval of both rules at 76 FR 40652 (July 11, 2011), but will be unable to take final action on the rules until after taking final action on the SJV 2008 $PM_{2.5}$ SIP because, while CARB has adopted the rules, the rules cannot take effect until approved by the California Office of Administrative Law (OAL) and such approval will not happen before EPA's final action must be taken on the plan.

We are nonetheless allowing the plan's attainment demonstration, and our final approval of it, to rely on the emissions reductions from the two CARB rules cited above for the following reasons:

- Both rules have been adopted by CARB and submitted to EPA as a revision to the California SIP,[51] and the adopted versions are essentially the same as those for which EPA proposed approval;
- The comments that we have received on our proposed approval of the two CARB rules (Truck Rule and Drayage Truck Rule) contend that the rules are costly and may not be economically or technologically feasible, but such considerations cannot form the basis for EPA disapproval of a rule submitted by a state as part of the SIP [see *Union Electric Company* v. *EPA,* 427 U.S. 246, 265 (1976)];
- The remaining administrative process, which involves review of the final adopted rules by California's Office of Administrative Law (OAL) is essentially procedural in nature, and should be completed over the near term;[52]
- CARB intends to submit the final, effective rules to EPA as soon as OAL completes its review and approves the rules.

Therefore, we are confident that the final action on the rules will be

[51] The Truck Rule and the Drayage Truck Rule were included in a SIP submittal dated September 21, 2011. We have included the September 21, 2011 SIP submittal in the docket for this rulemaking.

[52] See letter from James N. Goldstene, Executive Officer, CARB, to Jared Blumenfeld, Regional Administrator, EPA Region IX, dated September 21, 2011, submitting the Truck and Drayage Truck rules SIP revision to EPA. CARB indicates that the Drayage Truck Rule will be submitted to OAL no later than September 23, 2011, and the Truck Rule will be submitted to OAL no later than October 29, 2011. Under California law, OAL must taken action within 30 working days.

completed in the near-term and that, as a result, continued reliance by the SJV 2008 $PM_{2.5}$ SIP, and our final approval of it, on the emissions reductions associated with the rules is reasonable and appropriate. If, however, California does not submit the adopted and fully effective rules to EPA as a SIP revision prior to the effective date of today's action, we will take appropriate remedial action to ensure that our action on the plan is fully supportable or to reconsider that action.

TABLE 2—2007 STATE STRATEGY DEFINED MEASURES SCHEDULE FOR CONSIDERATION AND CURRENT STATUS

State measures	Expected action year	Implementation	Current status
Smog Check Improvements	2007–2009	2008–2010, 2013	Elements approved 75 FR 38023 (July 1, 2010).[53]
Expanded Vehicle Retirement (AB 118).	2007	2009	Adopted by CARB, June 2009; by BAR, September 2010.
Modification to Reformulated Gasoline Program.	2007	2010	Approved, 75 FR 26653 (May 12, 2010).
Cleaner In-Use Heavy Duty Trucks.	2007, 2008, 2010	2011–2015	Proposed for approval 76 FR 40642 (July 11, 2011).
Accelerated Introduction of Cleaner Locomotives.	2008	2012	Prop 1B bond funds awarded to upgrade line-haul locomotive engines not already accounted for by enforceable agreements with the railroads. Those cleaner line-hauls will begin operation by 2012.
Cleaner In-Use Off-Road Engines	2007, 2010	2009	Waiver action pending.
New Emissions Standards for Recreational Boats.	2013	To be determined	Partial adoption, July 2008. Additional action expected 2013.

Source: 2011 Progress Report, Table 1. Additional information from *http://www.ca.arb.gov.* Only defined measures with direct $PM_{2.5}$ or NO_X reductions in the SJV are shown here.

B. Enforceable Emissions Reductions Commitments

CARB's emissions reductions commitment is to achieve the ''total emissions reductions necessary to attain Federal standards'' through ''the implementation of control measures; the expenditure of local, State, or federal incentive funds; or through other enforceable measures.'' *See* CARB Resolution 07–28, Attachment B at pp. 3–6; 2009 State Strategy Status Report, p. 20; and 2011 Progress Report, p. 6.

The updates and improvements to the inventories as presented in CARB's 2011 Progress Report altered the calculation of the reductions needed for attainment of the 1997 $PM_{2.5}$ standards in SJV by reducing the total reductions needed from District and State control strategy measures to 9 tpd for $PM_{2.5}$, 26.1 tpd for NO_X, and 0.8 tpd for SO_2. *See* Table 3 below and 76 FR at 41354, Table 7.

We are approving the 2008 $PM_{2.5}$ Plan taking into account CARB's revisions to the control strategy based on the revisions to its projected baseline inventories and its enforceable emissions reductions commitment. Specifically, we are interpreting CARB's emissions reductions commitment, together with the adjustments to the 2014 baseline inventories provided in CARB's 2011 SIP revision and the District's commitments, as adjusting CARB's total emissions reductions commitment such that CARB is now obligated to achieve 2.3 tpd of $PM_{2.5}$ reductions and 17.1 tpd of NO_X reductions by 2014 through enforceable control measures to provide for attainment of the 1997 $PM_{2.5}$ NAAQS in SJV. SJVUAPCD's commitments as submitted in 2008 are to achieve 9 tpd NO_X, 6.7 tpd direct $PM_{2.5}$, and 0.9 tpd SO_X by 2014. *See* Table 3 below. The commitment numbers in this table do not include reductions from measures already adopted by CARB and the District to meet their commitments.

TABLE 3—SJVUAPCD AND CARB 2014 EMISSIONS REDUCTIONS COMMITMENTS

[Tons per average annual day in 2014]

	Direct $PM_{2.5}$	NO_X	SO_2
A—Adjusted 2014 baseline emissions level [1]	72.3	317.3	25.4
B—2014 attainment target level [2]	63.3	291.2	24.6
C—Reductions needed from control strategy measures (A − B)	9.0	26.1	0.8
D—District commitments [3]	6.7	9.0	0.9
E—CARB commitments (C − D)	2.3	17.1	.....

[1] From TSD, Table G–1.
[2] 2008 $PM_{2.5}$ Plan, p. 9–3.
[3] 2008 $PM_{2.5}$ Plan, pp. 6–11 to 6–12.

The level of emissions reductions remaining as commitments after adjusting the baseline to reflect updates and improvements to the inventories and crediting reductions from SIP-approved or otherwise SIP-creditable measures is shown in Table 4. These levels remain unchanged from our 2011 proposal as does our conclusion that the attainment demonstration in the SJV 2008 $PM_{2.5}$ SIP which relies in part on these enforceable commitments is approvable. *See* 76 FR 41338, 41354 (Table 8) and 41356.

[53] California Assembly Bill 2289, passed in 2010, requires the Bureau of Automotive Repair to direct older vehicles to high performing auto technicians and test stations for inspection and certification effective 2013. Reductions shown for the SmogCheck program in the 2011 Progress Report do not include reductions from AB 2289 improvements. CARB Progress Report supplement, attachment 5.

TABLE 4—REDUCTIONS NEEDED FOR ATTAINMENT REMAINING AS COMMITMENTS BASED ON SIP-CREDITABLE MEASURES

[Tons per average annual day in 2014]

	Direct $PM_{2.5}$	NO_X	SO_X
A—Total reductions needed from baseline and control strategy measures and other adjustments to the baseline to attain	22.7	284.2	1.8
B—Reductions from baseline measures and adjustments to baseline	13.7	258.1	1.0
C—Total reductions from approved measures	6.0	13.2	3.6
D—Total reductions remaining as commitments (A − B − C)	3.0	12.9	0.0
E—Percent of total reductions needed remaining as commitments	13.2	4.5	0.0

IV. Approval of the Motor Vehicle Emissions Budgets and Trading Mechanism for Transportation Conformity

We noted in our July 2011 proposal that CARB had posted draft technical revisions to the SJV 2008 $PM_{2.5}$ SIP's motor vehicle emissions budgets on June 20, 2011 (see 76 FR 41338, at 41360 and *http://www.arb.ca.gov/planning/sip/2007sip/2007sip.htm*) to correct data entry errors in the budget calculations and to remove the emissions reductions attributable to SJVUAPCD's Rule 9510 ''Indirect Source Review.'' [54] In our July 2011 proposal, we proposed to approve these draft budgets contingent on our receiving the SIP submittal from CARB containing these budgets before our final action on the SJV 2008 $PM_{2.5}$ SIP. The budgets were submitted by CARB as a SIP revision on July 29, 2011 (see letter, James Goldstene, Executive Officer, CARB, to Jared Blumenfeld, Regional Administrator, EPA Region 9, dated July 29, 2011, with Attachments). We summarize the budgets we are approving today in Table 5 below. We posted the draft version of these budgets on our Web site for adequacy on July 14, 2011 for a 30-day comment period which ended on August 15, 2011 (see *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm*). We received no comments on our adequacy posting and have completed our adequacy review (see TSD, section II.J.).

EPA is also approving the trading mechanism in the State's submittal for use in transportation conformity analyses by the SJV MPOs as allowed for under 40 CFR 93.124. The trading applies only to:

- Analysis years after the 2014 attainment year.
- On-road mobile emission sources.
- Trades using vehicle NO_X emission reductions in excess of those needed to meet the NO_X budget.
- Trades in one direction from NO_X to direct $PM_{2.5}$.
- A trading ratio of 9 tpd NO_X to 1 tpd $PM_{2.5}$.

Clear documentation of the calculations used in the trade would be included in the conformity analysis. See 2011 Ozone SIP Revision, Appendix A, p. A–6.

Now that the approval of the budgets is finalized, the SJV MPOs and the U.S. Department of Transportation are required to use the revised budgets in transportation conformity determinations. Due to the formatting of the budgets (combining emissions changes, recession impacts and reductions from control measures), CARB will need to provide the MPOs with emissions reductions associated with the control measures incorporated into the budgets for the appropriate analysis years so that they can include these reductions in future conformity determinations per 40 CFR 93.122. In addition, for these conformity determinations, the motor vehicle emissions from implementation of the transportation plan should be projected and compared to the budgets at the same level of accuracy as the budgets in the plan, for example emissions should be rounded to the nearest tenth (e.g. 0.1 tpd).

TABLE 5—$PM_{2.5}$ MVEB FOR THE SAN JOAQUIN VALLEY

[Tons per average annual day]

County	2012		2014	
	$PM_{2.5}$	NO_X	$PM_{2.5}$	NO_X
Fresno	1.5	35.7	1.1	31.4
Kern (SJV)	1.9	48.9	1.2	43.8
Kings	0.4	10.5	0.3	9.3
Madera	0.4	9.2	0.3	8.1
Merced	0.8	19.7	0.6	17.4
San Joaquin	1.1	24.5	0.9	21.6
Stanislaus	0.7	16.7	0.6	14.6
Tulare	0.7	15.7	0.5	13.8

V. Final Actions and Resulting Clean Air Act Consequences

A. EPA's Final Actions

For the reasons discussed in our July 13, 2011 proposal, EPA approves, with the exception of the contingency measures provisions, California's SIP for attaining the 1997 $PM_{2.5}$ NAAQS in the San Joaquin Valley and grants the State's request for an extension of the attainment date to April 5, 2015. The California $PM_{2.5}$ attainment SIP for the San Joaquin Valley is composed of the SJVUAPCD's 2008 $PM_{2.5}$ Plan as revised in 2010 and 2011 and the SJV-specific portions of CARB's 2007 State Strategy as revised in 2009 and 2011 that address CAA and EPA regulations for attainment of the 1997 $PM_{2.5}$ NAAQS in the SJV.

Specifically, EPA approves under CAA section 110(k)(3) the following elements of the SJV $PM_{2.5}$ attainment SIP:

[54] EPA has approved Rule 9510 into the California SIP but disallowed the use of emissions reductions from the rule for any SIP purpose including transportation conformity. See 75 FR 28509 (May 21, 2010) and 76 FR 26609 (May 9, 2011).

1. The 2005 base year emissions inventories as meeting the requirements of CAA section 172(c)(3) and 40 CFR 51.1008;

2. The reasonably available control measures/reasonably available control technology demonstration as meeting the requirements of CAA section 172(c)(1) and 40 CFR 51.1010;

3. The reasonable further progress demonstration as meeting the requirements of CAA section 172(c)(2) and 40 CFR 51.1009;

4. The attainment demonstration and associated air quality modeling as meeting the requirements of CAA sections 172(c)(1) and (6) and 40 CFR 51.1007;

5. The 2012 RFP year and 2014 attainment year motor vehicle emissions budgets (as submitted on July 29, 2011) and CARB's trading mechanism to be used in transportation conformity analyses as allowed under 40 CFR 93.124;

6. SJVUAPCD's commitments to the adoption and implementation schedule for specific control measures listed in Table 6–2 (amended June 15, 2010) of the 2008 $PM_{2.5}$ Plan to the extent that these commitments have not yet been fulfilled, and to achieve specific aggregate emissions reductions of direct $PM_{2.5}$, NO_X and SO_X by year, as listed in Table 6–3 of the $PM_{2.5}$ Plan; and

7. CARB's commitments to propose certain defined measures, as listed in Table B–1 on page 1 of Appendix B of the 2011 Progress Report to the extent that these commitments have not yet been fulfilled and to achieve aggregate emissions reductions of 17.1 tpd NO_X and 2.3 tpd direct $PM_{2.5}$ by 2014 sufficient to provide for attainment of the 1997 $PM_{2.5}$ NAAQS as described in CARB Resolution 07–28, Attachment B at pp. 3–6, the 2009 State Strategy Status Report, p. 21. and given in Table 3 above.

In addition, EPA concurs with the State's determination under 40 CFR 51.1002(c) that SO_X and NO_X are and VOC and ammonia are not attainment plan precursors for the attainment of the 1997 $PM_{2.5}$ NAAQS in the SJV.

EPA also grants, pursuant to CAA section 172(a)(2)(A) and 40 CFR 51.1004(a), California's request to extend the attainment date for the San Joaquin Valley $PM_{2.5}$ nonattainment area to April 5, 2015.

Finally, EPA disapproves under CAA section 110(k)(3) the contingency measures provisions of the SJV $PM_{2.5}$ attainment SIP as failing to meet the requirements of CAA section 172(c)(9) and 40 CFR 51.1012.

B. CAA Consequences of the Final Disapproval of the Contingency Measure Provisions

EPA is committed to working with the District and CARB to resolve the remaining issues that make the current $PM_{2.5}$ attainment SIP for the SJV not fully approvable under the CAA and the $PM_{2.5}$ implementation rule.

Under the CAA, a final disapproval of a required CAA element, such as the contingency measures provisions in section 172(c)(9), triggers sanction clocks under CAA section 179(b) that run from the effective date of the final action. The first sanction, the offset sanction in CAA section 179(b)(2), will apply in the SJV $PM_{2.5}$ nonattainment area 18 months from January 9, 2012 The second sanction, highway funding sanctions in CAA section 179(b)(1), will apply in the area six months after the offset sanction is imposed. Neither sanction will be imposed under the CAA if California submits and we approve prior to the implementation of the sanctions, SIP revisions that correct the deficiencies identified in our proposed action. In addition to the sanctions, CAA section 110(c)(1) provides that EPA must promulgate a federal implementation plan addressing the deficient elements in the $PM_{2.5}$ SIP for the SJV nonattainment area, two years after January 9, 2012, the effective date of this rule if we have not approved a SIP revision correcting the deficiencies within the two years.

Because we are approving the RFP and attainment demonstrations and the motor vehicle emissions budgets, we are issuing a protective finding under 40 CFR 93.120(a)(3) to the disapproval of the contingency measures. Without a protective finding, the final disapproval would result in a conformity freeze, under which only projects in the first four years of the most recent conforming Regional Transportation Plan and Transportation Improvement Programs can proceed. During a freeze, no new RTPs, TIPs or RTP/TIP amendments can be found to conform. *See* 40 CFR 93.120(a)(2). Under this protective finding, however, the final disapproval of the contingency measures does not result in a transportation conformity freeze in the San Joaquin $PM_{2.5}$ nonattainment area.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

B. Paperwork Reduction Act

This action does not impose an 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).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP approvals and partial approvals/partial disapprovals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because this partial approval/partial disapproval action does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small

governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the partial approval/partial disapproval action promulgated does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). 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.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely approves a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. It 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. Thus, Executive Order 13175 does not apply to this rule.

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

EPA interprets Executive Order 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 Executive Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045, because it approves a State rule implementing a Federal standard.

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

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (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 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

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

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

EPA lacks the discretionary authority to address environmental justice in this rulemaking. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely approves certain State requirements for inclusion into the SIP under CAA section 110 and subchapter I, part D and disapproves others, and will not in-and-of itself create any new requirements. Accordingly, it 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.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective on January 9, 2012.

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the

appropriate circuit by *January 9, 2012.* Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Sulfur oxides.

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

Dated: September 30, 2011.

Jared Blumenfeld,

Regional Administrator, EPA Region 9.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for Part 52 continues to read as follows:

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

Subpart F—California

■ 2. Section 52.220, is amended by adding paragraph (c)(356)(ii)(B), adding and reserving paragraph (c)(391), and adding paragraphs(c)(392), (c)(393), (c)(394), (c)(395), and (c)(396).

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(356) * * *

(i) * * *

(ii) * * *

(B) State of California Air Resources Board.

(*1*) Proposed State Strategy for California's 2007 State Implementation Plan, adopted on September 27, 2007.

(*2*) CARB Resolution No. 07–28 with Attachments A and B, September 27, 2007. Commitment to achieve the total emissions reductions necessary to attain the Federal standards in the SJV air basin, which represent 2.3 tons per day (tpd) of direct $PM_{2.5}$ and 17.1 tpd of nitrogen oxides by 2014 for purposes of the 1997 $PM_{2.5}$ NAAQS, as described in Resolution No. 07–28 at Attachment B, pp. 3–6, and modified by CARB Resolution No. 09–34 (April 24, 2009) adopting ''Status Report on the State Strategy for California's 2007 State Implementation Plan (SIP) and Proposed Revisions to the SIP Reflecting Implementation of the 2007 State Strategy'' and by CARB Resolution No. 11–24 (April 28, 2011) adopting the ''Progress Report on Implementation of $PM_{2.5}$ State Implementation Plans (SIP) for the South Coast and San Joaquin Valley Air Basins and Proposed SIP Revisions.''

(*3*) Executive Order S–07–002, Relating to Approval of the State Strategy for California's State Implementation Plan (SIP) for the Federal 8-Hour Ozone and $PM_{2.5}$ Standards, November 16, 2007.

(391) [Reserved]

(392) A plan was submitted on June 30, 2008 by the Governor's designee.

(i) [Reserved]

(ii) Additional Material.

(A) San Joaquin Valley Unified Air Pollution Control District.

(*1*) 2008 $PM_{2.5}$ Plan, adopted on April 30, 2008.

(*2*) SJVUAPCD Governing Board, In the Matter of: Adopting the San Joaquin Valley Unified Air Pollution Control District 2008 $PM_{2.5}$ Plan, Resolution No. 08–04–10, April 30, 2008. Commitments to achieve emissions reductions (including emissions reductions of 8.97 tpd of NO_X, 6.7 tpd of direct $PM_{2.5}$, and 0.92 tpd of SOx by 2014) as described in Table 6–3a (p. 6–11), Table 6–3b (p. 6–12), and Table 6–3c (p. 6–12) respectively of the 2008 $PM_{2.5}$ Plan and commitments to adopt and submit control measures as described in Table 6–2 (p. 6–9) of the 2008 $PM_{2.5}$ Plan, as amended June 17, 2010.

(B) State of California Air Resources Board.

(*1*) CARB Resolution No. 08–28 with Attachment A, May 22, 2008.

(393) An amended plan was submitted on August 12, 2009 by the Governor's designee.

(i) [Reserved]

(ii) Additional Material.

(A) State of California Air Resources Board.

(*1*) Status Report on the State Strategy for California's 2007 State Implementation Plan (SIP) and Proposed Revisions to the SIP Reflecting Implementation of the 2007 State Strategy, pages 11–17, April 24, 2009.

(*2*) CARB Resolution No. 09–34, April 24, 2009.

(394) An amended plan was submitted on September 15, 2010 by the Governor's designee.

(i) [Reserved]

(ii) Additional Material.

(A) San Joaquin Valley Unified Air Pollution Control District.

(*1*) 2008 $PM_{2.5}$ Plan Amendment to Extend the Rule 4905 Amendment Schedule, June 17, 2010.

(*2*) SJVUAPCD Governing Board, In the Matter of: Proposed Amendments to the 2008 $PM_{2.5}$ Plan to Extend the Rule Amendment Schedule for Rule 4905 (Natural Gas-Fired, Fan-Type Residential Central Furnaces), Resolution 10–06–18, June 17, 2010.

(B) State of California Air Resources Board.

(1) Executive Order S–10–003, Relating to Approval of Amendments to the 2008 $PM_{2.5}$ Plan to Extend the Rule Amendment Schedule for Rule 4905 (Natural Gas-Fired, Fan-Type Residential Central Furnaces), September 15, 2010.

(395) An amended plan was submitted on May 18, 2011 by the Governor's designee.

(i) [Reserved]

(ii) Additional Material.

(A) State of California Air Resources Board.

(*1*) Progress Report on Implementation of $PM_{2.5}$ State Implementation Plans (SIP) for the South Coast and San Joaquin Valley Air Basins and Proposed SIP Revisions, Release Date: March 29, 2011.

(*2*) CARB Resolution No. 11–24, April 28, 2011. Commitment to propose measures as described in Appendix B of the Progress Report on the Implementation of $PM_{2.5}$ State Implementation Plans (SIP) for the South Coast and San Joaquin Valley Air Basins and Proposed SIP Revisions.

(*3*) Executive Order S–11–010, ''Approval of Revisions to the Fine Particulate Matter State Implementation Plans for the South Coast Air Quality Management Plans for the South Coast Air Quality Management District and the San Joaquin Valley Air Pollution Control District,'' May 18, 2011.

(396) An amended plan was submitted on July 29, 2011 by the Governor's designee.

(i) [Reserved]

(ii) Additional Material.

(A) State of California Air Resources Board.

(*1*) 8-Hour Ozone State Implementation Plan Revisions and Technical Revisions to the $PM_{2.5}$ State Implementation Plan Transportation Conformity Budgets for the South Coast and San Joaquin Valley Air Basins, Appendix A, page A–6, (dated June 20, 2011), adopted July 21, 2011.

(*2*) CARB Resolution No. 11–22, July 21, 2011.

(*3*) Executive Order S–11–016, ''Approval of Revisions to the 8-Hour Ozone State Implementation Plans for the South Coast Air Quality Management District and the San Joaquin Valley Air Pollution Control District,'' July 29, 2011.

[FR Doc. 2011–27232 Filed 11–8–11; 8:45 am]

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Part V

Environmental Protection Agency

40 CFR Part 52

Approval of Air Quality Implementation Plans; California; South Coast; Attainment Plan for 1997 $PM_{2.5}$ Standards; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2009–0366; FRL–9482–9]

Approval of Air Quality Implementation Plans; California; South Coast; Attainment Plan for 1997 $PM_{2.5}$ Standards

AGENCY: U.S. Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving in part and disapproving in part state implementation plan (SIP) revisions submitted by California to provide for attainment of the 1997 fine particulate matter ($PM_{2.5}$) national ambient air quality standards in the Los Angeles-South Coast area (South Coast). These SIP revisions are the South Coast 2007 Air Quality Management Plan (South Coast 2007 AQMP) (revised 2011) and South Coast-related provisions of the 2007 State Strategy (revised 2009 and 2011). EPA is approving the emissions inventory; reasonably available control measures/reasonably available control technology demonstration; the reasonable further progress and attainment demonstrations and associated air quality modeling; and the transportation conformity motor vehicle emissions budgets. EPA is also granting California's request to extend the attainment deadline for the South Coast to April 5, 2015 and approving commitments to measures and reductions by the South Coast Air Quality Management District and the California Air Resources Board. Finally, we are disapproving the SIP's contingency measures and issuing a protective finding under 40 CFR 93.120(a)(3), and we are rejecting the assignment of 10 tons per day (tpd) of nitrogen oxide (NO_X) reductions to the federal government.

DATES: *Effective Date:* This rule is effective on January 9, 2012.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2009–0366 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

Copies of the SIP materials are also available for inspection in the following locations:

- California Air Resources Board, 1001 I Street, Sacramento, CA 95812
- South Coast Air Quality. Management District, 21865 E. Copley Drive, Diamond Bar, CA 91765.

The SIP materials are also electronically available at *http://www.aqmd.gov/aqmp/07aqmp/index.html* and *http://www.arb.ca.gov/planning/sip/2007sip/2007sip.htm.*

FOR FURTHER INFORMATION CONTACT: Wienke Tax, Air Planning Office (AIR–2), U.S. Environmental Protection Agency, Region IX, (415) 947–4192, *tax.wienke@epa.gov.*

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

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I. Summary of EPA's Proposed and Final Actions on the 2007 State Implementation Plan for Attainment of the 1997 $PM_{2.5}$ Standards in the South Coast Nonattainment Area

On July 14, 2011 (76 FR 41562), EPA proposed to approve in part and disapprove in part California's state implementation plan (SIP) for attaining the 1997 fine particulate ($PM_{2.5}$) national ambient air quality standards (NAAQS) in the Los Angeles-South Coast Air Basin Area (South Coast).[1] California developed this SIP to provide for expeditious attainment of the $PM_{2.5}$ standards in the South Coast and to meet other applicable $PM_{2.5}$ planning requirements in Clean Air Act (CAA) section 172(c) and EPA's $PM_{2.5}$ implementation rule.[2]

In all, California has made six submittals to address these $PM_{2.5}$ SIP planning requirements for the South Coast. The two principal ones are the South Coast Air Quality Management District (SCAQMD or District) Final 2007 South Coast Air Quality Management Plan (AQMP) (amended 2011) and the California Air Resources Board (CARB) Final 2007 State and Federal Strategy (2007 State Strategy) (amended 2009 and 2011).[3] Together, the South Coast 2007 AQMP and the 2007 State Strategy present a comprehensive and innovative strategy for attaining the 1997 $PM_{2.5}$ standards in the South Coast.

In our July 2011 notice, we proposed multiple approval actions on the South Coast 2007 AQMP. First, we proposed to approve the SIP's base year emissions inventory, the reasonably available control measure (RACM)/reasonably available control technology (RACT) demonstration, the reasonable further progress (RFP) and attainment demonstrations and associated air quality modeling, and related motor vehicle emissions budgets (budgets).[4]

[1] The area referred to as ''Los Angeles-South Coast Air Basin'' (South Coast Air Basin or ''South Coast'') includes Orange County, the southwestern two-thirds of Los Angeles County, southwestern San Bernardino County, and western Riverside County. For a precise description of the boundaries of the Los Angeles-South Coast Air Basin, see 40 CFR 81.305.

[2] ''The Clean Air Fine Particle Implementation Rule for the 1997 $PM_{2.5}$ NAAQS,'' 72 FR 20586 (April 25, 2007) and codified at 40 CFR part 51, subpart Z ($PM_{2.5}$ implementation rule).

[3] These SIP submittals are:

1. SCAQMD, Final 2007 Air Quality Management Plan (AQMP), adopted on June 1, 2007 by the SCAQMD and September 27, 2007 by CARB, submitted on November 28, 2007.

2. CARB, *Proposed State Strategy for California's 2007 State Implementation Plan,* as amended and adopted on September 27, 2007 by CARB, submitted on November 16, 2007.

3. CARB, *Status Report on the State Strategy for California's 2007 State Implementation Plan (SIP) and Proposed Revisions to the SIP Reflecting Implementation of the 2007 State Strategy* (pages 11–27 only), adopted on April 24, 2009 by CARB, submitted on August 12, 2009.

4. CARB, *Progress Report on Implementation of $PM_{2.5}$* State Implementation Plans (SIP) for the South Coast and San Joaquin Valley Air Basins and Proposed SIP Revisions (Appendices B, C and D only), adopted on April 28, 2011 by CARB, submitted on May 18, 2011. ''2011 Progress Report.''

5. SCAQMD, *Revisions to the 2007 $PM_{2.5}$ and Ozone State Implementation Plans for the South Coast Air Basin and Coachella Valley (SIP Revisions),* adopted on March 4, 2011 by the SCAQMD Governing Board and approved by the CARB Board on April 28, 2011 and submitted on May 19, 2011.

6. CARB, *8–Hour Ozone State Implementation Plan Revisions and Technical Revisions to the $PM_{2.5}$ State Implementation Plan Transportation Conformity Budgets for the South Coast and San Joaquin Valley Air Basins,* (South Coast $PM_{2.5}$ SIP MVEBs only) adopted on July 21, 2011 by CARB and submitted on July 29, 2011. (2011 Ozone SIP Revision). Only the $PM_{2.5}$ motor vehicle emissions budgets in this submittal are addressed in today's action.

[4] The 2011 Progress Report contained budgets that were not approvable because they included emissions reductions from a rule that was ineligible for SIP credit. These budgets also included data entry errors. See 76 FR 41338, 41360. In lieu of these budgets, we proposed to approve alternative

Second, we proposed to approve enforceable commitments by both the District and CARB to certain measures and specific amounts of emissions reductions. Third, we also proposed to concur with the State's determination that NO_X, sulfur oxides (SO_X), and volatile organic compounds (VOC) are, and ammonia is not, attainment plan precursors for attainment of the 1997 $PM_{2.5}$ NAAQS in the South Coast nonattainment area. Fourth, we proposed to grant California's request to extend the attainment date for the South Coast $PM_{2.5}$ nonattainment area to April 5, 2015. See 76 FR 41562.

We also proposed to disapprove the contingency measure provisions of the South Coast 2007 AQMP as failing to meet the requirements of the CAA as interpreted in EPA guidance. In addition, we noted that we were rejecting the assignment of 10 tpd of NO_X emissions to the federal government.

A more detailed discussion of each of California's SIP submittals for the South Coast area, the CAA and EPA requirements applicable to them, and our evaluation and proposed actions, can be found in the July 14, 2011 **Federal Register** notice and the technical support document (TSD) for this final action.[5]

Our July 2011 proposal was the second time that EPA proposed action on California's South Coast 2007 AQMP to address attainment of the 1997 $PM_{2.5}$ NAAQS. On November 22, 2010, (75 FR 71294) rule, EPA proposed to disapprove the majority of the provisions in this SIP. During the comment period for the November 2010 proposal, we received several comment letters from the public as well as comment letters from CARB and the District. Subsequent to the close of that comment period, CARB adopted and submitted revisions to the South Coast 2007 AQMP and 2007 State Strategy. After considering information contained in the comment letters and the supplemental SIP submittals, we issued the July 2011 proposed rule which substantially amended our November 2010 proposal. As part of our final action, EPA has considered and provided responses to all significant comments submitted in response to both the November 2010 and the July 2011 proposals.

EPA is today approving most elements of the South Coast 2007 AQMP based on our conclusion that they comply with applicable CAA requirements and provide for expeditious attainment of the 1997 $PM_{2.5}$ standards in the South Coast nonattainment area. We are also today disapproving the SIP's contingency measure provisions because they do not provide sufficient emissions reductions. We are continuing to work with the State and District to identify additional control measures and programs that meet the CAA's requirements for contingency measures consistent with EPA regulations and policy.

II. Summary of Public Comments Received on the Proposals and EPA Responses

As part of our final action, EPA has considered and provided responses to all significant comments submitted in response to both the November 2010 and the July 2011 proposals.

We received eleven comment letters in response to our November 22, 2010 proposal and July 14, 2011 supplemental proposal. In the following sections, we summarize our responses to the most significant comments that we received on the proposals. Our full responses to all the comments received can be found in the ''Response to Comments'' section of the TSD accompanying today's rulemaking.

We received comments on both proposals from the Natural Resources Defense Council (NRDC) representing various organizations.

We received letters on both proposals from Communities for a Better Environment (CBE) representing various organizations.

We received comment letters on both proposals from the South Coast Air Quality Management District.

We received comments from CARB on our November proposal.[6]

We received comments from Kirk Marckwald, California Environmental Associates, on behalf of the Association of American Railroads, on our November proposal.

Michael W. Lewis, Construction Industry Air Quality Coalition (CIAQC), on behalf of a number of its members, submitted comments on our July amended proposal.

Lawrence J. Joseph, on behalf of the American Road and Transportation Builders Association (ARTBA), submitted comments on our July amended proposal.

Robin Hall, private citizen, submitted comments on our November proposal.

A. Comments on Proposed Approval of the Emissions Inventory

Comment: NRDC comments that EPA proposes to approve the inventories in the South Coast 2007 AQMP because they were current and accurate ''at the time the Plan was developed and submitted,'' citing 76 FR 41567. NRDC argues that such language is not in the CAA and the addition is not a reasonable extension of Congress's intent. NRDC argues that Congress did not mean for EPA to rely on inventory data that EPA knew to be incorrect on the basis that the data was thought to be accurate at the time it was submitted because Congress' goal is to ensure the adoption and approval of SIPs that will achieve clean air. NRDC notes that section 172(c)(3) expressly envisions that EPA may require revisions to the inventory ''to assure that the requirements of this part are met.'' EPA's interpretation would suggest that the only time such revisions are needed is when it is found that the inventory is not current or accurate as of the date it is submitted and this would undermine any assurance that ''the requirements of [Part D] are met.''

Response: EPA does not dispute the importance of emissions inventories. We evaluated the emissions inventories in the 2007 AQMP to determine whether they satisfy the requirements of CAA section 172(c)(3) and adequately support the Plan's RACM, RFP and attainment demonstrations. Based on this evaluation, we have concluded that the South Coast 2007 AQMP's base year emissions inventory was based on the most current and accurate information available to the State and District at the time that it was developed and submitted and comprehensively addresses all source categories in the South Coast area, consistent with applicable CAA requirements and EPA guidance. See 76 FR 41562 at 41566–41567 and July 2011 TSD[7] at section II.A.; see also ''General Preamble for Implementation of Title I of the Clean Air Act Amendments of 1990,'' 57 FR 13498 at 13502 (April 16, 1992) (''General Preamble'').

budgets that CARB had developed and posted for public comment as part of its 2011 Ozone SIP Revision and stated that the approval was contingent on our receipt of the SIP revision containing the revised budgets. *Id.* CARB submitted that SIP revision on July 29, 2011.

[5] ''Final Technical Support Document and Response to Comments, Final Rulemaking Action on the South Coast 2007 AQMP for $PM_{2.5}$ and the South Coast Portions of the Revised 2007 State Strategy,'' Air Division, U.S. Region 9, September 30, 2011. The TSD can be found in the docket for this rulemaking.

[6] The majority of CARB's and the District's comments addressed the November 2010 proposed disapprovals and EPA's grounds for them. These comments were, for the most part, addressed by our July 2011 amended proposal.

[7] ''Technical Support Document for the Revised Proposed Rulemaking Action on the South Coast 2007 AQMP for $PM_{2.5}$ and the South Coast Portions of the 2007 State Strategy,'' Air Division, U.S. EPA, Region 9, June 29, 2011, ''July 2011 TSD.''

We do not agree with NRDC's suggestion that this inventory undermines the attainment demonstration in the Plan. To the contrary, as discussed in the proposed rule (76 FR 41562, 41567) and in section II.B. below, we have concluded that the State's changes to its methodologies for estimating future emissions do not significantly affect the 2002 base year inventories and, consequently, do not undermine the modeling or other analyses that rely on those inventories. Although significant changes to a base year inventory that undermine the assumptions in an attainment demonstration may call for a more comprehensive reevaluation of the modeling and other planning analyses supporting that demonstration, we conclude based on our technical assessment that such a comprehensive reevaluation is not necessary in this case. We note that states are required to report comprehensive emissions inventories to EPA every three years under the Air Emissions Reporting Requirements in 40 CFR part 51, subpart A. *See* 40 CFR 51.30(b).

CAA section 172(b) provides that ''the State containing [a nonattainment] area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of [section 172(c) and section 110]'' on the schedule established by EPA, and section 172(c) contains, inter alia, the requirement that nonattainment plans ''shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area.'' We believe it is reasonable to read these provisions together as requiring that the State submit an inventory that is ''comprehensive, accurate, [and] current'' at the time the State submitted it to EPA, rather than requiring that the State continually revise its plan as new emissions data becomes available. See Brief of Respondents, EPA, in *Sierra Club, et al.* v. *U.S. EPA, et al.,* Case Nos. 10–71457 and 10–71458 (consolidated), May 5, 2011. States could never effectively plan for air quality improvement if they had to constantly revise their inventories as new data became available. Air quality planning is an iterative process and states and EPA must rely on the best available data at the time the plans are created.

As we stated in our proposal, since late 2007, California has experienced an economic recession that has greatly reduced current levels of economic activity in the State's construction and goods movement sectors. The recession has resulted in lowered projected future levels of activity in this sector. 2011 Progress Report, Appendix E. As a result, projected emission levels from these categories are now substantially lower than the levels projected for 2008 and later in the Plan as submitted in 2007. At this time, California is addressing these recession impacts on future economic activity through adjustments to the baseline inventories for specific source categories. See 2011 Progress Report, Appendix E, page 2. There are no recession-related adjustments to the 2002 base year inventory in the South Coast 2007 AQMP. CARB also made technical changes to the inventories for diesel trucks, buses, and certain categories of off-road mobile source engines as part of its December 2010 rulemaking amending the In-Use On-Road Truck and Bus Rule and the In-Use Off-Road Engine rule.[8] *Id.* The State estimates that these changes collectively reduce the 2002 base year total inventory in the South Coast by 4 percent for NO_X and 5 percent for $PM_{2.5}$. See 76 FR 41562, at 41567.

Comment: NRDC questions EPA's calculations that estimated the emissions changes to the 2002 base year inventory (see 76 FR 41562, at 41567), noting that EPA's calculations come from a May 18, 2011 letter from CARB providing supplemental information. NRDC then asserts that these numbers do not match with statements in staff reports on the diesel rules; however, NRDC does not provide the statements or data from the staff reports.

Response: As NRDC noted, EPA calculated the change in the 2002 base year emission inventory based on information provided in the 2011 Progress Report Supplement, transmitted by CARB on May 18, 2011. We took the difference between the ''SIP'' estimate and the ''Current Estimate'' columns in Attachment 1, Table SC–2002, to the May 18 letter and divided by the ''SIP'' estimate to calculate the percent change in the inventories. We explain these calculations in our TSD in Section II.A.

B. Comments on Credit for Baseline Measures

Comment: NRDC asserts that EPA's proposed rule and TSD fail to clearly and accurately account for the measures that contribute to specific emission reductions, such as the Federal, state, and district rules adopted before October 2006 (''baseline measures'') that are incorporated into the baseline inventory. NRDC argues that California and SCAQMD must have the data related to these emission reduction estimates, which are critical to the integrity of the Plan, and that an EPA approval of the emissions inventories in the absence of this data would be arbitrary and capricious. NRDC also argues that this ''gap in data'' is made more problematic by the fact that EPA does not require California's mobile source control measures that have received a waiver of preemption under CAA section 209 (''waiver measures'') to be approved into the SIP.

Response: As to the commenter's assertion about the ''gap in data'' regarding baseline measures and projected baseline inventories, we disagree that there is any inadequacy in the emissions projections that undermines the RACM, RFP or attainment demonstrations in the South Coast 2007 AQMP and 2007 State Strategy. We explained in our amended proposal (76 FR 41562 at 41566–41567) our reasons for concluding both that the 2002 base year inventory in the South Coast 2007 AQMP is comprehensive, accurate, and current as required by CAA section 172(c)(3) and that the projected baseline inventories for 2009, 2012 and 2014 provide adequate bases for the RACM, RFP and attainment demonstrations in the Plan.

With respect to mobile source emissions, we believe that credit for emissions reductions from implementation of California mobile source rules that are subject to CAA section 209 waivers (''waiver measures'') is appropriate notwithstanding the fact that such rules are not approved as part of the California SIP. In the TSD supporting our July 14, 2011 proposal (76 FR 41562), we explained why we believe such credit is appropriate. See TSD at section II.F.4.a.i (pp. 97–100). Historically, EPA has granted credit for the waiver measures because of special Congressional recognition, in establishing the waiver process in the first place, of the pioneering California motor vehicle control program and because amendments to the CAA (in 1977) expanded the flexibility granted to California in order ''to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare'' (H.R. Rep. No. 294, 95th Congr., 1st Sess. 301–2 (1977)). In allowing California to take credit for the waiver measures notwithstanding the

[8] CARB revised population, regional allocation factors, lifetime odometer assumptions, growth rates, and forecasted vehicle age distributions for heavy duty truck and buses, and updated equipment population, activity, load factors, and future equipment sales for construction equipment, based on updated information. See *http://www.arb.ca.govregact/2010/truckbus10/truckbus10.htm* and *http://www.arb.ca.govregact/2010/offroadlsi10/offroadlsi10.htm.*

fact that the underlying rules are not part of the California SIP, EPA treated the waiver measures similarly to the Federal motor vehicle control requirements, which EPA has always allowed States to credit in their SIPs without submitting the program as a SIP revision.

EPA's historical practice has been to give SIP credit for motor-vehicle-related waiver measures by allowing California to include motor vehicle emissions estimates made by using California's EMFAC (and its predecessors) motor vehicle emissions factor model in SIP inventories. EPA verifies the emissions reductions from motor-vehicle-related waiver measures through review and approval of EMFAC, which is updated from time to time by California to reflect updated methods and data, as well as newly-established emissions standards. (Emissions reductions from EPA's motor vehicle standards are reflected in an analogous model known as MOVES.) The South Coast 2007 AQMP was developed using a version of the EMFAC model referred to as EMFAC2007, which EPA has approved for use in SIP development in California. See 73 FR 3464 (January 18, 2008). Thus, the emissions reductions that are from the California on-road ''waiver measures'' and that are estimated through use of EMFAC are as verifiable as are the emissions reductions relied upon by states other than California in developing their SIPs based on estimates of motor vehicle emissions made through the use of the MOVES model and prior to the release of MOVES made through the use of the MOBILE model. All other states use the MOVES model in their baseline inventories without submitting the federal motor vehicle regulations for incorporation into their SIPs.

Similarly, emissions reductions that are from California's waiver measures for non-road engines and vehicles (e.g., agricultural, construction, lawn and garden and off-road recreation equipment) are estimated through use of CARB's OFFROAD emissions factor model.[9] (Emissions reductions from EPA's non-road engine and vehicle standards are reflected in an analogous model known as NONROAD). Since 1990, EPA has treated California non-road standards for which EPA has issued waivers in the same manner as California motor vehicle standards, i.e., allowing credit for standards subject to the waiver process without requiring submittal of the standards as part of the SIP. In so doing, EPA has treated the California non-road standards similarly to the Federal non-road standards, which are relied upon, but not included in, various SIPs.

CARB's EMFAC and OFFROAD models employ complex routines that predict vehicle fleet turnover by vehicle model years and include control algorithms that account for all adopted regulatory actions which, when combined with the fleet turnover algorithms, provide future baseline projections. *See* 2007 State Strategy, Appendix F at 7–8. For stationary sources, the California Emission Forecasting System (CEFS) projects future emissions from stationary and area sources (in addition to aircraft and ships) using a forecasting algorithm that applies growth factors and control profiles to the base year inventory.[10] *See id.* at 7. The CEFS model integrates the projected inventories for both stationary and mobile sources into a single database to provide a comprehensive statewide forecast inventory, from which nonattainment area inventories are extracted for use in establishing future baseline planning inventories. *See Id.* The South Coast 2007 AQMP describes how the District developed the future baseline inventories in the plan, based in part on the emissions data and baseline projections provided by CARB and other California agencies. *See generally* South Coast 2007 AQMP, Appendix III. The District's projections took into account the controls implemented under SCAQMD rules adopted as of June 2006, most CARB regulations adopted by June 2005, and a specific set of growth rates from the Southern California Association of Governments (SCAG) for population, industry, and motor vehicle activity, among other factors. *See id.* at 2–3. In 2011, CARB updated the baseline emissions projections for several source categories to account for, among other things, more recent economic forecasts and improved methodologies for estimating emissions from the heavy-duty truck and construction source categories. *See* 2011 Progress Report at Appendix E. These methodologies for projecting future emissions based on growth factors and existing Federal, State, and local controls were consistent with EPA guidance on developing projected baseline inventories. *See* TSD at section II.A; *see also* ''Procedures for Preparing Emissions Projections,'' EPA Office of Air Quality Planning and Standards, EPA–450/4–91–019, July 1991; ''Emission Projections,'' STAPPA/ALAPCO/EPA Emission Inventory Improvement Project, Volume X, December 1999 (available at *http://www.epa.gov/ttnchie1/eiip/techreport/volume10/x01.pdf*).

In sum, the 2002 base year and future projected baseline inventories in the South Coast 2007 AQMP were prepared using a sophisticated set of CARB and SCAQMD methodologies to estimate and project emissions from stationary sources, in addition to the most recent emissions factors and models and updated activity levels for emissions associated with mobile sources, including: (1) The latest EPA-approved California motor vehicle emissions factor model (EMFAC2007) and the most recent motor vehicle activity data from SCAG; (2) improved methodologies for estimating emissions from specific source categories; and (3) CARB's non-road mobile source model (the OFFROAD model). *See* TSD at Section II.A (referencing, *inter alia,* South Coast 2007 AQMP at Appendix III and 2007 State Strategy at Appendix F) and 2011 Progress Report. EPA has approved numerous California SIPs that rely on base year and projected baseline inventories including emissions estimates derived from the EMFAC, OFFROAD, and CEFS models. *See, e.g.,* 65 FR 6091 (February 8, 2000) (proposed rule to approve 1-hour ozone plan for South Coast) and 65 FR 18903 (April 10, 2000) (final rule); 70 FR 43663 (July 28, 2005) (proposed rule to approve PM–10 plan for South Coast and Coachella Valley) and 70 FR 69081 (November 14, 2005) (final rule); 74 FR 66916 (December 17, 2009) (direct final rule to approve ozone plan for Monterey Bay). The commenter has provided no information to support a claim that these methodologies for developing base year inventories and projecting future emissions in the South Coast are inadequate to support the RACM, RFP, and attainment demonstrations in the South Coast 2007 AQMP.

For all of these reasons and as discussed in our amended proposal (76 FR 41562 at 41566–41567), we have concluded that the 2002 base year inventory in the South Coast 2007 AQMP is a ''comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants'' in the South Coast area, consistent with the

[9] Information about CARB's emissions inventories for on-road and non-road mobile sources, and the EMFAC and OFFROAD models used to project changes in future inventories, is available at *http://www.arb.ca.gov/msei/msei.htm.*

[10] Information on base year emissions from stationary point sources is obtained primarily from the districts, while CARB and the districts share responsibility for developing and updating information on emissions from various area source categories. See 2007 State Strategy, Appendix F at 21; see also South Coast 2007 AQMP, Appendix III at pp. 1–9 through 1–15 (describing the SCAQMD's and CARB's methodologies for developing 2002 base year emissions estimates for stationary point and area sources).

requirements for emissions inventories in CAA section 172(c)(3), 40 CFR 51.1008, and 40 CFR part 51, subpart A. In addition, we conclude that the projected baseline inventories for 2009, 2012 and 2014 were prepared consistent with EPA's guidance on development of emissions inventories and attainment demonstrations and, therefore, provide an adequate basis for the RACM, RFP and attainment demonstrations in the Plan. *See* TSD at section II.A.

C. Comments on $PM_{2.5}$ Plan Precursors

Comment: NRDC commented that our proposed rule does not adequately explain why ammonia (NH_3) is not a precursor for $PM_{2.5}$ formation.

Response: Under the $PM_{2.5}$ implementation rule, ammonia is not a $PM_{2.5}$ plan precursor unless either EPA or the State provides an appropriate technical demonstration showing that ammonia emissions from sources in the State significantly contribute to $PM_{2.5}$ concentrations in the nonattainment area. *See* 40 CFR 51.1002(c)(4). Absent such a technical demonstration, the State is not required to address ammonia in its $PM_{2.5}$ attainment plan or to evaluate sources of ammonia emissions in the State for control measures.

Comment: Communities for a Better Environment (CBE) asserts that methane is a reactive VOC, a smog precursor, and a potent greenhouse gas (GHG), and that EPA should require the SCAQMD to revise its definition of VOC in Rule 102 to remove the exemption for methane. In support of these assertions, CBE states that: (1) A 2002 Harvard University modeling study [11] concludes that methane reductions could be highly effective in reducing ambient ozone levels; (2) SCAQMD's draft 2007 AQMP identified significantly larger amounts of Total Organic Gases (TOG) including methane from refineries than VOC emissions (10.1 tons per day (tpd) of TOG versus 6 tpd of VOC); (3) the District should require control of all organic gases from oil refineries; and (4) the District should also review its list of other TOG compounds that are exempt from regulation. CBE contends that regulation of methane is a reasonably available control measure that should be required because additional VOC reductions are needed to satisfy RACT/RACM requirements.

Response: The SCAQMD's definition of VOC in Rule 102 is consistent with EPA's definition of VOC in 40 CFR 51.100(s), which excludes methane because it has been determined to have negligible photochemical reactivity. 40 CFR 51.100(s)(1); see also 62 FR 44900 (August 25, 1997) (final rule revising definition of VOC to exclude methane and other compounds). EPA approved Rule 102 into the SCAQMD portion of the California SIP on January 8, 2007. See 72 FR 656. Accordingly, pursuant to its SIP-approved definition of VOC, SCAQMD is not required to regulate methane as a VOC for purposes of preparing SIPs to attain the NAAQS. To the extent that CBE intended to challenge the exclusion of methane from EPA's regulatory definition of VOC at 40 CFR 51.100(s), such a challenge is outside the scope of today's action on the $PM_{2.5}$ attainment plan for the South Coast area. Likewise, CBE's assertions about the effect of methane controls on ambient ozone levels are also outside the scope of today's action, which addresses the State's plan for attaining the 1997 $PM_{2.5}$ standards.

D. Comments on Reasonably Available Control Measures (RACM) Demonstration

Comment: CBE states that EPA should require the SCAQMD to complete a new RACM/RACT demonstration including assessment of all available control measures for direct emissions of $PM_{2.5}$ as well as measures for control of secondary $PM_{2.5}$ resulting from NO_X, SO_X, and VOC emissions. CBE also provides a list of potential pollution control and energy efficiency measures that it asserts should be included ''as part of a new, broader, and complete RACM/RACT assessment to demonstrate attainment expeditiously.'' Finally, CBE asserts that because the South Coast 2007 AQMP is several years old, it is important to reassess and update the control measures in the plan, especially given the SCAQMD's failure to demonstrate attainment. CBE is also opposed to what it characterizes as EPA proposed approval of a commitment by CARB to propose measures later, as a lump sum.

Response: Section 172(c)(1) of the CAA requires that each attainment plan ''provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology), and shall provide for attainment of the national primary ambient air quality standards.'' For over 30 years, EPA has consistently interpreted this provision to require that States adopt only those ''reasonably available'' measures necessary for expeditious attainment and to meet RFP requirements. 40 CFR 51.1010; *see also* 44 FR 20372 (April 4, 1979) (Part D of title I of the CAA ''does not require that all sources apply RACM if less than all RACM will suffice for [RFP] and attainment''); 57 FR 13498 at 13560 (April 16, 1992) (''where measures that might in fact be available for implementation in the nonattainment area could not be implemented on a schedule that would advance the date for attainment in the area, EPA would not consider it reasonable to require implementation of such measures''); ''Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas,'' November 30, 1999 (1999 Seitz Memo) (a State may justify rejection of a measure as not ''reasonably available'' for that area based on technological or economic grounds); and 70 FR 71612 (November 29, 2005) at 71661 (noting that States ''need adopt measures only if they are both economically and technologically feasible and will advance the attainment date or are necessary for RFP''). EPA's interpretation of section 172(c)(1) has been upheld by several courts. *See, e.g., Sierra Club* v. *EPA, et al.,* 294 F. 3d 155 (DC Cir. 2002); *Sierra Club* v. *EPA,* 314 F.3d 735 (5th Cir. 2002).

Under the $PM_{2.5}$ Implementation Rule at 40 CFR 51.1010, a RACM demonstration must include ''the list of the potential measures considered by the State, and information and analysis sufficient to support the State's judgment that it has adopted all RACM, including RACT.'' 40 CFR 51.1010(a). In addition, ''[p]otential measures that are reasonably available considering technical and economic feasibility must be adopted as RACM if, considered collectively, they would advance the attainment date by one year or more.'' As explained in the preamble to the $PM_{2.5}$ Implementation Rule, Congress provided EPA and States broad discretion to determine what measures to include in an attainment plan, and the language in section 172(c)(1) requiring only ''reasonably available'' measures and implementation of these measures ''as expeditiously as practicable'' indicates that Congress intended for the RACT/RACM requirement to be driven by an overall requirement that the measure be ''reasonable.'' 72 FR 20586 at 20610 (April 25, 2007). Thus, the rule of ''reason'' drives the decisions on what controls to apply, what should be controlled, by when emissions must be

[11] Fiore, et al, Harvard University, *Linking ozone pollution and climate change: The case for controlling methane,* 2002. *http://www.gfdl.noaa.gov/bibliography/related_files/amf0201.pdf.*

reduced, and finally, the rigor required in a State's RACT/RACM analysis. *See id.* States may, as part of a RACM analysis, consider the costs of potential control measures and whether the measures can be readily and effectively implemented without undue administrative burden. *See id.* (citing 55 FR 38327 and 66 FR 26969).

As discussed in our July 14, 2011 amended proposal, we have evaluated the collection of reasonably available control measures that CARB, the District, and the Southern California Association of Governments (SCAG) have adopted and submitted with the attainment demonstration in the South Coast 2007 AQMP and 2007 State Strategy to meet the RACM/RACT requirement in CAA section 172(c)(1) and 40 CFR 51.1010. *See* 76 FR 41562 at 41568–41572 and TSD at section II.D. For the reasons discussed in our amended proposal and as further discussed below, we conclude that the South Coast 2007 AQMP and the 2007 State Strategy demonstrate that the State has adopted all reasonably available control measures (including RACT for stationary sources) necessary to demonstrate attainment as expeditiously as practicable and to meet any RFP requirements, as required by CAA section 172(c)(1) and 40 CFR 51.1010. Thus, we disagree with CBE's assertion that the additional measures it has identified are required RACM under CAA section 172(c)(1) for purposes of the 1997 $PM_{2.5}$ NAAQS in the South Coast and or that it is necessary to reassess or update the control measures in the plan at this time. We explain more specifically below our reasons for concluding that the additional control options and energy efficiency measures identified by CBE are not required RACM for purposes of attaining the 1997 $PM_{2.5}$ NAAQS in the South Coast.

Comment: CBE objects to what it characterizes as CARB's ''promise to 'propose' measures later, in a lump sum,'' and argues that this provides the public with no assurance that attainment will be achieved. CBE asserts that individual emission reduction targets should be attached to each separate measure and they should be individually required. Finally, CBE argues that ''[a]lternative control measures and emissions trading should not be allowed, because of deficiencies in the reliability of such programs.''

Response: We disagree with CBE's contention that it is necessary for the State to commit to individual measures with specific emission reduction targets for each measure. For the reasons discussed in our proposed rule (see 76 FR 41562 at 41575–41577) and further below (see responses to comments on ''enforceable commitments''), we conclude that CARB and the SCAQMD have satisfied the criteria that EPA has historically applied in approving attainment demonstrations based in part on enforceable commitments in lieu of adopted measures. The 2007 State Strategy includes commitments to propose defined new measures and an enforceable commitment for emissions reductions sufficient, in combination with existing measures and the District's commitments, to attain the $PM_{2.5}$ NAAQS in the South Coast by April 5, 2015. See 76 FR 41562, at 41571 and CARB Resolution 07–28 (September 27, 2007, Attachment B, p. 3). As discussed below in our responses to comments on ''enforceable commitments,'' the 2011 SIP revisions changed the total amount of reductions needed from control strategy measures in 2014 to 44 tpd of VOC reductions, 129 tpd of NO_X reductions, and 41 tpd of SO_X reductions (the $PM_{2.5}$ remaining commitment stayed the same at 9 tpd of directly-emitted $PM_{2.5}$). *See* July 2011 TSD, Table F–10. Although CARB's commitment provides that it may adopt ''alternative'' measures (i.e., measures different from the potential control options identified in the South Coast 2007 AQMP or 2007 State Strategy), ultimately the State is obligated to achieve these specific aggregate amounts of emission reductions through the adoption of enforceable measures no later than the beginning of 2014. See 40 CFR 51.1007(b) (requiring implementation of all control measures needed for expeditious attainment no later than the beginning of the year prior to the attainment date). The State's commitments to achieve specific amounts of emission reductions by 2014 are enforceable by EPA and citizens under CAA sections 113 and 304, respectively. We note that CARB has already adopted and submitted to EPA either for SIP-approval or for a CAA section 209 waiver most of the measures it had committed to adopt in the 2007 State Strategy, as revised. See 2011 Progress Report, Appendix B, Table B–1.

It is unclear what CBE intends by stating that ''alternative control measures and emissions trading should not be allowed'' because of deficiencies in their reliability.

Comment: CBE asserts that the South Coast 2007 AQMP must set Best Available Retrofit Control Technology (BARCT) standards for NO_X and other $PM_{2.5}$ precursor emissions from industrial boilers and heaters, and that it should require replacement of old and severely inefficient equipment at oil refineries and other large sources. CBE also asserts that the SCAQMD's Regional Clean Air Incentives Market (RECLAIM) program does not produce the emission reductions that are achievable from industrial boilers and heaters because it allows sources to buy and sell credits. CBE contends that a RACM demonstration should include evaluation of each industrial boiler and heater, including its age, the type of fuel it uses, and its emissions of criteria pollutants, toxics and GHGs. Additionally, CBE claims that CARB, as part of its recent Greenhouse Gas (GHG) regulatory process under California's Assembly Bill 32 (AB32), identified numerous methods for increasing energy efficiency, reducing fuel use, and thus reducing emissions of criteria pollutants and precursors as well as GHGs statewide, and that EPA should require the SCAQMD to carry out the same evaluation for industrial boilers and heaters in the South Coast. CBE contends that such energy efficiency measures could also save money. Finally, CBE asserts that Ultra-Low NO_X burners are cost-effective and must be evaluated as part of a RACM analysis for industrial boilers and heaters.

Response: The SCAQMD had adopted two regulations to control NO_X emissions from industrial boilers, steam generators and process heaters in the South Coast: Rule 1146.1 (for boilers with rated heat inputs between 2 and 5 MMBtu/hour) and Rule 1146 (for boilers with rated heat inputs above 5 MMBtu/hour, with certain exemptions). EPA has approved both of these rules into the SIP. See 67 FR 16640 (April 8, 2002) and 60 FR 46220 (September 6, 1995). EPA recently proposed a limited approval and limited disapproval of revisions to these rules that further tighten the NO_X emission limits in both rules. *See* 76 FR 40303 (July 8, 2011).[12] As part of that action, we evaluated the stringency of the rules' control requirements and proposed to conclude that the rules together require all control measures that are reasonably available for covered boilers, steam generators and process heaters. *See id.* and associated technical support documents

[12] Our proposed limited disapproval was based on specific deficiencies in the compliance provisions in both rules. These enforceability deficiencies do not alter our proposal to conclude that the NO_X emission limits in the rule, which are more stringent than the SIP-approved version of the rule, represent RACT-level controls. *See* TSDs at page 3. Note, however, that these measures are not eligible for SIP credit until EPA approves rule revisions correcting the enforceability deficiencies identified in our proposal. We expect the State to submit, as expeditiously as practicable, rule revisions to address these deficiencies consistent with its enforceable emission reduction commitments. *See* 76 FR 41562 at 41569, Table 3.

(TSDs). We also noted that the NO_X emission limits in both rules are equivalent to California BARCT standards for these types of boilers, steam generators and process heaters. *See id.* According to the SCAQMD's staff report on Rule 1146, most boilers subject to the rule will have to use either ultra-low NO_X burners or selective catalytic reduction (SCR) controls to meet the rule's emission limits, depending on the size of the boiler. See Final Staff Report, Proposed Amended Rule 1146—Emissions of Oxides of Nitrogen from Industrial, Institutional, and Commercial Boilers, Steam Generators, and Process Heaters, at ES–1. Boilers with rated heat inputs above 40 MMBtu/hour located at refineries are subject to the NO_X and SO_X emission caps in SCAQMD's RECLAIM program, discussed immediately below. See email dated September 22, 2011, from Ken Mangelsdorf (SCAQMD) to Idalia Perez (EPA Region 9), re: ''question about refineries and RECLAIM.'' These adopted measures require all RACM for covered industrial boilers, steam generators and process heaters in the South Coast and provide an adequate basis for approving the RACM demonstration in the South Coast 2007 AQMP with respect to such emission units. We therefore disagree with CBE's assertion that the SCAQMD is required to evaluate additional control measures for industrial boilers and heaters as part of its RACM demonstration for the 1997 $PM_{2.5}$ standards.

We also disagree with CBE's objections to the inclusion of RECLAIM as a RACM measure. RECLAIM is a market incentive program designed to provide sources flexibility in complying with emissions limitations. Cap and trade programs, like RECLAIM, can take into account emissions control technology by limiting the size of the emissions cap. EPA policy provides that a cap and trade program may satisfy RACT by ensuring that the level of emission reductions resulting from implementation of the program will be equal, in the aggregate, to those reductions expected from the direct application of RACT on affected sources within the nonattainment area. *See* 59 FR 16690 (April 7, 1994) and ''Improving Air Quality with Economic Incentive Programs,'' EPA–452/R–01–001 (January 2001), at Section 16.7. EPA approved the RECLAIM program into the California SIP in June 1998 based in part on a conclusion that the NO_X emission caps in the program satisfied the RACT requirements of CAA section 182(b)(2) and (f) for covered NO_X emission sources [13] in the aggregate. See 61 FR 57834 (November 8, 1996) and 63 FR 32621 (June 15, 1998). In 2005 and 2010, the SCAQMD tightened the NO_X and SO_X emissions caps in Rule 2002 to address California Health and Safety Code requirements for BARCT,[14] to require that agricultural sources be subject to existing command-and-control regulations instead of RECLAIM, and to satisfy a NO_X reduction commitment in the 2003 AQMP. See Technical Support Document for EPA's Rulemaking for the California SIP regarding SCAQMD RECLAIM program rules, March 27, 2006, at pp. 5, 6 and Attachment 4. EPA approved the revisions to the NO_X and SO_X emission caps in Rule 2002 on August 29, 2006 and August 12, 2011 respectively, based in part on conclusions that the revisions continue to satisfy NO_X RACT requirements. See 71 FR 51120 (August 29, 2006) and 76 FR 50128 (August 12, 2011). Because RECLAIM achieves reductions of NO_X emissions from covered sources that are equivalent, in the aggregate, to the reductions achieved by RACT-level controls, we conclude that it requires all RACM for covered sources. *See* 76 FR at 41569, Table 3.

Comment: CBE asserts that emissions of criteria pollutants, toxics, and GHGs could be reduced by requiring the SCAQMD to implement the findings of industrial energy use audits performed under California's AB32 program. Specifically, CBE asserts that the SCAQMD could supplement CARB's work under AB32 by: (1) Requiring implementation of potential energy efficiency improvements identified through audits; (2) expanding the audit requirements to cover more industrial sources, including certain large sources and oil refineries exempted from CARB's program; and (3) improving the reporting requirements associated with the audits. CBE states that industrial energy efficiency assessments not only reduce pollution but also reduce energy costs and should be required RACM for purposes of the $PM_{2.5}$ NAAQS and other standards. CBE contends, therefore, that EPA should require the SCAQMD to add such auditing requirements to the South Coast 2007 AQMP in strengthened form with emission reduction targets.

Response: Although we agree generally that improvements in energy efficiency can reduce emissions of criteria and other air pollutants, we disagree with CBE's assertion that the specific measures associated with energy efficiency that it has identified are required RACM for purposes of attaining the 1997 $PM_{2.5}$ standards in the South Coast. Under the $PM_{2.5}$ Implementation Rule at 40 CFR 51.1010(b), ''[p]otential measures that are reasonably available considering technical and economic feasibility must be adopted as RACM if, considered collectively, they would advance the attainment date by one year or more.'' CBE asserts only generally that the measures it has identified are reasonably available for implementation in the South Coast considering technical and economic feasibility, and provides no information to support a conclusion that these additional measures would, individually or collectively with other reasonable measures, advance attainment of the 1997 $PM_{2.5}$ standards by at least one year in the South Coast.

We explained in the preamble to the $PM_{2.5}$ Implementation Rule (72 FR 20586) that although States must conduct a thorough analysis of reasonably available measures, States are not required to analyze every conceivable measure to satisfy the RACM requirement in CAA section 172(c)(1). 72 FR at 20612. As long as a State's analysis is ''sufficiently robust in considering potential measures to ensure selection of all appropriate RACT and RACM, and the State provides a reasoned justification for its analytical approach, we will consider approving that State's RACT/RACM strategy.'' *Id.* As discussed in our July 14, 2011 amended proposal, CARB, the SCAQMD, and SCAG have conducted thorough analyses of all reasonable control measures (including RACT [15] for stationary sources) that are available for implementation in the South Coast and provided reasoned justifications for the collection of RACM that the State has adopted or committed to adopt, based on these analyses. *See* 76 FR 41562 at 41568, 414572 and TSD at section II.D; *see also* South Coast 2007 AQMP, Appendix VI. CBE's comments do not change our conclusion that the State has adopted all RACM and RACT necessary to demonstrate attainment as expeditiously as practicable and to meet any RFP requirements, as required by

[13] RECLAIM generally applies to facilities that emit 4 tons or more per year of NO_X or SO_X in the year 1990 or subsequent years. *See* Rule 2001.

[14] BARCT is defined as ''an emission limitation that is based on the maximum degree of reduction achievable taking into account environmental, energy, and economic impacts by each class or category of source.'' See California Health and Safety Code, Section 40406.

[15] EPA has defined RACT as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility. 44 FR 53762 (September 17, 1979).

CAA section 172(c)(1) and 40 CFR 51.1010.

Comment: CBE asserts that SCAQMD ''must implement measures [for additional SO_X reduction] that were identified in the recent SO_X RECLAIM regulation, but not adopted.''

Response: This comment does not contain sufficient specificity for EPA to respond.

Comment: CBE asserts that major flaring and smoking episodes occur regularly at refineries in the region [16] and that the SCAQMD must require that every refinery have a flare minimization plan (FMP) consistent with rigorous control methods achieved by two specific oil refineries in Martinez, California and Flint Hills, Texas. CBE asserts that FMPs are reasonably available measures that could significantly reduce short-term emissions of particulates, SO_X, NO_X, and VOC, although they probably would not significantly affect annual emissions levels. CBE states that the SCAQMD's flare rule requires implementation of an FMP only if emissions exceed certain levels on an annual basis, and that the South Coast 2007 AQMP does not adequately account for emissions from flaring events, which are episodic. CBE asserts that EPA should require the SCAQMD to: (1) Model the ambient $PM_{2.5}$ impacts of large flaring events; (2) revise the SCAQMD flare regulation to require that every refinery implement an FMP consistent with those at Shell's refineries in Martinez, California and Flint Hills, Texas; and (3) add a provision to the SCAQMD flare regulation to prohibit all flaring (with certain exceptions) unless it is consistent with an approved FMP, as provided in the Bay Area Air Quality Management District (BAAQMD) Regulation 12–12–301 (''Flare Minimization''). CBE contends that such measures are technologically and economically feasible and therefore required RACM.

Response: The SCAQMD regulates refinery flares through Rule 1118 (''Control of Emissions from Refinery Flares''), which EPA approved into the SIP on August 28, 2007. *See* 72 FR 49196. Although CBE correctly notes that Rule 1118 requires FMPs only at refineries that exceed specific annual emissions thresholds (see Rule 1118 at subsection (d)(3)(a) and (e)(1)), CBE appears to misunderstand several other requirements in the rule that apply to all petroleum refineries and that are essentially equivalent to the FMP requirements in the BAAQMD's Rule 12–12. We agree that FMPs are reasonably available measures and note that requirements in BAAQMD 12–12 401.1 through 401.3 are required of all petroleum refineries under SCAQMD Rule 1118 sections (c)(2) and (c)(3). For example, BAAQMD 12–12 401.4 requires a description of prevention measures addressing specific activities that may cause flaring. SCAQMD's Rule 1118 contains a requirement in section (c)(2)(C) that requires refinery owners to submit to the SCAQMD ''descriptions of any equipment, processes or procedures the owner or operators plans to install or implement to eliminate or reduce flaring,'' including the scheduled year of installation or implementation. This requirement is essentially equivalent to the requirement in BAAQMD Rule 12–12 401.4. Thus, SCAQMD Rule 1118 contains in sections (c)(2) and (c)(3) requirements that, although separate from the requirements for ''flare minimization plans'' under section (e) of the rule, essentially require SCAQMD facilities to submit plans to reduce flaring events similar to those required under BAAQMD Rule 12–12. We disagree, therefore, with CBE's assertion that the SCAQMD is required to adopt additional control requirements for refinery flares and conclude that Rule 1118 requires all RACM for these emission sources in the South Coast.[17]

We note that SCAQMD's Board Resolution adopting the District's most recent revisions to SCAQMD Rule 1118 directs District staff to evaluate the feasibility of a daily emissions target and to evaluate refinements to the annual emissions targets as warranted. See SCAQMD Board Resolution 2005–32 (November 4, 2005). Consistent with this directive, we encourage the District to reevaluate the control and compliance requirements in Rule 1118 as new information about feasible controls becomes available, and to adopt any additional control measures that are reasonably available as expeditiously as practicable consistent with CAA requirements.

Comment: CBE asserts that oil refineries, which contribute to power plant emissions by using substantial amounts of electricity from the grid, should be required to have backup power using clean/alternative energy sources. Specifically, CBE claims that electrical grid shutdowns cause power outages at oil refineries, which in turn cause flaring and significant amounts of air pollution near the refineries. CBE asserts that the SCAQMD should require oil refineries to use alternative energy sources (in place of fossil-fuel electricity generation), such as wind and solar energy, and that such measures should be required RACM. Based on general information about power plant emissions obtained from PG&E, CBE provides its own estimates of the SO_X and NO_X emission reductions that could be achieved if oil refineries were to meet some or all of their electricity demands with clean alternative energy sources. CBE contends that the ''large air emissions caused by fossil fuel generation at Power Plants due to oil refinery electricity demand is worthy of phaseout requirements by the AQMD as a measure in the AQMP.''

Response: Although we generally agree that use of alternative (i.e., non-fossil fuel) energy sources to power oil refineries and other large industrial operations would reduce emissions of air pollutants, we disagree with CBE's generalized assertion that such measures are required RACM for purposes of attaining the 1997 $PM_{2.5}$ NAAQS in the South Coast. Section 172(c)(1) of the CAA requires that States adopt measures that are ''reasonably available'' and that are necessary to demonstrate attainment as expeditiously as practicable and to meet any RFP requirements. 40 CFR 51.1010. As explained above, States are required to conduct a thorough analysis of reasonably available measures but are not required to analyze every conceivable measure to satisfy the RACM requirement in CAA section 172(c)(1). 72 FR at 20612.

As discussed in our July 14, 2011 amended proposal, CARB, the SCAQMD, and SCAG have conducted thorough analyses of all reasonable control measures that are available for implementation in the South Coast and provided reasoned justifications for the collection of RACM that the State has adopted or committed to adopt, based on these analyses. *See* 76 FR 41562 at 41568–41572 and TSD at section II.D. Electric generating stations and oil refineries in the South Coast are subject to numerous prohibitory rules and other control measures that regulate emissions of NO_X, SO_X, VOC, and $PM_{2.5}$, among other air pollutants, from various emission points within each facility. *See, e.g.,* 76 FR at 41570, Table 3 and

[16] CBE references several sources of SCAQMD data as the basis for its estimates of criteria pollutant emissions from these flaring episodes.

[17] We note that CBE's estimates of emissions from flaring episodes during the 2009–2011 time period are consistent with data provided in SCAQMD staff reports submitted to EPA, which show an overall decline in emissions from flaring events since 2004. *See, e.g.,* SCAQMD 2005 Staff Report Table IV–2. Generally, it is difficult to develop reliable estimates of emissions from flaring events given uncertainties about the efficiency of a particular flare event. Flares are devices which burn anything in the stream, and the contents of the stream may not be completely combusted, causing an unknown composition of emissions.

TSD, Appendix B (identifying, *e.g.,* Rule 1105 for fluidized-bed coal combustion units (FCCUs) and Rules 1146 and 1146.1 for Industrial, Institutional, and Commercial Boilers, Steam Generators, and Process Heaters.) Power plants in the district are also subject to RECLAIM. See South Coast Rules 2011 and 2012. CBE has provided no information to support its general assertion that requiring the oil refining industry to obtain electricity (backup electricity or otherwise) from alternative energy sources instead of from the electrical grid is a ''reasonably available'' control measure within the meaning of CAA section 172(c)(1). These comments therefore do not change our conclusion that the State has adopted all RACM and RACT necessary to demonstrate attainment as expeditiously as practicable and to meet any RFP requirements, as required by CAA section 172(c)(1) and 40 CFR 51.1010.

Comment: CBE states that the SCAQMD is in the process of developing a regulation to control coke drum emissions and that EPA should ensure that this rule is included in the District's RACM/RACT control strategy. CBE also asserts that this rule has been repeatedly delayed due to pressure from the oil industry, and that EPA should ensure that the rulemaking occurs expeditiously. CBE asserts that refinery coking operations are increasing due to the use of increasingly heavier crude at oil refineries.

Response: EPA does not currently have reliable information about the types and amounts of pollutant emissions from refinery coke drums in the South Coast, and CBE has not provided such information to support its assertions. Consequently we cannot conclude at this time that any such controls would represent RACT in the South Coast. We note that EPA Region 9 staff recently contacted SCAQMD staff to inquire about the status of this rule and learned that the District is awaiting information from EPA emission studies to inform the District's assessment of the feasibility and cost-effectiveness of regulating coke drum emissions.[18] EPA has sent requests for information about emissions from coking operations to several facilities in the South Coast.[19] Given the need for additional emission reductions in the South Coast to attain the 1997 $PM_{2.5}$ standards as well as other standards for which the area is designated nonattainment (see 40 CFR 81.305), we encourage the SCAQMD to adopt and implement this rule as expeditiously as practicable consistent with CAA requirements.

Comment: CBE states that it had proposed ''requiring 33% RPS for all power plants within the SCAQMD'' and asserts that this is ''clearly achievable'' since it has been adopted as State law.

Response: Assuming CBE intended to assert that the SCAQMD should require all investor-owned utilities, electric service providers, and community choice aggregators within the South Coast to procure 33 percent of their power from renewable sources by 2020 as currently required by the State under California's Renewable Portfolio Standard (RPS), and that such a measure is a required RACM under CAA section 172(c)(1) for purposes of attaining the 1997 $PM_{2.5}$ NAAQS in the South Coast, we disagree. As discussed above, section 172(c)(1) of the CAA requires that States adopt measures that are ''reasonably available'' and that are necessary to demonstrate attainment of the NAAQS as expeditiously as practicable and to meet any RFP requirements. 40 CFR 51.1010. CBE has provided no information to support either an assertion that California's 33% RPS under Senate Bill 2 is such a measure or an assertion that some additional RPS to be implemented by the SCAQMD within the South Coast would be such a measure.

Comment: CBE claims that the RACM analysis for locomotive emissions in the South Coast 2007 AQMP is deficient because the SCAQMD failed to evaluate reasonably available technologies that could reduce locomotive and other railyard emissions. In support of this assertion, CBE references two September 2009 public comment letters to CARB and an August 2009 CARB document entitled ''Technical Options to Achieve Additional Emissions and Risk Reductions from California Locomotives and Railyards.'' *Citing Association of American Railroads* v. *South Coast Air Quality Management District,* 622 F.3d 1094 (9th Cir. 2010), CBE contends that the Ninth Circuit ''has indicated that the SCAQMD and the State of California have the authority to reduce emissions from locomotive sources through its determination that [the Interstate Commerce Commission Termination Act of 1995] may not preempt some measures included in a federally approved SIP.'' CBE asserts that EPA should therefore direct California and the SCAQMD to cure this defect.

Response: We disagree. SCAQMD's RACM Demonstration (see Appendix VI to the 2007 South Coast AQMP) does list one type of measure with the potential to reduce locomotive and other railyard emissions (locomotive anti-idling) as one of the measures the District evaluated as a potential RACM/RACT measure (see Table 2 on page VI–11 of the 2007 South Coast AQMP, Appendix VI). With reference to long duration switch yard locomotive idling measures, SCAQMD concluded that ''[I]f there are any additional SIP emission reductions that could be accounted for using these innovative technology, they would be addressed by CARB during the rule development of their on-road and off-road control measures.'' 2007 South Coast AQMP, Appendix VI, page VI–12. This is a reasonable conclusion in light of the legal challenge to the District's own locomotive anti-idling rules (SCAQMD Rules 3501, 3502, and 3503). Moreover, CARB has adopted regulations for mobile cargo handling equipment at ports and intermodal rail yards which are designed to use best available control technologies to reduce public exposure to NO_X and PM. CARB's mobile cargo handling equipment rules are the subject of a current authorization request to EPA. See 76 FR 5586 (February 1, 2011).

We note that, while the Ninth Circuit's opinion in the *Association of American Railroads* v. *South Coast Air Quality Management District* case opens the door to District regulation of locomotive idling under Federal law by signaling the potential for harmonization between such District rules and the Interstate Commerce Commission Termination Act of 1995 (ICCTA) if the rules are approved into the SIP, there remains uncertainty as to whether the District's locomotive anti-idling rules would be within the scope of the District's state-law regulatory authority. The Ninth Circuit did not decide that issue. 622 F.3d at 1096.

In addition, the documents and court case cited by CBE in support of the idea that a number of locomotive- and railyard-related measures may be technologically and economically feasible, as well as legally enforceable, all post-date the development and submittal of the 2007 South Coast AQMP and 2007 State Strategy. As such, they cannot be used to undermine the RACM demonstration for $PM_{2.5}$ submitted by California for the South Coast several years earlier. The cited documents and court case may influence the development of control measures for future air quality plans for the South Coast, as well as other nonattainment areas, but they do not

[18] See record of phone conversation between Nicole Law and Stanley Tong, USEPA Region 9 Air Division, and Eugene Teszler, SCAMQD, dated September 14, 2011.

[19] See record of phone conversation between Nicole Law, USEPA Region 9 Air Division, and Brenda Shine, USEPA OAQPS, dated September 20, 2011.

undermine the RACM demonstration in the plan that we are approving in relevant part today.

For the reasons set forth in the preceding paragraphs, these comments do not change our conclusion that the State has adopted all RACM and RACT necessary to demonstrate attainment as expeditiously as practicable and to meet any RFP requirements for the 1997 $PM_{2.5}$ standards, as required by CAA section 172(c)(1) and 40 CFR 51.1010. *See* 72 FR at 20612 (noting that although States must conduct thorough analyses of reasonably available measures, States are not required to analyze every conceivable measure to satisfy the RACM requirement in CAA section 172(c)(1)).

Comment: NRDC asserts that the South Coast 2007 AQMP does not satisfy the RACM requirement in CAA 172(c)(1) because it fails to identify and require implementation of certain reasonably available transportation control measures (TCMs) as expeditiously as practicable. NRDC asserts that ''EPA's Transportation Conformity Rule requires that TCMs either be listed in section 108(f) of the CAA, or reduce transportation emissions by lowering vehicle use or improving traffic flow.'' Specifically, NRDC asserts that in the ''illustrative list of TCMs in CAA 108(f), the EPA has acknowledged that improvements to bicycle paths and pedestrian walkways are RACM'' and that the South Coast 2007 AQMD contains very few TCMs to implement such measures. As an example, NRDC claims that little more than 11 percent of the 1996 Los Angeles Bicycle Plan's proposed bike lanes have been implemented since its development. Finally, NRDC asserts that planning agencies have used the TCM process to ''load the SIP with proposed highway expansion projects that will purportedly achieve emissions reductions'' and that several of the plan's identified TCMs, such as the SR–47 diesel truck road expansion project, should not be included as TCMs because they will not actually reduce emissions.

Response: We disagree with NRDC's contention that any of the TCMs it has identified are required RACM for purposes of attaining the 1997 $PM_{2.5}$ standards in the South Coast or that the SCAQMD failed to adequately consider reasonably available TCMs as part of its RACM analysis. Under 40 CFR 51.1010(b), ''[p]otential measures that are reasonably available considering technical and economic feasibility must be adopted as RACM if, considered collectively, they would advance the attainment date by one year or more.'' NRDC asserts only generally that the 1996 Los Angeles Bicycle Plan is reasonably available for implementation in the South Coast considering technical and economic feasibility, and provides no information to support a conclusion that this or any other potential TCM would, individually or collectively with other reasonable measures, advance attainment of the 1997 $PM_{2.5}$ standards by at least one year in the South Coast.[20]

As discussed in our July 14, 2011 amended proposal, CARB, the SCAQMD, and the Southern California Association of Governments (SCAG)[21] have conducted thorough analyses of all reasonable control measures that are available for implementation in the South Coast and provided reasoned justifications for the collection of RACM that the State has adopted or committed to adopt, based on these analyses. *See* 76 FR 41562 at 41568–41572 and TSD at section II.D. With respect to TCMs in particular, SCAG evaluated potential measures identified by public commenters, measures adopted in other nonattainment areas, and potential measures identified by EPA. Bicycle projects were considered along with many other TCMs as part of the RACM analysis to determine if they alone or in combination with other measures would advance the attainment date. *See* South Coast 2007 AQMP, Appendix IV–C, p. 36–55. Attachment A to Appendix IV–C of the South Coast 2007 AQMP contains a list of the specific TCMs included as part of the South Coast 2007 AQMP. The 1996 LA Bicycle Plan is not a part of the approved SIP for the South Coast. When an individual bike project has funding for right-of-way or construction in the first two years of the Transportation Improvement Program (TIP), it is included in TCM–1, SCAG's overall TCM program.[22] NRDC's comments do not change our conclusion that the State has adopted all RACM and RACT necessary to demonstrate attainment as expeditiously as practicable and to meet any RFP requirements for the 1997 $PM_{2.5}$ standards, as required by CAA section 172(c)(1) and 40 CFR 51.1010. *See* 72 FR at 20612 (noting that although States must conduct thorough analyses of reasonably available measures, States are not required to analyze every conceivable measure to satisfy the RACM requirement in CAA section 172(c)(1)). SCAG included a description of the process used to identify the potential RACM measures considered. See South Coast 2007 AQMP, Appendix IV–C.

We also disagree with NRDC's characterization of EPA's transportation conformity regulations and EPA's position with respect to the TCMs identified in CAA section 108(f). EPA's transportation conformity regulations in 40 CFR part 93 establish the criteria and procedures for timely implementation of TCMs approved into a SIP, including the specific steps and funding sources needed to fully implement each TCM, but do not require adoption and implementation of any particular TCM. As to CAA section 108(f), we note that following the 1990 CAA Amendments EPA revised its previous interpretation of the RACM requirement by eliminating the presumption that all TCMs listed in CAA section 108(f) are RACM for all areas. See 57 FR 13598 at 13560 (April 16, 1992) (stating that ''[l]ocal circumstances relevant to the reasonableness of any potential control measure involve practical considerations that cannot be made through a national presumption'' and that States should consider TCMs on an area-specific basis and ''consider groups of interacting measures, rather than individual measures''). Thus, States are required to adopt only those TCMs identified in CAA section 108(f) that are reasonably available for implementation in the specific nonattainment area. *Id.* We note that EPA cannot require that any measure be listed in section 108(f) of the CAA, as only Congress is authorized to amend the CAA.

Finally, we agree that SR–47 should not be listed as a TCM. We understand from SCAG staff that the SR–47 project (Project ID LA0D45) was inadvertently included as a TCM in the 2007 SIP in a table labeled ''System Management—Railroad Consolidation Programs,'' on page A–12 of Attachment A of Appendix IV–C of the South Coast 2007 AQMP. This error has been corrected

[20] Appendix IV–C to the South Coast 2007 AQMP indicates that implementation of all of the TCMs in SCAG's Transportation Strategy (including transit and High Occupancy Vehicle (HOV) projects, in addition to bicycle and pedestrian projects) is expected to achieve the following total amounts of emission reductions: 0.18 tpd of direct $PM_{2.5}$, 3.48 tpd of NO_X, and 1.04 tpd of ROG (VOC). *See* South Coast 2007 AQMP, Appendix IV–C at Table 7. Assuming the 1996 Los Angeles Bicycle Plan, if fully implemented, would achieve only a fraction of these amounts of emission reductions, it is highly unlikely that this measure would advance attainment of the 1997 $PM_{2.5}$ standard in the South Coast by at least a year. See Table I–1 in the TSD for a summary of the emission reductions that would achieve one year's worth of RFP (52.8 tpd of NO_X, 30.8 tpd of VOC, 1.1 tpd of $PM_{2.5}$ and 2.8 tpd of SO_X).

[21] SCAG is the metropolitan planning organization (MPO) responsible for the transportation strategy and transportation control measures in the South Coast nonattainment area.

[22] See record of conversation between Wienke Tax, EPA Region 9, and Jonathan Nadler, SCAG, September 19, 2011.

and this project is no longer listed as a TCM in the 2008 RTIP.[23]

Comment: NRDC asserts that the RACM/RACT analysis is deficient because it fails to provide any discussion of controls for condensable $PM_{2.5}$ emissions. NRDC references 40 CFR 51.1002(c) to support its assertion that ''[t]he transition period allowing agencies to ignore controls on condensable emissions expired on January 1, 2011,'' and also quotes EPA's statement in the preamble to the $PM_{2.5}$ Implementation Rule (72 FR at 20652) that ''[w]e expect States to address the control of direct $PM_{2.5}$ emissions, including condensables with any new actions taken after January 1, 2011.'' NRDC states that EPA should advise CARB and the District that consideration of reasonably available controls on condensable emissions will be required in a revised RACM/RACT submittal.

Response: EPA's $PM_{2.5}$ implementation rule states that ''[a]fter January 1, 2011, for purposes of establishing emissions limits under 51.1009 and 51.1010, States must establish such limits taking into consideration the condensable fraction of direct $PM_{2.5}$ emissions.'' 40 CFR 51.1002(c). Prior to this date, the rule required that nonattainment area SIPs identify and evaluate sources of $PM_{2.5}$ direct emissions and $PM_{2.5}$ attainment plan precursors as part of the RFP and RACM/RACT demonstrations but did not specifically require states to address condensable $PM_{2.5}$. *See id.*[24] Because the attainment, RFP and RACM demonstrations in the South Coast 2007 AQMP and 2007 State Strategy were adopted on June 1, 2007 and September 27, 2007, respectively, California was not required to address condensable PM in establishing the emissions limits contained in these demonstrations as originally submitted, or in adopting any other PM emission limits under 40 CFRs 51.1009 and 51.1010 prior to January 1, 2011. Consistent with these requirements, EPA has evaluated the reasonable further progress (RFP) and reasonably available control measures (RACM) demonstrations in the South Coast 2007 AQMP and 2007 State Strategy and concluded that these elements of the Plan appropriately address all sources of direct $PM_{2.5}$ emissions and $PM_{2.5}$ attainment plan precursors (SO_2, NO_X, and VOC) in the South Coast area. *See* 76 FR 41562 at 41574.[25]

The South Coast 2007 AQMP and 2007 State Strategy rely on several rules regulating direct PM emissions as part of the $PM_{2.5}$ control strategy (e.g., Wood Burning Fireplaces (Rule 445, adopted March 7, 2008), Wood Stoves and Under-Fired Charbroilers (Rule 1138, adopted November 14, 1997), and Particulate Matter (PM) Control Devices (Rule 1155, adopted December 4, 2009)). *See* 2011 Progress Report, Appendix F, Table 4. EPA has not yet acted on any District rule adopted or revised after January 1, 2011 that regulates direct $PM_{2.5}$ emissions. As part of our action on any such rule, we will evaluate the emission limits in the rule to ensure that they appropriately address condensable particulate matter (CPM), as required by 40 CFR 51.1002(c). We note that the SIP-approved version of Rule 1138 requires testing according to the District's Protocol, which requires measurement of both condensable and filterable PM in accordance with SCAQMD Test Method 5.1. *See* Rule 1138 paragraph (c)(1) and (g) and SCAQMD Protocol paragraph 3.1.[26] We also note that the SIP-approved version of Rule 1155 requires measurement of both condensable and filterable PM in accordance with SCAQMD Test Methods 5.1, 5.2, or 5.3 as applicable. See SCAQMD Rule 1155 paragraph (e)(6).[27]

Comment. NRDC asserts that the contingency measures in the South Coast 2007 AQMP should be included in the RACM/RACT demonstration.

Response: We disagree. For many of the same reasons that EPA is disapproving the contingency measures identified in the South Coast 2007 AQMP, many of these measures would not be approvable elements of a RACM/RACT demonstration and in any case are not required RACM for purposes of the 1997 $PM_{2.5}$ NAAQS in the South Coast. For example, for CTY–01, ''Offsetting the Potential Emission Increase Due to the Change in Natural Gas Specifications,'' the District has provided neither cost effectiveness information nor information about the types or amounts of pollutant reductions this measure would achieve. Therefore, EPA cannot determine at this time whether such a measure is reasonably available considering technical or economic feasibility or whether it would contribute to advancing attainment of the 1997 $PM_{2.5}$ NAAQS in the South Coast. The District characterizes the measure as an offsetting measure for potential increases in emissions, so it is not clear CTY–01 will provide any additional reductions of $PM_{2.5}$ or $PM_{2.5}$ plan precursors. See South Coast 2007 AQMP, Appendix IV–A, page 167. The reductions associated with CTY–02, ''Clean Air Act Emission Fees for Major Stationary Sources,'' do not occur until after 2023, and therefore clearly would not contribute to advancing attainment date of the 1997 $PM_{2.5}$ NAAQS. CTY–03, ''Banning Pre-Tier 3 Off-Road Diesel Engines during High Pollution Days,'' similarly lacks quantification of emissions reductions and cost-effectiveness data. As we noted in our July 14, 2011 proposed rulemaking, CTY–04, ''Accelerated Implementation of CARB's Mobile Source Control Measures,'' would require additional rulemaking at the District level and potentially substantial and lengthy additional rulemaking at the State level to be implemented. See 76 FR 41562, at 41579. Therefore, we do not believe the reductions could occur in time to advance the attainment date for the 1997 $PM_{2.5}$ NAAQS. In summary, we have concluded that the contingency measures in the South Coast 2007 AQMP are not approvable as contingency measures under CAA section 172(c)(9) and for many of the same reasons, these measures are not required RACM for purposes of the 1997 $PM_{2.5}$ NAAQS. Moreover, NRDC provides no information to support a claim that any of these measures would individually or collectively advance the attainment date of the South Coast area for the 1997 $PM_{2.5}$ NAAQS by at least one year. 40 CFR 51.1010.

[23] See electronic mail, Rongsheng Luo, SCAG, to Wienke Tax, U.S. EPA Region 9, August 31, 2011.

[24] *See also* Letter dated April 25, 2011, from Lisa P. Jackson, EPA, to Paul Cort, EarthJustice, denying Petition for Reconsideration with respect to the deferral of the requirement to establish emission limits for CPM until January 1, 2011.

[25] In our proposed rule, we noted that the SCAQMD has deferred limits for condensable particulate matter (CPM) in its rules but that this limited deferral does not affect the South Coast 2007 AQMP's RACM/RACT and expeditious attainment demonstrations. 76 FR 41562 at 41566, n. 13. We also noted that we would evaluate any $PM_{2.5}$ rule adopted or revised by the District after January 1, 2011 to assure that it appropriately addresses CPM. *See id.*

[26] *See* SCAQMD Protocol, *Determination of Particulate and Volatile Organic Compound Emissions From Restaurant Operations,* November 14, 1997 (available at *http://yosemite.epa.gov/R9/R9Testmethod.nsf/0/3D4DEB4D21AB4AAF882570AD005DFF69/$file/SC%20Rest%20emiss.pdf*).

[27] *See* SCAQMD Test Method 5.1, *Determination of Particulate Matter Emissions From Stationary Sources Using a Wet Impingement Train,* March 1989 (available at *http://aqmd.gov/tao/methods/stm/stm-005-1.pdf*); SCAQMD Test Method 5.2, *Determination of Particulate Matter Emissions From Stationary Sources Using Heated Probe and Filter,* March 1989 (available at *http://aqmd.gov/tao/methods/stm/stm-005-2.pdf*); and SCAQMD Test Method 5.3, *Determination of Particulate Matter Emissions From Stationary Sources Using an in-Stack Filter,* October 2005 (available at *http://aqmd.gov/tao/methods/stm/stm-005-3.pdf*).

E. Comments on CARB and District Control Measures

Comment: ARTBA requests that EPA designate this rulemaking as having nationwide scope or effect pursuant to CAA section 307(b)(1) based on its belief that certain California statewide measures include in-use controls that are inconsistent with section 209 of the CAA and that are adoptable by states outside not only California but also EPA Region IX. ARTBA notes that the DC Circuit has never addressed many of the preemption issues raised below. Accordingly, ARTBA concludes that the section 307(b)(1) determination is necessary to ensure nationwide uniformity in the interpretation and enforcement of these important CAA preemption issues.

Response: CAA section 307(b)(1) generally provides that judicial review of EPA action in approving a SIP or SIP revision may be filed only in the U.S. Court of Appeals for the appropriate circuit. Thus, final EPA actions on revisions to the California SIP, such as the South Coast $PM_{2.5}$ Plan, are generally subject to timely challenges filed in the U.S. Court of Appeals for the Ninth Circuit. However, judicial review of an EPA SIP action may be filed only in the U.S. Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if, in taking such action, the EPA finds and publishes that such action is based on such a determination.

We do not believe that our action approving the South Coast $PM_{2.5}$ Plan as a revision to the California SIP is based on a determination of ''nationwide scope or effect.'' ARTBA does not identify which specific state in-use controls the association is referring to, but we assume ARTBA is referring to CARB's in-use truck rule and drayage truck rule, CARB's in-use nonroad equipment rule, and CARB's rule regarding ships at port, and CARB's commercial harbor craft rule (which are referred to in the plan as ''cleaner in-use heavy-duty trucks,'' ''cleaner in-use off-road equipment (> 25 ph)''), ''ship auxiliary engine cold ironing & clean technology,'' and ''clean up existing harbor craft.''). While we recognize that the plan relies on these state in-use controls to demonstrate attainment of the $PM_{2.5}$ NAAQS in the South Coast, the specific in-use controls themselves are not the subject of today's action. In other words, we are not taking action to approve the in-use controls as a part of the action we are taking today on the plan, but anticipate final action on the in-use controls in other final actions. Moreover, our action today relates to only two regions within the state of California, and the provisions reviewed are specific to California. Today's decision does not affect any other State. Thus, our approval of the plan under CAA section 110 is not one of ''nationwide scope or effect.''

With respect to nonroad vehicles and equipment, to the extent section 209(e) is at all relevant, other states are free to adopt and enforce California in-use emissions standards and other related requirements, but only after EPA has authorized the California standards under CAA section 209(e)(2)(A). See CAA section 209(e)(2)(B). EPA is not taking action in this document under section 209(e), and thus the potential widespread effect that concerns ARTBA will not occur as a consequence of this rulemaking. Moreover, such State action would be a separate action by a separate State and would be handled separately.

With respect to on-road engines and vehicles, California and the other states have the same authority, and are subject to the same limitations, in establishing in-use emissions standards and other related requirements and thus, even if EPA were to be approving California's on-road in-use emissions standards in this rulemaking, which it is not, the potential for nationwide effect would not occur as a consequence of this rulemaking.

While any action taken by EPA in one rulemaking may have some precedential effect on other actions, this does not make every action taken by EPA an action of ''nationwide scope or effect.'' This action applies only in California and is relevant only to a particular California-specific $PM_{2.5}$ plan. Therefore, we disagree that today's action on the South Coast $PM_{2.5}$ Plan would be of ''nationwide scope or effect.''

Comment: ARTBA asserts that the lawfulness of the California and SCAQMD measures will hinge on litigation between ARTBA and EPA currently under way in the Ninth Circuit, No. 11–71897, and the DC Circuit, No. 11–1256, and ARTBA requests that EPA stay action on this proceeding pending the resolution of ARTBA's litigation. ARTBA further requests that, because ARTBA is litigating the nationwide standards under which EPA will decide the important preemption issues in this case and because EPA's decision on California measures would lead to other states' adopting (or being compelled to adopt) California measures as RFP for their SIPs, EPA stay consideration of nonroad rules pending resolution of the ARTBA litigation.

Response: In settlement of a lawsuit seeking to compel EPA action on the 2007 South Coast AQMP and related portions of the *2007 State Strategy* [*Natural Resources Defense Council* v. *EPA,* No. 2:10–cv–06029 (C.D. Cal.)], which includes the South Coast $PM_{2.5}$ Plan, EPA is subject to a consent decree deadline of September 30, 2011 to take final action on the South Coast $PM_{2.5}$ Plan, and thus, any stay of the rulemaking beyond that date is not possible. In any event, other than the general preemption issues that ARTBA has raised, and that EPA has addressed in various forums, the current lawsuit cited above by ARTBA challenges EPA's approval of the San Joaquin Valley Unified Air Pollution Control District's (SJVUAPCD's) Rule 9510 [''Indirect Source Review (ISR'')], which turns on an interpretation of CAA section 110(a)(5), which is not germane to EPA's action on the South Coast $PM_{2.5}$ Plan.

Comment: ARTBA states that California has adopted a novel series of statewide measures that set emission standards and other requirements for in-use on-road and nonroad vehicles and fleets of those vehicles. In addition to seeking credit for these statewide measures, ARTBA notes that SCAQMD also seeks credit for that district's local implementation of the Surplus Off-Road Opt-In for NO_X (''SOON'') program under which large construction fleets must seek ''SOON'' funding to acquire clean-than-required equipment, with the cost partially deferred by government funds and that the South Coast $PM_{2.5}$ Plan also includes a contingency measure (CTY–03) that would ban pre-Tier 3 off-road diesel engines on ''high pollution advisory'' days.

ARTBA asserts that all of these measures share the characteristic of setting fleetwide standards for CAA-required vehicles that differ from—and are more stringent than—the various standards and other requirements that title II of the CAA applies to those vehicles, and concludes that the California statewide measures that rely on in-use controls or impose in-use fleet measures are preempted. With respect to California's in-use controls for construction and other diesel-powered equipment, ARTBA believes that preemption applies both for equipment above and below the 175-horsepower threshold and that the proposed contingency measures (CTY–03) to ban pre-Tier 3 off-road diesel engines on ''high pollution advisory'' days is a preempted in-use standard—particularly for equipment under 175 horsepower—for the same reasons. Because these SIP and contingency measures are beyond California's and

SCAQMD's authority, ARTBA believes that CAA section 110(a)(2)(E)(i) prohibits EPA's approving these measures as part of the SIP.

Response: In relevant part, CAA section 110(a)(2)(E) requires SIPs to provide necessary assurances that the State will have adequate authority under State law to carry out a SIP and is not prohibited by any provision of Federal or State law from carrying out such SIP. As a general matter, we agree that States must provide such assurances for SIPs and SIP revisions. In the CARB Resolution approving the plan, the State of California provided the necessary assurances of adequate legal authority to implement the South Coast $PM_{2.5}$ Plan. See CARB Resolution 07–41 (September 27, 2007).

To the extent that ARTBA challenges EPA's approval of the South Coast $PM_{2.5}$ Plan based on the plan's reliance on the emission standards and other requirements for in-use on-road measures, such as CARB's truck rule and drayage truck rule, we expect to approve the rules into the SIP prior to the effective date of this action, and no comments have been received on our proposed approval of the rules [76 FR 40652 (July 11, 2011)] that call into question the authority of the State to enforce those rules. To the extent that ARTBA challenges EPA's approval of the plan based on the plan's reliance on standards and other preempted requirements for in-use nonroad vehicles, we simply note that EPA authorizations under CAA section 209(e) bestow enforceability on the State of California as to the emissions standards and other requirements covered by the authorizations. We anticipate EPA action on CARB's authorization requests for the in-use nonroad rules upon which the plan relies prior to the effective date of today's action.[28] These rules are needed to support emissions reduction credit for certain State measures, including ''cleaner in-use off-road equipment (> 25 hp),'' ''ship auxiliary engine cold ironing & clean technology,'' and ''clean up existing harbor craft.'' See table 5 on page 41571 of the July 14, 2011 proposed rule. If the authorizations are issued, there will be no prohibition under any Federal law that we are aware of that would prevent California from enforcing the related standards and achieving the associated emissions reductions relied upon by the plan. If EPA denies CARB's authorization requests for the in-use nonroad rules, or if no decision is forthcoming, prior to the effective date of today's action, we will take appropriate remedial action to ensure that our action on the plan is fully supportable or to reconsider that action.

With respect to SCAQMD's SOON program, EPA notes that the District implements the SOON program through its Rule 2449 (''Control of Oxides of Nitrogen Emissions from Off-Road Diesel Vehicles''), adopted May 2, 2008. SCAQMD Rule 2449 has been submitted to EPA for approval into the SIP (submittal date July 18, 2008), but EPA has not taken any action on that submittal, nor is EPA taking action on Rule 2449 in connection with today's action on the South Coast $PM_{2.5}$ Plan. We recognize that the South Coast $PM_{2.5}$ Plan does take emissions reduction credit for the SOON program, but EPA has not allowed the credit in taking action on the plan, and thus the issue of the enforceability of the associated emissions reductions is not germane to our approval of the plan.

With respect to the contingency measure referred to as CTY–03, which ARTBA opposes, EPA proposed to disapprove the contingency measures, including CTY–03, see 76 FR at 41579, and is finalizing that proposed disapproval in today's document.

Comment: ARTBA provides a lengthy discussion of the principles of Federal preemption in the context of State regulation of emissions from mobile sources under the Clean Air Act and its various amendments over time. In so doing, ARTBA identifies a number of instances where ARTBA's interpretation of the CAA and relevant case history differs from that of EPA and offers a number of legal arguments supporting its views.

Response: Except to the extent we have discussed above, ARTBA does not tie this discussion of preemption to the SIP action EPA is taking today, namely, final partial approval and partial disapproval of the South Coast $PM_{2.5}$ Plan and related portions of the 2007 State Strategy. For this reason, and because EPA has addressed ARTBA's general comments on preemption several times in earlier proceedings, we are not addressing those general comments here.

Comment: AAR asserts that CARB's control measure known as ARB–OFRD–02 anticipates a 90% NO_X and PM reduction from the uncontrolled baseline and projects a 4.3 tons per day (tpd) of NO_X emissions reductions in the South Coast by 2014. AAR further asserts that, as such, ARB–OFRD–02 is not consistent with the timeframe and emission reductions levels contained in EPA's regulations for achieving emissions reductions from locomotive engines and locomotive fuel.

Response: ARB–OFRD–02 is the identifier used in the 2007 South Coast AQMP to refer to the State measure known as ''Accelerated Introduction of Cleaner Locomotives.'' The State's measure anticipates that EPA's ''tier 4'' locomotive standards, proposed in 2007 and promulgated in 2008 (73 FR 25098, May 6, 2008), would likely not provide significant additional emissions reductions of NO_X and PM from locomotives in the time necessary to contribute to attainment of the $PM_{2.5}$ NAAQS in the South Coast given an attainment date of 2015. Thus, the control measure calls for CARB staff ''to work with the railroads to bring the cleanest locomotives into California service'' (Revised Draft State Strategy (April 26, 2007), page 114). As noted by AAR, the 2007 State Strategy estimates a reduction of NO_X of 4.3 tons per day (tpd) in 2014 in the South Coast due to this measure. See page 61 of Revised Draft State Strategy (April 26, 2007). However, the State Strategy indicates that such estimates are for informational purposes only. CARB has not committed to achieving the 4.3 tpd reduction specifically from this measure but has committed to aggregate emissions reductions that would be achieved through any combination of measures.

Since adoption of the 2007 State Strategy, CARB staff have been working with neighborhood groups, the railroads, and other interested stakeholders to, among other things, develop emissions reduction targets at certain rail yards in the South Coast to which the railroads would commit (referred to as the ''2010 Commitments''). See CARB Resolution 10–29 (June 24, 2010). Final approvals of the 2010 Commitments are still being negotiated, and there are no plans to submit the 2010 Commitments as a part of the SIP; thus, our proposed approval of the attainment demonstration for $PM_{2.5}$ Plan does not rely on any emissions reductions from this control measure (see 76 FR 41562, July 14, 2011, at 41571, Table 5), nor does today's final approval. Therefore, the difference in the timing of emissions reductions under ARB–OFRD–02 relative to those expected under EPA's locomotive regulations does not

[28] The notices of opportunity for public hearing and comment on the relevant requests for authorizations were published at 73 FR 58585 (October 7, 2008), 73 FR 67509 (November 14, 2008), and 75 FR 11880 (March 12, 2010) for CARB's in-use nonroad equipment rule; at 76 FR 38153 (June 29, 2011) for CARB's in-use commercial harbor craft rule; and at 76 FR 38155 (June 29, 2011) for CARB's at-berth rule that is intended to reduce emissions from auxiliary diesel engines on ocean-going marine vessels at-berth in California ports.

undermine our approval of the South Coast $PM_{2.5}$ Plan.

F. Comments on Enforceable Commitments

Comment: California Communities Against Toxics, Communities for a Better Environment, Natural Resources Defense Council and Physicians for Social Responsibility—Los Angeles (commenters) assert that the South Coast $PM_{2.5}$ Plan fails to include enforceable control measures that meet the requirements of the CAA and that EPA cannot rely on ''enforceable commitments'' as a substitute for adopted control measures to ''close the shortfall in the control strategy.'' Commenters claim that EPA's action ''breaks with its long-standing interpretation that an attainment SIP must include currently adopted emissions limitations and other control measures'' that achieve the needed emissions reductions. Specifically, commenters state that CAA sections 110(a)(2)(A) and 172(c)(6) require SIPs to contain ''enforceable emission limitations * * * as may be necessary or appropriate'' to achieve attainment. Commenters note that CAA section 110(k)(4) allows EPA to grant ''conditional approval'' of a SIP lacking certain statutory elements ''based on a commitment of the state to adopt specific enforceable measures'' by a certain date, and that this provision provides that the conditional approval automatically becomes a disapproval if the State fails to comply with the commitment within one year. Commenters state that courts have rejected similar attempts to circumvent the statute's limitations on conditional approvals and cite *Sierra Club* v. *EPA,* 356 F.3d 296, 298 (DC Cir. 2004) as overturning EPA's conditional approval of SIPs based in part on the fact that the commitments identified no specific measures the state would implement. In further support of their assertions that EPA may not allow States to submit ''promises to develop unspecified future enforceable measures as a substitute for'' enforceable control measures, the commenters reference CAA sections 107(a), 110(a)(1), 110(a)(2)(A), 110(a)(2)(C), the nonattainment plan requirements of part D, title I of the Act, EPA regulations in 40 CFR part 51, and EPA's General Preamble for the Implementation of Title I of the Clean Air Act Amendments (57 FR 13498, 13567 (April 16, 1992).

Response: As pertinent to the comment, *Sierra Club* involved EPA's conditional approval under section 110(k)(4) of SIPs lacking in their entirety RACM and ROP demonstrations and contingency measures based on letters submitted by states that committed to cure these deficiencies. The court rejected EPA's construction of section 110(k)(4) as contrary to the unambiguous statutory language requiring the state to commit to adopt *specific* enforceable measures. *Sierra Club* at 302. The court found that EPA's construction turned the section 110(k)(4) conditional approval into a means of circumventing SIP deadlines. *Id.* At 303.

EPA does not dispute the holding of *Sierra Club.* However that case is not germane to EPA's approval of CARB's and the District's commitments here because the Agency is not approving those commitments under section 110(k)(4). The relevant precedent is instead *BCCA Appeal Group* v. *EPA,* 355 F.3d 817 (5th Cir. 2003) (*BCCA).* The facts in *BCCA* were very similar to those presented here. In *BCCA,* EPA approved an enforceable commitment in the Houston ozone SIP to adopt and implement unspecified NO_X controls on a fixed schedule to achieve aggregate emission reductions. Petitioners claimed that EPA lacked authority under the CAA to approve a SIP containing an enforceable commitment to adopt unspecified control measures in the future. The court disagreed and found that section 110(k)(4) conditional approvals do not supplant EPA's practice of fully approving enforceable commitments:

> Nothing in the CAA speaks directly to enforceable commitments. The CAA does, however, provide EPA with great flexibility in approving SIPs. A SIP may contain ''enforceable emission limitations and other control measures, means, or techniques * * * as well as schedules and timetables for compliance, as may be necessary or appropriate'' to meet the CAA's requirements. * * * Thus, according to the plain language of the statute, SIPs may contain ''means,'' ''techniques'' and/or ''schedules and timetables for compliance'' that the EPA considers ''appropriate'' for attainment so long as they are ''enforceable.'' See *id. section 7410(a)(2)(A).* ''Schedules and timetables'' is broadly defined as ''a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, prohibition or standard.'' *42 U.S.C. section 7602(p).* The remaining terms are not defined by the Act. Because the statute is silent on the issue of whether enforceable commitments are appropriate means, techniques, or schedules for attainment, EPA's interpretation allowing limited use of an enforceable commitment in the Houston SIP must be upheld if reasonable.

BCCA at 839–840. The court upheld EPA's approval of the commitment, finding that ''EPA reasonably concluded that an enforceable commitment to adopt additional control measures on a fixed schedule was an 'appropriate' means, technique, or schedule or timetable for compliance'' under sections 110(a)(2)(A) and 172(c)(6). *Id.* at 841. Thus the court recognized that sections 110(a)(2)(A) and 172(c)(6) provide a basis for EPA to approve enforceable commitments as distinct from the commitments contemplated by section 110(k)(4) which are not in fact enforceable but instead lead to SIP disapproval if not honored. See also *Environmental Defense* v. *EPA,* 369 F.3d 193, 209–210 (2nd Cir. 2004) (similarly upholding enforceable SIP commitments). As a result, contrary to commenters' contention, section 110(k)(4) is not a bar to EPA's approval of CARB's and the District's enforceable commitments and that approval under section 110(k)(3) is permissible as an appropriate means, technique or schedule or timetable for compliance under sections 110(a)(2)(A) and 172(c)(6).

Comment: Commenters state that EPA has not determined whether the commitments are in fact enforceable. Commenters state that courts ''may only enforce SIP strategies'' and that ''[m]ere approval of an aspirational goal or non-specific promise into the SIP does not convert that goal or promise into an enforceable commitment.'' In support of these assertions, commenters cite *Bayview Hunters Point Community Advocates* v. *Metropolitan Transp. Comm'n,* 366 F.3d 692, 701 (9th Cir. 2004) and *Citizens for a Better Environment* v. *Metropolitan Tranp. Comm'n,* 746 F. Supp. 976, 980 (N.D.Cal. 1990) [known as CBE II]. In addition, commenters single out *El Comite Para El Bienstar de Earlimart* v. *Warmerdam,* 539 F.3d 1062, 1067 (9th Cir. 2008), stating that in *El Comite* the court explained that because an inventory in a SIP is not a ''standard or limitation'' as defined by the CAA, it was not an independently enforceable aspect of the SIP. Thus, the commenters reason, in order to be enforceable, not only must a state's commitment to adopt additional measures to attain emission standards be specific and announced in plain language, but any data or rubric that will be used to determine when and how the state will adopt those measures must be enforceable. Commenters state that the commitments in the South Coast SIP are so vague that they cannot possibly be enforced against the State and that there is no requirement that the State take *any* specific actions. The commenters conclude that the commitments cannot be considered

enforceable under Ninth Circuit case law, because they are not strategies based on enforceable emissions standards or limitations.

Response: Under CAA section 110(a)(2)(A), SIPs must include enforceable emission limitations and other control measures, means or techniques necessary to meet the requirements of the Act, as well as timetables for compliance. Similarly, section 172(c)(6) provides that nonattainment area SIPs must include enforceable emission limitations and such other control measures, means or techniques ''as may be necessary or appropriate to provide for attainment'' of the NAAQS by the applicable attainment date.

Control measures, including commitments in SIPs, are enforced directly by EPA under CAA section 113 and also through CAA section 304(a), which provides for citizen suits to be brought against any person who is alleged ''to be in violation of * * * an emission standard or limitation. * * *'' ''Emission standard or limitation'' is defined in subsection (f) of section 304.[29] As observed in *Conservation Law Foundation, Inc.* v. *James Busey et al.,* 79 F.3d 1250, 1258 (1st Cir. 1996):

> Courts interpreting citizen suit jurisdiction have largely focused on whether the particular standard or requirement plaintiffs sought to enforce was sufficiently specific. Thus, interpreting citizen suit jurisdiction as limited to claims ''for violations of specific provisions of the act or specific provisions of an applicable implementation plan,'' the Second Circuit held that suits can be brought to enforce specific measures, strategies, or commitments designed to ensure compliance with the NAAQS, but not to enforce the NAAQS directly. See, e.g., *Wilder, 854 F.2d at 613–14.* Courts have repeatedly applied this test as the linchpin of citizen suit jurisdiction. See, e.g., *Coalition Against Columbus Ctr.* v. *City of New York, 967 F.2d 764, 769–71 (2d Cir. 1992); Cate* v. *Transcontinental Gas Pipe Line Corp., 904 F. Supp. 526, 530–32 (W.D. Va. 1995); Citizens for a Better Env't* v. *Deukmejian, 731 F. Supp. 1448, 1454–59* (N.D. Cal.), modified, *746 F. Supp. 976 (1990).*

Thus courts have found that the citizen suit provision cannot be used to enforce the aspirational goal of attaining the NAAQS, but can be used to enforce specific strategies to achieve that goal including enforceable commitments to develop future emissions controls.

We describe CARB's and the District's commitments in the 2007 State Strategy (revised in 2009 and 2011) and the 2007 AQMP in detail in our proposal and amended proposal (75 FR 71294 and 76 FR 41562). The 2007 State Strategy includes commitments to propose defined new measures and an enforceable commitment for emissions reductions sufficient, in combination with existing measures and the District's commitments, to attain the $PM_{2.5}$ NAAQS in the South Coast by April 5, 2015. For the South Coast, the State's emissions reductions commitments, as submitted in 2007 and revised by the 2009 State Strategy Update were to achieve 152 tpd NO_X, 46 tpd VOC, 9 tpd of direct $PM_{2.5}$ and 20 tpd SO_X in the South Coast area by 2014. See 76 FR 41562, at 41572; 2009 State Strategy Status Report, p. 20.[30]

The SCAQMD's commitments as submitted in 2007 (and revised in 2011) were to achieve 10.8 tpd NO_X, 10.4 tpd VOC, 2.9 tpd direct $PM_{2.5}$ and 2.9 tpd SO_X by 2014. See 76 FR 41562, Table 2, at 41569; see also 2011 Progress Report, Appendix F, Table 1, and SCAQMD Board Resolution 11–9, March 4, 2011. As discussed above, the 2011 SIP revisions revised the State's total emissions reduction commitments to 129 tpd of NO_X, 44 tpd of VOC, 9 tpd of $PM_{2.5}$, and 41 tpd of SO_X, which the State remains obligated to achieve through the adoption of enforceable measures by 2014. *See* TSD, Table F–9; *see also* CARB Resolution 07–28, Attachment B at p. 4.

Thus, CARB's commitments are clearly distinguishable from the aspirational goals, i.e., the SIP's overall objectives, identified by the *Bayview* court and cited by the commenter. CARB's commitments here are to adopt and implement measures that will achieve specific reductions of NO_X, VOC, direct $PM_{2.5}$ and SO_X emissions by 2014. These are not mere aspirational goals to ultimately achieve the standards. Rather, the State and District have committed to adopt enforceable measures no later than 2014 that will achieve these specific amounts of emission reductions prior to the attainment date of April 5, 2015. All of these control measures are subject to State and local rulemaking procedures and public participation requirements, through which EPA and the public may track the State/District's progress in achieving the requisite emission reductions. EPA and citizens may enforce these commitments under CAA sections 113 and 304(a), respectively, should the State/District fail to adopt measures that achieve the requisite amounts of emission reductions by the beginning of 2014. *See* 40 CFR 51.1007(b) (requiring implementation of all control measures needed for expeditious attainment no later than the beginning of the year prior to the attainment date). We conclude that these enforceable commitments to adopt and implement additional control measures to achieve aggregate emission reductions on a fixed schedule are appropriate means, techniques, or schedules for compliance under sections 110(a)(2)(A) and 172(c)(6) of the Act.

Commenters cite *Bayview* as support for their contention that the plan's commitments are unenforceable aspirational goals. *Bayview* does not, however, provide any such support. That case involved a provision of the 1982 Bay Area 1-hour ozone SIP, known as TCM 2, which states in pertinent part:

> Support post-1983 improvements identified in transit operator's 5-year plans, after consultation with the operators adopt ridership increase target for 1983–1987.
>
> EMISSION REDUCTION ESTIMATES: These emission reduction estimates are predicated on a 15% ridership increase. The actual target would be determined after consultation with the transit operators.

Following a table listing these estimates, TCM 2 provided that ''[r]idership increases would come from productivity improvements. * * *''

Ultimately the 15% ridership estimate was adopted by the Metropolitan Transportation Commission (MTC), the implementing agency, as the actual target. Plaintiffs subsequently attempted to enforce the 15% ridership increase. The court found that the 15% ridership increase was an unenforceable estimate or goal. In reaching that conclusion, the court considered multiple factors, including the plain language of TCM 2 (e.g., ''[a]greeing to establish a ridership 'target' is simply not the same as promising to attain that target,'' *Bayview* at 698); the logic of TCM 2, i.e., the drafters of TCM 2 were careful not to characterize any given increase as an obligation because the TCM was contingent on a number of factors beyond MTC's control, *id.* at 699; and the fact that TCM 2 was an extension of TCM 1 that had as an enforceable strategy the improvement of transit services, specifically through productivity improvements in transit operators' five-year plans, *id.* at 701. As a result of all of these factors, the Ninth Circuit found that TCM 2 clearly designated the productivity improvements as the only enforceable strategy. *Id.* at 703.

The commitments in the 2007 State Strategy (revised in 2009 and 2011) and

[29] EPA can also enforce SIP commitments pursuant to CAA section 113.

[30] We note that in our proposed rule at 76 FR 41562, p. 41571 we reference the 2007 State Strategy, p. 63 and CARB Resolution 07–28, Attachment B. p. 6. Page 63 of the 2007 State Strategy was replaced with the information in the 2009 State Strategy Status Report.

South Coast 2007 AQMP are in stark contrast to the ridership target that was deemed unenforceable in *Bayview.* The language in CARB's and the District's commitments, as stated multiple times in multiple documents, is specific; the intent of the commitments is clear; and the strategy of adopting measures to achieve the required reductions is completely within CARB's and the District's control. Furthermore, as stated previously, CARB and the District identify specific emission reductions that they could achieve, how they could be achieved and the time by which these reductions will be achieved, i.e., by 2014.

Commenters also cite *CBE II* at 980 for the proposition that courts can only enforce ''express'' or ''specific'' strategies. However, as discussed below, there is nothing in the *CBE* cases that supports the commenter's view that the CARB and District commitments are neither express nor specific. In fact, these cases support our interpretation of CARB's and the District's commitments.

Citizens for a Better Environment v. *Deukmejian,* 731 F.Supp.1448 (N.D. Cal. 1990), known as *CBE I,* concerned in part contingency measures for the transportation sector in the 1982 Bay Area 1-hour ozone SIP. The provision states: '''If a determination is made that RFP is not being met for the transportation sector, MTC will adopt additional TCMs within 6 months of the determination. These TCMs will be designed to bring the region back within the RFP line.'' The court found that ''[o]n its face, this language is both specific and mandatory.'' *Id.* at 1458. In *CBE I,* CARB and MTC argued that TCM 2 could not constitute an enforceable strategy because the provision fails to specify exactly what TCMs must be adopted. The court rejected this argument, finding that ''[w]e discern no principled basis, consistent with the Clean Air Act, for disregarding this unequivocal commitment simply because the particulars of the contingency measures are not provided. Thus we hold that that the basic commitment to adopt and implement additional measures, should the identified conditions occur, constitutes a specific strategy, fully enforceable in a citizens action, although the exact contours of those measures are not spelled out.'' *Id.* at 1457.[31] In concluding that the transportation and stationary source contingency provisions were enforceable, the court stated: ''Thus, while this Court is not empowered to enforce the Plan's overall objectives [footnote omitted; attainment of the NAAQS]—or NAAQS—directly, it can and indeed, must, enforce specific strategies committed to in the Plan.'' *Id.* at 1454.

Commenters' reliance on *CBE II* is misplaced. It also involves in part the contingency measures in the 1982 Bay Area Plan. In *CBE II,* defendants argued that RFP and the NAAQS are coincident because, had the plan's projections been accurate, then achieving RFP would have resulted in attainment of the NAAQS. The court rejected this argument, stating that:

> The Court would be enforcing the *contingency plan,* an express strategy for attaining NAAQS. Although enforcement of this strategy might possibly result in attainment, it is distinct from simply ordering that NAAQS be achieved without anchoring that order on any specified strategy. Plainly, the fact that a specified strategy might be successful and lead to attainment does not render that strategy unenforceable.

(Emphasis in original). *CBE II* at 980.

CARB's commitments here are analogous to the terms of the contingency measures in the *CBE* cases. CARB and the District commit to adopt measures, which are not specifically identified, to achieve a specific tonnage of emission reductions. Thus, the commitment to a specific tonnage reduction is comparable to a commitment to achieve RFP. Similarly, a commitment to achieve a specific amount of emission reductions through adoption and implementation of unidentified measures is comparable to the commitments to adopt unspecified TCMs and stationary source measures. The key is that a commitment must be clear in terms of what is required, e.g., a specified amount of emission reductions or the achievement of a specified amount of progress (i.e., RFP). CARB's and the District's commitments are thus clearly a specific enforceable strategy rather than an unenforceable aspirational goal.

Commenter's reliance on *El Comite* is also misplaced. The plaintiffs in the district court attempted to enforce a provision of the 1994 California 1-hour ozone SIP known as the Pesticide Element. The Pesticide Element relied on an inventory of pesticide VOC emissions to provide the basis to determine whether additional regulatory measures would be needed to meet the SIP's pesticides emissions target. To this end, the Pesticide Element provided that ''CARB will develop a baseline inventory of estimated 1990 pesticidal VOC emissions based on 1991 pesticide use data * * *.'' *El Comite Para El Bienestar de Earlimart* v. *Helliker,* 416 F. Supp. 2d 912, 925 (E.D. Cal. 2006). CARB subsequently employed a different methodology which it deemed more accurate to calculate the baseline inventory. The plaintiffs sought to enforce the commitment to use the original methodology, claiming that the calculation of the baseline inventory constitutes an ''emission standard or limitation.'' The district court disagreed:

> By its own terms, the baseline identifies emission sources and then quantifies the amount of emissions attributed to those sources. As defendants argue, once the sources of air pollution are identified, control strategies can then be formulated to control emissions entering the air from those sources. From all the above, I must conclude that the baseline is not an emission ''standard'' or ''limitation'' within the meaning of *42 U.S.C. section 7604(f)(1)–(4).*

Id. at 928. In its opinion, the court distinguished *Bayview* and *CBE I,* pointing out that in those cases ''the measures at issue were designed to reduce emissions.'' *Id.*

On appeal, the plaintiffs shifted their argument to claim that the baseline inventory and the calculation methodology were necessary elements of the overall enforceable commitment to reduce emissions in nonattainment areas. The Ninth Circuit agreed with the district court's conclusion that the baseline inventory was not an emission standard or limitation and rejected plaintiffs' arguments attempting ''to transform the baseline inventory into an enforceable emission standard or limitation by bootstrapping it to the commitment to decide to adopt regulations, if necessary.'' *Id.* at 1073.

While commenters cite the Ninth Circuit's *El Comite* opinion, its utility in analyzing the CARB and District commitments here is limited to that court's agreement with the district court's conclusion that neither the baseline nor the methodology qualifies as an independently enforceable aspect of the SIP. Rather, it is the district court's opinion, in distinguishing the commitments in *CBE* and *Bayview,* that provides insight into the situation at issue in our action. As the court recognized, a baseline inventory or the methodology used to calculate it, is not a measure to reduce emissions. It instead ''identifies emission sources and then quantifies the amount of emissions attributed to those sources.'' In contrast,

[31] In this passage, the court was referring specifically to the stationary source contingency measures in the Bay Area plan which contained a commitment to adopt such measures if emission targets were not met. The Plan identified a number of potential stationary sources but did not commit to any particular one. In discussing the transportation contingency measures, the court applied this same reasoning. *Id.* at 1456–1457.

as stated previously, in the 2007 State Strategy (revised 2009 and 2011) and 2007 AQMP, CARB and the District commits to adopt and implement measures sufficient to achieve specified emission reductions by a date certain. As described above, a number of courts have found commitments substantially similar to CARB's here to be enforceable under CAA section 304(a).

Comment: Commenters state that the commitments do not satisfy EPA's three-part test for enforceable commitments. First, commenters state that EPA admits that the State and District have no idea at all how they will achieve the remaining 11% of the NO_X, 3% of VOC and 8% of $PM_{2.5}$. Commenters state that this is hardly a ''limited'' or minimal portion of the long-overdue reductions and cite *BCCA Appeal Group* v. *EPA,* 355 F.3d 817, 840–41 (5th Cir. 2003) (commitments for only six percent of the overall reductions). Commenters state it is arbitrary and capricious for EPA to conclude that 11% is approximately within the 10% range that EPA has historically accepted in approving attainment demonstrations. Commenters believe EPA's strategy trivializes the task of achieving 70 tpd of reductions over the next 3 years and believes it is even more arbitrary given the importance of NO_X reductions for attainment.

Response: We disagree with the commenters' assertion that CARB and the District do not know how they will achieve the remaining NO_X, VOC, and $PM_{2.5}$ reductions needed for attainment in the South Coast. As discussed in our amended proposal, the South Coast 2007 AQMD relies principally on adopted rules approved into the SIP or given a waiver under CAA section 209 to achieve the emissions reductions needed to attain the 1997 $PM_{2.5}$ standards in the South Coast by April 5, 2015, including baseline (pre-2007) measures that continue to achieve emission reductions through 2014. 76 FR at 41576. The balance of the needed reductions is currently in the form of enforceable commitments that account for 11% of the NO_X, 7% of the VOC and 8% of the $PM_{2.5}$ emission reductions needed from 2002 levels to attain.[32] *See id.* These SIP-approved or CAA-waived control measures and enforceable commitments satisfy the requirement in CAA section 110(a)(2)(A) to include ''enforceable emission limitations and other control measures, means or techniques * * * as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements'' of the CAA. *See id.* at n. 31. Although CARB's and the District's enforceable commitments to additional emission reductions are expressed in aggregate tonnages and not tied to specific measures, both CARB and the District have provided a list of potential measures that may achieve the additional reductions needed to attain the standards, together with expeditious rule development, adoption, and implementation schedules. *See id.* at 41576, 41577.

We also disagree with the commenters' assertions that these remaining amounts are not ''limited'' and that it is arbitrary and capricious for EPA to conclude that 11% is approximately within the 10% range that EPA has historically accepted as appropriate for enforceable commitments in approving attainment demonstrations. The State of Texas' enforceable commitment for the Houston/Galveston area, the approval of which was upheld by the Fifth Circuit Court of Appeals in *BCCA,* represented 6 percent of the reductions needed for attainment in the area. We note that the court in *BCCA* did not conclude that any amount greater than 6 percent of the reductions needed would be unreasonable. We believe that the 11% of NO_X, 7% of VOC and 8% of $PM_{2.5}$ reductions, as stated in our amended proposal, also fit within the parameters of a ''limited'' amount of the reductions needed for attainment and nothing in the *BCCA* decision contravenes that. *See also* 76 FR 41562 at 41576, n. 34.

Finally, we disagree with the commenters' assertion that EPA's strategy ''trivializes'' the task of achieving 70 tpd of NO_X reductions over the next three years. As explained in our amended proposal, CARB has adopted and submitted a 2009 State Strategy Status Report and a 2011 Progress Report, which update and revise the 2007 State Strategy. These reports show that CARB has made significant progress in meeting its enforceable commitments for the South Coast and several other nonattainment areas in California. Additional ongoing programs that address locomotives, recreational boats, and other measures have yet to be quantified but are expected to reduce NO_X and direct $PM_{2.5}$ emissions in the South Coast by 2014. See 2011 Progress Report, Appendix E, page 2. The District has already exceeded its commitment for reducing VOC and SO_X emissions and is working to meet the commitment to reduce NO_X and directly-emitted $PM_{2.5}$. See Tables 2 and 3. The District is also continuing to work to identify and adopt additional measures that will reduce emissions. Beyond the rules discussed above, both CARB and the District have well-funded incentive grant programs to reduce emissions from the on- and offroad engine fleets. Reductions from several of these programs have yet to be quantified and/or credited in the attainment demonstration. Finally, we note that the South Coast has experienced significant improvements in its $PM_{2.5}$ air quality in the past few years.

Given the evidence of the State's and District's efforts to date and their continuing efforts to reduce emissions, we conclude that the State and District are capable of meeting their enforceable commitments to achieve the necessary reductions needed to attain the 1997 $PM_{2.5}$ standards in the South Coast nonattainment area by April 5, 2015.

Comment: For the second factor, commenters state that the State has not shown that they are capable of achieving its reductions because they have done little more than assert that they are committed to meeting the requirements of federal law—but have not included any indication of *how* they will meet the requirements. Commenters assert that given the slow progress to date, it seems unlikely that the reductions of the magnitude remaining—70.5 tpd NO_X, 11 tpd VOC and 1.3 tpd $PM_{2.5}$—can be achieved without a plan more focused and robust than the vague commitment to somehow get the needed reductions.

Response: We disagree. As explained in our amended proposal, the State's and District's efforts to date and their continuing efforts to reduce emissions (discussed above and in our proposed rule), indicate they are capable of meeting their specific enforceable commitments to achieve the necessary reductions by 2014. 76 FR 41562 at 41568–41572 and 41575–41577 and July 2011 TSD at Sections II.D and II.F.

Comment: Finally, for the third factor, commenters state that it is unclear with the changing landscape of many of the measures whether any of these commitments will take place within a reasonable and appropriate period of time. Commenters state that EPA fails to explain how in the context of an approval in late 2011, the state and air district will be able to complete even the requisite rulemaking process, much less actually achieve the reductions required by 2014.

Response: Commenters assume that the only path open to the State to fulfill its commitments is the adoption of new measures. We disagree. The list of measures provided by CARB in the 2011 Progress Report, Appendix B, Table B–1. represents a fraction of the rules and programs adopted and implemented by the State. See TSD Appendix A. CARB

[32] See Table 3 of this notice.

has not provided, nor has it been required to provide, an evaluation of the effectiveness of its entire control program in reducing emissions in the South Coast area. Given that the State has preliminarily demonstrated, based on a limited set of measures, that all of the needed SO_X reductions, and approximately 90 percent or more of the reductions of NO_X, VOC, and $PM_{2.5}$ reductions needed for attainment of the 1997 $PM_{2.5}$ standards in the South Coast have already been achieved, we believe it is reasonable to conclude that the balance of the needed reductions will also be achieved by 2014. See 76 FR 41562, p. 41575, Table 7 and September 2011 TSD, Table F–10.

Comment: Commenters assert that although EPA has previously allowed conditional approval of SIPs based on ''commitments to complete the adoption of specific enforceable measures within a short period of time,'' EPA has never before allowed a five-year extension of the statutory deadline for the submission of control measures yet to be specified by the State.

Response: EPA is not granting a five-year extension under section 110(k)(4) of the CAA. Rather, EPA is granting California's request for an attainment date extension to April 5, 2015 under CAA section 172(a)(2)(A). We are granting this extension of the attainment date for the reasons discussed in our amended proposal. 76 FR 41562 at 41577.

Comment: NRDC asserts that EPA is allowing the South Coast to ''adjust'' the 2014 baseline emissions inventory to account for California's recent slowdown in economic growth. NRDC states that the Act requires that improvements in air quality are the result of permanent and enforceable reductions in emissions.

Response: The commenters correctly note that the 2014 baseline emissions inventory in the South Coast 2007 AQMP have been adjusted to account for California's recent slowdown in economic growth. As explained in Section II.B (Emission Inventory) of the TSD, however, CARB's revisions to the 2014 baseline inventory took into account not only updates to the State's economic forecasts but also a variety of other factors (out-of-state VMT estimates, cumulative mileage, equipment populations, load factors, and hours of use, etc.) used to calculate emissions from trucks, buses, and certain off-road equipment categories. See 2011 Progress Report, Appendix E.

The commenters' assertion that the CAA requires improvements in air quality to result from permanent and enforceable emissions reductions appears to be based on an incorrect understanding of the statutory basis for EPA's action. EPA is not determining that emission ''reductions'' related to the economic recession are ''enforceable'' measures under CAA sections 110(a)(2)(A) and 172(c)(6). Section 110(a)(2)(A) of the CAA requires that each implementation plan submitted by a State include ''enforceable emission limitations and other control measures, means, or techniques * * * as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of [the CAA].'' Section 172(c)(6) contains substantively identical requirements for all nonattainment area plans. Baseline emissions inventories, however, are not ''enforceable emission limitations and other control measures, means, or techniques'' or ''schedules and timetables for compliance'' that are necessary or appropriate to meet CAA requirements. *See El Comite Para El Bienestar de Earlimart* v. *Warmerdam,* 539 F.3d 1062 (9th Cir. 2008) (concluding that a baseline inventory is not an enforceable ''standard or limitation'' as defined by the CAA and is not, therefore, an independently enforceable aspect[] of the SIP''). Rather, base year and baseline emissions inventories provide the basis for, among other things, the State's development of progress milestones and control strategies for attaining the NAAQS consistent with the requirements of CAA sections 172(c)(1) and 172(c)(2). *See* General Preamble at 13503–13510 (discussing planning inventory requirements for ozone nonattainment areas). In short, emissions inventories provide estimates of current and future emissions that, in turn, provide the starting point for the State's attainment demonstration and enforceable control strategy.

Nothing in the CAA precludes a State from revising a submitted plan to take into account revised emissions estimates and growth projections. All projections of future emissions-generating activity, including the projections in the South Coast 2007 AQMP as originally submitted, are based on projections of population, employment and other growth factors, all of which can increase or decrease as economic conditions change. However, reliance on projections from reputable sources of economic behavior based on established methods of predicting such behavior is the historic practice for development of emissions inventories. CARB's revised projections of future emissions-generating activity are based on reputable sources, represent the most current understanding of expected economic conditions through at least 2014, and were subject to extensive public review and comment before CARB adopted its 2011 SIP revisions containing these updated projections. Given the magnitude of the economic recession's impact on emissions-generating activity in the South Coast and other parts of California, and the resulting impact on the State's assessment of the control strategy necessary to demonstrate attainment of the 1997 $PM_{2.5}$ standards, we conclude that it is appropriate to take these updated emissions projections into account as part of our action on the South Coast 2007 AQMP and 2007 State Strategy. Other than asserting generally that CARB and EPA should not rely on the revised economic data to determine the reductions needed for attainment and that future conditions may change, the commenters provides no information to undermine the State's revised economic data or the related changes to the projected inventories.

For these reasons and as explained in our amended proposal (76 FR 41562, at 41567), we are concluding that CARB's 2011 SIP revisions, which updated the State's projected (''baseline'') emissions inventories based on improved methodologies for estimating emissions and more recent growth factors, reduced the total amount of emission reductions needed for attainment and that the control strategy in the South Coast 2007 AQMP and 2007 State Strategy, as revised in 2011, demonstrates expeditious attainment of the 1997 $PM_{2.5}$ NAAQS in the South Coast.

G. Comments on Attainment Demonstration and Modeling

Comment: NRDC comments that the attainment demonstration cannot be approved because of changes in the inventory. NRDC states that EPA's new proposal to approve the air quality modeling in the 2007 $PM_{2.5}$ Plan based on the supplemental documentation provided by CARB does not address the fundamental problem with the modeling, which is that the modeling fails to provide an accurate picture of whether the region will attain. EPA even admits that ''Ideally, new attainment demonstration modeling would be performed to evaluate the effect of [the diesel rule updates] * * *'' 76 FR at 41,573. However, the Clean Air Act does not allow EPA to approve inventories it knows to be erroneous because new modeling would be too hard. EPA must analyze how these errors in the base year inventory actually affect the attainment demonstration. EPA attempts

to do this by looking at sensitivity modeling submitted by CARB, which was meant to determine the ''relative effectiveness'' on design values of additional reductions of NO_X and $PM_{2.5}$ emissions in the attainment year. EPA claims that the results of this sensitivity modeling support its conclusion that new attainment demonstration modeling would be unnecessary. The obvious flaw in EPA's reasoning is that it is calculating attainment year design value changes, to the hundredth of a percent, from attainment year design values that it has already admitted are erroneous. EPA cannot justify its failure to require updated attainment modeling by back-calculating from the wrong 2014 design values to claim that the changes to the inventory would be too small to affect the design values. Accordingly, this approach is arbitrary and capricious.

Response: While some large emission inventory changes might indeed necessitate new modeling, EPA does not agree that the inventory changes were large enough to substantially affect the modeling conclusions, or to invalidate the attainment demonstration. Ideally new modeling would be performed when an area's emission inventory is changed. However, since the cost in time and resources of remodeling and consequent reworking of a Plan is not trivial, administrative necessity requires a judgement call about when changes are large enough to merit new modeling. An important criterion in making this judgement is whether the changes would affect the conclusion that the Plan's emission reductions are adequate for attaining the NAAQS. Another consideration is the uncertainty inherent in modeling; although model results may be reported to several decimal places, model performance goals for fractional bias are typically in the range of 30%. (EPA Guidance Appendix B) Small changes in the emission inventory are likely to have a small impact on future year design values. This is not to discount the importance of an accurate emission inventory, but rather to make the point that relatively small changes in inventory estimates do not necessarily invalidate a model application. EPA believes that the base year emission decreases due to the inventory updates are small enough to leave the overall modeling conclusions unchanged. This is a quantitative showing that the emission updates are small enough that they do not invalidate the attainment demonstration.

EPA does not agree with NRDC that starting from the Plan's modeled design values, and ending with small design value changes, constitute flaws in the procedure for estimating the effect of the baseline inventory revisions. EPA believes that results derived from model sensitivity tests are a reasonable approximation to what would result from new modeling with the updated inventory. EPA's procedure based on model sensitivity does make a number of assumptions: however, the original modeling is basically sound in how it portrays South Coast Air Basin's atmospheric chemistry and transport. The emission changes are small enough that the model response is linear, model sensitivity is similar in the starting and ending years, and the spatial and temporal distribution of emissions is little changed with the inventory update. EPA believes that these assumptions hold well enough that the procedure provides strong evidence for the attainment demonstration's validity.

For regulatory purposes, administrative necessity requires a judgement call about whether such problems are substantial enough to compromise regulatory decisions. Years of effort by modeling experts from regulatory agencies and academia went into developing the SC modeling; it underwent successful diagnostic testing; and it performs well. EPA believes that it should not be discarded, and that it continues to constitute an adequate basis for the attainment demonstration.

As for the small magnitude of the design value changes resulting from the procedure, EPA does not believe this is a substantive issue. Any procedure (even new modeling) that starts with small emission changes will necessarily result in small design value changes: within a small range, over which the chemistry does not shift fundamentally, ambient concentrations are approximately proportional to emissions. This is not a case of an overly precise tiny number being added to a large erroneous random number, but rather of an adjustment ratio applied to a number with a lot of solid work behind it. The emission inventory update, involving small NO_X changes, would also yield relatively small design value changes. Of course, this assumes the basic soundness of the original modeling, as discussed above.

Comment: NRDC comments that EPA should not approve the attainment demonstration because it fails to identify and address elevated $PM_{2.5}$ concentrations in the near-highway environment. In addition, NRDC asserts that SCAQMD's monitoring network is deficient because none of the monitoring stations are within 300 meters of a major freeway.

Response: The $PM_{2.5}$ Implementation Rule requires that states prepare attainment demonstrations through modeling that is ''consistent with EPA's modeling guidance,'' and the modeling guidance explains that future air quality should be estimated at current monitoring sites. 72 FR 20586 (April 25, 2007); SCAQMD followed EPA's modeling guidance in developing its air quality modeling and attainment demonstration.[33]

With respect to SCAQMD's monitoring network, EPA has approved previous Annual Monitoring Network Plans (2007–2010) submitted by the District and determined that the $PM_{2.5}$ network covered under the Annual Monitoring Network Plan meets regulatory requirements. EPA's monitoring rules do not require placement of $PM_{2.5}$ monitors in micro or middle scale locations.[34] The requirements for the Annual Monitoring Network Plan are found in 40 CFR 58.10.

H. Comments on the Reasonable Further Progress Demonstration

Comment: CBE commented that the RFP demonstration is unapprovable due to shortfalls in SO_2 in 2009 and in NO_X and $PM_{2.5}$ in 2012.

Response: Under the $PM_{2.5}$ implementation rule, an RFP plan must demonstrate that in each applicable milestone year, emissions will be at a level consistent with generally linear progress in reducing emissions between the base year and the attainment year. See 40 CFR 51.1009(d). The goal of the RFP requirements is for areas to achieve generally linear progress toward attainment. The RFP requirements were included in the Clean Air Act to assure steady progress toward attaining air quality standards, as opposed to deferring implementation of all measures until the end date by which the standard is to be attained. 75 FR 20586, at 20633.

As we noted in our July 14, 2011 proposed rulemaking, although the South Coast experienced a shortfall of 9 tpd for SO_X in 2009, this shortfall is made up by the reductions estimated for 2012, and the area meets its 2012 SO_X milestone. We note that the shortfall in 2012 for NO_X is less than 1% of the 2002 baseline inventory, and the shortfall in $PM_{2.5}$ reductions in 2012 is also about 1% of the 2002 baseline inventory, while 2012 SO_X reduction

[33] ''Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze,'' prepared by EPA's Office of Air Quality Planning and Standards, at 15 (April 2007).

[34] 71 FR 61236 (October 17, 2006).

milestones are met and 2012 VOC reduction milestones are exceeded by 20 tpd. (TSD, p. 116) In addition, we noted that we were not evaluating the provisions of the updated South Coast 2007 AQMP that address contingency measures for failure to meet the 2009 RFP benchmarks. Information available to EPA and the public shows that the South Coast met its 2009 RFP benchmarks for 2009 for directly emitted $PM_{2.5}$, NO_X, and VOC. SO_X emissions are higher than the linear benchmark but achieve the benchmark levels in 2012 due to recently adopted rules controlling emissions of SO_X. See 2011 Progress Report, Table C–2 and section II.H of the TSD. Therefore, contingency measures for failure to meet the 2009 RFP benchmark no longer have meaning or effect under the CAA and therefore do not require any review or action by EPA.

In addition, as noted above, the purpose of RFP contingency measures is to provide continued progress while the SIP is being revised to meet a missed RFP milestone. Failure to meet the 2009 benchmark would have required California to revise the South Coast 2007 AQMP to assure that the next milestone was met and that the plan still provided for attainment. California has, in fact, prepared and submitted a revision to the South Coast 2007 AQMP that provides for RFP in 2012 and for attainment by 2015. (TSD, p. 122) For all of these reasons we conclude that the South Coast 2007 AQMP provides for generally linear progress towards attainment, consistent with the requirements of CAA section 172(c)(2) and 40 CFR 51.1009. The State has also submitted a SIP revision to address the missed 2009 SO_X milestone which assures that the 2012 SO_X milestone will be met (the 2011 Progress Report).

I. Comments on Contingency Measures

Comment: In their January 20, 2011 comment letter, the SCAQMD agrees that the SIP must contain contingency measures that should be implemented if the area fails to meet the NAAQS by the applicable attainment date. However, the District argues that the requirement for these measures to be fully adopted in rule form at time of plan submittal is unrealistic.

Response: EPA understands that for some areas the CAA requirement for contingency measures is difficult; however, the Act is clear on these requirements. Under CAA section 172(c)(9), all $PM_{2.5}$ attainment plans must include specific contingency measures to be implemented if an area fails to meet RFP (RFP contingency measures) and contingency measures to be implemented if an area fails to attain the $PM_{2.5}$ NAAQS by the applicable attainment date (attainment contingency measures). These contingency measures must be fully adopted rules or control measures that are ready to be implemented quickly without significant additional action by the State. 40 CFR 51.1012 (''contingency measures must take effect without significant further action by the State or EPA''); see also 57 FR 13498, at 13510–11. They must also be measures not relied on in the plan to demonstrate RFP or attainment and should provide SIP-creditable emissions reductions equivalent to one year of RFP. Finally, the SIP should contain trigger mechanisms for the contingency measures and specify a schedule for their implementation. 72 FR 20586, p. 20642. We noted that the purpose of RFP contingency measures is to provide continued progress while the SIP is being revised to meet a missed RFP milestone. See 76 FR 41562, at 41580. This timely continued progress would not be possible if significant additional rulemaking action needed to be taken at the District or State level before a measure could be fully adopted and implemented. For the reasons provided in both of our proposals, we are disapproving the proposed contingency measures in the South Coast 2007 AQMP, which include measures that are not yet fully adopted, because they do not meet the requirements for contingency measures in CAA section 172(c)(9) and 40 CFR 51.1012. See 76 FR 41562, at 41580.

Comment: In its August 12, 2011 comment letter, the SCAQMD recognizes that the SIP must contain contingency measures that should be implemented if the area fails to meet the NAAQS by the applicable attainment date; however, they again state that they believe the requirement to have such measures adopted at the time of plan submittal is unrealistic. They point out that under the California Clean Air Act, the SCAQMD is required to evaluate all feasible measures in SIP development to achieve the maximum emissions reductions possible. Therefore, they believe it is unreasonable to expect that there are additional rules that would achieve one year's worth of RFP reductions beyond what is already adopted. Nevertheless, the SCAQMD outlines a three pronged approach to demonstrate that sufficient emissions reductions can be identified to meet the requirement for 1-year's worth of RFP reductions for contingency measures. The three prongs are (1) $PM_{2.5}$ air quality improvements have significantly exceeded the RFP milestone targets by more than one year's worth of reductions, (2) relying on continued emissions reductions beyond 2014 based on adopted regulations for the 2007 ozone plan, and (3) quantifying excess emissions reductions that were not originally included in the 2007 $PM_{2.5}$ SIP. The District provides additional detailed information for each of these prongs in an attachment to their comments.

Response: EPA understands the unique air quality challenges in the South Coast area and appreciates the District's efforts to identify additional measures that may serve as contingency measures for purposes of the 1997 $PM_{2.5}$ NAAQS. We note, however, that contingency measures should consist of available control measures beyond those required to attain the standards, and may go beyond those measures considered to be RACM for the area. *See* 72 FR 20586 at 20643. We commit to work with the State and District to identify new or existing control measures and programs not currently included in the South Coast 2007 AQMP that may satisfy the CAA section 172(c)(9) requirements for contingency measures for purposes of the 1997 $PM_{2.5}$ NAAQS.

Comment: In both their January 21, 2011 and August 15, 2011 comment letters, NRDC supports our proposed disapproval of the contingency measures. NRDC raises two issues related to the contingency measures. First, it asserts that the contingency measures lack enforceability. Second, they note that the District does not describe the criteria regarding how the monies in the proposed ozone nonattainment fee contingency measure will be spent, and does not provide mechanisms for ensuring that emissions reductions are enforceable. (We address NRDC's third comment about contingency measures in relation to RACM in our responses to RACM comments above).

Response: In both our 2010 proposal and our 2011 amended proposal, we proposed to disapprove the Plan's contingency measure provisions and we are disapproving those provisions in today's action. See 75 FR 71294, 71311–71312 and 76 FR 41562, 41580. In particular, we stated the following: The South Coast 2007 AQMP includes suggestions for several measures that do not meet the CAA's minimum requirements (e.g., no additional rulemaking, surplus to attainment and RFP needs). The AQMP, however, indicates that the measures proposed by the District are not adopted, and does not quantify the expected emissions

reductions in order to gauge whether they provide reductions equivalent to one year's worth of RFP. For the reasons stated above, we are disapproving the District's contingency measure provisions in the South Coast 2007 AQMP for $PM_{2.5}$. 76 FR 41562, at 415780 (July 14, 2011).

Regarding NRDC's second point, we agree that for CTY–02, ''Clean Air Act Emission Fees for Major Stationary Sources,'' the District does not describe how the monies for the CAA nonattainment fees will be spent, nor does it provide mechanisms for ensuring that emissions reductions are enforceable. These are among the reasons that we provided for disapproving this contingency measure in both our November 2010 and July 2011 proposed rulemakings. We also noted that the 2007 AQMP does not identify the quantity of emissions reductions that the District intended to use to meet the contingency measure requirement and therefore, we are unable to determine if the proposed measures are SIP creditable or sufficient to provide in combination with other measures the roughly one-year's worth of RFP needed. For these reasons, we determined that the measures submitted did not currently meet the CAA requirements for contingency measures.

III. Approval Status of the Control Strategy Measures and Enforceable Emissions Reductions Commitments

A. Approval Status of Control Strategy Measures

We describe CARB's and the District's commitments in the 2007 State Strategy (as revised in 2009 and 2011) and the South Coast 2007 AQMP in detail in our amended proposal. See 76 FR 41562, at 41575–41577. As part of its control strategy for attaining the $PM_{2.5}$ standards in the South Coast, the District made specific commitments to adopt or revise nineteen measures for SIP credit on the schedule identified in the revised 2007 AQMP. See 2011 Progress Report, Appendix F, Tables 2 through 5. The District has now completed its adoption actions and EPA has approved most of the adopted rules. See Table 1 below. The rules we have not yet approved we have not credited with emissions reductions in the attainment demonstration.

TABLE 1—APPROVAL AND SUBMITTAL STATUS OF DISTRICT RULES IN THE SOUTH COAST 2007 AQMP

District rule	Adoption date	Current SIP approval status
Rule 445—Woodburning fireplaces and wood stoves.	03/07/08	74 FR 27716, 6/11/09.
Rule 461—Gasoline transfer and dispensing	03/07/08	71 FR 18216, 4/11/06.
Rule 1110.2—Liquid and gaseous fuels—stationary ICEs.	02/01/08	74 FR 18995, 4/27/09.
Rule 1111—Further NO_X reductions from space heaters.	11/06/09	75 FR 46845, 08/04/10.
Rule 1127—Livestock Waste	08/06/04	Under EPA review.
Rule 1138—Restaurant Operations	2012	Most recent approval: 66 FR 36170, 7/11/01.
Rule 1143—Consumer Paint Thinners and Multi-Purpose Solvents.	12/03/10	Proposed for approval 76 FR 41744, 07/15/11.
Rule 1144—Vanishing oils and rust inhibitors	07/09/10	Proposed for approval 76 FR 41744, 07/15/11.
Rule 1145—Plastic, Rubber, Leather and Glass Coatings.	12/3/04	75 FR 40726, 07/14/10.
Rule 1146—NO_X from industrial, institutional, commercial boilers, steam gens, and process heaters.	09/05/08	Proposed limited approval/limited disapproval 76 FR 40303, 7/8/11.
Rule 1146.1—NO_X from small industrial, institutional, commercial boilers, steam gens, and process heaters.	09/05/08	Proposed limited approval/limited disapproval 76 FR 40303, 7/8/11.
Rule 1147—NO_X reductions from miscellaneous sources.	12/05/08	75 FR 46845, 08/04/10.
Rule 1149—Storage Tank and Pipeline Cleaning and Degassing.	05/02/08	74 FR 67821, 12/21/09.
Rule 2002—Further SO_X reductions from RECLAIM.	11/4/10	76 FR 50128, 8/12/11.
Rule 2301—Indirect Source Review	2012	
Refinery Pilot Program	Not yet adopted	N/A.
SOON program	Submitted	Not yet acted on.
AB923 Light and medium duty vehicle high emitter program.	No rules associated with these measures	N/A.
AB923 Light and medium duty vehicle high emitter program.	No rules associated with these measures	N/A.

As part of its control strategy for attaining the $PM_{2.5}$ standards in the South Coast, CARB committed to propose certain measures on the schedule identified in the 2007 State Strategy. These commitments, which were updated in the 2011 Progress Report, and their current approval status, are shown in Table 2.

TABLE 2—REVISED 2007 STATE STRATEGY DEFINED MEASURES SCHEDULE FOR CONSIDERATION AND CURRENT STATUS

State measures	Expected action year	Implementation date	Current status
Defined Measures in 2007 State Strategy			
Smog Check Improvements	2007–2009	2008–2010; 2013	Elements approved 75 FR 38023 (July 1, 2010).[35]
Expanded Vehicle Retirement (AB 118)	2007	2009	Adopted by CARB, June 2009; by BAR, September 2010.
Modifications to Reformulated Gasoline Program.	2007	2010	Approved 75 FR 26653 (May 12, 2010).
Cleaner In-use Heavy Duty Trucks	2007, 2008, 2010	2011–2015	Proposed approval 76 FR 40562, July 11, 2011.
Auxiliary Ship Cold Ironing and Other Clean Technologies.	2007–2008	2010	Adopted December, 2007.
Cleaner Main Ship Engines and Fuels	Fuel: 2008–2011 Engines: 2008	Fuel: 2009–2–15 Engines: 2011	Proposed approval 76 FR 40562, July 11, 2011.
Port Truck Modernization	2007, 2008, 2010	2008–2020	Adopted December 2007 and December 2008.
Accelerated Introduction of Cleaner Locomotives.	2008	2012	Prop 1B funds awarded to upgrade line-haul locomotive engines not already accounted for by enforceable agreements with the railroads. Those cleaner line-hauls will begin operation by 2012.
Clean Up Existing Harbor Craft	2007, 2010	2009–2018	Adopted November 2007, revised June 2010.
Cleaner In-Use Off-Road Equipment	2007, 2010	2009	Waiver action pending.
New Emissions Standards for Recreational Boats.	2013	tbd	Partially adopted, July, 2008; additional action expected 2013.
Expanded Off-Road Recreational Vehicle Emissions Standards.	2013	tbd	Partially adopted, July, 2008; additional action expected 2013.
Enhanced Vapor Recovery for Above Ground Storage Tanks	2008	2009–2016.	Adopted June, 2007.
Additional Evaporative Emissions Standards	2009	2010–2012	Partial adoption: September, 2008 (outboard marine tanks).
Consumer Products Program (I & II)	2008, 2009, 2011	2010–2014	Approved, 74 FR 57074 (November 4, 2009), 76 FR 27613 (May 12, 2011), and proposed approval of 2011 rule signed September 28, 2011.

Sources: 2009 State Strategy Status Report, p. 23 (footnotes in original not included) and 2011 Progress Report, Appendix B, Table B–1. Additional information from *http://www.ca.arb.gov.* Only defined measures with $PM_{2.5}$,VOC, SO_X or NO_X reductions in South Coast are shown here.

Generally speaking, EPA will approve a State plan that takes emissions reduction credit for control measures only where EPA has approved the measures as part of the SIP, or in the case of certain on-road and nonroad measures, where EPA has issued the related waiver of preemption or authorization under CAA section 209(b) or section 209(e). In our July 14, 2011 proposed rule, in calculating and proposing to approve the State's aggregate emissions reductions commitment in connection with our proposed approval of the attainment demonstration, we assumed that full final approval, waiver, or authorization of a number of CARB rules would occur prior to our final action on the South Coast $PM_{2.5}$ Plan. See 76 FR at 41562, 41575 (Table 7). Three specific CARB rules on which the attainment demonstration relies include the Truck Rule, Drayage Truck Rule, and Ocean-Going Vessel (OGV) Rule. We proposed approval of all three rules at 76 FR 40652 (July 11, 2011), but will be unable to take final action on the rules until after taking final action on the plan because, while CARB has adopted the rules, the rules cannot take effect until approved by the California Office of Administrative Law (OAL) and such approval will not happen before EPA's final action must be taken on the plan.

We are nonetheless allowing the plan's attainment demonstration, and our final approval of it, to rely on the emissions reductions from the three CARB rules for the following reasons:

- All three rules have been adopted by CARB and submitted to EPA as a revision to the California SIP,[36] and the adopted versions are essentially the same as those for which EPA proposed approval;
- The comments that we have received on our proposed approval of the three CARB rules (truck rule, drayage truck rule, and ocean-going vessel rule) contend that the rules are costly and may not be economically or technologically feasible, but such considerations cannot form the basis for EPA disapproval of a rule submitted by a state as part of a SIP [see *Union Electric Company* v. *EPA;* 427 U.S. 246, 265 (1976)];
- The remaining administrative process, which involves review of the final adopted rules by California's Office of Administrative Law (OAL) is essentially procedural in nature, and should be completed over the near-term;[37]

[35] California Assembly Bill 2289, passed in 2010, requires the Bureau of Automotive Repair to direct older vehicles to high performing auto technicians and test stations for inspection and certification effective 2013. Reductions shown for the SmogCheck program in the 2011 Progress Report do not include reductions from AB 2289 improvements. See CARB Progress Report Supplement, Attachment 5.

[36] The Truck Rule and Drayage Truck Rules were included in a SIP submittal dated September 21, 2011, and the OGV Rule was included in a SIP submittal also dated September 21, 2011. We have placed both of these SIP submittals in the docket for this rulemaking.

[37] See letters from James N. Goldstene, Executive Officer, CARB, to Jared Blumenfeld, Regional Administrator, EPA Region IX, dated September 21, 2011, submitting the Truck and Drayage Truck rules SIP revision and the OGV Rule SIP revision to EPA. CARB indicates that the Drayage Truck Rule will be submitted to OAL no later than September 23, 2011, and the Truck Rule will be submitted to OAL no

Continued

• CARB intends to submit the final, effective rules to EPA as soon as OAL completes its review and approves the rules.

Therefore, we are confident that the final action on the rules will be completed in the near term and that, as a result, continued reliance by the plan, and our final approval of it, on the emissions reductions associated with the rules is reasonable and appropriate. If, however, California does not submit the adopted and fully effective rules to EPA as a SIP revision prior to the effective date of today's action, we will take appropriate remedial action to ensure that our action on the plan is fully supportable or to reconsider that action.

B. Enforceable Emissions Reduction Commitments

CARB's emissions reductions commitment is to achieve the ''total emissions reductions necessary to attain Federal standards'' through ''the implementation of control measures; the expenditure of local, State, or federal incentive funds; or through other enforceable measures.'' *See* CARB Resolution 07–28, Attachment B at pp. 3–5 and 2009 State Strategy Status Report, pp. 20–21.

The updates and improvements to the inventories as presented in CARB's 2011 Progress Report altered the calculation of the reductions needed for attainment of the 1997 $PM_{2.5}$ standards in South Coast by revising the total reductions needed from District and State control strategy measures to 44 tpd for VOC, 129 tpd for NO_X, and 41 tpd for SO_X (the remaining reductions needed for direct $PM_{2.5}$ remained the same at 9 tpd). *See* Table 3 below and July 2011 TSD, Table F–10.

We are approving the South Coast 2007 AQMP for attainment of the 1997 $PM_{2.5}$ standards taking into account CARB's revisions to the control strategy based on the revisions to its projected baseline inventories and its enforceable emissions reductions commitment. Specifically, we are interpreting CARB's emissions reductions commitment, together with the adjustments to the 2014 baseline inventories provided in CARB's 2011 SIP revision and the District's commitments, as adjusting the State's total emission reduction commitment such that the State is now obligated to achieve 129 tpd of NO_X, 44 tpd of VOC, 41 tpd of SO_X, and 9 tpd of $PM_{2.5}$ reductions and reductions by 2014 through enforceable control measures to provide for attainment of the 1997 $PM_{2.5}$ NAAQS in the South Coast. *See* Table 3 below. The commitment numbers in this table do not include reductions from measures adopted by CARB and the District and approved or waived by EPA following submittal of the South Coast AQMP in 2007.

TABLE 3—2014 EMISSIONS REDUCTIONS COMMITMENTS FOR THE SOUTH COAST $PM_{2.5}$ NONATTAINMENT AREA

[Tons per average annual day in 2014]

		NO_X	VOC	Direct $PM_{2.5}$	SO_X
A	Adjusted 2014 baseline emissions level [1]	589	518	95	61
B	2014 attainment target level [2]	460	474	86	20
C	Reductions needed from control strategy measures (A–B)	129	44	9	41
D	District commitments [3]	10.8	10.4	2.9	2.9
E	CARB commitments (C–D)	118.2	33.6	6.1	38.1

[1] From TSD, Table F–9.
[2] See 76 FR 41562, 41573, fn 27.
[3] See 2011 Progress Report, Appendix F, Table 1.

The level of emissions reductions remaining as commitments after adjusting the baseline to reflect updates and improvements to the inventories and crediting reductions from SIP-approved or otherwise SIP-creditable measures is shown in Table 4. We are approving the attainment demonstration in the South Coast 2007 AQMP to address the 1997 $PM_{2.5}$ standards, based in part on these enforceable commitments. See 76 FR 41562, at 41577.

TABLE 4—REDUCTIONS NEEDED FOR ATTAINMENT REMAINING AS COMMITMENTS BASED ON SIP–CREDITABLE MEASURES

[Tons per average annual day in 2014]

		NO_X	VOC	Direct $PM_{2.5}$	SO_X
A	Total reductions needed from baseline and control strategy measures and other adjustments to the baseline to attain.	633	370	13	33
B	Reductions from baseline measures and adjustments to baseline.	504	326	4	−8
C	Total reductions from approved measures	59	20	8	41
D	Total reductions remaining as commitments (A–B–C)	70	25	1	0
E	Percent of total reductions needed remaining as commitments	11	7	8	0

As shown in Table 4, the majority of the emissions reductions that the State projects are needed for attainment of the 1997 $PM_{2.5}$ NAAQS in the South Coast by 2015 come from baseline reductions. These baseline reductions reflect numerous adopted District and State control measures which generally have been approved by EPA either through the SIP process or the CAA section 209 waiver process, in addition to the effect of the recent economic recession on

later than October 29, 2011. CARB has already submitted the OGV Rule to OAL. Under California law, OAL must take action within 30 working days.

projected future inventories. See 2011 Progress Report, Appendix E and Appendices A and B of the TSD. The remaining reductions needed for attainment are to be achieved through the District's and CARB's commitments to reduce emissions in the South Coast. These aggregate commitments are shown in Line C of Table 3.[38] Since the submittal of the 2007 AQMP and 2007 State Strategy, the District and CARB have adopted additional measures that can be credited toward their aggregate emissions reduction commitments. The State's remaining enforceable commitments are shown in line E of Table 3.

As we noted in our July 14, 2011 proposal, we cannot credit District rules that have not been adopted, submitted to EPA, and approved (see footnote a to Table 3, 76 FR 41562, at 41570) or certain on-road or nonroad measures that have been given a waiver under CAA section 209. In our July 14, 2011 proposal, we presented a table with the State's remaining enforceable commitments (see 76 FR 41562, at 41575 (Table 7) of 70 tpd (11%) for NO_X, 11 tpd (3%) for VOC, 1 tpd (8%) for direct $PM_{2.5}$, and 0 tpd (0%) for SO_X. Today, we are slightly modifying our estimate of the State's remaining enforceable commitments for VOC. On July 15, 2011, we published a direct final rule to approve South Coast Rules 1143 (Consumer Paint Thinners and Multi-Purpose Solvents) and 1144 (Metalworking Fluids and Direct-Contact Lubricants). See 76 FR 41744. We received adverse comments on this action with respect to Rules 1143 and 1144, and thus withdrew the direct final rule (see 76 FR 54384, September 1, 2011). We are responding to comments received on the parallel proposal but have not yet finalized that action, and therefore are adding those reductions to the State's remaining enforceable commitment for VOC. The effect of this action is to slightly increase the State's remaining enforceable commitment for VOC from 11 tpd to 24.5 tpd, an increase from 4% to 7%, and is reflected in Table 4 above. This remaining commitment is still within the range of 10% for enforceable commitments that we have historically accepted in approving attainment demonstrations.

IV. Approval of Motor Vehicle Emissions Budgets

We noted in our July 14, 2011 proposal that CARB had posted technical revisions to the motor vehicle emissions budgets on June 20, 2011 (see 76 FR 41562, at 41581 and *http://www.arb.ca.gov/planning/sip/2007sip/2007sip.htm*) to correct data entry errors in the budget calculations and to remove the emissions reductions attributable to the Assembly Bill (AB) 923 program (South Coast's light and medium duty high emitter program). In our July 14, 2011 proposal, we proposed to approve these revised updated budgets contingent on our receiving the SIP submittal from CARB with the revised updated budgets before our final action on the South Coast 2007 AQMP addressing the 1997 $PM_{2.5}$ standards. These revised updated budgets were submitted by CARB as a SIP revision on July 29, 2011 (see letter, James Goldstene, Executive Officer, CARB, to Jared Blumenfeld, Regional Administrator, EPA Region 9, dated July 29, 2011, with Attachments). We posted these budgets (as posted by CARB on June 20, 2011) on our Web site for adequacy on July 14, 2011 for a 30-day comment period which ended on August 15, 2011 (see *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm*). We received no comments on our adequacy posting, and have completed our adequacy review on these budgets (see the TSD, Section J). We also discuss the basis for our approval of the budgets in the TSD, Section J. We identify the budgets that we are approving today in Table 5 below.

EPA is also approving the trading mechanism in the State's submittal for use in transportation conformity analyses by SCAG as allowed for under 40 CFR 93.124. The trading applies only to:

- Analysis years after the 2014 attainment year.
- On-road mobile emission sources.
- Trades using vehicle NO_X emission reductions in excess of those needed to meet the NO_X budget.
- Trades in one direction from NO_X to direct $PM_{2.5}$.
- A trading ratio of 10 tpd NO_X to 1 tpd $PM_{2.5}$.

Clear documentation of the calculations used in the trade would be included in the conformity analysis. See 2011 Ozone SIP Revision, Appendix A, p. A–6.

Now that the approval of the budgets is finalized, the area's metropolitan planning organization, the Southern California Association of Governments (SCAG) and the U.S. Department of Transportation are required to use the revised budgets in transportation conformity determinations. Due to the formatting of the budgets (combining emission changes, recession impacts and reductions from control measures), CARB will need to provide SCAG with emission reductions associated with the control measures incorporated into the budgets for the appropriate analysis years in future conformity determinations so that they can include these reductions per 40 CFR 93.122. In addition, for these conformity determinations, the motor vehicle emissions from implementation of the transportation plan should be projected and compared to the budgets at the same level of accuracy as the budgets in the plan, for example emissions should be rounded to the nearest ton (e.g. 11 tpd).

TABLE 5—SUMMARY OF UPDATED $PM_{2.5}$ AND $PM_{2.5}$ PRECURSOR MOTOR VEHICLE EMISSIONS BUDGETS FOR THE SOUTH COAST $PM_{2.5}$ NONATTAINMENT AREA

[Tons per annual average day]

	2012			2014		
	VOC	NO_X	Directly emitted $PM_{2.5}$	VOC	NO_X	Directly emitted $PM_{2.5}$
South Coast Air Basin	154	326	37	132	290	35

[38] Enforceable control measures adopted and submitted by CARB or the District and approved or waived by EPA may be credited towards this aggregate commitment.

V. Final Actions and CAA Consequences of the Final Disapproval of the Contingency Measure Provisions

A. Final Actions

For the reasons discussed in our July 14, 2011 proposal, EPA approves, with the exception of the contingency measure provisions, California's SIP for attaining the 1997 $PM_{2.5}$ NAAQS in the South Coast nonattainment area, and grants the State's request for an extension of the attainment date to April 5, 2015. California's $PM_{2.5}$ attainment SIP for the South Coast nonattainment area is composed of the relevant portions of the South Coast 2007 AQMP as revised in 2011 and the South Coast-specific portions of CARB's 2007 State Strategy as revised in 2009 and 2011 that address CAA and EPA regulations for attainment of the 1997 $PM_{2.5}$ standards in the South Coast nonattainment area.

Specifically, EPA approves under CAA section 110(k)(3) the following elements of the South Coast $PM_{2.5}$ attainment SIP:

1. The 2002 base year emissions inventory as meeting the requirements of CAA section 172(c)(3) and 40 CFR 51.1008;
2. The reasonably available control measures/reasonably available control technology demonstration as meeting the requirements of CAA sections 172(c)(1) and 40 CFR 51.1010;
3. The reasonable further progress demonstration as meeting the requirements of CAA section 172(c)(2) and 40 CFR 51.1009;
4. The attainment demonstration and supporting air quality modeling as meeting the requirements of CAA section 172(c)(1) and(6) and 40 CFR 51.1007;
5. The 2012 RFP and 2014 attainment year motor vehicle emissions budgets, as submitted by CARB on July 29, 2011, because they are derived from the approvable RFP and attainment demonstrations and meet the requirements of CAA section 176(c) and 40 CFR part 93, subpart A; and CARB's trading mechanism to be used in transportation conformity analyses as allowed under 40 CFR 93.124;
6. SCAQMD's commitments to the adoption and implementation schedule for specific control measures and to achieve specific aggregate emissions reductions of direct $PM_{2.5}$, NO_X, VOC, and SO_X listed in Tables 1 through 5 in Appendix F of the 2011 Progress Report to the extent that these commitments have not yet been fulfilled,; and
7. CARB's commitments to propose certain defined measures, as listed in Table B–1 on page 1 of Appendix B of the 2011 Progress Report to the extent that these commitments have not yet been fulfilled and to achieve aggregate emission reductions of NO_X, VOC, direct $PM_{2.5}$ and SO_X by 2014 sufficient to provide for attainment of the 1997 $PM_{2.5}$ NAAQS as described in CARB Resolution 07–28, Attachment B at p. 3–5, the 2009 State Strategy Status Report, p. 21, and in Table 3 above.

In addition, EPA concurs with the State's determination under 40 CFR 51.1002(c) that NO_X, SO_X, and VOC are attainment plan precursors and that ammonia is not an attainment plan precursor for attainment of the 1997 $PM_{2.5}$ NAAQS in the South Coast nonattainment area.

EPA also grants, pursuant to CAA section 172(a)(2)(A) and 40 CFR 51.1004(a), California's request to extend the attainment date for the South Coast $PM_{2.5}$ nonattainment area to April 5, 2015.

Finally, EPA disapproves under CAA section 110(k)(3) the contingency measure provisions in the South Coast 2007 AQMP as failing to meet the requirements of CAA section 172(c)(9) and 40 CFR 51.1012. We also reject the assignment of 10 tpd of NO_X to the federal government.

B. CAA Consequences of the Final Disapproval of the Contingency Measure Provisions

EPA is committed to working with the District, CARB and SCAG to resolve the remaining issues with the SIP that make the current $PM_{2.5}$ attainment SIP for the South Coast nonattainment area not fully approvable under the CAA and the $PM_{2.5}$ implementation rule. However, because we are finalizing the disapproval of the contingency measure provisions in the South Coast 2007 AQMP, the offset sanction in CAA section 179(b)(2) will apply in the South Coast $PM_{2.5}$ nonattainment area 18 months after the effective date of today's final disapproval. The highway funding sanctions in CAA section 179(b)(1) will apply in the area six months after the offset sanction is imposed. Neither sanction will be imposed under the CAA if California submits and we approve prior to the implementation of sanctions, SIP revisions that correct the deficiencies identified in our proposed action. In addition to the sanctions, CAA section 110(c)(1) provides that EPA must promulgate a federal implementation plan addressing the deficient elements in the $PM_{2.5}$ SIP for the South Coast nonattainment area two years after January 9, 2012, the effective date of this rule, if we have not approved a SIP revision correcting the deficiencies within the two years.

Because we are approving the RFP and attainment demonstrations and the motor vehicle emission budgets, we are issuing a protective finding under 40 CFR 93.120(a)(3) to the disapproval of the contingency measures. Without a protective finding, final disapproval would result in a conformity freeze under which only projects in the first four years of the most recent conforming RTP and TIP can proceed. During a freeze, no new RTPs, TIPs or RTP/TIP amendments can be found to conform. See 40 CFR 93.120(a)(2). Under a protective finding, however, final disapproval of the contingency measures will not result in a transportation conformity freeze in the South Coast $PM_{2.5}$ nonattainment area.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

B. Paperwork Reduction Act

This action does not impose an 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).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP approvals and partial approvals/partial disapprovals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because this partial approval/partial disapproval action does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal

inquiry into the economic reasonableness of State action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the partial approval/partial disapproval action promulgated does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). 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.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely approves a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. It 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. Thus, Executive Order 13175 does not apply to this rule.

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

EPA interprets Executive Order 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 Executive Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045, because it approves a State rule implementing a Federal standard.

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

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (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 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

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

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

EPA lacks the discretionary authority to address environmental justice in this rulemaking. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely approves certain State requirements for inclusion into the SIP under CAA section 110 and subchapter I, part D and disapproves others, and will not in-and-of itself create any new requirements. Accordingly, it 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.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. section 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. section 804(2). This rule will be effective on January 9, 2012.

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 9, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Oxides of nitrogen, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 30, 2011.

Jared Blumenfeld,

Regional Administrator, Region 9.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52 [AMENDED]

■ 1. The authority citation for Part 52 continues to read as follows:

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(397), (c)(398), (c)(399), (c)(400), and (c)(401) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(397) A plan was submitted on November 16, 2007 by the Governor's designee.

(i) [Reserved]

(ii) Additional Material.

(A) State of California Air Resources Board.

(*1*) Proposed State Strategy for California's 2007 State Implementation Plan, adopted on September 27, 2007.

(2) CARB Resolution No. 07–28 with Attachments A and B, September 27, 2007. Commitment to achieve the total emissions reductions necessary to attain the Federal standards in the South Coast air basin, which represent 6.1 tons per day (tpd) of direct $PM_{2.5}$, 38.1 tpd of SO_X, 33.6 tpd of VOC and 118.2 tpd of nitrogen oxides by 2014 for purposes of the 1997 $PM_{2.5}$ NAAQS, as described in Resolution No. 07–28 at Attachment B, pp. 3–5, and modified by CARB Resolution No. 09–34 (April 24, 2009) adopting the ''Status Report on the State Strategy for California's 2007 State Implementation Plan (SIP) and Proposed Revision to the SIP reflecting Implementation of the 2007 State Strategy,'' and by CARB Resolution 11–24 (April 28, 2011) adopting the ''Progress Report on Implementation of $PM_{2.5}$ State Implementation Plans (SIP) for the South Coast and San Joaquin Valley Air Basins and Proposed SIP Revisions.''.

(3) Executive Order S–07–002, Relating to Approval of the State Strategy for California's State Implementation Plan (SIP) for the Federal 8-Hour Ozone and $PM_{2.5}$ Standards, November 16, 2007.

(398) A plan was submitted on November 28, 2007 by the Governor's designee.

(i) [Reserved]

(ii) Additional Material.

(A) South Coast Air Quality Management District.

(*1*) Final South Coast 2007 Air Quality Management Plan, adopted on June 1, 2007.

(*2*) SCAQMD Governing Board Resolution 07–9, ''A Resolution of the Governing Board of the South Coast Air Quality Management District certifying the final Program Environmental Impact Report for the 2007 Air Quality Management Plan, adopting the Final 2007 Air Quality Management Plan (AQMP), to be referred to after adoption as the Final 2007 AQMP, and to fulfill USEPA Requirements for the use of emissions reductions form the Carl Moyer Program in the State Implementation Plan,'' June 1, 2007. Commitments to achieve emissions reductions (including emissions reductions of 2.9 tons per day (tpd) of direct $PM_{2.5}$, 2.9 tpd of SO_X, 10.4 tpd of VOC and 10.8 tpd of nitrogen oxides by 2014) as described by SCAQMD Governing Board Resolution No. 07–9, p. 10, June 1, 2007, and modified by SCAQMD Governing Board Resolution 11–9, p. 3, March 4, 2011, and commitments to adopt and submit control measures as described in Table 4–2A of the Final 2007 AQMP, as amended March 4, 2011.

(B) State of California Air Resources Board.

(*1*) CARB Resolution No. 07–41, September 27, 2007.

(399) An amended plan was submitted on May 18, 2011 by the Governor's designee.

(i) [Reserved]

(ii) Additional Material.

(A) State of California Air Resources Board.

(*1*) Progress Report on Implementation of $PM_{2.5}$ State Implementation Plans (SIP) for the South Coast and San Joaquin Valley Air Basins and Proposed SIP Revisions, Appendices B and C. Release Date: March 29, 2011.

(*2*) CARB Resolution No. 11–24, April 28, 2011.

(*3*) Executive Order S–11–010, ''Approval of Revisions to the Fine Particulate Matter State Implementation Plans for the South Coast Air Quality Management Plans for the South Coast Air Quality Management District and the San Joaquin Valley Air Pollution Control District,'' May 18, 2011.

(400) An amended plan was submitted on May 19, 2011 by the Governor's designee.

(i) [Reserved]

(ii) Additional Material.

(A) South Coast Air Quality Management District.

(*1*) Revisions to the 2007 $PM_{2.5}$ and Ozone State Implementation Plan for South Coast Air Basin and Coachella Valley (SIP Revisions), adopted on March 4, 2011.

(*2*) SCAQMD Governing Board Resolution 11–9, ''A Resolution of the South Coast Air Quality Management District Governing Board (AQMD) certifying the Addendum to Final Program Environmental Impact Report (PEIR) for the 2007 Air Quality Management Plan, (AQMP), for a revision to the Final 2007 AQMP, to be referred to after adoption as the Revision to the Final 2007 AQMP,'' March 4, 2011.

(B) State of California Air Resources Board.

(*1*) CARB Resolution No. 11–24, April 28, 2011. Commitment to propose measures as described in Appendix B of the ''Progress Report on the Implementation of the $PM_{2.5}$ State Implementation Plans (SIP) for the South Coast and San Joaquin Valley Air Basins and Proposed SIP Revisions.''

(401) An amended plan was submitted on July 29, 2011 by the Governor's designee.

(i) [Reserved]

(ii) Additional Material.

(A) State of California Air Resources Board.

(*1*) 8-Hour Ozone State Implementation Plan Revisions and Technical Revisions to the $PM_{2.5}$ State Implementation Plan Transportation Conformity Budgets for the South Coast and San Joaquin Valley Air Basins, Appendix A, page A–5 (dated June 20, 2011), adopted July 21, 2011.

(*2*) CARB Resolution No. 11–22, July 21, 2011.

(*3*) Executive Order S–11–016, ''Approval of Revisions to the 8–Hour Ozone State Implementation Plans and Technical Revisions to the $PM_{2.5}$ State Implementation Plan Transportation Conformity Budgets for the South Coast San Joaquin Valley Air Basin,'' July 21, 2011.

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Part VI

Department of Commerce

National Oceanic and Atmospheric Administration

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to an Exploration Drilling Program in the Chukchi Sea, Alaska; Notice

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA811

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to an Exploration Drilling Program in the Chukchi Sea, Alaska

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS received an application from Shell Offshore Inc. (Shell) for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to offshore exploration drilling on Outer Continental Shelf (OCS) leases in the Chukchi Sea, Alaska. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to Shell to take, by Level B harassment only, 12 species of marine mammals during the specified activity.

DATES: Comments and information must be received no later than December 9, 2011.

ADDRESSES: Comments on the application should be addressed to Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing email comments is *ITP.Nachman@noaa.gov.* NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 10-megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* 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.

A copy of the application, which contains several attachments, including Shell's marine mammal mitigation and monitoring plan and Plan of Cooperation, used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Candace Nachman, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [''Level A harassment'']; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [''Level B harassment''].

Summary of Request

NMFS received an application on June 30, 2011, from Shell for the taking, by harassment, of marine mammals incidental to offshore exploration drilling on OCS leases in the Chukchi Sea, Alaska. NMFS reviewed Shell's application and identified a number of issues requiring further clarification. After addressing comments from NMFS, Shell modified its application and submitted a revised application on September 12, 2011. NMFS carefully evaluated Shell's application, including their analyses, and determined that the application is complete. The September 12, 2011, application is the one available for public comment (see **ADDRESSES**) and considered by NMFS for this proposed IHA.

Shell plans to drill up to three exploration wells at three possible drill sites and potentially a partial well at a fourth drill site on OCS leases offshore in the Chukchi Sea, Alaska, during the 2012 Arctic open-water season (July through October). Impacts to marine mammals may occur from noise produced by the drillship, zero-offset vertical seismic profile (ZVSP) surveys, and supporting vessels (including icebreakers) and aircraft. Shell has requested an authorization to take 13 marine mammal species by Level B harassment. However, the narwhal (*Monodon monoceros*) is not expected to be found in the activity area. Therefore, NMFS is proposing to authorize take of 12 marine mammal species, by Level B harassment, incidental to Shell's offshore exploration drilling in the Chukchi Sea. These species include: Beluga whale (*Delphinapterus leucas*); bowhead whale (*Balaena mysticetus*); gray whale (*Eschrichtius robustus*); killer whale (*Orcinus orca*); minke whale (*Balaenoptera acutorostrata*); fin whale (*Balaenoptera physalus*); humpback whale (*Megaptera novaeangliae*); harbor porpoise (*Phocoena phocoena*); bearded seal (*Erignathus barbatus*); ringed seal (*Phoca hispida*); spotted seal (*P. largha*); and ribbon seal (*Histriophoca fasciata*).

Description of the Specified Activity and Specified Geographic Region

Shell plans to conduct an offshore exploration drilling program on U.S. Department of the Interior, Bureau of Ocean Energy Management (BOEM, formerly the Minerals Management

Service) Alaska OCS leases located greater than 64 mi (103 km) from the Chukchi Sea coast during the 2012 open-water season. The leases were acquired during the Chukchi Sea Oil and Gas Lease Sale 193 held in February 2008. During the 2012 drilling program, Shell plans to drill up to three exploration wells at three drill sites and potentially a partial well at a fourth drill site at the prospect known as Burger. See Figure 1–1 in Shell's application for the lease block and drill site locations (see **ADDRESSES**). All drilling is planned to be vertical.

Exploration Drilling

All of the possible Chukchi Sea offshore drill sites are located between 65 and 78 mi (105 and 125.5 km) from the Chukchi coast in water depths between 143 and 150 ft (43.7 and 45.8 m). Table 2–1 in Shell's application provides the coordinates for the drill sites (see **ADDRESSES**). All of the proposed wells would be at Shell's Burger prospect. Shell has identified a total of six lease blocks on this prospect where drilling could occur.

(1) Drilling Vessel

Shell proposes to use the ice strengthened drillship *Discoverer* to drill the wells. The *Discoverer* is a true drillship and is a largely self-contained drillship that offers full accommodations for a crew of up to 140 persons. The *Discoverer* is 514 ft (156.7 m) long with a maximum height (above keel) of 274 ft (83.7 m). It is an anchored drillship with an 8-point anchored mooring system and would likely have a maximum anchor radius of 2,969–2,986 ft (905–910 m) at either the Sivulliq or Torpedo drill sites. While on location at the drill sites, the *Discoverer* will be affixed to the seafloor using eight 7,000 kg (7.7 ton) Stevpris anchors arranged in a radial array. The underwater fairleads prevent ice fouling of the anchor lines. Turret mooring allows orientation of the vessel's bow into the prevailing ice drift direction to present minimum hull exposure to drifting ice. The vessel is rotated around the turret by hydraulic jacks. Rotation can be augmented by the use of the fitted bow and stern thrusters. The hull has been reinforced for ice resistance. Ice-strengthened sponsons have been retrofitted to the ship's hull. Additional details about the drillship can be found in Attachment A of Shell's IHA application (see **ADDRESSES**).

(2) Support Vessels

During the 2012 drilling season, the *Discoverer* will be attended by eight vessels that will be used for ice management, anchor handling, oil spill response (OSR), refueling, resupply, and servicing of the exploration drilling operations. The ice-management vessels will consist of an icebreaker and an anchor handler. The OSR vessels supporting the exploration drilling program include a dedicated OSR barge and an OSR vessel, both of which have associated smaller workboats, an oil spill tanker, and a containment barge. Tables 1–2a and 1–2b in Shell's application provide a list of the support and OSR vessels that will be used during the drilling program.

Shell's base plan is for the ice management vessel and the anchor handler, or similar vessels, the oil spill vessels (OSVs), and potentially some of the OSR vessels to accompany the *Discoverer* traveling north from Dutch Harbor through the Bering Strait, on or about July 1, 2012, then into the Chukchi Sea, before arriving on location approximately July 4. Exploration drilling is expected to be complete by October 31, 2012. At the completion of the drilling season, one or two ice-management vessels, along with various support vessels, such as the OSR fleet, will accompany the *Discoverer* as it travels south out of the Chukchi Sea and through the Bering Strait to Dutch Harbor. Subject to ice conditions, alternate exit routes may be considered.

The *M/V Fennica* (*Fennica*), or a similar vessel, will serve as the primary ice management vessel, and the *M/V Tor Viking* (*Tor Viking*), or a similar vessel, will serve as the primary anchor handling vessel in support of the *Discoverer.* The *Fennica* and *Tor Viking* will remain at a location approximately 25 mi (40 km) upwind and upcurrent of the drillship when not in use. Any ice management would be expected to occur within 0.6–6 mi (1–9.6 km) upwind from the *Discoverer.* When managing ice, the vessels will generally be confined to a 40° arc up to 3.1 mi (4.9 km) upwind originating at the drilling vessel (see Figure 1–3 in Shell's application). It is anticipated that the ice management vessels will be managing ice for up to 38% of the time when within 25 mi (40 km) of the *Discoverer.* Active ice management involves using the ice management vessel to steer larger floes so that their path does not intersect with the drill site. Around-the-clock ice forecasting using real-time satellite coverage (available through Shell Ice and Weather Advisory Center [SIWAC]) will support the ice management duties. The proposed exploration drilling operations will require two OSVs to resupply the *Discoverer* with exploration drilling materials and supplies from facilities in Dutch Harbor and fuel.

(3) Aircraft

Offshore operations will be serviced by helicopters operated out of onshore support base locations. A Sikorsky S–92 or Eurocopter EC225 capable of transporting 10 to 12 persons will be used to transport crews between the onshore support base and the drillship. The helicopters will also be used to haul small amounts of food, materials, equipment, and waste between vessels and the shorebase. The helicopter will be housed at facilities at the Barrow airport. Shell will have a second helicopter for Search and Rescue (SAR). The SAR helicopter is expected to be a Sikorsky S–61, S–92, Eurocopter EC225, or similar model. This aircraft will stay grounded at the Barrow shorebase location except during training drills, emergencies, and other non-routine events.

A fixed wing propeller or turboprop aircraft, such as a Saab 340–B 30-seat, Beechcraft 1900, or deHavilland Dash8 will be used to routinely transport crews, materials, and equipment between the shorebase and hub airports such as Barrow or Fairbanks. A fixed wing aircraft, deHavilland Twin Otter (DHC–6) will be used for marine mammal monitoring flights. Table 1–2c in Shell's application presents the aircraft planned to support the exploration drilling program.

Zero-Offset Vertical Seismic Profile

At the end of each drill hole, Shell may conduct a geophysical survey referred to as ZVSP at each drill site where a well is drilled in 2012. During ZVSP surveys, an airgun array is deployed at a location near or adjacent to the drilling vessel, while receivers are placed (temporarily anchored) in the wellbore. The sound source (airgun array) is fired repeatedly, and the reflected sonic waves are recorded by receivers (geophones) located in the wellbore. The geophones, typically in a string, are then raised up to the next interval in the wellbore, and the process is repeated until the entire wellbore has been surveyed. The purpose of the ZVSP is to gather geophysical information at various depths, which can then be used to tie-in or ground-truth geophysical information from the previous seismic surveys with geological data collected within the wellbore.

Shell intends to conduct a particular form of vertical seismic profile known as a ZVSP, in which the sound source is maintained at a constant location near the wellbore (see Figure 1–2 in Shell's

application). A typical sound source that would be used by Shell in 2012 is the ITAGA eight-airgun array, which consists of four 150 in^3 airguns and four 40 in^3 airguns. These airguns can be activated in any combination, and Shell intends to utilize the minimum airgun volume required to obtain an acceptable signal. Current specifications of the array are provided in Table 1–3 of Shell's application. The airgun array is depicted within its frame or sled, which is approximately 6 ft x 5 ft x 10 ft (1.8 m x 1.5 m x 3 m) (see photograph in Shell's application). Typical receivers would consist of a Schlumberger wireline four level Vertical Seismic Imager (VSI) tool, which has four receivers 50-ft (15-m) apart.

A ZVSP survey is normally conducted at each well after total depth is reached but may be conducted at a shallower depth. For each survey, Shell plans to deploy the airgun array over the side of the *Discoverer* with a crane (sound source will be 50–200 ft [15–61 m] from the wellhead depending on crane location) to a depth of approximately 10–23 ft (3–7 m) below the water surface. The VSI, with its four receivers, will be temporarily anchored in the wellbore at depth. The sound source will be pressured up to 2,000 pounds per square inch (psi) and activated 5–7 times at approximately 20-second intervals. The VSI will then be moved to the next interval of the wellbore and reanchored, after which the airgun array will again be activated 5–7 times. This process will be repeated until the entire well bore is surveyed in this manner. The interval between anchor points for the VSI usually is between 200 and 300 ft (61 and 91 m). A normal ZVSP survey is conducted over a period of about 10–14 hours, depending on the depth of the well and the number of anchoring points. Therefore, considering a few different scenarios, the airgun array could be fired between 117 and 245 times during the 10–14 hour period. For example, a 7,000-ft (2,133.6-m) well with 200-ft (61-m) spacing and seven activations per station would result in the airgun array being fired 245 times to survey the entire well. That same 7,000-ft (2,133.6-m) well with 300-ft (91-m) spacing and five activations would result in the airgun array being fired 117 times to survey the entire well. The remainder of the time during those 10–14 hours when the airgun is not firing is used to move and anchor the geophone array.

Ice Management and Forecasting

Shell recognizes that the drilling program is located in an area that is characterized by active sea ice movement, ice scouring, and storm surges. In anticipation of potential ice hazards that may be encountered, Shell has developed and will implement an Ice Management Plan (IMP; see Attachment B in Shell's IHA application) to ensure real-time ice and weather forecasting is conducted in order to identify conditions that might put operations at risk and will modify its activities accordingly. The IMP also contains ice threat classification levels depending on the time available to suspend drilling operations, secure the well, and escape from advancing hazardous ice. Real-time ice and weather forecasting will be available to operations personnel for planning purposes and to alert the fleet of impending hazardous ice and weather conditions. Ice and weather forecasting is provided by SIWAC. The center is continuously manned by experienced personnel, who rely on a number of data sources for ice forecasting and tracking, including:

- Radarsat and Envisat data—satellites with Synthetic Aperture Radar, providing all-weather imagery of ice conditions with very high resolution;
- Moderate Resolution Imaging Spectroradiometer—a satellite providing lower resolution visual and near infrared imagery;
- Aerial reconnaissance—provided by specially deployed fixed wing or rotary wing aircraft for confirmation of ice conditions and position;
- Reports from ice specialists on the ice management and anchor handling vessels and from the ice observer on the drillship;
- Incidental ice data provided by commercial ships transiting the area; and
- Information from NOAA ice centers and the University of Colorado.

Drift ice will be actively managed by ice management vessels, consisting of an ice management vessel and an anchor handling vessel. Ice management for safe operation of Shell's planned exploration drilling program will occur far out in the OCS, remote from the vicinities of any routine marine vessel traffic in the Chukchi Sea causing no threat to public safety or services that occur near to shore. Shell vessels will also communicate movements and activities through the 2012 North Slope Communications Centers. Management of ice by ice management vessels will occur during a drilling season predominated by open water and thus is not expected to contribute to ice hazards, such as ridging, override, or pileup in an offshore or nearshore environment.

The ice-management/anchor handling vessels would manage the ice by deflecting any ice floes that could affect the *Discoverer* when it is drilling and would also handle the *Discoverer's* anchors during connection to and separation from the seafloor. When managing ice, the ice management and anchor handling vessels will generally be operating at a 40° arc up to 3.1 mi (4.9 km) upwind originating at the *Discoverer* (see Figure 1–3 in Shell's application).

The ice-management/anchor handling vessels would manage any ice floes upwind of the *Discoverer* by deflecting those that could affect the *Discoverer* when it is on location conducting exploration drilling operations. The ice-management/anchor handling vessels would also manage the *Discoverer's* anchors during connection to and separation from the seafloor. The ice floe frequency and intensity are unpredictable and could range from no ice to ice sufficiently dense that the fleet has insufficient capacity to continue operating, and the *Discoverer* would need to disconnect from its anchors and move off site. If ice is present, ice management activities may be necessary in early July and towards the end of operations in late October, but it is not expected to be needed throughout the proposed drilling season. Shell has indicated that when ice is present at the drill site, ice disturbance will be limited to the minimum needed to allow drilling to continue. First-year ice (*i.e.,* ice that formed in the most recent autumn-winter period) will be the type most likely to be encountered. The ice management vessels will be tasked with managing the ice so that it will flow easily around and past the *Discoverer* without building up in front of or around it. This type of ice is managed by the ice management vessel continually moving back and forth across the drift line, directly up-drift of the *Discoverer* and making turns at both ends. During ice management, the vessel's propeller is rotating at approximately 15–20 percent of the vessel's propeller rotation capacity. Ice management occurs with slow movements of the vessel using lower power and therefore slower propeller rotation speed (*i.e.,* lower cavitation), allowing for fewer repositions of the vessel, thereby reducing cavitation effects in the water. Occasionally, there may be multi-year ice (*i.e.,* ice that has survived at least one summer melt season) ridges that would be managed at a much slower speed than that used to manage first-year ice.

During Chukchi Sea exploration drilling operations, Shell has indicated

that they do not intend to conduct any icebreaking activities; rather, Shell would deploy its support vessels to manage ice as described here. As detailed in Shell's IMP (see Attachment B of Shell's IHA application), actual breaking of ice would occur only in the unlikely event that ice conditions in the immediate vicinity of operations create a safety hazard for the drilling vessel. In such a circumstance, operations personnel will follow the guidelines established in the IMP to evaluate ice conditions and make the formal designation of a hazardous, ice alert condition, which would trigger the procedures that govern any actual icebreaking operations. Historical data relative to ice conditions in the Chukchi Sea in the vicinity of Shell's planned operations, and during the timeframe for those operations, establish that there is a very low probability (*e.g.,* minimal) for the type of hazardous ice conditions that might necessitate icebreaking (*e.g.,* records of the National Naval Ice Center archives). This probability could be greater at the shoulders of the drilling season (early July or late October); therefore, for purposes of evaluating possible impacts of the planned activities, Shell has assumed limited icebreaking activities for a very limited period of time, and estimated incidental takes of marine mammals from such activities.

Timeframe of Activities

Shell proposes to mobilize the drillship and its fleet of vessels from Dutch Harbor and to travel through the Bering Strait on or about July 1, 2012. The vessels would then travel into the Chukchi Sea, arriving on location at the Burger prospect in the Chukchi Sea on approximately July 4, 2012. Shell proposes to conduct the exploration drilling program through October 31, 2012. At the end of the exploration drilling season, the *Discoverer* and its support vessels would travel south out of the Chukchi Sea through the Bering Strait to Dutch Harbor. Subject to ice conditions, alternate exit routes may be considered.

Shell anticipates that the exploration drilling program will require approximately 32 days per well, including mudline cellar construction. Therefore, if Shell is able to drill three exploration wells during the 2012 open-water season, it would require a total of 96 days. If Shell is able to drill part of a fourth well, it would add an additional 1–32 days to the season but would not extend beyond October 31, 2012. These estimates do not include any downtime for weather or other operational delays. Time to conduct the ZVSP surveys for each well is included in the 32 drilling days for each well. Shell also assumes approximately 10 additional days will be needed for transit, drillship mobilization and mooring, drillship moves between locations, and drillship demobilization.

Activities associated with the 2012 Chukchi Sea exploration drilling program include operation of the *Discoverer,* associated support vessels, crew change support, and resupply, ZVSP surveys, and icebreaking. The *Discoverer* will remain at the location of the designated exploration drill sites except when mobilizing and demobilizing to and from the Chukchi Sea, transiting between drill sites, and temporarily moving off location if it is determined ice conditions require such a move to ensure the safety of personnel and/or the environment in accordance with Shell's IMP. The anchor handler and OSR vessels will remain in close proximity to the drillship during drilling operations.

Exploratory Drilling Program Sound Characteristics

Potential impacts to marine mammals could occur from the noise produced by the drillship and its support vessels (including the icebreakers), aircraft, and the airgun array during ZVSP surveys. The drillship produces continuous noise into the marine environment. NMFS currently uses a threshold of 120 dB re 1 μPa (rms) for the onset of Level B harassment from continuous sound sources. This 120 dB threshold is also applicable for the icebreakers when actively managing or breaking ice. The drilling vessel to be used will be the *Discoverer.* The airgun array proposed to be used by Shell for the ZVSP surveys produces pulsed noise into the marine environment. NMFS currently uses a threshold of 160 dB re 1 μPa (rms) for the onset of Level B harassment from pulsed sound sources.

(1) Drilling Sounds

Exploratory drilling will be conducted from the *Discoverer,* a vessel specifically designed for such operations in the Arctic. Underwater sound propagation results from the use of generators, drilling machinery, and the rig itself. Received sound levels during vessel-based operations may fluctuate depending on the specific type of activity at a given time and aspect from the vessel. Underwater sound levels may also depend on the specific equipment in operation. Lower sound levels have been reported during well logging than during drilling operations (Greene, 1987b), and underwater sound levels appeared to be lower at the bow and stern aspects than at the beam (Greene, 1987a).

Most drilling sounds generated from vessel-based operations occur at relatively low frequencies below 600 Hz although tones up to 1,850 Hz were recorded by Greene (1987a) during drilling operations in the Beaufort Sea. At a range of 558 ft (170 m) the 20–1000 Hz band level was 122–125 dB for the drillship *Explorer I.* Underwater sound levels were slightly higher (134 dB) during drilling activity from the *Northern Explorer II* at a range of 656 ft (200 m), although tones were only recorded below 600 Hz. Underwater sound measurements from the *Kulluk* at 0.62 mi (1 km) were higher (143 dB) than from the other two vessels.

Sound measurements from the *Discoverer* have not previously been conducted in the Arctic. However, measurements of sounds produced by the *Discoverer* were made in the South China Sea in 2009 (Austin and Warner, 2010). The results of those measurements were used to model the sound propagation from the *Discoverer* (including a nearby support vessel) at planned exploration drilling locations in the Chukchi Sea (Warner and Hannay, 2011). Broadband source levels of sounds produced by the *Discoverer* varied by activity and direction from the ship but were generally between 177 and 185 dB re 1 μPa at 1 m (rms) (Austin and Warner, 2010). Once on location at the drill sites in Chukchi Sea, Shell plans to take measurements of the drillship to quantify the absolute sound levels produced by drilling and to monitor their variations with time, distance, and direction from the drilling vessel.

(2) Vessel Sounds

In addition to the drillship, various types of vessels will be used in support of the operations, including ice management vessels, anchor handlers, offshore supply vessels, barges and tugs, and OSR vessels. Sounds from boats and vessels have been reported extensively (Greene and Moore, 1995; Blackwell and Greene, 2002, 2005, 2006). Numerous measurements of underwater vessel sound have been performed in support of recent industry activity in the Chukchi and Beaufort Seas. Results of these measurements were reported in various 90-day and comprehensive reports since 2007 (*e.g.,* Aerts *et al.,* 2008; Hauser *et al.,* 2008; Brueggeman, 2009; Ireland *et al.,* 2009). For example, Garner and Hannay (2009) estimated sound pressure levels of 100 dB at distances ranging from approximately 1.5 to 2.3 mi (2.4 to 3.7 km) from various types of barges. MacDonald *et*

al. (2008) estimated higher underwater sound pressure levels (SPLs) from the seismic vessel *Gilavar* of 120 dB at approximately 13 mi (21 km) from the source, although the sound level was only 150 dB at 85 ft (26 m) from the vessel. Like other industry-generated sound, underwater sound from vessels is generally at relatively low frequencies.

The primary sources of sounds from all vessel classes are propeller cavitation, propeller singing, and propulsion or other machinery. Propeller cavitation is usually the dominant noise source for vessels (Ross, 1976). Propeller cavitation and singing are produced outside the hull, whereas propulsion or other machinery noise originates inside the hull. There are additional sounds produced by vessel activity, such as pumps, generators, flow noise from water passing over the hull, and bubbles breaking in the wake. Icebreakers contribute greater sound levels during icebreaking activities than ships of similar size during normal operation in open water (Richardson *et al.,* 1995a). This higher sound production results from the greater amount of power and propeller cavitation required when operating in thick ice.

Measurements of the icebreaking supply ship *Robert Lemeur* pushing and breaking ice during exploration drilling operations in the Beaufort Sea in 1986 resulted in an estimated broadband source level of 193 dB re 1 μPa at 1 m (Greene, 1987a; Richardson *et al.,* 1995a).

Sound levels during ice management activities would not be as intense as during icebreaking, and the resulting effects to marine species would be less significant in comparison. During ice management, the vessel's propeller is rotating at approximately 15–20 percent of the vessel's propeller rotation capacity. Instead of actually breaking ice, during ice management, the vessel redirects and repositions the ice by pushing it away from the direction of the drillship at slow speeds so that the ice floe does not slip past the vessel bow. Basically, ice management occurs at slower speed, lower power, and slower propeller rotation speed (*i.e.,* lower cavitation), allowing for fewer repositions of the vessel, thereby reducing cavitation effects in the water than would occur during icebreaking. Once on location at the drill sites in the Chukchi Sea, Shell plans to measure the sound levels produced by vessels operating in support of drilling operations. These vessels will include crew change vessels, tugs, ice management vessels, and OSR vessels.

(3) Aircraft Sound

Helicopters may be used for personnel and equipment transport to and from the drillship. Under calm conditions, rotor and engine sounds are coupled into the water within a 26° cone beneath the aircraft. Some of the sound will transmit beyond the immediate area, and some sound will enter the water outside the 26° area when the sea surface is rough. However, scattering and absorption will limit lateral propagation in the shallow water.

Dominant tones in noise spectra from helicopters are generally below 500 Hz (Greene and Moore, 1995). Harmonics of the main rotor and tail rotor usually dominate the sound from helicopters; however, many additional tones associated with the engines and other rotating parts are sometimes present.

Because of doppler shift effects, the frequencies of tones received at a stationary site diminish when an aircraft passes overhead. The apparent frequency is increased while the aircraft approaches and is reduced while it moves away.

Aircraft flyovers are not heard underwater for very long, especially when compared to how long they are heard in air as the aircraft approaches an observer. Helicopters flying to and from the drillship will generally maintain straight-line routes at altitudes of at least 1,500 ft (457 m) above sea level, thereby limiting the received levels at and below the surface. Aircraft travel would be controlled by Federal Aviation Administration approved flight paths.

(4) Vertical Seismic Profile Sound

A typical eight airgun array (4×40 in^3 airguns and 4×150 in^3 airguns, for a total discharge volume of 760 in^3) would be used to perform ZVSP surveys, if conducted after the completion of each exploratory well. Typically, a single ZVSP survey will be performed when the well has reached proposed total depth or final depth; although, in some instances, a prior ZVSP will have been performed at a shallower depth. A typical survey will last 10–14 hours, depending on the depth of the well and the number of anchoring points, and include firings of the full array, plus additional firing of a single 40-in^3 airgun to be used as a ''mitigation airgun'' while the geophones are relocated within the wellbore. The source level for the airgun array proposed for use by Shell will differ based on source depth. At a depth of 9.8 ft (3 m), the SPL is 238 dB re 1 μPa at 1 m, and at a depth of 16.4 ft (5 m), the SPL is 241 dB re 1 μPa at 1 m, with most energy between 20 and 140 Hz.

Airguns function by venting high-pressure air into the water. The pressure signature of an individual airgun consists of a sharp rise and then fall in pressure, followed by several positive and negative pressure excursions caused by oscillation of the resulting air bubble. The sizes, arrangement, and firing times of the individual airguns in an array are designed and synchronized to suppress the pressure oscillations subsequent to the first cycle. Typical high-energy airgun arrays emit most energy at 10–120 Hz. However, the pulses contain significant energy up to 500–1,000 Hz and some energy at higher frequencies (Goold and Fish, 1998; Potter *et al.,* 2007).

Although there will be several support vessels in the drilling operations area, NMFS considers the possibility of collisions with marine mammals highly unlikely. Once on location, the majority of the support vessels will remain in the area of the drillship throughout the 2012 drilling season and will not be making trips between the shorebase and the offshore vessels. When not needed for ice management/icebreaking operations, the icebreaker and anchor handler will remain approximately 25 mi (40 km) upwind and upcurrent of the drillship. Any ice management/icebreaking activity would be expected to occur at a distance of 0.6–12 mi (1–19 km) upwind and upcurrent of the drillship. As the crew change/resupply activities are considered part of normal vessel traffic and are not anticipated to impact marine mammals in a manner that would rise to the level of taking, those activities are not considered further in this document.

Description of Marine Mammals in the Area of the Specified Activity

The Chukchi Sea supports a diverse assemblage of marine mammals, including: bowhead, gray, beluga, killer, minke, humpback, and fin whales; harbor porpoise; ringed, ribbon, spotted, and bearded seals; narwhals; polar bears (*Ursus maritimus*); and walruses (*Odobenus rosmarus divergens;* see Table 4–1 in Shell's application). The bowhead, humpback, and fin whales are listed as ''endangered'' under the Endangered Species Act (ESA) and as depleted under the MMPA. Certain stocks or populations of gray, beluga, and killer whales and spotted seals are listed as endangered or are proposed for listing under the ESA; however, none of those stocks or populations occur in the proposed activity area. On December 10, 2010, NMFS published a notice of

proposed threatened status for subspecies of the ringed seal (75 FR 77476) and a notice of proposed threatened and not warranted status for subspecies and distinct population segments of the bearded seal (75 FR 77496) in the **Federal Register.** Neither of these two ice seal species is considered depleted under the MMPA. Additionally, the ribbon seal is considered a ''species of concern'' under the ESA. Both the walrus and the polar bear are managed by the U.S. Fish and Wildlife Service (USFWS) and are not considered further in this proposed IHA notice.

Of these species, 12 are expected to occur in the area of Shell's proposed operations. These species include: The bowhead, gray, humpback, minke, fin, killer, and beluga whales; harbor porpoise; and the ringed, spotted, bearded, and ribbon seals. Beluga, bowhead, and gray whales, harbor porpoise, and ringed, bearded, and spotted seals are anticipated to be encountered more than the other marine mammal species mentioned here. The marine mammal species that is likely to be encountered most widely (in space and time) throughout the period of the proposed drilling program is the ringed seal. Encounters with bowhead and gray whales are expected to be limited to particular seasons, as discussed later in this document. Where available, Shell used density estimates from peer-reviewed literature in the application. In cases where density estimates were not readily available in the peer-reviewed literature, Shell used other methods to derive the estimates. NMFS reviewed the density estimate descriptions and articles from which estimates were derived and requested additional information to better explain the density estimates presented by Shell in its application. This additional information was included in the revised IHA application. The explanation for those derivations and the actual density estimates are described later in this document (see the ''Estimated Take by Incidental Harassment'' section).

The narwhal occurs in Canadian waters and occasionally in the Alaskan Beaufort Sea and the Chukchi Sea, but it is considered extralimital in U.S. waters and is not expected to be encountered. There are scattered records of narwhal in Alaskan waters, including reports by subsistence hunters, where the species is considered extralimital (Reeves *et al.,* 2002). Due to the rarity of this species in the proposed project area and the remote chance it would be affected by Shell's proposed Chukchi Sea drilling activities, this species is not discussed further in this proposed IHA notice.

Shell's application contains information on the status, distribution, seasonal distribution, abundance, and life history of each of the species under NMFS jurisdiction mentioned in this document. When reviewing the application, NMFS determined that the species descriptions provided by Shell correctly characterized the status, distribution, seasonal distribution, and abundance of each species. Please refer to the application for that information (see **ADDRESSES**). Additional information can also be found in the NMFS Stock Assessment Reports (SAR). The Alaska 2010 SAR is available at: *http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2010.pdf.*

Brief Background on Marine Mammal Hearing

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms have been derived using auditory evoked potentials, anatomical modeling, and other data, Southall *et al.* (2007) designate ''functional hearing groups'' for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. The functional groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range):

- Low frequency cetaceans (13 species of mysticetes): functional hearing is estimated to occur between approximately 7 Hz and 22 kHz (however, a study by Au *et al.* (2006) of humpback whale songs indicate that the range may extend to at least 24 kHz);
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High frequency cetaceans (eight species of true porpoises, six species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): functional hearing is estimated to occur between approximately 200 Hz and 180 kHz; and
- Pinnipeds in Water: functional hearing is estimated to occur between approximately 75 Hz and 75 kHz, with the greatest sensitivity between approximately 700 Hz and 20 kHz.

As mentioned previously in this document, 12 marine mammal species (four pinniped and eight cetacean species) are likely to occur in the proposed drilling area. Of the eight cetacean species likely to occur in Shell's project area, five are classified as low frequency cetaceans (*i.e.,* bowhead, gray, humpback, minke, and fin whales), two are classified as mid-frequency cetaceans (*i.e.,* beluga and killer whales), and one is classified as a high-frequency cetacean (*i.e.,* harbor porpoise) (Southall *et al.,* 2007).

Underwater audiograms have been obtained using behavioral methods for four species of phocinid seals: the ringed, harbor, harp, and northern elephant seals (reviewed in Richardson *et al.,* 1995a; Kastak and Schusterman, 1998). Below 30–50 kHz, the hearing threshold of phocinids is essentially flat down to at least 1 kHz and ranges between 60 and 85 dB re 1 μPa. There are few published data on in-water hearing sensitivity of phocid seals below 1 kHz. However, measurements for one harbor seal indicated that, below 1 kHz, its thresholds deteriorated gradually to 96 dB re 1 μPa at 100 Hz from 80 dB re 1 μPa at 800 Hz and from 67 dB re 1 μPa at 1,600 Hz (Kastak and Schusterman, 1998). More recent data suggest that harbor seal hearing at low frequencies may be more sensitive than that and that earlier data were confounded by excessive background noise (Kastelein *et al.,* 2009a,b). If so, harbor seals have considerably better underwater hearing sensitivity at low frequencies than do small odontocetes like belugas (for which the threshold at 100 Hz is about 125 dB).

Pinniped call characteristics are relevant when assessing potential masking effects of man-made sounds. In addition, for those species whose hearing has not been tested, call characteristics are useful in assessing the frequency range within which hearing is likely to be most sensitive. The four species of seals present in the study area, all of which are in the phocid seal group, are all most vocal during the spring mating season and much less so during late summer. In each species, the calls are at frequencies from several hundred to several thousand hertz—above the frequency range of the dominant noise components from most of the proposed oil exploration activities.

Cetacean hearing has been studied in relatively few species and individuals. The auditory sensitivity of bowhead, gray, and other baleen whales has not been measured, but relevant anatomical

and behavioral evidence is available. These whales appear to be specialized for low frequency hearing, with some directional hearing ability (reviewed in Richardson *et al.,* 1995a; Ketten, 2000). Their optimum hearing overlaps broadly with the low frequency range where exploration drilling activities, airguns, and associated vessel traffic emit most of their energy.

The beluga whale is one of the better-studied species in terms of its hearing ability. As mentioned earlier, the auditory bandwidth in mid-frequency odontocetes is believed to range from 150 Hz to 160 kHz (Southall *et al.,* 2007); however, belugas are most sensitive above 10 kHz. They have relatively poor sensitivity at the low frequencies (reviewed in Richardson *et al.,* 1995a) that dominate the sound from industrial activities and associated vessels. Nonetheless, the noise from strong low frequency sources is detectable by belugas many kilometers away (Richardson and Wursig, 1997). Also, beluga hearing at low frequencies in open-water conditions is apparently somewhat better than in the captive situations where most hearing studies were conducted (Ridgway and Carder, 1995; Au, 1997). If so, low frequency sounds emanating from drilling activities may be detectable somewhat farther away than previously estimated.

Call characteristics of cetaceans provide some limited information on their hearing abilities, although the auditory range often extends beyond the range of frequencies contained in the calls. Also, understanding the frequencies at which different marine mammal species communicate is relevant for the assessment of potential impacts from manmade sounds. A summary of the call characteristics for bowhead, gray, and beluga whales is provided next.

Most bowhead calls are tonal, frequency-modulated sounds at frequencies of 50–400 Hz. These calls overlap broadly in frequency with the underwater sounds emitted by many of the activities to be performed during Shell's proposed exploration drilling program (Richardson *et al.,* 1995a). Source levels are quite variable, with the stronger calls having source levels up to about 180 dB re 1 μPa at 1 m. Gray whales make a wide variety of calls at frequencies from < 100–2,000 Hz (Moore and Ljungblad, 1984; Dalheim, 1987).

Beluga calls include trills, whistles, clicks, bangs, chirps and other sounds (Schevill and Lawrence, 1949; Ouellet, 1979; Sjare and Smith, 1986a). Beluga whistles have dominant frequencies in the 2–6 kHz range (Sjare and Smith, 1986a). This is above the frequency range of most of the sound energy produced by the proposed exploratory drilling activities and associated vessels. Other beluga call types reported by Sjare and Smith (1986a,b) included sounds at mean frequencies ranging upward from 1 kHz.

The beluga also has a very well developed high frequency echolocation system, as reviewed by Au (1993). Echolocation signals have peak frequencies from 40–120 kHz and broadband source levels of up to 219 dB re 1 μPa-m (zero-peak). Echolocation calls are far above the frequency range of the sounds produced by the devices proposed for use during Shell's Chukchi Sea exploratory drilling program. Therefore, those industrial sounds are not expected to interfere with echolocation.

Potential Effects of the Specified Activity on Marine Mammals

The likely or possible impacts of the proposed exploratory drilling program in the Chukchi Sea on marine mammals could involve both non-acoustic and acoustic effects. Potential non-acoustic effects could result from the physical presence of the equipment and personnel. Petroleum development and associated activities introduce sound into the marine environment. Impacts to marine mammals are expected to primarily be acoustic in nature. Potential acoustic effects on marine mammals relate to sound produced by drilling activity, vessels, and aircraft, as well as the ZVSP airgun array. The potential effects of sound from the proposed exploratory drilling program might include one or more of the following: tolerance; masking of natural sounds; behavioral disturbance; non-auditory physical effects; and, at least in theory, temporary or permanent hearing impairment (Richardson *et al.,* 1995a). However, for reasons discussed later in this document, it is unlikely that there would be any cases of temporary, or especially permanent, hearing impairment resulting from these activities. As outlined in previous NMFS documents, the effects of noise on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.,* 1995a):

(1) The noise may be too weak to be heard at the location of the animal (*i.e.,* lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

(2) The noise may be audible but not strong enough to elicit any overt behavioral response;

(3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions such as vacating an area at least until the noise event ceases but potentially for longer periods of time;

(4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent, and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;

(6) If mammals remain in an area because it is important for feeding, breeding, or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

(7) Very strong sounds have the potential to cause a temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage.

Potential Acoustic Effects From Exploratory Drilling Activities

(1) Tolerance

Numerous studies have shown that underwater sounds from industry activities are often readily detectable by marine mammals in the water at distances of many kilometers. Numerous studies have also shown that marine mammals at distances more than a few kilometers away often show no apparent response to industry activities

of various types (Miller *et al.,* 2005; Bain and Williams, 2006). This is often true even in cases when the sounds must be readily audible to the animals based on measured received levels and the hearing sensitivity of that mammal group. Although various baleen whales, toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to underwater sound such as airgun pulses or vessels under some conditions, at other times mammals of all three types have shown no overt reactions (*e.g.,* Malme *et al.,* 1986; Richardson *et al.,* 1995; Madsen and Mohl, 2000; Croll *et al.,* 2001; Jacobs and Terhune, 2002; Madsen *et al.,* 2002; Miller *et al.,* 2005). In general, pinnipeds and small odontocetes seem to be more tolerant of exposure to some types of underwater sound than are baleen whales. Richardson *et al.* (1995a) found that vessel noise does not seem to strongly affect pinnipeds that are already in the water. Richardson *et al.* (1995a) went on to explain that seals on haul-outs sometimes respond strongly to the presence of vessels and at other times appear to show considerable tolerance of vessels, and Brueggeman *et al.* (1992, cited in Richardson *et al.,* 1995a) observed ringed seals hauled out on ice pans displaying short-term escape reactions when a ship approached within 0.25–0.5 mi (0.4–0.8 km).

(2) Masking

Masking is the obscuring of sounds of interest by other sounds, often at similar frequencies. Marine mammals are highly dependent on sound, and their ability to recognize sound signals amid other noise is important in communication, predator and prey detection, and, in the case of toothed whales, echolocation. Even in the absence of manmade sounds, the sea is usually noisy. Background ambient noise often interferes with or masks the ability of an animal to detect a sound signal even when that signal is above its absolute hearing threshold. Natural ambient noise includes contributions from wind, waves, precipitation, other animals, and (at frequencies above 30 kHz) thermal noise resulting from molecular agitation (Richardson *et al.,* 1995a). Background noise also can include sounds from human activities. Masking of natural sounds can result when human activities produce high levels of background noise. Conversely, if the background level of underwater noise is high (*e.g.,* on a day with strong wind and high waves), an anthropogenic noise source will not be detectable as far away as would be possible under quieter conditions and will itself be masked.

Although some degree of masking is inevitable when high levels of manmade broadband sounds are introduced into the sea, marine mammals have evolved systems and behavior that function to reduce the impacts of masking. Structured signals, such as the echolocation click sequences of small toothed whales, may be readily detected even in the presence of strong background noise because their frequency content and temporal features usually differ strongly from those of the background noise (Au and Moore, 1988, 1990). The components of background noise that are similar in frequency to the sound signal in question primarily determine the degree of masking of that signal.

Redundancy and context can also facilitate detection of weak signals. These phenomena may help marine mammals detect weak sounds in the presence of natural or manmade noise. Most masking studies in marine mammals present the test signal and the masking noise from the same direction. The sound localization abilities of marine mammals suggest that, if signal and noise come from different directions, masking would not be as severe as the usual types of masking studies might suggest (Richardson *et al.,* 1995a). The dominant background noise may be highly directional if it comes from a particular anthropogenic source such as a ship or industrial site. Directional hearing may significantly reduce the masking effects of these noises by improving the effective signal-to-noise ratio. In the cases of high-frequency hearing by the bottlenose dolphin, beluga whale, and killer whale, empirical evidence confirms that masking depends strongly on the relative directions of arrival of sound signals and the masking noise (Penner *et al.,* 1986; Dubrovskiy, 1990; Bain *et al.,* 1993; Bain and Dahlheim, 1994). Toothed whales, and probably other marine mammals as well, have additional capabilities besides directional hearing that can facilitate detection of sounds in the presence of background noise. There is evidence that some toothed whales can shift the dominant frequencies of their echolocation signals from a frequency range with a lot of ambient noise toward frequencies with less noise (Au *et al.,* 1974, 1985; Moore and Pawloski, 1990; Thomas and Turl, 1990; Romanenko and Kitain, 1992; Lesage *et al.,* 1999). A few marine mammal species are known to increase the source levels or alter the frequency of their calls in the presence of elevated sound levels (Dahlheim, 1987; Au, 1993; Lesage *et al.,* 1993, 1999; Terhune, 1999; Foote *et al.,* 2004; Parks *et al.,* 2007, 2009; Di Iorio and Clark, 2009; Holt *et al.,* 2009).

These data demonstrating adaptations for reduced masking pertain mainly to the very high frequency echolocation signals of toothed whales. There is less information about the existence of corresponding mechanisms at moderate or low frequencies or in other types of marine mammals. For example, Zaitseva *et al.* (1980) found that, for the bottlenose dolphin, the angular separation between a sound source and a masking noise source had little effect on the degree of masking when the sound frequency was 18 kHz, in contrast to the pronounced effect at higher frequencies. Directional hearing has been demonstrated at frequencies as low as 0.5–2 kHz in several marine mammals, including killer whales (Richardson *et al.,* 1995a). This ability may be useful in reducing masking at these frequencies. In summary, high levels of noise generated by anthropogenic activities may act to mask the detection of weaker biologically important sounds by some marine mammals. This masking may be more prominent for lower frequencies. For higher frequencies, such as that used in echolocation by toothed whales, several mechanisms are available that may allow them to reduce the effects of such masking.

Masking effects of underwater sounds from Shell's proposed activities on marine mammal calls and other natural sounds are expected to be limited. For example, beluga whales primarily use high-frequency sounds to communicate and locate prey; therefore, masking by low-frequency sounds associated with drilling activities is not expected to occur (Gales, 1982, as cited in Shell, 2009). If the distance between communicating whales does not exceed their distance from the drilling activity, the likelihood of potential impacts from masking would be low (Gales, 1982, as cited in Shell, 2009). At distances greater than 660–1,300 ft (200–400 m), recorded sounds from drilling activities did not affect behavior of beluga whales, even though the sound energy level and frequency were such that it could be heard several kilometers away (Richardson *et al.,* 1995b). This exposure resulted in whales being deflected from the sound energy and changing behavior. These minor changes are not expected to affect the beluga whale population (Richardson *et al.,* 1991; Richard *et al.,* 1998). Brewer *et al.* (1993) observed belugas within 2.3 mi (3.7 km) of the drilling unit *Kulluk* during drilling; however, the authors do

not describe any behaviors that may have been exhibited by those animals. Please refer to the Arctic Multiple-Sale Draft Environmental Impact Statement (USDOI MMS, 2008), available on the Internet at: *http://www.mms.gov/alaska/ref/EIS%20EA/ArcticMultiSale_209/_DEIS.htm,* for more detailed information.

There is evidence of other marine mammal species continuing to call in the presence of industrial activity. Annual acoustical monitoring near BP's Northstar production facility during the fall bowhead migration westward through the Beaufort Sea has recorded thousands of calls each year (for examples, see Richardson *et al.,* 2007; Aerts and Richardson, 2008). Construction, maintenance, and operational activities have been occurring from this facility for over 10 years. To compensate and reduce masking, some mysticetes may alter the frequencies of their communication sounds (Richardson *et al.,* 1995a; Parks *et al.,* 2007). Masking processes in baleen whales are not amenable to laboratory study, and no direct measurements on hearing sensitivity are available for these species. It is not currently possible to determine with precision the potential consequences of temporary or local background noise levels. However, Parks *et al.* (2007) found that right whales (a species closely related to the bowhead whale) altered their vocalizations, possibly in response to background noise levels. For species that can hear over a relatively broad frequency range, as is presumed to be the case for mysticetes, a narrow band source may only cause partial masking. Richardson *et al.* (1995a) note that a bowhead whale 12.4 mi (20 km) from a human sound source, such as that produced during oil and gas industry activities, might hear strong calls from other whales within approximately 12.4 mi (20 km), and a whale 3.1 mi (5 km) from the source might hear strong calls from whales within approximately 3.1 mi (5 km). Additionally, masking is more likely to occur closer to a sound source, and distant anthropogenic sound is less likely to mask short-distance acoustic communication (Richardson *et al.,* 1995a).

Although some masking by marine mammal species in the area may occur, the extent of the masking interference will depend on the spatial relationship of the animal and Shell's activity. Almost all energy in the sounds emitted by drilling and other operational activities is at low frequencies, predominantly below 250 Hz with another peak centered around 1,000 Hz. Most energy in the sounds from the vessels and aircraft to be used during this project is below 1 kHz (Moore *et al.,* 1984; Greene and Moore, 1995; Blackwell *et al.,* 2004b; Blackwell and Greene, 2006). These frequencies are mainly used by mysticetes but not by odontocetes. Therefore, masking effects would potentially be more pronounced in the bowhead and gray whales that might occur in the proposed project area. If, as described later in this document, certain species avoid the proposed drilling locations, impacts from masking are anticipated to be low.

(3) Behavioral Disturbance Reactions

Behavioral responses to sound are highly variable and context-specific. Many different variables can influence an animal's perception of and response to (in both nature and magnitude) an acoustic event. An animal's prior experience with a sound or sound source affects whether it is less likely (habituation) or more likely (sensitization) to respond to certain sounds in the future (animals can also be innately pre-disposed to respond to certain sounds in certain ways; Southall *et al.,* 2007). Related to the sound itself, the perceived nearness of the sound, bearing of the sound (approaching vs. retreating), similarity of a sound to biologically relevant sounds in the animal's environment (*i.e.,* calls of predators, prey, or conspecifics), and familiarity of the sound may affect the way an animal responds to the sound (Southall *et al.,* 2007). Individuals (of different age, gender, reproductive status, *etc.*) among most populations will have variable hearing capabilities and differing behavioral sensitivities to sounds that will be affected by prior conditioning, experience, and current activities of those individuals. Often, specific acoustic features of the sound and contextual variables (*i.e.,* proximity, duration, or recurrence of the sound or the current behavior that the marine mammal is engaged in or its prior experience), as well as entirely separate factors such as the physical presence of a nearby vessel, may be more relevant to the animal's response than the received level alone.

Exposure of marine mammals to sound sources can result in (but is not limited to) no response or any of the following observable responses: Increased alertness; orientation or attraction to a sound source; vocal modifications; cessation of feeding; cessation of social interaction; alteration of movement or diving behavior; avoidance; habitat abandonment (temporary or permanent); and, in severe cases, panic, flight, stampede, or stranding, potentially resulting in death (Southall *et al.,* 2007). On a related note, many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007).

Detailed studies regarding responses to anthropogenic sound have been conducted on humpback, gray, and bowhead whales and ringed seals. Less detailed data are available for some other species of baleen whales, sperm whales, small toothed whales, and sea otters. The following sub-sections provide examples of behavioral responses that provide an idea of the variability in behavioral responses that would be expected given the different sensitivities of marine mammal species to sound.

Baleen Whales—Richardson *et al.* (1995b) reported changes in surfacing and respiration behavior and the occurrence of turns during surfacing in bowhead whales exposed to playback of underwater sound from drilling activities. These behavioral effects were localized and occurred at distances up to 1.2–2.5 mi (2–4 km).

Some bowheads appeared to divert from their migratory path after exposure to projected icebreaker sounds. Other bowheads however, tolerated projected icebreaker sound at levels 20 dB and more above ambient sound levels. The source level of the projected sound however, was much less than that of an actual icebreaker, and reaction distances to actual icebreaking may be much greater than those reported here for projected sounds.

Brewer *et al.* (1993) and Hall *et al.* (1994) reported numerous sightings of marine mammals including bowhead whales in the vicinity of offshore drilling operations in the Beaufort Sea. One bowhead whale sighting was reported within approximately 1,312 ft (400 m) of a drilling vessel although most other bowhead sightings were at much greater distances. Few bowheads were recorded near industrial activities by aerial observers. After controlling for spatial autocorrelation in aerial survey data from Hall *et al.* (1994) using a Mantel test, Schick and Urban (2000) found that the variable describing

straight line distance between the rig and bowhead whale sightings was not significant but that a variable describing threshold distances between sightings and the rig was significant. Thus, although the aerial survey results suggested substantial avoidance of the operations by bowhead whales, observations by vessel-based observers indicate that at least some bowheads may have been closer to industrial activities than was suggested by results of aerial observations.

Richardson *et al.* (2008) reported a slight change in the distribution of bowhead whale calls in response to operational sounds on BP's Northstar Island. The southern edge of the call distribution ranged from 0.47 to 1.46 mi (0.76 to 2.35 km) farther offshore, apparently in response to industrial sound levels. This result however, was only achieved after intensive statistical analyses, and it is not clear that this represented a biologically significant effect.

Patenaude *et al.* (2002) reported fewer behavioral responses to aircraft overflights by bowhead compared to beluga whales. Behaviors classified as reactions consisted of short surfacings, immediate dives or turns, changes in behavior state, vigorous swimming, and breaching. Most bowhead reaction resulted from exposure to helicopter activity and little response to fixed-wing aircraft was observed. Most reactions occurred when the helicopter was at altitudes ≤492 ft (150 m) and lateral distances ≤820 ft (250 m; Nowacek *et al.,* 2007).

During their study, Patenaude *et al.* (2002) observed one bowhead whale cow-calf pair during four passes totaling 2.8 hours of the helicopter and two pairs during Twin Otter overflights. All of the helicopter passes were at altitudes of 49–98 ft (15–30 m). The mother dove both times she was at the surface, and the calf dove once out of the four times it was at the surface. For the cow-calf pair sightings during Twin Otter overflights, the authors did not note any behaviors specific to those pairs. Rather, the reactions of the cow-calf pairs were lumped with the reactions of other groups that did not consist of calves.

Richardson *et al.* (1995b) and Moore and Clarke (2002) reviewed a few studies that observed responses of gray whales to aircraft. Cow-calf pairs were quite sensitive to a turboprop survey flown at 1,000 ft (305 m) altitude on the Alaskan summering grounds. In that survey, adults were seen swimming over the calf, or the calf swam under the adult (Ljungblad *et al.,* 1983, cited in Richardson *et al.,* 1995b and Moore and Clarke, 2002). However, when the same aircraft circled for more than 10 minutes at 1,050 ft (320 m) altitude over a group of mating gray whales, no reactions were observed (Ljungblad *et al.,* 1987, cited in Moore and Clarke, 2002). Malme *et al.* (1984, cited in Richardson *et al.,* 1995b and Moore and Clarke, 2002) conducted playback experiments on migrating gray whales. They exposed the animals to underwater noise recorded from a Bell 212 helicopter (estimated altitude = 328 ft [100 m]), at an average of three simulated passes per minute. The authors observed that whales changed their swimming course and sometimes slowed down in response to the playback sound but proceeded to migrate past the transducer. Migrating gray whales did not react overtly to a Bell 212 helicopter at greater than 1,394 ft (425 m) altitude, occasionally reacted when the helicopter was at 1,000–1,198 ft (305–365 m), and usually reacted when it was below 825 ft (250 m; Southwest Research Associates, 1988, cited in Richardson *et al.,* 1995b and Moore and Clarke, 2002). Reactions noted in that study included abrupt turns or dives or both. Green *et al.* (1992, cited in Richardson *et al.,* 1995b) observed that migrating gray whales rarely exhibited noticeable reactions to a straight-line overflight by a Twin Otter at 197 ft (60 m) altitude. Restrictions on aircraft altitude will be part of the proposed mitigation measures (described in the ''Proposed Mitigation'' section later in this document) during the proposed drilling activities, and overflights are likely to have little or no disturbance effects on baleen whales. Any disturbance that may occur would likely be temporary and localized.

Southall *et al.* (2007, Appendix C) reviewed a number of papers describing the responses of marine mammals to non-pulsed sound, such as that produced during exploratory drilling operations. In general, little or no response was observed in animals exposed at received levels from 90–120 dB re 1 μPa (rms). Probability of avoidance and other behavioral effects increased when received levels were from 120–160 dB re 1 μPa (rms). Some of the relevant reviews contained in Southall *et al.* (2007) are summarized next.

Baker *et al.* (1982) reported some avoidance by humpback whales to vessel noise when received levels were 110–120 dB (rms) and clear avoidance at 120–140 dB (sound measurements were not provided by Baker but were based on measurements of identical vessels by Miles and Malme, 1983).

Malme *et al.* (1983, 1984) used playbacks of sounds from helicopter overflight and drilling rigs and platforms to study behavioral effects on migrating gray whales. Received levels exceeding 120 dB induced avoidance reactions. Malme *et al.* (1984) calculated 10%, 50%, and 90% probabilities of gray whale avoidance reactions at received levels of 110, 120, and 130 dB, respectively. Malme *et al.* (1986) observed the behavior of feeding gray whales during four experimental playbacks of drilling sounds (50 to 315 Hz; 21- min overall duration and 10% duty cycle; source levels of 156–162 dB). In two cases for received levels of 100–110 dB, no behavioral reaction was observed. However, avoidance behavior was observed in two cases where received levels were 110–120 dB.

Richardson *et al.* (1990) performed 12 playback experiments in which bowhead whales in the Alaskan Arctic were exposed to drilling sounds. Whales generally did not respond to exposures in the 100 to 130 dB range, although there was some indication of minor behavioral changes in several instances.

McCauley *et al.* (1996) reported several cases of humpback whales responding to vessels in Hervey Bay, Australia. Results indicated clear avoidance at received levels between 118 to 124 dB in three cases for which response and received levels were observed/measured.

Palka and Hammond (2001) analyzed line transect census data in which the orientation and distance off transect line were reported for large numbers of minke whales. The authors developed a method to account for effects of animal movement in response to sighting platforms. Minor changes in locomotion speed, direction, and/or diving profile were reported at ranges from 1,847 to 2,352 ft (563 to 717 m) at received levels of 110 to 120 dB.

Biassoni *et al.* (2000) and Miller *et al.* (2000) reported behavioral observations for humpback whales exposed to a low-frequency sonar stimulus (160- to 330–Hz frequency band; 42-s tonal signal repeated every 6 min; source levels 170 to 200 dB) during playback experiments. Exposure to measured received levels ranging from 120 to 150 dB resulted in variability in humpback singing behavior. Croll *et al.* (2001) investigated responses of foraging fin and blue whales to the same low frequency active sonar stimulus off southern California. Playbacks and control intervals with no transmission were used to investigate behavior and distribution on time scales of several weeks and spatial scales of tens of kilometers. The general conclusion was that whales remained feeding within a region for which 12 to

30 percent of exposures exceeded 140 dB.

Frankel and Clark (1998) conducted playback experiments with wintering humpback whales using a single speaker producing a low-frequency ''M-sequence'' (sine wave with multiple-phase reversals) signal in the 60 to 90 Hz band with output of 172 dB at 1 m. For 11 playbacks, exposures were between 120 and 130 dB re 1 μPa (rms) and included sufficient information regarding individual responses. During eight of the trials, there were no measurable differences in tracks or bearings relative to control conditions, whereas on three occasions, whales either moved slightly away from (n = 1) or towards (n = 2) the playback speaker during exposure. The presence of the source vessel itself had a greater effect than did the M-sequence playback.

Finally, Nowacek *et al.* (2004) used controlled exposures to demonstrate behavioral reactions of northern right whales to various non-pulse sounds. Playback stimuli included ship noise, social sounds of conspecifics, and a complex, 18-min ''alert'' sound consisting of repetitions of three different artificial signals. Ten whales were tagged with calibrated instruments that measured received sound characteristics and concurrent animal movements in three dimensions. Five out of six exposed whales reacted strongly to alert signals at measured received levels between 130 and 150 dB (*i.e.,* ceased foraging and swam rapidly to the surface). Two of these individuals were not exposed to ship noise, and the other four were exposed to both stimuli. These whales reacted mildly to conspecific signals. Seven whales, including the four exposed to the alert stimulus, had no measurable response to either ship sounds or actual vessel noise.

Toothed Whales—Most toothed whales have the greatest hearing sensitivity at frequencies much higher than that of baleen whales and may be less responsive to low-frequency sound commonly associated with oil and gas industry exploratory drilling activities. Richardson *et al.* (1995b) reported that beluga whales did not show any apparent reaction to playback of underwater drilling sounds at distances greater than 656–1,312 ft (200–400 m). Reactions included slowing down, milling, or reversal of course after which the whales continued past the projector, sometimes within 164–328 ft (50–100 m). The authors concluded (based on a small sample size) that the playback of drilling sounds had no biologically significant effects on migration routes of beluga whales migrating through pack ice and along the seaward side of the nearshore lead east of Point Barrow in spring.

At least six of 17 groups of beluga whales appeared to alter their migration path in response to underwater playbacks of icebreaker sound (Richardson *et al.,* 1995b). Received levels from the icebreaker playback were estimated at 78–84 dB in the 1/3-octave band centered at 5,000 Hz, or 8–14 dB above ambient. If beluga whales reacted to an actual icebreaker at received levels of 80 dB, reactions would be expected to occur at distances on the order of 6.2 mi (10 km). Finley *et al.* (1990) also reported beluga avoidance of icebreaker activities in the Canadian High Arctic at distances of 22–31 mi (35–50 km). In addition to avoidance, changes in dive behavior and pod integrity were also noted.

Patenaude *et al.* (2002) reported that beluga whales appeared to be more responsive to aircraft overflights than bowhead whales. Changes were observed in diving and respiration behavior, and some whales veered away when a helicopter passed at ≤820 ft (250 m) lateral distance at altitudes up to 492 ft (150 m). However, some belugas showed no reaction to the helicopter. Belugas appeared to show less response to fixed-wing aircraft than to helicopter overflights.

In reviewing responses of cetaceans with best hearing in mid-frequency ranges, which includes toothed whales, Southall *et al.* (2007) reported that combined field and laboratory data for mid-frequency cetaceans exposed to non-pulse sounds did not lead to a clear conclusion about received levels coincident with various behavioral responses. In some settings, individuals in the field showed profound (significant) behavioral responses to exposures from 90–120 dB, while others failed to exhibit such responses for exposure to received levels from 120–150 dB. Contextual variables other than exposure received level, and probable species differences, are the likely reasons for this variability. Context, including the fact that captive subjects were often directly reinforced with food for tolerating noise exposure, may also explain why there was great disparity in results from field and laboratory conditions—exposures in captive settings generally exceeded 170 dB before inducing behavioral responses. A summary of some of the relevant material reviewed by Southall *et al.* (2007) is next.

LGL and Greeneridge (1986) and Finley *et al.* (1990) documented belugas and narwhals congregated near ice edges reacting to the approach and passage of icebreaking ships. Beluga whales responded to oncoming vessels by (1) fleeing at speeds of up to 12.4 mi/hr (20 km/hr) from distances of 12.4–50 mi (20–80 km), (2) abandoning normal pod structure, and (3) modifying vocal behavior and/or emitting alarm calls. Narwhals, in contrast, generally demonstrated a ''freeze'' response, lying motionless or swimming slowly away (as far as 23 mi [37 km] down the ice edge), huddling in groups, and ceasing sound production. There was some evidence of habituation and reduced avoidance 2 to 3 days after onset.

The 1982 season observations by LGL and Greeneridge (1986) involved a single passage of an icebreaker with both ice-based and aerial measurements on June 28, 1982. Four groups of narwhals (n = 9 to 10, 7, 7, and 6) responded when the ship was 4 mi (6.4 km) away (received levels of approximately 100 dB in the 150- to 1,150-Hz band). At a later point, observers sighted belugas moving away from the source at more than 12.4 mi (20 km; received levels of approximately 90 dB in the 150- to 1,150-Hz band). The total number of animals observed fleeing was about 300, suggesting approximately 100 independent groups (of three individuals each). No whales were sighted the following day, but some were sighted on June 30, with ship noise audible at spectrum levels of approximately 55 dB/Hz (up to 4 kHz).

Observations during 1983 (LGL and Greeneridge, 1986) involved two icebreaking ships with aerial survey and ice-based observations during seven sampling periods. Narwhals and belugas generally reacted at received levels ranging from 101 to 121 dB in the 20- to 1,000-Hz band and at a distance of up to 40.4 mi (65 km). Large numbers (100s) of beluga whales moved out of the area at higher received levels. As noise levels from icebreaking operations diminished, a total of 45 narwhals returned to the area and engaged in diving and foraging behavior. During the final sampling period, following an 8-h quiet interval, no reactions were seen from 28 narwhals and 17 belugas (at received levels ranging up to 115 dB).

The final season (1984) reported in LGL and Greeneridge (1986) involved aerial surveys before, during, and after the passage of two icebreaking ships. During operations, no belugas and few narwhals were observed in an area approximately 16.8 mi (27 km) ahead of the vessels, and all whales sighted over 12.4–50 mi (20–80 km) from the ships were swimming strongly away. Additional observations confirmed the spatial extent of avoidance reactions to this sound source in this context.

Buckstaff (2004) reported elevated dolphin whistle rates with received levels from oncoming vessels in the 110 to 120 dB range in Sarasota Bay, Florida. These hearing thresholds were apparently lower than those reported by a researcher listening with towed hydrophones. Morisaka *et al.* (2005) compared whistles from three populations of Indo-Pacific bottlenose dolphins. One population was exposed to vessel noise with spectrum levels of approximately 85 dB/Hz in the 1- to 22-kHz band (broadband received levels approximately 128 dB) as opposed to approximately 65 dB/Hz in the same band (broadband received levels approximately 108 dB) for the other two sites. Dolphin whistles in the noisier environment had lower fundamental frequencies and less frequency modulation, suggesting a shift in sound parameters as a result of increased ambient noise.

Morton and Symonds (2002) used census data on killer whales in British Columbia to evaluate avoidance of non-pulse acoustic harassment devices (AHDs). Avoidance ranges were about 2.5 mi (4 km). Also, there was a dramatic reduction in the number of days ''resident'' killer whales were sighted during AHD-active periods compared to pre- and post-exposure periods and a nearby control site.

Monteiro-Neto *et al.* (2004) studied avoidance responses of tucuxi (*Sotalia fluviatilis*) to Dukane® Netmark acoustic deterrent devices. In a total of 30 exposure trials, approximately five groups each demonstrated significant avoidance compared to 20 pinger off and 55 no-pinger control trials over two quadrats of about 0.19 mi^2 (0.5 km^2). Estimated exposure received levels were approximately 115 dB.

Awbrey and Stewart (1983) played back semi-submersible drillship sounds (source level: 163 dB) to belugas in Alaska. They reported avoidance reactions at 984 and 4,921 ft (300 and 1,500 m) and approach by groups at a distance of 2.2 mi (3.5 km; received levels were approximately 110 to 145 dB over these ranges assuming a 15 log R transmission loss). Similarly, Richardson *et al.* (1990) played back drilling platform sounds (source level: 163 dB) to belugas in Alaska. They conducted aerial observations of eight individuals among approximately 100 spread over an area several hundred meters to several kilometers from the sound source and found no obvious reactions. Moderate changes in movement were noted for three groups swimming within 656 ft (200 m) of the sound projector.

Two studies deal with issues related to changes in marine mammal vocal behavior as a function of variable background noise levels. Foote *et al.* (2004) found increases in the duration of killer whale calls over the period 1977 to 2003, during which time vessel traffic in Puget Sound, and particularly whale-watching boats around the animals, increased dramatically. Scheifele *et al.* (2005) demonstrated that belugas in the St. Lawrence River increased the levels of their vocalizations as a function of the background noise level (the ''Lombard Effect'').

Several researchers conducting laboratory experiments on hearing and the effects of non-pulse sounds on hearing in mid-frequency cetaceans have reported concurrent behavioral responses. Nachtigall *et al.* (2003) reported that noise exposures up to 179 dB and 55-min duration affected the trained behaviors of a bottlenose dolphin participating in a TTS experiment. Finneran and Schlundt (2004) provided a detailed, comprehensive analysis of the behavioral responses of belugas and bottlenose dolphins to 1-s tones (received levels 160 to 202 dB) in the context of TTS experiments. Romano *et al.* (2004) investigated the physiological responses of a bottlenose dolphin and a beluga exposed to these tonal exposures and demonstrated a decrease in blood cortisol levels during a series of exposures between 130 and 201 dB. Collectively, the laboratory observations suggested the onset of a behavioral response at higher received levels than did field studies. The differences were likely related to the very different conditions and contextual variables between untrained, free-ranging individuals vs. laboratory subjects that were rewarded with food for tolerating noise exposure.

Pinnipeds—Pinnipeds generally seem to be less responsive to exposure to industrial sound than most cetaceans. Pinniped responses to underwater sound from some types of industrial activities such as seismic exploration appear to be temporary and localized (Harris *et al.,* 2001; Reiser *et al.,* 2009).

Blackwell *et al.* (2004) reported little or no reaction of ringed seals in response to pile-driving activities during construction of a man-made island in the Beaufort Sea. Ringed seals were observed swimming as close as 151 ft (46 m) from the island and may have been habituated to the sounds which were likely audible at distances <9,842 ft (3,000 m) underwater and 0.3 mi (0.5 km) in air. Moulton *et al.* (2003) reported that ringed seal densities on ice in the vicinity of a man-made island in the Beaufort Sea did not change significantly before and after construction and drilling activities.

Southall *et al.* (2007) reviewed literature describing responses of pinnipeds to non-pulsed sound and reported that the limited data suggest exposures between approximately 90 and 140 dB generally do not appear to induce strong behavioral responses in pinnipeds exposed to non-pulse sounds in water; no data exist regarding exposures at higher levels. It is important to note that among these studies, there are some apparent differences in responses between field and laboratory conditions. In contrast to the mid-frequency odontocetes, captive pinnipeds responded more strongly at lower levels than did animals in the field. Again, contextual issues are the likely cause of this difference.

Jacobs and Terhune (2002) observed harbor seal reactions to AHDs (source level in this study was 172 dB) deployed around aquaculture sites. Seals were generally unresponsive to sounds from the AHDs. During two specific events, individuals came within 141 and 144 ft (43 and 44 m) of active AHDs and failed to demonstrate any measurable behavioral response; estimated received levels based on the measures given were approximately 120 to 130 dB.

Costa *et al.* (2003) measured received noise levels from an Acoustic Thermometry of Ocean Climate (ATOC) program sound source off northern California using acoustic data loggers placed on translocated elephant seals. Subjects were captured on land, transported to sea, instrumented with archival acoustic tags, and released such that their transit would lead them near an active ATOC source (at 939-m depth; 75-Hz signal with 37.5- Hz bandwidth; 195 dB maximum source level, ramped up from 165 dB over 20 min) on their return to a haul-out site. Received exposure levels of the ATOC source for experimental subjects averaged 128 dB (range 118 to 137) in the 60- to 90-Hz band. None of the instrumented animals terminated dives or radically altered behavior upon exposure, but some statistically significant changes in diving parameters were documented in nine individuals. Translocated northern elephant seals exposed to this particular non-pulse source began to demonstrate subtle behavioral changes at exposure to received levels of approximately 120 to 140 dB.

Kastelein *et al.* (2006) exposed nine captive harbor seals in an approximately 82 × 98 ft (25 × 30 m) enclosure to non-pulse sounds used in underwater data

communication systems (similar to acoustic modems). Test signals were frequency modulated tones, sweeps, and bands of noise with fundamental frequencies between 8 and 16 kHz; 128 to 130 [± 3] dB source levels; 1- to 2-s duration [60–80 percent duty cycle]; or 100 percent duty cycle. They recorded seal positions and the mean number of individual surfacing behaviors during control periods (no exposure), before exposure, and in 15-min experimental sessions (n = 7 exposures for each sound type). Seals generally swam away from each source at received levels of approximately 107 dB, avoiding it by approximately 16 ft (5 m), although they did not haul out of the water or change surfacing behavior. Seal reactions did not appear to wane over repeated exposure (*i.e.,* there was no obvious habituation), and the colony of seals generally returned to baseline conditions following exposure. The seals were not reinforced with food for remaining in the sound field.

Potential effects to pinnipeds from aircraft activity could involve both acoustic and non-acoustic effects. It is uncertain if the seals react to the sound of the helicopter or to its physical presence flying overhead. Typical reactions of hauled out pinnipeds to aircraft that have been observed include looking up at the aircraft, moving on the ice or land, entering a breathing hole or crack in the ice, or entering the water. Ice seals hauled out on the ice have been observed diving into the water when approached by a low-flying aircraft or helicopter (Burns and Harbo, 1972, cited in Richardson *et al.,* 1995a; Burns and Frost, 1979, cited in Richardson *et al.,* 1995a). Richardson *et al.* (1995a) note that responses can vary based on differences in aircraft type, altitude, and flight pattern. Additionally, a study conducted by Born *et al.* (1999) found that wind chill was also a factor in level of response of ringed seals hauled out on ice, as well as time of day and relative wind direction.

Blackwell *et al.* (2004a) observed 12 ringed seals during low-altitude overflights of a Bell 212 helicopter at Northstar in June and July 2000 (9 observations took place concurrent with pipe-driving activities). One seal showed no reaction to the aircraft while the remaining 11 (92%) reacted, either by looking at the helicopter (n = 10) or by departing from their basking site (n = 1). Blackwell *et al.* (2004a) concluded that none of the reactions to helicopters were strong or long lasting, and that seals near Northstar in June and July 2000 probably had habituated to industrial sounds and visible activities that had occurred often during the preceding winter and spring. There have been few systematic studies of pinniped reactions to aircraft overflights, and most of the available data concern pinnipeds hauled out on land or ice rather than pinnipeds in the water (Richardson *et al.,* 1995a; Born *et al.,* 1999).

Born *et al.* (1999) determined that 49 percent of ringed seals escaped (*i.e.,* left the ice) as a response to a helicopter flying at 492 ft (150 m) altitude. Seals entered the water when the helicopter was 4,101 ft (1,250 m) away if the seal was in front of the helicopter and at 1,640 ft (500 m) away if the seal was to the side of the helicopter. The authors noted that more seals reacted to helicopters than to fixed-wing aircraft. The study concluded that the risk of scaring ringed seals by small-type helicopters could be substantially reduced if they do not approach closer than 4,921 ft (1,500 m).

Spotted seals hauled out on land in summer are unusually sensitive to aircraft overflights compared to other species. They often rush into the water when an aircraft flies by at altitudes up to 984–2,461 ft (300–750 m). They occasionally react to aircraft flying as high as 4,495 ft (1,370 m) and at lateral distances as far as 1.2 mi (2 km) or more (Frost and Lowry, 1990; Rugh *et al.,* 1997).

(4) Hearing Impairment and Other Physiological Effects

Temporary or permanent hearing impairment is a possibility when marine mammals are exposed to very strong sounds. Non-auditory physiological effects might also occur in marine mammals exposed to strong underwater sound. Possible types of non-auditory physiological effects or injuries that theoretically might occur in mammals close to a strong sound source include stress, neurological effects, bubble formation, and other types of organ or tissue damage. It is possible that some marine mammal species (*i.e.,* beaked whales) may be especially susceptible to injury and/or stranding when exposed to strong pulsed sounds. However, as discussed later in this document, there is no definitive evidence that any of these effects occur even for marine mammals in close proximity to industrial sound sources, and beaked whales do not occur in the proposed activity area. Additional information regarding the possibilities of TTS, permanent threshold shift (PTS), and non-auditory physiological effects, such as stress, is discussed for both exploratory drilling activities and ZVSP surveys in the following section (''*Potential Effects from ZVSP Activities*'').

Potential Effects from ZVSP Activities

(1) Tolerance

Numerous studies have shown that pulsed sounds from airguns are often readily detectable in the water at distances of many kilometers. Weir (2008) observed marine mammal responses to seismic pulses from a 24 airgun array firing a total volume of either 5,085 in^3 or 3,147 in^3 in Angolan waters between August 2004 and May 2005. Weir recorded a total of 207 sightings of humpback whales (n = 66), sperm whales (n = 124), and Atlantic spotted dolphins (n = 17) and reported that there were no significant differences in encounter rates (sightings/hr) for humpback and sperm whales according to the airgun array's operational status (*i.e.,* active versus silent). For additional information on tolerance of marine mammals to anthropogenic sound, see the previous subsection in this document (''*Potential Effects from Exploratory Drilling Activities*'').

(2) Masking

As stated earlier in this document, masking is the obscuring of sounds of interest by other sounds, often at similar frequencies. For full details about masking, see the previous subsection in this document (''*Potential Effects from Exploratory Drilling Activities*''). Some additional information regarding pulsed sounds is provided here.

There is evidence of some marine mammal species continuing to call in the presence of industrial activity. McDonald *et al.* (1995) heard blue and fin whale calls between seismic pulses in the Pacific. Although there has been one report that sperm whales cease calling when exposed to pulses from a very distant seismic ship (Bowles *et al.,* 1994), a more recent study reported that sperm whales off northern Norway continued calling in the presence of seismic pulses (Madsen *et al.,* 2002). Similar results were also reported during work in the Gulf of Mexico (Tyack *et al.,* 2003). Bowhead whale calls are frequently detected in the presence of seismic pulses, although the numbers of calls detected may sometimes be reduced (Richardson *et al.,* 1986; Greene *et al.,* 1999; Blackwell *et al.,* 2009a). Bowhead whales in the Beaufort Sea may decrease their call rates in response to seismic operations, although movement out of the area might also have contributed to the lower call detection rate (Blackwell *et al.,* 2009a,b). Additionally, there is

increasing evidence that, at times, there is enough reverberation between airgun pulses such that detection range of calls may be significantly reduced. In contrast, Di Iorio and Clark (2009) found evidence of increased calling by blue whales during operations by a lower-energy seismic source, a sparker.

There is little concern regarding masking due to the brief duration of these pulses and relatively longer silence between airgun shots (9–12 seconds) near the sound source. However, at long distances (over tens of kilometers away) in deep water, due to multipath propagation and reverberation, the durations of airgun pulses can be ''stretched'' to seconds with long decays (Madsen *et al.,* 2006; Clark and Gagnon, 2006). Therefore it could affect communication signals used by low frequency mysticetes when they occur near the noise band and thus reduce the communication space of animals (*e.g.,* Clark *et al.,* 2009a,b) and cause increased stress levels (*e.g.,* Foote *et al.,* 2004; Holt *et al.,* 2009). Nevertheless, the intensity of the noise is also greatly reduced at long distances. Therefore, masking effects are anticipated to be limited, especially in the case of odontocetes, given that they typically communicate at frequencies higher than those of the airguns.

(3) Behavioral Disturbance Reactions

As was described in more detail in the previous sub-section (''*Potential Effects of Exploratory Drilling Activities''*), behavioral responses to sound are highly variable and context-specific. Summaries of observed reactions and studies are provided next.

Baleen Whales—Baleen whale responses to pulsed sound (*e.g.,* seismic airguns) have been studied more thoroughly than responses to continuous sound (*e.g.,* drillships). Baleen whales generally tend to avoid operating airguns, but avoidance radii are quite variable. Whales are often reported to show no overt reactions to pulses from large arrays of airguns at distances beyond a few kilometers, even though the airgun pulses remain well above ambient noise levels out to much greater distances (Miller *et al.,* 2005). However, baleen whales exposed to strong noise pulses often react by deviating from their normal migration route (Richardson *et al.,* 1999). Migrating gray and bowhead whales were observed avoiding the sound source by displacing their migration route to varying degrees but within the natural boundaries of the migration corridors (Schick and Urban, 2000; Richardson *et al.,* 1999; Malme *et al.,* 1983). Baleen whale responses to pulsed sound however may depend on the type of activity in which the whales are engaged. Some evidence suggests that feeding bowhead whales may be more tolerant of underwater sound than migrating bowheads (Miller *et al.,* 2005; Lyons *et al.,* 2009; Christie *et al.,* 2010).

Results of studies of gray, bowhead, and humpback whales have determined that received levels of pulses in the 160–170 dB re 1 μPa rms range seem to cause obvious avoidance behavior in a substantial fraction of the animals exposed. In many areas, seismic pulses from large arrays of airguns diminish to those levels at distances ranging from 2.8–9 mi (4.5–14.5 km) from the source. For the much smaller airgun array used during the ZVSP survey (total discharge volume of 760 in^3), distances to received levels in the 170–160 dB re 1 μPa rms range are estimated to be 1.44–2.28 mi (2.31–3.67 km). Baleen whales within those distances may show avoidance or other strong disturbance reactions to the airgun array. Subtle behavioral changes sometimes become evident at somewhat lower received levels, and recent studies have shown that some species of baleen whales, notably bowhead and humpback whales, at times show strong avoidance at received levels lower than 160–170 dB re 1 μPa rms. Bowhead whales migrating west across the Alaskan Beaufort Sea in autumn, in particular, are unusually responsive, with avoidance occurring out to distances of 12.4–18.6 mi (20–30 km) from a medium-sized airgun source (Miller *et al.,* 1999; Richardson *et al.,* 1999). However, more recent research on bowhead whales (Miller *et al.,* 2005) corroborates earlier evidence that, during the summer feeding season, bowheads are not as sensitive to seismic sources. In summer, bowheads typically begin to show avoidance reactions at a received level of about 160–170 dB re 1 μPa rms (Richardson *et al.,* 1986; Ljungblad *et al.,* 1988; Miller *et al.,* 2005).

Malme *et al.* (1986, 1988) studied the responses of feeding eastern gray whales to pulses from a single 100 in^3 airgun off St. Lawrence Island in the northern Bering Sea. They estimated, based on small sample sizes, that 50% of feeding gray whales ceased feeding at an average received pressure level of 173 dB re 1 μPa on an (approximate) rms basis, and that 10% of feeding whales interrupted feeding at received levels of 163 dB. Those findings were generally consistent with the results of experiments conducted on larger numbers of gray whales that were migrating along the California coast and on observations of the distribution of feeding Western Pacific gray whales off Sakhalin Island, Russia, during a seismic survey (Yazvenko *et al.,* 2007).

Data on short-term reactions (or lack of reactions) of cetaceans to impulsive noises do not necessarily provide information about long-term effects. While it is not certain whether impulsive noises affect reproductive rate or distribution and habitat use in subsequent days or years, certain species have continued to use areas ensonified by airguns and have continued to increase in number despite successive years of anthropogenic activity in the area. Gray whales continued to migrate annually along the west coast of North America despite intermittent seismic exploration and much ship traffic in that area for decades (Appendix A in Malme *et al.,* 1984). Bowhead whales continued to travel to the eastern Beaufort Sea each summer despite seismic exploration in their summer and autumn range for many years (Richardson *et al.,* 1987). Populations of both gray whales and bowhead whales grew substantially during this time. Bowhead whales have increased by approximately 3.4% per year for the last 10 years in the Beaufort Sea (Allen and Angliss, 2011). In any event, the brief exposures to sound pulses from the proposed airgun source (the airguns will only be fired for a period of 10–14 hours for each of the three, possibly four, wells) are highly unlikely to result in prolonged effects.

Toothed Whales—Few systematic data are available describing reactions of toothed whales to noise pulses. Few studies similar to the more extensive baleen whale/seismic pulse work summarized earlier in this document have been reported for toothed whales. However, systematic work on sperm whales is underway (Tyack *et al.,* 2003), and there is an increasing amount of information about responses of various odontocetes to seismic surveys based on monitoring studies (*e.g.,* Stone, 2003; Smultea *et al.,* 2004; Moulton and Miller, 2005).

Seismic operators and marine mammal observers sometimes see dolphins and other small toothed whales near operating airgun arrays, but, in general, there seems to be a tendency for most delphinids to show some limited avoidance of seismic vessels operating large airgun systems. However, some dolphins seem to be attracted to the seismic vessel and floats, and some ride the bow wave of the seismic vessel even when large arrays of airguns are firing. Nonetheless, there have been indications that small toothed whales sometimes move away or maintain a somewhat greater distance

from the vessel when a large array of airguns is operating than when it is silent (*e.g.,* Goold, 1996a,b,c; Calambokidis and Osmek, 1998; Stone, 2003). The beluga may be a species that (at least at times) shows long-distance avoidance of seismic vessels. Aerial surveys during seismic operations in the southeastern Beaufort Sea recorded much lower sighting rates of beluga whales within 6.2–12.4 mi (10–20 km) of an active seismic vessel. These results were consistent with the low number of beluga sightings reported by observers aboard the seismic vessel, suggesting that some belugas might be avoiding the seismic operations at distances of 6.2–12.4 mi (10–20 km) (Miller *et al.,* 2005).

Captive bottlenose dolphins and (of more relevance in this project) beluga whales exhibit changes in behavior when exposed to strong pulsed sounds similar in duration to those typically used in seismic surveys (Finneran *et al.,* 2002, 2005). However, the animals tolerated high received levels of sound (pk-pk level >200 dB re 1 μPa) before exhibiting aversive behaviors.

Reactions of toothed whales to large arrays of airguns are variable and, at least for delphinids, seem to be confined to a smaller radius than has been observed for mysticetes. However, based on the limited existing evidence, belugas should not be grouped with delphinids in the ''less responsive'' category.

Pinnipeds—Pinnipeds are not likely to show a strong avoidance reaction to the airgun sources proposed for use. Visual monitoring from seismic vessels has shown only slight (if any) avoidance of airguns by pinnipeds and only slight (if any) changes in behavior. Ringed seals frequently do not avoid the area within a few hundred meters of operating airgun arrays (Harris *et al.,* 2001; Moulton and Lawson, 2002; Miller *et al.,* 2005). Monitoring work in the Alaskan Beaufort Sea during 1996–2001 provided considerable information regarding the behavior of seals exposed to seismic pulses (Harris *et al.,* 2001; Moulton and Lawson, 2002). These seismic projects usually involved arrays of 6 to 16 airguns with total volumes of 560 to 1,500 in^3. The combined results suggest that some seals avoid the immediate area around seismic vessels. In most survey years, ringed seal sightings tended to be farther away from the seismic vessel when the airguns were operating than when they were not (Moulton and Lawson, 2002). However, these avoidance movements were relatively small, on the order of 328 ft (100 m) to a few hundreds of meters, and many seals remained within 328–656 ft (100–200 m) of the trackline as the operating airgun array passed by. Seal sighting rates at the water surface were lower during airgun array operations than during no-airgun periods in each survey year except 1997. Similarly, seals are often very tolerant of pulsed sounds from seal-scaring devices (Mate and Harvey, 1987; Jefferson and Curry, 1994; Richardson *et al.,* 1995a). However, initial telemetry work suggests that avoidance and other behavioral reactions by two other species of seals to small airgun sources may at times be stronger than evident to date from visual studies of pinniped reactions to airguns (Thompson *et al.,* 1998). Even if reactions of the species occurring in the present study area are as strong as those evident in the telemetry study, reactions are expected to be confined to relatively small distances and durations, with no long-term effects on pinniped individuals or populations. Additionally, the airguns are only proposed to be used for a short time during the exploration drilling program (approximately 10–14 hours for each well, for a total of 40–56 hours, and more likely to be 30–42 hours if the fourth well is not completed, over the entire open-water season, which lasts for approximately 4 months).

(4) Hearing Impairment and Other Physiological Effects

TTS—TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be stronger in order to be heard. At least in terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days, can be limited to a particular frequency range, and can be in varying degrees (*i.e.,* a loss of a certain number of dBs of sensitivity). For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound.

Marine mammal hearing plays a critical role in communication with conspecifics and in interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during a time when communication is critical for successful mother/calf interactions could have more serious impacts if it were in the same frequency band as the necessary vocalizations and of a severity that it impeded communication. The fact that animals exposed to levels and durations of sound that would be expected to result in this physiological response would also be expected to have behavioral responses of a comparatively more severe or sustained nature is also notable and potentially of more importance than the simple existence of a TTS.

Researchers have derived TTS information for odontocetes from studies on the bottlenose dolphin and beluga. For the one harbor porpoise tested, the received level of airgun sound that elicited onset of TTS was lower (Lucke *et al.,* 2009). If these results from a single animal are representative, it is inappropriate to assume that onset of TTS occurs at similar received levels in all odontocetes (*cf.* Southall *et al.,* 2007). Some cetaceans apparently can incur TTS at considerably lower sound exposures than are necessary to elicit TTS in the beluga or bottlenose dolphin.

For baleen whales, there are no data, direct or indirect, on levels or properties of sound that are required to induce TTS. The frequencies to which baleen whales are most sensitive are assumed to be lower than those to which odontocetes are most sensitive, and natural background noise levels at those low frequencies tend to be higher. As a result, auditory thresholds of baleen whales within their frequency band of best hearing are believed to be higher (less sensitive) than are those of odontocetes at their best frequencies (Clark and Ellison, 2004), meaning that baleen whales require sounds to be louder (*i.e.,* higher dB levels) than odontocetes in the frequency ranges at which each group hears the best. From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales (Southall *et al.,* 2007). Since current NMFS practice assumes the same thresholds for the onset of hearing impairment in both odontocetes and mysticetes, NMFS' onset of TTS threshold is likely conservative for mysticetes. For this proposed activity,

Shell expects no cases of TTS given the strong likelihood that baleen whales would avoid the airguns before being exposed to levels high enough for TTS to occur. The source levels of the drillship are far lower than those of the airguns.

In pinnipeds, TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound have not been measured. However, systematic TTS studies on captive pinnipeds have been conducted (Bowles *et al.,* 1999; Kastak *et al.,* 1999, 2005, 2007; Schusterman *et al.,* 2000; Finneran *et al.,* 2003; Southall *et al.,* 2007). Initial evidence from more prolonged (non-pulse) exposures suggested that some pinnipeds (harbor seals in particular) incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations (Kastak *et al.,* 1999, 2005; Ketten *et al.,* 2001; cf. Au *et al.,* 2000). The TTS threshold for pulsed sounds has been indirectly estimated as being a sound exposure level (SEL) of approximately 171 dB re 1 μPa ^{2}·s (Southall *et al.,* 2007) which would be equivalent to a single pulse with a received level of approximately 181 to 186 dB re 1 μPa (rms), or a series of pulses for which the highest rms values are a few dB lower. Corresponding values for California sea lions and northern elephant seals are likely to be higher (Kastak *et al.,* 2005). For harbor seal, which is closely related to the ringed seal, TTS onset apparently occurs at somewhat lower received energy levels than for odonotocetes. The sound level necessary to cause TTS in pinnipeds depends on exposure duration, as in other mammals; with longer exposure, the level necessary to elicit TTS is reduced (Schusterman *et al.,* 2000; Kastak *et al.,* 2005, 2007). For very short exposures (*e.g.,* to a single sound pulse), the level necessary to cause TTS is very high (Finneran *et al.,* 2003). For pinnipeds exposed to in-air sounds, auditory fatigue has been measured in response to single pulses and to non-pulse noise (Southall *et al.,* 2007), although high exposure levels were required to induce TTS-onset (SEL: 129 dB re: 20 μPa^2·s; Bowles *et al.,* unpub. data).

NMFS has established acoustic thresholds that identify the received sound levels above which hearing impairment or other injury could potentially occur, which are 180 and 190 dB re 1 μPa (rms) for cetaceans and pinnipeds, respectively (NMFS 1995, 2000). The established 180– and 190–dB re 1 μPa (rms) criteria are the received levels above which, in the view of a panel of bioacoustics specialists convened by NMFS before additional TTS measurements for marine mammals became available, one could not be certain that there would be no injurious effects, auditory or otherwise, to marine mammals. TTS is considered by NMFS to be a type of Level B (non-injurious) harassment. The 180– and 190–dB levels are shutdown criteria applicable to cetaceans and pinnipeds, respectively, as specified by NMFS (2000) and are used to establish exclusion zones (EZs), as appropriate. Additionally, based on the summary provided here and the fact that modeling indicates the back-propagated source level for the *Discoverer* to be between 177 and 185 dB re 1 μPa at 1 m (Austin and Warner, 2010), TTS is not expected to occur in any marine mammal species that may occur in the proposed drilling area since the source level will not reach levels thought to induce even mild TTS. While the source level of the airgun is higher than the 190–dB threshold level, an animal would have to be in very close proximity to be exposed to such levels. Additionally, the 180– and 190–dB radii for the airgun are 0.8 mi (1.24 km) and 0.3 mi (524 m), respectively, from the source. Because of the short duration that the airguns will be used (no more than 30–56 hours throughout the entire open-water season) and mitigation and monitoring measures described later in this document, hearing impairment is not anticipated.

PTS—When PTS occurs, there is physical damage to the sound receptors in the ear. In some cases, there can be total or partial deafness, whereas in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter, 1985).

There is no specific evidence that exposure to underwater industrial sound associated with oil exploration can cause PTS in any marine mammal (see Southall *et al.,* 2007). However, given the possibility that mammals might incur TTS, there has been further speculation about the possibility that some individuals occurring very close to such activities might incur PTS (*e.g.,* Richardson *et al.,* 1995, p. 372*ff;* Gedamke *et al.,* 2008). Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage in terrestrial mammals. Relationships between TTS and PTS thresholds have not been studied in marine mammals but are assumed to be similar to those in humans and other terrestrial mammals (Southall *et al.,* 2007; Le Prell, in press). PTS might occur at a received sound level at least several decibels above that inducing mild TTS. Based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds (such as airgun pulses as received close to the source) is at least 6 dB higher than the TTS threshold on a peak-pressure basis and probably greater than 6 dB (Southall *et al.,* 2007).

It is highly unlikely that marine mammals could receive sounds strong enough (and over a sufficient duration) to cause PTS during the proposed exploratory drilling program. As mentioned previously in this document, the source levels of the drillship are not considered strong enough to cause even slight TTS. Given the higher level of sound necessary to cause PTS, it is even less likely that PTS could occur. In fact, based on the modeled source levels for the drillship, the levels immediately adjacent to the drillship may not be sufficient to induce PTS, even if the animals remain in the immediate vicinity of the activity. The modeled source level from the *Discoverer* suggests that marine mammals located immediately adjacent to a drillship would likely not be exposed to received sound levels of a magnitude strong enough to induce PTS, even if the animals remain in the immediate vicinity of the proposed activity location for a prolonged period of time. Because the source levels do not reach the threshold of 190 dB currently used for pinnipeds and is at the 180 dB threshold currently used for cetaceans, it is highly unlikely that any type of hearing impairment, temporary or permanent, would occur as a result of the exploration drilling activities. Additionally, Southall *et al.* (2007) proposed that the thresholds for injury of marine mammals exposed to ''discrete'' noise events (either single or multiple exposures over a 24-hr period) are higher than the 180– and 190–dB re 1 μPa (rms) in-water threshold currently used by NMFS. Table 1 in this document summarizes the SPL and SEL levels thought to cause auditory injury to cetaceans and pinnipeds in-water. For more information, please refer to Southall *et al.* (2007).

TABLE 1—PROPOSED INJURY CRITERIA FOR CETACEANS AND PINNIPEDS EXPOSED TO ''DISCRETE'' NOISE EVENTS (EITHER SINGLE PULSES, MULTIPLE PULSES, OR NON-PULSES WITHIN A 24-HR PERIOD; SOUTHALL et al., 2007)

	Single pulses	Multiple pulses	Non pulses
Low-frequency cetaceans			
Sound pressure level	230 dB re 1 μPa (peak) (flat)	230 dB re 1 μPa (peak) (flat)	230 dB re 1 μPa (peak) (flat).
Sound exposure level	198 dB re 1 μPa^2-s (M_{lf})	198 dB re 1 μPa^2-s (M_{lf})	215 dB re 1 μPa^2-s (M_{lf}).
Mid-frequency cetaceans			
Sound pressure level	230 dB re 1 μPa (peak) (flat)	230 dB re 1 μPa (peak) (flat)	230 dB re 1 μPa (peak) (flat).
Sound exposure level	198 dB re 1 μPa^2-s (M_{lf})	198 dB re 1 μPa^2-s (M_{lf})	215 dB re 1 μPa^2-s (M_{lf}).
High-frequency cetaceans			
Sound pressure level	230 dB re 1 μPa (peak) (flat)	230 dB re 1 μPa (peak) (flat)	230 dB re 1 μPa (peak) (flat).
Sound exposure level	198 dB re 1 μPa^2-s (M_{lf})	198 dB re 1 μPa^2-s (M_{lf})	215 dB re 1 μPa^2-s (M_{lf}).
Pinnipeds (in water)			
Sound pressure level	218 dB re 1 μPa (peak) (flat)	218 dB re 1 μPa (peak) (flat)	218 dB re 1 μPa (peak) (flat).
Sound exposure level	186 dB re 1 μPa^2-s (M_{pw})	186 dB re 1 μPa^2-s (M_{pw})	203 dB re 1 μPa^2-s (M_{pw}).

Non-auditory Physiological Effects—Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007). Studies examining any such effects are limited. If any such effects do occur, they probably would be limited to unusual situations when animals might be exposed at close range for unusually long periods. It is doubtful that any single marine mammal would be exposed to strong sounds for sufficiently long that significant physiological stress would develop.

Classic stress responses begin when an animal's central nervous system perceives a potential threat to its homeostasis. That perception triggers stress responses regardless of whether a stimulus actually threatens the animal; the mere perception of a threat is sufficient to trigger a stress response (Moberg, 2000; Sapolsky *et al.,* 2005; Seyle, 1950). Once an animal's central nervous system perceives a threat, it mounts a biological response or defense that consists of a combination of the four general biological defense responses: behavioral responses; autonomic nervous system responses; neuroendocrine responses; or immune responses.

In the case of many stressors, an animal's first and most economical (in terms of biotic costs) response is behavioral avoidance of the potential stressor or avoidance of continued exposure to a stressor. An animal's second line of defense to stressors involves the sympathetic part of the autonomic nervous system and the classical ''fight or flight'' response, which includes the cardiovascular system, the gastrointestinal system, the exocrine glands, and the adrenal medulla to produce changes in heart rate, blood pressure, and gastrointestinal activity that humans commonly associate with ''stress.'' These responses have a relatively short duration and may or may not have significant long-term effects on an animal's welfare.

An animal's third line of defense to stressors involves its neuroendocrine or sympathetic nervous systems; the system that has received the most study has been the hypothalmus-pituitary-adrenal system (also known as the HPA axis in mammals or the hypothalamus-pituitary-interrenal axis in fish and some reptiles). Unlike stress responses associated with the autonomic nervous system, virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction (Moberg, 1987; Rivier, 1995), altered metabolism (Elasser *et al.,* 2000), reduced immune competence (Blecha, 2000), and behavioral disturbance. Increases in the circulation of glucocorticosteroids (cortisol, corticosterone, and aldosterone in marine mammals; see Romano *et al.,* 2004) have been equated with stress for many years.

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and distress is the biotic cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose a risk to the animal's welfare. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other biotic functions, which impair those functions that experience the diversion. For example, when mounting a stress response diverts energy away from growth in young animals, those animals may experience stunted growth. When mounting a stress response diverts energy from a fetus, an animal's reproductive success and fitness will suffer. In these cases, the animals will have entered a pre-pathological or pathological state which is called ''distress'' (sensu Seyle, 1950) or ''allostatic loading'' (sensu McEwen and Wingfield, 2003). This pathological state will last until the animal replenishes its biotic reserves sufficient to restore normal function. Note that these examples involved a long-term (days or weeks) stress response exposure to stimuli.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses have also been documented fairly well through controlled experiment; because this physiology exists in every vertebrate that has been studied, it is not surprising that stress responses and their costs have been documented in both laboratory and free-living animals (for examples see, Holberton *et al.,* 1996; Hood *et al.,* 1998; Jessop *et al.,* 2003; Krausman *et al.,*

2004; Lankford *et al.,* 2005; Reneerkens *et al.,* 2002; Thompson and Hamer, 2000). Although no information has been collected on the physiological responses of marine mammals to anthropogenic sound exposure, studies of other marine animals and terrestrial animals would lead us to expect some marine mammals to experience physiological stress responses and, perhaps, physiological responses that would be classified as ''distress'' upon exposure to anthropogenic sounds.

For example, Jansen (1998) reported on the relationship between acoustic exposures and physiological responses that are indicative of stress responses in humans (*e.g.,* elevated respiration and increased heart rates). Jones (1998) reported on reductions in human performance when faced with acute, repetitive exposures to acoustic disturbance. Trimper *et al.* (1998) reported on the physiological stress responses of osprey to low-level aircraft noise while Krausman *et al.* (2004) reported on the auditory and physiology stress responses of endangered Sonoran pronghorn to military overflights. Smith *et al.* (2004a, 2004b) identified noise-induced physiological transient stress responses in hearing-specialist fish (*i.e.,* goldfish) that accompanied short- and long-term hearing losses. Welch and Welch (1970) reported physiological and behavioral stress responses that accompanied damage to the inner ears of fish and several mammals.

Hearing is one of the primary senses marine mammals use to gather information about their environment and communicate with conspecifics. Although empirical information on the relationship between sensory impairment (TTS, PTS, and acoustic masking) on marine mammals remains limited, it seems reasonable to assume that reducing an animal's ability to gather information about its environment and to communicate with other members of its species would be stressful for animals that use hearing as their primary sensory mechanism. Therefore, we assume that acoustic exposures sufficient to trigger onset PTS or TTS would be accompanied by physiological stress responses because terrestrial animals exhibit those responses under similar conditions (NRC, 2003). More importantly, marine mammals might experience stress responses at received levels lower than those necessary to trigger onset TTS. Based on empirical studies of the time required to recover from stress responses (Moberg, 2000), NMFS also assumes that stress responses could persist beyond the time interval required for animals to recover from TTS and might result in pathological and pre-pathological states that would be as significant as behavioral responses to TTS. However, as stated previously in this document, the source levels of the drillships are not loud enough to induce PTS or likely even TTS.

Resonance effects (Gentry, 2002) and direct noise-induced bubble formations (Crum *et al.,* 2005) are implausible in the case of exposure to an impulsive broadband source like an airgun array. If seismic surveys disrupt diving patterns of deep-diving species, this might result in bubble formation and a form of the bends, as speculated to occur in beaked whales exposed to sonar. However, there is no specific evidence of this upon exposure to airgun pulses. Additionally, no beaked whale species occur in the proposed exploration drilling area.

In general, very little is known about the potential for strong, anthropogenic underwater sounds to cause non-auditory physical effects in marine mammals. Such effects, if they occur at all, would presumably be limited to short distances and to activities that extend over a prolonged period. The available data do not allow identification of a specific exposure level above which non-auditory effects can be expected (Southall *et al.,* 2007) or any meaningful quantitative predictions of the numbers (if any) of marine mammals that might be affected in those ways. The low levels of continuous sound that will be produced by the drillship are not expected to cause such effects. Additionally, marine mammals that show behavioral avoidance of the proposed activities, including most baleen whales, some odontocetes (including belugas), and some pinnipeds, are especially unlikely to incur auditory impairment or other physical effects.

Stranding and Mortality

Marine mammals close to underwater detonations of high explosives can be killed or severely injured, and the auditory organs are especially susceptible to injury (Ketten *et al.,* 1993; Ketten, 1995). However, explosives are no longer used for marine waters for commercial seismic surveys; they have been replaced entirely by airguns or related non-explosive pulse generators. Underwater sound from drilling, support activities, and airgun arrays is less energetic and has slower rise times, and there is no proof that they can cause serious injury, death, or stranding, even in the case of large airgun arrays. However, the association of mass strandings of beaked whales with naval exercises involving mid-frequency active sonar, and, in one case, a Lamont-Doherty Earth Observatory (L–DEO) seismic survey (Malakoff, 2002; Cox *et al.,* 2006), has raised the possibility that beaked whales exposed to strong pulsed sounds may be especially susceptible to injury and/or behavioral reactions that can lead to stranding (*e.g.,* Hildebrand, 2005; Southall *et al.,* 2007).

Specific sound-related processes that lead to strandings and mortality are not well documented, but may include:

(1) Swimming in avoidance of a sound into shallow water;

(2) A change in behavior (such as a change in diving behavior) that might contribute to tissue damage, gas bubble formation, hypoxia, cardiac arrhythmia, hypertensive hemorrhage or other forms of trauma;

(3) A physiological change, such as a vestibular response leading to a behavioral change or stress-induced hemorrhagic diathesis, leading in turn to tissue damage; and

(4) Tissue damage directly from sound exposure, such as through acoustically-mediated bubble formation and growth or acoustic resonance of tissues.

Some of these mechanisms are unlikely to apply in the case of impulse sounds. However, there are indications that gas-bubble disease (analogous to ''the bends''), induced in supersaturated tissue by a behavioral response to acoustic exposure, could be a pathologic mechanism for the strandings and mortality of some deep-diving cetaceans exposed to sonar. However, the evidence for this remains circumstantial and is associated with exposure to naval mid-frequency sonar, not seismic surveys or exploratory drilling programs (Cox *et al.,* 2006; Southall *et al.,* 2007).

Both seismic pulses and continuous drillship sounds are quite different from mid-frequency sonar signals, and some mechanisms by which sonar sounds have been hypothesized to affect beaked whales are unlikely to apply to airgun pulses or drillships. Sounds produced by airgun arrays are broadband impulses with most of the energy below 1 kHz, and the low-energy continuous sounds produced by drillships have most of the energy between 20 and 1,000 Hz. Additionally, the non-impulsive, continuous sounds produced by the drillship proposed to be used by Shell do not have rapid rise times. Rise time is the fluctuation in sound levels of the source. The type of sound that would be produced during the proposed drilling program will be constant and will not exhibit any sudden fluctuations or changes. Typical military mid-frequency sonar emits non-impulse sounds at frequencies of 2–10 kHz, generally with a relatively narrow bandwidth at any

one time. A further difference between them is that naval exercises can involve sound sources on more than one vessel. Thus, it is not appropriate to assume that there is a direct connection between the effects of military sonar and oil and gas industry operations on marine mammals. However, evidence that sonar signals can, in special circumstances, lead (at least indirectly) to physical damage and mortality (*e.g.,* Balcomb and Claridge, 2001; NOAA and USN, 2001; Jepson *et al.,* 2003; Fernández *et al.,* 2004, 2005; Hildebrand, 2005; Cox *et al.,* 2006) suggests that caution is warranted when dealing with exposure of marine mammals to any high-intensity ''pulsed'' sound.

There is no conclusive evidence of cetacean strandings or deaths at sea as a result of exposure to seismic surveys, but a few cases of strandings in the general area where a seismic survey was ongoing have led to speculation concerning a possible link between seismic surveys and strandings. Suggestions that there was a link between seismic surveys and strandings of humpback whales in Brazil (Engel *et al.,* 2004) were not well founded (IAGC, 2004; IWC, 2007). In September 2002, there was a stranding of two Cuvier's beaked whales in the Gulf of California, Mexico, when the L–DEO vessel R/V *Maurice Ewing* was operating a 20 airgun (8,490 in^3) array in the general area. The link between the stranding and the seismic surveys was inconclusive and not based on any physical evidence (Hogarth, 2002; Yoder, 2002). Nonetheless, the Gulf of California incident, plus the beaked whale strandings near naval exercises involving use of mid-frequency sonar, suggests a need for caution in conducting seismic surveys in areas occupied by beaked whales until more is known about effects of seismic surveys on those species (Hildebrand, 2005). No injuries of beaked whales are anticipated during the proposed exploratory drilling program because none occur in the proposed area.

Exploratory Drilling Program and Potential for Oil Spill

As noted above, the specified activity involves the drilling of exploratory wells and associated activities in the Chukchi Sea during the 2012 open-water season. The impacts to marine mammals that are reasonably expected to occur will be acoustic in nature. In response to previous IHA applications submitted by Shell, various entities have asserted that NMFS cannot authorize the take of marine mammals incidental to exploratory drilling under an IHA. Instead, they contend that incidental take can be allowed only with a letter of authorization (LOA) issued under five-year regulations because of the potential that an oil spill will cause serious injury or mortality.

There are two avenues for authorizing incidental take of marine mammals under the MMPA. NMFS may, depending on the nature of the anticipated take, authorize the take of marine mammals incidental to a specified activity through regulations and LOAs or annual IHAs. *See* 16 U.S.C. 1371(a)(5)(A) and (D). In general, regulations (accompanied by LOAs) may be issued for any type of take (*e.g.,* Level B harassment (behavioral disturbance), Level A harassment (injury), serious injury, or mortality), whereas IHAs are limited to activities that result only in harassment (*e.g.,* behavioral disturbance or injury). Following the 1994 MMPA Amendments, NMFS promulgated implementing regulations governing the issuance of IHAs in Arctic waters. See 60 FR 28379 (May 31, 1995) and 61 FR 15884 (April 10, 1996). NMFS stated in the preamble of the proposed rulemaking that the scope of IHAs would be limited to ''* * * those authorizations for harassment involving incidental harassment that may involve *non-serious injury.*'' See 60 FR 28380 (May 31, 1995; emphasis added); 50 CFR 216.107(a). (''[e]xcept for activities that have the potential to result in serious injury or mortality, which must be authorized under 216.105, incidental harassment authorizations may be issued, * * * to allowed activities that may result in only the incidental harassment of a small number of marine mammals.'') NMFS explained further that applications would be reviewed to determine whether the activity would result in more than harassment, and, if so, the agency would either (1) attempt to negate the potential for serious injury through mitigation requirements, or (2) deny the incidental harassment authorization and require the applicant to apply for incidental take regulations. See *id.* at 28380–81.

NMFS' determination of whether the type of incidental take authorization requested is appropriate occurs shortly after the applicant submits an application for an incidental take authorization. The agency evaluates the proposed action and all information contained in the application to determine whether it is adequate and complete and whether the type of taking requested is appropriate. See 50 CFR 216.104; see also 60 FR 28380 (May 31, 1995). Among other things, NMFS considers the specific activity or class of activities that can reasonably be *expected* to result in incidental take; the *type* of incidental take authorization that is being requested; and the *anticipated* impact of the activity upon the species or stock and its habitat. See *id.* at 216.104(a) (emphasis added). Any application that is determined to be incomplete or inappropriate for the type of taking requested will be returned to the applicant with an explanation of why the application is being returned. See *id.* Finally, NMFS evaluates the best available science to determine whether a proposed activity is reasonably expected or likely to result in serious injury or mortality.

NMFS evaluated Shell's incidental take application for its proposed 2012 drilling activities in light of the foregoing criteria and has concluded that Shell's request for an IHA is warranted. Shell submitted information with its IHA Application indicating that an oil spill is a highly unlikely event that is not reasonably expected to occur during the course of exploration drilling or ZVSP surveys. *See* Chukchi Sea IHA Application, p. 3 and Attachment E—Analysis of the Probability of an ''Unspecified Activity'' and Its Impacts: Oil Spill. In addition, Shell's 2012 Exploration Plan indicates there is a ''very low likelihood of a large oil spill event.'' *See* Shell Offshore, Inc.'s Revised Outer Continental Shelf Lease Exploration Plan, Chukchi Sea, Alaska (May 2011), at p. 8–1; *see also,* Appendix F to Shell's Revised Outer Continental Shelf Lease Exploration Plan, at p. 4–174.

The likelihood of a large or very large (*i.e.,* ≥1,000 barrels or ≥150,000 barrels, respectively) oil spill occurring during Shell's proposed program has been estimated to be low. A total of 35 exploration wells have been drilled between 1982 and 2003 in the Chukchi and Beaufort seas, and there have been no blowouts. In addition, no blowouts have occurred from the approximately 98 exploration wells drilled within the Alaskan OCS (MMS, 2007a). Attachment E in Shell's IHA Application contains information regarding the probability of an oil spill occurring during the proposed program and the potential impacts should one occur. Based on modeling conducted by Bercha (2008), the predicted frequency of an exploration well oil spill in waters similar to those in the Chukchi Sea, Alaska, is 0.000612 per well for a blowout sized between 10,000 barrels (bbl) to 149,000 bbl and 0.000354 per well for a blowout greater than 150,000 bbl. Please refer to Shell's application for additional information on the model and predicted frequencies (see **ADDRESSES**).

Shell has implemented several design standards and practices to reduce the already low probability of an oil spill occurring as part of its operations. The wells proposed to be drilled in the Arctic are exploratory and will not be converted to production wells; thus, production casing will not be installed, and the well will be permanently plugged and abandoned once exploration drilling is complete. Shell has also developed and will implement the following plans and protocols: Shell's Critical Operations Curtailment Plan; IMP; Well Control Plan; and Fuel Transfer Plan. Many of these safety measures are required by the Department of the Interior's interim final rule implementing certain measures to improve the safety of oil and gas exploration and development on the Outer Continental Shelf in light of the Deepwater Horizon event (*see* 75 FR 63346, October 14, 2010). Operationally, Shell has committed to the following to help prevent an oil spill from occurring in the Chukchi Sea:

- Shell's Blow Out Preventer (BOP) was inspected and tested by an independent third party specialist;
- Further inspection and testing of the BOP have been performed to ensure the reliability of the BOP and that all functions will be performed as necessary, including shearing the drill pipe;
- Subsea BOP hydrostatic tests will be increased from once every 14 days to once every 7 days;
- A second set of blind/shear rams will be installed in the BOP stack;
- Full string casings will typically not be installed through high pressure zones;
- Liners will be installed and cemented, which allows for installation of a liner top packer;
- Testing of liners prior to installing a tieback string of casing back to the wellhead;
- Utilizing a two-barrier policy; and
- Testing of all casing hangers to ensure that they have two independent, validated barriers at all times.

NMFS has considered Shell's proposed action and has concluded that there is no reasonable likelihood of serious injury or mortality from the 2012 Chukchi Sea exploration drilling program. NMFS has consistently interpreted the term ''potential,'' as used in 50 CFR 216.107(a), to only include impacts that have more than a discountable probability of occurring, that is, impacts must be reasonably expected to occur. Hence, NMFS has regularly issued IHAs in cases where it found that the potential for serious injury or mortality was ''highly unlikely'' (*See* 73 FR 40512, 40514, July 15, 2008; 73 FR 45969, 45971, August 7, 2008; 73 FR 46774, 46778, August 11, 2008; 73 FR 66106, 66109, November 6, 2008; 74 FR 55368, 55371, October 27, 2009).

Interpreting ''potential'' to include impacts with any probability of occurring (*i.e.,* speculative or extremely low probability events) would nearly preclude the issuance of IHAs in every instance. For example, NMFS would be unable to issue an IHA whenever vessels were involved in the marine activity since there is always some, albeit remote, possibility that a vessel could strike and seriously injure or kill a marine mammal. This would also be inconsistent with the dual-permitting scheme Congress created and undesirable from a policy perspective, as limited agency resources would be used to issue regulations that provide no additional benefit to marine mammals beyond what is proposed in this IHA.

Despite concluding that the risk of serious injury or mortality from an oil spill in this case is extremely remote, NMFS has nonetheless evaluated the potential effects of an oil spill on marine mammals. While an oil spill is not a component of Shell's specified activity, potential impacts on marine mammals from an oil spill are discussed in more detail below and will be addressed further in the Environmental Assessment.

Potential Effects of Oil on Cetaceans

The specific effects an oil spill would have on cetaceans are not well known. While mortality is unlikely, exposure to spilled oil could lead to skin irritation, baleen fouling (which might reduce feeding efficiency), respiratory distress from inhalation of hydrocarbon vapors, consumption of some contaminated prey items, and temporary displacement from contaminated feeding areas. Geraci and St. Aubin (1990) summarize effects of oil on marine mammals, and Bratton *et al.* (1993) provides a synthesis of knowledge of oil effects on bowhead whales. The number of cetaceans that might be contacted by a spill would depend on the size, timing, and duration of the spill and where the oil is in relation to the animals. Whales may not avoid oil spills, and some have been observed feeding within oil slicks (Goodale *et al.,* 1981). These topics are discussed in more detail next.

In the case of an oil spill occurring during migration periods, disturbance of the migrating cetaceans from cleanup activities may have more of an impact than the oil itself. Human activity associated with cleanup efforts could deflect whales away from the path of the oil. However, noise created from cleanup activities likely will be short term and localized. In fact, whale avoidance of clean-up activities may benefit whales by displacing them from the oil spill area.

There is no direct evidence that oil spills, including the much studied Santa Barbara Channel and Exxon Valdez spills, have caused any deaths of cetaceans (Geraci, 1990; Brownell, 1971; Harvey and Dahlheim, 1994). It is suspected that some individually identified killer whales that disappeared from Prince William Sound during the time of the Exxon Valdez spill were casualties of that spill. However, no clear cause and effect relationship between the spill and the disappearance could be established (Dahlheim and Matkin, 1994). The AT–1 pod of transient killer whales that sometimes inhabits Prince William Sound has continued to decline after the Exxon Valdez oil spill (EVOS). Matkin *et al.* (2008) tracked the AB resident pod and the AT–1 transient group of killer whales from 1984 to 2005. The results of their photographic surveillance indicate a much higher than usual mortality rate for both populations the year following the spill (33% for AB Pod and 41% for AT–1 Group) and lower than average rates of increase in the 16 years after the spill (annual increase of about 1.6% for AB Pod compared to an annual increase of about 3.2% for other Alaska killer whale pods). In killer whale pods, mortality rates are usually higher for non-reproductive animals and very low for reproductive animals and adolescents (Olesiuk *et al.,* 1990, 2005; Matkin *et al.,* 2005). No effects on humpback whales in Prince William Sound were evident after the EVOS (von Ziegesar *et al.,* 1994). There was some temporary displacement of humpback whales out of Prince William Sound, but this could have been caused by oil contamination, boat and aircraft disturbance, displacement of food sources, or other causes.

Migrating gray whales were apparently not greatly affected by the Santa Barbara spill of 1969. There appeared to be no relationship between the spill and mortality of marine mammals. The higher than usual counts of dead marine mammals recorded after the spill represented increased survey effort and therefore cannot be conclusively linked to the spill itself (Brownell, 1971; Geraci, 1990). The conclusion was that whales were either able to detect the oil and avoid it or were unaffected by it (Geraci, 1990).

(1) Oiling of External Surfaces

Whales rely on a layer of blubber for insulation, so oil would have little if any effect on thermoregulation by whales. Effects of oiling on cetacean skin appear to be minor and of little significance to the animal's health (Geraci, 1990). Histological data and ultrastructural studies by Geraci and St. Aubin (1990) showed that exposures of skin to crude oil for up to 45 minutes in four species of toothed whales had no effect. They switched to gasoline and applied the sponge up to 75 minutes. This produced transient damage to epidermal cells in whales. Subtle changes were evident only at the cell level. In each case, the skin damage healed within a week. They concluded that a cetacean's skin is an effective barrier to the noxious substances in petroleum. These substances normally damage skin by getting between cells and dissolving protective lipids. In cetacean skin, however, tight intercellular bridges, vital surface cells, and the extraordinary thickness of the epidermis impeded the damage. The authors could not detect a change in lipid concentration between and within cells after exposing skin from a white-sided dolphin to gasoline for 16 hours in vitro.

Bratton *et al.* (1993) synthesized studies on the potential effects of contaminants on bowhead whales. They concluded that no published data proved oil fouling of the skin of any free-living whales, and conclude that bowhead whales contacting fresh or weathered petroleum are unlikely to suffer harm. Although oil is unlikely to adhere to smooth skin, it may stick to rough areas on the surface (Henk and Mullan, 1997). Haldiman *et al.* (1985) found the epidermal layer to be as much as seven to eight times thicker than that found on most whales. They also found that little or no crude oil adhered to preserved bowhead skin that was dipped into oil up to three times, as long as a water film stayed on the skin's surface. Oil adhered in small patches to the surface and vibrissae (stiff, hairlike structures), once it made enough contact with the skin. The amount of oil sticking to the surrounding skin and epidermal depression appeared to be in proportion to the number of exposures and the roughness of the skin's surface. It can be assumed that if oil contacted the eyes, effects would be similar to those observed in ringed seals; continued exposure of the eyes to oil could cause permanent damage (St. Aubin, 1990).

(2) Ingestion

Whales could ingest oil if their food is contaminated, or oil could also be absorbed through the respiratory tract. Some of the ingested oil is voided in vomit or feces but some is absorbed and could cause toxic effects (Geraci, 1990). When returned to clean water, contaminated animals can depurate this internal oil (Engelhardt, 1978, 1982). Oil ingestion can decrease food assimilation of prey eaten (St. Aubin, 1988). Cetaceans may swallow some oil-contaminated prey, but it likely would be only a small part of their food. It is not known if whales would leave a feeding area where prey was abundant following a spill. Some zooplankton eaten by bowheads and gray whales consume oil particles and bioaccumulation can result. Tissue studies by Geraci and St. Aubin (1990) revealed low levels of naphthalene in the livers and blubber of baleen whales. This result suggests that prey have low concentrations in their tissues, or that baleen whales may be able to metabolize and excrete certain petroleum hydrocarbons. Whales exposed to an oil spill are unlikely to ingest enough oil to cause serious internal damage (Geraci and St. Aubin, 1980, 1982) and this kind of damage has not been reported (Geraci, 1990).

(3) Fouling of Baleen

Baleen itself is not damaged by exposure to oil and is resistant to effects of oil (St. Aubin *et al.,* 1984). Crude oil could coat the baleen and reduce filtration efficiency; however, effects may be temporary (Braithwaite, 1983; St. Aubin *et al.,* 1984). If baleen is coated in oil for long periods, it could cause the animal to be unable to feed, which could lead to malnutrition or even death. Most of the oil that would coat the baleen is removed after 30 min, and less than 5% would remain after 24 hr (Bratton *et al.,* 1993). Effects of oiling of the baleen on feeding efficiency appear to be minor (Geraci, 1990). However, a study conducted by Lambertsen *et al.* (2005) concluded that their results highlight the uncertainty about how rapidly oil would depurate at the near zero temperatures in arctic waters and whether baleen function would be restored after oiling.

(4) Avoidance

Some cetaceans can detect oil and sometimes avoid it, but others enter and swim through slicks without apparent effects (Geraci, 1990; Harvey and Dahlheim, 1994). Bottlenose dolphins in the Gulf of Mexico apparently could detect and avoid slicks and mousse but did not avoid light sheens on the surface (Smultea and Wursig, 1995). After the Regal Sword spill in 1979, various species of baleen and toothed whales were observed swimming and feeding in areas containing spilled oil southeast of Cape Cod, MA (Goodale *et al.,* 1981). For months following EVOS, there were numerous observations of gray whales, harbor porpoises, Dall's porpoises, and killer whales swimming through light-to-heavy crude-oil sheens (Harvey and Dalheim, 1994, cited in Matkin *et al.,* 2008). However, if some of the animals avoid the area because of the oil, then the effects of the oiling would be less severe on those individuals.

(5) Factors Affecting the Severity of Effects

Effects of oil on cetaceans in open water are likely to be minimal, but there could be effects on cetaceans where both the oil and the whales are at least partly confined in leads or at ice edges (Geraci, 1990). In spring, bowhead and beluga whales migrate through leads in the ice. At this time, the migration can be concentrated in narrow corridors defined by the leads, thereby creating a greater risk to animals caught in the spring lead system should oil enter the leads. This situation would only occur if there were an oil spill late in the season and Shell could not complete cleanup efforts prior to ice covering the area. The oil would likely then be trapped in the ice until it began to thaw in the spring.

In fall, the migration route of bowheads can be close to shore (Blackwell *et al.,* 2009c). If fall migrants were moving through leads in the pack ice or were concentrated in nearshore waters, some bowhead whales might not be able to avoid oil slicks and could be subject to prolonged contamination. However, the autumn migration through the Chukchi Sea extends over several weeks, and some of the whales travel along routes north or inland of the area, thereby reducing the number of whales that could approach patches of spilled oil. Additionally, vessel activity associated with spill cleanup efforts may deflect whales traveling near the Burger prospect in the Chukchi Sea, thereby reducing the likelihood of contact with spilled oil.

Bowhead and beluga whales overwinter in the Bering Sea (mainly from November to March). In the summer, the majority of the bowhead whales are found in the Canadian Beaufort Sea, although some have recently been observed in the U.S. Beaufort and Chukchi Seas during the summer months (June to August). Data from the Barrow-based boat surveys in

2009 (George and Sheffield, 2009) showed that bowheads were observed almost continuously in the waters near Barrow, including feeding groups in the Chukchi Sea at the beginning of July. The majority of belugas in the Beaufort stock migrate into the Beaufort Sea in April or May, although some whales may pass Point Barrow as early as late March and as late as July (Braham *et al.,* 1984; Ljungblad *et al.,* 1984; Richardson *et al.,* 1995a). Therefore, a spill in summer would not be expected to have major impacts on these species. Additionally, humpback and fin whales are only sighted in the Chukchi Sea in small numbers in the summer, as this is thought to be the extreme northern edge of their range. Therefore, impacts to these species from an oil spill would be extremely limited.

Potential Effects of Oil on Pinnipeds

Ice seals are present in open-water areas during summer and early autumn. Externally oiled phocid seals often survive and become clean, but heavily oiled seal pups and adults may die, depending on the extent of oiling and characteristics of the oil. Prolonged exposure could occur if fuel or crude oil was spilled in or reached nearshore waters, was spilled in a lead used by seals, or was spilled under the ice when seals have limited mobility (NMFS, 2000). Adult seals may suffer some temporary adverse effects, such as eye and skin irritation, with possible infection (MMS, 1996). Such effects may increase stress, which could contribute to the death of some individuals. Ringed seals may ingest oil-contaminated foods, but there is little evidence that oiled seals will ingest enough oil to cause lethal internal effects. There is a likelihood that newborn seal pups, if contacted by oil, would die from oiling through loss of insulation and resulting hypothermia. These potential effects are addressed in more detail in subsequent paragraphs.

Reports of the effects of oil spills have shown that some mortality of seals may have occurred as a result of oil fouling; however, large scale mortality had not been observed prior to the EVOS (St. Aubin, 1990). Effects of oil on marine mammals were not well studied at most spills because of lack of baseline data and/or the brevity of the post-spill surveys. The largest documented impact of a spill, prior to EVOS, was on young seals in January in the Gulf of St. Lawrence (St. Aubin, 1990). Brownell and Le Boeuf (1971) found no marked effects of oil from the Santa Barbara oil spill on California sea lions or on the mortality rates of newborn pups.

Intensive and long-term studies were conducted after the EVOS in Alaska. There may have been a long-term decline of 36% in numbers of molting harbor seals at oiled haul-out sites in Prince William Sound following EVOS (Frost *et al.,* 1994a). However, in a reanalysis of those data and additional years of surveys, along with an examination of assumptions and biases associated with the original data, Hoover-Miller *et al.* (2001) concluded that the EVOS effect had been overestimated. The decline in attendance at some oiled sites was more likely a continuation of the general decline in harbor seal abundance in Prince William Sound documented since 1984 (Frost *et al.,* 1999) rather than a result of EVOS. The results from Hoover-Miller *et al.* (2001) indicate that the effects of EVOS were largely indistinguishable from natural decline by 1992. However, while Frost *et al.* (2004) concluded that there was no evidence that seals were displaced from oiled sites, they did find that aerial counts indicated 26% fewer pups were produced at oiled locations in 1989 than would have been expected without the oil spill. Harbor seal pup mortality at oiled beaches was 23% to 26%, which may have been higher than natural mortality, although no baseline data for pup mortality existed prior to EVOS (Frost *et al.,* 1994a). There was no conclusive evidence of spill effects on Steller sea lions (Calkins *et al.,* 1994). Oil did not persist on sea lions themselves (as it did on harbor seals), nor did it persist on sea lion haul-out sites and rookeries (Calkins *et al.,* 1994). Sea lion rookeries and haul out sites, unlike those used by harbor seals, have steep sides and are subject to high wave energy (Calkins *et al.,* 1994).

(1) Oiling of External Surfaces

Adult seals rely on a layer of blubber for insulation, and oiling of the external surface does not appear to have adverse thermoregulatory effects (Kooyman *et al.,* 1976, 1977; St. Aubin, 1990). Contact with oil on the external surfaces can potentially cause increased stress and irritation of the eyes of ringed seals (Geraci and Smith, 1976; St. Aubin, 1990). These effects seemed to be temporary and reversible, but continued exposure of eyes to oil could cause permanent damage (St. Aubin, 1990). Corneal ulcers and abrasions, conjunctivitis, and swollen nictitating membranes were observed in captive ringed seals placed in crude oil-covered water (Geraci and Smith, 1976) and in seals in the Antarctic after an oil spill (Lillie, 1954).

Newborn seal pups rely on their fur for insulation. Newborn ringed seal pups in lairs on the ice could be contaminated through contact with oiled mothers. There is the potential that newborn ringed seal pups that were contaminated with oil could die from hypothermia.

(2) Ingestion

Marine mammals can ingest oil if their food is contaminated. Oil can also be absorbed through the respiratory tract (Geraci and Smith, 1976; Engelhardt *et al.,* 1977). Some of the ingested oil is voided in vomit or feces but some is absorbed and could cause toxic effects (Engelhardt, 1981). When returned to clean water, contaminated animals can depurate this internal oil (Engelhardt, 1978, 1982, 1985). In addition, seals exposed to an oil spill are unlikely to ingest enough oil to cause serious internal damage (Geraci and St. Aubin, 1980, 1982).

(3) Avoidance and Behavioral Effects

Although seals may have the capability to detect and avoid oil, they apparently do so only to a limited extent (St. Aubin, 1990). Seals may abandon the area of an oil spill because of human disturbance associated with cleanup efforts, but they are most likely to remain in the area of the spill. One notable behavioral reaction to oiling is that oiled seals are reluctant to enter the water, even when intense cleanup activities are conducted nearby (St. Aubin, 1990; Frost *et al.,* 1994b, 2004).

(4) Factors Affecting the Severity of Effects

Seals that are under natural stress, such as lack of food or a heavy infestation by parasites, could potentially die because of the additional stress of oiling (Geraci and Smith, 1976; St. Aubin, 1990; Spraker *et al.,* 1994). Female seals that are nursing young would be under natural stress, as would molting seals. In both cases, the seals would have reduced food stores and may be less resistant to effects of oil than seals that are not under some type of natural stress. Seals that are not under natural stress (*e.g.,* fasting, molting) would be more likely to survive oiling.

In general, seals do not exhibit large behavioral or physiological reactions to limited surface oiling or incidental exposure to contaminated food or vapors (St. Aubin, 1990; Williams *et al.,* 1994). Effects could be severe if seals surface in heavy oil slicks in leads or if oil accumulates near haul-out sites (St. Aubin, 1990). An oil spill in open-water is less likely to impact seals.

The potential effects to marine mammals described in this section of the document do not take into consideration the proposed monitoring and mitigation measures described later in this document (see the ''Proposed Mitigation'' and ''Proposed Monitoring and Reporting'' sections).

Anticipated Effects on Marine Mammal Habitat

The primary potential impacts to marine mammals and other marine species are associated with elevated sound levels produced by the exploratory drilling program (*i.e.* the drillship and the airguns). However, other potential impacts are also possible to the surrounding habitat from physical disturbance and an oil spill (should one occur). This section describes the potential impacts to marine mammal habitat from the specified activity. Because the marine mammals in the area feed on fish and/or invertebrates there is also information on the species typically preyed upon by the marine mammals in the area.

Common Marine Mammal Prey in the Area

All of the marine mammal species that may occur in the proposed project area prey on either marine fish or invertebrates. The ringed seal feeds on fish and a variety of benthic species, including crabs and shrimp. Bearded seals feed mainly on benthic organisms, primarily crabs, shrimp, and clams. Spotted seals feed on pelagic and demersal fish, as well as shrimp and cephalopods. They are known to feed on a variety of fish including herring, capelin, sand lance, Arctic cod, saffron cod, and sculpins. Ribbon seals feed primarily on pelagic fish and invertebrates, such as shrimp, crabs, squid, octopus, cod, sculpin, pollack, and capelin. Juveniles feed mostly on krill and shrimp.

Bowhead whales feed in the eastern Beaufort Sea during summer and early autumn but continue feeding to varying degrees while on their migration through the central and western Beaufort Sea in the late summer and fall (Richardson and Thomson [eds.], 2002). Aerial surveys in recent years have sighted bowhead whales feeding in Camden Bay on their westward migration through the Beaufort Sea. When feeding in relatively shallow areas, bowheads feed throughout the water column. However, feeding is concentrated at depths where zooplankton is concentrated (Wursig *et al.,* 1984, 1989; Richardson [ed.], 1987; Griffiths *et al.,* 2002). Lowry and Sheffield (2002) found that copepods and euphausiids were the most common prey found in stomach samples from bowhead whales harvested in the Kaktovik area from 1979 to 2000. Areas to the east of Barter Island in the Beaufort Sea appear to be used regularly for feeding as bowhead whales migrate slowly westward across the Beaufort Sea (Thomson and Richardson, 1987; Richardson and Thomson [eds.], 2002). However, in some years, sizable groups of bowhead whales have been seen feeding as far west as the waters just east of Point Barrow (which is more than 150 mi [241 km] east of Shell's proposed drill sites in the Chukchi Sea) near the Plover Islands (Braham *et al.,* 1984; Ljungblad *et al.,* 1985; Landino *et al.,* 1994). The situation in September–October 1997 was unusual in that bowheads fed widely across the Alaskan Beaufort Sea, including higher numbers in the area east of Barrow than reported in any previous year (S. Treacy and D. Hansen, MMS, pers. comm.). However, by the time most bowhead whales reach the Chukchi Sea (October), they will likely no longer be feeding, or if it occurs it will be very limited. The location near Point Barrow is currently under intensive study as part of the BOWFEST program (BOWFEST, 2011).

Beluga whales feed on a variety of fish, shrimp, squid, and octopus (Burns and Seaman, 1985). Like several of the other species in the area, harbor porpoise feed on demersal and benthic species, mainly schooling fish and cephalopods. Killer whales from resident stocks primarily feed on salmon while killer whales from transient stocks feed on other marine mammals, such as harbor seals, harbor porpoises, gray whale calves and other pinniped and cetacean species.

Gray whales are primarily bottom feeders, and benthic amphipods and isopods form the majority of their summer diet, at least in the main summering areas west of Alaska (Oliver *et al.,* 1983; Oliver and Slattery, 1985). Farther south, gray whales have also been observed feeding around kelp beds, presumably on mysid crustaceans, and on pelagic prey such as small schooling fish and crab larvae (Hatler and Darling, 1974). The northeastern-most of the recurring feeding areas for gray whales is in the northeastern Chukchi Sea southwest of Barrow (Clarke *et al.,* 1989).

Three other baleen whale species may occur in the proposed project area, although likely in very small numbers: Minke, humpback, and fin whales. Minke whales opportunistically feed on crustaceans (*e.g.,* krill), plankton (*e.g.,* copepods), and small schooling fish (*e.g.,* anchovies, dogfish, capelin, coal fish, cod, eels, herring, mackerel, salmon, sand lance, saury, and wolfish) (Reeves *et al.,* 2002). Fin whales tend to feed in northern latitudes in the summer months on plankton and shoaling pelagic fish (Jonsgard, 1966a,b). Like many of the other species in the area, humpback whales primarily feed on euphausiids, copepods, and small schooling fish (*e.g.,* herring, capelin, and sand lance) (Reeves *et al.,* 2002). However, the primary feeding grounds for these species do not occur in the northern Chukchi Sea.

Two kinds of fish inhabit marine waters in the study area: (1) True marine fish that spend all of their lives in salt water, and (2) anadromous species that reproduce in fresh water and spend parts of their life cycles in salt water.

Most arctic marine fish species are small, benthic forms that do not feed high in the water column. The majority of these species are circumpolar and are found in habitats ranging from deep offshore water to water as shallow as 16.4–33 ft (5–10 m; Fechhelm *et al.,* 1995). The most important pelagic species, and the only abundant pelagic species, is the Arctic cod. The Arctic cod is a major vector for the transfer of energy from lower to higher trophic levels (Bradstreet *et al.,* 1986). In summer, Arctic cod can form very large schools in both nearshore and offshore waters (Craig *et al.,* 1982; Bradstreet *et al.,* 1986). Locations and areas frequented by large schools of Arctic cod cannot be predicted but can be almost anywhere. The Arctic cod is a major food source for beluga whales, ringed seals, and numerous species of seabirds (Frost and Lowry, 1984; Bradstreet *et al.,* 1986).

Anadromous Dolly Varden char and some species of whitefish winter in rivers and lakes, migrate to the sea in spring and summer, and return to fresh water in autumn. Anadromous fish form the basis of subsistence, commercial, and small regional sport fisheries. Dolly Varden char migrate to the sea from May through mid-June (Johnson, 1980) and spend about 1.5–2.5 months there (Craig, 1989). They return to rivers beginning in late July or early August with the peak return migration occurring between mid-August and early September (Johnson, 1980). At sea, most anadromous corregonids (whitefish) remain in nearshore waters within several kilometers of shore (Craig, 1984, 1989). They are often termed ''amphidromous'' fish in that they make repeated annual migrations into marine waters to feed, returning each fall to overwinter in fresh water.

Benthic organisms are defined as bottom dwelling creatures. Infaunal

organisms are benthic organisms that live within the substrate and are often sedentary or sessile (bivalves, polychaetes). Epibenthic organisms live on or near the bottom surface sediments and are mobile (amphipods, isopods, mysids, and some polychaetes). The northeastern Chukchi Sea supports a higher biomass of benthic organisms than do surrounding areas (Grebmeier and Dunton, 2000). Some benthic-feeding marine mammals, such as walruses and gray whales, take advantage of the abundant food resources and congregate in these highly productive areas. Harold and Hanna Shoals are two known highly productive areas in the Chukchi Sea rich with benthic animals.

Many of the nearshore benthic marine invertebrates of the Arctic are circumpolar and are found over a wide range of water depths (Carey *et al.,* 1975). Species identified include polychaetes (*Spio filicornis, Chaetozone setosa, Eteone longa*), bivalves (*Cryrtodaria kurriana, Nucula tenuis, Liocyma fluctuosa*), an isopod (*Saduria entomon*), and amphipods (*Pontoporeia femorata, P. affinis*). Additionally, kelp beds occur in at least two areas in the nearshore areas of the Chukchi Sea (Mohr *et al.,* 1957; Phillips *et al.,* 1982; Phillips and Reiss, 1985), but they are located within about 15.5 mi (25 km) of the coast, which is much closer nearshore than Shell's proposed activities.

Potential Impacts From Seafloor Disturbance on Marine Mammal Habitat

There is a possibility of some seafloor disturbance or temporary increased turbidity in the seabed sediments during anchoring and excavation of the mudline cellars (MLCs). The amount and duration of disturbed or turbid conditions will depend on sediment material and consolidation of specific activity.

The *Discoverer* would be stabilized and held in place with a system of eight 15,400 lb (7,000 kg) Stevpris anchors during operations. The anchors from the *Discoverer* are designed to embed into the seafloor. Prior to setting, the anchors will penetrate the seafloor and drag two or three times their length. Both the anchor and anchor chain will disturb sediments and create an ''anchor scar,'' which is a depression in the seafloor caused by the anchor embedding. The anchor scar is a depression with ridges of displaced sediment, and the area of disturbance will often be greater than the size of the anchor itself because the anchor is dragged along the seafloor until it takes hold and sets.

Each Stevpris anchor may impact an area of 2,027 ft^2 (188 m^2) of the seafloor, including the scar made when the anchor chain is dragged across the seafloor. Minimum impact estimates from each well or mooring the *Discoverer* by its eight anchors is 16,216 ft^2 (1,507 m^2) of seafloor. This estimate assumes that the anchors are set only once. Shell plans to pre-set anchors at each drill site. Unless moved by an outside force such as sea current, anchors should only need to be set once per drill site. (Shell proposes to drill at three sites and potentially a fourth site in the Chukchi Sea during the 2012 open-water season.) Additionally, based on the vast size of the Chukchi Sea, the area of disturbance is not anticipated to adversely affect marine mammal use of the area.

Once the drillship ends operation, the anchors will be retrieved. Over time, the anchor scars will be filled through natural movement of sediment. The duration of the scars depends upon the energy of the system, water depth, ice scour, and sediment type. Anchor scars were visible under low energy conditions in the North Sea for 5–10 years after retrieval. Centaur Associates, Inc. (1984) reported that anchoring in sand or muddy sand sediments may not result in anchor scars or may result in scars that do not persist. Surficial sediments in Shell's Burger prospect consist of soft sandy mud (silt and clay) with lesser amounts of gravel (Battelle Memorial Institute, 2010; Blanchard *et al.,* 2010a,b). The energy regime, plus possible effects of ice gouge in the Chukchi Sea, suggests that anchor scars would be refilled faster than in the North Sea.

Excavation of each MLC by the *Discoverer* will displace about 17,128 ft^3 (485 m^3) of seafloor sediments and directly disturb approximately 314 ft^2 (29 m^2) of seafloor. Material will be excavated from the MLCs using a large diameter drillbit. Pressurized air and seawater (no drilling mud used) will be used to assist in the removal of the excavated materials from the MLC.

Some of the excavated sediments will be displaced to adjacent seafloor areas and some will be removed via the air lift system and discharged on the seafloor away from the MLC. These excavated materials will also have some indirect effects as they are deposited on the seafloor in the vicinity of the MLCs. Direct and indirect effects would include slight changes in seafloor relief and sediment consistency.

Vessel mooring and MLC construction would result in increased suspended sediment in the water column that could result in lethal effects on some zooplankton (food source for baleen whales). However, compared to the overall population of zooplankton and the localized nature of effects, any mortality that may occur would not be considered significant. Due to fast regeneration periods of zooplankton, populations are expected to recover quickly.

Impacts on fish resulting from suspended sediments would be dependent upon the life stage of the fish (*e.g.,* eggs, larvae, juveniles, or adults), the concentration of the suspended sediments, the type of sediment, and the duration of exposure (IMG Golder, 2004). Eggs and larvae have been found to exhibit greater sensitivity to suspended sediments (Wilber and Clarke, 2001) and other stresses, which is thought to be related to their relative lack of motility (Auld and Schubel, 1978). Sedimentation could affect fish by causing egg morbidity of demersal fish feeding near or on the ocean floor (Wilber and Clarke, 2001). Surficial membranes are especially susceptible to abrasion (Cairns and Scheier, 1968). Adhesive demersal eggs could be exposed to the sediments as long as the excavation activity continues, while exposure of pelagic eggs would be much shorter as they move with ocean currents (Wilber and Clarke, 2001). Most of the offshore demersal marine fish species in the northeastern Chukchi Sea (Shell's proposed project area) spawn under the ice during the winter and therefore would not be affected by redeposition of sediments on the seafloor due to MLC construction since Shell has not scheduled any exploration drilling activities during the winter months.

Most diadromous fish species expected to be present in the area of Shell's drilling operations lay their eggs in freshwater or coastal estuaries. Therefore, only those eggs carried into the marine environment by winds and current would be affected by these operations. Because Shell's proposed drill sites occur 65 and 78 mi (105 and 125.5 km) from the Chukchi coast, the statistical probability of diadromous fish eggs being present in the vicinity of Shell's proposed operations is infinitesimally small. Thus, impacts on diadromous fish eggs due to abrasion, puncture, burial, or other effects associated with anchoring or MLC construction would be slight. Further, since most diadromous fish species produce eggs prolifically, even if a small number of eggs were impacted by these activities, the total species population would not be expected to be impacted.

Suspended sediments, resulting from vessel mooring and MLC excavation, are

not expected to result in permanent damage to habitats used by the marine mammal species in the proposed project area or on the food sources that they utilize. Rather, NMFS considers that such impacts will be temporary in nature and concentrated in the areas directly surrounding vessel mooring and MLC excavation activities—areas which are very small relative to the overall Chukchi Sea region. Less than 0.0000001 percent of the fish habitat in the LS 193 area would be directly affected by the mooring and excavation activity.

Potential Impacts From Sound Generation

With regard to fish as a prey source for odontocetes and seals, fish are known to hear and react to sounds and to use sound to communicate (Tavolga *et al.,* 1981) and possibly avoid predators (Wilson and Dill, 2002). Experiments have shown that fish can sense both the strength and direction of sound (Hawkins, 1981). Primary factors determining whether a fish can sense a sound signal, and potentially react to it, are the frequency of the signal and the strength of the signal in relation to the natural background noise level.

Fishes produce sounds that are associated with behaviors that include territoriality, mate search, courtship, and aggression. It has also been speculated that sound production may provide the means for long distance communication and communication under poor underwater visibility conditions (Zelick *et al.,* 1999), although the fact that fish communicate at low-frequency sound levels where the masking effects of ambient noise are naturally highest suggests that very long distance communication would rarely be possible. Fishes have evolved a diversity of sound generating organs and acoustic signals of various temporal and spectral contents. Fish sounds vary in structure, depending on the mechanism used to produce them (Hawkins, 1993). Generally, fish sounds are predominantly composed of low frequencies (less than 3 kHz).

Since objects in the water scatter sound, fish are able to detect these objects through monitoring the ambient noise. Therefore, fish are probably able to detect prey, predators, conspecifics, and physical features by listening to environmental sounds (Hawkins, 1981). There are two sensory systems that enable fish to monitor the vibration-based information of their surroundings. The two sensory systems, the inner ear and the lateral line, constitute the acoustico-lateralis system.

Although the hearing sensitivities of very few fish species have been studied to date, it is becoming obvious that the intra- and inter-specific variability is considerable (Coombs, 1981). Nedwell *et al.* (2004) compiled and published available fish audiogram information. A noninvasive electrophysiological recording method known as auditory brainstem response is now commonly used in the production of fish audiograms (Yan, 2004). Generally, most fish have their best hearing in the low-frequency range (*i.e.,* less than 1 kHz). Even though some fish are able to detect sounds in the ultrasonic frequency range, the thresholds at these higher frequencies tend to be considerably higher than those at the lower end of the auditory frequency range.

Literature relating to the impacts of sound on marine fish species can be divided into the following categories: (1) Pathological effects; (2) physiological effects; and (3) behavioral effects. Pathological effects include lethal and sub-lethal physical damage to fish; physiological effects include primary and secondary stress responses; and behavioral effects include changes in exhibited behaviors of fish. Behavioral changes might be a direct reaction to a detected sound or a result of the anthropogenic sound masking natural sounds that the fish normally detect and to which they respond. The three types of effects are often interrelated in complex ways. For example, some physiological and behavioral effects could potentially lead to the ultimate pathological effect of mortality. Hastings and Popper (2005) reviewed what is known about the effects of sound on fishes and identified studies needed to address areas of uncertainty relative to measurement of sound and the responses of fishes. Popper *et al.* (2003/2004) also published a paper that reviews the effects of anthropogenic sound on the behavior and physiology of fishes.

Potential effects of exposure to continuous sound on marine fish include TTS, physical damage to the ear region, physiological stress responses, and behavioral responses such as startle response, alarm response, avoidance, and perhaps lack of response due to masking of acoustic cues. Most of these effects appear to be either temporary or intermittent and therefore probably do not significantly impact the fish at a population level. The studies that resulted in physical damage to the fish ears used noise exposure levels and durations that were far more extreme than would be encountered under conditions similar to those expected during Shell's proposed exploratory drilling activities.

The level of sound at which a fish will react or alter its behavior is usually well above the detection level. Fish have been found to react to sounds when the sound level increased to about 20 dB above the detection level of 120 dB (Ona, 1988); however, the response threshold can depend on the time of year and the fish's physiological condition (Engas *et al.,* 1993). In general, fish react more strongly to pulses of sound rather than a continuous signal (Blaxter *et al.,* 1981), such as the type of sound that will be produced by the drillship, and a quicker alarm response is elicited when the sound signal intensity rises rapidly compared to sound rising more slowly to the same level.

Investigations of fish behavior in relation to vessel noise (Olsen *et al.,* 1983; Ona, 1988; Ona and Godo, 1990) have shown that fish react when the sound from the engines and propeller exceeds a certain level. Avoidance reactions have been observed in fish such as cod and herring when vessels approached close enough that received sound levels are 110 dB to 130 dB (Nakken, 1992; Olsen, 1979; Ona and Godo, 1990; Ona and Toresen, 1988). However, other researchers have found that fish such as polar cod, herring, and capeline are often attracted to vessels (apparently by the noise) and swim toward the vessel (Rostad *et al.,* 2006). Typical sound source levels of vessel noise in the audible range for fish are 150 dB to 170 dB (Richardson *et al.,* 1995a). (Based on models, the 160 dB radius for the *Discoverer* would extend approximately 33 ft [10 m]; therefore, fish would need to be in close proximity to the drillship for the noise to be audible). In calm weather, ambient noise levels in audible parts of the spectrum lie between 60 dB to 100 dB.

Sound will also occur in the marine environment from the various support vessels. Reported source levels for vessels during ice-management have ranged from 175 dB to 185 dB (Brewer *et al.,* 1993, Hall *et al.,* 1994). However, ice management or icebreaking activities are not expected to be necessary throughout the entire drilling season, so impacts from that activity would occur less frequently than sound from the drillship. Sound pressures generated by drilling vessels during active drilling operations have been measured during past exploration in the Beaufort and Chukchi seas. Sounds generated by drilling and ice-management are generally low frequency and within the frequency range detectable by most fish.

Shell also proposes to conduct seismic surveys with an airgun array for a short period of time during the drilling season (a total of approximately 30–56 hours over the course of the entire proposed drilling program). Airguns produce impulsive sounds as opposed to continuous sounds at the source. Short, sharp sounds can cause overt or subtle changes in fish behavior. Chapman and Hawkins (1969) tested the reactions of whiting (hake) in the field to an airgun. When the airgun was fired, the fish dove from 82 to 180 ft (25 to 55 m) depth and formed a compact layer. The whiting dove when received sound levels were higher than 178 dB re 1 μPa (Pearson *et al.,* 1992).

Pearson *et al.* (1992) conducted a controlled experiment to determine effects of strong noise pulses on several species of rockfish off the California coast. They used an airgun with a source level of 223 dB re 1 μPa. They noted:

- Startle responses at received levels of 200–205 dB re 1 μPa and above for two sensitive species, but not for two other species exposed to levels up to 207 dB;
- Alarm responses at 177–180 dB for the two sensitive species, and at 186 to 199 dB for other species;
- An overall threshold for the above behavioral response at about 180 dB;
- An extrapolated threshold of about 161 dB for subtle changes in the behavior of rockfish; and
- A return to pre-exposure behaviors within the 20–60 minute exposure period.

In summary, fish often react to sounds, especially strong and/or intermittent sounds of low frequency. Sound pulses at received levels of 160 dB re 1 μPa may cause subtle changes in behavior. Pulses at levels of 180 dB may cause noticeable changes in behavior (Chapman and Hawkins, 1969; Pearson *et al.,* 1992; Skalski *et al.,* 1992). It also appears that fish often habituate to repeated strong sounds rather rapidly, on time scales of minutes to an hour. However, the habituation does not endure, and resumption of the strong sound source may again elicit disturbance responses from the same fish. Underwater sound levels from the drillship and other vessels produce sounds lower than the response threshold reported by Pearson *et al.* (1992), and are not likely to result in major effects to fish near the proposed drill sites.

Based on a sound level of approximately 140 dB, there may be some avoidance by fish of the area near the drillship while drilling, around ice management vessels in transit and during ice management, and around other support and supply vessels when underway. Any reactions by fish to these sounds will last only minutes (Mitson and Knudsen, 2003; Ona *et al.,* 2007) longer than the vessel is operating at that location or the drillship is drilling. Any potential reactions by fish would be limited to a relatively small area within about 0.21 mi (0.34 km) of the drillship during drilling (JASCO, 2007). Avoidance by some fish or fish species could occur within portions of this area. No important spawning habitats are known to occur at or near the drilling locations.

Some of the fish species found in the Arctic are prey sources for odontocetes and pinnipeds. A reaction by fish to sounds produced by Shell's proposed operations would only be relevant to marine mammals if it caused concentrations of fish to vacate the area. Pressure changes of sufficient magnitude to cause that type of reaction would probably occur only very close to the sound source, if any would occur at all due to the low energy sounds produced by the majority of equipment proposed for use. Impacts on fish behavior are predicted to be inconsequential. Thus, feeding odontocetes and pinnipeds would not be adversely affected by this minimal loss or scattering, if any, of reduced prey abundance.

Some mysticetes, including bowhead whales, feed on concentrations of zooplankton. Bowhead whales primarily feed off Point Barrow in September and October. Reactions of zooplankton to sound are, for the most part, not known. Their ability to move significant distances is limited or nil, depending on the type of zooplankton. A reaction by zooplankton to sounds produced by the exploratory drilling program would only be relevant to whales if it caused concentrations of zooplankton to scatter. Pressure changes of sufficient magnitude to cause that type of reaction would probably occur only very close to the sound source, if any would occur at all due to the low energy sounds produced by the drillship. However, Barrow is located approximately 140 mi (225 km) east of Shell's Burger prospect. Impacts on zooplankton behavior are predicted to be inconsequential. Thus, bowhead whales feeding off Point Barrow would not be adversely affected.

Gray whales are bottom feeders and suck sediment and the benthic amphipods that are their prey from the seafloor. The species primary feeding habitats are in the northern Bering Sea and Chukchi Sea (Nerini, 1984; Moore *et al.,* 1986; Weller *et al.,* 1999). In the northeastern Chukchi Sea, gray whales can be found feeding in the shallow offshore water area known as Hanna Shoals, which is located approximately 25 mi (40 km) northeast from the proposed drill sites. This area lies outside of the 120-dB and 160-dB ensonified zones for Shell's proposed Chukchi Sea drill sites. Moore *et al.* (2000) reported that in the summer gray whales were clustered along the shore primarily between Cape Lisburne and Point Barrow. In 2006 and 2007, gray whales were noted to be most abundant along the coast south of Wainwright (2006) and nearshore from Wainwright to Barrow (2007) (Thomas *et al.,* 2007; Thomas *et al.,* 2009). While some gray whales may migrate past or through Shell's proposed drill sites, no impacts to gray whales feeding at Hanna Shoal are anticipated based on the distance from the proposed activity and the area of the ensonified zone. Additionally, Yazvenko *et al.* (2007) studied the impacts of seismic surveys off Sakhalin Island, Russia, on feeding gray whales and found that the seismic activity had no measurable effect on bottom feeding gray whales in the area.

Potential Impacts From Drill Cuttings

Discharging drill cuttings or other liquid waste streams generated by the drilling vessel could potentially affect marine mammal habitat. Toxins could persist in the water column, which could have an impact on marine mammal prey species. However, despite a considerable amount of investment in research on exposures of marine mammals to organochlorines or other toxins, there have been no marine mammal deaths in the wild that can be conclusively linked to the direct exposure to such substances (O'Shea, 1999).

The National Pollutant Discharge Elimination System (NPDES) General Permit (GP) establishes discharge limits for drilling fluids (at the end of a discharge pipe) to a minimum 96-hr LC_{50} of 30,000 parts per million. Both modeling and field studies have shown that discharged drilling fluids are diluted rapidly in receiving waters (Ayers *et al.,* 1980a,b; Brandsma *et al.,* 1980; NRC, 1983; O'Reilly *et al.,* 1989; Nedwed *et al.,* 2004; Smith *et al.,* 2004; Neff, 2005). The dilution rate is strongly affected by the discharge rate; the NPDES GP limits the discharge of cuttings and fluids to 750 bbl/hr. For example, the EPA modeled hypothetical 750 bbl/hr discharges of drilling fluids in water depths of 66 ft (20 m) in the Beaufort and Chukchi Seas and predicted a minimum dilution of 1,326:1 at 330 ft (100 m).

Modeling of similar discharges offshore of Sakhalin Island predicted a 1,000-fold dilution within 10 minutes and 330 ft (100 m) of the discharge. In a field study (O'Reilly *et al.,* 1989) of a drilling waste discharge offshore of California, a 270 bbl discharge of drilling fluids was found to be diluted 183-fold at 33 ft (10 m) and 1,049-fold at 330 ft (100 m). Neff (2005) concluded that concentrations of discharged drilling fluids drop to levels that would have no effect within about two minutes of discharge and within 16 ft (5 m) of the discharge location.

Studies by the EPA (2006) and Neff (2005) indicate that although planktonic organisms are extremely sensitive to environmental conditions (*e.g.,* temperature, light, availability of nutrients, and water quality), there is little or no evidence of effects from drilling mud and cuttings discharges on plankton. More than 30 OCS well sites have been drilled in the Beaufort Sea. The Warthog well was drilled in Camden Bay in 35 ft (11 m) of water (Thurston *et al.,* 1999). BOEMRE routinely monitored that well site for contaminants and found that it had no accumulated petroleum hydrocarbons or heavy metals (Brown *et al.,* 2001). Effects on zooplankton present within a few meters of the discharge point would be expected, primarily due to sedimentation. However, zooplankton and benthic animals are not likely to have long-term exposures to drilling mud and cuttings because of the episodic nature of discharges (typically only a few hours in duration). Results of a recent study on a historical drill site in Camden Bay (HH–2) showed that movement of drilling mud and cuttings were restricted to within 330 ft (100 m) of the discharge site (Trefry and Trocine, 2009).

Fine-grained particulates and other solids in drilling mud and cuttings could cause sublethal effects to organisms in the water column. The responses observed following exposure to drilling mud include alteration of respiration and filtration rates and altered behavior. Zooplankton in the immediate area of discharge from exploration drilling operations could potentially be adversely impacted by sediments in the water column, which could clog respiratory and feeding structures, and they could suffer abrasions. However, because of the close proximity that is required to endure such effects, impacts are anticipated to be inconsequential.

Studies in the 1980s, 1999, 2000, and 2002 (Brown *et al.,* 2001 cited in MMS, 2003) also found that benthic organisms near drilling sites in the Beaufort have accumulated neither petroleum hydrocarbon nor heavy metals. In 2008, Shell investigated the benthic communities (Dunton *et al.,* 2008) and sediments (Trefry and Trocine, 2009) around the Sivulliq Prospect, including the location of the historical Hammerhead drill site that was drilled in 1985. Benthic communities at the historical Hammerhead drill site were found not to differ statistically in abundance, community structure, or diversity, from benthic communities elsewhere in this portion of the Beaufort Sea, indicating that there was no long term effect. Because discharges from drilling mud and cuttings are composed of seawater, impacts to benthic organisms are anticipated to be inconsequential and restricted to a very small area of the seafloor in the Chukchi Sea.

Discharges and drill cuttings could impact fish by displacing them from the affected area. Additionally, sedimentation could impact fish, as demersal fish eggs could be smothered if discharges occur in a spawning area during the period of egg production. However, this is unlikely in deeper offshore locations, and no specific demersal fish spawning locations have been identified at the Burger well locations. The most abundant and trophically important marine fish, the Arctic cod, spawns with planktonic eggs and larvae under the sea ice during winter and will therefore have little exposure to discharges. Based on this information, drilling muds and cutting wastes are not anticipated to have long-term impacts to marine mammals or their prey.

Potential Impacts From Drillship Presence

The *Discoverer* is 514 ft (156.7 m) long. If an animal's swim path is directly perpendicular to the drillship, the animal will need to swim around the ship in order to pass through the area. The length of the drillship (approximately one and a half football fields) is not significant enough to cause a large-scale diversion from the animals' normal swim and migratory paths. Additionally, the eastward spring bowhead whale migration will occur prior to the beginning of Shell's proposed exploratory drilling program. Moreover, any deflection of bowhead whales or other marine mammal species due to the physical presence of the drillship or its support vessels would be very minor. The drillship's physical footprint is small relative to the size of the geographic region it will occupy and will likely not cause marine mammals to deflect greatly from their typical migratory route. Also, even if animals may deflect because of the presence of the drillship, the Chukchi Sea is much larger in size than the length of the drillship (many dozens to hundreds of miles vs. less than two football fields), and animals would have other means of passage around the drillship. While there are other vessels that will be on location to support the drillship, most of those vessels will remain within a few kilometers of the drillship (with the exception of the ice management vessels which will remain approximately 25 mi [40 km] upwind of the drillship when not in use). In sum, the physical presence of the drillship is not likely to cause a significant deflection to migrating marine mammals.

Potential Impacts From an Oil Spill

Lower trophic organisms and fish species are primary food sources for Arctic marine mammals. However, as noted earlier in this document, the offshore areas of the Chukchi Sea are not primary feeding grounds for many of the marine mammals that may pass through the area. Therefore, impacts to lower trophic organisms (such as zooplankton) and marine fishes from an oil spill in the proposed drilling area would not be likely to have long-term or significant consequences to marine mammal prey. Impacts would be greater if the oil moves closer to shore, as many of the marine mammals in the area have been seen feeding at nearshore sites (such as bowhead whales). Gray whales do feed in more offshore locations in the Chukchi Sea; therefore, impacts to their prey from oil could have some impacts.

Due to their wide distribution, large numbers, and rapid rate of regeneration, the recovery of marine invertebrate populations is expected to occur soon after the surface oil passes. Spill response activities are not likely to disturb the prey items of whales or seals sufficiently to cause more than minor effects. Spill response activities could cause marine mammals to avoid the disturbed habitat that is being cleaned. However, by causing avoidance, animals would avoid impacts from the oil itself. Additionally, the likelihood of an oil spill is expected to be very low, as discussed earlier in this document.

Potential Impacts From Ice Management/Icebreaking Activities

Ice management activities include the physical pushing or moving of ice to create more open-water in the proposed drilling area and to prevent ice floes from striking the drillship. Icebreaking activities include the physical breaking of ice. Shell does not intend to conduct icebreaking activities. However, should

there be a need for icebreaking, it would only be performed in order to safely move the drillship and other vessels off location and to end operations for the season. Ringed, bearded, spotted, and ribbon seals (along with the walrus) are dependent on sea ice for at least part of their life history. Sea ice is important for life functions such as resting, breeding, and molting. These species are dependent on two different types of ice: Pack ice and landfast ice. Should ice management/icebreaking activities be necessary during the proposed drilling program, Shell would only manage pack ice in either early to mid-July or mid- to late October. Landfast ice would not be present during Shell's proposed operations.

The ringed seal is the most common pinniped species in the proposed project area. While ringed seals use ice year-round, they do not construct lairs for pupping until late winter/early spring on the landfast ice. Therefore, since Shell plans to conclude drilling by October 31, Shell's activities would not impact ringed seal lairs or habitat needed for breeding and pupping in the Chukchi Sea. Aerial surveys in the eastern Chukchi Sea conducted in late May-early June 1999–2000 found that ringed seals were four to ten times more abundant in nearshore fast and pack ice environments than in offshore pack ice (Bengtson *et al.,* 2005). Ringed seals can be found on the pack ice surface in the late spring and early summer in the northern Chukchi Sea, the latter part of which may overlap with the start of Shell's proposed drilling activities. If an ice floe is pushed into one that contains hauled out seals, the animals may become startled and enter the water when the two ice floes collide. Bearded seals breed in the Bering and Chukchi Seas from mid-March through early May (several months prior to the start of Shell's operations). Bearded seals require sea ice for molting during the late spring and summer period. Because this species feeds on benthic prey, bearded seals occur over the pack ice front over the Chukchi Sea shelf in summer (Burns and Frost, 1979) but were not associated with the ice front when it receded over deep water (Kingsley *et al.,* 1985). The spotted seal does not breed in the Chukchi Sea. Spotted seals molt most intensely during May and June and then move to the coast after the sea ice has melted. Ribbon seals are not known to breed in the Chukchi Sea. From July-October, when sea ice is absent, the ribbon seal is entirely pelagic, and its distribution is not well known (Burns, 1981; Popov, 1982). Therefore, ice used by bearded, spotted, and ribbon seals needed for life functions such as breeding and molting would not be impacted as a result of Shell's drilling program since these life functions do not occur in the proposed project area or at the same time as Shell's operations. For ringed seals, ice management/icebreaking activities would occur during a time when life functions such as breeding, pupping, and molting do not occur in the proposed activity area. Additionally, these life functions normally occur on landfast ice, which will not be impacted by Shell's activity.

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under Sections 101(a)(5)(A) and (D) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant). This section summarizes the contents of Shell's Marine Mammal Monitoring and Mitigation Plan (4MP). Later in this document in the ''Proposed Incidental Harassment Authorization'' section, NMFS lays out the proposed conditions for review, as they would appear in the final IHA (if issued).

Mitigation Measures Proposed by Shell

Shell submitted a 4MP as part of its application (Attachment C; see **ADDRESSES**). Shell's planned offshore drilling program incorporates both design features and operational procedures for minimizing potential impacts on marine mammals and on subsistence hunts. The design features and operational procedures have been described in the IHA and LOA applications submitted to NMFS and USFWS, respectively, and are summarized here. Survey design features include:

- Timing and locating drilling and support activities to avoid interference with the annual subsistence hunts by the peoples of the Chukchi villages;
- Identifying transit routes and timing to avoid other subsistence use areas and communicating with coastal communities before operating in or passing through these areas; and
- Conducting pre-season sound propagation modeling to establish the appropriate exclusion and behavioral radii.

Shell indicates that the potential disturbance of marine mammals during operations will be minimized further through the implementation of several ship-based mitigation measures, which include establishing and monitoring safety and disturbance zones.

Exclusion radii for marine mammals around sound sources are customarily defined as the distances within which received sound levels are greater than or equal to 180 dB re 1 μPa (rms) for cetaceans and greater than or equal to 190 dB re 1 μPa (rms) for pinnipeds. These exclusion criteria are based on an assumption that sounds at lower received levels will not injure these animals or impair their hearing abilities, but that higher received levels might have such effects. It should be understood that marine mammals inside these exclusion zones will not necessarily be injured, as the received sound thresholds which determine these zones were established prior to the current understanding that significantly higher levels of sound would be required before injury would likely occur (see Southall *et al.,* 2007). With respect to Level B harassment, NMFS' practice has been to apply the 120 dB re 1 μPa (rms) received level threshold for underwater continuous sound levels and the 160 dB re 1 μPa (rms) received level threshold for underwater impulsive sound levels.

Shell proposes to monitor the various radii in order to implement any mitigation measures that may be necessary. Initial radii for the sound levels produced by the *Discoverer,* the icebreaker, and the airguns have been modeled. Measurements taken by Austin and Warner (2010) indicated broadband source levels between 177 and 185 dB re 1 μPa rms for the *Discoverer.* Measurements of the icebreaking supply ship *Robert Lemeur* pushing and breaking ice during exploration drilling operations in the Beaufort Sea in 1986 resulted in an estimated broadband source level of 193 dB re 1 μPa rms (Greene, 1987a; Richardson *et al.,* 1995a). Based on a similar airgun array used in the shallow waters of the Beaufort Sea in 2008 by BP, the source level of the airgun is predicted to be 241.4 dB re 1 μPa rms. Once on location in the Chukchi Sea, Shell will conduct sound source verification (SSV) tests to establish safety zones for the previously mentioned sound level criteria. The objectives of the SSV tests are: (1) To quantify the absolute sound levels produced by drilling and to monitor their variations with time, distance, and direction from the drillship; and (2) to measure the sound levels produced by

vessels operating in support of drilling operations, which include crew change vessels, tugs, ice management vessels, and spill response vessels. The methodology for conducting the SSV tests is fully described in Shell's 4MP (see **ADDRESSES**). Please refer to that document for further details. Upon completion of the SSV tests, the new radii will be established and monitored, and mitigation measures will be implemented in accordance with Shell's 4MP.

Based on the best available scientific literature, the source levels noted above for exploration drilling are not high enough to cause a temporary reduction in hearing sensitivity or permanent hearing damage to marine mammals. Consequently, Shell believes that mitigation as described for seismic activities including ramp ups, power downs, and shutdowns should not be necessary for drilling activities. NMFS has also determined that these types of mitigation measures, traditionally required for seismic survey operations, are not practical or necessary for this proposed drilling activity. Seismic airgun arrays can be turned on slowly (*i.e.,* only turning on one or some guns at a time) and powered down quickly. The types of sound sources used for exploratory drilling have different properties and are unable to be ''powered down'' like airgun arrays or shutdown instantaneously without posing other risks to operational and human safety. However, Shell plans to use Protected Species Observers (PSOs, formerly referred to as marine mammal observers) onboard the drillship and the various support vessels to monitor marine mammals and their responses to industry activities and to initiate mitigation measures (for ZVSP activities) should in-field measurements of the operations indicate that such measures are necessary. Additional details on the PSO program are described in the ''Proposed Monitoring and Reporting'' section found later in this document. Also, for the ZVSP activities, Shell proposes to implement standard mitigation procedures, such as ramp ups, power downs, and shutdowns.

A ramp up of an airgun array provides a gradual increase in sound levels and involves a step-wise increase in the number and total volume of airguns firing until the full volume is achieved. The purpose of a ramp up (or ''soft start'') is to ''warn'' cetaceans and pinnipeds in the vicinity of the airguns and to provide the time for them to leave the area and thus avoid any potential injury or impairment of their hearing abilities.

During the proposed ZVSP surveys, Shell will ramp up the airgun arrays slowly. Full ramp ups (*i.e.,* from a cold start when no airguns have been firing) will begin by firing a single airgun in the array. A full ramp up will not begin until there has been a minimum of 30 minutes of observation of the 180-dB and 190-dB exclusion zones for cetaceans and pinnipeds, respectively, by PSOs to assure that no marine mammals are present. The entire exclusion zone must be visible during the 30-minute lead-in to a full ramp up. If the entire exclusion zone is not visible, then ramp up from a cold start cannot begin. If a marine mammal(s) is sighted within the exclusion zone during the 30-minute watch prior to ramp up, ramp up will be delayed until the marine mammal(s) is sighted outside of the applicable exclusion zone or the animal(s) is not sighted for at least 15 minutes for small odontocetes and pinnipeds or 30 minutes for baleen whales.

A power down is the immediate reduction in the number of operating energy sources from all firing to some smaller number. A shutdown is the immediate cessation of firing of all energy sources. The arrays will be immediately powered down whenever a marine mammal is sighted approaching close to or within the applicable exclusion zone of the full arrays but is outside the applicable exclusion zone of the single source. If a marine mammal is sighted within the applicable exclusion zone of the single energy source, the entire array will be shutdown (*i.e.,* no sources firing). The same 15 and 30 minute sighting times described for ramp up also apply to starting the airguns again after either a power down or shutdown.

Additional mitigation measures proposed by Shell include: (1) Reducing speed and/or changing course if a marine mammal is sighted from a vessel in transit (NMFS has proposed a specific distance in the next subsection); (2) resuming full activity (*e.g.,* full support vessel speed) only after marine mammals are confirmed to be outside the safety zone; (3) implementing flight restrictions prohibiting aircraft from flying below 1,500 ft (457 m) altitude (except during takeoffs and landings or in emergency situations); and (4) keeping vessels anchored when approached by marine mammals to avoid the potential for avoidance reactions by such animals.

Shell has also proposed additional mitigation measures to ensure no unmitigable adverse impact on the availability of affected species or stocks for taking for subsistence uses. Those measures are described in the ''Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses'' section found later in this document.

Additional Mitigation Measures Proposed by NMFS

In addition to the mitigation measures proposed by Shell, NMFS proposes the following measures (which apply to vessel operations) be included in the IHA, if issued, in order to ensure the least practicable impact on the affected species or stocks. NMFS proposes to require Shell to avoid multiple changes in direction or speed when within 300 yards (274 m) of whales. Additionally, NMFS proposes to require Shell to reduce speed in inclement weather.

Oil Spill Contingency Plan

In accordance with BOEM regulations, Shell has developed an Oil Discharge Prevention and Contingency Plan (ODPCP) for its Chukchi Sea exploration drilling program. A copy of this document can be found on the Internet at: *http://www.alaska.boemre.gov/fo/ODPCPs/2010_Chukchi_rev1.pdf.* Additionally, in its Plan of Cooperation (POC), Shell has agreed to several mitigation measures in order to reduce impacts during the response efforts in the unlikely event of an oil spill. Those measures are detailed in the ''*Plan of Cooperation (POC)*'' section found later in this document. The ODPCP is currently under review by the Department of the Interior and other agencies. A final decision on the adequacy of the ODPCP is expected prior to the start of Shell's 2012 Chukchi Sea drilling program.

NMFS has carefully evaluated Shell's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation.

Proposed measures to ensure availability of such species or stock for taking for certain subsistence uses is discussed later in this document (see

''Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses'' section).

Proposed Monitoring and Reporting

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

Monitoring Measures Proposed by Shell

The monitoring plan proposed by Shell can be found in the 4MP (Attachment C of Shell's application; see **ADDRESSES**). The plan may be modified or supplemented based on comments or new information received from the public during the public comment period or from the peer review panel (see the ''Monitoring Plan Peer Review'' section later in this document). A summary of the primary components of the plan follows. Later in this document in the ''Proposed Incidental Harassment Authorization'' section, NMFS lays out the proposed monitoring and reporting conditions, as well as the mitigation conditions, for review, as they would appear in the final IHA (if issued).

(1) Vessel-Based PSOs

Vessel-based monitoring for marine mammals will be done by trained PSOs throughout the period of drilling operations on all vessels. PSOs will monitor the occurrence and behavior of marine mammals near the drillship during all daylight periods during operation and during most daylight periods when drilling operations are not occurring. PSO duties will include watching for and identifying marine mammals, recording their numbers, distances, and reactions to the drilling operations. A sufficient number of PSOs will be required onboard each vessel to meet the following criteria: (1) 100% monitoring coverage during all periods of drilling operations in daylight; (2) maximum of 4 consecutive hours on watch per PSO; and (3) maximum of 12 hours of watch time per day per PSO. Shell anticipates that there will be provision for crew rotation at least every 3–6 weeks to avoid observer fatigue.

Biologist-observers will have previous marine mammal observation experience, and field crew leaders will be highly experienced with previous vessel-based marine mammal monitoring projects. Resumes for those individuals will be provided to NMFS so that NMFS can review and accept their qualifications. Inupiat observers will be experienced in the region, familiar with the marine mammals of the area, and complete a NMFS approved observer training course designed to familiarize individuals with monitoring and data collection procedures. A handbook, adapted for the specifics of the planned Shell drilling program, will be prepared and distributed beforehand to all PSOs.

PSOs will watch for marine mammals from the best available vantage point on the drillship and support vessels. PSOs will scan systematically with the unaided eye and 7 x 50 reticle binoculars, supplemented with ''Big-eye'' binoculars and night-vision equipment when needed. Personnel on the bridge will assist the PSOs in watching for marine mammals. New or inexperienced PSOs will be paired with an experienced PSO or experienced field biologist so that the quality of marine mammal observations and data recording is kept consistent.

Information to be recorded by PSOs will include the same types of information that were recorded during recent monitoring programs associated with industry activity in the Arctic (*e.g.,* Ireland *et al.,* 2009). The recording will include information about the animal sighted, environmental and operational information, and the position of other vessels in the vicinity of the sighting. The ship's position, speed of support vessels, and water temperature, water depth, sea state, ice cover, visibility, and sun glare will also be recorded at the start and end of each observation watch, every 30 minutes during a watch, and whenever there is a change in any of those variables.

Distances to nearby marine mammals will be estimated with binoculars (Fujinon 7 x 50 binoculars) containing a reticle to measure the vertical angle of the line of sight to the animal relative to the horizon. PSOs may use a laser rangefinder to test and improve their abilities for visually estimating distances to objects in the water. However, previous experience showed that a Class 1 eye-safe device was not able to measure distances to seals more than about 230 ft (70 m) away. The device was very useful in improving the distance estimation abilities of the observers at distances up to about 1968 ft (600 m)—the maximum range at which the device could measure distances to highly reflective objects such as other vessels. Humans observing objects of more-or-less known size via a standard observation protocol, in this case from a standard height above water, quickly become able to estimate distances within about ±20% when given immediate feedback about actual distances during training.

(2) Aerial Survey Program

Recent aerial surveys of marine mammals in the Chukchi Sea were conducted over coastal areas to approximately 23 mi (37 km) offshore in 2006–2008 and 2010 in support of Shell's summer seismic exploration activities. These surveys were designed to provide data on the distribution and abundance of marine mammals in nearshore waters of the Chukchi Sea. Shell proposes to conduct an aerial survey program in the Chukchi Sea in 2012 that would be similar to the previous programs.

The current aerial survey program will be designed to collect data on cetaceans but will be limited in its ability to collect similar data on pinnipeds. Shell's objectives for this program include:

- To collect data on the distribution and abundance of marine mammals in coastal areas of the eastern Chukchi Sea; and
- To collect and report data on the distribution, numbers, orientation and behavior of marine mammals, particularly beluga whales, near traditional hunting areas in the eastern Chukchi Sea.

With agreement from hunters in the coastal villages, aerial surveys of coastal areas to approximately 23 mi (37 km) offshore between Point Hope and Point Barrow will begin in early to mid-July and will continue until drilling operations in the Chukchi Sea are completed. Weather and equipment permitting, surveys will be conducted twice per week during this time period. In addition, during the 2012 drilling season, aerial surveys will be coordinated in cooperation with the aerial surveys funded by BOEMRE and conducted by NMFS and any other groups conducting surveys in the region. A full description of Shell's survey procedures can be found in the 4MP of Shell's application (see **ADDRESSES**). A summary follows next.

Transects will be flown in a saw-toothed pattern between the shore and 23 mi (37 km) offshore, as well as along the coast from Point Barrow to Point Hope (see Figure 6 of Shell's 4MP). This design will permit completion of the survey in one to two days and will provide representative coverage of the

nearshore region. The surveyed area will include waters where belugas are normally available to subsistence hunters. Survey altitude will be at least 1,000 ft (305 m) with an average survey speed of 110–120 knots. As with past surveys of the Chukchi Sea coast, coordination with coastal villages to avoid disturbance of the beluga whale subsistence hunt will be extremely important. ''No-fly'' zones around coastal villages or other hunting areas established during communications with village representatives will be in place until the end of the hunting season.

Aerial surveys at an altitude of 1,000 ft (305 m) do not provide much information about seals but are suitable for bowhead, beluga, and gray whales. The need for a 1,000+ ft (305+ m) cloud ceiling will limit the dates and times when surveys can be flown. Selection of a higher altitude for surveys would result in a significant reduction in the number of days during which surveys would be possible, impairing the ability of the aerial program to meet its objectives. If large concentrations of belugas are encountered during the survey, the survey may be interrupted to photograph the groups to obtain better counts of the number of animals present. If whales are photographed in lagoons or other shallow-water concentration areas, the aircraft will climb to approximately 10,000 ft (3,050 m) altitude to avoid disturbing the whales and causing them to leave the area. If whales are in offshore areas, the aircraft will climb high enough to include all whales within a single photograph; typically about 3,000 ft (914 m) altitude.

Three PSOs will be aboard the aircraft during surveys. Two primary observers will be looking for marine mammals; one each at bubble windows on either side of the aircraft. The third person will record data. For each marine mammal sighting, the observer will dictate the species, number, size/age/sex class when determinable, activity, heading, swimming speed category (if traveling), sighting cue, ice conditions (type and percentage), and inclinometer reading to the marine mammal into a digital recorder. The inclinometer reading will be taken when the animal's location is 90° to the side of the aircraft track, allowing calculation of lateral distance from the aircraft trackline.

Transect information, sighting data and environmental data will be entered into a GPS-linked computer by the third observer and simultaneously recorded on digital voice recorders for backup and validation. At the start of each transect, the observer recording data will record the transect start time and position, ceiling height (ft), cloud cover (in 10ths), wind speed (knots), wind direction (°T) and outside air temperature (°C). In addition, each observer will record the time, visibility (subjectively classified as excellent, good, moderately impaired, seriously impaired or impossible), sea state (Beaufort wind force), ice cover (in 10ths) and sun glare (none, moderate, severe) at the start and end of each transect, and at 2 min intervals along the transect. The data logger will automatically record time and aircraft position (latitude and longitude) for sightings and transect waypoints, and at pre-selected intervals along the transects.

(3) Acoustic Monitoring

As discussed earlier in this document, Shell will conduct SSV tests to establish the isopleths for the applicable exclusion radii, mostly to be employed during the ZVSP surveys. In addition, Shell proposes to use an acoustic ''net'' array.

Drilling Sound Measurements—Drilling sounds are expected to vary significantly with time due to variations in the level of operations and the different types of equipment used at different times onboard the *Discoverer.* The objectives of these measurements are:

(1) To quantify the absolute sound levels produced by drilling and to monitor their variations with time, distance, and direction from the drilling vessel;

(2) To measure the sound levels produced by vessels operating in support of exploration drilling operations. These vessels will include crew change vessels, tugs, icebreakers, and OSRVs; and

(3) To measure the sound levels produced by an end-of-hole ZVSP survey, using a stationary sound source.

The *Discoverer,* support vessels, and ZVSP sound measurements will be performed using one of two methods, both of which involve real-time monitoring. The first method would involve use of bottom-founded hydrophones cabled back to the *Discoverer* (see Figure 1 in Shell's 4MP). These hydrophones would be positioned between 1,640 ft (500 m) and 3,281 ft (1,000 m) from the *Discoverer,* depending on the final positions of the anchors used to hold the *Discoverer* in place. Hydrophone cables would be fed to real-time digitization systems onboard. In addition to the cabled system, a separate set of bottom-founded hydrophones (see Figure 2 in Shell's 4MP) may be deployed at various distances from the exploration drilling operation for storage of acoustic data to be retrieved and processed at a later date.

As an alternative to the cabled hydrophone system (and possible inclusion of separate bottom-founded hydrophones), the second (or alternative) monitoring method would involve a radio buoy approach deploying four sparbuoys 4–5 mi (6–8 km) from the *Discoverer.* Additional hydrophones may be deployed closer to the *Discoverer,* if necessary, to better determine sound source levels. Monitoring personnel and recording/receiving equipment would be onboard one of the support vessels with 24-hr monitoring capacity. The system would allow for collection and processing of real-time data similar to that provided by the cabled system but from a wider range of locations.

Sound level monitoring with either method will occur on a continuous basis throughout all exploration drilling activities. Both types of systems will be set to record digital acoustic data at a sample rate of 32 kHz, providing useful acoustic bandwidth to at least 15 kHz. These systems are capable of measuring absolute broadband sound levels between 90 and 180 dB re 1 μPa. The long duration recordings will capture many different operations performed from the drillship. Retrieval of these systems will occur following completion of the exploration drilling activities.

These recorders will provide a capability to examine sound levels produced by different drilling activities and practices. This system will not have the capability to locate calling marine mammals and will indicate only relative proximity. The system will be evaluated during operations for its potential to improve PSO observations through notification of PSOs on vessel and aircraft of high levels of call detections and their general locations.

The deployment of drilling sound monitoring equipment will occur as soon as possible once the drillship is on site. Activity logs of exploration drilling operations and nearby vessel activities will be maintained to correlate with these acoustic measurements. This equipment will also be used to take measurements of the support vessels and airguns. Additional details can be found in Shell's 4MP.

Acoustic ''Net'' Array—The acoustic ''net'' array used by Shell during the 2006–2010 field seasons is proposed for 2011 and 2012. The array was designed to accomplish two main objectives:

- To collect information on the occurrence and distribution of marine

mammals that may be available to subsistence hunters near villages located on the Chukchi Sea coast and to document their relative abundance, habitat use, and migratory patterns; and

• To measure the ambient soundscape throughout the eastern Chukchi Sea and to record received levels of sound from industry and other activities further offshore in the Chukchi Sea.

The net array configuration used in 2007–2010 is again proposed for 2011 and 2012. The basic components of this effort consist of 30 hydrophone systems placed widely across the U.S. Chukchi Sea and a prospect specific array of 12 hydrophones capable of localization of marine mammal calls. The net array configuration will include hydrophone systems distributed at each of the four primary transect locations: Cape Lisburne; Point Hope; Wainwright; and Barrow. The systems comprising the regional array will be placed at locations shown in Figure 7 of the 4MP in Shell's application (see **ADDRESSES**). These offshore systems will capture exploration drilling sounds, if present, over large distances to help characterize the sound transmission properties in the Chukchi Sea and will also provide a large amount of information related to marine mammals in the Chukchi Sea.

The regional acoustic monitoring program will be augmented in 2012 by an array of additional acoustic recorders to be deployed on a grid pattern over a 7.2 mi (12 km) by 10.8 mi (18 km) area extending over several of Shell's lease blocks near locations of highest interest for exploration drilling in 2012. The cluster array will operate at a sampling frequency of 16 kHz, which is sufficient to capture vocalizations from bowhead, beluga, gray, fin, humpback, and killer whales, and most other marine mammals known to be present in the Chukchi Sea. The cluster deployment configuration was defined to allow tracking of vocalizing animals that pass through the immediate area of these lease blocks. Maximum separation between adjacent recorders is 3.6 mi (5.8 km). At this spacing, Shell expects that individual whale calls will be detected on at least three different recorders when the calling animals are within the boundary of the deployment pattern. Bowhead and other mysticete calls should be detectable simultaneously on more than three recorders due to their relatively higher sound source levels compared to other marine mammals. In calm weather conditions, when ambient underwater sound levels are low, Shell expects to detect most other marine mammal calls on more than three recorders. The goal of simultaneous detection on multiple recorders is to allow for triangulation of the call positions, which also requires accurate time synchronization of the recorders. When small numbers of whales are vocalizing, Shell hopes to be able to identify and track the movements of specific individuals within the deployment area. It will not be possible to track individual whales if many whales are calling due to abundant overlapping calls. In this case, analyses will show the general distribution of calls in the vicinity of the recorders.

Additional details on data analysis for the types of monitoring described here (*i.e.,* vessel-based, aerial, and acoustic) can be found in the 4MP in Shell's application (see **ADDRESSES**).

Monitoring Plan Peer Review

The MMPA requires that monitoring plans be independently peer reviewed ''where the proposed activity may affect the availability of a species or stock for taking for subsistence uses'' (16 U.S.C. 1371(a)(5)(D)(ii)(III)). Regarding this requirement, NMFS' implementing regulations state, ''Upon receipt of a complete monitoring plan, and at its discretion, [NMFS] will either submit the plan to members of a peer review panel for review or within 60 days of receipt of the proposed monitoring plan, schedule a workshop to review the plan'' (50 CFR 216.108(d)).

NMFS has established an independent peer review panel to review Shell's 4MP for Exploration Drilling of Selected Lease Areas in the Alaskan Chukchi Sea in 2012. The panel is scheduled to meet in early January 2012, and will provide comments to NMFS shortly after they meet. After completion of the peer review, NMFS will consider all recommendations made by the panel, incorporate appropriate changes into the monitoring requirements of the IHA (if issued), and publish the panel's findings and recommendations in the final IHA notice of issuance or denial document.

Reporting Measures

(1) SSV Report

A report on the preliminary results of the acoustic verification measurements, including as a minimum the measured 190- , 180- , 160- , and 120-dB (rms) radii of the drillship, support vessels, and airgun array will be submitted within 120 hr after collection and analysis of those measurements at the start of the field season or in the case of the airgun once that part of the program is implemented. This report will specify the distances of the exclusion zones that were adopted for the exploratory drilling program. Prior to completion of these measurements, Shell will use the radii outlined in their application and elsewhere in this document.

(2) Technical Reports

The results of Shell's 2012 Chukchi Sea exploratory drilling monitoring program (*i.e.,* vessel-based, aerial, and acoustic) will be presented in the ''90-day'' and Final Technical reports, as required by NMFS under the proposed IHA. Shell proposes that the Technical Reports will include: (1) Summaries of monitoring effort (*e.g.,* total hours, total distances, and marine mammal distribution through study period, accounting for sea state and other factors affecting visibility and detectability of marine mammals); (2) analyses of the effects of various factors influencing detectability of marine mammals (*e.g.,* sea state, number of observers, and fog/glare); (3) species composition, occurrence, and distribution of marine mammal sightings, including date, water depth, numbers, age/size/gender categories (if determinable), group sizes, and ice cover; (4) sighting rates of marine mammals during periods with and without drilling activities (and other variables that could affect detectability); (5) initial sighting distances versus drilling state; (6) closest point of approach versus drilling state; (7) observed behaviors and types of movements versus drilling state; (8) numbers of sightings/individuals seen versus drilling state; (9) distribution around the drillship and support vessels versus drilling state; and (10) estimates of take by harassment. This information will be reported for both the vessel-based and aerial monitoring.

Analysis of all acoustic data will be prioritized to address the primary questions, which are to: (a) Determine when, where, and what species of animals are acoustically detected on each Directional Autonomous Seafloor Acoustic Recorder; (b) analyze data as a whole to determine offshore bowhead distributions as a function of time; (c) quantify spatial and temporal variability in the ambient noise; and (d) measure received levels of drillship activities. The bowhead detection data will be used to develop spatial and temporal animal distributions. Statistical analyses will be used to test for changes in animal detections and distributions as a function of different variables (*e.g.,* time of day, time of season, environmental conditions, ambient noise, vessel type, operation conditions).

The initial technical report is due to NMFS within 90 days of the completion of Shell's Beaufort Sea exploratory drilling program. The ''90-day'' report will be subject to review and comment by NMFS. Any recommendations made by NMFS must be addressed in the final report prior to acceptance by NMFS.

(3) Comprehensive Report

Following the 2012 drilling season, a comprehensive report describing the vessel-based, aerial, and acoustic monitoring programs will be prepared. The comprehensive report will describe the methods, results, conclusions and limitations of each of the individual data sets in detail. The report will also integrate (to the extent possible) the studies into a broad-based assessment of industry activities, and other activities that occur in the Beaufort and/or Chukchi seas, and their impacts on marine mammals during 2012. The report will help to establish long-term data sets that can assist with the evaluation of changes in the Chukchi and Beaufort Sea ecosystems. The report will attempt to provide a regional synthesis of available data on industry activity in offshore areas of northern Alaska that may influence marine mammal density, distribution and behavior.

(4) Notification of Injured or Dead Marine Mammals

Shell will be required to notify NMFS' Office of Protected Resources and NMFS' Stranding Network of any sighting of an injured or dead marine mammal. Based on different circumstances, Shell may or may not be required to stop operations upon such a sighting. Shell will provide NMFS with the species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available). The specific language describing what Shell must do upon sighting a dead or injured marine mammal can be found in the ''Proposed Incidental Harassment Authorization'' section of this document.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment]. Only take by Level B behavioral harassment is anticipated as a result of the proposed drilling program. Noise propagation from the drillship, associated support vessels (including during icebreaking if needed), and the airgun array are expected to harass, through behavioral disturbance, affected marine mammal species or stocks. Additional disturbance to marine mammals may result from aircraft overflights and visual disturbance of the drillship or support vessels. However, based on the flight paths and altitude, impacts from aircraft operations are anticipated to be localized and minimal in nature.

The full suite of potential impacts to marine mammals from various industrial activities was described in detail in the ''Potential Effects of the Specified Activity on Marine Mammals'' section found earlier in this document. The potential effects of sound from the proposed exploratory drilling program might include one or more of the following: Tolerance; masking of natural sounds; behavioral disturbance; non-auditory physical effects; and, at least in theory, temporary or permanent hearing impairment (Richardson *et al.,* 1995a). As discussed earlier in this document, NMFS estimates that Shell's activities will most likely result in behavioral disturbance, including avoidance of the ensonified area or changes in speed, direction, and/or diving profile of one or more marine mammals. For reasons discussed previously in this document, hearing impairment (TTS and PTS) is highly unlikely to occur based on the fact that most of the equipment to be used during Shell's proposed drilling program does not have source levels high enough to elicit even mild TTS and/or the fact that certain species are expected to avoid the ensonified areas close to the operations. Additionally, non-auditory physiological effects are anticipated to be minor, if any would occur at all. Finally, based on the proposed mitigation and monitoring measures described earlier in this document and the fact that the back-propagated source level for the drillship is estimated to be between 177 and 185 dB re 1 μPa (rms), no injury or mortality of marine mammals is anticipated as a result of Shell's proposed exploratory drilling program.

For continuous sounds, such as those produced by drilling operations and during icebreaking activities, NMFS uses a received level of 120-dB (rms) to indicate the onset of Level B harassment. For impulsive sounds, such as those produced by the airgun array during the ZVSP surveys, NMFS uses a received level of 160-dB (rms) to indicate the onset of Level B harassment. Shell provided calculations for the 120-dB isopleths produced by the *Discoverer* and by the icebreaker during icebreaking activities and then used those isopleths to estimate takes by harassment. Additionally, Shell provided calculations for the 160-dB isopleth produced by the airgun array and then used that isopleth to estimate takes by harassment. Shell provides a full description of the methodology used to estimate takes by harassment in its IHA application (see **ADDRESSES**), which is also provided in the following sections.

Shell has requested authorization to take bowhead, gray, fin, humpback, minke, killer, and beluga whales, harbor porpoise, and ringed, spotted, bearded, and ribbon seals incidental to exploration drilling, ice management/icebreaking, and ZVSP activities. Additionally, Shell provided exposure estimates and requested takes of narwhal. However, as stated previously in this document, sightings of this species are rare, and the likelihood of occurrence of narwhals in the proposed drilling area is minimal. Therefore, NMFS is not proposing to authorize take of this species.

Basis for Estimating ''Take by Harassment''

''Take by Harassment'' is described in this section and was calculated in Shell's application by multiplying the expected densities of marine mammals that may occur near the exploratory drilling operations by the area of water likely to be exposed to continuous, non-pulse sounds ≥120 dB re 1 μPa (rms) during drillship operations or icebreaking activities and impulse sounds ≥160 dB re 1 μPa (rms) created by seismic airguns during ZVSP activities. NMFS evaluated and critiqued the methods provided in Shell's application and determined that they were appropriate to conduct the requisite MMPA analyses. This section describes the estimated densities of marine mammals that may occur in the project area. The area of water that may be ensonified to the above sound levels is described further in the ''*Estimated Area Exposed to Sounds >120 dB or >160 dB re 1 μPa rms''* subsection.

Marine mammal densities near the operation are likely to vary by season and habitat, mostly related to the presence or absence of sea ice. Marine mammal density estimates in the Chukchi Sea have been derived for two

time periods, the summer period covering July and August, and the fall period including September and October. Animal densities encountered in the Chukchi Sea during both of these time periods will further depend on the habitat zone within which the operations are occurring: Open water or ice margin. More ice is likely to be present in the area of operations during the summer period, so summer ice-margin densities have been applied to 50 percent of the area that may be exposed to sounds from exploration drilling and ZVSP activities in those months. Open water densities in the summer were applied to the remaining 50 percent of the area. Less ice is likely to be present during the fall season, so fall ice-margin densities have been applied to only 20 percent of the area that may be exposed to sounds from exploration drilling and ZVSP activities in those months. Fall open-water densities were applied to the remaining 80 percent of the area. Since icebreaking activities would only occur within ice-margin habitat, the entire area potentially ensonified by icebreaking activities has been multiplied by the ice-margin densities in both seasons.

Shell notes that there is some uncertainty about the representativeness of the data and assumptions used in the calculations. To provide some allowance for the uncertainties, ''maximum estimates'' as well as ''average estimates'' of the numbers of marine mammals potentially affected have been derived. For a few marine mammal species, several density estimates were available, and in those cases the mean and maximum estimates were determined from the survey data. In other cases, no applicable estimate (or perhaps a single estimate) was available, so correction factors were used to arrive at ''average'' and ''maximum'' estimates. These are described in detail in the following subsections. Table 6–7 in Shell's application indicates that the ''average estimate'' for killer, fin, humpback, and minke whales, harbor porpoise, and ribbon seal is either zero or one. Therefore, to account for the fact that these species listed as being potentially taken by harassment in this document may occur in Shell's proposed drilling sites during active operations, NMFS either used the ''maximum estimates'' or made an estimate based on typical group size for a particular species.

Detectability bias, quantified in part by $f(0)$, is associated with diminishing sightability with increasing lateral distance from the trackline. Availability bias [$g(0)$] refers to the fact that there is <100 percent probability of sighting an animal that is present along the survey trackline. Some sources of densities used below included these correction factors in their reported densities (*e.g.,* ringed seals in Bengtson *et al.,* 2005). In other cases the best available correction factors were applied to reported results when they had not been included in the reported data (*e.g.,* Moore *et al.,* 2000).

Estimated densities of marine mammals in the Chukchi Sea project area during the summer period (July–August) are presented in Table 6–1 in Shell's application and Table 2 here, and estimated fall densities (September–October) are presented in Table 6–2 in Shell's application and Table 3 here. Descriptions of the individual density estimates shown in the tables are presented next.

(1) Cetaceans

Beluga Whales—Summer densities of belugas in offshore waters are expected to be low, with somewhat higher densities in ice-margin and nearshore areas. Aerial surveys have recorded few belugas in the offshore Chukchi Sea during the summer months (Moore *et al.,* 2000). Aerial surveys of the Chukchi Sea in 2008–2009 flown by NMFS' National Marine Mammal Laboratory (NMML) as part of the Chukchi Offshore Monitoring in Drilling Area project (COMIDA) have only reported five beluga sightings during more than 8,700 mi (14,001 km) of on-transect effort, only two of which were offshore (COMIDA, 2009). One of the three nearshore sightings was of a large group (approximately 275 individuals on July 12, 2009) of migrating belugas along the coastline just north of Peard Bay. Additionally, only one beluga sighting was recorded during more than 37,900 mi (60,994 km) of visual effort during good visibility conditions from industry vessels operating in the Chukchi Sea in September–October of 2006–2008 (Haley *et al.,* 2010). If belugas are present during the summer, they are more likely to occur in or near the ice edge or close to shore during their northward migration. Expected densities have previously been calculated from data in Moore *et al.* (2000). However, more recent data from COMIDA aerial surveys during 2008–2010 are now available (Clarke and Ferguson, in prep.). Effort and sightings reported by Clarke and Ferguson (in prep.) were used to calculate the average open-water density estimate. Clarke and Ferguson (in prep.) reported two on-transect beluga sightings (5 individuals) during 11,985 km of on-transect effort in waters 118–164 ft (36–50 m) deep in the Chukchi Sea during July and August. The mean group size of these two sightings is 2.5. A $f(0)$ value of 2.841 and $g(0)$ value of 0.58 from Harwood *et al.* (1996) were also used in the density calculation. The CV associated with group size was used to select an inflation factor of 2 to estimate the maximum density that may occur in both open-water and ice-margin habitats. Specific data on the relative abundance of beluga in open-water versus ice-margin habitat during the summer in the Chukchi Sea is not available. However, belugas are commonly associated with ice, so an inflation factor of 4 was used to estimate the average ice-margin density from the open-water density. Very low densities observed from vessels operating in the Chukchi Sea during non-seismic periods and locations in July-August of 2006–2008 (0.0–0.0003/mi^2, 0.0–0.0001/km^2; Haley *et al.,* 2010), also suggest the number of beluga whales likely to be present near the planned activities will not be large.

In the fall, beluga whale densities in the Chukchi Sea are expected to be somewhat higher than in the summer because individuals of the eastern Chukchi Sea stock and the Beaufort Sea stock will be migrating south to their wintering grounds in the Bering Sea (Allen and Angliss, 2010). However, there were no beluga sightings reported during more than 11,200 mi (18,025 km) of vessel based effort in good visibility conditions during 2006–2008 industry operations in the Chukchi Sea (Haley *et al.,* 2010). Densities derived from survey results in the northern Chukchi Sea in Clarke and Ferguson (in prep) were used as the average density for open-water fall season estimates (see Table 6–2 in Shell's application and Table 3 here). Clarke and Ferguson (in prep) reported 3 beluga sightings (6 individuals) during 6,236 mi (10,036 km) of on-transect effort in water depths 118–164 ft (36–50 m). The mean group size of those three sightings is 2. A $f(0)$ value of 2.841 and $g(0)$ value of 0.58 from Harwood *et al.* (1996) were used in the calculation. The same inflation factor of 2 used for summer densities was used to estimate the maximum density that may occur in both open-water and ice-margin habitats in the fall. Moore *et al.* (2000) reported lower than expected beluga sighting rates in open-water during fall surveys in the Beaufort and Chukchi seas, so an inflation value of 4 was used to estimate the average ice-margin density from the open-water density. Based on the lack of any beluga sightings from vessels operating in the Chukchi Sea during non-seismic periods and locations in September–October of 2006–2008 (Haley *et al.,* 2010), the relatively low

densities shown in Table 6–2 in Shell's application and Table 3 here are consistent with what is likely to be observed from vessels during the planned operations.

Table 2. Expected Densities of Marine Mammals in Areas of the Chukchi Sea, Alaska, for the Planned Summer (July-August) Period. Species listed as endangered under the ESA are in italics.

	Open Water		Ice Margin	
Species	Average Density (# / km^2)	Maximum Density (# / km^2)	Average Density (# / km^2)	Maximum Density (# / km^2)
Odontocetes				
Monodontidae				
Beluga	0.0010	0.0020	0.0040	0.0080
Narwhal	0.0000	0.0000	0.0000	0.0001
Delphinidae				
Killer whale	0.0001	0.0004	0.0001	0.0004
Phocoenidae				
Harbor porpoise	0.0011	0.0015	0.0011	0.0015
Mysticetes				
Bowhead whale	0.0013	0.0026	0.0013	0.0026
Fin whale	0.0001	0.0004	0.0001	0.0004
Gray whale	0.0258	0.0516	0.0258	0.0516
Humpback whale	0.0001	0.0004	0.0001	0.0004
Minke whale	0.0001	0.0004	0.0001	0.0004
Pinnipeds				
Bearded seal	0.0107	0.0203	0.0142	0.0270
Ribbon seal	0.0005	0.0020	0.0005	0.0020
Ringed seal	0.3668	0.6075	0.4891	0.8100
Spotted seal	0.0073	0.0122	0.0098	0.0162

Table 3. Expected Densities of Marine Mammals in Areas of the Chukchi Sea, Alaska, for the Planned Fall (September-October) Period. Species listed as endangered under the ESA are in italics.

	Open Water		Ice Margin	
Species	Average Density (# / km^2)	Maximum Density (# / km^2)	Average Density (# / km^2)	Maximum Density (# / km^2)
Odontocetes				
Monodontidae				
Beluga	0.0015	0.0030	0.0060	0.0120
Narwhal	0.0000	0.0000	0.0000	0.0001
Delphinidae				
Killer whale	0.0001	0.0004	0.0001	0.0004
Phocoenidae				
Harbor porpoise	0.0007	0.0011	0.0007	0.0011
Mysticetes				
Bowhead whale	0.0219	0.0438	0.0438	0.0876
Fin whale	0.0001	0.0004	0.0001	0.0004
Gray whale	0.0080	0.0160	0.0080	0.0160
Humpback whale	0.0001	0.0004	0.0001	0.0004
Minke whale	0.0001	0.0004	0.0001	0.0004
Pinnipeds				
Bearded seal	0.0107	0.0203	0.0142	0.0270
Ribbon seal	0.0005	0.0020	0.0005	0.0020
Ringed seal	0.2458	0.4070	0.3277	0.5427
Spotted seal	0.0049	0.0081	0.0065	0.0108

Bowhead Whales—By July, most bowhead whales are northeast of the Chukchi Sea, within or migrating toward their summer feeding grounds in the eastern Beaufort Sea. No bowheads were reported during 6,640 mi (10,686 km) of on-transect effort in the Chukchi Sea by Moore *et al.* (2000). Aerial surveys in 2008–2010 by NMML as part of the COMIDA project reported only six sightings during more than 16,020 mi (25,781 km) of on-transect effort (Clarke and Ferguson, in prep.). Two of the six sightings were in waters less than 115 ft (35 m) deep, and the remaining four sightings were in waters 167–656 ft (51–200 m) deep. Bowhead whales were also rarely sighted in July–August of 2006–2008 during aerial surveys of the Chukchi Sea coast (Thomas *et al.,* 2010). This is consistent with movements of tagged whales (see ADFG, 2010), all of which moved through the Chukchi Sea by early May 2009, and tended to travel relatively close to shore, especially in the northern Chukchi Sea. The estimate of bowhead whale density in the Chukchi Sea was calculated by assuming there was one bowhead sighting during the 7,447 mi (11,985 km) of survey effort in waters 118–164 ft (36–50 m) deep in the Chukchi Sea during July–August reported in Clarke and Ferguson (in prep.) although no bowheads were actually observed during those surveys. The mean group size from September–October sightings reported in Clarke and Ferguson (in prep.) is 1.1, and this was also used in the calculation of summer densities. The group size value, along with a $f(0)$ value of 2 and a $g(0)$ value of 0.07, both from Thomas *et al.* (2002) were used to estimate a summer density of bowhead whales (see Table 6–1 in Shell's application and Table 2 here). The CV of group size and standard errors reported in Thomas *et al.* (2002) for $f(0)$ and $g(0)$ correction factors suggest that an inflation factor of 2 is appropriate for estimating the maximum density from the average density. Bowheads are not expected to be encountered in higher densities near ice in the summer (Moore *et al.,* 2000), so the same density estimates are used for open-water and ice-margin habitats. Densities from vessel based surveys in the Chukchi Sea during non-seismic periods and locations in July–August of 2006–2008 (Haley *et al.,* 2010) ranged from 0.0003–0.0018/mi^2 (0.0001–0.0007/km^2) with a maximum 95% confidence interval (CI) of 0.0075/mi^2 (0.0029 km^2).

During the fall, bowhead whales that summered in the Beaufort Sea and Amundsen Gulf migrate west and south to their wintering grounds in the Bering Sea, making it more likely that bowheads will be encountered in the Chukchi Sea at this time of year. Moore *et al.* (2002; Table 8) reported 34 bowhead sightings during 27,560 mi (44,354 km) of on-transect survey effort in the Chukchi Sea during September–October. Thomas *et al.* (2010) also reported increased sightings on coastal surveys of the Chukchi Sea during September and October of 2006–2008. GPS tagging of bowheads appear to show that migration routes through the Chukchi Sea are more variable than through the Beaufort Sea (Quakenbush *et al.,* 2010). Some of the routes taken by bowheads remain well north of the planned exploration drilling activities while others have passed near to or through the area. Kernel densities estimated from GPS locations of whales suggest that bowheads do not spend much time (*e.g.,* feeding or resting) in the north-central Chukchi Sea near the area of planned activities (Quakenbush *et al.,* 2010). Clarke and Ferguson (in prep) reported 14 sightings (15 individuals) during 6,236 mi (10,036) km of on transect aerial survey effort in 2008–2010. The mean group size of those sightings is 1.1. The same $f(0)$ and $g(0)$ values that were used for the summer estimates above were used for the fall estimates. As with the summer estimates, an inflation factor of 2 was used to estimate the maximum density from the average density in both habitat types. Moore *et al.* (2000) found that bowheads were detected more often than expected in association with ice in the Chukchi Sea in September–October, so a density of twice the average open-water density was used as the average ice-margin density. Densities from vessel based surveys in the Chukchi Sea during non-seismic periods and locations in July–August of 2006–2008 (Haley *et al.,* 2010) ranged from 0.0008 to 0.0114/mi^2 (0.0003–0.0044/km^2) with a maximum 95% CI of 0.1089/mi^2 (0.0419 km^2).

Gray Whales—Gray whale densities are expected to be much higher in the summer months than during the fall. Moore *et al.* (2000) found the distribution of gray whales in the planned operational area was scattered and limited to nearshore areas where most whales were observed in water less than 115 ft (35 m) deep. Thomas *et al.* (2010) also reported substantial declines in the sighting rates of gray whales in the fall. The average open-water summer density (see Table 6–1 in Shell's application and Table 2 here) was calculated from 2008–2010 aerial survey effort and sightings in Clarke and Ferguson (in prep.) for water depths 118–164 ft (36–50 m) including 54 sightings (73 individuals) during 7,447 mi (11,985 km) of on-transect effort. The average group size of those sightings is 1.35. Correction factors $f(0) = 2.49$ (Forney and Barlow, 1998) and $g(0) = 0.3$ (Forney and Barlow, 1998; Mallonee, 1991) were also used in the density calculation. Similar to beluga and bowhead whales, an inflation factor of 2 was used to estimate the maximum densities from average densities in both habitat types and seasons. Gray whales are not commonly associated with sea ice but may be present near it, so the same densities were used for ice-margin habitat as were derived for open-water habitat during both seasons. Densities from vessel based surveys in the Chukchi Sea during non-seismic periods and locations in July–August of 2006–2008 (Haley *et al.,* 2010) ranged from 0.0055mi^2 to 0.0208/mi^2 (0.0021/km^2 to 0.008/km^2) with a maximum 95% CI of 0.0874 mi^2 (0.0336 km^2).

In the fall, gray whales may be dispersed more widely through the northern Chukchi Sea (Moore *et al.,* 2000), but overall densities are likely to be decreasing as the whales begin migrating south. A density calculated from effort and sightings (15 sightings [19 individuals] during 6,236 mi [10,036 km] of on-transect effort) in water 118–164 ft (36–50 m) deep during September–October reported by Clarke and Ferguson (in prep.) was used as the average estimate for the Chukchi Sea during the fall period. The corresponding group size value of 1.26, along with the same $f(0)$ and $g(0)$ values described above were used in the calculation. Densities from vessel based surveys in the Chukchi Sea during non-seismic periods and locations in July–August of 2006–2008 (Haley *et al.,* 2010) ranged from 0.0068/mi^2 to 0.0109/mi^2 (0.0026/km^2 to 0.0042/km^2) with a maximum 95% CI of 0.072 mi^2 (0.0277 km^2).

Harbor Porpoise—Harbor porpoise densities were estimated from industry data collected during 2006–2008 activities in the Chukchi Sea. Prior to 2006, no reliable estimates were available for the Chukchi Sea, and harbor porpoise presence was expected to be very low and limited to nearshore regions. Observers on industry vessels in 2006–2008, however, recorded sightings throughout the Chukchi Sea during the summer and early fall months. Density estimates from 2006–2008 observations during non-seismic periods and locations in July–August ranged from 0.0021/mi^2 to 0.0039/mi^2 (0.0008/km^2 to 0.0015/km^2) with a maximum 95% CI of 0.0205/mi^2 (0.0079/km^2) (Haley *et al.,* 2010). The

average density from the summer season of those three years (0.0029/mi² [0.0011/km²]) was used as the average open-water density estimate while the high value (0.0039/mi² [0.0015/km²]) was used as the maximum estimate (see Table 6–1 in Shell's application and Table 2 here). Harbor porpoise are not expected to be present in higher numbers near ice, so the open-water densities were used for ice-margin habitat in both seasons. Harbor porpoise densities recorded during industry operations in the fall months of 2006–2008 ranged from 0.0005 mi² to 0.0029/mi² (0.0002/km² to 0.0011/km²) with a maximum 95% CI of 0.0242/mi² (0.0093/km²). The average of those years of 0.0018/mi² (0.0007/km²) was again used as the average density estimate, and the high value of 0.0029/mi² (0.0011/km²) was used as the maximum estimate (see Table 6–2 in Shell's application and Table 3 here).

Other Cetaceans—The remaining four cetacean species that could be encountered in the Chukchi Sea during Shell's planned exploration drilling program include the humpback, killer, minke, and fin whales. Although there is evidence of the occasional occurrence of these animals in the Chukchi Sea, it is unlikely that more than a few individuals will be encountered during the planned drilling program. Clarke *et al.* (2011) and Haley *et al.* (2010) reported humpback whale sightings; George and Suydam (1998) reported killer whales; Brueggeman *et al.* (1990), Haley *et al.* (2010), and COMIDA (2011) reported minke whales; and Clarke *et al.* (2011) and Haley *et al.* (2010) reported fin whales.

(2) Pinnipeds

Four species of pinnipeds may be encountered in the Chukchi Sea area of Shell's proposed drilling program: ringed, bearded, spotted, and ribbon seals. Each of these species, except the spotted seal, is associated with both the ice margin and the nearshore area. The ice margin is considered preferred habitat (as compared to the nearshore areas) during most seasons. Spotted seals are often considered to be predominantly a coastal species except in the spring when they may be found in the southern margin of the retreating sea ice. However, satellite tagging has shown that they sometimes undertake long excursions into offshore waters, as far as 74.6 mi (120 km) off the Alaskan coast in the eastern Chukchi Sea, during summer (Lowry *et al.,* 1994, 1998). Ribbon seals have been reported in very small numbers within the Chukchi Sea by observers on industry vessels (Patterson *et al.,* 2007; Haley *et al.,* 2010).

Ringed and Bearded Seals—Ringed and bearded seals ''average'' and ''maximum'' summer ice-margin densities (see Table 6–1 in Shell's application and Table 2 here) were available in Bengtson *et al.* (2005) from spring surveys in the offshore pack ice zone (zone 12P) of the northern Chukchi Sea. However, corrections for bearded seal availability, *g*(0), based on haul-out and diving patterns were not available. Densities of ringed and bearded seals in open-water are expected to be somewhat lower in the summer when preferred pack ice habitat may still be present in the Chukchi Sea. Average and maximum open-water densities have been estimated as ¾ of the ice margin densities during both seasons for both species. The fall density of ringed seals in the offshore Chukchi Sea has been estimated as ⅔ the summer densities because ringed seals begin to reoccupy nearshore fast ice areas as the ice forms in the fall. Bearded seals may also begin to leave the Chukchi Sea in the fall, but less is known about their movement patterns, so fall densities were left unchanged from summer densities. For comparison, the ringed seal density estimates calculated from data collected during summer 2006–2008 industry operations ranged from 0.0411/mi² to 0.1786/mi² (0.0158/km² to 0.0687/km²) with a maximum 95% CI of 0.3936/mi² (0.1514/km²) (Haley *et al.,* 2010). These estimates are lower than those made by Bengtson *et al.* (2005), which is not surprising given the different survey methods and timing.

Spotted Seals— Little information on spotted seal densities in offshore areas of the Chukchi Sea is available. Spotted seal densities in the summer were estimated by multiplying the ringed seal densities by 0.02. This was based on the ratio of the estimated Chukchi populations of the two species. Chukchi Sea spotted seal abundance was estimated by assuming that 8% of the Alaskan population of spotted seals is present in the Chukchi Sea during the summer and fall (Rugh *et al.,* 1997), the Alaskan population of spotted seals is 59,214 (Allen and Angliss, 2010), and that the population of ringed seals in the Alaskan Chukchi Sea is approximately 208,000 animals (Bengtson *et al.,* 2005). In the fall, spotted seals show increased use of coastal haul-outs so densities were estimated to be ⅔ of the summer densities.

Ribbon Seals—Two ribbon seal sightings were reported during industry vessel operations in the Chukchi Sea in 2006–2008 (Haley *et al.* 2010). The resulting density estimate of 0.0013/mi² (0.0005/km²) was used as the average density and 4 times that was used as the maximum for both seasons and habitat zones.

Estimated Area Exposed to Sounds ≥120 dB or ≥160 dB re 1 μPa rms

(1) Estimated Area Exposed to Continuous Sounds ≥ 120 dB rms From the Drillship

Sounds from the *Discoverer* have not previously been measured in the Arctic. However, measurements of sounds produced by the *Discoverer* were made in the South China Sea in 2009 (Austin and Warner, 2010). The results of those measurements were used to model the sound propagation from the *Discoverer* (including a nearby support vessel) at planned exploration drilling locations in the Chukchi and Beaufort seas (Warner and Hannay, 2011). Broadband source levels of sounds produced by the *Discoverer* varied by activity and direction from the ship but were generally between 177 and 185 dB re 1 μPa · m rms (Austin and Warner, 2010). Propagation modeling at the Burger Prospect resulted in an estimated distance of 0.81 mi (1.31 km) to the point at which exploration drilling sounds would likely fall below 120 dB. The estimated 0.81 mi (1.31 km) distance was multiplied by 1.5 (= 1.22 mi [1.97 km]) as a further precautionary measure before calculating the total area that may be exposed to continuous sounds ≥120 dB re 1 μPa rms by the *Discoverer* at each drill site on the Burger Prospect (Table 6–3 in Shell's application and Table 4 here). Given this distance or radius, the total area of water ensonified to ≥120 dB rms during exploration drilling at each drill site was estimated to be 4.6 mi² (12 km²). The 160-dB radius for the *Discoverer* was estimated to be approximately 33 ft (10 m). Again, because the source level for the drillship was measured to be between 177 and 185 dB, the 180 and 190-dB radii were not needed.

The acoustic propagation model used to estimate the sound propagation from the *Discoverer* in the Chukchi Sea is JASCO Research's Marine Operations Noise Model (MONM). MONM computes received sound levels in rms units when source levels are specified also in those units. MONM treats sound propagation in range-varying acoustic environments through a wide-angled parabolic equation solution to the acoustic wave equation. The specific parabolic equation code in MONM is based on the Naval Research Laboratory's Range-dependent Acoustic Model. This code has been extensively benchmarked for accuracy and is widely

employed in the underwater acoustics community (Collins, 1993).

Changes in the water column of the Chukchi Sea through the course of the exploration drilling season will likely affect the propagation of sounds produced by exploration drilling activities, so the modeling of exploration drilling sounds was run using expected oceanographic conditions in October which are expected to support greater sound propagation (Warner and Hannay, 2011). Results of sound propagation modeling that were used in the calculations of areas exposed to various levels of received sounds are summarized in Table 6–3 in Shell's application and Table 4 here.

Distances shown in Table 6–3 in Shell's application and Table 4 here were used to estimate the area ensonified to ≥120 dB rms around the drillship. As noted above, all exploration drilling activities will occur at the Burger Prospect. The exploration drill sites assumed for the summer of 2012 at the Burger Prospect (Burger A, F, J, and V) are 3.4 to 13 mi (5.5 km to 21 km) from each other, and wells will not be drilled simultaneously. Therefore, the area exposed to continuous sounds ≥120 dB at each drill site is not expected to overlap with any other drill site. The total area of water potentially exposed to received sound levels ≥120 dB rms by exploration drilling operations during July–August at two locations is therefore estimated to be 9.42 mi² (24.4 km²). Activities at two additional locations in September–October may expose an additional 9.42 mi² (24.4 km²) to continuous sounds ≥120 dB rms.

Table 4. Sound Propagation Modeling Results of Exploration Drilling, Icebreaking, and ZVSP Activities at the Burger Prospect in the Alaskan Chukchi Sea

Source	Received Level (dB re 1 μPa)	Modeling Results (km)	Used in Calculations (km)
Discoverer	120	1.31	1.97
Icebreaking	120	7.63	9.50
ZVSP	160	3.67	5.51

(2) Estimated Area Exposed to Continuous Sounds ≥120 dB rms from Ice Management/Icebreaking Activities

Measurements of the icebreaking supply ship *Robert Lemeur* pushing and breaking ice during exploration drilling operations in the Beaufort Sea in 1986 resulted in an estimated broadband source level of 193 dB re 1 μPa · m (Greene, 1987a; Richardson *et al.,* 1995a). Measurements of the icebreaking sounds were made at five different distances and those were used to generate a propagation loss equation [RL = 141.4 − 1.65R − 10Log(R) where R is range in kilometers (Greene, 1987a); converting R to meters results in the following equation: R = 171.4 − 10log(R) − 0.00165R]. Using that equation, the estimated distance to the 120 dB threshold for continuous sounds from icebreaking is 4.74 mi (7.63 km). Since the measurements of the *Robert Lemeur* were taken in the Beaufort Sea under presumably similar conditions as would be encountered in the Chukchi Sea in 2012, an inflation factor of 1.25 was selected to arrive at a precautionary 120 dB distance of 5.9 mi (9.5 km) for icebreaking sounds (see Table 6–3 in Shell's application and Table 4 here). Additionally, measurements of identical sound sources at the Burger and Camden Bay prospects in 2008 yielded similar results, suggesting that sound propagation at the two locations is likely to be similar (Hannay and Warner, 2009).

If ice is present, ice management/icebreaking activities may be necessary in early July and towards the end of operations in late October, but it is not expected to be needed throughout the proposed exploration drilling season. Icebreaking activities would likely occur in a 40° arc up to 3.1 mi (5 km) upwind of the *Discoverer* (see Figure 1–3 and Attachment B in Shell's application for additional details). This activity area plus a 5.9 mi (9.5 km) buffer around it results in an estimated total area of 162 mi² (420 km²) that may be exposed to sounds ≥120 dB from ice management/icebreaking activities in each season.

(3) Estimated Area Exposed to Impulsive Sounds ≥ 160 dB rms From Airguns

Shell proposes to use the ITAGA eight-airgun array for the ZVSP surveys in 2012, which consists of four 150-in³ airguns and four 40-in³ airguns for a total discharge volume of 760 in³. The ≥160 dB re 1 μPa rms radius for this source was estimated from measurements of a similar seismic source used during the 2008 BP Liberty seismic survey (Aerts *et al.,* 2008). The BP liberty source was also an eight-airgun array but had a slightly larger total volume of 880 in³. Because the number of airguns is the same, and the difference in total volume only results in an estimated 0.4 dB decrease in the source level of the ZVSP source, the 100th percentile propagation model from the measurements of the BP Liberty source is almost directly applicable. However, the BP Liberty source was towed at a depth of 5.9 ft (1.8 m), while Shell's ZVSP source would be lowered to a target depth of 13 ft (4 m) (from 10–23 ft [3–7 m]). The deeper depth of the ZVSP source has the potential to increase the source strength by as much as 6 dB. Thus, the constant term in the propagation equation from the BP Liberty source was increased from 235.4 to 241.4 while the remainder of the equation (–18*LogR—0.0047*R) was left unchanged. NMFS reviewed the use of this equation and the similarities between the 2008 BP Liberty project and Shell's proposed drilling sites and determined that it is appropriate to base the sound isopleths on those results. This equation results in the following estimated distances to maximum received levels: 190 dB = 0.33 mi (524 m); 180 dB = 0.77 mi (1,240 m); 160 dB = 2.28 mi (3,670 m); 120 dB = 6.52 mi (10,500 m). The ≥160 dB distance was multiplied by 1.5 (see Table 6–3 in Shell's application and Table 4 here) for use in estimating the area ensonified to ≥160 dB rms around the drilling vessel during ZVSP activities. Therefore, the total area of water potentially exposed to received sound levels ≥160 dB rms by ZVSP operations at two exploration well sites during each season is estimated to be 73.7 mi² (190.8 km²).

Shell intends to conduct sound propagation measurements on the

Discoverer and the airgun source in 2012 once they are on location in the Chukchi Sea. The results of those measurements would then be used during the season to implement mitigation measures.

Potential Number of Takes by Harassment

Although a marine mammal may be exposed to drilling or icebreaking sounds ≥ 120 dB (rms) or airgun sounds ≥ 160 dB (rms), this does not mean that it will *actually* exhibit a disruption of behavioral patterns in response to the sound source. Rather, the estimates provided here are simply the best estimates of the number of animals that potentially could have a behavioral modification due to the noise. However, not all animals react to sounds at this low level, and many will not show strong reactions (and in some cases any reaction) until sounds are much stronger. There are several variables that determine whether or not an individual animal will exhibit a response to the sound, such as the age of the animal, previous exposure to this type of anthropogenic sound, habituation, *etc.*

Numbers of marine mammals that might be present and potentially disturbed (*i.e.,* Level B harassment) are estimated below based on available data about mammal distribution and densities at different locations and times of the year as described previously. Exposure estimates are based on a single drillship (*Discoverer*) drilling up to four wells in the Chukchi Sea from July 4–October 31, 2012. Shell assumes an average of 32 days at each drill site (including the partial well drill site, including 7.5 days of MLC excavation at all four drill sites). Shell also assumes that ZVSP activities may occur at each well drilled. Additionally, Shell assumed that more ice is likely to be present in the area of operations during the July–August period, so summer ice-margin densities have been applied to 50 percent of the area that may be exposed to sounds from exploration drilling and ZVSP activities in those months. Open-water densities in the summer were applied to the remaining 50 percent of the area. Less ice is likely to be present during the September–October period, so fall ice-margin densities have been applied to only 20 percent of the area that may be exposed to sounds from exploration drilling and ZVSP activities in those months. Fall open-water densities were applied to the remaining 80 percent of the area. Since ice management/icebreaking activities would only occur within ice-margin habitat, the entire area potentially ensonified by ice management/icebreaking activities has been multiplied by the ice-margin densities in both seasons.

The number of different individuals of each species potentially exposed to received levels of continuous drilling-related sounds ≥ 120 dB re 1 μPa or to pulsed airgun sounds ≥ 120 dB re 1 μPa within each season and habitat zone was estimated by multiplying:

- The anticipated area to be ensonified to the specified level in the time period and habitat zone to which a density applies, by
- The expected species density.

The numbers of exposures were then summed for each species across the seasons and habitat zones.

(1) Drillship Activities

Estimates of the average and maximum number of individual marine mammals that may be exposed to continuous sound levels ≥120 dB by exploration drilling activities are shown by season and habitat in Table 6–4 in Shell's application and Table 5 here. Due to the relatively small estimated ≥120 dB radius around the exploration drilling activities, only a few individuals of any species are estimated to be exposed based on average densities. However, chance encounters with individuals of any species are possible as all of the species are known to occur in the Chukchi Sea (except for the narwhal for reasons stated previously in this document). Minimal estimates have therefore been included in the Total (Max) column to account for chance encounters or where greater numbers may be encountered than calculations suggested.

(2) Ice Management/Icebreaking Activities

Estimates of the average and maximum number of individual marine mammals that may be exposed to continuous sound levels ≥120 dB by ice management/icebreaking activities are shown by season and habitat in Table 6–5 in Shell's application and Table 6 here. Should ice management/icebreaking be necessary, it would ensonify a larger area of water to ≥120 dB than the exploration drilling activities or to ≥160 dB by ZVSP surveys, and, therefore, results in the highest number of potential estimated individual exposed to such sounds.

The average and maximum estimates of the number of individual bowhead whales exposed to received sound levels ≥120 dB are 19 and 38, respectively. The average estimates for beluga and gray whales are 4 and 14, respectively. Few other cetaceans are likely to be exposed to icebreaking sounds ≥120 dB, but maximum estimates have been included to account for chance encounters.

Ringed seals are expected to be the most abundant animal in the Chukchi Sea, and the average and maximum estimates of the number exposed to ≥120 dB by potential ice management/icebreaking activities are 343 and 568, respectively. Estimated exposures of other seal species are substantially less than those for ringed seals (see Table 6–5 in Shell's application and Table 6 here).

(3) ZVSP Activities

Estimates of the average and maximum number of individual marine mammals that may be exposed to pulsed airgun sounds at received levels ≥160 dB during ZVSP activities are shown by season and habitat in Table 6–6 in Shell's application and Table 7 here. The estimates are somewhat greater than for exploration drilling activities because of the larger ≥160 dB radius around the airguns compared to the estimated ≥120 dB radius around exploration drilling activities (see Table 6–3 in Shell's application and Table 4 here).

The average and maximum estimates of the number of individual bowhead whales potentially exposed to received sound levels ≥160 dB are 5 and 11, respectively. The average estimates for beluga and gray whales are 1 and 6, respectively (see Table 6–6 in Shell's application and Table 7 here). Few other cetaceans are likely to be exposed to airgun sounds ≥160 dB, but maximum estimates have been included to account for chance encounters.

The average and maximum estimated number of ringed seals potentially exposed to ≥160 dB by ZVSP activities are 132 and 218, respectively. Estimated exposures of other seal species are substantially below those for ringed seals (Table 6–6 in Shell's application and Table 7 here).

Estimated Take Conclusions

As stated previously, NMFS' practice has been to apply the 120 dB re 1 μPa (rms) received level threshold for underwater continuous sound levels and the 160 dB re 1 μPa (rms) received level threshold for underwater impulsive sound levels to determine whether take by Level B harassment occurs. However, not all animals react to sounds at these low levels, and many will not show strong reactions (and in some cases any reaction) until sounds are much stronger. Southall *et al.* (2007) provide a severity scale for ranking observed behavioral responses of both free-ranging marine mammals and laboratory subjects to various types of

anthropogenic sound (see Table 4 in Southall *et al.* (2007)). Tables 15, 17, and 21 in Southall *et al.* (2007) outline the numbers of low-frequency and mid-frequency cetaceans and pinnipeds in water, respectively, reported as having behavioral responses to non-pulsed sounds in 10-dB received level increments. These tables illustrate, especially for low- and mid-frequency cetaceans, that more intense observed behavioral responses did not occur until sounds were higher than 120 dB (rms). Many of the animals had no observable response at all when exposed to anthropogenic continuous sound at levels of 120 dB (rms) or even higher.

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Table 5. The number of potential exposures of marine mammals to received sound levels in the water of ≥120 dB rms during planned exploration drilling activities in summer (July-August) and fall (September-October) in the Chukchi Sea, Alaska, 2012.

	Number of Individuals Potentially Exposed to Drilling Sounds ≥ 120 dB													
	Summer						Fall							
	Open Water		Ice Margin		Total		Open Water		Ice Margin		Total		Grand Total	
	Avg.	Max.	Avg.	Max.	Avg.	Max.	Avg.	Max.	Avg.	Max.	Avg.	Max.	Avg.	Max.
Odontocetes														
Monodontidae														
Beluga	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Narwhal	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Delphinidae														
Killer whale	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Phocoenidae														
Harbor porpoise	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Mysticetes														
Bowhead whale	0	0	0	0	0	0	0	1	0	0	1	1	1	5
Fin whale	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Gray whale	0	1	0	1	1	1	0	0	0	0	0	0	1	5
Humpback Whale	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Minke whale	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Pinnipeds														
Bearded seal	0	0	0	0	0	1	0	0	0	0	0	1	1	5
Ribbon seal	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Ringed seal	4	7	6	10	10	17	5	8	2	3	6	11	17	28
Spotted seal	0	0	0	0	0	0	0	0	0	0	0	0	0	5

Table 6. The number of potential exposures of marine mammals to received sound levels in the water of ≥120 dB rms during potential ice management/icebreaking activities in summer (July-August) and fall (September-October) in the Chukchi Sea, Alaska, 2012.

	Number of Individuals Potentially Exposed to Icebreaking Sounds ≥120 dB													
	Summer						Fall							
	Open Water		Ice Margin		Total		Open Water		Ice Margin		Total		Grand Total	
	Avg.	Max.	Avg.	Max.	Avg.	Max.	Avg.	Max.	Avg.	Max.	Avg.	Max.	Avg.	Max.
Odontocetes														
Monodontidae														
Beluga	0	0	2	3	2	3	0	0	3	5	3	5	4	5
Narwhal	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Delphinidae														
Killer whale	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Phocoenidae														
Harbor porpoise	0	0	0	1	0	1	0	0	0	0	0	0	1	5
Mysticetes														
Bowhead whale	0	0	1	1	1	1	0	0	18	37	18	37	19	38
Fin whale	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Gray whale	0	0	11	22	11	22	0	0	3	7	3	7	14	28
Humpback Whale	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Minke whale	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Pinnipeds														
Bearded seal	0	0	6	11	6	11	0	0	6	11	6	11	12	23
Ribbon seal	0	0	0	1	0	1	0	0	0	1	0	1	0	5
Ringed seal	0	0	205	340	205	340	0	0	138	228	138	228	343	568
Spotted seal	0	0	4	7	4	7	0	0	3	5	3	5	7	11

Table 7. The number of potential exposures of marine mammals to received sound levels in the water of ≥160 dB rms during planned ZVSP activities in summer (July-August) and fall (September-October) in the Chukchi Sea, Alaska, 2012.

	Number of Individuals Potentially Exposed to VSP Sounds ≥160 dB													
	Summer						Fall							
	Open Water		Ice Margin		Total		Open Water		Ice Margin		Total		Grand Total	
	Avg.	Max.	Avg.	Max.	Avg.	Max.	Avg.	Max.	Avg.	Max.	Avg.	Max.	Avg.	Max.
Odontocetes														
Monodontidae														
Beluga	0	0	0	1	0	1	0	0	0	0	0	1	1	5
Narwhal	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Delphinidae														
Killer whale	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Phocoenidae														
Harbor porpoise	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Mysticetes														
Bowhead whale	0	0	0	0	0	0	3	7	2	3	5	10	5	11
Fin whale	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Gray whale	2	5	2	5	5	10	1	2	0	1	2	3	6	13
Humpback Whale	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Minke whale	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Pinnipeds														
Bearded seal	1	2	1	3	2	5	2	3	1	1	2	4	5	9
Ribbon seal	0	0	0	0	0	0	0	0	0	0	0	0	0	5
Ringed seal	35	58	47	77	82	135	38	62	13	21	50	83	132	218
Spotted seal	1	1	1	2	2	3	1	1	0	0	1	2	3	5

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Although the 120-dB isopleth for the drillship may seem slightly expansive (*i.e.,* 1.22 mi [1.97 km], which includes the 50% inflation factor), the zone of ensonification begins to shrink dramatically with each 10-dB increase in received sound level to where the 160-dB isopleth is only about 33 ft (10 m) from the drillship. As stated previously, source levels are expected to be between 177 and 185 dB (rms). For an animal to be exposed to received levels between 177 and 185 dB, it would have to be within several meters of the vessel, which is unlikely, especially given the fact that certain species are likely to avoid the area (as described earlier in this document).

For impulsive sounds, such as those produced by the airguns, studies reveal that baleen whales show avoidance responses, which would reduce the likelihood of them being exposed to higher received sound levels. The 180-dB zone (0.77 mi [1.24 km]) is one-third the size of the 160-dB zone (2.28 mi [3.67 km], which is the modeled distance before the 1.5 inflation factor is included). In the limited studies that have been conducted on pinniped responses to pulsed sound sources, they seem to be more tolerant and do not exhibit strong behavioral reactions (see Southall *et al.,* 2007).

NMFS is proposing to authorize the maximum take estimates provided in Table 6–7 of Shell's application. Table 8 in this document outlines the abundance, proposed take, and percentage of each stock or population for the 12 species that may be exposed to sounds ≥ 120 dB from the drillship and ice management/ice breaking activities and to sounds ≥ 160 dB from ZVSP activities in Shell's proposed Chukchi Sea drilling area. With the exception of killer and minke whales (which are still less than 2.5%), less than 1% of each species or stock would potentially be exposed to sounds above the Level B harassment thresholds. The take estimates presented here do not take any of the mitigation measures presented earlier in this document into consideration. These take numbers also do not consider how many of the exposed animals may actually respond or react to the proposed exploration drilling program. Instead, the take estimates are based on the presence of animals, regardless of whether or not they react or respond to the activities.

Table 8. Population abundance estimates, total proposed Level B take estimates (when combining takes from drillship operations, ice management/icebreaking, and ZVSP surveys), and percentage of stock or population that may be taken for the potentially affected species that may occur in Shell's proposed Chukchi Sea drilling area.

Species	Abundance[1]	Total Proposed Take	Percentage of Stock or Population
Beluga Whale	39,258	15	0.04
Killer Whale	656	15	2.3
Harbor Porpoise	48,215	15	0.03
Bowhead Whale	15,232[2]	53	0.35
Fin Whale	5,700	15	0.26
Gray Whale	18,017	46	0.26
Humpback Whale	2,845	15	0.53
Minke Whale	810-1,233	15	1.22-1.85
Bearded Seal	155,000[3]	36	0.02
Ribbon Seal	49,000	15	0.03
Ringed Seal	208,000-252,000	814	0.32-0.39
Spotted Seal	59,214	21	0.04

1 Unless stated otherwise, abundance estimates are taken from Allen and Angliss (2011)
2 Estimate from George et al. (2004) with an annual growth rate of 3.4%
3Beringia Distinct Population Segment (NMFS, 2010)

Negligible Impact Analysis

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) The number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the takes occur.

No injuries or mortalities are anticipated to occur as a result of Shell's proposed Chukchi Sea exploratory drilling program, and none are proposed to be authorized. Injury, serious injury, or mortality could occur if there were a large or very large oil spill. However, as discussed previously in this document, the likelihood of a spill is extremely remote. Shell has implemented many design and operational standards to mitigate the potential for an oil spill of any size. NMFS does not propose to authorize take from an oil spill, as it is not part of the specified activity. Additionally, animals in the area are not expected to incur hearing impairment (*i.e.,* TTS or PTS) or non-auditory physiological effects. Instead, any impact that could result from Shell's activities is most likely to be behavioral harassment and is expected to be of limited duration. Although it is possible that some individuals may be exposed to sounds from drilling operations more than once, during the migratory periods it is less likely that this will occur since animals will continue to move across the Chukchi Sea towards their wintering grounds.

Bowhead and beluga whales are less likely to occur in the proposed project area in July and August, as they are found mostly in the Canadian Beaufort Sea at this time. The animals are more likely to occur later in the season (mid-September through October), as they head west towards Russia or south towards the Bering Sea. Additionally, while bowhead whale tagging studies revealed that animals occurred in the LS 193 area, a higher percentage of animals were found outside of the LS 193 area in the fall (Quakenbush *et al.,* 2010). Bowhead whales are not known to feed in areas near Shell's leases in the Chukchi Sea. The closest primary feeding ground is near Point Barrow, which is more than 150 mi (241 km) east of Shell's Burger prospect. Therefore, if bowhead whales stop to feed near Point Barrow during Shell's proposed operations, the animals would not be exposed to continuous sounds from the drillship or icebreaker above 120 dB or to impulsive sounds from the airguns above 160 dB, as those sound levels only propagate 1.22 mi (1.97 km), 5.9 mi (9.5 km), and 3.42 mi (5.51 km), respectively, which includes the inflation factor. Additionally, the 120-dB radius for the airgun array has been modeled to propagate 6.5 mi (10.5 km) from the source (and would still be less than 10 mi [16.1 km] if an inflation factor of 1.5 were applied). Therefore, sounds from the operations would not reach the feeding grounds near Point Barrow. Gray whales occur in the northeastern Chukchi Sea during the summer and early fall to feed. Hanna Shoals, an area northeast of Shell's proposed drill sites, is a common gray whale feeding ground. This feeding ground lies outside of the 120-dB and 160-dB ensonified areas from Shell's activities. While some individuals may swim through the area of active drilling, it is not anticipated to interfere with their feeding at Hanna Shoals or other Chukchi Sea feeding grounds. Other cetacean species are much rarer in the proposed project area. The exposure of cetaceans to sounds produced by exploratory drilling operations (*i.e.,* drillship, ice management/icebreaking, and airgun operations) is not expected to result in more than Level B harassment.

Few seals are expected to occur in the proposed project area, as several of the species prefer more nearshore waters. Additionally, as stated previously in this document, pinnipeds appear to be more tolerant of anthropogenic sound, especially at lower received levels, than other marine mammals, such as mysticetes. Shell's proposed activities would occur at a time of year when the ice seal species found in the region are not molting, breeding, or pupping. Therefore, these important life functions would not be impacted by Shell's

proposed activities. The exposure of pinnipeds to sounds produced by Shell's proposed exploratory drilling operations in the Chukchi Sea is not expected to result in more than Level B harassment of the affected species or stock.

Of the 12 marine mammal species likely to occur in the proposed drilling area, three are listed as endangered under the ESA: The bowhead, humpback, and fin whales. All three species are also designated as ''depleted'' under the MMPA. Despite these designations, the Bering-Chukchi-Beaufort stock of bowheads has been increasing at a rate of 3.4% annually for nearly a decade (Allen and Angliss, 2011), even in the face of ongoing industrial activity. Additionally, during the 2001 census, 121 calves were counted, which was the highest yet recorded. The calf count provides corroborating evidence for a healthy and increasing population (Allen and Angliss, 2011). An annual increase of 4.8% was estimated for the period 1987–2003 for North Pacific fin whales. While this estimate is consistent with growth estimates for other large whale populations, it should be used with caution due to uncertainties in the initial population estimate and about population stock structure in the area (Allen and Angliss, 2011). Zeribini *et al.* (2006, cited in Allen and Angliss, 2011) noted an increase of 6.6% for the Central North Pacific stock of humpback whales in Alaska waters. Certain stocks or populations of gray and beluga whales and spotted seals are listed as endangered or are proposed for listing under the ESA; however, none of those stocks or populations occur in the proposed activity area. On December 10, 2010, NMFS published a notice of proposed threatened status for subspecies of the ringed seal (75 FR 77476) and a notice of proposed threatened and not warranted status for subspecies and distinct population segments of the bearded seal (75 FR 77496) in the **Federal Register**. Neither of these two ice seal species is currently considered depleted under the MMPA. The ribbon seal is a ''species of concern.'' None of the other species that may occur in the project area are listed as threatened or endangered under the ESA or designated as depleted under the MMPA. There is currently no established critical habitat in the proposed project area for any of these 12 species.

Potential impacts to marine mammal habitat were discussed previously in this document (see the ''Anticipated Effects on Habitat'' section). Although some disturbance is possible to food sources of marine mammals, the impacts are anticipated to be minor. Based on the vast size of the Arctic Ocean where feeding by marine mammals occurs versus the localized area of the drilling program, any missed feeding opportunities in the direct project area would be of little consequence, as marine mammals would have access to other feeding grounds.

The estimated takes proposed to be authorized represent less than 1% of the affected population or stock for 10 of the species and less than 2.5% for two of the species. These estimates represent the percentage of each species or stock that could be taken by Level B behavioral harassment if each animal is taken only once.

The estimated take numbers are likely somewhat of an overestimate for several reasons. First, these take numbers were calculated using a 50% inflation factor of the 120-dB radius from the drillship and of the 160-dB radius for the airguns and using a 25% inflation factor of the 120-dB radius from the icebreaker during active ice management/icebreaking activities, which is a conservative approach recommended by some acousticians when modeling a new sound source in a new location. This is fairly conservative given the fact that the radii were based on results from measurements of the *Discoverer* in another location and of the icebreaker and airguns in the Arctic Ocean. SSV tests may reveal that the Level B harassment zone is either smaller or larger than that used to estimate take. If the SSV tests reveal that the Level B harassment zone is slightly larger than those modeled or measured elsewhere, the inflation factors should cover the discrepancy, however, based on recent SSV tests of seismic airguns (which showed that the measured 160-dB isopleths was in the area of the modeled value), the 50% correction factor likely results in an overestimate of takes. Moreover, the mitigation and monitoring measures (described previously in this document) proposed for inclusion in the IHA (if issued) are expected to reduce even further any potential disturbance to marine mammals. Last, some marine mammal individuals, including mysticetes, have been shown to avoid the ensonified area around airguns at certain distances (Richardson *et al.,* 1999), and, therefore, some individuals would not likely enter into the Level B harassment zones for the various types of activities.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

Relevant Subsistence Uses

The disturbance and potential displacement of marine mammals by sounds from drilling activities are the principal concerns related to subsistence use of the area. Subsistence remains the basis for Alaska Native culture and community. Marine mammals are legally hunted in Alaskan waters by coastal Alaska Natives. In rural Alaska, subsistence activities are often central to many aspects of human existence, including patterns of family life, artistic expression, and community religious and celebratory activities. Additionally, the animals taken for subsistence provide a significant portion of the food that will last the community throughout the year. The main species that are hunted include bowhead and beluga whales, ringed, spotted, and bearded seals, walruses, and polar bears. (As mentioned previously in this document, both the walrus and the polar bear are under the USFWS' jurisdiction.) The importance of each of these species varies among the communities and is largely based on availability.

The subsistence communities in the Chukchi Sea that have the potential to be impacted by Shell's offshore drilling program include Point Hope, Point Lay, Wainwright, Barrow, and possibly Kotzebue and Kivalina (however, these two communities are much farther to the south of the proposed project area). Wainwright is the coastal village closest to the proposed drill site and is located approximately 78 mi (125.5 km) from Shell's Burger prospect. Point Lay, Barrow, and Point Hope are all approximately 92, 140, and 180 mi (148, 225.3, and 290 km), respectively, from Shell's Burger prospect.

(1) Bowhead Whales

Bowhead whale hunting is a key activity in the subsistence economies of northwest Arctic communities. The whale harvests have a great influence on social relations by strengthening the sense of Inupiat culture and heritage in addition to reinforcing family and community ties.

An overall quota system for the hunting of bowhead whales was established by the International Whaling Commission (IWC) in 1977. The quota is now regulated through an agreement between NMFS and the Alaska Eskimo Whaling Commission (AEWC). The AEWC allots the number of bowhead whales that each whaling community may harvest annually (USDOI/BLM,

2005). The annual take of bowhead whales has varied due to (a) changes in the allowable quota level and (b) year-to-year variability in ice and weather conditions, which strongly influence the success of the hunt.

Bowhead whales migrate around northern Alaska twice each year, during the spring and autumn, and are hunted in both seasons. Bowhead whales are hunted from Barrow during the spring and the fall migration. The spring hunt along Chukchi villages and at Barrow occurs after leads open due to the deterioration of pack ice; the spring hunt typically occurs from early April until the first week of June. From 1984–2009, bowhead harvests by the villages of Wainwright, Point Hope, and Point Lay occurred only between April 14 and June 24 and only between April 23 and June 15 in Barrow (George and Tarpley, 1986; George *et al.,* 1987, 1988, 1990, 1992, 1995, 1998, 1999, 2000; Philo *et al.,* 1994; Suydam *et al.,* 1995b, 1996, 1997, 2001b, 2002, 2003, 2004, 2005b, 2006, 2007, 2008, 2009, 2010). Shell will not mobilize and move into the Chukchi Sea prior to July 1.

The fall migration of bowhead whales that summer in the eastern Beaufort Sea typically begins in late August or September. Fall migration into Alaskan waters is primarily during September and October. In the fall, subsistence hunters use aluminum or fiberglass boats with outboards. Hunters prefer to take bowheads close to shore to avoid a long tow during which the meat can spoil, but Braund and Moorehead (1995) report that crews may (rarely) pursue whales as far as 50 mi (80 km). The autumn bowhead hunt usually begins in Barrow in mid-September and mainly occurs in the waters east and northeast of Point Barrow. Fall bowhead whaling has not typically occurred in the villages of Wainwright, Point Hope, and Point Lay in recent years. However, a Wainwright whaling crew harvested the first fall bowhead whale in 90 years or more on October 8, 2010. Because of changing ice conditions, there is the potential for these villages to resume a fall bowhead harvest.

Barrow participates in a fall hunt each year. From 1984–2009, Barrow whalers harvested bowhead whales between August 31 and October 29. While this time period overlaps with that of Shell's proposed operations, the drill sites are located more than 140 mi (225 km) west of Barrow, so the whales would reach the Barrow hunting grounds before entering the sound field of Shell's operations. Shell will be flying helicopters out to the drillship for resupply missions. In the past 35 years, however, Barrow whaling crews have harvested almost all whales in the Beaufort Sea to the east of Point Barrow (Suydam *et al.,* 2008), indicating that relatively little fall hunting occurs to the west where the flight corridor is located.

(2) Beluga Whales

Beluga whales are available to subsistence hunters along the coast of Alaska in the spring when pack-ice conditions deteriorate and leads open up. Belugas may remain in coastal areas or lagoons through June and sometimes into July and August. The community of Point Lay is heavily dependent on the hunting of belugas in Kasegaluk Lagoon for subsistence meat. From 1983–1992 the average annual harvest was approximately 40 whales (Fuller and George, 1997). Point Hope residents hunt beluga primarily in the lead system during the spring (late March to early June) bowhead hunt but also in open-water along the coastline in July and August. Belugas are harvested in coastal waters near these villages, generally within a few miles from shore.

In Wainwright and Barrow, hunters usually wait until after the spring bowhead whale hunt is finished before turning their attention to hunting belugas. The average annual harvest of beluga whales taken by Barrow for 1962–1982 was five (MMS, 1996). The Alaska Beluga Whale Committee (ABWC) recorded that 23 beluga whales had been harvested by Barrow hunters from 1987 to 2002, ranging from 0 in 1987, 1988 and 1995 to the high of 8 in 1997 (Fuller and George, 1997; ABWC, 2002 cited in USDOI/BLM, 2005). Barrow residents typically hunt for belugas between Point Barrow and Skull Cliffs in the Chukchi Sea (primarily April-June) and later in the summer (July-August) on both sides of the barrier island in Elson Lagoon/Beaufort Sea (MMS, 2008). Harvest rates indicate that the hunts are not frequent. Wainwright residents hunt beluga in April-June in the spring lead system, but this hunt typically occurs only if there are no bowheads in the area. Communal hunts for beluga are conducted along the coastal lagoon system later in July-August.

Shell's proposed exploration drilling activities take place well offshore, far away from areas that are used for beluga hunting by the Chukchi Sea communities.

(3) Ringed Seals

Ringed seals are hunted mainly from October through June. Hunting for these smaller mammals is concentrated during winter (November through March) because bowhead whales, bearded seals, and caribou are available through other seasons. In winter, leads and cracks in the ice off points of land and along the barrier islands are used for hunting ringed seals. The average annual ringed seal harvest was 49 seals in Point Lay, 86 in Wainwright, and 394 in Barrow (Braund *et al.,* 1993; USDOI/BLM, 2003, 2005). Although ringed seals are available year-round, the planned activities will not occur during the primary period when these seals are typically harvested (November-March). Also, the activities will be largely in offshore waters where they will not influence ringed seals in the nearshore areas where they are hunted.

(4) Spotted Seals

The spotted seal subsistence hunt peaks in July and August along the shore where the seals haul out, but usually involves relatively few animals. Available maps of recent and past subsistence use areas for spotted seals indicate harvest of this species within 30–40 mi (48–64 km) of the coastline. Spotted seals typically migrate south by October to overwinter in the Bering Sea. During the fall migration, spotted seals are hunted by the Wainwright and Point Lay communities as the seals move south along the coast (USDOI/BLM, 2003). Spotted seals are also occasionally hunted in the area off Point Barrow and along the barrier islands of Elson Lagoon to the east (USDOI/BLM, 2005). The planned activities will remain offshore of the coastal harvest area of these seals and should not conflict with harvest activities.

(5) Bearded Seals

Bearded seals, although generally not favored for their meat, are important to subsistence activities in Barrow and Wainwright because of their skins. Six to nine bearded seal hides are used by whalers to cover each of the skin-covered boats traditionally used for spring whaling. Because of their valuable hides and large size, bearded seals are specifically sought. Bearded seals are harvested during the spring and summer months in the Chukchi Sea (USDOI/BLM, 2003, 2005). The animals inhabit the environment around the ice floes in the drifting nearshore ice pack, so hunting usually occurs from boats in the drift ice. Most bearded seals are harvested in coastal areas inshore of the proposed exploration drilling area, so no conflicts with the harvest of bearded seals are expected.

Potential Impacts to Subsistence Uses

NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity that is likely to reduce the

availability of the species to a level insufficient for a harvest to meet subsistence needs by causing the marine mammals to abandon or avoid hunting areas; directly displacing subsistence users; or placing physical barriers between the marine mammals and the subsistence hunters; and that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Noise and general activity during Shell's proposed drilling program have the potential to impact marine mammals hunted by Native Alaskans. In the case of cetaceans, the most common reaction to anthropogenic sounds (as noted previously in this document) is avoidance of the ensonified area. In the case of bowhead whales, this often means that the animals divert from their normal migratory path by several kilometers. Helicopter activity also has the potential to disturb cetaceans and pinnipeds by causing them to vacate the area. Additionally, general vessel presence in the vicinity of traditional hunting areas could negatively impact a hunt. Native knowledge indicates that bowhead whales become increasingly ''skittish'' in the presence of seismic noise. Whales are more wary around the hunters and tend to expose a much smaller portion of their back when surfacing (which makes harvesting more difficult). Additionally, natives report that bowheads exhibit angry behaviors in the presence of seismic activity, such as tail-slapping, which translate to danger for nearby subsistence harvesters.

Plan of Cooperation (POC)

Regulations at 50 CFR 216.104(a)(12) require IHA applicants for activities that take place in Arctic waters to provide a POC or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes. Shell has developed a Draft POC for its 2012 Chukchi Sea, Alaska, exploration drilling program to minimize any adverse impacts on the availability of marine mammals for subsistence uses. A copy of the Draft POC was provided to NMFS with the IHA Application as Attachment D (see **ADDRESSES** for availability). Meetings with potentially affected subsistence users began in 2009 and continued into 2010 and 2011 (see Table 4.2–1 in Shell's POC for a list of all meetings conducted through April 2011). During these meetings, Shell focused on lessons learned from prior years' activities and presented mitigation measures for avoiding potential conflicts, which are outlined in the 2012 POC and this document. Shell's POC addresses vessel transit, drilling, and associated activities. Communities that were consulted regarding Shell's 2012 Arctic Ocean operations include: Barrow, Kaktovik, Wainwright, Kotzebue, Kivalina, Point Lay, Point Hope, Kiana, Gambell, Savoonga, and Shishmaref.

Beginning in early January 2009 and continuing into 2011, Shell held one-on-one meetings with representatives from the North Slope Borough (NSB) and Northwest Arctic Borough (NWAB), subsistence-user group leadership, and Village Whaling Captain Association representatives. Shell's primary purpose in holding individual meetings was to inform and prepare key leaders, prior to the public meetings, so that they would be prepared to give appropriate feedback on planned activities.

Shell presented the proposed project to the NWAB Assembly on January 27, 2009, to the NSB Assembly on February 2, 2009, and to the NSB and NWAB Planning Commissions in a joint meeting on March 25, 2009. Meetings were also scheduled with representatives from the AEWC, and presentations on proposed activities were given to the Inupiat Community of the Arctic Slope, and the Native Village of Barrow. On December 8, 2009, Shell held consultation meetings with representatives from the various marine mammal commissions. Prior to drilling in 2012, Shell will also hold additional consultation meetings with the affected communities and subsistence user groups, NSB, and NWAB to discuss the mitigation measures included in the POC. Shell also attended the 2011 Conflict Avoidance Agreement (CAA) negotiation meetings in support of a limited program of marine environmental baseline activities in 2011 taking place in the Beaufort and Chukchi seas. Shell has stated that it is committed to a CAA process and will demonstrate this by making a good-faith effort to negotiate a CAA every year it has planned activities.

The following mitigation measures, plans and programs, are integral to the POC and were developed during consultation with potentially affected subsistence groups and communities. These measures, plans, and programs will be implemented by Shell during its 2012 exploration drilling operations in both the Beaufort and Chukchi Seas to monitor and mitigate potential impacts to subsistence users and resources. The mitigation measures Shell has adopted and will implement during its 2012 Chukchi Sea offshore exploration drilling operations are listed and discussed below. This most recent version of Shell's planned mitigation measures was presented to community leaders and subsistence user groups starting in January of 2009 and has evolved since in response to information learned during the consultation process.

To minimize any cultural or resource impacts to subsistence activities from its exploration operations, Shell will implement the following additional measures to ensure coordination of its activities with local subsistence users to minimize further the risk of impacting marine mammals and interfering with the subsistence hunts for marine mammals:

(1) The drillship and support vessels will not enter the Chukchi Sea before July 1;

(2) To minimize impacts on marine mammals and subsistence hunting activities, vessels that can safely travel outside of the polynya zone will do so. In the event the transit outside of the polynya zone results in Shell having to break ice (as opposed to managing ice by pushing it out of the way), the drillship and support vessels will enter into the polynya zone far enough so that ice breaking is not necessary. If it is necessary to move into the polynya zone, Shell will notify the local communities of the change in the transit route through the Communication Centers (Com Centers);

(3) Shell has developed a Communication Plan and will implement the plan before initiating exploration drilling operations to coordinate activities with local subsistence users as well as Village Whaling Associations in order to minimize the risk of interfering with subsistence hunting activities and keep current as to the timing and status of the bowhead whale migration, as well as the timing and status of other subsistence hunts. The Communication Plan includes procedures for coordination with Com and Call Centers to be located in coastal villages along the Chukchi and Beaufort Seas during Shell's proposed activities in 2012;

(4) Shell will employ local Subsistence Advisors from the Beaufort and Chukchi Sea villages to provide consultation and guidance regarding the whale migration and subsistence hunt. There will be a total of nine subsistence advisor-liaison positions (one per village), to work approximately 8 hours per day and 40-hour weeks through Shell's 2012 exploration project. The subsistence advisor will use local knowledge (Traditional Knowledge) to gather data on subsistence lifestyle within the community and advise on

ways to minimize and mitigate potential impacts to subsistence resources during the drilling season. Responsibilities include reporting any subsistence concerns or conflicts; coordinating with subsistence users; reporting subsistence-related comments, concerns, and information; and advising how to avoid subsistence conflicts. A subsistence advisor handbook will be developed prior to the operational season to specify position work tasks in more detail;

(5) Shell will recycle drilling muds (*e.g.,* use those muds on multiple wells), to the extent practicable based on operational considerations (*e.g.,* whether mud properties have deteriorated to the point where they cannot be used further), to reduce discharges from its operations. At the end of the season excess water base fluid will be pre-diluted to a 30:1 ratio with seawater and then discharged;

(6) Shell will implement flight restrictions prohibiting aircraft from flying within 1,000 ft (305 m) of marine mammals or below 1,500 ft (457 m) altitude (except during takeoffs and landings or in emergency situations) while over land or sea;

(7) Vessels within 900 ft (274 m) of marine mammals will reduce speed, avoid separating members from a group, and avoid multiple changes in direction;

(8) Vessels underway will alter course to avoid impacts to marine mammals, including collisions;

(9) The drilling support fleet will avoid known fragile ecosystems, including the Ledyard Bay Critical Habitat Unit and will include coordination through the Com Centers; and

(10) Vessel speeds will be reduced during inclement weather conditions in order to reduce the potential for collisions with marine mammals.

Aircraft and vessel traffic between the drill sites and support facilities in Wainwright, and aircraft traffic between the drill sites and air support facilities in Barrow would traverse areas that are sometimes used for subsistence hunting of belugas. Disturbance associated with vessel and aircraft traffic could therefore potentially affect beluga hunts. Vessel and aircraft traffic associated with Shell's proposed drilling program will be restricted under normal conditions to designated corridors that remain onshore or proceed directly offshore thereby minimizing the amount of traffic in coastal waters where beluga hunts take place. The designated traffic corridors do not traverse areas indicated in recent mapping as utilized by Barrow, Point Lay, or Point Hope for beluga hunts. The corridor avoids important beluga hunting areas in Kasegaluk Lagoon.

The POC also contains measures regarding ice management procedures, critical operations procedures, the blowout prevention program, and oil spill response. Some of the oil spill response measures to reduce impacts to subsistence hunts include: having the primary OSRV on standby at all times so that it is available within 1 hour if needed; the remainder of the OSR fleet will be available within 72 hours if needed and will be capable of collecting oil on the water up to the calculated Worst Case Discharge; oil spill containment equipment will be available in the unlikely event of a blowout; capping stack equipment will be stored aboard one of the ice management vessels and will be available for immediate deployment in the unlikely event of a blowout; and pre-booming will be required for all fuel transfers between vessels.

Unmitigable Adverse Impact Analysis

Shell has adopted a spatial and temporal strategy for its Chukchi Sea operations that should minimize impacts to subsistence hunters. Shell will enter the Chukchi Sea far offshore, so as to not interfere with July hunts in the Chukchi Sea villages and will communicate with the Com Centers to notify local communities of any changes in the transit route. After the close of the July beluga whale hunts in the Chukchi Sea villages, very little whaling occurs in Wainwright, Point Hope, and Point Lay. Although the fall bowhead whale hunt in Barrow will occur while Shell is still operating (mid- to late September to October), Barrow is located 140 mi (225 km) east of the proposed drill sites. Based on these factors, Shell's Chukchi Sea survey is not expected to interfere with the fall bowhead harvest in Barrow. In recent years, bowhead whales have occasionally been taken in the fall by coastal villages along the Chukchi coast, but the total number of these animals has been small. Wainwright landed its first fall whale in more than 90 years in October 2010. Hunters from the northwest Arctic villages prefer to harvest whales within 50 mi (80 km) so as to avoid long tows back to shore.

Adverse impacts are not anticipated on sealing activities since the majority of hunts for seals occur in the winter and spring, when Shell will not be operating. Additionally, most sealing activities occur much closer to shore than Shell's proposed drill sites.

Shell will also support the village Com Centers in the Arctic communities and employ local Subsistence Advisors from the Beaufort and Chukchi Sea villages to provide consultation and guidance regarding the whale migration and subsistence hunt. The Subsistence Advisors will provide advice to Shell on ways to minimize and mitigate potential impacts to subsistence resources during the drilling season. Support activities, such as helicopter flights, could impact nearshore subsistence hunts. However, Shell will use flight paths and agreed upon flight altitudes to avoid adverse impacts to hunts and will communicate regularly with the Com Centers.

In the unlikely event of a major oil spill in the Chukchi Sea, there could be major impacts on the availability of marine mammals for subsistence uses. As discussed earlier in this document, the probability of a major oil spill occurring over the life of the project is low (Bercha, 2008). Additionally, Shell developed an ODPCP, which is currently under review by the Department of the Interior and several Federal agencies and the public. Shell has also incorporated several mitigation measures into its operational design to reduce further the risk of an oil spill. Copies of Shell's 2012 Chukchi Sea Exploration Plan and ODPCP can be found on the Internet at: *http://alaska.boemre.gov/ref/ProjectHistory/2012_Shell_CK/revisedEP/EP.pdf* and *http://www.alaska.boemre.gov/fo/ODPCPs/2010_Chukchi_rev1.pdf,* respectively.

Proposed Incidental Harassment Authorization

This section contains a draft of the IHA itself. The wording contained in this section is proposed for inclusion in the IHA (if issued).

(1) This Authorization is valid from July 4, 2012, through October 31, 2012.

(2) This Authorization is valid only for activities associated with Shell's 2012 Chukchi Sea exploration drilling program. The specific areas where Shell's exploration drilling program will be conducted are within Shell lease holdings in the Outer Continental Shelf Lease Sale 193 area in the Chukchi Sea.

(3)(a) The incidental taking of marine mammals, by Level B harassment only, is limited to the following species: bowhead whale; gray whale; beluga whale; minke whale; fin whale; humpback whale; killer whale; harbor porpoise; ringed seal; bearded seal; spotted seal; and ribbon seal.

(3)(b) The taking by injury (Level A harassment), serious injury, or death of any of the species listed in Condition 3(a) or the taking of any kind of any other species of marine mammal is prohibited and may result in the

modification, suspension or revocation of this Authorization.

(4) The authorization for taking by harassment is limited to the following acoustic sources (or sources with comparable frequency and intensity) and from the following activities:

(a) 8-Airgun array with a total discharge volume of 760 in^3;

(b) Continuous drillship sounds during active drilling operations; and

(c) Vessel sounds generated during active ice management or icebreaking.

(5) The taking of any marine mammal in a manner prohibited under this Authorization must be reported immediately to the Chief, Permits and Conservation Division, Office of Protected Resources, NMFS or his designee.

(6) The holder of this Authorization must notify the Chief of the Permits and Conservation Division, Office of Protected Resources, at least 48 hours prior to the start of exploration drilling activities (unless constrained by the date of issuance of this Authorization in which case notification shall be made as soon as possible).

(7) General Mitigation and Monitoring Requirements: The Holder of this Authorization is required to implement the following mitigation and monitoring requirements when conducting the specified activities to achieve the least practicable impact on affected marine mammal species or stocks:

(a) All vessels shall reduce speed to at least 9 knots when within 300 yards (274 m) of whales. The reduction in speed will vary based on the situation but must be sufficient to avoid interfering with the whales. Those vessels capable of steering around such groups should do so. Vessels may not be operated in such a way as to separate members of a group of whales from other members of the group;

(b) Avoid multiple changes in direction and speed when within 300 yards (274 m) of whales;

(c) When weather conditions require, such as when visibility drops, support vessels must reduce speed and change direction, as necessary (and as operationally practicable), to avoid the likelihood of injury to whales;

(d) Aircraft shall not fly within 1,000 ft (305 m) of marine mammals or below 1,500 ft (457 m) altitude (except during takeoffs, landings, or in emergency situations) while over land or sea;

(e) Utilize two, NMFS-qualified, vessel-based Protected Species Observers (PSOs) (except during meal times and restroom breaks, when at least one PSO shall be on watch) to visually watch for and monitor marine mammals near the drillship or support vessel during active drilling or airgun operations (from nautical twilight-dawn to nautical twilight-dusk) and before and during start-ups of airguns day or night. The vessels' crew shall also assist in detecting marine mammals, when practicable. PSOs shall have access to reticle binoculars (7 × 50 Fujinon), big-eye binoculars (25 × 150), and night vision devices. PSO shifts shall last no longer than 4 hours at a time and shall not be on watch more than 12 hours in a 24-hour period. PSOs shall also make observations during daytime periods when active operations are not being conducted for comparison of animal abundance and behavior, when feasible;

(f) When a mammal sighting is made, the following information about the sighting will be recorded by the PSOs:

(i) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from the MMO, apparent reaction to activities (*e.g.,* none, avoidance, approach, paralleling, *etc.*), closest point of approach, and behavioral pace;

(ii) Time, location, speed, activity of the vessel, sea state, ice cover, visibility, and sun glare; and

(iii) The positions of other vessel(s) in the vicinity of the MMO location.

(iv) The ship's position, speed of support vessels, and water temperature, water depth, sea state, ice cover, visibility, and sun glare will also be recorded at the start and end of each observation watch, every 30 minutes during a watch, and whenever there is a change in any of those variables.

(g) PSO teams shall consist of Inupiat observers and experienced field biologists. An experienced field crew leader will supervise the PSO team onboard the survey vessel. New observers shall be paired with experienced observers to avoid situations where lack of experience impairs the quality of observations;

(h) PSOs will complete a two or three-day training session on marine mammal monitoring, to be conducted shortly before the anticipated start of the 2012 open-water season. The training session(s) will be conducted by qualified marine mammalogists with extensive crew-leader experience during previous vessel-based monitoring programs. A marine mammal observers' handbook, adapted for the specifics of the planned program, will be reviewed as part of the training;

(i) If there are Alaska Native PSOs, the PSO training that is conducted prior to the start of the survey activities shall be conducted with both Alaska Native PSOs and biologist PSOs being trained at the same time in the same room. There shall not be separate training courses for the different PSOs; and

(j) PSOs shall be trained using visual aids (*e.g.,* videos, photos), to help them identify the species that they are likely to encounter in the conditions under which the animals will likely be seen.

(8) ZVSP Mitigation and Monitoring Measures: The Holder of this Authorization is required to implement the following mitigation and monitoring requirements when conducting the specified activities to achieve the least practicable impact on affected marine mammal species or stocks:

(a) PSOs shall conduct monitoring while the airgun array is being deployed or recovered from the water;

(b) PSOs shall visually observe the entire extent of the exclusion zone (EZ) (180 dB re 1 μPa [rms] for cetaceans and 190 dB re 1 μPa [rms] for pinnipeds) using NMFS-qualified PSOs, for at least 30 minutes (min) prior to starting the airgun array (day or night). If the PSO finds a marine mammal within the EZ, Shell must delay the seismic survey until the marine mammal(s) has left the area. If the PSO sees a marine mammal that surfaces then dives below the surface, the PSO shall continue the watch for 30 min. If the PSO sees no marine mammals during that time, they should assume that the animal has moved beyond the EZ. If for any reason the entire radius cannot be seen for the entire 30 min period (*i.e.,* rough seas, fog, darkness), or if marine mammals are near, approaching, or in the EZ, the airguns may not be ramped-up. If one airgun is already running at a source level of at least 180 dB re 1 μPa (rms), the Holder of this Authorization may start the second airgun without observing the entire EZ for 30 min prior, provided no marine mammals are known to be near the EZ;

(c) Establish and monitor a 180 dB re 1 μPa (rms) and a 190 dB re 1 μPa (rms) EZ for marine mammals before the 8-airgun array (760 in^3) is in operation; and a 180 dB re 1 μPa (rms) and a 190 dB re 1 μPa (rms) EZ before a single airgun (40 in^3) is in operation, respectively. For purposes of the field verification tests, described in condition 10(c)(i) below, the 180 dB radius is predicted to be 0.77 mi (1.24 km) and the 190 dB radius is predicted to be 0.33 mi (524 m);

(d) Implement a ''ramp-up'' procedure when starting up at the beginning of seismic operations, which means start the smallest gun first and add airguns in a sequence such that the source level of the array shall increase in steps not exceeding approximately 6 dB per 5-min period. During ramp-up, the PSOs

shall monitor the EZ, and if marine mammals are sighted, a power-down, or shut-down shall be implemented as though the full array were operational. Therefore, initiation of ramp-up procedures from shut-down requires that the PSOs be able to view the full EZ;

(e) Power-down or shutdown the airgun(s) if a marine mammal is detected within, approaches, or enters the relevant EZ. A shutdown means all operating airguns are shutdown (*i.e.,* turned off). A power-down means reducing the number of operating airguns to a single operating 40 in^3 airgun, which reduces the EZ to the degree that the animal(s) is no longer in or about to enter it;

(f) Following a power-down, if the marine mammal approaches the smaller designated EZ, the airguns must then be completely shutdown. Airgun activity shall not resume until the PSO has visually observed the marine mammal(s) exiting the EZ and is not likely to return, or has not been seen within the EZ for 15 min for species with shorter dive durations (small odontocetes and pinnipeds) or 30 min for species with longer dive durations (mysticetes);

(g) Following a power-down or shut-down and subsequent animal departure, airgun operations may resume following ramp-up procedures described in Condition 8(d) above;

(h) ZVSP surveys may continue into night and low-light hours if such segment(s) of the survey is initiated when the entire relevant EZs are visible and can be effectively monitored; and

(i) No initiation of airgun array operations is permitted from a shutdown position at night or during low-light hours (such as in dense fog or heavy rain) when the entire relevant EZ cannot be effectively monitored by the PSO(s) on duty.

(9) Subsistence Mitigation Measures: To ensure no unmitigable adverse impact on subsistence uses of marine mammals, the Holder of this Authorization shall:

(a) Traverse north through the Bering Strait through the Chukchi Sea along a route that lies offshore of the polynya zone. In the event the transit outside of the polynya zone results in Shell having to break ice, the drilling vessel and support vessels will enter into the polynya zone far enough so that icebreaking is not necessary. If it is necessary to move into the polynya zone, Shell shall notify the local communities of the change in transit route through the Communication and Call Centers (Com Centers). As soon as the fleet transits past the ice, it will exit the polynya zone and continue a path in the open sea toward the Camden Bay drill sites;

(b) Not enter the Bering Strait prior to July 1 to minimize effects on spring and early summer whaling;

(c) Implement the Communication Plan before initiating exploration drilling operations to coordinate activities with local subsistence users and Village Whaling Associations in order to minimize the risk of interfering with subsistence hunting activities;

(d) Participate in the Com Center Program. The Com Centers shall operate 24 hours/day during the 2012 bowhead whale hunt;

(e) Employ local Subsistence Advisors (SAs) from the Beaufort and Chukchi Sea villages to provide consultation and guidance regarding the whale migration and subsistence hunt;

(f) Not operate aircraft below 1,500 ft (457 m) unless engaged in marine mammal monitoring, approaching, landing or taking off, or unless engaged in providing assistance to a whaler or in poor weather (low ceilings) or any other emergency situations;

(g) Cool all drilling mud to mitigate any potential permafrost thawing or thermal dissociation of any methane hydrates encountered during exploration drilling if such materials are present at the drill site; and

(h) Recycle all drilling mud to the extent practicable based on operational considerations (*e.g.,* whether mud properties have deteriorated to the point where they cannot be used further) so that the volume of the mud disposed of at the end of the drilling season is reduced.

(10) Monitoring Measures:

(a) Vessel-based Monitoring: The Holder of this Authorization shall designate biologically-trained PSOs to be aboard the drillship and all support vessels. The PSOs are required to monitor for marine mammals in order to implement the mitigation measures described in conditions 7 and 8 above;

(b) Aerial Survey Monitoring: The Holder of this Authorization must implement the aerial survey monitoring program detailed in its Marine Mammal Mitigation and Monitoring Plan (4MP); and

(c) Acoustic Monitoring:

(i) Field Source Verification: the Holder of this Authorization is required to conduct sound source verification tests for the drilling vessel, support vessels, and the airgun array. Sound source verification shall consist of distances where broadside and endfire directions at which broadband received levels reach 190, 180, 170, 160, and 120 dB re 1 μPa (rms) for all active acoustic sources that may be used during the activities. For the airgun array, the configurations shall include at least the full array and the operation of a single source that will be used during power downs. The test results shall be reported to NMFS within 5 days of completing the test.

(ii) Acoustic ''Net'' Array: Deploy acoustic recorders widely across the U.S. Chukchi Sea and on the prospect in order to gain information on the distribution of marine mammals in the region. This program must be implemented as detailed in the 4MP.

(11) Reporting Requirements: The Holder of this Authorization is required to:

(a) Within 5 days of completing the sound source verification tests for the drillship, support vessels, and the airguns, the Holder shall submit a preliminary report of the results to NMFS. The report should report down to the 120-dB radius in 10-dB increments;

(b) Submit a draft report on all activities and monitoring results to the Office of Protected Resources, NMFS, within 90 days of the completion of the exploration drilling program. This report must contain and summarize the following information:

(i) summaries of monitoring effort (*e.g.,* total hours, total distances, and marine mammal distribution through the study period, accounting for sea state and other factors affecting visibility and detectability of marine mammals);

(ii) analyses of the effects of various factors influencing detectability of marine mammals (*e.g.,* sea state, number of observers, and fog/glare);

(iii) species composition, occurrence, and distribution of marine mammal sightings, including date, water depth, numbers, age/size/gender categories (if determinable), group sizes, and ice cover;

(iv) sighting rates of marine mammals during periods with and without exploration drilling activities (and other variables that could affect detectability), such as: (A) initial sighting distances versus drilling state; (B) closest point of approach versus drilling state; (C) observed behaviors and types of movements versus drilling state; (D) numbers of sightings/individuals seen versus drilling state; (E) distribution around the survey vessel versus drilling state; and (F) estimates of take by harassment;

(v) Reported results from all hypothesis tests should include estimates of the associated statistical power when practicable;

(vi) Estimate and report uncertainty in all take estimates. Uncertainty could be

expressed by the presentation of confidence limits, a minimum-maximum, posterior probability distribution, *etc.;* the exact approach would be selected based on the sampling method and data available;

(vii) The report should clearly compare authorized takes to the level of actual estimated takes.

(viii) If, after the independent monitoring plan peer review changes are made to the monitoring program, those changes must be detailed in the report.

(c) The draft report will be subject to review and comment by NMFS. Any recommendations made by NMFS must be addressed in the final report prior to acceptance by NMFS. The draft report will be considered the final report for this activity under this Authorization if NMFS has not provided comments and recommendations within 90 days of receipt of the draft report.

(d) A draft comprehensive report describing the aerial, acoustic, and vessel-based monitoring programs will be prepared and submitted within 240 days of the date of this Authorization. The comprehensive report will describe the methods, results, conclusions and limitations of each of the individual data sets in detail. The report will also integrate (to the extent possible) the studies into a broad based assessment of all industry activities and their impacts on marine mammals in the Arctic Ocean during 2012.

(e) The draft comprehensive report will be subject to review and comment by NMFS, the AEWC, and the NSB Department of Wildlife Management. The draft comprehensive report will be accepted by NMFS as the final comprehensive report upon incorporation of comments and recommendations.

(12)(a) In the unanticipated event that the drilling program operation clearly causes the take of a marine mammal in a manner prohibited by this Authorization, such as an injury (Level A harassment), serious injury or mortality (*e.g.,* ship-strike, gear interaction, and/or entanglement), Shell shall immediately cease operations and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, by phone or email and the Alaska Regional Stranding Coordinators. The report must include the following information: (i) Time, date, and location (latitude/longitude) of the incident; (ii) the name and type of vessel involved; (iii) the vessel's speed during and leading up to the incident; (iv) description of the incident; (v) status of all sound source use in the 24 hours preceding the incident; (vi) water depth; (vii) environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility); (viii) description of marine mammal observations in the 24 hours preceding the incident; (ix) species identification or description of the animal(s) involved; (x) the fate of the animal(s); (xi) and photographs or video footage of the animal (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with Shell to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. Shell may not resume their activities until notified by NMFS via letter, email, or telephone.

(b) In the event that Shell discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.,* in less than a moderate state of decomposition as described in the next paragraph), Shell will immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, by phone or email and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinators. The report must include the same information identified in Condition 12(a) above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with Shell to determine whether modifications in the activities are appropriate.

(c) In the event that Shell discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in Condition 2 of this Authorization (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), Shell shall report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, by phone or email and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinators, within 24 hours of the discovery. Shell shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. Activities may continue while NMFS reviews the circumstances of the incident.

(13) Activities related to the monitoring described in this Authorization do not require a separate scientific research permit issued under section 104 of the Marine Mammal Protection Act.

(14) The Plan of Cooperation outlining the steps that will be taken to cooperate and communicate with the native communities to ensure the availability of marine mammals for subsistence uses must be implemented.

(15) Shell is required to comply with the Terms and Conditions of the Incidental Take Statement (ITS) corresponding to NMFS's Biological Opinion issued to NMFS's Office of Protected Resources.

(16) A copy of this Authorization and the ITS must be in the possession of all contractors and PSOs operating under the authority of this Incidental Harassment Authorization.

(17) Penalties and Permit Sanctions: Any person who violates any provision of this Incidental Harassment Authorization is subject to civil and criminal penalties, permit sanctions, and forfeiture as authorized under the MMPA.

(18) This Authorization may be modified, suspended or withdrawn if the Holder fails to abide by the conditions prescribed herein or if the authorized taking is having more than a negligible impact on the species or stock of affected marine mammals, or if there is an unmitigable adverse impact on the availability of such species or stocks for subsistence uses.

Endangered Species Act (ESA)

There are three marine mammal species listed as endangered under the ESA with confirmed or possible occurrence in the proposed project area: the bowhead, humpback, and fin whales. NMFS' Permits and Conservation Division will initiate consultation with NMFS' Endangered Species Division under section 7 of the ESA on the issuance of an IHA to Shell under section 101(a)(5)(D) of the MMPA for this activity. Consultation will be concluded prior to a determination on the issuance of an IHA.

National Environmental Policy Act (NEPA)

NMFS is currently preparing an Environmental Assessment (EA), pursuant to NEPA, to determine whether the issuance of an IHA to Shell for its 2012 drilling activities may have a significant impact on the human environment. NMFS expects to release a draft of the EA for public comment and will inform the public through the **Federal Register** and posting on our Web site once a draft is available (see **ADDRESSES**).

Request for Public Comment

As noted above, NMFS requests comment on our analysis, the draft authorization, and any other aspect of the Notice of Proposed IHA for Shell's 2012 Chukchi Sea exploratory drilling program. Please include, with your comments, any supporting data or literature citations to help inform our final decision on Shell's request for an MMPA authorization.

Dated: November 2, 2011.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2011–28914 Filed 11–8–11; 8:45 am]

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Part VII

Department of Health and Human Services

Administration for Children and Families

45 CFR Part 1307

Head Start Program; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1307

RIN 0970–AC44

Head Start Program

AGENCY: Office of Head Start (OHS), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This final rule amends the Head Start Program regulations to implement statutory provisions of the Improving Head Start for School Readiness Act of 2007 to establish a system of designation renewal to determine if Head Start and Early Head Start agencies are delivering high-quality and comprehensive Head Start and Early Head Start programs that meet the educational, health, nutritional, and social needs of the children and families they serve and meet program and financial management requirements and standards. This system of designation renewal will determine which grantees must compete for on-going funding. This final rule is consistent with Executive Order 13563 and in particular its requirement, in section 6, of ''periodic review of existing significant regulations.''

DATES: This regulation is effective on December 9, 2011.

FOR FURTHER INFORMATION CONTACT: Colleen Rathgeb, Office of Head Start, (202) 205–7378 (not a toll-free call). Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–(800) 877–8339 between 8 a.m. and 7 p.m. Eastern time.

SUPPLEMENTARY INFORMATION:

I. Statutory Authority

This final rule is published under the authority granted to the Secretary of Health and Human Services by sections 641, 645A(b)(12), 645A(d) and 644(c) of the Head Start Act (the Act) (42 U.S.C. 9801 *et seq.),* as amended by the Improving Head Start for School Readiness Act of 2007 (Pub. L. 110–134).

II. Background

The Head Start program is a national program administered by the Office of Head Start (OHS), Administration for Children and Families (ACF), Department of Health and Human Services (HHS), which promotes school readiness of children from low-income families by enhancing their cognitive, physical, social, and emotional development through the provisions of health, educational, nutritional, social, and other services determined necessary based on family needs assessments.

The Head Start program provides grants to local public and private non-profit and for-profit agencies to provide comprehensive child development services to economically disadvantaged children and families, with a special focus on helping preschoolers develop the necessary skills for school success. The Early Head Start program established in FY 1995 serves families of economically disadvantaged children from birth to three years of age and pregnant women from such families based on the mounting evidence that indicate the great importance of the early years of a child's growth and development.

On December 12, 2007, the Improving Head Start for School Readiness Act of 2007 (Public Law 110–134) amended the Head Start Act (the Act) to direct HHS to recompete certain Head Start grants. The Head Start Act, as amended, establishes that Head Start grantees will be awarded grants for a five-year period and only grantees delivering high-quality services will be given additional five-year grants non-competitively. Section 641 of the Act requires the Secretary of HHS to develop and implement a system for designation renewal (*e.g.,* Designation Renewal System (DRS)) to determine if a Head Start agency is delivering a high-quality and comprehensive Head Start program that meets the educational, health, nutritional, and social needs of the children and families it serves. This regulation defines, for purposes of the Designation Renewal System, what comprises delivering a high quality comprehensive Head Start program—if a program does not meet any of the seven conditions, they are de facto a high quality program for purposes of the Designation Renewal System.

Section 641(c)(1) of the Act requires that the DRS be developed to determine whether a grantee is providing high-quality services and meets the program and financial management requirements and standards described in section 641A(a)(1) of the Act, based on:

(A) Annual budget and fiscal management data;

(B) Program review conducted under section 641A(c);

(C) Annual audits required under section 647;

(D) Classroom quality as measured under section 641A(c)(2)(F); and

(E) Program Information Reports.

The Act also requires that the system is fair, consistent and transparent and that the Secretary periodically evaluate whether the criteria of the system are being applied in a manner that is transparent, reliable and valid.

This final rule responds to those requirements and was developed after consideration of public comments received in response to the Notice of Proposed Rulemaking (NPRM) issued September 22, 2010, in the **Federal Register** [75 FR 57704]. This final rule is also consistent with Executive Order 13563, section 6, which calls for ''periodic review of existing significant regulations,'' and which directs agencies to engage in ''retrospective analysis of rules'' in order to improve them ''in accordance with what has been learned.'' In brief, the NPRM proposed seven conditions that would signal that a Head Start or Early Head Start agency was not delivering high-quality and comprehensive services and ''trigger'' the grant for competition. The conditions in the NPRM were: one or more deficiencies under section 641A(c)(1)(A), (C), or (D) of the Act; failure to establish school readiness goals; failure to meet minimum thresholds on CLASS: Pre-K domains; revocation of a license to operate a center or program; suspension from the program; debarment from receiving Federal or State funds or disqualified from the Child and Adult Care Food Program; or, one or more material weaknesses or at risk for failing to function as a going concern. The NPRM also proposed adding an eighth criterion to ensure that a minimum threshold of 25 percent of grants would be subject to competition.

Head Start is the largest federal investment in early childhood education, serving nearly one million of our nation's most vulnerable young children and their families. It is the federal government's responsibility to make sure that these children and families get the highest quality services possible. This final rule makes structural changes in Head Start that will drive significant improvements in program quality. Specifically, for the first time in the history of Head Start, individual grantees whose programs fall short of certain standards will be required to compete with other organizations to continue receiving funding. Funds will be awarded to the organization that can best meet the needs of Head Start children and families.

III. Summary Description of Regulatory Provisions

The following is a summary of the most significant regulatory changes included in this final rule resulting from public comment. The Section-by-Section Discussion of the Regulations (Section IV) provides a detailed listing of the comments and responses. We considered each comment and where appropriate made amendments in this final rule. Specifically, changes include:

In § 1307.3 of the NPRM, ACF proposed that a minimum of 25 percent of grantees reviewed in each cycle would be required to compete and proposed adding an eighth condition to achieve this. In response to comments, this threshold is replaced in the final rule. The final rule retains the seven criteria for recompetition in section 1307.3 with some modification, and adds a second sub-part to the CLASS: PreK condition, but does not add an eighth criterion. Most significantly, with respect to the third criterion at § 1307.3(c), the final rule provides that, in addition to grantees that will be required to compete based on CLASS: Pre-K scores below minimum quality thresholds, those grantees reviewed by ACF in the same year that score in the lowest decile in any of the three domains of the Classroom Assessment Scoring System: Pre-K (CLASS: Pre-K) will also be required to compete. Taken together, these changes ensure rigorous competition in the Head Start program and provide an approach that is transparent and based on the most valid and reliable indicators of performance currently available to ACF. Current data from Head Start monitoring and CLASS reviews suggest that roughly a third of grantees would have been designated for competition based on the revised criteria. While there are limitations on the precision of estimates with current data, it is clear that this approach will hold grantees to high standards and lead to rigorous competition.

As discussed in the Section-by-Section Discussion that follows, in response to comments this final rule also revises definitions included in the NPRM; modifies the timeframe for the school readiness criteria; and modifies reporting requirements.

IV. Section-by-Section Discussion of Comments and Regulatory Provisions

This section provides a detailed discussion of the comments received on the proposed rule and describes changes made to the proposed rule. We received approximately 16,000 comments on the NPRM from Head Start grantees, parents, teachers and State associations; national organizations; and some academic institutions and legal entities. Most comments focused on: the proposed 25 percent minimum requirement for recompetition; retrospective review criteria; proposed conditions related to licensing, deficiencies, and audits; and, the proposed timing and method for using CLASS: Pre-K. Many respondents submitted comments in support of competition, stating that requiring grantees to compete would ensure that Head Start and Early Head Start children across the country receive high-quality services and that dollars invested are spent well.

General Comments

Comments not attributable to specific sections of the regulation are discussed below.

Concerns Over Competition

1. *Comment:* Many respondents endorsed the principle that grantees not conducting high quality programs should be required to compete for further funding. However, others opposed competition among Head Start and Early Head Start grantees for a variety of reasons, including costs vs. benefits; hardship and stress for staff resulting from the loss of jobs and loss or disruption of employee benefits; disruption of services; and the possibility that grantees required to compete will be stigmatized. Some commenters stated that to avoid potential stigma it would be better to compete all programs. Additionally, commenters expressed concerns that recompetition could be a disincentive for organizations to collaborate with Head Start because of the potential instability of the funding.

Response: We appreciate the concerns expressed by commenters and the suggestions provided (discussed more specifically later in this section) to utilize alternative means of holding grantees accountable. However, the 2007 reauthorization of the Head Start Act required the establishment of five-year grants and a Designation Renewal System by which grantees would compete for renewed funding if they were not determined to be providing high quality services. We can assure commenters that we intend to make every effort to ensure continuity of services to children and families, although we acknowledge that it is possible that some short-term disruption of services might occur if and when service providers change.

We think it is important to note that requiring a Head Start or Early Head Start grantee to compete for continued funding is not the same as taking a grant away or defunding a grantee. Requiring a grantee to compete means that if a grantee wants to continue to provide Head Start or Early Head Start services to the community, it must apply, along with any other entities that choose to do so, for on-going funding and demonstrate that it is the most capable entity to do so.

Use of Retroactive Data

2. *Comment:* We received many comments regarding the provision that most of the DRS conditions would be based on data regarding grantee performance starting on June 12, 2009. Commenters claimed that by considering pre-regulation events, ACF was imposing the DRS retroactively and in a manner inconsistent with Congressional intent, that ACF's delay in proposing the regulation should disqualify ACF from imposing retroactive requirements, and that the statute did not require ACF to consider events between June 12, 2009, and the effective date of the regulation. Some commenters objected to the consideration of performance beginning on June 12, 2009 for only certain conditions, such as the establishment of school readiness goals.

Response: In the NPRM we proposed, with one exception, application of data collected starting on June 12, 2009, because that is the date specified in the Act before which the system for designation renewal cannot apply. We have maintained in the final rule that data collected beginning on June 12, 2009, may be considered for all of the conditions, with the exception of the condition related to school readiness goals, as discussed later in this preamble, and the CLASS: Pre-K condition that we already proposed in the NPRM to apply after the effective date of the rule. The five conditions for which data collected prior to the effective date of the regulation will be considered are based on Head Start requirements that pre-date this regulation, and were known to grantees as requirements for which they would be held accountable.

Failure to comply with these requirements, even before this regulation was effective, could lead to adverse consequences, such as termination or suspension. Specifically with respect to licensing, Section 641A(a)(D)(i) requires that ''facilities used by Head Start agencies for regularly scheduled * * * classroom activities shall meet or exceed State and local requirements concerning licensing for such facilities.'' These requirements to meet state and local licensing

standards are echoed in Head Start regulations 1306.30(c). Clearly the revocation of a license to operate—a licensing entity actually shutting down a center—is clear and direct evidence that a program is not meeting or exceeding state and local licensing requirements. With respect to disqualification from USDA to participate in the CACFP, Head Start regulations at 1304.23(b)(i) require that all programs ''must use funds from the USDA Food and Consumer Services Child Nutrition Programs as the primary source of payment for meal services.'' A program disqualified from CACFP would be unable to comply with this long standing requirement. With respect to audit findings potentially jeopardizing a Head Start grant pre-dating this regulation, the Act and existing Head Start regulations at § 1301.12 require an annual audit of all programs to ensure that statements are accurate, that they are complying with the terms and conditions of the grant and that financial and administrative procedures and controls have been installed and are operating effectively. On the ''one deficiency'' condition, the concept of a ''deficiency'' and the process for correcting a deficiency have been part of the Head Start Act (section 641A(e)) and the Head Start Performance Standards (45 CFR 1304.60) for many years. Deficiency was defined in Section 637 of the Act and a process for identifying and correcting deficiencies clarified and revised in Section 641A. Therefore, grantees reasonably had notice that a deficiency finding was important and could jeopardize their grant. Grantees also had notice before the adoption of the Designation Renewal System regulation that both debarment and suspension were evidence of programming that was not high quality because debarment is defined in section 637(2) of the Head Start Act as a deficiency and suspension was associated with violations of Head Start requirements under 45 CFR 1303.10(a). In addition, the Federal Uniform Administrative Requirements at 45 CFR 74.13 clearly states that ''Federal agencies shall not award assistance to applicants that are debarred or suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549.''

We also believe that the Act gave grantees clear and sufficient notification of the potential consequences of failing to deliver a high quality and comprehensive Head Start program and that their performance beginning on June 12, 2009, could be considered under the DRS to determine whether a grantee must recompete for a five-year grant. We believe that not considering important performance data as soon as allowable by the Act would delay this important mechanism for ensuring grantee accountability and could result in re-awarding grants non-competitively to entities that are not the best equipped to provide high-quality services in that community.

Designation Renewal System Final Decision

3. *Comment:* A number of commenters also expressed concern that the decision that a grantee must compete for renewal of funding would be final and suggested that grantees should have the ability to appeal the determination. Other commenters suggested that each condition should be appealable or correctable. Other comments stated that the requirement to compete could injure grantee's reputation which could result in a loss of funding from other sources and therefore due process rights should be afforded. (Condition-specific comments are discussed more in the Section-by-Section Discussion below.)

Response: Congress did not require that grantees designated to compete for further funding be given an opportunity to appeal. Congress did require appeals for grantees that are terminated or suspended for more than 30 days and for delegate agencies that are terminated or who have their applications rejected. Because Congress did not require appeal rights for grantees required to compete for further funding, apparently Congress did not believe that the requirement that a grantee compete for further funding was on a par with termination or other actions for which Congress did require appeals.

Additionally, all eligible entities that have not been terminated from providing Head Start or Early Head Start services in the preceding five years—including the grantees designated for competition—are able and encouraged to apply through that competition. Unlike a grant termination, a requirement to compete provides a mechanism for a current grantee to demonstrate its capacity to provide a high quality program while providing ACF the ability to shift funding to more capable entities if such entities exist in the community. Further, a grantee that competed and lost a competition would remain eligible for future competitions. Because of this the grantee that is required to compete for further funding is one whose level of compliance is sufficient to justify continuance in the Head Start program, provided that there is no other organization in the same community that establishes, via a competitive process that it is better able to provide a high quality and comprehensive program. Thus the decision to require competition cannot reasonably be expected to damage the grantee's reputation in such a way as to deprive it of funding from another source.

In response to the suggestions for training and technical assistance for those grantees that meet one of the seven DRS conditions, we note that all grantees already receive training and technical assistance on a variety of related topics and grantees also may request special assistance as needed.

Large Grantees and Delegate Agencies

4. *Comment:* A number of commenters raised concerns about designation renewal as it relates to supergrantees (*e.g.,* grantees that serve over 5,000 children or administer grants that cover a large geographic region) or large grantees that have a great number of programs or agencies that provide Head Start services on behalf of the grantee. Concerns were raised that large grantees are more likely to be required to compete because they have more classrooms and provide services to a greater number of families. Several commented that ACF should limit competition to only the service area found to have met one of the seven conditions, rather than requiring the grantee to recompete for its entire service area. Concerns that the problems of a single delegate agency would cause an entire grantee to compete were raised by a number of respondents.

Response: All grantees are responsible for ensuring that all children and families participating in the program receive high-quality services, regardless of how many children are served, where the children are served or by whom the children are directly served. Section 1304.51(i)(2), a longstanding regulation, requires grantees to establish and implement procedures for the on-going monitoring of their programs, regardless of the size or structure of that grantee. A grantee's failure to ensure high quality services are being provided to children that are served in any of their locations indicates that the grantee has failed to maintain a high-quality Head Start program through their on-going monitoring. Thus, we have made no changes in response to these comments.

Specifically with respect to deficiencies identified through Head Start monitoring, a deficiency reflects a very serious program violation. In a large grantee a deficiency would not be

cited for an isolated incident unless it is very severe or was not corrected when identified as a non-compliance. Since the statutory definition includes that a deficiency is a ''systemic or substantial material failure,'' it accounts for differences in the size of grantees in that an issue that might be material or systemic in a very small grantee may not meet the thresholds of material or systemic in a very large grantee. For example, ten child health records being incomplete in a program serving 20 children could indicate substantial material and systemic problems; however, ten child health records being incomplete in a program serving 10,000 children would not indicate substantial material and systemic problems.

Migrant and Seasonal Head Start Programs

5. *Comment:* A number of comments mentioned that the NPRM was silent on Migrant and Seasonal Head Start (MSHS) programs and questioned whether the rule applied to MSHS. Some thought that MSHS programs should be subject to competition under the same rules in place for non-MSHS programs while others requested special considerations for MSHS programs because of the unique challenges MSHS programs face delivering services to children of migrant and seasonal farm workers.

Some respondents expressed concern with the reliability and clarity of the seven conditions proposed in the NPRM for MSHS programs such as whether the CLASS: Pre-K conditions are culturally and linguistically appropriate for MSHS programs or other dual language learner children.

Response: The statute is clear that the length of all grants awarded under the Act is five years and that all Head Start grants should be subject to the DRS to determine if they are required to compete for their grants. Congress did not include an exception for MSHS programs. As a result, this entire rule applies to MSHS programs and we have not established separate conditions or a different standard for any program type. However, under § 1307.3(b)(2)(i), we allow programs operating less than 90 days, as many MSHS programs do, to aggregate and analyze their child-level assessment data at least two times within their operating program period, rather than at least three times per year as is required for other Head Start programs. ACF encourages programs facing difficulties with requirements where waivers are authorized under statute or current regulations to submit a request for a waiver.

Alternatives to the Proposed DRS

6. *Comment:* Some commenters offered alternative methods to determine which grantees should be required to compete. For example, several recommended an external review process similar to that used to review hospitals and healthcare organizations by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO). Others recommended alternative systems such as (1) Alternate criteria and an alternate timeline over the five-year grant period, (2) using a tiered system to rate grantees, (3) considering additional information such as national accreditation and (4) randomly assigning some grantees to competition.

Response: We appreciate the alternatives suggested by commenters. However, ACF does not believe that any of the systems proposed could be implemented in a fair, consistent and reliable manner within the parameters of the Act. We continue to believe the system for designation renewal proposed in the NPRM, with the adaptations made in this final rule, provides a fair, transparent and evidence-based approach for determining whether Head Start and Early Head Start agencies are delivering high-quality and comprehensive programs that meet the educational, health, nutritional, and social needs of the children and families they serve and meet program and financial management requirements and standards.

V. Section-by-Section Discussion of Comments and the Final Rule

Proposed § 1307.1—Purpose and Scope

1. *Comment:* Some commenters questioned the authority to apply the Designation Renewal System to Early Head Start grantees.

Response: HHS has the authority to establish requirements for the scope and design of Early Head Start programs under section 645A(b)(12) of the Act and to establish requirements for the time, manner, and content of applications under section 645A(d) of the Act. ACF believes that requiring Early Head Start grantees that are not providing high-quality, comprehensive services to compete for further funding is necessary to assure that all children receive high-quality services under the program.

Proposed § 1307.2—Definitions

1. *Comment:* A number of comments were received on definitions proposed in the NPRM. Commenters requested modification of the proposed definitions of ''agency'' and ''material weakness.'' Others requested that we add new definitions including: ''aggregate child assessment data,'' ''child-level assessment data,'' ''Migrant and Seasonal Head Start,'' ''redesignation assessment,'' and ''school readiness goals.''

Response: Based on the comments received, we have added definitions of the following terms to the rule: ''aggregate child-level assessment data,'' ''child-level assessment data,'' and ''school readiness goals.'' For the reasons explained below, we also have removed the proposed terms: ''designated ACF official'' and ''material weakness.'' We also made a minor technical change to the definition of ''transition period'' to conform to other changes in the final rule.

2. *Comment:* Commenters stated that the proposed definition of ''agency'' is inconsistent with the definitions of ''Head Start agency'' in 45 CFR part 1301 and the definition of ''Head Start agency'' in the proposed regulation. Commenters stated that ACF should add the word ''local'' to the definition of ''agency'' to make it correct.

Response: We have not modified this definition because the term ''agency'' is being adopted in part 1307 to refer to both Head Start and Early Head Start grantees. Inserting the term ''local'' in the definition would make the term inapplicable to Early Head Start grantees. Under section 645A(d) of the Act, an organization does not have to qualify as a ''local'' organization in order to be funded under the Early Head Start program. The definition of ''agency'' in 45 CFR part 1301 was adopted in 1979, before establishment of the Early Head Start program in 1995. In future regulations, ACF will be proposing changes to that definition and several other provisions of Part 1301 that are now obsolete.

3. *Comment:* Commenters suggested that, for the sake of consistency, ACF use the term ''responsible HHS official,'' which is used in other Head Start regulations, instead of ''designated ACF official.''

Response: As suggested, ACF has changed the term used throughout this final rule to ''responsible HHS official'' to be consistent with other regulations. As such, we also have deleted the definition of ''designated ACF official'' proposed in the NPRM.

4. *Comment:* Commenters suggested adopting the definition of ''material weakness'' in the Government Accountability Office ''Government Auditing Standards,'' in place of the definition proposed in the NPRM.

Response: In the final rule, we are deleting the proposed definition of material weakness since, as discussed below, we are modifying § 1307.3(g) to remove a finding of material weakness as a condition for recompetition, as had been proposed in the NPRM.

5. *Comment:* Commenters also suggested that ''redesignation assessment'' be a defined term in the final regulation. Commenters expressed confusion about the process of the designation review or assessment.

Response: We have modified § 1307.7 to clarify what the designation review entails, *i.e.,* that it is a review by ACF of grantee data to determine if one or more of the conditions specified under § 1307.3 were met by the agency's program during the relevant time periods also described in that section.

6. *Comment:* Commenters asked for a definition of ''school readiness goals'' as used under proposed § 1307.3(b)(2).

Response: We have added a definition to the rule to specify that ''school readiness goals'' mean the expectations of children's status and progress across domains of learning and literacy development, cognition and general knowledge, approaches to learning, physical well-being and motor development, and social and emotional development that will improve their readiness for kindergarten. This definition is consistent with guidance from the Office of Head Start, section 641A(g) of the Act, and draws from comments.

7. *Comment:* Some commenters asked about what constituted ''child-level assessment data'' as the term was used in proposed § 1307.3(b)(2). Specifically, commenters asked if the term includes only data gathered through direct standardized assessment of children.

Response: The definition added in the final rule clarifies that ''child-level assessment data'' means ''the data collected by an agency on an individual child from one or more valid and reliable assessments of a child's status and progress, including but not limited to direct assessment, structured observations, checklists, staff- or parent-report measures, and portfolio records or work samples.'' This definition is intended to make it clear that we are not imposing a new requirement to use only direct standardized assessment data; rather, agencies may use any one of a number of different methods to gather child-level assessment data (including but not limited to the methods identified in the definition). This is consistent with long standing Head Start regulations at § 1304.20(b), (d) and (e) on on-going assessment of children.

8. *Comment:* Some commenters requested that ''aggregate child-level assessment data'' be defined to understand the term as it was used in proposed § 1307.3(b)(2).

Response: In response to comments, we have added a definition of ''aggregate child-level assessment data'' to mean ''the data collected by an agency on the status and progress of the children it serves that have been combined to provide summary information about groups of children enrolled in specific classrooms, centers, home-based or other options, groups, or setting, or other groups of children such as dual language learners or to provide summary information by specific domains of development.'' This definition will help programs understand how to utilize this data to understand the status and progress of children in their program and implement appropriate program improvements. It is consistent with best practices in the early childhood education field.

9. *Comment:* Some respondents requested that ACF include a definition of Migrant and Seasonal Head Start (MSHS) and proposed the following definition: ''A MSHS agency is an entity of a local public or private not-for-profit organization, which is designed by ACF to operate programs that serve children from birth to compulsory school age.''

Response: The term ''Migrant or Seasonal Head Start Program'' is defined in section 637(17) of the Act and therefore we do not have the authority to change the definition of this term through regulation.

Proposed § 1307.3—Basis for determining whether a Head Start agency will be subject to an open competition. (Note that proposed § 1307.3(a) and (c) have been removed in the final rule. As a result, proposed § 1307.3(b)(1) to (7) have been redesignated as final § 1307.3(a) to (g).)

Proposed § 1307.3(a)—Minimum of 25 Percent

1. *Comment:* The vast majority of comments received on the NPRM pertained to the proposed criterion to ensure that a minimum of 25 percent of grantees are required to compete each year. Respondents stated that the 25 percent requirement is arbitrary, capricious, and unfair. Many of these respondents claimed the minimum percent results in an unfair quota system. Some expressed concern that the quota itself rather than the quality of programs would drive decisions. Others stated that quotas in almost any setting generally are perceived as leading to unfair and inappropriate determinations and are inconsistent with the intent to identify individual low-performing grantees for competition. Respondents also stated that the approach is not transparent because it fails to articulate a specific standard of quality that programs can aim to meet. Some respondents stated that they may be inclined to support the 25 percent or some minimum percent if it was demonstrated using relevant data how this percent was derived.

Other respondents expressed concern that the standards for running a successful program could change during the school year to meet the 25 percent minimum. Commenters noted that Congress specifically required the development of a merit-based system, and that competing 25 percent of all grantees reviewed in a given year regardless of the quality of those programs does not meet the statutory requirement for a program-by-program determination of whether ''a Head Start grantee is successfully delivering a high-quality and comprehensive Head Start program.''

The most frequently expressed consequence of the 25 percent minimum is that it could cause high-quality programs to be required to compete for continued funding.

Other respondents requested more clarification on this provision. Specifically, a number said it is not clear from the NRPM whether the proposed 25 percent minimum is a national figure or whether it would be applied equally across all twelve Federal regions. Others offered alternatives to the minimum 25 percent provision. Some recommended ACF use standard, objective, absolute measures only. Others suggested that ACF establish a new review system that would recognize high quality and innovation and ''weed out'' the lowest performing programs.

Respondents also offered suggestions if the 25 percent minimum remains in the final rule. Some asked that high performers be exempt from competition and that the remaining 25 percent of grantees be chosen by lottery. Others suggested creating a tiered system of quality, which would identify programs along a quality spectrum rather than drawing a single line between high- and low-quality programs. There were also a number of comments in favor of the 25 percent minimum noting it would ensure robust levels of competition and drive all programs to strive for excellence. A few commenters suggested a higher percentage requirement.

Response: ACF carefully considered all the comments received and we have

replaced the 25 percent minimum provision in the final rule with a revised CLASS: Pre-K condition. The revised two-part condition will ensure robust competition and guard against potential score inflation, using this valid, evidence based classroom evaluation tool. As discussed further below, under the final rule, in addition to those programs that score below a minimum threshold, programs that score in the bottom ten percent in any of the three domains of classroom quality measured by CLASS: Pre-K will be required to compete for further funding. This will ensure that standards remain high, but that grantees are held to objective, meaningful standards. Furthermore, to respond to comments received that the 25 percent provision could result in high-performing programs being required to compete, the CLASS-based criteria further stipulates that in the unlikely event that a program that scores in the bottom decile in a domain but whose score in the domain meets the ''standards of excellence'' will not be required to compete.

Taken together, the revised CLASS-based criteria and the other six conditions meet the same goal of ensuring high standards and driving continuous quality improvement, which was specified in the NPRM. Namely, these criteria ensure robust competition and, based on currently available data, will result in roughly a third of all programs being designated for competition. Additionally these criteria are transparent and guard against potential score inflation while addressing legitimate concerns raised by commenters.

Proposed § 1307.3(b)(1)—Deficiency (Note that proposed § 1307.3(b)(1) has been changed to § 1307.3(a) in the final rule.)

1. *Comment:* A significant number of comments received related to the proposed condition that an agency that has been determined by ACF to have one or more deficiencies on a single review conducted under section 641A(c)(1)(A), (C), or (D) of the Act would be required to compete. Some commenters shared support for the proposal, while other respondents stated that there is insufficient data on monitoring findings available to evaluate the merits of this condition.

Many respondents stated that the definition of deficiency is unclear. A number of these respondents said ACF should publish a list of deficiencies on its Web site annually.

Response: In response to concerns that there is insufficient data on monitoring findings available and suggestions that ACF should publish a list of deficiencies on an annual basis, we note that we publish an annual report that provides a description of the monitoring review process, a summary of findings of the monitoring reviews conducted in each fiscal year (including a list showing the number of noncompliances and deficiencies by Head Start requirement), the outcomes of follow-up actions on grantees with required corrective actions, and any recent steps taken regarding monitoring and program integrity. The annual report on Head Start monitoring can be found at the following link: *http://eclkc.ohs.acf.hhs.gov/hslc/*.

2. *Comment:* Other respondents noted that there are inconsistencies in the OHS monitoring review system and process for determining deficiencies. As a result, they believe the criteria for determining a deficiency finding is subjective and varies among on-site monitoring teams or the ACF official. ACF received nearly 5,000 comments related to monitoring reviews. A number of Tribes noted that many reviewers do not understand the concept of Tribal sovereignty.

Response: ACF stands behind the integrity of the monitoring review process used for all Head Start and Early Head Start grantees. As required by the Act, OHS consistently reviews and revises its monitoring process and protocol. Each year, OHS makes some changes to its monitoring protocol and trains all reviewers on the changes. In order to ensure interrater reliability, OHS annually trains reviewers before the monitoring year begins. The determination that a finding constitutes a deficiency is not made on-site by monitoring review teams, but rather is made after OHS and ACF experts and senior staff conduct a deliberative and rigorous review of the evidence. The results of the monitoring process are tested when grantees that have been terminated based on a failure to correct deficiencies appeal their terminations. In the overwhelming majority of these appeals, ACF's judgment that a deficiency existed, and that the grantee had failed to correct the deficiency, have been upheld by the Departmental Appeals Board. These rulings have often been made without the necessity of conducting a hearing because the grantee has not challenged ACF's factual findings. When a program is cited for a deficiency, it is an indication of a significant failure to meet program requirements. We believe that when a program fails to meet these standards, it is entirely appropriate to require them to compete for funding to determine if children would be better served by a different entity.

3. *Comment:* Other comments objected to the standard of one deficiency triggering competition. Some respondents stated that ACF has not articulated clearly its rationale for using a single deficiency condition.

Response: As stated in the preamble to the NPRM, ACF firmly believes that a grantee determined to have one or more deficiencies in a single review has demonstrated that it does not meet the requirement of being a high-quality program. ACF believes it is a reasonable standard that programs identified as having a deficiency, which, in summary, is defined as a systemic or material failure to meet program performance standards, a systemic or material failure of the governing body of an agency to fully exercise its legal and fiduciary responsibilities, or an unresolved area of noncompliance, should be required to compete for funding to determine if they are the most capable entity to provide Head Start or Early Head Start services to that community. This condition also is grounded in the Secretary's Advisory Committee's recommendations related to ''Key Quality Indicators.'' It is important to note that as stated in the NPRM, ACF will consider data from triennial reviews, follow-up reviews, and other reviews—and not first-year reviews.

It is ACF's position that grantees should have systems in place to avoid the types of failures that constitute deficiencies as defined in the Act, including the ability to resolve a noncompliance in the specified corrective action timeframe before it is considered a deficiency.

4. *Comment:* Some respondents stated that different deficiencies do not represent problems of equal severity; some are more serious or systemic issues than others. These respondents argued that establishing a specific number of deficiencies to trigger competition is inappropriate because of differences in the severity of problems identified as deficiencies. Some respondents stated that only matters that present a systemic threat to health and safety or acts of financial irresponsibility should be considered deficiencies for purposes of competition.

Response: While it is true that deficiencies can reflect problems of varying levels of severity, all deficiencies represent a significant failure to provide services consistent with Head Start Program Performance Standards and therefore it is appropriate to require a competition to determine if

the current grantee or another entity is the most qualified provider in that community.

5. *Comment:* A large number of respondents stated that grantees should have the opportunity to appeal deficiencies before a grantee is required to compete.

Response: The Act does not provide for an appeal of deficiency findings, unlike terminations and suspensions lasting more than 30 days. Although there is no statutory right to an appeal, grantees currently have the opportunity to discuss the progress of the monitoring review while the review team is on site. Although the final determination is not made during the on-site review, grantees consistently are informed of the opportunity to provide additional input when concerns are identified while the team is on-site.

6. *Comment:* Some respondents recommended that a weighting system be applied for findings from unannounced visits versus those found during announced monitoring reviews. Some respondents recommended that ACF revise the condition to focus on a pattern of deficiencies, deficiencies based on their severity, deficiencies that directly impact services to children and families, or multiple deficiencies in a single review.

Response: In 2007, Congress specifically added authority in section 641A(c)(1)(D) of the Act for ACF to conduct unannounced site inspections and consistent with this the number of unannounced reviews has increased as an added quality assurance measure. Programs should always be following Program Performance Standards and be ready for a review at any time. Grantees are always required to follow requirements of the Act and regulations and can be cited for not complying with regulations at any time during the year.

While we appreciate the comments received on this provision, the final rule maintains the provision as proposed. As stated above, a deficiency is by definition a ''substantial or systemic material failure.'' ACF firmly stands behind the integrity of the monitoring and review process through which deficiencies are established and this has been consistently validated by rulings supporting ACF findings in the appeals process. ACF strongly believes that a grantee found to have a deficiency should compete to determine if it or another entity is the strongest provider in the community.

Proposed § 1307.3(b)(2)—School Readiness Goals (Note that proposed § 1307.3(b)(2) has been changed to § 1307.3(b) in the final rule.)

1. *Comment:* Many comments were received related to the establishment of goals and utilization of data on children's school readiness. While the majority of commenters expressed support for this requirement, numerous commenters raised concerns about how the condition will be implemented. For example, nearly all of the comments received on this condition requested that ACF issue guidance to clarify the requirements and explain how grantees' adherence to those requirements will be measured (discussed in further detail below). Many of the commenters also recommended that ACF not implement the condition until after such guidance has been issued and training and technical assistance has been provided to grantees.

Response: We agree with these concerns and have revised the date of implementation of the condition to be after the effective date of the final rule. Therefore, in evaluating whether a grantee has met this condition, we will not rely on data beginning on June 12, 2009, as had been proposed in the NPRM, but rather beginning on the effective date of this final rule. In the NPRM, ACF proposed that grantees would be evaluated on establishing school readiness goals (§ 1307.3(b)(1)) at the June 2009 date, and on the steps to achieve school readiness (§ 1307.3(b)(2)) after the effective date of the regulation. We have changed the final rule to reflect that all of § 1307.3(b) related to school readiness will be considered after the effective date of this regulation. Since the publication of the NPRM in September 2010, there has been steady communication with Head Start grantees about school readiness goals through webcasts, two national institutes in February and October of 2011, training and technical assistance materials (including The Guide to Resources for Developing School Readiness Goals) and other material created by the National Center for Quality Teaching and Learning (*http://eckkc.ohs.acf.hhs.gov/hslc/tta-system/teaching*). We also will continue to provide technical assistance and other supports for implementation of this condition.

Establishing and using school readiness goals are central to providing high-quality services to children and families, and the high quality implementation of activities to meet this requirement will be the focus of training, technical assistance and on-going oversight by federal staff. However, compliance with the requirements and determinations about whether grantees meet the school readiness goals condition of the DRS will only be measured by evidence collected in reviews conducted under section 641A(c) of the Head Start Act. Evidence in these reviews is collected by monitoring teams, including regional staff, but determinations regarding evidence collected in any reviews are made only by the responsible HHS official.

2. *Comment:* Numerous commenters requested that ACF issue guidance on the implementation of the requirement to establish and take steps to achieve school readiness goals. For example, many of these comments requested clarification on the definition of ''school readiness goals,'' what they should look like, how to determine what they should look like, and how to measure children's progress against them. Some commenters suggested that ACF establish national goals and benchmarks for children's school readiness that would be applied to all grantees. Other commenters stated that there should not be a uniform definition because what it means to be ready for school may vary by State, community, or population.

Response: In response to these comments on the need for a definition, we have added a definition of ''school readiness goals'' to the final rule. The definition clarifies that school readiness goals are expectations of children's status and progress across domains of language and literacy development, cognition and general knowledge, approaches to learning, physical well-being and motor development, and social and emotional development that will improve their readiness for kindergarten. This definition is consistent with section 641A(g) of the Act and guidance provided by the Office of Head Start and draws on comments received. With respect to comments on national goals, in section 641A(g)(2)(A) the Act requires that school readiness goals be ''agency determined.''

3. *Comment:* Some commenters were unclear about whether the goals for improving the school readiness of children were meant to be individual plans for each child or global goals for all children in a program. Some commenters misinterpreted this section in the NPRM as requiring grantees to meet benchmarks for children's outcomes and progress, rather than requiring grantees to demonstrate how child-level assessment data is used to individualize children's experiences and inform continuous quality improvement. Others asked for guidance

around how to analyze school readiness data and requested that training and technical assistance be provided to increase grantees' capacity for analyzing child-level assessment data. Some also asked for ACF to provide a schedule that includes when grantees should analyze child-level assessment data within the year (*e.g.,* within the first 45 days of the program year).

Response: In response to these comments on program or individual child goals, we have clarified in the final rule that the School Readiness Goals are for improving the school readiness of children in their program and are global or program goals for all of their children. We also reorganized the provision in the final rule to make it clearer that individual child-level data is critical in how programs take steps to help each individual child to make progress and to achieve overall program school readiness goals. Specifically for individual children, programs must analyze individual child-level data in order to determine each child's status and progress on those goals in order to individualize instruction for those children and to inform parents and families. Furthermore, we clarify in the final rule that aggregated child-level assessment data must be used to inform curriculum, instruction, professional development, program design, and other program decisions.

4. *Comment:* Some commenters requested guidance on the process for aligning school readiness goals with the Head Start Child Outcomes Framework (Framework). In particular, commenters were concerned about the requirement to align with the Framework because, at the time the NPRM was open for public comment, the Framework was undergoing revision by ACF.

Response: ACF since has published the revised framework (now called the Head Start Child Development and Early Learning Framework (available at *http://eclkc.ohs.acf.hhs.gov/hslc/tta-system/teaching/eecd/Assessment/Child%20Outcomes/HS_Revised_Child_Outcomes_Framework.pdf*)). We also have addressed these concerns in the OHS training and technical assistance, which discusses grantees' responsibilities and processes for ensuring alignment between agency-established school readiness goals and the revised framework.

5. *Comment:* Other commenters had concerns about using the Early Head Start Performance Measures Framework in determining children's status on the child competencies. In particular, there were questions about whether grantees need to set goals and measure progress on ''parents as the primary nurturer'' and ''parent-child relationships'' as described in the Framework.

Response: In response to these comments, the final rule clarifies that children's progress on the five essential domains is what should be measured by both Head Start and Early Head Start grantees. While the Framework is comprehensive and includes many elements, it is organized so that all the elements fit under the five essential domains of child development. Programs will continue to be instructed on using the essential domains as a framework for their goals and assessment of meeting the goals.

6. *Comment:* Some commenters misinterpreted the language in the NPRM as requiring grantees to conduct a formal assessment of children three times per year (or two times per year for programs operating less than 90 days), rather than requiring them to aggregate and examine child-level assessment data regardless of the method of assessment three times each year.

Response: In response to these concerns, ACF has added a definition of ''child-level assessment data'' to the final regulation. We also have addressed these comments in the training and technical assistance ACF provides by including information about the methods and types of assessment, assessment instruments, and other strategies for understanding children's development and learning that grantees should utilize in meeting the requirements to establish and take steps to achieve school readiness goals. Training and technical assistance also included a clear distinction between the process of child assessment and the process for collecting, aggregating, and analyzing child-level assessment data.

7. *Comment:* Numerous comments were received related to how programs are to show compliance with the requirement to establish and take steps to achieve school readiness goals and utilize data for individualization and program improvement. Specifically, commenters requested guidance on what information needs to be documented and maintained to demonstrate compliance; how programs can self-assess; and what criteria ACF will use to evaluate compliance.

Response: We appreciate these suggestions and drew on them in preparing technical assistance for grantees, which includes information regarding how grantees can self-assess, how they can examine school readiness goals as part of ongoing monitoring and use that information to guide program improvements to curricula and professional development, and how grantees can document and demonstrate compliance with these requirements for the triennial monitoring review. Additional information is available to grantees in the monitoring protocol.

Proposed § 1307.3(b)(3)—Classroom Assessment Scoring System (CLASS): Pre-K (Note that proposed § 1307.3(b)(3) has been changed to § 1307.3(c) in the final rule.)

Section 641A(c)(2)(F) of the Act requires the Secretary to include as part of the Head Start monitoring review process ''a valid and reliable research based observational instrument, implemented by qualified individuals with demonstrated reliability, that assesses classroom quality, including assessing multiple dimensions of teacher-child interactions that are linked to positive child development and later achievement.'' Section 641(c)(1)(D) requires that such an instrument be used as part of the system for designation renewal. CLASS: Pre-K, a system that uses observation to rate the interactions between adults and children in the classroom as high-, middle- or low-quality, meets the statutory requirements for ''a valid and reliable research-based observational instrument.'' Before selecting an instrument to fulfill this requirement, ACF consulted with leading early childhood assessment experts who all advised that the CLASS: Pre-K was the instrument that best met the statutory requirement. The Conference Report accompanying the Act also suggested that ACF consider using the CLASS: Pre-K (H.R. Conference Report No. 220–439 at 111 (2007), as reprinted in 2007 U.S.C.C.A.N. 442, 462). Ultimately, ACF selected the CLASS: Pre-K instrument because, as discussed in the ''CLASS Implementation Guide: Measuring and Improving Classroom Interactions in Early Childhood Settings'' CLASS: Pre-K has been validated by over ten years of research in educational settings.

1. *Comment:* ACF received a large number of comments related to CLASS: Pre-K. While there was general support for the tool, some commenters raised a range of concerns related to using CLASS: Pre-K for program accountability purposes.

Response: As discussed in the CLASS: Pre-K manual, the purpose of CLASS: Pre-K is to measure ''the quality of the classroom environment'' and uses of CLASS: Pre-K include research, accountability efforts, program planning and evaluation, and professional development and supervision. ACF recognizes that while CLASS: Pre-K was developed for a range of purposes, it has been used primarily for research and professional development purposes. It is

also being used in some state accountability and quality improvement efforts in Quality Rating and Improvement Systems, in which CLASS scores are used as a measure in rating the quality of an early childhood program. ACF is working closely with the developers to ensure CLASS: Pre-K is used in ways that inform programs and accurately reflect classroom quality.

2. *Comment:* A number of respondents requested that ACF delay the inclusion of CLASS: Pre-K in the Designation Renewal System. Respondents stated that CLASS: Pre-K has not been in use long enough with Head Start grantees to elevate scores to such high importance and that the science has not provided a basis yet for selecting the threshold for competition. Others said it should not be implemented until after the transition period in order to hold all grantees to the same standard.

Response: While we appreciate the public comments received on the timing for considering CLASS: Pre-K, ACF has decided not to delay the inclusion of CLASS: Pre-K as a condition for designation renewal due to the critical importance of classroom quality. As was included in the NPRM, the CLASS: Pre-K condition will be implemented in the second year of the transition period using data from observations conducted after the effective date of the final rule. However, no grantees will be awarded non-competitive extensions without being evaluated against the two-part CLASS criterion. We based the decision to utilize CLASS in the Designation Renewal System on the following: (1) Research has shown that teacher-child interaction is critical for children's social and academic development, (2) a measure of classroom quality is critical to ensuring that children are in high quality programs, and (3) there is an extensive research base for CLASS: Pre-K. ACF notified grantees in August 2008 that CLASS: Pre-K would begin to be used in Head Start monitoring reviews (see ACF–IM–HS–08–11). In addition, ACF has provided all grantees the opportunity to be trained on the protocol and grantees have been monitored on CLASS: Pre-K instrument for two years. Moreover, ACF–IM–HS–08–21 provided further information regarding the importance of child-teacher interaction. ACF also provides training resources to each Head Start grantee as part of its annual funding, consistent with requirements in the Act. Finally, ACF's inclusion of a relative threshold, as well as a minimum threshold of quality and a standard of excellence, are responsive to comments about the current state of the science. While research has not yet identified a specific CLASS score necessary to impact positive outcomes, research has shown, (1) That low levels of quality are not related to children's outcomes, and (2) that there is no ''good enough'' level of quality above which additional quality improvements do not matter for children's outcomes (*i.e.,* higher levels of quality are related to better outcomes for children) (Burchinal, M., Xue, Y., Tien, H., Auger, A., & Mashburn, A. (March, 2011)).

3. *Comment:* A number of respondents raised concerns with the use and reliability of CLASS: Pre-K with culturally and linguistically diverse classrooms. Some respondents commented that CLASS: Pre-K is inappropriate with specific populations or programs, such as American Indian/Alaska Native, Migrant and Seasonal Head Start, or dual language learners.

Response: Research consistently shows that children in classrooms with higher CLASS: Pre-K scores demonstrate more positive social and early academic development.(Burchinal, M., Vandergrift, N., Pianta, R., & Mashburn, A. (2010), and Burchinal, M., Xue, Y., Tien, H., Auger, A., & Mashburn, A. (March, 2011)). While the CLASS: Pre-K was not designed to measure specific practices in multi-lingual classrooms, the tool has been used in classrooms with diverse populations. For example, findings from the National Center for Early Development and Learning (NCEDL)'s research conducted in nearly 700 pre-kindergarten classrooms and 700 kindergarten classrooms, including linguistically diverse classrooms, suggest that CLASS: Pre-K functions well as an assessment of the quality of teacher-child interactions in classrooms with language diversity, and that CLASS: Pre-K predicts gains in dual language learners children's school readiness skills (Downer, 2011). ACF will continue to examine concerns regarding the use of CLASS: Pre-K in culturally and linguistically diverse classes. ACF is providing additional cross-cultural training to CLASS: Pre-K reviewers to ensure reviewers are familiar with the culture of the families served and that they are fluent in the predominant teaching language used in the class where they conduct observations.

4. *Comment:* Some respondents raised other concerns with the CLASS: Pre-K instrument itself, aside from culture or language. Respondents stated, for example, that CLASS: Pre-K scores are reliable within one number above or below the actual score and that CLASS: Pre-K was developed with a national norming sample and data primarily from State-funded pre-kindergarten programs.

Response: ACF is confident of the reliability and appropriateness of the CLASS: Pre-K tool for use in Head Start classrooms based on the extensive and growing use of the instrument to assess a wide range of early childhood programs (*e.g.,* in numerous research studies as well as State Quality Rating and Improvement Systems) and ACF's experience using the instrument over the last 2 years. With respect to concerns about the norming sample used for the development of CLASS: Pre-K, we note that the developers included Head Start programs among the sample of programs they tested.

5. *Comment:* ACF specifically requested comments on alternative methods to the CLASS: Pre-K condition, including the use of an absolute threshold versus a relative threshold that compares each grantee's score to the scores of other grantees reviewed in the same year, or the use of different absolute thresholds for each domain. A smaller subset of respondents commented on these issues. Those in support of absolute thresholds emphasized that identifying low-performing grantees is achieved best by defining a minimum level of quality all grantees must meet. Those recommending a relative threshold indicated that comparing grantees to their peers is the most appropriate approach, particularly absent clear research indicating what an absolute threshold should be. Several respondents proposed using national averages to determine scores to trigger competition or focusing on significant variances from the national averages.

Some respondents asked for further clarification on what was meant by ''low'' scores or requested a justification for why the proposed scores were chosen. Other respondents commented that the proposed scores for competition establish either unrealistic standards in some domains or inadequate standards of quality in other domains.

Response: In response to comments, ACF has revised the proposed CLASS: Pre-K condition from being solely an absolute threshold of scores below a 3 on any of the three CLASS: Pre-K domains (Emotional Support, Instructional Support, and Classroom Organization) during the two most recent CLASS: Pre-K observations to a two-part criterion, that consists of both a relative and an absolute threshold based on the most recent CLASS: Pre-K observation for all three domains of CLASS: Pre-K.

Specifically, ACF will require grantees whose average scores across

classrooms fall in the lowest 10 percent on any of the three CLASS: Pre-K domains in that year to compete. ACF will determine the lowest deciles by comparing the scores in each of the three CLASS: Pre-K domains of all grantees reviewed in the same year under section 641A(c)(1)(A), (C), and (D). If a program scores in the bottom 10 percent of all Head Start programs, this indicates that the vast majority of organizations operating Head Start are providing a higher quality program for children. For a program with an average score in the lowest ten percent in the domain of Emotional Support, it means that ninety percent of Head Start programs assessed were shown to be doing a better job helping children develop positive relationships, enjoyment of learning, and appropriate levels of independence. For a program with an average score in the lowest ten percent in Classroom Organization it means that ninety percent of Head Start programs assessed were rated higher on how well teachers manage classrooms to maximize learning and keep children engaged. And for a program with an average score in the lowest ten percent in the domain of Instructional Support, it means that ninety percent of Head Start programs were assessed to be doing a better job promoting children's thinking and problem solving, using feedback to deepen understanding and helping children develop more complex language skills. If ninety percent of Head Start programs are doing better in these areas, it is certainly reasonable to require that these programs compete to determine if there is another provider in that community that can provide children a higher quality experience.

In addition, the final rule establishes a minimum quality threshold, or ''floor,'' for each of the three domains under § 1307.3(c)(1). Grantees will be required to compete if, in the most recent CLASS: Pre-K observation, the average score across all classrooms observed by ACF in any CLASS: Pre-K domain falls below the minimum quality threshold for that domain established in the regulations, even if it does not fall into the lowest 10 percent of grantees assessed on that domain. For reasons described below, for the Emotional Support domain, the minimum quality threshold is an average score across all classrooms of a 4. For the Instructional Support domain, the minimum quality threshold is an average score across all classrooms of a 2. For the Classroom Organization domain, the minimum quality threshold is an average score across all classrooms of a 3.

ACF sets a clear minimum quality threshold grantees must achieve, consistent with research that demonstrates the lack of improvement in child outcomes when the quality of child-teacher interactions measured by the CLASS fell below certain levels in the different CLASS domains. There is a growing body of research showing that at least moderate quality is necessary in Instructional Support for improving children's outcomes (*i.e.,* there is no evidence demonstrating a link between CLASS Instructional Support scores and children's outcomes when CLASS Instructional Support scores fall below a 2). Conversely, research suggests moderate to high-quality is necessary in Emotional Support for improving children's outcomes. (See, for example, Burchinal, M., Vandergrift, N., Pianta, R., & Mashburn, A. (2010). Threshold analysis of association between child care quality and child outcomes for low-income children in pre-kindergarten programs. Early Childhood Research Quarterly, 25(2), 166–176.) Based on this research, as well as comments received on the NPRM, we consulted the CLASS manual to identify the CLASS scores that most closely correspond to ''at least moderate quality'' for the Instructional Support domain and ''moderate to high quality'' for Emotional Support domain. As a result, we revised the minimum thresholds for Instructional Support and Emotional Support proposed in the NPRM (*i.e.,* 2 for Instructional Support and 4 for Emotional Support). The minimum threshold for Classroom Organization stays at 3, the same as the NPRM.

Finally, ACF is establishing an exceptional level of quality to ensure that the relative threshold does not result in exceptionally high quality programs being required to compete. In the unlikely event that a grantee's score in a domain falls in the lowest 10 percent but the score equals or exceeds the exceptional level of quality, then the grantee will not be required to compete on the basis of its score on that domain. The exceptional level of -quality threshold or standard of excellence for each three CLASS: Pre-K domains is an average score across all classrooms of 6 or above. ACF selected this particular threshold because the developers of the CLASS: Pre-K established these scores on the instrument's seven point scale expressly to identify those grantees functioning at the highest levels of quality (with scores of 1 to two being in the low range; three to five in the mid-range; and six to seven in the high range of quality). The following is an example of how the absolute thresholds would work in conjunction with the relative threshold in Emotional Support. The lowest 10 percent of grantees as well as all grantees that have an average score below a 4 will be required to recompete based on their Emotional Support average score. If more than 10 percent of grantees had an average score in that domain below a 4, all of those grantees would have to compete. If a grantee in the lowest 10 percent in that domain had an average score of 6 or above, they would not be required to compete on the basis of the Emotional Support score because they have achieved the exceptional quality threshold in that domain. Grantees with an average score between a 4 and a 6 on Emotional Support but that are not in the lowest 10 percent would not be required to compete on the basis of their Emotional Support score.

In summary, this revised CLASS condition combines the merits of both the relative and absolute threshold concepts. It includes a relative threshold, which is responsive to comments that research has not yet identified the specific threshold of quality that is needed to impact positive outcomes, while recognizing research showing that there is no ''good enough'' level of quality (*i.e.,* higher levels of quality are related to better outcomes for children) (Burchinal, M., Xue, Y., Tien, H., Auger, A., & Mashburn, A. (March, 2011)). It also guards against score inflation, which, if it occurred, would result in less rigorous standards over time. The rule also sets a minimum quality threshold based on research findings that show a minimum level of quality must be achieved before positive changes can be made in children's outcomes and it establishes a high-quality standard above which grantees would be exempt from competition. In setting the minimum quality thresholds and exceptionally high-quality standards ACF compared CLASS: Pre-K scores for Head Start programs to national data and to data on other early childhood programs, examined the CLASS: Pre-K user manual, considered the Office of Head Start's expectations for what should be taking place in early childhood classrooms, and embraced the latest research findings.

As will be discussed in more detail in Section § 1307.8, ACF is implementing a significantly improved approach to each grantees' CLASS assessment including even more rigorous training and reliability assurance, a more rigorous random sampling of each grantee's classes to determine which to observe, and more consistent protocols for implementation. For these reason,

determinations for designation renewal will be made based on the most recent CLASS: Pre-K observations, rather than the two most recent CLASS: Pre-K observations as was proposed in the NPRM.

6. *Comment:* A number of respondents had questions about whether or how the CLASS Pre-K would be implemented in Early Head Start programs and/or in the Home-based program option.

Response: CLASS: Pre-K will not be used in Early Head Start programs or in programs that operate the Home-based option only. ACF will consider incorporating a valid and reliable measure of teacher-child interaction in Early Head Start and in the Home-based program option when such a tool becomes available. ACF would incorporate such a tool only after soliciting public input through an NPRM.

7. *Comment:* Some commenters expressed concerns about how the ''negative climate'' dimension of the Emotional Support domain of the CLASS Pre-K would be included in grantees' average scores in that domain.

Response: The ''negative climate'' dimension high and low scores have the opposite meaning than for all of the other CLASS dimensions. Specifically, for negative climate a low score means that there is a low level of negative climate in the classroom—which is good. For that reason, the negative climate score is reversed when averaging dimension scores to obtain a domain score, as is explained in the CLASS: Pre-K manual—so that a grantee receiving a good negative climate score will likewise receive a higher score on the overall domain of Emotional Support of which negative climate is one part. ACF will use that methodology for obtaining averaging as prescribed in the CLASS: Pre-K manual to ensure that average domain scores are accurate.

Proposed § 1307.3(b)(4)—License Revocation (Note that proposed § 1307.3(b)(4) has been changed to § 1307.3(d) in the final rule.)

1. *Comment:* ACF received a significant number of comments in response to the proposed licensing condition described at § 1307.3(b)(4). A number of commenters expressed support for licensing revocation as a trigger for competition. Others raised concerns about the trigger and what constitutes a license revocation as discussed in § 1307.3(b)(4).

A common theme among comments on this condition was that variations among State licensing requirements would make it impossible to implement it in an equitable manner across Head Start and Early Head Start grantees. Many remarked that ACF should set a standard for all Head Start programs rather than relying on separate State standards.

There were a number of comments that mentioned that the fate of an entire grantee and all of its delegates would be in jeopardy when one delegate agency loses its license. Many respondents noted that the condition is duplicative since OHS already would learn about a licensing revocation during an on-site monitoring review. Finally, a common theme among commenters was a concern that the licensing condition in particular could create challenges to collaborations because of concerns over potential loss of funding due to loss of individual center licenses.

Response: We would like to clarify that it is the revocation of a license, not the suspension of a license, that will require a grantee to compete. Revocation is a process that varies by State and local standards. However, despite these variations, removing a licensing or forbidding a center to continue operating is the final step in a series of corrective actions for an agency in all jurisdictions. Revocation is the removal of a license, meaning that a center no longer is allowed to operate in caring for children in that jurisdiction. The revocation of a license to operate is a serious indication of an agency's inability to operate a high-quality program.

Section 641A(a)(1)(D)(i) of the Act and Head Start regulations implemented at 45 CFR 1306.30(c) require that ''the facilities used by Early Head Start and Head Start grantees and delegate agencies for regularly scheduled center-based and combination program option classroom activities or home-based group socialization activities must comply with State and local requirements concerning licensing. In cases where these licensing standards are less comprehensive or less stringent than the Head Start regulations, or where no State or local licensing standards are applicable, grantee and delegate agencies are required to assure that their facilities are in compliance with the Head Start Program Performance Standards related to health and safety as found in 45 CFR 1304.53(a).'' ACF would be remiss if it did not require a grantee whose license had been revoked to demonstrate its fitness to continue to receive Head Start funding following such a determination by State or local authorities. Given the serious nature of revocation and given that the consequence for the grantee is not termination from the program or even suspension, but only a requirement to compete for further funding, it should not be necessary to require exhaustion of appeal opportunities before ACF requires the grantee to compete to prove through a competition they are the most qualified entity in the community.

ACF will maintain this condition as laid out in the NPRM, regardless of appeal status since it is such a serious condition with one exception. It merits repeating here that requiring a grantee to compete for continued funding is not equivalent to terminating the grant. In the final rule ACF is allowing for a longer period to resolve appeals than was proposed. The final rule would allow a grantee that has had its license revoked to continue to receive further funding without competing if the revocation was overturned or withdrawn any time ''before the announcement of the competition in which the grantee would be required to compete for renewed funding.'' If a decision on appeal is not made by that point then ACF is justified in requiring the grantee to compete since competitions have to be held within certain time periods to ensure that either the existing grantee or a new grantee has been selected by the time the existing grant expires. It does not make sense to delay a competition based on the possibility that a revocation of a license may be overturned or withdrawn sometime in the indefinite future.

If the license of any center where a grantees is serving Head Start or Early Head Start children is revoked, the grantee would be required to compete. As mentioned previously, each grantee is responsible for ensuring that every child it serves, no matter where or by whom, receives high-quality early childhood services. Delegate agencies are required to follow licensing regulations, and grantees should be aware of issues that may jeopardize a delegate agency's license before that license is revoked.

Proposed § 1307.3(b)(5)—Suspended by ACF (Note that proposed § 1307.3(b)(5) has been changed to § 1307.3(e) in the final rule.)

1. *Comment:* Many commenters agreed that agencies that have been suspended by ACF should have to compete for renewed funding. Other commenters stated that the condition only should apply after an agency has exercised all of its due process rights afforded under the appeals process and after final decisions have been made in that appeal process. A few commenters raised the concern that smaller entities may not have adequate resources to appeal a suspension. One commenter

suggested that suspension should not be counted as meeting the condition if a grantee was reinstated. One commenter stated that ACF should ensure that the reason for the suspension was related to the Head Start program. Another commented that suspension was already a tool ACF could use in finding a grantee unsuited for maintaining Federal funding.

Response: Under 45 CFR 1303.12(a), a grantee can be subject to summary suspension if it is at ''[a] serious risk of: (1) Substantial injury to property or loss of project funds; or (2) Violation of a Federal, State or local criminal statute; or (3) If staff or participants' health and safety are at risk.'' Suspension under 45 CFR 1303.11 only can be based on ''circumstances related to a particular grant, such as ineffective or improper use of Federal funds or for failure to comply with applicable laws, regulations, policies, instructions, assurances, terms and conditions or, in accordance with Part 1302 of this chapter, upon loss by the grantee of legal status or financial viability.'' Regulations implemented at 45 CFR 1303.10(a) specify that a suspension of either type involves a finding by ACF that a grantee has either failed to live up to one or more standards applicable to Head Start grantees or is at risk for misusing Head Start funds, violating a criminal statute, or harming its staff or program participants. The grounds for suspension and summary suspension are also grounds for finding that the grantee is not conducting a high quality program and should be required to compete for funding.

ACF considered all the comments submitted related to suspension and is making one change in the final rule. We have modified the rule so that if there is a pending appeal and the agency did not have an opportunity to show cause as to why the suspension should not have been imposed or why the suspension should have been lifted if it had already been imposed under 45 CFR Part 1303, the agency will not be required to compete based on this condition. If an agency has received an opportunity to show cause, the condition will be implemented regardless of appeal status, since the performance issues that would lead ACF to suspend a grantee are so serious—and are exercised with such infrequency—that to delay a competition in that service area would not be in the best interest of the children and families in that community.

Proposed § 1307.3(b)(6)—Debarred From Receiving Federal Funds or Disqualified From CACFP (Note that proposed § 1307.3(b)(6) has been changed to § 1307.3(f) in the final rule.)

1. *Comment:* In § 1307.3(b)(6) of the NPRM, ACF proposed that a grantee be required to compete that ''has been debarred from receiving Federal or State funds from any Federal or State department or agency or has been disqualified from the Child and Adult Care Food Program (CACFP) any time during the period covered by the designated ACF official's review under § 1307.7 but has not yet been terminated or denied refunding by ACF.'' A majority of respondents were supportive of this condition. Some respondents raised questions about aspects of debarment and disqualification and implementation of this condition such as noting that the debarment condition is duplicative because an agency that has been debarred from receiving Federal funds already would have lost its Head Start grant. One commenter suggested that programs disqualified from CACFP due to errors should not have to recompete.

A number of respondents raised concerns that only a final debarment or disqualification decision should be considered, allowing the grantee to go through the entire appeal process and exercise all due process rights. Several commenters recommended that if a delegate agency is debarred, the grantees should terminate the delegate and the grantee should not be required to compete.

Response: ACF considered the comments received and has not changed the policy in the final rule. Debarment is grounds for a deficiency finding under the statutory definition of that term, and indicates an agency's failure to administer a high-quality program. Head Start grantees are eligible to receive funding under the Department of Agriculture's (USDA) Child and Adult Care Food Program (CACFP) for the food served to children at the meals provided by the Head Start program. If a grantee were disqualified from the USDA program, the grantee would not receive funding for the food served to children in the program. Under 45 CFR 1304.23(b)(1)(i), all grantees are required to use CACFP funds as the first source of funding for program meals under the regulations; therefore, disqualification would mean that the grantee had lost a major funding source for the meals and snacks served in the programs. In addition to requiring grantees to report on this condition, ACF will work with USDA's Food and Nutrition Services (FNS) to receive information about grantees that have been disqualified and will check that information against grantee reporting.

Proposed § 1307.3(b)(7)—Audit Findings (Note that proposed § 1307.3(b)(7) has been changed to § 1307.3(g) in the final rule.)

1. *Comment:* Commenters raised concerns about the performance of the audits. Many focused on the issue of using A–133 audit findings or State agency audit, review or investigation findings to trigger recompetition automatically. Many commenters stated that ACF would be delegating its statutory duties to third parties. Others stated that by accepting the findings of outside sources, ACF would be denying the grantee's due process. Although many agreed with the intent of this condition, they recommended that qualified fiscal officers or Certified Public Accountants within the Office of Head Start be tasked with reviewing the outside audit results.

A small number of commenters expressed concerns that auditors could lose some of their independence if they realized that their findings could cause grantees to face competition.

Other commenters supported the need to have strong, financially sound grantees. Some commenters were concerned with the idea of allowing only one material weakness, which might be a minor problem, to lead to a recompetition. They stated that ACF should instead look for a pattern of problems indicating a grantee's financial weakness that could place Federal funds at risk.

Response: In response to comments, ACF is removing the material weakness component from the proposed condition. ACF has concluded that while in many instances a single finding of material weakness represents a serious issue, that there are instances where a material weakness finding would not be adequate as a singular indicator of program quality that would trigger competition.

Nevertheless, ACF takes audit findings seriously and for any year in which an entity's audit as required by OMB Circular A–133 classifies Head Start as a major program and the report to the Federal Audit Clearinghouse (FAC) shows other than an unqualified (''clean'') opinion (*e.g.,* qualified opinion, adverse opinion, or disclaimer of opinion) for the Head Start program, ACF will consider this as a ''red flag'' that will trigger additional fiscal oversight through on-going monitoring and-additional targeted review, including unannounced on-site

monitoring reviews, to make a determination (concurred in by program officials and senior ACF management) as to whether the issue identified raises to the level of a deficiency as defined in the Act. Failure to complete the required audit under OMB Circular A–133 and submit the results to the FAC will be considered a ''red flag'' in the same manner. If the fiscal issue identified does lead to a deficiency in Head Start monitoring, that deficiency finding would lead to competition under § 1307.3(a).

Since inability to continue to operate as a going concern is a more serious problem, ACF is maintaining this part of the proposed condition with the same definition and the same time frame as proposed in the NPRM.

Aside from that modification, this condition remains unchanged. In response to concerns commenters raised that ACF is impermissibly delegating its responsibility to non-federal auditors, note that the final regulation still requires that ACF review the auditor's findings before making the final decision to require the grantee to compete based upon an auditor's findings.

Proposed § 1307.3(c)—Possible Eighth Condition

1. *Comment:* ACF received a significant number of comments related to possible additional criteria (an eighth condition) that would be utilized if the seven conditions outlined in proposed § 1307.3(b)(1)–(7) of the NPRM did not result in 25 percent of grantees competing in a given review cycle. Nearly all of the comments opposed, the inclusion of additional criteria for the purpose of reaching a minimum percent of grantees competing because of concerns about setting a 25 percent quota for redesignation. These comments stated that a 25 percent quota does not reflect Congressional intent.

Response: As explained above in the discussion regarding proposed § 1307.3(a), we replaced the 25 percent minimum requirement with the two-part CLASS criteria and have made a conforming change to § 1307.3(c). A discussion of comments received on the proposed additional criteria that were open for public comment and our responses to these comments follows, although neither of these criteria was incorporated into the final rule.

2. *Comment:* In the preamble text of the NPRM, ACF requested comments on two possible approaches to defining additional criteria to be met if needed to satisfy the 25 percent minimum standard. Commenters stated that even though ACF described in general terms two approaches under consideration for reaching the minimum requirement of grantees competing (*i.e.,* assigning values to noncompliances, using evidence-based rating tools or some combination), the NPRM does not describe adequately these criteria or how they would be used in the Designation Renewal System.

Comments also were received specific to each of the two possible approaches to defining additional criteria. The first approach would use noncompliance findings from monitoring reviews by assigning a value to each noncompliance, weighting more serious or problematic noncompliances more heavily, and giving each grantee an overall score for noncompliances. Many respondents objected to the inclusion of noncompliances entirely, stating that the term ''noncompliance'' is broad and captures such a continuum of violations—from minor infractions to more serious health and safety issues—which respondents stated might not be indicative of poor performance. Respondents emphasized that using such a broad framework is inappropriate as a basis for measuring program quality.

Many respondents stated that an approach that involves a ranking system and complex scoring of noncompliances would be burdensome to ACF and to grantees and contrary to the requirement that the Designation Renewal System be reliable and transparent. Several comments questioned why ACF would create a separate ranking system, in addition to the existing review processes in place. ACF also requested public comment specifically on the relative weighting of noncompliance findings, whether some noncompliances should be weighted more heavily than others, and whether the size of the grantee should be a factor taken into consideration in the ranking system. In response, many respondents stated that selecting which noncompliance findings should be included and what their relative weighting should be is arbitrary and introduces a high level of subjectivity that makes measuring quality consistently across programs difficult. Respondents questioned how ACF would distinguish between noncompliance findings and determine which are most important. Other comments, while objecting generally to using noncompliance findings, stated that weighting noncompliances would be a logical step if noncompliances were used. These respondents stated that some noncompliance should be weighted more heavily than others and doing so would prevent minor issues from requiring grantees to compete.

Response: We appreciate the comments and recommendations respondents offered regarding the use of noncompliances as an additional criterion to reaching a 25 percent minimum of grantees competing. While ACF believes that noncompliance findings as a category are integral to the monitoring process and that such findings are critical to understanding whether grantees are meeting the Head Start Program Performance Standards, we are not using them for the purpose of designation renewal, provided that grantees correct them in the specified timeframes; uncorrected noncompliance findings that become deficiencies still will be included in the Designation Renewal System as part of the deficiency condition under § 1307.3(a). We agree that noncompliances represent a broad range of areas and believe that assigning values for purposes of determining which grantees compete would be difficult and imprecise. In response to comments and because the deficiency condition already is inclusive of uncorrected noncompliances, we have not added a condition related to noncompliance in the final rule.

3. *Comment:* Many comments also were received related to the second approach to defining additional criteria that would introduce the use of evidence-based rating instruments (*e.g.,* the Early Childhood Environmental Rating Scale, Infant and Toddler Environment Rating Scale, and the Family Child Care Environment Rating Scale) into the Head Start monitoring review system. Some of the comments received expressed a preference for use of the environment rating scales (ERS) over noncompliance data if the proposed 25 percent minimum standard is maintained in the final rule and one of the two proposed additional criteria must be selected.

Although comments supporting the use of ERS were received and many stated that they held the ERS instruments in high regard, the majority of commenters expressed concerns and objected to the use of ERS as criteria for determining whether grantees would have to compete for renewed funding. Commenters viewed the ERS as primarily input driven (*e.g.,* focusing on furnishings, personal care, and the structure of activities) and would not capture some of the central features of the program, such as comprehensive services. A concern also was raised that the ERS focuses on the classroom environment and does not give attention to governance or administrative structures. Many commenters also expressed concerns that the ERS does

not provide a thorough assessment of the central element of quality for children under three—the relationship between caregiver, child, and family.

We also received numerous comments expressing concerns about the implementation of ERS in the monitoring review system and as a condition for designation renewal. Some commenters expressed concerns over the complexity of the administration of the ERS, noting that they are sophisticated instruments, requiring reviewers to make subjective judgments on some 40 different dimensions of classroom quality. Concerns were raised around the cost and burden associated with the need for appropriate training of teams of outside professional reviewers and ongoing monitoring of inter-rater reliability.

Response: We appreciate the comments and suggestions received regarding the proposed use of ERS as additional criteria to identify grantees for competition if the 25 percent minimum standard is not met through the seven conditions. We believe the ERS instruments are high quality, research-based measures of the quality of the environment in early childhood settings, including Head Start and Early Head Start. However, we also agree with comments regarding the limitations of the instruments (*i.e.,* they are not able to capture some of the key features of quality of Head Start and Early Head Start programs) and view them as overlapping to some extent with existing measures, such as the monitoring reviews. As a result, as indicated previously, we replaced the proposed 25 percent threshold in this final rule and modified the CLASS: Pre-K related criteria to have two subparts to ensure that there is robust competition.

Proposed § 1307.4—Grantee Reporting Requirements Concerning Certain Conditions

1. *Comment:* In the NPRM, we proposed that Head Start agencies must report in writing to the designated ACF official within 10 working days of the occurrence any of the following events: (1) The agency has had a revocation of a license to operate a center by a State or local licensing entity; (2) the agency has filed for bankruptcy or agreed to a reorganization plan as part of a bankruptcy settlement; (3) the agency has been debarred from receiving Federal or State funds from any Federal or State department or agency or has been disqualified from the Child and Adult Care Food Program (CACFP); and (4) the agency has received an audit, audit review, investigation or inspection report from the agency's auditor, a State agency, or the cognizant Federal audit agency containing a determination that the agency is at risk for ceasing to be a going concern. Commenters raised concern that it is an undue burden on programs to provide this information and that ACF should be able to collect this information. In addition, some commenters agreed that reporting this information was necessary but that the 10-day time frame was not feasible.

Response: We are not making any changes to the requirement for grantees to report to ACF on these four conditions. We believe that each of these conditions indicates a serious problem and that ACF should know about them as soon as possible so that appropriate action can be taken. The most efficient method for ACF to learn of these conditions is to require grantees to report them directly.

However, in response to comments, we have made a couple of changes to the final reporting requirements. First, based on comments that license revocation is a serious and problematic occurrence, we have modified the reporting requirements for certain events based on whether they occurred before or after the effective date of the Part. Specifically, for licensing revocations, we require that Head Start agencies must report in writing to the responsible HHS official within 30 working days of the effective date of this Part if the agency has had a revocation of a license to operate a center by a State or local licensing entity during the period between June 12, 2009, and the effective date of this Part. This modification to the NPRM was made since there is not a source of information for ACF to check to determine whether a grantee had its license revoked.

Regarding reporting of debarment and disqualification from CACFP, many commenters suggested that HHS use existing sources of information rather than having grantees report. In the case of debarment from Federal funds, there is a database that is publicly available. As proposed in the NPRM, ACF still will still require grantees to report on this condition. We also will check the information grantees provide against the national List of Excluded Parties. Regarding CACFP disqualification, the National Disqualified List is not part of the other Federal funding database nor is the list publicly available or available to other Federal agencies. Grantees will be required to report CACFP disqualification and ACF will work with USDA (administering agency for CACFP) to acquire this information as well.

While we appreciate comments asking for a longer timeframe to report, we have retained the 10 day requirement due to the very serious nature of these events. HHS believes that each of these conditions is so serious that we should be notified as soon as possible. We believe that it does not put an undue burden on programs to report within 10 working days.

Proposed § 1307.5—Requirements To Be Considered for Designation for a Five-year Period When the Existing Entity in a Community Is Not Determined To Be Delivering a High-quality and Comprehensive Head Start Program and Is Not Automatically Renewed

1. *Comment:* A few comments were received on the application process described in this section for cases where the existing grantee in a community is not determined to be delivering a high-quality program and so there will be a competition in that community. Those comments expressed confusion about the provision and asked for clarification in the final rule. The commenters on this provision expressed strong concern in all cases when there is a transition between grantees. Commenters also asked whether grantees that voluntarily relinquished their grant would be considered a terminated grantee and therefore prohibited from applying from competition.

Response: This language is taken directly from the description of DRS in the Act at section 641(d) but we have added additional language for clarification. We also clarify that the criteria at section 641(d) of the Act apply to Head Start.

As proposed in the NPRM, terminated grantees will be excluded from competing for funding for the next five years. This provision applies beginning with the effective date of the regulation and that exclusion is for a five-year period beginning with the former grantee's termination by ACF. We have clarified that this only applies to grantees terminated for cause. ACF has made one modification to 1307.5, however; similar to terminated grantees, a Head Start or Early Head Start agency that has had a ''denial of refunding,'' defined in 45 CFR 1303.2, is also excluded from competing for the next five years. ACF has added the reference to denials of refunding because denials of refunding are made on the same grounds as terminations and have the same effect under 45CFR 1303.15(c). A determination that a grantee will not be awarded funding noncompetitively is not a denial of refunding and in no way limits the ability of that grantee to apply for funding.

ACF acknowledges concerns about continuity of Head Start services and always seeks to minimize disruption in services to children and families. In cases in which a new grantee is selected as a result of recompetition, ACF believes that the transition generally will proceed without significant disruption of services to children and families in the community served. If ACF determines that a particular transition poses a risk of disruption of services, ACF may exercise its statutory authority to appoint an interim grantee in exceptional circumstances.

Proposed § 1307.6—Tribal Government Consultation Under the Designation Renewal System for When an Indian Head Start Is Being Considered for Competition

1. *Comment:* Many commenters expressed concern that there had not been appropriate Tribal consultation on the proposed regulation. Some commenters mentioned that all grantees should have the same process for Tribal programs. Commenters said that MSHS grantees and rural grantees especially should be allowed to comply with the same provisions as described for Tribal programs.

Response: Because this rule simply implements the specific redesignation provisions related to Tribes that are required by the Act, the policies related to Tribal programs proposed in the NPRM are maintained.

Regarding concerns about consultation, consistent with Executive Order 13175, the Department of Health and Human Services (HHS) has established a Tribal Consultation Policy (Policy).

This Policy affirms the authority of HHS to utilize notice and comment rulemaking as one form of consultation. ACF consulted with Tribes by raising the issues related to the Designation Renewal System at OHS Tribal consultations in 2009 and 2010 and by providing the 90-day opportunity to submit comments on this NPRM.

Proposed § 1307.7—Designation Request and Review Process. (Note that the proposed title of § 1307.7 ''Designation request and review process'' has been changed to ''Designation request, review and notification process'' in the final rule.)

1. *Comment:* Commenters raised concerns that requiring grantees to apply to have their funding renewed without competition is burdensome to grantees and could result in programs not being considered if they miss the deadline to submit the paperwork.

Response: While ACF appreciates the comments on this provision, we are unable to change this provision because of the statutory requirement at Section 641(b) entitled ''Application for Designation Renewal'' which states ''to be considered for designation renewal, an entity shall submit an application to the Secretary, at such time and in such manner as the Secretary may require.'' ACF has tried to make this requirement that grantees officially apply for designation renewal as least burdensome as possible. We have modified the final rule to only require that grantees submit their intent to be considered for designation renewal once during the transition period and during the period after the transition only once during the five year grant period.

2. *Comment:* Commenters also expressed concern over the proposed three-year transition period and suggested that the transition period be lengthened to five years. Commenters suggested ACF make it clear that reviews under the Designation Renewal System taking place after the transition period focus on findings since the beginning of a grantee's current grant.

Response: Since the transition period of three years is established under section 641(c)(9) of the Act, we do not have the authority to modify its length. Therefore, we have not made any changes to the timeframe of the transition period in the final regulation. After the transition period, the time periods for relevant data will be only within that five-year grant period, as explained in final § 1307.7(b)(3).

3. *Comment:* Some commenters were confused about whether the designation review process was another on-site review separate from the on-site monitoring reviews required under section 641A(c)(1) of the Act.

Response: In response to comments, ACF has amended this section to explain the process more clearly. We also note that the DRS review is separate from the monitoring reviews required under section 641A(c)(1)(A), (C), or (D) of the Act. The language in final § 1307.7(b) explains that the DRS reviews under Part 1307 consist of an ACF review of data to determine if one or more of the conditions under § 1307.3 had been met by the Head Start and Early Head Start agency's program. This DRS review is a review of all performance data available on a grantee, and is consistent with the focus on continuous program improvement by Head Start. It is not intended to comprise an additional on-site review, data from the monitoring reviews required under section 641A(c)(1)(A), (C), or (D) of the Act will be used in the DRS determination.

Final § 1307.7(b) also describes the data that will be reviewed by ACF for three distinct time periods. First, § 1307.7(b)(1) explains that during the first year of the transition period, ACF will review the data on each Head Start and Early Head Start agency to determine if any of the conditions under final § 1307.3(a) or (d)–(g) (*i.e.,* the five conditions excluding the school readiness goals and CLASS: Pre-K conditions) were met by the agency's program since June 12, 2009. As explained previously, we have maintained the beginning date of June 12, 2009, on which data will be considered for the conditions described under final § 1307.3(a) and (d)–(g) (proposed § 1307.3(b)(1) and (4)–(7)). However we will not consider the school readiness condition described under § 1307.3(b) (proposed § 1307.3(b)(2)) during the timeframe that had been proposed in the NPRM. Instead, this condition will be applied using data beginning after the effective date of this part during the second year of the transition period, as explained below. We maintain the provision in the NPRM that we will use data for the condition described under final § 1307.3(c) (proposed § 1307.3(b)(3)) beginning on the effective date of this part but have changed the timing of when this will be used in the transition. In the final regulation, the results of the CLASS: Pre-K Instrument obtained in on-site reviews under Section 641A of the Act after the effective date of the regulation will be used to determine if grantees will have to compete for further funding. For reasons already noted, we will use CLASS: Pre-K data in the second year of the transition.

Then, during the remainder of the transition period, § 1307.7(b)(2) explains that ACF will review the data on each Head Start and Early Head Start agency still operating under grants with indefinite project periods and for whom ACF has relevant data on the conditions in § 1307.3(a) through (g) to determine if any of the conditions under § 1307.3(a) or (d) through (g) were met by the agency's program since June 12, 2009, or if the conditions under § 1307.3(b) or (c) existed in the agency's program since the effective date of this Part. This means, that over the course of the transition period, no program will receive a Head Start or Early Head Start grant automatically before being judged on all of the criteria. If a program meets one or more of the criteria, the program will have to compete to receive continued funding.

The table below is provided to illustrate which criteria will be considered during the relevant periods.

Time period	1307.3 Conditions to be considered (specific provisions in 1307.3 have been abbreviated in this table, see 1307.3 for full text of conditions)	Designation renewal review
Year 1 of Transition	(a) A deficiency on a review conducted under Section 641A ..... (d) Revocation of a License to Operate. (e) Suspension by OHS. (f) Debarred from receiving state or federal funds or Disqualified from CACFP. (g) Audit finding of being at risk of failing to continue functioning as a Going Concern.	• Data on all grantees will be reviewed. • Those meeting any of the conditions of 1307.3(a), (d), (e), (f) or (g) from data collected since June 12, 2009 will be required to compete. • No grantees will be moved to five year grants non-competitively this year.
Remainder of Transition	(a) A deficiency on a review conducted under Section 641A ..... (b) Failure to establish program goals for improving the school readiness of children and taking steps to achieve those school readiness goals. (c) Low CLASS scores as described in 1307.3(c). (d) Revocation of a License to Operate. (e) Suspension by OHS. (f) Debarred from receiving state or federal funds or Disqualified from CACFP. (g) Audit finding of being at risk of failing to continue functioning as a Going Concern.	• All grantees still under continuous grants and that ACF has complete data on the conditions of 1307.3(b)–(c) will have their data reviewed to determine if they meet those conditions since the effective date of this rule. • All grantees still under continuous grants will have their data reviewed to determine if they meet the conditions of 1307.3(a), (c), (d), (e), (f) or (g) since June 12, 2009.
Five Year Grant Period	(a) A deficiency on a review conducted under Section 641A ..... (b) Failure to establish program goals for improving the school readiness of children and taking steps to achieve those school readiness goals. (c) Low CLASS scores as described in 1307.3(c). (d) Revocation of a License to Operate. (e) Suspension by OHS. (f) Debarred from receiving state or federal funds or Disqualified from CACFP. (g) Audit finding of being at risk of failing to continue functioning as a Going Concern.	• ACF will review the data on each Head Start and Early Head Start agency in the fourth year of the grant to determine if any of the conditions under § 1307.3 existed in the agency's program during the period of that grant.

We explain in § 1307.7(b)(3) that following the transition period, ACF will review the data on each Head Start and Early Head Start agency in the fourth year of the grant to determine if any of the conditions under § 1307.3 existed in the agency's program during the period of that grant.

In final § 1307.7(c), we explain the method ACF will follow to provide notice to grantees on their Designation Renewal System status during each of the time periods. We also note that this process does not apply for Tribal Head Start programs; the process for those grantees is described under § 1307.6. In the NPRM, ACF proposed sending grantees a preliminary notice 6 months prior to the ending of their grant to indicate whether they would be required to recompete. In response to public comment, this provision has been removed from the final rule because it is not necessary and causes additional burden on ACF and grantees.

In § 1307.7(c)(1), we explain that during the first year of the transition period, ACF will give written notice to all grantees meeting any of the conditions under § 1307.3(a) or (d)–(g) since June 12, 2009, by certified mail return receipt requested or other system that establishes the date of receipt of the notice by the addressee, stating that the agency will be required to compete for funding for an additional five-year period. All other grantees that did not meet any of the conditions under § 1307.3(a) or (d)–(g) will remain under indefinite project periods until the time period specified in § 1307.7(c)(2).

In § 1307.7(c)(2), we explain that during the remainder of the transition period, ACF will give written notice to all grantees still under grants with indefinite project periods on the conditions in § 1307.3(a)–(g) by certified mail return receipt requested or other system that establishes the date of receipt of the notice by the addressee. This written notice will state either that the agency will be required to compete for funding for an additional five-year period because ACF finds that one or more conditions under § 1307.3 has been met during the relevant time period described in paragraph (b) of this section, will identify the conditions ACF found, and will summarize the basis for the finding or that such agency has been determined on a preliminary basis to be eligible for renewed funding for five years without competition because ACF finds that none of the conditions under § 1307.3 have been met during the relevant time period described in paragraph (b) of this section. However, we specify that if prior to the award of that grant, ACF determines that the grantee has met one of the conditions, this determination will change and the grantee will receive notice that it will be required to compete for funding for an additional five-year period.

In § 1307.7(c)(3), we explain that following the transition period, ACF will give written notice to all grantees at least 12 months before the expiration date of an agency's five year grant period by certified mail return receipt requested or other system that establishes the date of receipt of the notice by the addressee, stating the same information described under § 1307.7(b)(2). In addition, we specify that if prior to the award of that grant, ACF determines that the grantee has met one or more of the conditions, this determination will change and the grantee will receive notice that it will be required to compete for funding for an additional five-year period.

Proposed § 1307.8—Use of CLASS: Pre-K Instrument in the Designation Renewal System

1. *Comment:* Section 1307.8 specifically addresses the implementation of CLASS: Pre-K in the Designation Renewal System. Many commenters raised concerns that OHS does not follow the University of Virginia's protocol in its use of CLASS: Pre-K. These comments stated that ACF must adhere strictly to the protocol with respect to the number of observation cycles, length and frequency of observations and timing, and training of reviewers in order to maintain the integrity of the CLASS: Pre-K tool in monitoring.

Response: ACF has worked with the developers in determining the most appropriate number of observations. Although the Classroom Assessment Scoring System manual describes that the recommended protocol for conducting CLASS observations is four cycles in each class that are each 30 minutes (*i.e.,* 20-minute observe, 10 minute record), the University of Virginia (UVA) has advised ACF that four cycles with a single teacher, while appropriate for research, is not the best use of resources when ACF's objective is to get a picture of classroom quality at the grantee level. Instead, UVA has recommended a protocol that involves fewer cycles per teacher, but that includes more teachers. Given the importance of observing more classes, rather than fewer classes for a longer period of time, ACF will conduct two cycles in each class in the sample.

Further, data from the HHS Family and Child Experiences Survey (FACES) study, which provides descriptive data on a nationally representative sample of three and four-year olds entering Head Start, reinforced ACF's decision to conduct two rather than four CLASS observations. FACES data indicates that four CLASS observations were not consistently conducted of all grantees, even though that was the intention in the study design. Attempting to conduct four observations in every monitoring review when it could not be accomplished in FACES, and doing so on a scale much larger than the FACES study, likely would result in differential treatment of grantees since some grantees would likely get four observations and others would get fewer. Given the importance of observing more classrooms, rather than fewer classrooms for a longer period of time, ACF will conduct two cycles in each classroom in the sample.

2. *Comment:* A number of respondents also raised concerns regarding inconsistencies in how CLASS: Pre-K is used in monitoring and how reviewers conduct the observations. Grantees from a particular State relayed their experiences with a reviewer who did not follow the process specified in the CLASS: Pre-K protocol. Other respondents raised concern with the reliability of the CLASS: Pre-K instrument when it is used at different times during the day or year. These comments expressed concerns that grantees would be treated differently depending on the time of day or season of the review or observations at a certain point in time would not be a fair representation of classroom quality. These comments stated that CLASS: Pre-K scores were lower, for example, for programs reviewed in the spring than those reviewed in the winter. Others raised concerns about the continued reliability of the reviewers.

Response: ACF has focused considerable attention on its implementation of the CLASS: Pre-K in the monitoring review system to ensure that CLASS: Pre-K observations are conducted consistently across monitoring reviews. In addition to developing a random sampling methodology, ACF has integrated ongoing training for CLASS: Pre-K reviewers to ensure their continued reliability, as well as a reviewer double coding process to assure the consistency of the implementation. ''Double coding'' is a technical term that refers to the process of using two reviewers during observational measures to ensure that both reviewers reach the same conclusion, and it offers evidence of reliability and consistency. ACF also has made the determination that reviews will not be conducted in the first two and last two weeks of the program year, as well as the two weeks surrounding the winter holidays because grantees' classrooms when the program is beginning and concluding its year, and preparing for the winter break, is not representative of the environment during the program year. While ACF has made some adjustments for time of year, we believe strongly that children need to be in high-quality early childhood settings for the entire length of their day; thus, we will continue to conduct CLASS: Pre-K observations at any time throughout the day with the exception of naptime and outdoor unstructured free play. Since all programs will be observed at all points when they are operating, with the exception of nap time and outdoor free play, we are confident that this is a fair standard that will yield consistent results.

3. *Comment:* Many respondents raised concerns about the sampling methodology used to determine which classrooms would be observed. Respondents requested clarification on the ''subset of classrooms'' referenced as the sample in the NPRM and urged that the sample be statistically valid.

Response: ACF has worked with statisticians to develop a statistically sound methodology for sampling the center-based preschool classes of grantees that will be observed using CLASS: Pre-K. This methodology will select a random sample (subset) of each grantee's classes and that subset will be representative of the grantee. The sampling methodology ensures that a sufficient number of classes are selected from across the grantee's total classes; as a result, the resulting score will be generalizable to the grantee's total classes overall. This approach also was vetted through an external review process. For more information on ACF's sampling methodology, please reference the following link: *http://eclkc.ohs.acf.hhs.gov/hslc.* As noted previously, since ACF is implementing a significantly improved and more rigorous random sampling of each grantee's classes, determinations for designation renewal will be made based on the most recent CLASS: Pre-K observation, rather than the two most recent CLASS: Pre-K observations as was proposed in the NPRM.

VI. Paperwork Reduction Act

This rule establishes new information collection requirements in § 1307.4. As required by the Paperwork Reduction Act of 1995, codified at 44 U.S.C. 3507, ACF will submit a copy of these sections to the Office of Management and Budget (OMB) for review and they will not be effective until they have been approved and assigned a clearance number.

Requirement	Respondents	Annual	Average burden per respondent (hours)	Total burden hours
Per § 1307.4, Head Start and Early Head Start agencies must report in writing to the responsible HHS official within 30 working days of the effective date of this Part if the agency has had a revocation of a license to operate a center by a State or local licensing entity during the period between June 12, 2009 and the effective date of this Part.	20–40 grantees	1 hour or less	1 hour or less	20–40 hours.
Following the effective date of this Part, Head Start and Early Head Start agencies must report to ACF within 10 working days of occurrence of any of the following: (1) The agency has had a license to operate a center revoked by a State or local licensing entity. (2) The agency has filed for bankruptcy or agreed to a reorganization plan as part of a bankruptcy settlement. (3) The agency has been debarred from receiving Federal or State funds from any Federal or State agency or has been disqualified from The Child and Adult Care Food Program (CACFP). (4) The agency has received an audit, audit review, investigation or inspection report from the agency's auditor, a State agency, or the cognizant Federal audit agency containing a determination that the agency is at risk of failing to function as a going concern.				
Per section 1307.7(a) each Head Start or Early Head Start agency wishing to be renewed for five years without competition shall request that status from ACF.	1,600 grantees	1 hour or less	1 hour or less	1,600 hours.
Agencies required to compete will have to complete applications consistent with the criteria at 1307.5.	480 grantees	40 hours	40 hours	19,200 hours.

In the NPRM we estimated the costs of implementing these requirements to be approximately $481,000 annually across all 1,600 grantees. This estimate includes approximately $1,000 across all grantees and $480,000 across those grantees that are required to submit competitive applications.

We do not anticipate that Head Start agencies will be gathering new information to accomplish these changes. They only will be required to inform ACF if one of four events specified in § 1307.4 has occurred.

In the NPRM, ACF asked for public comments on collection of information in the following areas:

(a) Evaluating whether the proposed collection is necessary for the proper performance of the functions of ACF, including whether the information will have practical utility;

(b) Evaluating the accuracy of ACF's estimate of the proposed collection of information, including the validity of the methodology and the assumptions used;

(c) Enhancing the quality, usefulness, and clarity of the information to be collected; and

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

We received some comments regarding the reporting requirements proposed in § 1307.4, which explained the grantee reporting requirements concerning certain conditions. In the NPRM, we had proposed that Head Start agencies must report in writing to the designated ACF official within 10 working days of the occurrence any of the following events: (1) The agency has had a revocation of a license to operate a center by a State or local licensing entity; (2) the agency has filed for bankruptcy or agreed to a reorganization plan as part of a bankruptcy settlement; (3) the agency has been debarred from receiving Federal or State funds from any Federal or State department or agency or has been disqualified from the Child and Adult Care Food Program (CACFP); and (4) The agency has received an audit, audit review, investigation or inspection report from the agency's auditor, a State agency, or the cognizant Federal audit agency containing a determination that the agency is at risk for ceasing to be a going concern. The specific concerns with this

proposed provision included: That it was an undue burden on programs to provide this information, that ACF had not made clear what it intends to do with this information and why it requires agencies to report, that ACF had underestimated the cost to grantees of the reporting requirements, and that ACF should be able to collect this information. ACF has considered these comments and will maintain this provision in the final regulation requiring grantees to report to ACF on these four conditions. ACF believes that each of these conditions is a serious problem and that ACF should know about the occurrence as soon as possible so that appropriate action can be taken. The most efficient method for ACF to learn of these conditions is to require grantees to report them directly. As stated in the preamble to § 1307.4, the reporting timelines remain unchanged.

Commenters also stated that requiring grantees to apply to have their funding renewed without competition is burdensome to grantees and could result in programs not being considered if they miss the deadline to submit the paperwork. As indicated earlier in this preamble, while ACF appreciates the comments on this provision, we are unable to change this provision because of the statutory requirement at section 641(b) which states ''to be considered for designation renewal, an entity shall submit an application to the Secretary.'' ACF has tried to make this as least burdensome as possible and has modified the final rule to only require grantees to submit their intent once during the transition period and once during the five year grant period. Consistent with comments received on the burden of preparing applications for competitions, ACF has added an estimate of 40 hours of burden for the roughly one-third of grantees that will be required to compete. This has increased the burden estimate significantly.

VII. Regulatory Flexibility Act

The Secretary certifies that, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96–354), this rule will not result in a significant economic impact on a substantial number of small entities. The actions required of grantees to comply with the reporting, recordkeeping, and other requirements of this rule do not require significant expenditures of funds.

Specifically, as noted under the Paperwork Reduction Act section of this preamble, we estimate the cost of implementing new reporting requirements to be approximately $481,000 annually, which when applied to all 1,600 grantees nationally, results in a cost per grantee of less than $300. This reflects approximately $1,000 in reporting requirements across all grantees for the unusual events such as debarment or license revocation and the estimated 480,000 in costs associated with competitive applications for those grantees required to compete. As in the NPRM, this assumes that agencies would not be gathering any new information, since such information would have to be known to grantees in order to efficiently manage their programs. In addition, only a subset of the 1,600 grantees will be required to compete for renewal of a grant under these regulations. We estimate that roughly one-third of grantees reviewed in a review cycle will be affected by the regulation. Those grantees that need to compete for another five-year grant are required to submit an application. Since all grantees currently are required to submit a refunding application each year for their noncompetitive grant, there only will be an incremental increase in costs for grantees that must prepare and submit a competitive application. We estimate those costs to be less than $3,000 for each grantee submitting a competitive application. In developing this estimate, we assumed that it would take 40 hours for two senior level staff and one administrative staff person to complete a refunding application. Further, we assumed that grantees could spend more than twice as much time preparing this competitive application as they do on their regular annual refunding application.

These rules primarily are intended to ensure accountability for Federal funds consistent with the purposes of the Head Start Act, to ensure that communities receive the highest quality services available, and are not duplicative of other requirements. In developing this rule, we sought to implement the new and expanded requirements of the Head Start Act in a manner that does not impinge on a small entity's ability to design and manage effective and responsive Head Start programs. At the same time, we sought to focus renewed attention on strengthening accountability for Head Start programs and increasing program quality and improving outcomes for low-income families. We believe this rule implements the aims of the Head Start Act, as amended, to improve the effectiveness of Head Start programs while preserving Head Start grantees' abilities to continue using creativity and innovation to promote the school readiness of children from low-income families. In the NPRM, we had requested public comments on whether we have adequately considered all costs for small entities and achieved the balance described above. We received comments that we under-estimated the costs associated with the application. In response, we have increased the estimate significantly to assure we are adequately reflecting the potential costs.

VIII. Regulatory Impact Analysis

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 in particular emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department has determined that this rule is consistent with these priorities and principles.

These regulations primarily implement statutory changes to the Head Start program enacted in the Improving Head Start for School Readiness Act of 2007 (Pub. L. 110–134). ACF does not believe there will be a significant economic impact from this regulatory action. We estimate that roughly one-third of grantees reviewed in each review cycle will be affected by the regulation. The costs of implementation of these rules for the subset of grantees that would be required to compete in any year (estimated to be no more than $1,500 for each grantee), the total cost per year resulting from this regulation is well under $1 million. This rule has been designated a ''significant regulatory action'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

These regulations are also consistent with section 6 of Executive Order 13563, which directs agencies to engage in ''periodic review of existing significant regulations'' and to ''promote retrospective analysis of rules.'' These regulations grow out of a careful process of review and retrospective analysis, and hence are part of a general effort, in HHS and government-wide, to improve regulatory programs as a result of ''what has been learned.''

IX. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $136 million or more in any one year. If an agency must prepare a budgetary impact statement, section 205 requires that it select the most cost-effective and least burdensome alternative that achieves the objectives of the rule consistent with the statutory requirements. Section 203 requires a plan for informing and advising any small government that may be significantly or uniquely impacted. The Department has determined that this rule, in implementing the new statutory requirements, would not impose a mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than $136 million in any one year.

X. Congressional Review

This regulation is not a major rule as defined in 5 U.S.C. chapter 8.

XI. Executive Order 13132

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

XII. Treasury and General Government Appropriations Act of 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, ACF has concluded that it is not necessary to prepare a Family Policymaking Assessment.

List of Subjects in 45 CFR Part 1307

Education of disadvantaged, Grant programs—social programs.

(Catalog of Federal Domestic Assistance Programs Number 93.600, Head Start)

Dated: September 8, 2011.

George H. Sheldon,

Acting Assistant Secretary for Children and Families.

Approved: September 30, 2011.

Kathleen Sebelius,

Secretary.

For the reasons set forth in the preamble, we amend 45 CFR Chapter XIII by adding part 1307 to read as follows:

PART 1307—POLICIES AND PROCEDURES FOR DESIGNATION RENEWAL OF HEAD START AND EARLY HEAD START GRANTEES

Sec.

1307.1 Purpose and scope.
1307.2 Definitions.
1307.3 Basis for determining whether a Head Start agency will be subject to an open competition.
1307.4 Grantee reporting requirements concerning certain conditions.
1307.5 Requirements to be considered for designation for a five-year period when the existing grantee in a community is not determined to be delivering a high-quality and comprehensive Head Start program and is not automatically renewed.
1307.6 Tribal government consultation under the Designation Renewal System for when an Indian Head Start grant is being considered for competition.
1307.7 Designation request, review and notification process.
1307.8 Use of CLASS: Pre-K Instrument in the Designation Renewal System.

Authority: 42 U.S.C. 9801 *et seq.*

§ 1307.1 Purpose and scope.

The purpose of this Part is to set forth policies and procedures for the designation renewal of Head Start and Early Head Start programs. It is intended that these programs be administered effectively and responsibly; that applicants to administer programs receive fair and equitable consideration; and that the legal rights of current Head Start and Early Head Start grantees be fully protected. The Designation Renewal System is established in this Part to determine whether Head Start and Early Head Start agencies deliver high-quality services to meet the educational, health, nutritional, and social needs of the children and families they serve; meet the program and financial requirements and standards described in section 641A(a)(1) of the Head Start Act; and qualify to be designated for funding for five years without competing for such funding as required under section 641(c) of the Head Start Act with respect to Head Start agencies and pursuant to section 645A(b)(12) and (d) with respect to Early Head Start agencies. A competition to select a new Head Start or Early Head Start agency to replace a Head Start or Early Head Start agency that has been terminated voluntarily or involuntarily is not part of the Designation Renewal System established in this Part, and is subject instead to the requirements of part 1302.

§ 1307.2 Definitions.

As used in this Part—

ACF means the Administration for Children and Families in the Department of Health and Human Services.

Act means the Head Start Act, 45 U.S.C. 9831 *et seq.*

Agency means a public or private non-profit or for-profit entity designated by ACF to operate a Head Start or Early Head Start program.

Aggregate child-level assessment data means the data collected by an agency on the status and progress of the children it serves that have been combined to provide summary information about groups of children enrolled in specific classrooms, centers, home-based or other options, groups or settings, or other groups of children such as dual language learners, or to provide summary information by specific domains of development.

Child-level assessment data means the data collected by an agency on an individual child from one or more valid and reliable assessments of a child's status and progress, including but not limited to direct assessment, structured observations, checklists, staff or parent report measures, and portfolio records or work samples.

Early Head Start agency means a public or private non-profit or for-profit entity designated by ACF to operate an Early Head Start program to serve pregnant women and children from birth to age three, pursuant to section 645A(e) of the Head Start Act.

Going concern means an organization that operates *without* the threat of liquidation for the foreseeable future, a period of at least 12 months.

Head Start agency means a local public or private non-profit or for-profit entity designated by ACF to operate a Head Start program to serve children age three to compulsory school age, pursuant to section 641(b) and (d) of the Head Start Act.

School readiness goals mean the expectations of children's status and

progress across domains of language and literacy development, cognition and general knowledge, approaches to learning, physical well-being and motor development, and social and emotional development that will improve their readiness for kindergarten.

Transition period means the three-year time period after December 9, 2011, on the Designation Renewal System during which ACF will convert all of the current continuous Head Start and Early Head Start grants into five-year grants after reviewing each grantee to determine if it meets any of the conditions under section 1307.3 that require recompetition or if the grantee will receive its first five-year grant non-competitively.

§ 1307.3 Basis for determining whether a Head Start agency will be subject to an open competition.

A Head Start or Early Head Start agency shall be required to compete for its next five years of funding whenever the responsible HHS official determines that one or more of the following seven conditions existed during the relevant time period covered by the responsible HHS official's review under § 1307.7 of this part:

(a) An agency has been determined by the responsible HHS official to have one or more deficiencies on a single review conducted under section 641A(c)(1)(A), (C), or (D) of the Act in the relevant time period covered by the responsible HHS official's review under section 1307.7.

(b) An agency has been determined by the responsible HHS official based on a review conducted under section 641A(c)(1)(A), (C), or (D) of the Act during the relevant time period covered by the responsible HHS official's review under § 1307.7 not to have:

(1) After December 9, 2011, established program goals for improving the school readiness of children participating in its program in accordance with the requirements of section 641A(g)(2) of the Act and demonstrated that such goals:

(i) Appropriately reflect the ages of children, birth to five, participating in the program;

(ii) Align with the Head Start Child Development and Early Learning Framework, State early learning guidelines, and the requirements and expectations of the schools, to the extent that they apply to the ages of children, birth to five, participating in the program and at a minimum address the domains of language and literacy development, cognition and general knowledge, approaches toward learning, physical well-being and motor development, and social and emotional development;

(iii) Were established in consultation with the parents of children participating in the program.

(2) After December 9, 2011, taken steps to achieve the school readiness goals described under paragraph (b)(1) of this section demonstrated by:

(i) Aggregating and analyzing aggregate child-level assessment data at least three times per year (except for programs operating less than 90 days, which will be required to do so at least twice within their operating program period) and using that data in combination with other program data to determine grantees' progress toward meeting its goals, to inform parents and the community of results, and to direct continuous improvement related to curriculum, instruction, professional development, program design and other program decisions; and

(ii) Analyzing individual ongoing, child-level assessment data for all children birth to age five participating in the program and using that data in combination with input from parents and families to determine each child's status and progress with regard to, at a minimum, language and literacy development, cognition and general knowledge, approaches toward learning, physical well-being and motor development, and social and emotional development and to individualize the experiences, instructional strategies, and services to best support each child.

(c) An agency has been determined during the relevant time period covered by the responsible HHS official's review under § 1307.7:

(1) After December 9, 2011, to have an average score across all classrooms observed below the following minimum thresholds on any of the three CLASS: Pre-K domains from the most recent CLASS: Pre-K observation:

(i) For the Emotional Support domain the minimum threshold is 4;

(ii) For the Classroom Organization domain, the minimum threshold is 3;

(iii) For the Instructional Support domain, the minimum threshold is 2;

(2) After December 9, 2011, to have an average score across all classrooms observed that is in the lowest 10 percent on any of the three CLASS: Pre-K domains from the most recent CLASS: Pre-K observation among those currently being reviewed unless the average score across all classrooms observed for that CLASS: Pre-K domain is equal to or above the standard of excellence that demonstrates that the classroom interactions are above an exceptional level of quality. For all three domains, the ''standard of excellence'' is a 6.

(d) An agency has had a revocation of its license to operate a Head Start or Early Head Start center or program by a State or local licensing agency during the relevant time period covered by the responsible HHS official's review under § 1307.7 of this part, and the revocation has not been overturned or withdrawn before a competition for funding for the next five-year period is announced. A pending challenge to the license revocation or restoration of the license after correction of the violation shall not affect application of this requirement after the competition for funding for the next five-year period has been announced.

(e) An agency has been suspended from the Head Start or Early Head Start program by ACF during the relevant time period covered by the responsible HHS official's review under § 1307.7 of this part and the suspension has not been overturned or withdrawn. If there is a pending appeal and the agency did not have an opportunity to show cause as to why the suspension should not have been imposed or why the suspension should have been lifted if it had already been imposed under 45 CFR part 1303, the agency will not be required to compete based on this condition. If an agency has received an opportunity to show cause, the condition will be implemented regardless of appeal status.

(f) An agency has been debarred from receiving Federal or State funds from any Federal or State department or agency or has been disqualified from the Child and Adult Care Food Program (CACFP) any time during the relevant time period covered by the responsible HHS official's review under § 1307.7 of this part but has not yet been terminated or denied refunding by ACF. (A debarred agency will only be eligible to compete for Head Start funding if it receives a waiver described in 2 CFR 180.135.)

(g) An agency has been determined within the twelve months preceding the responsible HHS official's review under § 1307.7 of this part to be at risk of failing to continue functioning as a going concern. The final determination is made by the responsible HHS official based on a review of the findings and opinions of an audit conducted in accordance with section 647 of the Act; an audit, review or investigation by a State agency; a review by the National External Audit Review (NEAR) Center; or an audit, investigation or inspection by the Department of Health and Human Services Office of Inspector General:

§ 1307.4 Grantee reporting requirements concerning certain conditions.

(a) Head Start agencies must report in writing to the responsible HHS official within 30 working days of December 9, 2011, if the agency has had a revocation of a license to operate a center by a State of local licensing entity during the period between June 12, 2009, and December 9, 2011.

(b) Head Start agencies must report in writing to the responsible HHS official within 10 working days of occurrence any of the following events following December 9, 2011:

(1) The agency has had a revocation of a license to operate a center by a State or local licensing entity.

(2) The agency has filed for bankruptcy or agreed to a reorganization plan as part of a bankruptcy settlement.

(3) The agency has been debarred from receiving Federal or State funds from any Federal or State department or agency or has been disqualified from the Child and Adult Care Food Program (CACFP).

(4) The agency has received an audit, audit review, investigation or inspection report from the agency's auditor, a State agency, or the cognizant Federal audit agency containing a determination that the agency is at risk for ceasing to be a going concern.

§ 1307.5 Requirements to be considered for designation for a five-year period when the existing grantee in a community is not determined to be delivering a high-quality and comprehensive Head Start program and is not automatically renewed.

In order to compete for the opportunity to be awarded a five-year grant, an agency must submit an application to the responsible HHS official that demonstrates that it is the most qualified entity to deliver a high-quality and comprehensive Head Start or Early Head Start program. The application must address the criteria for selection listed at section 641(d)(2) of the Act for Head Start. Any agency that has had its Head Start or Early Head Start grant terminated for cause in the preceding five years is excluded from competing in such competition for the next five years. A Head Start or Early Head Start agency that has had a denial of refunding, as defined in 45 CFR 1303.2, in the preceding five years is also excluded from competing.

§ 1307.6 Tribal government consultation under the Designation Renewal System for when an Indian Head Start grant is being considered for competition.

(a) In the case of an Indian Head Start or Early Head Start agency determined not to be delivering a high-quality and comprehensive Head Start or Early Head Start program, the responsible HHS official will engage in government-to-government consultation with the appropriate Tribal government or governments for the purpose of establishing a plan to improve the quality of the Head Start program or Early Head Start program operated by the Indian Head Start or Indian Early Head Start agency.

(1) The plan will be established and implemented within six months after the responsible HHS official's determination.

(2) Not more than six months after the implementation of that plan, the responsible HHS official will reevaluate the performance of the Indian Head Start or Early Head Start agency.

(3) If the Indian Head Start or Early Head Start agency is still not delivering a high quality and comprehensive Head Start or Early Head Start program, the responsible HHS official will conduct an open competition to select a grantee to provide services for the community currently being served by the Indian Head Start or Early Head Start agency.

(b) A non-Indian Head Start or Early Head Start agency will not be eligible to receive a grant to carry out an Indian Head Start program, unless there is no Indian Head Start or Early Head Start agency available for designation to carry out an Indian Head Start or Indian Early Head Start program.

(c) A non-Indian Head Start or Early Head Start agency may receive a grant to carry out an Indian Head Start program only until such time as an Indian Head Start or Indian Early Head Start agency in such community becomes available and is designated pursuant to this Part.

§ 1307.7 Designation request, review and notification process.

(a) Grantees must apply to be considered for Designation Renewal

(1) For the transition period, each Head Start or Early Head Start agency wishing to be considered to have their designation as a Head Start or Early Head Start agency renewed for a five year period without competition shall request that status from ACF within six months of December 9, 2011.

(2) After the transition period, each Head Start or Early Head Start agency wishing to be considered to have their designation as a Head Start or Early Head Start agency renewed for another five year period without competition shall request that status from ACF at least 12 months before the end of their five year grant period or by such time as required by the Secretary.

(b) ACF will review the relevant data to determine if one or more of the conditions under § 1307.3 of this part were met by the Head Start and Early Head Start agency's program:

(1) During the first year of the transition period, ACF shall review the data on each Head Start and Early Head Start agency to determine if any of the conditions under § 1307.3(a) or (d) through (g) of this part were met by the agency's program since June 12, 2009.

(2) During the remainder of the transition period, ACF shall review the data on each Head Start and Early Head Start agency still under grants with indefinite project periods and for whom ACF has relevant data on all of the conditions in § 1307.3(a) through (g) of this part to determine if any of the conditions under § 1307.3(a) or (d) through (g) were met by the agency's program since June 12, 2009, or if the conditions under § 1307.3(b) or (c) existed in the agency's program since December 9, 2011.

(3) Following the transition period, ACF shall review the data on each Head Start and Early Head Start agency in the fourth year of the grant to determine if any of the conditions under § 1307.3 of this partexisted in the agency's program during the period of that grant.

(c) ACF will give notice to grantees on Designation Renewal System status, except as provided in § 1307.6 of this part:

(1) During the first year of the transition period, ACF shall give written notice to all grantees meeting any of the conditions under § 1307.3(a) or (d) through (g) of this part since June 12, 2009, by certified mail return receipt requested or other system that establishes the date of receipt of the notice by the addressee, stating that the Head Start or Early Head Start agency will be required to compete for funding for an additional five-year period, identifying the conditions ACF found, and summarizing the basis for the finding. All grantees that do not meet any of the conditions under § 1307.3(a) or (d) thorugh (g) will remain under indefinite project periods until the time period described under § 1307.7(b)(2).

(2) During the remainder of the transition period, ACF shall give written notice to all grantees still under grants with indefinite project periods and on the conditions in § 1307.3(a) through (g) by certified mail return receipt requested or other system that establishes the date of receipt of the notice by the addressee stating either:

(i) The Head Start or Early Head Start agency will be required to compete for funding for an additional five-year period because ACF finds that one or more conditions under § 1307.3(a) through (g) has been met during the

relevant time period described in paragraph (b) of this section, identifying the conditions ACF found, and summarizing the basis for the finding; or

(ii) That such agency has been determined on a preliminary basis to be eligible for renewed funding for five years without competition because ACF finds that none of the conditions under § 1307.3 of this part have been met during the relevant time period described in paragraph (b) of this section. If prior to the award of that grant, ACF determines that the grantee has met one of the conditions under § 1307.3 during the relevant time period described in paragraph (b) of this section, this determination will change and the grantee will receive notice under paragraph (c)(2)(i) of this section that it will be required to compete for funding for an additional five-year period.

(3) Following the transition period, ACF shall give written notice to all grantees at least 12 months before the expiration date of a Head Start or Early Head Start agency's then current grant by certified mail return receipt requested or other system that establishes the date of receipt of the notice by the addressee, stating:

(i) The Head Start or Early Head Start agency will be required to compete for funding for an additional five-year period because ACF finds that one or more conditions under § 1307.3 of this part were met by the agency's program during the relevant time period described in paragraph (b) of this section, identifying the conditions ACF found, and summarizing the basis for the finding; or

(ii) That such agency has been determined on a preliminary basis to be eligible for renewed funding for five years without competition because ACF finds that none of the conditions under § 1307.3 have been met during the relevant time period described in paragraph (b) of this section. If prior to the award of that grant, ACF determines that the grantee has met one of the conditions under § 1307.3 during the relevant time period described in paragraph (b) of this section, this determination will change and the grantee will receive notice under paragraph (c)(3)(i) of this section that it will be required to compete for funding for an additional five-year period.

§ 1307.8 Use of CLASS: Pre-K Instrument in the Designation Renewal System.

Except when all children are served in a single classroom, ACF will conduct observations of multiple classes operated by the grantee based on a random sample of all classes and rate the conduct of the classes observed using the CLASS: Pre-K instrument. When the grantee serves children in its program in a single class, that class will be observed and rated using the CLASS: Pre-K instrument. The domain scores for that class will be the domain scores for the grantee for that observation. After the observations are completed, ACF will report to the grantee the scores of the classes observed during the CLASS: Pre-K observations in each of the domains covered by the CLASS: Pre-K instrument. ACF will average CLASS: Pre-K instrument scores in each domain for the classes operated by the agency that ACF observed to determine the agency's score in each domain.

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Part VIII

The President

Notice of November 7, 2011—Continuation of the National Emergency With Respect to Iran

Federal Register
Vol. 76, No. 217
Wednesday, November 9, 2011

Presidential Documents

Title 3—

The President

Notice of November 7, 2011

Continuation of the National Emergency With Respect to Iran

On November 14, 1979, by Executive Order 12170, the President declared a national emergency with respect to Iran, pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706), to deal with the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States constituted by the situation in Iran. Because our relations with Iran have not yet returned to normal, and the process of implementing the agreements with Iran, dated January 19, 1981, is still under way, the national emergency declared on November 14, 1979, must continue in effect beyond November 14, 2011. Therefore, consistent with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year this national emergency with respect to Iran.

This notice shall be published in the *Federal Register* and transmitted to the Congress.

THE WHITE HOUSE,
November 7, 2011.

[FR Doc. 2011–29256
Filed 11–8–11; 11:15 am]
Billing code 3295–F2–P

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H.R. 489/P.L. 112–45

To clarify the jurisdiction of the Secretary of the Interior with respect to the C.C. Cragin Dam and Reservoir, and for other purposes. (Nov. 7, 2011; 125 Stat. 535)

H.R. 765/P.L. 112–46

Ski Area Recreational Opportunity Enhancement Act of 2011 (Nov. 7, 2011; 125 Stat. 538)

H.R. 1843/P.L. 112–47

To designate the facility of the United States Postal Service located at 489 Army Drive in Barrigada, Guam, as the "John Pangelinan Gerber Post Office Building". (Nov. 7, 2011; 125 Stat. 541)

H.R. 1975/P.L. 112–48

To designate the facility of the United States Postal Service located at 281 East Colorado Boulevard in Pasadena, California, as the "First Lieutenant Oliver Goodall Post Office Building". (Nov. 7, 2011; 125 Stat. 542)

H.R. 2062/P.L. 112–49

To designate the facility of the United States Postal Service located at 45 Meetinghouse Lane in Sagamore Beach, Massachusetts, as the "Matthew A. Pucino Post Office". (Nov. 7, 2011; 125 Stat. 543)

H.R. 2149/P.L. 112–50

To designate the facility of the United States Postal Service located at 4354 Pahoa Avenue in Honolulu, Hawaii, as the "Cecil L. Heftel Post Office Building". (Nov. 7, 2011; 125 Stat. 544)

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