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Washington, DC 20002

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Federal Register

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0533; Directorate Identifier 2011–NE–16–AD; Amendment 39–16948; AD 2012–03–07]

RIN 2120–AA64

Airworthiness Directives; Lycoming Engines Reciprocating Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Lycoming Engines reciprocating engines. This AD was prompted by a report of a ''machined-from-billet'' HA–6 carburetor having a loose mixture control sleeve that rotated in the carburetor body causing restriction of fuel and power loss. This AD requires removing certain ''machined-from-billet'' Volare LLC (formerly Precision Airmotive Corporation, formerly Facet Aerospace Products Company, formerly Marvel-Schebler (BorgWarner)) HA–6 carburetors, inspecting for a loose mixture control sleeve or for a sleeve that may become loose, repairing the carburetor, or replacing the carburetor with one eligible for installation. We are issuing this AD to prevent engine in-flight shutdown, power loss, and reduced control of the airplane.

DATES: This AD is effective March 27, 2012.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of March 27, 2012.

ADDRESSES: For service information identified in this AD, contact Marvel-Schebler Aircraft Carburetors LLC, 125 Piedmont Avenue, Gibsonville NC 27249; phone: 336–446–0002; fax: 336–446–0007; email: *customerservice@msacarbs.com;* Web site: *www.msacarbs.com.* You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Kevin Brane, Aerospace Engineer, Propulsion, Atlanta Aircraft Certification Office, FAA, Small Airplane Directorate; 1701 Columbia Avenue, College Park, Georgia 30337; phone: 404–474–5582; fax: 404–474–5606; email: *kevin.brane@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM published in the **Federal Register** on September 1, 2011 (76 FR 54397). That NPRM proposed to require removing certain ''machined-from-billet'' Volare LLC (formerly Precision Airmotive Corporation, formerly Facet Aerospace Products Company, formerly Marvel-Schebler (BorgWarner)) HA–6 carburetors, inspecting for a loose mixture control sleeve or for a sleeve that may become loose, repairing the carburetor, or replacing the carburetor with one eligible for installation.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comment received on the proposal and the FAA's response.

Request To Incorporate All Affected Engine Models

One commenter, a private citizen, requested that we incorporate all affected engine models with HA–6 model carburetors installed in the AD. The commenter provided a list, which he compiled from reviewing all applicable published Type Certificate Data Sheets (TCDS).

We partially agree. We agree that some additional models are affected because the list provided by the commenter is mostly consistent with the applicable TCDS. We do not agree with the commenter on some of the models he thinks are affected, because we could not confirm they are affected, based on the TCDS. However, we determined that we need to change the applicability from a table of specific engine models, to all Lycoming Engines reciprocating engines with carburetor part numbers listed in Table 1 of the AD. We changed the AD applicability to all Lycoming Engines reciprocating engines with carburetor part numbers listed in Table 1 of the AD.

Change to the Alternative Methods of Compliance (AMOC) Paragraph

Since we issued the proposed AD, we found that we referenced the wrong office in the AMOC paragraph. We changed that sentence to state that the Manager, Atlanta Aircraft Certification Office, FAA, may approve AMOCs for this AD.

Change to Service Information

Marvel-Schebler Aircraft Carburetors LLC has revised their Marvel-Schebler Emergency Service Bulletin (SB) No. SB–18, dated October 14, 2010, to Revision A, dated March 15, 2011. We reviewed Revision A, and determined that it also is acceptable. We changed the incorporated by reference paragraph k of the AD to include the original issue and Revision A.

Conclusion

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

Costs of Compliance

We estimate that this AD affects 10,700 engines installed on aircraft of U.S. registry. We also estimate that it will take about 0.5 work-hours per aircraft to perform the inspection, and that about 409 carburetors will need repair. Approximately 2 work-hours per carburetor are required to repair the carburetor. The average labor rate is $85 per work-hour. Required parts will cost about $600 per carburetor. Based on these figures, we estimate the cost of the AD on U.S. operators to be $769,680. Our estimate is exclusive of possible warranty coverage.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

(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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2012–03–07 Lycoming Engines (formerly Textron Lycoming Division, AVCO Corporation): Amendment 39–16948; Docket No. FAA–2011–0533; Directorate Identifier 2011–NE–16–AD.

(a) Effective Date

This AD is effective March 27, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Lycoming Engines reciprocating engines with carburetor part numbers listed in Table 1 of this AD.

TABLE 1—PART NUMBERS (INCLUDING ALL DASH NUMBERS) OF KNOWN AFFECTED HA–6 MODEL CARBURETORS

10–5219–XX	10–5224–XX	10–5230–XX	10–5235–XX	10–5253–XX
10–5255–XX	10–5283–XX	10–6001–XX	10–6019–XX	10–6030–XX

(d) Unsafe Condition

This AD was prompted by a report of a ''machined-from-billet'' HA–6 carburetor having a loose mixture control sleeve that rotated in the carburetor body causing restriction of fuel and power loss. We are issuing this AD to prevent engine in-flight shutdown, power loss, and reduced control of the airplane.

(e) Compliance

Comply with this AD within 50 flight hours after the effective date of this AD, unless already done.

(f) Inspection

Inspect the carburetor to determine the type of body the carburetor has. Use Marvel-Schebler Emergency Service Bulletin (SB) No. SB–18, dated October 14, 2010, or Revision A, dated March 15, 2011, Figure (3) to determine which type of body is used.

(g) If the carburetor has a die-cast body, no further action is required.

(h) If the carburetor has an affected ''machined-from-billet'' body, remove the carburetor; and replace the carburetor with:

(1) An HA–6 carburetor not listed in Table 1 of this AD; or

(2) An HA–6 carburetor that is listed in Table 1 but is exempted as described in paragraphs 1.A. and 1.B of Marvel-Schebler Emergency SB No. SB–18, dated October 14, 2010 or Revision A, dated March 15, 2011; or that has already been repaired using that Emergency SB.

(i) Alternative Methods of Compliance (AMOCs)

The Manager, Atlanta Aircraft Certification Office, FAA, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(j) Related Information

For more information about this AD, contact Kevin Brane, Aerospace Engineer, Propulsion, Atlanta Aircraft Certification Office, FAA, Small Airplane Directorate; 1701 Columbia Avenue, College Park, Georgia 30337; phone: (404) 474–5582; fax: (404) 474–5606; email: *kevin.brane@faa.gov.*

(k) Material Incorporated by Reference

(1) You must use the following service information to do the actions required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference (IBR) under 5 U.S.C. 552(a) and 1 CFR part 51 of the following service information:

(i) Marvel-Schebler Emergency Service Bulletin No. SB–18, dated October 14, 2010.

(ii) Marvel-Schebler Emergency Service Bulletin No. SB–18, Revision A, dated March 15, 2011.

(2) For service information identified in this AD, contact Marvel-Schebler Aircraft Carburetors LLC, 125 Piedmont Avenue, Gibsonville, NC 27249; phone: 336–446–0002; fax: 336–446–0007; email: *customerservice@msacarbs.com;* Web site: *www.msacarbs.com.*

(3) You may review copies of the service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

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

Issued in Burlington, Massachusetts, on February 1, 2012.

Peter A. White,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2012–3862 Filed 2–17–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–0783; Airspace Docket No. 11–ANM–16]

Amendment of Class D and Class E Airspace, and Establishment of Class E Airspace; Bozeman, MT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies Class D and Class E airspace at Bozeman, Gallatin Field Airport, Bozeman, MT, to accommodate aircraft using Instrument Landing System (ILS) Localizer (LOC) standard instrument approach procedures at Bozeman, Gallatin Field Airport. This action also establishes Class E En Route Domestic airspace to facilitate vectoring of Instrument Flight Rules (IFR) operations at the airport. This action, initiated by the biennial review of the Bozeman airspace area, enhances the safety and management of aircraft operations at the airport.

DATES: Effective date, 0901 UTC, May 31, 2012. 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 November 16, 2011, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend and establish controlled airspace at Bozeman, MT (76 FR 70919). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class D and Class E airspace designations are published in paragraph 5000, 6005 and 6006, respectively, 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 D and 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 D airspace, and Class E airspace extending upward from 700 feet above the surface at Bozeman, Gallatin Field Airport, Bozeman, MT. Additional controlled airspace is necessary to accommodate aircraft using the ILS LOC standard instrument approach procedures at the airport. Also, this action establishes Class E En Route Domestic airspace extending upward from 1,200 feet above the surface to allow vectoring IFR aircraft from En Route airspace to the airport.

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 Bozeman, Gallatin Field Airport, Bozeman, MT.

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 5000 Class D airspace.

* * * * *

ANM MT D Bozeman, MT [Modified]

Bozeman, Gallatin Field Airport, MT
(Lat. 45°46′39″ N., long. 111°09′07″ W.)

That airspace extending upward from the surface to and including 7,000 feet MSL within a 5.4-mile radius of Bozeman, Gallatin Field Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

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

* * * * *

ANM MT E5 Bozeman, MT [Modified]

Bozeman, Gallatin Field Airport, MT
(Lat. 45°46′39″ N., long. 111°09′07″ W.)

That airspace extending upward from 700 feet above the surface within a 13.5-mile radius of Bozeman, Gallatin Field Airport, and within 8 miles northeast and 13 miles southwest of the 316° bearing of the airport extending from the 13.5-mile radius to 24.4 miles northwest of the airport.

Paragraph 6006 En route domestic airspace areas.

* * * * *

ANM MT E6 Bozeman, MT [New]

Bozeman, Gallatin Field Airport, MT
(Lat. 45°46′39″ N., long. 111°09′07″ W.)

That airspace extending upward from 1,200 feet above the surface within a 50-mile radius of the Bozeman, Gallatin Field Airport; excluding existing lateral limits of controlled airspace 12,000 feet MSL and above.

Issued in Seattle, Washington, on February 10, 2012.

John Warner,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2012–3815 Filed 2–17–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–0010; Airspace Docket No. 11–AAL–1]

RIN 2120–AA66

Amendment of Federal Airways; Alaska

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; technical amendment.

SUMMARY: This technical amendment corrects a final rule published in the **Federal Register** of April 28, 2011; subsequently delayed in the **Federal Register** of June 16, 2011; and announced with a new effective date in the **Federal Register** of December 9, 2011. In that rule, the route description of VHF Omnidirectional Range (VOR) Federal airway V–388 was inadvertently reversed. This technical amendment corrects that error.

DATES: Effective date 0901 UTC February 21, 2012. 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: Colby Abbott, Airspace, Regulations, and ATC Procedures Group, Office of Mission Support Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

History

On April 28, 2011, the FAA published a final rule in the **Federal Register**, Docket No. FAA–2011–0010, Airspace Docket No. 11–AAL–1, that amended Title 14 Code of Federal Regulations part 71 by amending all Federal airways affected by the relocation of the Anchorage VOR navigation aid, (76 FR 23687). Subsequent to that rule, the FAA published in the **Federal Register** of June 16, 2011, a rule delaying the effective date (76 FR 35097), and then published in the **Federal Register** of December 9, 2011, a rule announcing the new effective date (76 FR 76891). In that rule, the route description for V–388 was published in an east to west direction in error. The correct direction for the route description for V–388 is west to east.

Amendment to Final Rule

Accordingly, pursuant to the authority delegated to me, the legal descriptions for V–388 for Airspace Docket No. FAA–2011–0010, Airspace Docket No. 11–AAL–1, as published in the **Federal Register** on April 28, 2011 (76 FR 23687), is corrected as follows:

■ On page 23688, column 2, lines 10 and 11, amend the V–388 description to read:

§ 71.1 [Amended]

* * * * *

''From Kenai, AK; INT Kenai 067°and Anchorage, AK, 208° radials; to Anchorage.'' instead of ''From Anchorage, AK, to INT Anchorage 208°and Kenai, AK, 067° Kenai, AK.''

Issued in Washington, DC, on February 9, 2012.

Gary A. Norek,

Acting Manager, Airspace, Regulations, and ATC Procedures Group.

[FR Doc. 2012–3816 Filed 2–17–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–1191; Airspace Docket No. 11–ANM–21]

Amendment of Class E Airspace; Colorado Springs, CO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace at City of Colorado Springs Municipal Airport, Colorado Springs, CO. Decommissioning of the Black Forest Tactical Air Navigation System (TACAN) has made this action necessary for the safety and management of Instrument Flight Rules (IFR) operations at the airport. This action also adjusts the geographic coordinates of the airport.

DATES: Effective date, 0901 UTC, May 31, 2012. 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 November 16, 2011, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend controlled airspace at Colorado Springs, CO (76 FR 70920). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6003, 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 amending Class E airspace designated as an extension to Class C airspace area for the City of Colorado Springs Municipal Airport, Colorado Springs, CO. Airspace reconfiguration is necessary due to the decommissioning of the Black Forest TACAN. Also, the geographic coordinates of the airport will be updated to coincide with the FAA's aeronautical database. This action is necessary for the safety and management of IFR operations.

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 amends controlled airspace at City of Colorado Springs Municipal Airport, Colorado Springs, CO.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

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

Paragraph 6003 Class E airspace designated as an extension to class C surface areas.

* * * * *

ANM CO E3 Colorado Springs, CO [Amended]

City of Colorado Springs Municipal Airport, CO

(Lat. 38°48′21″ N., long. 104°42′03″ W.)

That airspace extending upward from the surface within 2.4 miles northwest and 1.2 miles southeast of the City of Colorado Springs Municipal Airport 025° bearing extending from the 5-mile radius of the airport to 8.9 miles northeast, and within 1.4 miles each side of the airport 360° bearing extending from the 5-mile radius of the airport to 7.7 miles north of the airport.

Issued in Seattle, Washington, on February 7, 2012.

John Warner,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2012–3827 Filed 2–17–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–1193; Airspace Docket No. 11–ANM–14]

Modification of Area Navigation Route T–288; WY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies area navigation (RNAV) route T–288 by extending the route westward from the Rapid City, SD, VORTAC to the Gillette, WY, VOR/DME. This extension enhances the efficiency and safety of the National Airspace System (NAS) by supplementing the existing VOR Federal airway structure in that area.

DATES: *Effective Dates:* 0901 UTC, April 5, 2012. 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: Paul Gallant, Airspace, Regulations and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

History

On December 6, 2011, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to modify RNAV route T–288 by adding a new segment between the Rapid City, SD, VORTAC (RAP) and the Gillette, WY, VOR/DME (GCC) (76 FR 76070). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. No comments were received.

In the NPRM, the state designation (WY) for the KARAS intersection was inadvertently omitted from the route description. With the exception of that editorial change, this amendment is the same as that proposed in the NPRM.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 to modify RNAV route T–288 by adding a new segment between the Rapid City, SD, VORTAC and the Gillette, WY, VOR/DME. The extension supplements the existing VOR Federal airway structure to provide alternative routing between Gillette and Rapid City in the event of navigation aid outages.

RNAV routes are published in paragraph 6011 of FAA Order 7400.9V signed August 9, 2011 and effective September 15, 2011, which is incorporated by reference in 14 CFR 71.1. The jet route listed in this document will be published subsequently in the Order.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it expands RNAV route coverage to enhance the safe and efficient flow of traffic in the western United States.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures,'' paragraph 311a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

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 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 FAA Order 7400.9V, Airspace Designations and Reporting Points, dated August 9, 2011 and effective September 15, 2011, is amended as follows:

Paragraph 6011 United States area navigation routes.

* * * * *

T–288 Gillette, WY (GCC) to Wolbach, NE (OBH) [Amended]

Gillette, WY (GCC) VOR/DME
(Lat. 44°20′52″ N., long. 105°32′37″ W.)
KARAS, WY INT
(Lat. 44°16′23″ N., long. 104°18′50″ W.)
Rapid City, SD (RAP) VORTAC
(Lat. 43°58′34″ N., long. 103°00′42″ W)
WNDED, SD WP
(Lat. 43°19′14″ N., long. 101°32′19″ W.)
Valentine, NE (VTN) NDB
(Lat. 42°51′42″ N., long. 100°32′59″ W.)
Ainsworth, NE (ANW) VOR/DME
(Lat. 42°34′09″ N., long. 99°59′23″ W.)
FESNT, NE WP
(Lat. 42°03′57″ N., long. 99°17′18″ W.)
Wolbach, NE (OBH) VORTAC
(Lat. 41°22′33″ N., long. 98°21′13″ W.)

Issued in Washington, DC, on February 2, 2012.

Gary A. Norek,

Acting Manager, Airspace, Regulations and ATC Procedures Group.

[FR Doc. 2012–3813 Filed 2–17–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 292

[Docket No. RM09–23–000]

Revisions to Form, Procedures and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule; correcting amendment.

SUMMARY: This document contains corrections to the final regulations (Docket No. RM09–23–000) which were published in the **Federal Register** of Tuesday, March 30, 2010 (75 FR 15950). The final rule document adopted revisions to FERC Form 556 and to Commission procedures and criteria for the certification of qualifying status for a small power production or cogeneration facility.

DATES: *Effective date:* February 21, 2012.

FOR FURTHER INFORMATION CONTACT: S.L. Higginbottom (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Telephone: 202–502–8561, Email: *samuel.higginbottom@ferc.gov.*

SUPPLEMENTARY INFORMATION: The final regulations that are the subject of these regulations amended 18 CFR 292.602(c) and affect the Commission's grant of exemption of qualifying small power production facilities and cogeneration facilities from certain Federal and State laws and regulations.

As published, the final regulations contained errors which involved the removal of subparagraphs from 18 CFR 292.602(c)(1). These subparagraphs contain critical information concerning which state laws apply to qualifying small power production facilities and qualifying cogeneration facilities.

List of Subjects in 18 CFR Part 292

Electric power, Electric power plants, Electric utilities.

Kimberly D. Bose,

Secretary.

Accordingly, 18 CFR part 292 is corrected by making the following correcting amendment:

Subchapter K—Regulations Under the Public Utility Regulatory Policies Act of 1978

PART 292—REGULATIONS UNDER SECTION 201 AND 210 OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978 WITH REGARD TO SMALL POWER PRODUCTION AND COGENERATION

■ 1. The authority citation for part 292 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. Section 292.602(c) is amended by adding paragraphs (c)(1)(i) and (c)(1)(ii) to read as follows:

§ 292.602 Exemption to qualifying facilities from the Public Utility Holding Company Act of 2005 and certain State laws and regulations.

* * * * *

(c) * * *
(1) * * *
(i) The rates of electric utilities; and
(ii) The financial and organizational regulation of electric utilities.

* * * * *

[FR Doc. 2012–3811 Filed 2–17–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. FDA–2000–P–0102 (formerly 2000P–1275), FDA–2000–P–0133 (formerly 2000P–1276), and FDA–2006–P–0033 (formerly 2006P–0316)]

Health Claim; Phytosterols and Risk of Coronary Heart Disease

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification; extension of enforcement discretion.

SUMMARY: The Food and Drug Administration (FDA) is extending the period of time that it intends to exercise enforcement discretion concerning the use of the health claim for phytosterols and risk of coronary heart disease (CHD), in a manner that is consistent with FDA's February 14, 2003, letter of enforcement discretion to Cargill Health and Food Technologies, until publication of a final rule.

DATES: Submit either electronic or written comments by April 23, 2012.

ADDRESSES: Submit electronic comments to *http://www.regulations.gov.* Submit written

comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Blakeley Fitzpatrick, Center for Food Safety and Applied Nutrition (HFS–830), 5100 Paint Branch Pkwy., College Park, MD 20740, 240–402–1450.

SUPPLEMENTARY INFORMATION: For the reasons described herein, FDA intends to continue to exercise enforcement discretion with respect to the use of a health claim regarding reduced risk of coronary heart disease (CHD) for phytosterol-containing conventional food and dietary supplements, in a manner that is consistent with FDA's February 14, 2003, letter of enforcement discretion to Cargill Health and Food Technologies, until publication of a final rule.

I. Regulatory History

In the **Federal Register** of September 8, 2000 (65 FR 54686), FDA issued an interim final rule (IFR) authorizing a health claim for plant sterol/stanol esters and CHD. Among other requirements, we established in the IFR that spreads and dressings for salads must contain at least 0.65 grams (g) of plant sterol esters per reference amount customarily consumed (RACC) to be eligible to bear the health claim and that spreads, dressings for salad, snack bars, and dietary supplements in soft gel form must contain at least 1.7 g of plant stanol esters per RACC to be eligible to bear the health claim.

FDA received a letter, dated January 6, 2003, from Cargill Health and Food Technologies requesting that FDA issue a letter stating its intention not to enforce certain requirements in the IFR. The letter cited new scientific evidence and comments submitted to FDA in the plant sterol/stanol esters health claim rulemaking in support of extending the authorized health claim to all forms and sources of phytosterols and product forms that might effectively reduce blood cholesterol levels. In response to the letter submitted by Cargill and other comments received to the IFR, we issued a letter of enforcement discretion on February 14, 2003 (the 2003 letter) (Ref. 1). In the letter, we explained that we would consider exercising enforcement discretion, pending publication of the final rule, with respect to certain requirements of the health claim. Specifically, we stated we would consider such discretion with regard to the use of the claim in the labeling of a phytosterol-containing food, including foods other than those specified in § 101.83(c)(2)(iii)(A) (21 CFR 101.83(c)(2)(iii)(A)), if: (1) The food contains at least 400 milligrams (mg) per RACC of phytosterols; (2) mixtures of phytosterol substances (i.e., mixtures of sterols and stanols) contain at least 80-percent beta-sitosterol, campesterol, stigmasterol, sitostanol, and campestanol (combined weight); (3) the food meets the requirements of § 101.83(c)(2)(iii)(B) through (c)(2)(iii)(D); (4) products containing phytosterols, including mixtures of sterols and stanols in free (non-esterified) forms, use a collective term in lieu of the terms required by § 101.83(c)(2)(i)(D) in the health claim to describe the substance (e.g., ''plant sterols'' or ''phytosterol''); (5) the claim specifies that the daily dietary intake of phytosterols that may reduce the risk of CHD is 800 mg or more per day, expressed as the weight of free Phytosterol; (6) vegetable oils for home use that exceed the total fat disqualifying level can bear the health claim along with a disclosure statement that complies with § 101.13(h); and (7) the use of the claim otherwise complies with § 101.83. Thus, the 2003 letter described intended enforcement discretion with respect to: (1) Different forms and mixtures of phytosterols in a wider variety of products and (2) the use of the claim on foods containing lower levels of phytosterols than set forth in the IFR.

In the **Federal Register** of December 8, 2010 (75 FR 76526), we published a proposed rule that, if finalized, would amend § 101.83 (the 2010 proposed rule). The 2010 proposed rule, in part, responds to a health claim petition we received on May 5, 2006, and it also includes the evaluation of new scientific data that was not available when we published the IFR.

We stated in the 2010 proposed rule for phytosterols and the risk of CHD health claim that, pending publication of a final rule, FDA intends to consider the exercise of its enforcement discretion on a case-by-case basis when a health claim regarding phytosterols and CHD is made in a manner that is consistent with the proposed rule (75 FR 76526 at 76546).

The 2010 proposed rule also stated that, beginning 75 days after the date of publication of the proposed rule (February 21, 2011), FDA did not intend to exercise its enforcement discretion based on the 2003 letter (75 FR 76526 at 76546). We stated that starting on February 21, 2011, all products bearing the health claim would have to be in compliance with § 101.83, or if health claims were made in a manner consistent with the proposed rule, we would consider exercising enforcement discretion pending publication of a final rule.

In the 2010 proposed rule, we proposed to make several changes to the requirements for the nature of the food eligible to bear the claim that differ from the requirements in current § 101.83 and from the basis for enforcement discretion in the 2003 letter. Among other changes, FDA proposed to increase the amount of phytosterols that must be present in the food product from 0.4 to 0.5 g of phytosterols per RACC and to only allow the use of the claim in dietary supplements containing the esterified form of phytosterols. In addition, we proposed that a conventional food would be eligible to bear the claim if it is the subject of a GRAS notification to which FDA had no further questions.

After publication of the proposed rule, we received requests from industry to extend the 75-day period from the date of publication of the proposed rule for the exercise of FDA enforcement discretion based on the 2003 letter. We subsequently issued a notice in the **Federal Register** of February 18, 2011, extending the period during which we intended to exercise enforcement discretion based on the 2003 letter to February 21, 2012 (76 FR 9525) (the February 18, 2011 notice).[1]

In the February 18, 2011 notice, FDA stated that it intended to exercise enforcement discretion until February 21, 2012, with respect to the use of a claim regarding reduced risk of CHD in the labeling of a phytosterol-containing food, including foods other than those specified in § 101.83(c)(2)(iii)(A), based on the factors set forth in the 2003 letter for the use of such claim in the labeling of food. FDA also stated that the February 18, 2011 notice did not change how we intend to consider exercising our enforcement discretion when claims are made consistent with the proposed requirements in the proposed rule, and that our decision to extend the period of time during which we would consider the exercise of our enforcement discretion only related to FDA's enforcement discretion based on the 2003 letter.

II. Current Extension of Intent To Exercise Enforcement Discretion

Since publication of the February 18, 2011, notice, we have received two

[1] In the February 18, 2011, notice, we identified two letters (from the Council for Responsible Nutrition and the Consumer Healthcare Products Association) and two petitions for an administrative stay of action (from Cargill, Inc., and Pharmachem Laboratories, Inc.). These two petitions are under FDA consideration and neither the February 18, 2011 notice, nor this notice, represents a decision on the petitions, in whole or in part.

additional petitions; one requesting an administrative stay of action with an embedded citizen petition and the other requesting an administrative stay of action. Each of the requests for an administrative stay of action concern FDA's use of enforcement discretion related to labeling of dietary supplements, pending the publication of a final rule.[2] In addition, FDA received numerous comments on the 2010 proposed rule requesting that FDA extend the period of enforcement discretion based on the 2003 letter until publication of a final rule. FDA has received new scientific data and information, through comments to the 2010 proposed rule, or submitted with petitions, relating to several of the factors we set forth in the 2003 letter, e.g., the possible health benefit of free phytosterols in dietary supplements and the minimum daily consumption amount of phytosterols necessary to achieve the claimed effect. We are reviewing the comments and information we received and do not intend to make a determination as to the daily phytosterols consumption amount needed to achieve the claimed effect or the eligibility of dietary supplements containing free phytosterols to bear the authorized health claim until the publication of the final rule.

Based on the new data and information currently under our review that may be important, to our consideration in deciding what requirements to include in the final rule, and the need to focus FDA's resources on other public health priorities, we find it appropriate to continue to extend our consideration of the exercise of enforcement discretion for the labeling of foods, including dietary supplements, bearing a health claim regarding phytosterols and risk of CHD consistent with the 2003 letter, until publication of the final rule.

Therefore, FDA is extending the period during which it intends to exercise enforcement discretion, consistent with the factors set forth in the 2003 letter, until publication of a final rule for the phytosterols and risk of CHD health claim. This document does not change how FDA intends to consider exercising its enforcement discretion when claims are made consistent with the proposed requirements in the proposed rule. Food, including dietary supplements, bearing the health claim would be required to comply with any revised requirements established in the final rule when the final rule becomes effective.

III. Reference

The following reference has been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m. Monday through Friday.

1. Center for Food Safety and Applied Nutrition, Food and Drug Administration, Letter of Enforcement Discretion from FDA to Cargill Health & Food Technologies, Docket No. FDA–2000–P–0102, document ID DRAFT–0059 (formerly 2000P–1275/LET3) and Docket No. FDA–2000–P–0133, document ID DRAFT–0127 (formerly 2000P–1276/LET4), February 14, 2003.

Dated: February 15, 2012.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2012–3940 Filed 2–17–12; 8:45 am]

BILLING CODE 4160–01–P

[2] FDA received a petition for an administrative stay of action with an embedded citizen petition from Pharmavite LLC (''Pharmavite petition'') dated February 24, 2011, and a petition for an administrative stay from Botanical Laboratories, Inc. (''Botanical petition''), dated March 18, 2011 (Docket Nos. FDA–2000–P–0102, FDA–2000–P–0133, and FDA–2006–P–0033). Specifically, Pharmavite LLC requests FDA to stay its February 18, 2011, decision to discontinue enforcement discretion for dietary supplements containing free phytosterols that have been shown, through an adequate and well-controlled clinical trial, to reduce low density lipoprotein (LDL) and total cholesterol, pending publication of a final rule for the health claim. In a citizen petition embedded in the petition for an administrative stay, Pharmavite LLC also asked us to agree that: (1) A dietary supplement produced by Pharmavite LLC has been shown to effectively reduce LDL and total cholesterol; (2) FDA will continue to exercise enforcement discretion to permit this dietary supplement to bear an appropriately worded claim pursuant to the 2010 proposed regulation, pending publication of a final rule addressing the health claim; and (3) the final rule will allow those dietary supplements containing free phytosterols that have been shown through an adequate and well-controlled clinical trial to effectively reduce LDL and total cholesterol to bear the claim. Botanical Laboratories, Inc., requested that FDA stay its February 18, 2011, decision to discontinue enforcement discretion for dietary supplements containing phytosterols in liquid form until the issuance of a final rule for the health claim. We are currently considering these petitions. This document does not represent a decision on these petitions, in whole or in part.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9571]

RIN 1545–BJ84

Allocation and Apportionment of Interest Expense; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

SUMMARY: This document contains corrections to the final regulations (TD 9571), which were published in the **Federal Register** on January 17, 2012 (77 FR 2225) that provide guidance regarding the allocation and apportionment of interest expense.

DATES: This correction is effective on February 21, 2012, and is applicable on January 17, 2012.

FOR FURTHER INFORMATION CONTACT: Jeffrey L. Parry, (202) 622–3850 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations (TD 9571) that are the subject of these corrections are under section 864 of the Internal Revenue Code.

Need for Correction

As published, the temporary regulations contain errors that may prove to be misleading and are in need of clarification.

List of Subjects 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

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

§ 1.861–9T [Corrected]

■ **Par. 2.** Section 1.861–9T is amended by revising paragraph (l) to read as follows:

§ 1.861–9T Allocation and apportionment of interest expense (temporary).

* * * * *

(l) *Expiration date.* The applicability date of paragraphs (e)(2), (e)(3), and (h)(4) expires on January 13, 2015.

§ 1.861–11T [Corrected]

■ **Par. 3.** Section 1.861–11T is amended by revising paragraph (i) to read as follows:

§ 1.861–11T Special rules for allocating and apportioning interest expense of an affiliated group of corporations (temporary).

* * * * *

(i) *Expiration date.* The applicability date of paragraph (d)(6)(ii) expires on January 13, 2015.

Robin R. Jones,

Federal Register Liaison Officer, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, Procedure and Administration.

[FR Doc. 2012–3855 Filed 2–17–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9567]

RIN 1545–BK17

Reporting of Specified Foreign Financial Assets; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

SUMMARY: This document contains corrections to final regulations (TD 9567), which were published in the **Federal Register** on Monday, December 19, 2011, relating to the reporting of specified foreign financial assets.

DATES: *Effective date:* This correction is effective February 21, 2012, and is applicable beginning December 19, 2011.

FOR FURTHER INFORMATION CONTACT: Joseph S. Henderson, (202) 622–3880 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations that are the subject of these corrections are under section 6038 of the Internal Revenue Code.

Need for Correction

As published on December 19, 2011 (76 FR 78561), final regulation (TD 9567), contains errors which may prove to be misleading and are in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments.

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

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

PART 1—[CORRECTED]

■ **Par. 2.** Section 1.6038D–2T is amended by:

■ 1. Revising the last sentence of paragraph (b)(3).

■ 2. Revising, in paragraph (d), the subject heading and fifth sentence of paragraph (2)(i) in the *Example.*

The revisions read as follows:

§ 1.6038D–2T Requirement to report specified foreign financial assets (temporary).

* * * * *

(b) * * *

(3) * * * See § 1.6038D–5T(f) for rules to determine the maximum value of an interest in a foreign trust or estate.

* * * * *

(d) * * *

Example. * * *

(2) * * *

(i) *Married specified individuals filing separate annual returns.* * * * See § 1.6038D–5T(b) regarding the maximum value of a jointly owned and specified foreign financial asset to be reported by a specified person, including a married specified individual, that is a joint owner of an asset. * * *

* * * * *

■ **Par. 3.** Section 1.6038D–4T is amended by revising paragraph (a)(9) to read as follows:

§ 1.6038D–4T Information required to be reported (temporary).

(a) * * *

(9) The foreign currency exchange rate and, if the source of such rate is other than as described in § 1.6038D–5T(c)(1), the source of the rate used to determine the specified foreign financial asset's U.S. dollar value, including maximum value; and

* * * * *

■ **Par. 4.** Section 1.6038D–5T is amended by revising paragraph (c)(1).

§ 1.6038D–5T Valuation guidelines (temporary).

* * * * *

(c) * * *

(1) *In general.* Except as provided in paragraph (c)(2) of this section, the U.S. Treasury Department's Financial Management Service foreign currency exchange rate is to be used to convert the value of a specified foreign financial asset into U.S. dollars for purposes of determining the aggregate value of specified foreign financial assets in which a specified person has an interest and determining the maximum value of a specified foreign financial asset.

* * * * *

■ **Par. 5.** Section 1.6038D–7T is amended by revising paragraphs (a)(1)(i)(C) and (b) introductory text to read as follows:

§ 1.6038D–7T Exceptions from the reporting of certain assets under section 6038D (temporary).

(a) * * *

(1) * * *

(i) * * *

(C) Form 8621, ''Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund'';

* * * * *

(b) *Owner of certain trusts.* A specified person that is treated as an owner of any portion of a domestic trust under sections 671 through 678 is not required to file Form 8938 to report any specified foreign financial asset held by the trust if the trust is—

* * * * *

Guy R. Traynor,

Federal Register Liaison, Legal Processing Division, Publication and Regulations Br., Procedure & Administration.

[FR Doc. 2012–3935 Filed 2–17–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9567]

RIN 1545–BK17

Reporting of Specified Foreign Financial Assets; Correction

AGENCY: Internal Revenue Service (IRS).

ACTION: Final rule; correction.

SUMMARY: This document contains corrections to final regulations (TD 9567), which were published in the **Federal Register** on Monday, December 19, 2011, relating to reporting of specified foreign financial assets.

DATES: *Effective Date:* This correction is effective February 21, 2012, and is applicable beginning December 19, 2011.

FOR FURTHER INFORMATION CONTACT: Joseph S. Henderson, (202) 622–3880 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations that are the subject of these corrections are under section 6038 of the Internal Revenue Code.

Need for Correction

As published on December 19, 2011 (76 FR 78553), final regulation (TD 9567) contains errors which may prove to be misleading and are in need of correction.

Correction of Publication

Accordingly, the publication of the final regulations (TD 9567), which were the subject of FR Doc. 2011–32263, is corrected as follows:

1. On page 78557, the first column, in the preamble, in paragraph (J), line 7 from the bottom of the paragraph, the language ''Investment Company or a Qualified'' is corrected to read ''Investment Company or Qualified''.

2. On page 78557, the third column, in the preamble, lines one and two in the first paragraph of paragraph (C) the language ''Except as described in sections 5(D) and 5(E) of this explanation, for'' is corrected to read ''Except as described in sections 4(D) and 4(E) of this explanation, for''.

Guy R. Traynor,

Federal Register Liaison, Legal Processing Division, Publications & Regulations Br., Procedure & Administration.

[FR Doc. 2012–3936 Filed 2–17–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9579]

RIN 1545–BJ78

Source of Income From Qualified Fails Charges

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations that prescribe the source of income received on a qualified fails charge under section 863 of the Internal Revenue Code (Code). The regulations finalize proposed regulations and withdraw temporary regulations published on December 8, 2010, and affect persons that pay or are entitled to receive qualified fails charges, including withholding agents.

DATES: *Effective Date.* These regulations are effective on February 21, 2012.

Applicability Date. For the date of applicability, see § 1.863–10(g).

FOR FURTHER INFORMATION CONTACT: Karen Walny, Office of Associate Chief Counsel (International) (202) 622–3870 (not a toll free call).

SUPPLEMENTARY INFORMATION:

Background

In response to persistent delivery failures in delivery-versus-payment transactions involving U.S. Treasury securities (Treasuries), the Treasury Market Practices Group (TMPG) and the Securities Industry and Financial Markets Association published a trading practice governing failed deliveries of Treasuries in 2008. In July, 2009, the Treasury Department and the Internal Revenue Service (IRS) issued Notice 2009–61 (2009–2 CB 181), which provided that the IRS will not challenge the position taken by a taxpayer or a withholding agent that a fails charge paid with respect to a Treasury on or before December 31, 2010 is not subject to U.S. gross basis taxation. On December 8, 2010, the Treasury Department and the IRS issued temporary and proposed regulations that establish source rules for a fails charge paid with respect to a Treasury, with a correction to the temporary regulations on December 28, 2010. 75 FR 76262, 75 FR 76321, and 75 FR 81457, respectively.

The temporary and proposed regulations provide that the source of income from a qualified fails charge is generally determined by reference to the residence of the taxpayer that is the recipient of the qualified fails charge income, with two exceptions. Qualified fails charge income earned by a qualified business unit (QBU) of a taxpayer is sourced to the country in which the QBU is engaged in a trade or business, and qualified fails charge income that arises from a transaction the income from which is effectively connected to a United States trade or business is sourced in the United States and treated as effectively connected to the conduct of a United States trade or business.

No comments were received on the proposed regulations, and no hearing was requested or held. This Treasury decision adopts the proposed regulations with the changes discussed in this preamble.

Explanation of Provisions

These final regulations adopt, with one substantive change, the proposed regulations on the source of a qualified fails charge. The final regulations also make a number of clarifying changes to the language of the regulations.

The preamble to the temporary regulations noted that no trading practice existed at that time for fails charges on securities other than Treasuries, but that if a fails charge trading practice pertaining to other securities was endorsed by the TMPG or an agency of the United States government, the Treasury Department and the IRS would consider whether the source rule in the regulations should be extended to those fails charges. The TMPG has subsequently endorsed a trading practice for debentures issued by the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Federal Home Loan Banks and agency pass-through mortgage-backed securities issued or guaranteed by the Government National Mortgage Association (Ginnie Mae), Fannie Mae, and Freddie Mac (Agency Debt and Agency MBS, respectively) beginning in February, 2012.

The Treasury Department and the IRS have determined that the same source rule should apply to fails charges incurred with respect to Agency Debt and Agency MBS as to fails charges on Treasuries. Accordingly, these final regulations expand the scope of a qualified fails charge to fails charges paid with respect to Agency Debt. The sourcing rule in the final regulations also applies to a fails charge on Agency MBS guaranteed by Fannie Mae, Freddie Mac, and Ginnie Mae (for tax purposes, Fannie Mae, Freddie Mac, and Ginnie Mae do not issue Agency MBS). The final regulations do not address the source of any other payment, including a fails charge that is not a qualified fails charge.

The Treasury Department and the IRS are considering whether separate guidance is needed on the source of income attributable to certain payments, other than qualified fails charges, that arise in securities lending transactions or repurchase transactions and request comments regarding this issue.

Effective Date

These regulations are effective on February 21, 2012.

Applicability Date

These regulations apply to a qualified fails charge paid or accrued on or after December 8, 2010.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to

these regulations, and because these regulations do not impose a collection of information on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply. Pursuant to section 7805(f) of the Code, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Karen Walny, Office of the Associate Chief Counsel (International). However, other persons from the Office of Associate Chief Counsel (International) and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 863(a) and 7805
* * *

■ **Par. 2.** Section 1.863–10 is added to read as follows:

§ 1.863–10 Source of income from a qualified fails charge.

(a) *In general.* Except as provided in paragraphs (b) and (c) of this section, the source of income from a qualified fails charge shall be determined by reference to the residence of the taxpayer as determined under section 988(a)(3)(B)(i).

(b) *Qualified business unit exception.* The source of income from a qualified fails charge shall be determined by reference to the residence of a qualified business unit (as defined in section 989) of a taxpayer if—

(1) The taxpayer's residence, determined under section 988(a)(3)(B)(i), is the United States;

(2) The qualified business unit's residence, determined under section 988(a)(3)(B)(ii), is outside the United States;

(3) The qualified business unit is engaged in the conduct of a trade or business in the country where it is a resident; and

(4) The transaction to which the qualified fails charge relates is attributable to the qualified business unit. A transaction will be treated as attributable to a qualified business unit if it satisfies the principles of § 1.864–4(c)(5)(iii) (substituting ''qualified business unit'' for ''U.S. office'').

(c) *Effectively connected income exception.* Qualified fails charge income that arises from a transaction any income from which is (or would be if the transaction produced income) effectively connected with a United States trade or business pursuant to § 1.864–4(c) is treated as from sources within the United States, and the income from the qualified fails charge is treated as effectively connected to the conduct of a United States trade or business.

(d) *Qualified fails charge.* For purposes of this section, a qualified fails charge is a payment that—

(1) Compensates a party to a transaction that provides for delivery of a designated security (as defined in paragraph (e) of this section) in exchange for the payment of cash (delivery-versus-payment settlement) for another party's failure to deliver the specified designated security on the settlement date specified in the relevant agreement; and

(2) Is made pursuant to—

(i) A trading practice or similar guidance approved or adopted by either an agency of the United States government or the Treasury Market Practices Group, or

(ii) Any trading practice, program, policy or procedure approved by the Commissioner in guidance published in the Internal Revenue Bulletin.

(e) *Designated security.* For purposes of this section, a *designated security* means any—

(i) Debt instrument (as defined in § 1.1275–1(d)) issued by the United States Treasury Department, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or any Federal Home Loan Bank; or

(ii) Pass-through mortgage-backed security guaranteed by the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, or the Government National Mortgage Association.

(g) *Effective/applicability date.* This section is effective on February 21, 2012. This section applies to a qualified fails charge paid or accrued on or after December 8, 2010.

§ 1.863–10T [Removed]

■ **Par. 3.** Section 1.863–10T is removed.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: February 14, 2012.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury, Tax Policy.

[FR Doc. 2012–3909 Filed 2–17–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of the Secretary

31 CFR Part 1

RIN 1505–AC33

Privacy Act of 1974; Implementation

Correction

In rule document 2011–29385 appearing on pages 70640–70644 the issue of Tuesday, November 15, 2011 make the following correction:

§ 1.36 [Corrected]

■ On page 70644, in § 1.36, in paragraph (g)(1)(viii), in the untitled table, the third row of the table should read:

''IRS 90.002 . . . . . Chief Counsel Litigation and Advice (Civil) Records''

[FR Doc. C1–2011–29385 Filed 2–17–12; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–0067]

RIN 1625–AA00

Safety Zone; Kinnickinnic River Containment and Cleanup; Milwaukee, WI

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the Kinnickinnic River in Milwaukee, Wisconsin. This zone is intended to restrict vessels from a portion of the Kinnickinnic River due to the petroleum cleanup efforts. This temporary safety zone is necessary to protect the surrounding public and vessels from the hazards associated with the removal of petroleum product from this area of the Kinnickinnic River.

DATES: This rule is effective in the CFR on February 21, 2012. This rule is effective with actual notice for purposes of enforcement at 7 a.m. on January 30, 2012. This rule will remain in effect through 7 a.m. on March 1, 2012.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2012–0067 and are available online by going to *www.regulations.gov,* inserting USCG–2012–0067 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, contact or email BM1 Adam Kraft, U.S. Coast Guard Sector Lake Michigan, at 414–747–7148 or *Adam.D.Kraft@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 an agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under U.S.C. 553 (b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the dangers presented by the containment and cleanup of petroleum product are immediate and do not allow time for a notice and comment period. Thus, waiting for a notice and comment period to run would be impracticable and contrary to the public interest in that it would prevent the Coast Guard from protecting the public and vessels on navigable waters from the aforementioned hazards.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. For the reasons discussed in the preceding paragraph, a 30-day notice period would be impracticable and contrary to the public interest.

Background and Purpose

On January 23, 2012 it was discovered that a large amount of jet fuel is entering the Kinnickinnic River from an underground fuel leak in the vicinity of the airport in Milwaukee, WI. The Captain of the Port, Sector Lake Michigan, has determined that the containment and cleanup poses a serious risk of injury to persons and property within this area of the river.

Discussion of Rule

Because of the aforesaid hazards, the Captain of the Port, Sector Lake Michigan, has determined that a safety zone is necessary to protect the public. The safety zone will encompass all U.S. navigable waters of Kinnickinnic River between the West Becher Street Bridge located at 43°00′37″ N 087°54′51″ W and the First street bridge located at 43°00′30″ N 087°54′41″ W (NAD 83). This rule will be enforced from 7 a.m. on January 30, 2012 until 7 a.m. on March 1, 2012.

All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port, Sector Lake Michigan, or his or her designated representative. Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port, Sector Lake Michigan, or his or her designated representative. The Captain of the Port, Sector Lake Michigan, or his or her designated representative may be contacted via VHF Channel 16.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone will be in effect along a portion of the river, given the time of year that has minimal traffic. Moreover, the most prominent marine commercial company in the area has been notified of the situation and it has chosen to use an alternate mooring.

Small Entities

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

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

This rule will affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor on a portion of Kinnickinnic River between 7 a.m. on January 30, 2012 and 7 a.m. on March 1, 2012.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: Vessel traffic will be minimal due to the time of year and the location of the safety zone.

In the event that this temporary safety zone affects shipping, commercial vessels may request permission from the Captain of The Port, Sector Lake Michigan, or his or her designated representative to transit through the safety zone. The Coast Guard will give notice to the public via a Broadcast to Mariners that the regulation is in effect.

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 could better evaluate its effects on them and participate in the rulemaking process. Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by

employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, 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 concern an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

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

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T09–0067 to read as follows:

§ 165.T09–0067 Safety Zone; Kinnickinnic River containment and cleanup, Milwaukee, Wisconsin.

(a) *Location.* All waters of the Kinnickinnic River between the West Becher Street Bridge located at 43°00′37″ N 087°54′51″ W and the First Street Bridge located at 43°00′30″ N 087°54′41″ W (NAD 83).

(b) *Effective and Enforcement Period.* This rule is effective and will be enforced from 7 a.m. on January 30, 2012 until 7 a.m. on March 1, 2012. The Captain of the Port, Sector Lake Michigan, or his or her designated representative, may suspend the enforcement of this safety zone.

(c) *Regulations.* (1) In accordance with the general regulations in section 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port, Sector Lake Michigan, or his or her designated representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port, Sector Lake Michigan, or his or her on-scene representative.

(3) The ''designated representative'' of the Captain of the Port, Sector Lake Michigan, is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port, Sector Lake Michigan, to act on his or her behalf. The designated representative of the Captain of the Port, Sector Lake Michigan, will be on land

in the vicinity of the safety zone and will have constant communications with the on-scene safety vessels.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port, Sector Lake Michigan, or his or her designated representative to obtain permission to do so. The Captain of the Port, Sector Lake Michigan, or his or her designated representative may be contacted via VHF Channel 16.

Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port, Sector Lake Michigan, or his or her designated representative.

Dated: January 31, 2012.

C. W. Tenney,

Commander, U.S. Coast Guard, Captain of the Port, Sector Lake Michigan, Acting.

[FR Doc. 2012–3866 Filed 2–17–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–1146]

RIN 1625–AA08

Safety Zone; 2012 Mavericks Invitational, Half Moon Bay, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in support of the Mavericks Surf Competition. This temporary safety zone will establish a temporary safety zone in vicinity of Pillar Point in the navigable waters of Half Moon Bay, California. The regulation will temporarily restrict vessel traffic in vicinity of Pillar Point and prohibit vessels not participating in the surfing event from entering the dedicated surfing area and the hazardous waters surrounding Pillar Point. This regulation is necessary to provide for the safety of life on the navigable waters immediately prior to, during, and immediately after the surfing competition.

DATES: *Effective Date:* This rule is effective in the CFR from February 21, 2012 until 3 p.m. March 31, 2012. This rule is effective with actual notice for purposes of enforcement beginning 7 a.m. January 23, 2012.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–1146 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–1146 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 Lieutenant Junior Grade DeCarol Davis (415) 399–7443, or email *D11-PF-MarineEvents@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the event would occur before the rulemaking process would be completed. Because of the dangers posed by the surf conditions during the 2012 Mavericks Invitational surf competition, the safety zone is necessary to provide for the safety of event participants, spectators, 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.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Any delay in the effective date of this rule would expose mariners to the dangers posed by the surf conditions during the 2012 Mavericks Invitational.

Basis and Purpose

The 2012 Mavericks Invitational is a one day ''Big Wave'' surfing competition consisting of the top 24 big wave surfers and only occurs when 15–20 foot waves are sustained for over 24 hours and are combined with mild easterly winds of no more than 5–10 knots. The rock and reef ridges that make up the sea floor of the Pillar Point area combined with optimal weather conditions create the large waves that Mavericks is known for. Due to the hazardous waters surrounding Pillar Point at the time of the surfing competition, the Coast Guard is establishing a safety zone in vicinity of Pillar Point that restricts navigation in the area of the surf competition and in neighboring hazardous areas.

Discussion of Rule

The Coast Guard is establishing a safety zone associated with the 2012 Mavericks Invitational surf competition. The 2012 Mavericks Invitational will take place on a day that presents favorable surf conditions between 7 a.m. Monday January 23, 2012 and 3 p.m. Saturday March 31, 2012. The 2012 Mavericks Invitational can only occur when 15–20 foot waves are sustained for over 24 hours and are combined with mild easterly winds of no more than 5–10 knots. Unpredictable weather patterns and the event's narrow operating window limit the Coast Guard's ability to notify the public of the event. The Coast Guard will issue notice of the event as soon as practicable, and no later than 24 hours prior via the Broadcast Notice to Mariners.

The 2012 Mavericks Invitational will occur on the navigable waters of Half Moon Bay in vicinity of Pillar Point. The Coast Guard will enforce a temporary safety zone bounded by a line connecting the following coordinates in the order they appear: 37°29′23″ N, 122°30′04″ W; 37°29′15″ N, 122°30′10″ W; 37°29′17″ N, 122°30′30″ W; 37°29′36″ N, 122°30′16″ W; 37°29′23″ N, 122°30′04″ W; 37°29′36″ N, 122°29′21″ W; 37°29′13″ N, 122°29′25″ W; 37°29′15″ N, 122°29′58″ W; 37°29′23″ N, 122°30′04″ W (NAD 83).

The effect of this temporary safety zone will be to restrict navigation in the vicinity of Pillar Point while the 2012 Mavericks Invitational is taking place. During the enforcement period, unauthorized persons or vessels are prohibited from transiting through, anchoring, blocking, or loitering in the safety zone without permission of the COTP or PATCOM. Vessels desiring to enter or operate in the safety zone shall do so with COTP or PATCOM permission via VHF–23A or through the 24-hour Command Center telephone at (415) 399–3547.

This safety zone is needed to keep spectators and vessels a safe distance away from the event participants and the hazardous waters surrounding Pillar

Point. Failure to comply with the lawful directions of the Coast Guard could result in additional vessel movement restrictions, citation, or both.

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 Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under that those Orders.

Although this rule regulates navigation in the waters encompassed by the regulated area, the effect of this rule will not be significant. The entities most likely to be affected are fishing vessels and pleasure craft engaged in recreational activities. In addition, the rule will only regulate navigation for a limited time. Finally, the Public Broadcast Notice to Mariners will notify the users of local waterway to ensure that the regulated area will result in minimum impact.

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.

Although this rule may affect owners and operators of fishing vessels and pleasure craft engaged in recreational activities and sightseeing, it will not have a significant economic impact on a substantial number of small entities for several reasons: (i) This rule will encompass only a small portion of the waterway for a limited period of time; (ii) vessel traffic can pass safely around the area; (iii) vessels engaged in commercial and recreational activities have ample space outside of the affected areas of Half Moon Bay, CA to engage in these activities; and (iv) the maritime public will be advised in advance of this regulated area via Broadcast Notice to Mariners.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 0023.1 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, which applies to regulations establishing, disestablishing, or changing Regulated Navigation Areas, safety zones or security zones.

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

■ 2. Add temporary § 165.T11–472 to read as follows:

§ 165–T11–472 Safety Zone; 2012 Mavericks Invitational, Half Moon Bay, CA.

(a) *Location.* This safety zone is established for the waters of Half Moon Bay, California, in the vicinity of Pillar Point bounded by a line connecting the following coordinates in the order they appear written in this section: 37°29′23″ N, 122°30′04″ W; 37°29′15″ N, 122°30′10″ W; 37°29′17″ N, 122°30′30″ W; 37°29′36″ N, 122°30′16″ W; 37°29′23″ N, 122°30′04″ W; 37°29′36″ N, 122°29′21″ W; 37°29′13″ N, 122°29′25″ W; 37°29′15″ N, 122°29′58″ W; 37°29′23″ N, 122°30′04″ W (NAD 83).

(b) *Definitions. Patrol Commander (PATCOM).* As used in this section, ''Patrol Commander'' or ''PATCOM'' means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer, or a Federal, State, or local officer designated by the Captain of the Port San Francisco (COTP) to assist in the enforcement of the safety zone.

(c) *Enforcement period.* This rule is effective during the 2012 Maverick Invitational, which will take place on a day that presents favorable surf conditions between 7 a.m. Monday January 23, 2012 and 3 p.m. Saturday March 31, 2012. The Coast Guard will issue notice of the event to the public as soon as practicable, and no later than 24 hours prior to the event via Broadcast Notice to Mariners.

(d) *Regulations.* (1) Under the general regulations in 33 CFR part 165, Subpart C this title, the safety zone is closed to all unauthorized vessel traffic, except as may be permitted by the COTP or PATCOM.

(2) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or PATCOM to obtain permission. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the COTP or PATCOM. Persons or vessels may request permission to enter the safety zone on VHF–23A or through the 24-hour Command Center telephone at (415)–399–3547.

(4) The COTP, or PATCOM as the designated representative of the COTP, may control the movement of all vessels operating on the navigable waters of Half Moon Bay when the COTP has determined that such orders are justified in the interest of safety by reason of weather, visibility, sea conditions, temporary port congestion, and other temporary hazardous circumstances. When hailed or signaled by PATCOM, the hailed vessel must come to an immediate stop and comply with the lawful directions issued. Failure to comply with a lawful direction may result in additional operating restrictions, citation for failure to comply, or both.

Dated: January 23, 2012.

C.L. Stowe,

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

[FR Doc. 2012–3868 Filed 2–17–12; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

RIN 1024–AD88

Special Regulations; Areas of the National Park System, Cape Cod National Seashore

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: The National Park Service is amending special regulations for Cape Cod National Seashore that authorize hunting to allow for a spring season hunt for Eastern Wild Turkey. The Final Rule implements the Record of Decision for the Cape Cod National Seashore Hunting Program Environmental Impact Statement of August 2007.

DATES: This rule is effective March 22, 2012.

FOR FURTHER INFORMATION CONTACT: Craig Thatcher, Acting Chief Ranger, 99 Marconi Site Road Wellfleet, MA 02667; 508–957–0735.

SUPPLEMENTARY INFORMATION:

Description of the Park Area

In 1961 Congress established Cape Cod National Seashore (Seashore). In establishing the Seashore, Congress directed that the unique flora and fauna, the physiographic conditions, and the historic sites and structures of the area be permanently preserved; authorized the Secretary of the Interior (Secretary) to provide for the public enjoyment and understanding of the unique natural, historic, and scientific features of the Seashore be facilitated by establishing trails, observation points, exhibits and services for the public, and provided that adaptable portions of the Seashore may be managed for camping, swimming, boating, sailing, hunting, fishing, and other activities of similar nature. Public Law 87–126, Sec. 7 (Aug. 7, 1961).

The Seashore comprises 43,608 acres of shoreline; salt marshes; clear, deep, freshwater kettle ponds; and uplands; as well as a great diversity of species supported by these habitats. Lighthouses, a life-saving station, dune shacks, modern and Cape Cod-style houses, cultural landscapes, and wild

cranberry bogs provide a glimpse into Cape Cod's past and continuing life ways. The Seashore offers six swimming beaches, eleven self-guiding nature trails, and a variety of picnic areas and scenic overlooks.

Background

The 1961 legislation establishing the Seashore authorized the Secretary, acting through the National Park Service (NPS), to permit hunting.

> The Secretary may permit hunting and fishing, including shellfishing, on lands and waters under his jurisdiction within the seashore in such areas and under such regulations as he may prescribe during open seasons prescribed by applicable local, State and Federal law. The Secretary shall consult with officials of the Commonwealth of Massachusetts and any political subdivision thereof who have jurisdiction of hunting and fishing, including shellfishing, prior to the issuance of any such regulations, and the Secretary is authorized to enter into cooperative arrangements with such officials regarding such hunting and fishing, including shellfishing, as he may deem desirable. * * *

16 U.S.C. 459b–6(c).

The final rule increases hunting opportunities by expanding the hunting season to include a spring turkey hunt. Hunting within the Seashore that is authorized by NPS regulations is conducted in accordance with Commonwealth of Massachusetts, Department of Fisheries and Wildlife (MDFW) regulations. Currently authorized hunting in the Seashore is limited to deer, upland game, and migratory waterfowl. Although the Eastern Wild Turkey is managed as a native upland game bird by the MDFW, the current special regulation for hunting within the Seashore prohibits all hunting from March 1 through August 31. This rule change is necessary because the Massachusetts spring turkey season generally takes place from late April to mid or late May when hunting is prohibited by the Seashore's current special regulation. Fall turkey hunting could also be initiated if MDFW established such a season in the Cape Cod zone, but no rule change would be needed for a fall turkey hunt since the State does not conduct hunting before September 1.

For many years, the Seashore cooperated with the MDFW to release ring-necked pheasants within the Seashore to provide a pheasant hunt. In 2002, the Seashore was sued for failure to follow the National Environmental Policy Act (NEPA) with respect to the hunting program. In September 2003, the U.S. District Court ordered the Seashore to prepare a NEPA environmental assessment of the hunting program. The court also enjoined the pheasant hunt until the Seashore completed the NEPA assessment.

National Environmental Policy Act Process

As a result of the court order, the Seashore initiated and completed a Final Environmental Impact Statement (FEIS), and Record of Decision (ROD), on the Seashore's hunting program. The chosen alternative as documented by the ROD, was Alternative B—Develop a Modified Hunting Program.

Through Alternative B, the Seashore seeks to increase hunting opportunities for native upland game bird species by establishing a turkey season generally consistent with MDFW regulations and making ancillary improvements to upland game bird habitat. The alternative phases out pheasant stocking and hunting through adaptive management actions aimed at improving the availability of native upland game bird species. Hunting areas will be consolidated and clearly delineated and educational outreach concerning hunting will be expanded to hunting and non-hunting users. The NPS and MDFW will cooperatively monitor and manage game and other species. The FEIS and ROD may be reviewed at: *http://www.nps.gov/caco/parkmgmt/planning.htm*.

Summary of and Responses to Public Comments

The NPS published a proposed rule on March 22, 2011, and accepted public comments through April 21, 2011. Comments were accepted through the mail, hand delivery, and through the Federal eRulemaking Portal: *http://www.regulations.gov*. A total of eleven comments were received during the comment period. Ten comments supported the establishment of the spring turkey season within the Seashore. One comment was not responsive to the proposed rule, but contained strong, general anti-hunting sentiment.

Seven comments were received from individuals. Of these, two came from the same person. Two of the remaining individual comments were very similar in context and point, but did not contain the name(s) of the person(s) that sent them.

Three comments were received from organizations: the Cranberry County Longbeards Chapter of the National Wild Turkey Federation; the Barnstable County League of Sportsman's Clubs, Inc.; and the Bass River Rod and Gun Club, Inc. One comment was from the agency that manages hunting in Massachusetts, the MDFW.

Two individual comments expressed general support for establishing a spring turkey season at the Seashore that was consistent with the MDFW program, but also recognized that the Seashore season and the State season were separately managed. Two individual comments supported the spring turkey season based on reducing motor vehicle and turkey conflicts on Route 6, a well travelled State highway that runs through the Seashore.

The comments received from the three organizations supported establishing a spring turkey season at the Seashore. These comments also suggested there should be:

- Consistency between the Seashore and MDFW regulations,
- A youth turkey hunt similar to the State youth hunt,
- Flexibility in the rule for the Seashore to adjust to any changes MDFW makes with the spring turkey season, and
- No extra geographic restraints in the Seashore spring turkey season that might create a high hunter density.

The MDFW made similar suggestions and also expressed concern about the possible need for a hunter to have a permit issued by the Seashore in addition to their State hunting license and turkey stamp.

Analysis and Response

The Seashore's hunting FEIS evaluated a turkey hunting season that was consistent with the MDFW regulations. The Seashore's hunting program has generally followed the MDFW program, with additional provisions or restrictions as necessary to meet park objectives and NPS policies. The Seashore regards MDFW as a key expert agency with State and region-wide perspective that is important for determining hunting seasons, bag limits, and other elements of a sound hunting program. Accordingly, management of hunting at the Seashore will be accomplished through close coordination between the Seashore and MDFW. The Seashore has adopted many of the MDFW regulations without additional restrictions, although the ultimate responsibility for developing and managing an appropriate hunting program for the Seashore rests with the NPS.

The existing special regulation utilizes 36 CFR 1.5, Closures and public use limits, to designate appropriate locations where hunting is allowed and to impose reasonable limits or restrictions necessary to address park specific issues such as resource

protection, public safety and other visitor use concerns. While the general authority of § 1.5 remains available as an alternative closure authority, the new § 7.67(f)(5) creates Seashore-specific discretionary authority for the Superintendent, consistent with the public notice requirement of 36 CFR 1.7, to require permits where appropriate and to ensure that potential park specific concerns or conflicts, such as resource protection, visitor use, and public safety, can be addressed should they arise. Section 1.7 describes four alternative methods of notifying the public: Signs; maps; newspaper publication; and electronic media, brochures, or hand-outs. In addition, the Superintendent must annually compile all park closures and restrictions into a document generally referred to as the Superintendent's Compendium, which is available to the public on the Seashore's Web site at *http://www.nps.gov/caco.* Although, closures under the new § 7.67(f)(5)(ii) are ''temporary'' insofar as they must be annually re-evaluated and renewed by the Superintendent, they may be renewed each year whenever appropriate. In order to clarify this point, and because the requirement for annual review already exists in 36 CFR 1.7, NPS has deleted the word ''temporarily'' from § 7.67(f)(5)(ii) in this final rule. This closure authority will allow for such closures to remain flexible in light of changes in visitor use, public safety, wildlife resource impacts, or other changed or unanticipated conditions. Hunters are urged to consult with the Seashore each season to ascertain whether or not there are any changes from the prior year.

For similar reasons, NPS has deleted the reference to management activities and objectives ''such as those described in the Cape Cod National Seashore Hunting Program/Final Environmental Impact Statement'' from § 7.67(f)(5)(ii) in this final rule. Although the FEIS will continue to be an important guiding document, the Seashore will gain knowledge and experience each season that will inform the ongoing management process, and accordingly some flexibility is necessary.

For example, when the FEIS (July 2007) and ROD (September 2007), were completed, the MDFW had a two-week spring turkey hunting season, starting at the end of April and ending in early May. The FEIS and ROD statements of being ''consistent with'' the State season and expanding the Seashore's hunting season to accommodate the State's spring turkey hunt was written in the context of the two-week season. Since that date, the State has expanded its spring turkey season from two to four weeks, ending in late May. Due to possible user conflicts that may arise in late May, the Seashore Superintendent, using discretionary authority of the rule, will set the closing date of the season. The Seashore will strive to be consistent with the MDFW's turkey season dates to avoid confusion. However, the Superintendent will have the discretion to adjust the Seashore's opening and closings dates based on factors such as safety, use patterns, and the public interest.

To authorize and manage hunting activities compatible with their land management concerns, other federal and Commonwealth facilities within Massachusetts, such as the Massachusetts Military Reservation, have different rules and different dates than the dates/times established by the MDFW. The Superintendent's discretion in this case would be similar to such established practice. The public will be notified of the spring turkey hunt opening and closing dates and other special conditions for the Seashore hunting program, all of which will also be published in the Superintendent's Compendium.

Affording the Seashore Superintendent this discretion provides the flexibility suggested by the three organizations and the MDFW to allow for accommodation of future changes in the State's program (provided the changes fall within the scope of discretion authorized by this regulation) without further rulemaking. For example, MDFW currently has a special youth turkey hunt, which is allowed on a specific day, as part of its spring turkey season. The Seashore may consider, and this rulemaking accommodates, the possibility of incorporating a youth turkey hunt into the Seashore's program in the future. Consideration of the youth turkey hunt component may be entertained after the Seashore has implemented and evaluated the regular spring turkey hunt.

The ROD directed that: ''[t]urkey hunting within [the Seashore] will be a controlled hunt requiring a permit, limiting the number of hunters, and likely managed through a lottery system.'' Accordingly, to control issues such as hunter density for safety, this rule provides that the Seashore will manage the turkey hunt through permits. A person seeking the turkey hunting permit must present a driver's license, vehicle registration and Massachusetts State Hunting license with turkey stamp to ensure compliance with MDFW turkey hunt legal requirements and to verify the identity of the applicant. Seashore hunters should understand that some areas where hunting has previously been allowed might be closed to hunting during the spring turkey season for safety reasons.

Changes From the Proposed Rule

After review and analysis of the public comments, NPS has:

- Deleted the word ''temporarily'' in paragraph (f)(5)(ii), for the reasons discussed in the previous section;
- Deleted the reference to activities and objectives ''such as those described in the Cape Cod National Seashore Hunting Program/Final Environmental Impact Statement'' in paragraph (f)(5)(ii), for the reasons discussed in the previous section; and
- Added the terms ''limitations, restrictions * * * or other hunting related designations'' to the public notification requirements for closures in paragraph (f)(6) to clarify that the requirement applies to all such actions.

Compliance With Other Laws and Executive Orders

Regulatory Planning and Review (Executive Order 12866)

This document is not a significant rule and the Office of Management and Budget has not reviewed this rule under Executive Order 12866.

(1) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. This is an agency specific rule.

(3) This rule does not alter the budgetary effects of entitlements, grants, user-fees, or loan programs or the rights or obligations of their recipients.

(4) This rule does not raise novel legal or policy issues. The rule meets the requirements of the NPS general regulations at 36 CFR 2.2(b)(2).

Regulatory Flexibility Act (RFA)

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the RFA (5 U.S.C. 601 *et seq.*).

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the SBREFA. This rule:

a. Does not have an annual effect on the economy of $100 million or more.

The rule will benefit small businesses in the local communities through the sale of goods and services to turkey hunters.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The rule will not impose restrictions on business in the local communities in the form of fees, record keeping or other requirements that would increase costs.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act (UMRA)

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. A statement containing the information required by the UMRA (2 U.S.C. 1531 *et seq.*) is not required.

Takings (Executive Order 12630)

Under the criteria in Executive Order 12630, this rule does not have significant takings implications. A takings implication assessment is not required.

Federalism (Executive Order 13132)

Under the criteria in Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism summary impact statement. A Federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988)

This rule complies with the requirements of Executive Order 12988. Specifically this rule:

(a) Meets the requirements of section 3(a) requiring all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation With Indian Tribes (Executive Order 13175)

Under the criteria in Executive Order 13175 we have evaluated this rule and determined that it has no potential effects on federally recognized Indian tribes.

Paperwork Reduction Act (PRA)

This rule does not contain any new collection of information that requires approval by OMB under the PRA of 1995 (44 U.S.C. 3501 *et seq.*). OMB has approved the information collection requirements associated with NPS special use permits and has assigned OMB control number 1024–0026 (expires 06/30/2013). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

This rule implements a portion of a major Federal action significantly affecting the quality of the human environment. The Seashore formally initiated the NEPA process on June 21, 2004 by publishing in the **Federal Register** a Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) on the Seashore Hunting Program.

A series of public and agency scoping meetings followed to solicit input on hunting in the park from American Indian tribes, Federal and State agencies and local towns, the public, and interested groups. Using the information gathered during the scoping process, the Seashore prepared a Draft Environmental Impact Statement (Draft EIS) for public review and comment. The comment period opened on April 21, 2006, with the Environmental Protection Agency's (EPA) publication of a Notice of Availability (NOA) in the **Federal Register**, and closed 60 days later, on June 19, 2006.

Two public meetings were held during the 60-day review period to receive oral comment. The availability of the Draft EIS and the dates and times of the public meetings were also publicized through a second NOA published by the NPS in the **Federal Register** on May 10, 2006, and through press releases sent to local newspapers and radio stations. Over 200 comments were received on the Draft EIS. These comments were used to improve the Draft and produce the FEIS.

Completion of the FEIS was noticed in the **Federal Register** by the DOI and EPA on August 7 and August 10, 2007, respectively. The ROD was signed on September 18, 2007. The chosen alternative was Alternative B—Develop a Modified Hunting Program. The FEIS and ROD may be reviewed at: *http://www.nps.gov/caco/parkmgmt/planning.htm.*

Effects on the Energy Supply (Executive Order 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A statement of Energy Effects is not required.

Drafting Information

The primary authors of this regulation were Craig Thatcher, Acting Chief Ranger, Cape Cod National Seashore; Robin Lepore, Office of the Regional Solicitor, Department of the Interior; Russel J. Wilson, Chief Regulations and Special Park Uses, National Park Service; and, A.J. North, Regulations Coordinator, National Park Service.

List of Subjects in 36 CFR Part 7

National Parks, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the National Park Service amends 36 CFR part 7 as follows:

PART 7—SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

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

Authority: 16 U.S.C. 1, 3, 9a, 462(k); Sec. 7.96 also issued under 36 U.S.C. 501–511, DC Code 10–137 (2001) and DC Code 50–2201 (2001).

■ 2. Revise § 7.67(f) to read as follows:

§ 7.67 Cape Cod National Seashore.

* * * * *

(f) *Hunting.* (1) Hunting is allowed at times and locations designated by the Superintendent as open to hunting.

(2) Except as otherwise provided in this section, hunting is permitted in accordance with § 2.2 of this chapter.

(3) Only deer, upland game (including Eastern Wild Turkey), and migratory waterfowl may be hunted.

(4) Hunting is prohibited from March 1st through August 31st each year, except for the taking of Eastern Wild Turkey as designated by the Superintendent.

(5) The Superintendent may:

(i) Require permits and establish conditions for hunting; and

(ii) Limit, restrict, or terminate hunting access or activities after taking into consideration public health and safety, natural and cultural resource protection, and other management activities and objectives.

(6) The public will be notified of such limitations, restrictions, closures, or other hunting related designations through one or more methods listed in § 1.7(a) of this chapter.

(7) Violating a closure, designation, use or activity restriction or a term or

condition of a permit is prohibited. Violating a term or condition of a permit may result in the suspension or revocation of the permit by the Superintendent.

Dated: February 10, 2012.

Rachel Jacobson,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–3950 Filed 2–17–12; 8:45 am]

BILLING CODE 4310–WV–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA–2012–0003; Internal Agency Docket No. FEMA–8219]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP) that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

DATES: *Effective Dates:* The effective date of each community's scheduled suspension is the third date (''Susp.'') listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact David Stearrett, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2953.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase Federal flood insurance that is not otherwise generally available from private insurers. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits the sale of NFIP flood insurance unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. We recognize that some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, FEMA publishes a Flood Insurance Rate Map (FIRM) that identifies the Special Flood Hazard Areas (SFHAs) in these communities. The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year on FEMA's initial FIRM for the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

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

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

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

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for part 64 continues to read as follows:

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

§ 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Region III				
Pennsylvania:				
Allegheny, Township of, Blair County	420961	November 5, 1973, Emerg; April 3, 1985, Reg; March 2, 2012, Susp.	March 2, 2012	March 2, 2012.
Altoona, City of, Blair County	420159	September 26, 1973, Emerg; March 2, 1983, Reg; March 2, 2012, Susp.	do*	Do.
Antis, Township of, Blair County	421385	July 30, 1975, Emerg; February 4, 1981, Reg; March 2, 2012, Susp.	do*	Do.
Bedford, Borough of, Bedford County	421228	July 17, 1974, Emerg; September 2, 1988, Reg; March 2, 2012, Susp.	do	Do.
Bedford, Township of, Bedford County	421331	July 30, 1975, Emerg; October 17, 1989, Reg; March 2, 2012, Susp.	do	Do.
Bellwood, Borough of, Blair County	420160	May 18, 1976, Emerg; June 1, 1979, Reg; March 2, 2012, Susp.	do	Do.
Blair, Township of, Blair County	421386	August 1, 1975, Emerg; January 18, 1984, Reg; March 2, 2012, Susp.	do	Do.
Bloomfield, Township of, Bedford County.	421332	March 19, 1984, Emerg; October 5, 1984, Reg; March 2, 2012, Susp.	do	Do.
Broad Top, Township of, Bedford County.	421333	August 7, 1975, Emerg; June 4, 1990, Reg; March 2, 2012, Susp.	do	Do.
Catharine, Township of, Blair County	420962	October 4, 1973, Emerg; August 1, 1980, Reg; March 2, 2012, Susp.	do	Do.
Coaldale, Borough of, Bedford County	420118	June 16, 1975, Emerg; April 16, 1990, Reg; March 2, 2012, Susp.	do	Do.
Colerain, Township of, Bedford County	421334	March 20, 1984, Emerg; October 5, 1984, Reg; March 2, 2012, Susp.	do	Do.
Cumberland Valley, Township of, Bedford County.	421335	July 23, 1975, Emerg; October 15, 1985, Reg; March 2, 2012, Susp.	do	Do.
Duncansville, Borough of, Blair County	420161	August 22, 1974, Emerg; September 28, 1984, Reg; March 2, 2012, Susp.	do	Do.
East Providence, Township of, Bedford County.	421336	June 17, 1975, Emerg; June 19, 1989, Reg; March 2, 2012, Susp.	do	Do.
East Saint Clair, Township of, Bedford County.	421337	March 3, 1977, Emerg; June 19, 1989, Reg; March 2, 2012, Susp.	do	Do.
Everett, Borough of, Bedford County	420119	January 13, 1975, Emerg; November 16, 1990, Reg; March 2, 2012, Susp.	do	Do.
Frankstown, Township of, Blair County	421387	August 16, 1974, Emerg; June 15, 1981, Reg; March 2, 2012, Susp.	do	Do.
Freedom, Township of, Blair County	421388	July 31, 1975, Emerg; September 16, 1981, Reg; March 2, 2012, Susp.	do	Do.
Greenfield, Township of, Blair County	421389	July 28, 1975, Emerg; April 1, 1982, Reg; March 2, 2012, Susp.	do	Do.
Harrison, Township of, Bedford County	421338	October 24, 1975, Emerg; July 4, 1989, Reg; March 2, 2012, Susp.	do	Do.
Hollidaysburg, Borough of, Blair County	420162	March 30, 1973, Emerg; June 1, 1982, Reg; March 2, 2012, Susp.	do	Do.
Hopewell, Borough of, Bedford County	420120	July 3, 1975, Emerg; September 15, 1989, Reg; March 2, 2012, Susp.	do	Do.
Hopewell, Township of, Bedford County	421339	July 28, 1975, Emerg; September 6, 1989, Reg; March 2, 2012, Susp.	do	Do.
Huston, Township of, Blair County	422332	February 6, 1976, Emerg; September 30, 1980, Reg; March 2, 2012, Susp.	do	Do.
Hyndman, Borough of, Bedford County	420121	April 29, 1975, Emerg; December 15, 1989, Reg; March 2, 2012, Susp.	do	Do.
Juniata, Township of, Bedford County	421340	September 4, 1975, Emerg; December 16, 1977, Reg; March 2, 2012, Susp.	do	Do.
Juniata, Township of, Blair County	421390	February 3, 1976, Emerg; September 16, 1981, Reg; March 2, 2012, Susp.	do	Do.
Kimmel, Township of, Bedford County	421341	July 2, 1975, Emerg; October 15, 1985, Reg; March 2, 2012, Susp.	do	Do.
King, Township of, Bedford County	421342	May 11, 1984, Emerg; August 15, 1990, Reg; March 2, 2012, Susp.	do	Do.
Liberty, Township of, Bedford County	421343	May 28, 1975, Emerg; September 30, 1988, Reg; March 2, 2012, Susp.	do	Do.
Lincoln, Township of, Bedford County	421344	August 21, 1975, Emerg; September 30, 1988, Reg; March 2, 2012, Susp.	do	Do.
Logan, Township of, Blair County	421391	November 24, 1975, Emerg; September 28, 1984, Reg; March 2, 2012, Susp.	do	Do.
Londonderry, Township of, Bedford County.	421345	August 12, 1975, Emerg; July 17, 1989, Reg; March 2, 2012, Susp.	do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Mann, Township of, Bedford County	421346	August 26, 1975, Emerg; September 1, 1978, Reg; March 2, 2012, Susp.	....do	Do.
Manns Choice, Borough of, Bedford County.	421325	March 2, 1977, Emerg; September 6, 1989, Reg; March 2, 2012, Susp.	....do	Do.
Martinsburg, Borough of, Blair County	421384	February 9, 1976, Emerg; April 20, 1979, Reg; March 2, 2012, Susp.	....do	Do.
Monroe, Township of, Bedford County	421347	June 10, 1975, Emerg; October 15, 1985, Reg; March 2, 2012, Susp.	....do	Do.
Napier, Township of, Bedford County	421348	January 20, 1978, Emerg; September 6, 1989, Reg; March 2, 2012, Susp.	....do	Do.
New Paris, Borough of, Bedford County	421326	May 12, 1975, Emerg; July 21, 1978, Reg; March 2, 2012, Susp.	....do	Do.
Newry, Borough of, Blair County	422333	March 10, 1976, Emerg; January 18, 1984, Reg; March 2, 2012, Susp.	....do	Do.
North Woodbury, Township of, Blair County.	421392	February 6, 1976, Emerg; September 16, 1981, Reg; March 2, 2012, Susp.	....do	Do.
Pavia, Township of, Bedford County	421352	April 29, 1975, Emerg; June 1, 1989, Reg; March 2, 2012, Susp.	....do	Do.
Pleasantville, Borough of, Bedford County.	421327	March 8, 1977, Emerg; September 30, 1988, Reg; March 2, 2012, Susp.	....do	Do.
Rainsburg, Borough of, Bedford County	420122	April 29, 1975, Emerg; May 27, 1977, Reg; March 2, 2012, Susp.	....do	Do.
Roaring Spring, Borough of, Blair County.	420163	September 4, 1973, Emerg; September 1, 1977, Reg; March 2, 2012, Susp.	....do	Do.
Saxton, Borough of, Bedford County	420123	September 26, 1974, Emerg; January 26, 1983, Reg; March 2, 2012, Susp.	....do	Do.
Snake Spring, Township of, Bedford County.	421349	February 28, 1977, Emerg; July 4, 1988, Reg; March 2, 2012, Susp.	....do	Do.
Snyder, Township of, Blair County	421393	June 10, 1975, Emerg; February 2, 1983, Reg; March 2, 2012, Susp.	....do	Do.
South Woodbury, Township of, Bedford County.	421350	June 5, 1985, Emerg; February 19, 1986, Reg; March 2, 2012, Susp.	....do	Do.
Southampton, Township of, Bedford County.	421351	July 13, 1984, Emerg; September 1, 1987, Reg; March 2, 2012, Susp.	....do	Do.
Taylor, Township of, Blair County	421394	July 2, 1975, Emerg; September 30, 1980, Reg; March 2, 2012, Susp.	....do	Do.
Tyrone, Borough of, Blair County	420164	July 9, 1973, Emerg; May 2, 1983, Reg; March 2, 2012, Susp.	....do	Do.
Tyrone, Township of, Blair County	421395	December 17, 1975, Emerg; June 18, 1980, Reg; March 2, 2012, Susp.	....do	Do.
West Providence, Township of, Bedford County.	421353	November 11, 1974, Emerg; July 4, 1989, Reg; March 2, 2012, Susp.	....do	Do.
West Saint Clair, Township of, Bedford County.	421354	April 22, 1975, Emerg; July 17, 1989, Reg; March 2, 2012, Susp.	....do	Do.
Williamsburg, Borough of, Blair County	420165	August 7, 1973, Emerg; March 1, 1978, Reg; March 2, 2012, Susp.	....do	Do.
Woodbury, Borough of, Bedford County	421330	July 5, 1978, Emerg; September 24, 1984, Reg; March 2, 2012, Susp.	....do	Do.
Woodbury, Township of, Bedford County.	421355	August 9, 1982, Emerg; August 24, 1984, Reg; March 2, 2012, Susp.	....do	Do.
Woodbury, Township of, Blair County	420963	September 26, 1973, Emerg; May 15, 1980, Reg; March 2, 2012, Susp.	....do	Do.
West Virginia:				
Reedy, Town of, Roane County	540184	September 11, 1974, Emerg; December 1, 1978, Reg; March 2, 2012, Susp.	....do	Do.
Roane County, Unincorporated Areas	540183	January 20, 1978, Emerg; September 10, 1984, Reg; March 2, 2012, Susp.	....do	Do.
Spencer, City of, Roane County	540185	November 25, 1974, Emerg; January 3, 1979, Reg; March 2, 2012, Susp.	....do	Do.
Region IV				
Mississippi: Anguilla, Town of, Sharkey County.	280153	May 14, 1973, Emerg; July 3, 1986, Reg; March 2, 2012, Susp.	....do	Do.
Region VI				
Arkansas: Sebastian County, Unincorporated Areas.	050462	January 27, 1983, Emerg; April 1, 1988, Reg; March 2, 2012, Susp.	....do	Do.
Region VII				
Missouri: Canton, City of, Lewis County	290204	March 25, 1974, Emerg; February 1, 1977, Reg; March 2, 2012, Susp.	....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Region VIII				
North Dakota:				
Hettinger County, Unincorporated Areas	380293	July 7, 1975, Emerg; February 19, 1987, Reg; March 2, 2012, Susp.	.....do	Do.
Mott, City of, Hettinger County	380038	October 20, 1972, Emerg; December 15, 1976, Reg; March 2, 2012, Susp.	.....do	Do.
Regent, City of, Hettinger County	380198	August 5, 1975, Emerg; January 30, 1984, Reg; March 2, 2012, Susp.		

*do = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: February 7, 2012.

David L. Miller,

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

[FR Doc. 2012–3887 Filed 2–17–12; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 160

[Docket No. USCG–2010–0048]

RIN 1625–AB46

Lifesaving Equipment: Production Testing and Harmonization With International Standards

AGENCY: Coast Guard, DHS.

ACTION: Interim rule.

SUMMARY: The Coast Guard is amending the interim rule addressing lifesaving equipment to harmonize Coast Guard regulations for inflatable liferafts and inflatable buoyant apparatuses with recently adopted international standards affecting capacity requirements for such lifesaving equipment.

DATES: This interim rule is effective March 22, 2012. The Director of the Federal Register has approved the incorporation by reference of certain publications listed in this rule effective March 22, 2012.

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–2010–0048 and are 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. You may also find this docket on the Internet by going to *http://www.regulations.gov,* inserting USCG–2010–0048 in the ''Keyword'' box, and then clicking ''Search.''

Viewing incorporation by reference material. You may inspect the material incorporated by reference at U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593–7126 between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–372–1389. Copies of the material are available as indicated in the ''Incorporation by Reference'' section of this preamble.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, email or call Ms. Jacqueline Yurkovich, Commercial Regulations and Standards Directorate, Office of Design and Engineering Standards, Lifesaving and Fire Safety Division (CG–5214), Coast Guard; email *TypeApproval@uscg.mil,* telephone 202–372–1389. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

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I. Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
IMO International Maritime Organization
LSA Life-saving Appliance
MSC Maritime Safety Committee of the International Maritime Organization
NEPA National Environmental Policy Act 1969 (42 U.S.C. 4321–4370f)
NPRM Notice of Proposed Rulemaking
NTTAA National Technology Transfer and Advancement Act (15 U.S.C. 272 note)
OMB Office of Management and Budget
SNPRM Supplemental Notice of Proposed Rulemaking
SOLAS International Convention for Safety of Life at Sea, 1974, as amended
§ Section symbol
USCG United States Coast Guard

II. Regulatory History

On August 31, 2010, the Coast Guard published a notice of proposed rulemaking (NPRM) titled ''Lifesaving Equipment: Production Testing and Harmonization With International Standards'' in the **Federal Register**. *See* 75 FR 53458. On October 11, 2011, the Coast Guard published an interim rule titled ''Lifesaving Equipment: Production Testing and Harmonization With International Standards; Interim Rule'' (2011 interim rule) making effective changes proposed in the NPRM. 76 FR 62962. Also on October 11, 2011, the Coast Guard published a supplementary notice of proposed rulemaking (SNPRM) proposing amendments to the portion of the Code of Federal Regulations (CFR) modified by the 2011 interim rule regarding inflatable liferafts and buoyant apparatuses. 76 FR 62714. The SNPRM addressed amendments to international standards affecting capacity requirements for inflatable liferaft and inflatable buoyant apparatuses that were recently adopted by the International Maritime Organization (IMO) and that entered into force on January 1, 2012.

The IMO amendments to the international standards affect the 2011 interim rule regarding inflatable liferafts and inflatable buoyant apparatuses. The IMO amendments affect capacity requirements for such liferafts, and by extension buoyant apparatuses, but do not affect any other part of the 2011 interim rule.

III. Basis and Purpose

The Coast Guard is charged with ensuring that lifesaving equipment used on vessels subject to inspection by the United States meets specific design, construction, and performance standards, including those found in the International Convention for the Safety of Life at Sea, 1974, as amended, (SOLAS), Chapter III ''Life-saving appliances and arrangements.'' *See* 46 U.S.C. 3306. The Coast Guard carries out this charge through the approval of lifesaving equipment per 46 CFR part 2, subpart 2.75. The approval process includes pre-approving lifesaving equipment designs, overseeing prototype construction, witnessing prototype testing, and monitoring production of the equipment for use on U.S. vessels. *See* 46 CFR part 159. At each phase of the approval process, the Coast Guard sets specific standards to which lifesaving equipment must be built and tested.

The Coast Guard's specific standards for inflatable liferafts are found in 46 CFR part 160, subparts 160.151 (Inflatable Liferafts (SOLAS)) and 160.051 (Inflatable Liferafts for Domestic Service). The Coast Guard's specific standards for inflatable buoyant apparatuses are found in 46 CFR part 160, subpart 160.010 (Buoyant Apparatus for Merchant Vessels). Current subpart 160.151 satisfies SOLAS requirements, and current subparts 160.051 and 160.010 require compliance with the standards in subpart 160.151, with some specifically listed exceptions. *See* 46 CFR 160.051–1 and 160.010–3(a).

Subpart 160.151 implements SOLAS requirements by incorporating by reference the IMO standards referenced by Chapter III of SOLAS. The primary IMO standards referenced by Chapter III of SOLAS are the ''Revised recommendation on testing of life-saving appliances'' (Recommendation on Testing), IMO Resolution MSC.81(70), and the ''International Life-saving Appliance Code'' (LSA Code), IMO Resolution MSC.48(66). The IMO updates these standards by adopting MSC resolutions promulgating amendments to these standards.

In the 2011 interim rule, the Coast Guard revised subpart 160.151 to, among other things, update the version of the Recommendation on Testing incorporated by reference, and incorporate by reference for the first time the LSA Code. Subpart 160.151–5(d)(3) and (4) of Title 46 of the CFR incorporate by reference the LSA Code (as amended up through resolutions MSC.207(81), MSC.218(82), and MSC.272(85)), and the Recommendation on Testing (as amended up through resolutions MSC.226(82) and MSC.274(85)). Subparts 160.051 and 160.010 retain, with some specifically listed exceptions, the requirement for compliance with the standards in subpart 160.151, which will now also include the updated versions of the Recommendation on Testing and the LSA Code.

IMO recently adopted two new MSC resolutions further amending the LSA Code and the Recommendation on Testing: ''Adoption of Amendments to the International Life-Saving Appliance (LSA) Code'' (MSC.293(87)) and ''Adoption of Amendments to the Revised Recommendation on Testing of Life-Saving Appliances'' (MSC.295(87)).

Resolution MSC.293(87) amends the LSA Code and entered into force on January 1, 2012. This resolution increases the assumed average mass of liferaft occupants from 75 kg to 82.5 kg for inflatable liferaft design and approval testing purposes.[1]

Resolution MSC.295(87) amends the Recommendation on Testing and also entered into force on January 1, 2012. This resolution specifies revisions necessary to account for this assumed average mass increase with respect to certain existing tests. The tests required by the Recommendation on Testing, Part 1 (Prototype Tests), significantly affected by Resolution MSC.295(87), are: The jump test, loading and seating test, davit-launched liferaft boarding test, damage test, righting test, and davit-launched inflatable liferaft strength tests.

Based on these amendments, the Coast Guard is revising the regulations modified by the 2011 interim rule to include the increased average mass of liferaft occupants and to require liferaft performance under subpart 160.151 to comply with the revisions to tests necessitated by the occupant weight increase. This revision to subpart 160.151 will also, by extension, affect liferaft performance under subpart 160.051 and inflatable buoyant apparatus performance under subpart 160.010.

IV. Discussion of This Interim Rule

In this new interim rule, the Coast Guard is revising § 160.151–5(d) to incorporate by reference Resolution MSC.293(87) and Resolution MSC.295(87), and revising all references to the LSA Code and Recommendation on Testing to include the newly incorporated by reference Resolutions. References to the LSA Code will become ''LSA Code, as amended by Resolution MSC.293(87),'' and references to the Recommendation on Testing will become ''Revised recommendation on testing, as amended by Resolution MSC.295(87).'' These revisions will affect the tests in §§ 160.151–27, 160.151–29, 160.151–31, and 160.151–57, which refer to the Recommendation on Testing. A complete discussion of these changes is available in the SNPRM, published October 11, 2011. 76 FR 62714.

The Coast Guard received one comment in response to the SNPRM. The comment addresses the Coast Guard's expanded use of qualified independent laboratories, instead of Coast Guard inspectors, during the approval process and for production inspections of certain types of lifesaving equipment. This comment is beyond the scope of the SNPRM and this interim rule, which addresses the increase in occupant mass for SOLAS life rafts based on two new IMO Resolutions only. The Coast Guard sought public comment in the 2010 NPRM on the Coast Guard's proposal regarding expanded use of independent laboratories, and finalized that proposal in the 2011 interim rule. As stated in the 2011 interim rule, the Coast Guard still finds the use of independent laboratories in the Coast Guard's approval process to be ''the most effective manner'' of executing and carrying out its obligations under 46 U.S.C. section 3306. See the discussion regarding the use of independent labs to perform these inspections in III.B ''Independent Laboratories'' in the Preamble of the interim rule published on October 11, 2011. The Coast Guard did not make any changes to the regulations in response to this comment.

[1] Although the numbers are similar, the assumed average occupant mass of 82.5 kg (181.5 lbs) adopted by IMO for survival craft design and approval testing purposes and the average passenger weight of 185 lbs used in the Coast Guard's Passenger Weight and Inspected Vessel Stability Requirements Final Rule (75 FR 78064) are not related. The Passenger Weight Final Rule updated regulations that address vessel stability and the assumed average passenger weights that directly affect vessel stability. This rule, however, would use the assumed average occupant mass of 82.5 kg (181.5 lbs) to address safe loading of inflatable liferafts and buoyant apparatuses, and does not address vessel stability. The IMO-adopted assumed average occupant mass is the international consensus standard, and the Coast Guard views this IMO standard as the best standard in this context.

In this interim rule, the Coast Guard is making non-substantive changes to the citations for the IMO resolutions incorporated by reference. The changes update the citations for IMO resolutions to make them easier to identify and to obtain copies. These citation updates have not changed the IMO resolutions or the versions of the IMO resolutions from the SNPRM to the interim rule.

V. Incorporation by Reference

The Director of the Federal Register has approved the material in 46 CFR 160.151–5 for incorporation by reference under 5 U.S.C. 552 and 1 CFR part 51. You may inspect this material at U.S. Coast Guard Headquarters where indicated under **ADDRESSES**. Copies of the material are available from the sources listed in paragraph (d) of § 160.151–5.

VI. Regulatory Analyses

The Coast Guard developed this interim rule after considering numerous statutes and executive orders related to rulemaking. Below the Coast Guard summarizes these analyses based on 14 of these statutes or executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 (''Regulatory Planning and Review'') and 13563 (''Improving Regulation and Regulatory Review'') direct agencies to assess the 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 interim rule has not been designated a ''significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, the interim rule has not been reviewed by the Office of Management and Budget.

The Coast Guard received no comments that altered our assessment of impacts in the SNPRM. We have found no additional data or information that changed our findings in the NPRM. We have adopted the assessment in the SNPRM for this rule as final.

The SNPRM is available in the docket where indicated under the ''Public Participation and Request for Comments'' section of this preamble. A summary of the analysis follows: This interim rule addresses the change in the international standard for occupant weight used in testing equipment to establish the rated capacity of inflatable liferafts and inflatable buoyant apparatuses. This interim rule revises the occupant weight or ''assumed average occupant mass'' from the current 75 kg to the new weight standard of 82.5 kg.

The Coast Guard issues a Certificate of Approval for inflatable liferafts and inflatable buoyant apparatuses under the applicable subpart in 46 CFR part 160 after successful testing of those appliances by their manufacturers. A Certificate of Approval specifies the number of occupants (or rated capacity) for which the inflatable liferaft or inflatable buoyant apparatus is designed and has been successfully tested, and the Certificate must be renewed every 5 years. New testing is not required to renew a current Certificate, but new approval requests require testing before a Certificate can be issued.

Costs

While this interim rule requires manufacturers to conduct prototype and production tests for inflatable liferafts and inflatable buoyant apparatuses manufactured on or after March 22, 2012 using the new occupant weight standard, it would limit re-testing of currently approved equipment, thus limiting the cost impact on manufacturers. And, as discussed in section IV. *Discussion of the Interim Rule* (referencing the complete discussion of the rule in the SNPRM, published October 11, 2011 (76 FR 62714)), this interim rule does not apply to liferafts currently in service aboard U.S. vessels; thus, no vessel would incur replacement costs for liferafts. A summary of changes to the baseline testing requirements is shown in Table 1.

TABLE 1—SUMMARY OF CHANGES

Device	Testing type	Existing equipment (approval prior to January 1, 2012)		New equipment (approval after January 1, 2012)	
		Testing	Impacts	Testing	Impacts
SOLAS Inflatable Liferafts (160.151).	Prototype testing ..	Manufacturers must obtain a new Certificate of Approval certifying rated occupancy using the new occupant weight standard. Manufacturers may either re-test or have a certification made using previous test results adjusted for the new occupant weight standard. Testing costs are negligible on a unit cost basis.	Units with rated capacity of less than 6 occupants are ineligible for SOLAS service. Costs of testing unchanged as nature of the test is unchanged.	All tests use the new occupant weight standard to establish occupancy rating. Costs of testing unchanged as nature of the test is unchanged.	Units with rated capacity of less than 6 occupants are ineligible for SOLAS service.
	Production Testing	All tests use the new weight standard to establish occupancy rating.	Costs of testing unchanged as nature of the test is unchanged.	All tests use the new occupant weight standard to establish occupancy rating.	Costs of testing unchanged as nature of the test is unchanged.
Non-SOLAS Inflatable Liferafts (160.051).	Prototype testing ..	Existing Certificates of Approval may be renewed without re-testing.	No cost or benefit as the use of the new occupant weight standard is optional.	All tests use the new occupant weight standard to establish occupancy rating.	Costs of testing unchanged as nature of the test is unchanged.

TABLE 1—SUMMARY OF CHANGES—Continued

Device	Testing type	Existing equipment (approval prior to January 1, 2012)		New equipment (approval after January 1, 2012)	
		Testing	Impacts	Testing	Impacts
	Production Testing	No cost or benefit. The use of the new occupant weight standard is optional for equipment manufactured under an existing Certificate of Approval.		All tests use the new occupant weight standard to establish occupancy rating.	Costs of testing unchanged as nature of the test is unchanged.
Inflatable Buoyant Apparatus (160.010).	Prototype testing ..	Existing Certificates of Approval may be renewed without re-testing.	No cost or benefit as the use of the new occupant weight standard is optional.	All tests use the new occupant weight standard to establish occupancy rating.	Costs of testing unchanged as nature of the test is unchanged.
	Production Testing	No cost or benefit. The use of the new occupant weight standard is optional for equipment manufactured under an existing Certificate of Approval.		All tests use the new occupant weight standard to establish occupancy rating.	Costs of testing unchanged as nature of the test is unchanged.

SOLAS Inflatable Liferafts (Subpart 160.151)

As shown in Table 1 above, manufacturers of SOLAS inflatable liferafts approved under subpart 160.151 (SOLAS liferafts) and manufactured on or after March 22, 2012 are allowed the option of either re-testing using the new occupant weight standard or requesting certification for a lower rated occupancy (adjusted for the new occupant weight standard) based on the certification testing submitted for their current approval.

The principal cost impact for manufacturers of SOLAS liferafts will be for currently approved inflatable liferafts whose rated capacity is six using the current 75 kg occupant weight standard. Since SOLAS requires that inflatable liferafts have a minimum capacity of six, any SOLAS liferaft currently approved for six occupants will have to be re-tested under the new occupant weight standard in order to retain approval.

Currently, there are 10 manufacturers that produce 109 models of SOLAS liferafts. Of these, there are 11 liferaft models (from eight manufacturers) whose rated capacity is six (Table 2). These 11 models will be required to re-test to maintain their SOLAS certification. Three of these eight manufacturers are U.S. firms and they each produce one model of inflatable liferaft with a rated occupancy of six occupants. Of those three models, one model is designed primarily for use in aircraft under a Federal Aviation Administration approval number. The three models produced by U.S. firms and the eight models manufactured by foreign firms will have to be re-tested in order to verify a minimum occupancy rating under the new occupant weight standard to be used on SOLAS vessels. From estimates obtained from industry, we estimate the costs of re-testing for compliance with the new occupant weight standard at $1,800 for each model.

We estimate the total cost to industry to re-test all current SOLAS liferaft models as $19,800 ($14,400 for foreign manufacturers and $5,400 for U.S.-owned manufacturers). See Table 2 below.

TABLE 2—SOLAS LIFERAFTS

Manufacturer	Number of manufacturers	Total number of models of liferaft produced	Total number of models of liferaft produced with an occupancy rating of 6	Cost to re-test each SOLAS liferaft	Total cost to retest
Foreign owned	7	104	8	$1,800	$14,400
U.S. owned	3	5	3	1,800	5,400
Total	10	109	11	1,800	19,800

Non-SOLAS Inflatable Liferafts (Subpart 160.051) and Inflatable Buoyant Apparatus (Subpart 160.010)

As shown earlier in Table 1, manufacturers of domestic service inflatable liferafts under subpart 160.051 (domestic service liferafts) and inflatable buoyant apparatuses under subpart 160.010 manufactured on or after March 22, 2012 under current Certificates of Approval, have the option of using either the old 75 kg or the new 82.5 kg occupant weight standard. If a manufacturer of domestic service liferafts or a manufacturer of inflatable buoyant apparatuses with current Certificates of Approval chooses to use the new occupant weight standard, it also has the option of either re-testing using the new occupant weight standard or requesting re-certification for a lower number of occupants (adjusted for the new occupant weight standard). Manufacturers of domestic inflatable liferafts under subpart 160.051 or inflatable buoyant apparatuses under 160.010 are required to use the new occupant weight standard only when testing domestic inflatable liferafts or

inflatable buoyant apparatuses approved after March 22, 2012.

In terms of the cost of the regulation:

1. While prototype testing for all SOLAS liferafts on or after March 22, 2012, will have to employ the new occupant weight standard, there is no additional cost in performing the required tests due to the change in the testing weight because the nature of the test remains the same.

2. Production testing of all SOLAS liferafts manufactured on or after March 22, 2012 will require testing using the new occupant weight standard. As with prototype testing, there is no additional cost in performing the required tests due to the change in the testing weight because the nature of the test remains the same.

3. For production testing of SOLAS liferafts, the manufacturer may either request a certification with a lower maximum occupancy based on the new occupant weight standard or re-test the equipment for certification of its current rated capacity using the new occupant weight standard.

4. The 11 models (three models made by U.S. manufacturers) of SOLAS inflatable liferafts whose current rated capacity is six occupants, would have to verify that they meet the minimum SOLAS requirements for a capacity of six occupants at the new occupant weight standard if they wish to continue their current SOLAS approval status.

5. For both prototype and production testing of domestic service inflatable liferafts and inflatable buoyant apparatuses approved by the Coast Guard prior to March 22, 2012 the manufacturer may test under either the 75 kg or the 82.5 kg occupant weight standard with no change to testing based on the new occupant weight standard.

6. For prototype and production testing of domestic service inflatable liferafts and inflatable buoyant apparatuses approved on or after March 22, 2012 the manufacturer must test under the 82.5 kg occupant weight standard.

For inflatable liferafts approved under subpart 160.051 prior to March 22, 2012 and inflatable buoyant apparatuses approved under subpart 160.010 prior to March 22, 2012, the cost of testing equipment at the higher occupant weight standard is voluntary, as domestic liferafts and inflatable buoyant apparatuses may be certified using either occupant weight standard. Likewise, equipment manufactured under a current Certificate of Approval is required to be re-tested only if the manufacturer elects to retain their current rated capacity for their equipment under the higher occupant weight standard. However, manufacturers have the option to reduce the current rated capacities of their equipment to comply with the new occupant weight standard, provided that the resulting capacity does not conflict with the minimum required capacity applicable to that equipment.

Prototype and production testing of all SOLAS liferafts approved under subpart 160.151 is required using the higher 82.5 kg occupant weight standard. The Coast Guard has no evidence to suggest that testing at the higher occupant weight standard will involve additional testing costs for manufacturers because the nature of the test remains the same.

Benefits

The principal benefit of the interim rule is the protection of life at sea by establishing capacity standards for inflatable liferafts and inflatable buoyant apparatuses reflecting a global increase in mariner weights. Additionally, the rule ensures compliance with internationally applicable standards for SOLAS adopted by IMO where noncompliance would exclude the use of inflatable liferafts manufactured under subpart 160.151 aboard SOLAS vessels.

B. Small Entities

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

An SNPRM discussing the impact of this rule on small entities is available in the docket where indicated under the ''Public Participation and Request for Comments'' section of this preamble. In the SNPRM, the Coast Guard certified under 5 U.S.C. 605(b) that the rule would not have a significant economic impact on a substantial number of small entities. We received no comments on this certification and have made no changes that would alter our assessment of the impacts in the SNPRM.

We have identified three U.S.-owned entities involved in the manufacture of SOLAS liferafts manufactured under subpart 160.151. All are business entities, and all are small entities. For manufacturers seeking certification of equipment currently approved under subpart 160.151 whose rated capacity is six, re-testing at the higher occupant weight standard will be required to retain their SOLAS approval status since SOLAS inflatable liferafts must have a minimum rated capacity of at least six. For the three models of liferafts currently approved under subpart 160.151, the cost estimates for certification testing, obtained from industry sources, are approximately $1,800 per liferaft, for a total industry cost of $5,400 (3 liferaft models × $1,800 testing cost per model). As each of the three U.S. owned small businesses directly impacted by this rule will likely need to retest one model, the costs to these three small businesses is $1,800 per business. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this interim rule will not have a significant economic impact on a substantial number of small entities.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), the Coast Guard wants to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult Ms. Jacqueline Yurkovich, Commercial Regulations and Standards Directorate, Office of Design and Engineering Standards, Lifesaving and Fire Safety Division (CG–5214), Coast Guard; email *TypeApproval@uscg.mil,* telephone 202–372–1389. The Coast Guard will not retaliate against individuals or small entities that question or complain about this rule or any policy or action of the Coast Guard.

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).

D. Collection of Information

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

E. Federalism

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

The U.S. Supreme Court has long recognized the field preemptive impact of the Federal regulatory regime for inspected vessels. *See, e.g., Kelly* v. *Washington ex rel Foss,* 302 U.S. 1 (1937) and the consolidated cases of *United States* v. *Locke and Intertanko* v. *Locke,* 529 U.S. 89, 113–116 (2000). Therefore, the Coast Guard's view is that regulations issued under the authority of 46 U.S.C. 3306 in the areas of design, construction, alteration, repair, operation, superstructures, hulls, fittings, equipment, appliances, propulsion machinery, auxiliary machinery, boilers, unfired pressure vessels, piping, electric installations, accommodations for passengers and crew, sailing school instructors, sailing school students, lifesaving equipment and its use, firefighting equipment, its use and precautionary measures to guard against fire, inspections and tests related to these areas and the use of vessel stores and other supplies of a dangerous nature have preemptive effect over State regulation in these fields, regardless of whether the Coast Guard has issued regulations on the subject or not, and regardless of the existence of conflict between the State and Coast Guard regulation.

While it is well settled that States may not regulate in categories in which Congress intended the Coast Guard to be the sole source of a vessel's obligations, as these categories are within a field foreclosed from regulation by the States (see *U.S.* v. *Locke,* above), the Coast Guard recognizes the key role state and local governments may have in making regulatory determinations. Additionally, Sections 4 and 6 of Executive Order 13132 require that for any rules with preemptive effect, the Coast Guard will provide elected officials of affected state and local governments and their representative national organizations the notice and opportunity for appropriate participation in any rulemaking proceedings, and to consult with such officials early in the rulemaking process. Therefore, we invited affected state and local governments and their representative national organizations to indicate their desire for participation and consultation in this rulemaking. We received no such indications.

F. Unfunded Mandates Reform Act

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

G. Taking of Private Property

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

H. Civil Justice Reform

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

I. Protection of Children

The Coast Guard has 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 might disproportionately affect children.

J. Indian Tribal Governments

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

K. Energy Effects

The Coast Guard has analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The Coast Guard has 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.

L. Technical Standards

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

This rule uses the following voluntary consensus standards:

- Resolution MSC.293(87), Adoption of Amendments to the International Life-Saving Appliance (LSA) Code;
- Resolution MSC.295(87), Adoption of Amendments to the Revised Recommendation on Testing of Life-Saving Appliances (Resolution MSC.81(70)).

The sections that reference these standards and the locations where these standards are available are listed in 46 CFR 160.151–5.

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

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

N. Environment

We have analyzed this rule under Department of Homeland Security 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 involves regulations which are editorial, regulations concerning equipping of vessels, and regulations concerning vessel operation safety standards. This rule is categorically excluded under Section 2.B.2, Figure 2–1, paragraphs (34)(a) and (d) of the Instruction and under paragraph 6(a) of the ''Appendix to National Environmental Policy Act: Coast Guard Procedures for Categorical Exclusions, Notice of Final Agency Policy'' (67 FR 48243, July 23, 2002). An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 46 CFR Part 160

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

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

PART 160—LIFESAVING EQUIPMENT

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

Authority: 46 U.S.C. 2103, 3306, 3703 and 4302; E.O. 12234, 45 FR 58801, 3 CFR, 1980 Comp., p. 277; 49 CFR 1.46.

Subpart 160.151—Inflatable Liferafts (SOLAS)

■ 2. Amend § 160.151–5 by adding paragraphs (d)(5) and (d)(6) to read as follows:

§ 160.151–5 Incorporation by reference.

* * * * *

(d) * * *

(5) Annex 7 to MSC 87/26, Report of the Maritime Safety Committee on its Eighty-Seventh Session, ''Resolution MSC.293(87), Adoption of Amendments to the International Life-Saving Appliance (LSA) Code,'' (adopted May 21, 2010), IBR approved for §§ 160.151–7, 160.151–15, 160.151–17, 160.151–21, 160.151–29, and 160.151–33 (''Resolution MSC.293(87)'').

(6) Annex 9 to MSC 87/26, Report of the Maritime Safety Committee on its Eighty-Seventh Session, ''Resolution MSC.295(87), Adoption of Amendments to the Revised Recommendation on Testing of Life-Saving Appliances (Resolution MSC.81(70)),'' (adopted May 21, 2010), IBR approved for §§ 160.151–21, 160.151–27, 160.151–29, 160.151–31, and 160.151–57 (''Resolution MSC.295(87)'').

* * * * *

§ 160.151–7 [Amended]

■ 3. Amend § 160.151–7 by removing the words ''IMO LSA Code'' wherever they appear and adding, in their place, the words ''IMO LSA Code, as amended by Resolution MSC.293(87)''.

§ 160.151–15 [Amended]

■ 4. Amend § 160.151–15 by removing the words ''IMO LSA Code'' wherever they appear and adding, in their place, the words ''IMO LSA Code, as amended by Resolution MSC.293(87)''.

§ 160.151–17 [Amended]

■ 5. Amend § 160.151–17 by removing the words ''IMO LSA Code'' wherever they appear and adding, in their place, the words ''IMO LSA Code, as amended by Resolution MSC.293(87)''.

§ 160.151–21 [Amended]

■ 6. Amend § 160.151–21 as follows:

■ a. Remove the words ''IMO LSA Code'' wherever they appear and add, in their place, the words ''IMO LSA Code, as amended by Resolution MSC.293(87)''; and

■ b. In paragraph (f), remove the words ''IMO Revised recommendation on testing'' and add, in their place, the words ''IMO Revised recommendation on testing, as amended by Resolution MSC.295(87)''.

§ 160.151–27 [Amended]

■ 7. Amend § 160.151–27 by removing the words ''IMO Revised recommendation on testing'' wherever they appear and adding, in their place, the words ''IMO Revised recommendation on testing, as amended by Resolution MSC.295(87)''.

§ 160.151–29 [Amended]

■ 8. Amend § 160.151–29 as follows:

■ a. In the introductory text, remove the words ''IMO LSA Code'' and add, in their place, the words ''IMO LSA Code, as amended by Resolution MSC.293(87)''; and

■ b. In the introductory text, remove the words ''IMO Revised recommendation on testing'' and add, in their place, the words ''IMO Revised recommendation on testing, as amended by Resolution MSC.295(87)''.

§ 160.151–31 [Amended]

■ 9. Amend § 160.151–31 by removing the words ''IMO Revised recommendation on testing'' wherever they appear and adding, in their place, the words ''IMO Revised recommendation on testing, as amended by Resolution MSC.295(87)''.

§ 160.151–33 [Amended]

■ 10. Amend § 160.151–33 by removing the words ''IMO LSA Code'' wherever they appear and adding, in their place, the words ''IMO LSA Code, as amended by Resolution MSC.293(87)''.

§ 160.151–57 [Amended]

■ 11. Amend § 160.151–57 by removing the words ''IMO Revised recommendation on testing'' wherever they appear and adding, in their place, the words ''IMO Revised recommendation on testing, as amended by Resolution MSC.295(87)''.

Dated: February 1, 2012.

J.G. Lantz,

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

[FR Doc. 2012–3869 Filed 2–17–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 173

[Docket No. PHMSA–2011–0157; Notice No. 11–6]

Clarification on the Division 1.1 Fireworks Approvals Policy

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Clarification.

SUMMARY: In this document, PHMSA is responding to comments received from its initial Notice No. 11–6 clarifying PHMSA's policy regarding the fireworks approvals program. Furthermore, in this document PHMSA is restating its policy clarification that it will accept only those classification approval applications for Division 1.1 fireworks that have been examined and assigned a recommended shipping description, division, and compatibility group by a DOT-approved explosives test laboratory, or those that have been issued an approval for the explosive by the competent authority of a foreign government acknowledged by PHMSA's Associate Administrator. This policy clarification is intended to enhance safety by ensuring that fireworks transported in commerce meet the established criteria for their assigned classification, thereby minimizing the potential shipment of incorrectly classified or forbidden fireworks.

DATES: The policy clarification discussed in this document is effective February 21, 2012.

FOR FURTHER INFORMATION CONTACT: Mr. Ryan Paquet, Director, Approvals and Permits Division, Office of Hazardous Materials Safety, (202) 366–4512, PHMSA, 1200 New Jersey Avenue SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

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II. Background
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IV. Summary of Policy Clarification

I. Introduction

The Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) require that Division 1.1 fireworks must be examined by a DOT-approved explosives test laboratory and assigned a recommended shipping description, division, and compatibility group in accordance with § 173.56(b). The tests provided for the classification of Division 1.1 fireworks specified in §§ 173.57 and 173.58 describe the procedures used to determine the acceptance criteria and assignment of class and division for all new explosives. Further, the HMR also permit Division 1.1 firework devices that have been approved by the competent authority of a foreign government that PHMSA's Associate Administrator has acknowledged in writing as acceptable in accordance with § 173.56(g).

On September 27, 2011, PHMSA published the initial Notice No. 11–6 (76 FR 59769) clarifying its policy, consistent with the HMR, that all Division 1.1 fireworks must undergo examination by a DOT-approved explosives examination laboratory or be issued an approval for the explosive by the competent authority of a foreign government acknowledged by PHMSA's Associate Administrator. In today's document, PHMSA is responding to comments received as a result of this notice and is restating its policy clarification on the fireworks approval program.

II. Background

The HMR require that Division 1.1 fireworks must be examined by a DOT-approved explosives test laboratory and assigned a recommended shipping description, division, and compatibility group in accordance with § 173.56(b). The HMR also permit Division 1.1 firework devices that have been approved by the competent authority of a foreign government that PHMSA's Associate Administrator has acknowledged in writing as acceptable in accordance with § 173.56(g).

According to § 173.56(j), manufacturers of Division 1.3 and 1.4 fireworks, or their designated U.S. agents, may apply for an explosives (EX) classification approval without prior examination by a DOT-approved explosives test laboratory if the firework device is manufactured in accordance with APA Standard 87–1 (IBR, see § 171.7), and the device passes the thermal stability test. Additionally, the applicant must certify that the firework device conforms to the APA Standard 87–1 and that the descriptions and technical information contained in the application are complete and accurate. PHMSA has in the past, on a case-by-case basis, in accordance with § 173.56(i), approved some Division 1.1G fireworks without requiring testing by a DOT-approved explosives examination laboratory. PHMSA evaluates each EX approval application independently and has also required Division 1.1G fireworks to undergo examination testing by a DOT-approved explosive examination lab prior to issuing the EX approval.

While APA Standard 87–1 contains two instances where Division 1.1 fireworks may be approved under the standard, it does not call for the level of testing required in the HMR, nor does it provide testing and criteria to determine when a firework ceases to be a Division 1.1 and becomes forbidden for transport.

In this document, PHMSA is clarifying its policy that all Division 1.1 fireworks must undergo examination by a DOT-approved explosives examination laboratory or be approved by a competent authority. Division 1.1 fireworks will not require UN Test Method 6, as testing will be limited to UN Test Method 4a(i) and 4b(ii), as is specified in § 173.57(b). The examination laboratory may request additional information to make its classification recommendation. Additionally, PHMSA allows the laboratory to make a classification recommendation for Division 1.1 fireworks based on analogy.

PHMSA believes that by issuing Division 1.1 fireworks approvals only after a DOT-approved explosive laboratory has examined and recommended a classification, or an approval has been issued by a competent authority of a foreign government acknowledged by PHMSA's Associate Administrator, it is ensuring that fireworks transported in commerce meet the established criteria for their assigned classification, thereby minimizing the potential shipment of incorrectly classified or forbidden fireworks.

III. List of Commenters, Beyond-the-Scope Comments, and General Comments

PHMSA received three comments in response to the initial Notice No. 11–6. The comments covered various topics including, but not limited to, transportation safety, general comments, and economic impacts. One commenter supported the clarification to the fireworks policy in initial Notice 11–6, while two commenters had reservations about it. A summary of the comments received is discussed below. The comments, as submitted to the docket for the initial Notice No. 11–6 (Docket No. PHMSA–2011–0157), may be accessed via *http://www.regulations.gov* and were submitted by the following:

(1) Veolia ES Technical Solutions, L.L.C.; PHMSA–2011–0157–0002.

(2) American Pyrotechnics Association (APA); PHMSA–2011–0157–0003.

(3) Kellner's Fireworks Inc.; PHMSA–201–0157–0004.

Beyond-the-Scope Comments

One commenter requests PHMSA consider waste management of used or defective fireworks when proposing any amendments to regulations related to the transport of fireworks. In this document, PHMSA does not propose any regulatory amendments; rather, we are clarifying existing policy. While PHMSA agrees environmental impacts should be considered when proposing amendments to regulations, no regulatory changes were proposed in the initial Notice; therefore, waste management of fireworks is beyond the scope of this document.

Another commenter acknowledges the current prohibition in the HMR to classify Division 1.1 fireworks under § 173.56(j), but requests that PHMSA remove the terminology ''Division 1.3 and Division 1.4'' in § 173.56(j) to allow PHMSA to grant approvals for all fireworks manufactured in accordance with APA Standard 87–1, regardless of their classification. This document is a clarification of current requirements and does not propose any regulatory amendments, rather, PHMSA is clarifying existing policy; therefore this request will be handled as a petition for rulemaking and responded to accordingly.

General Comments

Transportation Safety

With regard to transportation safety, PHMSA received one comment in support of its effort to clarify the classification of Division 1.1 fireworks. Specifically, this commenter noted that

PHMSA's oversight of the classification of Division 1.1 fireworks is preferable due to the increased safety hazards involved in the management of Division 1.1 fireworks.

Another commenter opposes PHMSA's clarification and indicates that Division 1.1 fireworks approved under APA Standard 87–1 have not resulted in any incidents that would cause it to reconsider its practice. Although to date there have been no known incidents involving the transportation of Division 1.1 fireworks, there are known occurrences of fireworks being transported that contain chemical compositions rendering them forbidden from transportation. The APA Standard 87–1 does not provide the testing and criteria to determine when a device ceases to be a Division 1.1 firework device and becomes forbidden from transportation. Testing Division 1.1 fireworks devices as prescribed in the HMR, enables a determination when a firework device ceases to be a Division 1.1 device and becomes forbidden. Furthermore, this clarification will provide oversight to ensure that Division 1.1 fireworks meet the established criteria for their assigned classification, thereby minimizing the potential shipment of incorrectly classified or forbidden fireworks.

Economic Impact

One commenter opposes the policy clarification because they indicate that fireworks currently classified as Division 1.1G devices have not changed in many years, even though the regulations governing their transportation have changed. The commenter states that a fireworks device that was previously considered to be 1.3G under APA Standard 87–1 is now considered a 1.1G, but the device is still manufactured the same way as it was when the device was classed as a 1.3G.

In December 1991, PHMSA (Research and Special Programs Administration) revised the HMR to align its classification system for fireworks with the U.N. Recommendations on the Transport of Dangerous Goods. Under the previous system, fireworks were classified as Class A, B, or C—Class A fireworks were considered to be the most hazardous and Class C fireworks were considered to be least hazardous. For the most part, Class A fireworks were reclassed as Division 1.1, Class B fireworks were reclassed as Division 1.3, and Class C fireworks were reclassed as Division 1.4. This resulted in some fireworks with shell diameters as great as 16 inches being classed as Division 1.3 fireworks. In the 2001–2002 edition of the APA Standard 87–1, fireworks with diameters greater than 10 inches were all classified as Division 1.1 fireworks. Prior to that edition of the APA Standard 87–1, aerial shell firework devices not classed as a 1.4G were classed as a 1.3G regardless of size or quantity of flash composition. This change was made in the interest of safety.

While PHMSA has approved Division 1.1G fireworks manufactured in accordance with the APA Standard 87–1, it evaluates each EX approval independently and has also required Division 1.1G fireworks to be examined.

Further, the commenter states that the testing for these items can cost upwards of $8,000 and that the cost will put fireworks companies intending to sell Division 1.1G fireworks devices at a major loss before the product is available for sale. To the contrary, third-party labs have indicated that the cost of performing these tests is considerably less—depending on a number of variables, PHMSA estimates that required tests would cost less than $5,400.

Also, as indicated in the initial document, if a fireworks device is classed and approved as a Division 1.1 firework, the UN Test Method 6 is not required; rather, testing will be limited to UN Test Method 4a(i) and 4b(ii), as is specified in § 173.57(b). Further, PHMSA allows the laboratory to make a classification recommendation for Division 1.1 fireworks based on analogy.

This document is intended to clarify current regulations: that only Division 1.3 and 1.4 fireworks devices may be approved in accordance with the APA Standard 87–1.

IV. Summary of Policy Clarification

Based on the comments received and PHMSA's responses to those comments, henceforth, PHMSA will not accept Division 1.1 fireworks approval applications submitted under the APA Standard 87–1. Division 1.1 fireworks must be examined and assigned a recommended shipping description, division, and compatibility group by a DOT-approved explosives test laboratory, or issued an approval for the explosive by the competent authority of a foreign government acknowledged by PHMSA's Associate Administrator. On a case-by-case basis under 173.56(i), PHMSA will evaluate them for approval without testing.

Issued in Washington, DC, on February 14, 2012 under authority delegated in 49 CFR part 1.

Magdy El-Sibaie,

Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2012–3894 Filed 2–17–12; 8:45 am]

BILLING CODE 4910–60–P

Proposed Rules

Federal Register
Vol. 77, No. 34
Tuesday, February 21, 2012

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–1045; Directorate Identifier 2011–NE–32–AD]

RIN 2120–AA64

Airworthiness Directives; Honeywell International Inc. Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Honeywell International Inc. models TFE731–4, –4R, –5, –5R, –5AR, and –5BR series turbofan engines. This proposed AD was prompted by a report of a rim/web separation of a first stage low-pressure turbine (LPT1) rotor assembly. This proposed AD would require replacing affected LPT1 rotor assemblies with LPT1 rotor assemblies eligible for installation. We are proposing this AD to prevent uncontained disk separation, leading to fuel tank penetration, fire, personal injury, and damage to the airplane.

DATES: We must receive comments on this proposed AD by April 23, 2012.

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 Honeywell Engines and Systems Technical Publications and Distribution, M/S 2101–201, P.O. Box 52170, Phoenix, AZ 85072–2170, phone: 602–365–2493 (General Aviation), 602–365–5535 (Commercial Aviation), fax: 602–365–5577 (General Aviation and Commercial Aviation). You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

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: Joseph Costa, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; phone: 562–627–5246; fax: 562–627–5210: email: *joseph.costa@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–2011–1045; Directorate Identifier 2011–NE–32–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 received a report of a rim/web separation on an LPT1 rotor disk, part number (P/N) 3075446–2, in a TFE731–5BR engine. The crack propagated in sustained peak strain low-cycle-fatigue, and accumulated 762 cycles-in-service (CIS) before failure. The current published life limit for this part is 10,000 CIS. The most probable cause for this separation was due to LPT1 blade walking. This condition, if not corrected, could result in an uncontained disk separation, fuel tank penetration, fire, personal injury, and damage to the airplane.

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 replacing affected LPT1 rotor assemblies with improved design LPT1 rotor assemblies that are eligible for installation.

Costs of Compliance

We estimate that this proposed AD would affect 1,550 engines installed on airplanes of U.S. registry. We also estimate that it would take about 1 work-hour per engine to perform the proposed actions at next access and 165 work-hours per unscheduled engine disassembly, and that the average labor rate is $85 per work-hour. Replacement parts would cost about $175,000 per engine. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $35,195,488 per year.

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):

Honeywell International Inc. (formerly AlliedSignal Inc., formerly Garret Turbine Engine Company): Docket No. FAA–2011–1045; Directorate Identifier 2011–NE–32–AD.

(a) Comments Due Date

We must receive comments by April 23, 2012.

(b) Affected ADs

None.

(c) Applicability

(1) This AD applies to Honeywell International Inc. model TFE731–5 series engines, with a first stage low-pressure turbine (LPT1) rotor assembly, part number (P/N) 3075184–2, 3075184–3, or 3075184–4, installed.

(2) This AD also applies to Honeywell International Inc. models TFE731–5AR and –5BR series engines, with a first stage LPT1 rotor assembly, P/N 3075447–1, 3075447–2, 3075447–4, 3075713–1, 3075713–2, 3075713–3, or 3074748–5, installed.

(3) This AD also applies to Honeywell International Inc. models TFE731–4, –4R, –5AR, –5BR, and –5R series turbofan engines, with an LPT1 rotor assembly, P/N 3074748–4, 3074748–5, 3075447–1, 3075447–2, 3075447–4, 3075713–1, 3075713–2, or 3075713–3, installed.

(d) Unsafe Condition

This AD was prompted by a report of a rim/web separation of an LPT1 rotor assembly. We are issuing this AD to prevent uncontained disk separation, leading to fuel tank penetration, fire, personal injury, and damage to the airplane.

(e) Compliance

Comply with this AD within the compliance times specified, unless already done.

(f) Engines Installed in Dassault-Aviation Falcon 20 and Construcciones Aeronauticas, S.A. (CASA) 101 Airplanes

(1) Remove the LPT1 rotor assembly at the next access to the LPT1 rotor assembly or at the next major periodic inspection, not to exceed 2,600 hours-in-service since last major periodic inspection, or 8 years after the effective date of this AD, whichever occurs first.

(2) Install an LPT1 rotor assembly that is eligible for installation.

(g) Engines Not Installed in Dassault-Aviation Falcon 20 or CASA 101 Airplanes

(1) Remove the LPT1 rotor assembly at the next core zone inspection, not to exceed 5,100 hours-in-service since last core zone inspection, or at the next time the LPT1 rotor disc is removed for cause, or 8 years after the effective date of this AD, whichever occurs first.

(2) Install an LPT1 rotor assembly that is eligible for installation.

(h) Definitions

(1) For the purpose of this AD, ''next access'' is when the low-pressure tie rod is unstretched.

(2) For the purpose of this AD, an LPT1 rotor assembly ''eligible for installation'' is an LPT1 rotor assembly not having a P/N listed in this AD.

(i) Installation Prohibition

After the effective date of this AD, if the rotor assembly must be replaced as specified in paragraph (f)(1) or (g)(1) of this AD, do not install any LPT1 rotor assembly listed by P/N in paragraphs (c)(1), (c)(2), and (c)(3) of this AD, into any engine.

(j) Alternative Methods of Compliance (AMOCs)

The Manager, Los Angeles Aircraft Certification Office, FAA, may approve AMOCs for this AD. Use the procedures in 14 CFR 39.19 to request an AMOC.

(k) Related Information

(1) For more information about this AD, contact Joseph Costa, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; phone: 562–627–5246; fax: 562–627–5210: email: *joseph.costa@faa.gov.*

(2) Honeywell International Inc. Service Bulletin (SB) No. TFE731–72–3768, SB No. TFE731–72–3769, and SB No. TFE731–72–3770, pertain to the subject of this AD. Contact Honeywell Engines and Systems Technical Publications and Distribution, M/S 2101–201, P.O. Box 52170, Phoenix, AZ 85072–2170, phone: 602–365–2493 (General Aviation), 602–365–5535 (Commercial Aviation), fax: 602–365–5577 (General Aviation and Commercial Aviation), for a copy of this service information.

(3) You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Issued in Burlington, Massachusetts, on February 3, 2012.

Peter A. White,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2012–3861 Filed 2–17–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0224; Directorate Identifier 2007–NE–44–AD]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Deutschland Ltd & Co KG (RRD) Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); rescission.

SUMMARY: We propose to rescind an airworthiness directive (AD) for RRD BR700–715A1–30, BR700–715B1–30, and BR700–715C1–30 turbofan engines. The existing AD resulted from the need to reduce the published life limits of high-pressure (HP) turbine stage 1 discs, part numbers (P/Ns) BRH20130 and BRH20131, and HP turbine stage 2 discs, P/Ns BRH19423 and BRH19427.

Since we issued the existing AD, RRD has revised the approved published life limits of these parts to the same or higher limits as originally certified.

DATES: We must receive comments on this proposed AD by April 23, 2012.

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

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

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Mark Riley, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7758; fax: 781–238–7199; email: *mark.riley@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD rescission. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–0224; Directorate Identifier 2007–NE–44–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD rescission. We will consider all comments received by the closing date and may amend this proposed AD rescission based on those comments.

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

Discussion

On March 17, 2009, we issued AD 2009–07–01 (74 FR 12086, March 23, 2009). That AD requires reducing the published life limits of BR700–715 turbofan engine HP turbine stage 1 discs, P/Ns BRH20130 and BRH20131, and HP turbine stage 2 discs, P/Ns BRH19423 and BRH19427.

Since we issued AD 2009–07–01 (74 FR 12086, March 23, 2009), RRD has revised the approved published life limits of these HP turbine stage 1 discs to the same or higher limits as originally certified. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive Cancellation Notice 2007–0152–CN, dated December 22, 2011. EASA stated in that Cancellation Notice that they have approved published life limits for the affected parts that are increased to the same or higher value as originally certified. We have evaluated the information provided by RRD and EASA and have determined that an unsafe condition no longer exists in these HP turbine stage 1 and stage 2 discs.

FAA's Determination and Requirements of This Proposed AD Rescission

We are proposing this AD rescission of AD 2009–07–01 (74 FR 12086, March 23, 2009) because we evaluated all information and determined that allowing the increase in the published part life limits is acceptable. This proposed AD would rescind AD 2009–07–01.

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 a practice, method, or procedure necessary for safety in air commerce.

Regulatory Findings

We determined that this proposed AD rescission would not have federalism implications under Executive Order 13132. This proposed AD rescission 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 rescission of a regulation:

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, 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 rescinding airworthiness directive (AD) 2009–07–01, Amendment 39–15860 (74 FR 12086, March 23, 2009):

Rolls-Royce Deutschland Ltd & Co KG (formerly BMW Rolls-Royce GmbH, formerly BMW Rolls-Royce Aero Engines): Docket No. FAA–2008–0224; Directorate Identifier 2007–NE–44–AD.

(a) Comments Due Date

We must receive comments by April 23, 2012.

(b) Affected ADs

This AD rescinds AD 2009–07–01 (74 FR 12086, March 23, 2009).

(c) Applicability

This AD applies to Rolls-Royce Deutschland Ltd & Co KG BR700–715A1–30, BR700–715B1–30, and BR700–715C1–30 turbofan engines.

Issued in Burlington, Massachusetts, on February 10, 2012.

Peter A. White,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2012–3864 Filed 2–17–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0143; Directorate Identifier 2011–NM–077–AD]

RIN 2120–AA64

Airworthiness Directives; Fokker Services B.V. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to all Fokker Services B.V. Model F.28 Mark 0070 and 0100 airplanes. The existing AD currently requires revising the airworthiness limitations section (ALS) of the instructions for continued airworthiness for certain airplanes, and the FAA-approved maintenance program for certain other airplanes, to incorporate new limitations for fuel tank systems. Since we issued that AD, Fokker Services B.V. has revised a Fokker 70/100 maintenance review board (MRB) document with revised limitations, tasks, thresholds, and intervals. This proposed AD would revise the maintenance program to incorporate the limitations, tasks, thresholds, and intervals specified in that Fokker MRB document. We are proposing this AD to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by April 6, 2012.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Fokker Services B.V., Technical Services Dept., P.O. Box 231, 2150 AE Nieuw-Vennep, the Netherlands; telephone +31 (0)252–627–350; fax +31 (0)252–627–211; email *technicalservices.fokkerservices@stork.com;* Internet *http://www.myfokkerfleet.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 Operations office 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 Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0143; Directorate Identifier 2011–NM–077–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 based on 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

On July 9, 2004, we issued AD 2004–15–08, Amendment 39–13742 (69 FR 44586, July 27, 2004). This AD required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2004–15–08, Amendment 39–13742 (69 FR 44586, July 27, 2004): The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2011–0157, dated August 25, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Fokker Services have published issue 8 of report SE–623 dated 17 March 2011, which is part of the Airworthiness Limitations Section of the Instructions for Continued Airworthiness, referred to in Section 06, Appendix 1, of the Fokker 70/100 Maintenance Review Board (MRB) document. The complete Airworthiness Limitations Section currently consists of:
>
> —Certification Maintenance Requirements (CMRs)—report SE–473, issue 8,
> —Airworthiness Limitation Items (ALIs) and Safe Life Items (SLIs)—report SE–623, issue 8,
> —Fuel ALIs and Critical Design Configuration Control Limitations (CDCCLs)—report SE–672, issue 2.
>
> The instructions contained in those reports have been identified as mandatory actions for continued airworthiness.
>
> For the reasons described above, this [EASA] AD retains the requirements of EASA AD 2011–0046, which is superseded, and requires the implementation of the inspections and limitations as specified in the Airworthiness Limitation Section of the Instructions for Continued Airworthiness, referred to in Section 06, Appendix 1 of the Fokker 70/100 MRB document, reports SE–473, SE–623 and SE–672 at the above-mentioned issues.

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

The FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank

systems. As a result of those findings, we issued a regulation titled ''Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements'' (66 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 (''SFAR 88,'' Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 (66 FR 23086, May 7, 2001) requires certain type design (i.e., type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: single failures, single failures in combination with a latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

The Joint Aviation Authorities (JAA) has issued a regulation that is similar to SFAR 88 (66 FR 23086, May 7, 2001). (The JAA is an associated body of the European Civil Aviation Conference (ECAC) representing the civil aviation regulatory authorities of a number of European States who have agreed to co-operate in developing and implementing common safety regulatory standards and procedures.) Under this regulation, the JAA stated that all members of the ECAC that hold type certificates for transport category airplanes are required to conduct a design review against explosion risks.

We have determined that the actions identified in this AD are necessary to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

Relevant Service Information

Fokker Services B.V. has issued the following documents:

- Fokker Services B.V. Report SE–473, ''Fokker 70/100 Certification Maintenance Requirements,'' Issue 8, dated September 1, 2009.
- Fokker Services B.V. Report SE–623, ''Fokker 70/100 Airworthiness Limitation Items and Safe Life Limits,'' Issue 8, dated December 20, 2010.
- Fokker Services B.V. Report SE–672, ''Fokker 70/100 Fuel Airworthiness Limitation Items (ALI) and Critical Design Configuration Control Limitations (CDCCL),'' Issue 2, dated December 1, 2006.

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 4 products of U.S. registry.

The actions that are required by AD 2004–15–08, Amendment 39–13742 (69 FR 44586, July 27, 2004) and retained in this proposed AD take about 1 work-hour per product, at an average labor rate of $85 per work hour. Required parts cost about $0 per product. The actions that are required by AD 2008–06–20, Amendment 39–15432 (73 FR 14661, March 19, 2008) and retained in this proposed AD take about 1 work-hour per product, at an average labor rate of $85 per work hour. Required parts cost about $0 per product. Based on these figures, the estimated cost of the currently required actions is $170 per product.

We estimate that it would take about 1 work-hour per product to comply with the new basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $1,020, or $255 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

We determined that this 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); and
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.

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

List of Subjects in 14 CFR Part 39

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

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 removing Amendment 39–13742 (69 FR 44586, July 27, 2004) and adding the following new AD:

Fokker Services B.V.: Docket No. FAA–2012–0143; Directorate Identifier 2011–NM–077–AD.

(a) Comments Due Date

We must receive comments by April 6, 2012.

(b) Affected ADs

This AD supersedes AD 2004–15–08, Amendment 39–13742 (69 FR 44586, July 27, 2004). This AD also affects AD 2008–06–20, Amendment 39–15432 (73 FR 14661, March 19, 2008).

(c) Applicability

This AD applies to Fokker Services B.V. Model F.28 Mark 0070 and 0100 airplanes; certificated in any category; all serial numbers.

Note 1: This AD requires revisions to certain operator maintenance documents to include new actions (e.g., inspections) and/or Critical Design Configuration Control Limitations (CDCCLs). Compliance with these actions and/or CDCCLs is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (m) of this AD. The request should include a description of changes to the required actions that will ensure the continued operational safety of the airplane.

(d) Subject

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

(e) Reason

This AD was prompted by a revised Fokker 70/100 maintenance review board (MRB) document with revised limitations, tasks, thresholds, and intervals. We are issuing this AD to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

(f) Compliance

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

Restatement of Requirements of AD 2004–15–08, Amendment 39–13742 (69 FR 44586, July 27, 2004)

(g) New Airworthiness Limitations Revision

Within 6 months after August 31, 2004 (the effective date of AD 2004–15–08, Amendment 39–13742 (69 FR 44586, July 27, 2004)), revise the Airworthiness Limitations section (ALS) of the Instructions for Continued Airworthiness by incorporating Fokker Services B.V. Report SE–623, ''Fokker 70/100 Airworthiness Limitations Items and Safe Life Items,'' Issue 2, dated September 1, 2001; and Fokker Services B.V. Report SE–473, ''Fokker 70/100 Certification Maintenance Requirements,'' Issue 5, dated July 16, 2001; into Section 6 of the Fokker 70/100 MRB document. (These reports are already incorporated into Fokker 70/100 MRB document, Revision 10, dated October 1, 2001.) Once the actions required by this paragraph have been accomplished, the original issue of Fokker Services B.V. Report SE–623, ''Fokker 70/100 Airworthiness Limitations Items and Safe Life Items,'' dated June 1, 2000, may be removed from the ALS of the Instructions for Continued Airworthiness. Doing the actions in paragraph (j) of this AD terminates the requirements of paragraph (g) of this AD.

(h) No Alternative Inspections or Intervals

After the actions specified in paragraph (g) of this AD have been accomplished, no alternative inspections or inspection intervals may be approved for the structural elements specified in the documents listed in paragraph (g) of this AD, except as required by paragraph (j) of this AD.

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

New Requirements of This AD

(i) Maintenance Program Revision

Within 3 months after the effective date of this AD, revise the maintenance program to incorporate the airworthiness limitations specified in the Fokker maintenance review board (MRB) documents listed in paragraphs (i)(3), (i)(4), and (i)(5) of this AD. For all tasks and retirement lifes identified in the Fokker MRB documents listed in paragraphs (i)(3), (i)(4), and (i)(5) of this AD, the initial compliance times start from the later of the times specified in paragraphs (i)(1) and (i)(2) of this AD, and the repetitive inspections must be accomplished thereafter at the interval specified in the Fokker MRB documents listed in paragraphs (i)(3), (i)(4), and (i)(5) of this AD.

(1) Within 3 months after the effective date of this AD.

(2) At the time specified in the documents listed in paragraphs (i)(3), (i)(4), and (i)(5) of this AD.

(3) Fokker Services B.V. Report SE–473, ''Fokker 70/100 Certification Maintenance Requirements,'' Issue 8, dated September 1, 2009.

(4) Fokker Services B.V. Report SE–623, ''Fokker 70/100 Airworthiness Limitation Items and Safe Life Limits,'' Issue 8, dated December 20, 2010.

(5) Fokker Services B.V. Report SE–672, ''Fokker 70/100 Fuel Airworthiness Limitation Items (ALI) and Critical Design Configuration Control Limitations (CDCCL),'' Issue 2, dated December 1, 2006.

(j) No Alternative Actions, Intervals, and/or CDCCLs

After accomplishing the revision required by paragraph (i) of this AD, no alternative actions (e.g., inspections), intervals, or CDCCLs may be used unless the actions, intervals, or CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (m)(1) of this AD.

(k) Terminating Action

Accomplishing the actions in paragraph (i) of this AD terminates the requirements of paragraph (g) of this AD.

(l) Method of Compliance With AD 2008–06–20, Amendment 39–15432 (73 FR 14661, March 19, 2008)

Accomplishing the actions in paragraph (i) of this AD, terminates the requirements of paragraphs (f)(1), (f)(2), (f)(3), (f)(4), and (f)(5) of AD 2008–06–20, Amendment 39–15432 (73 FR 14661, March 19, 2008).

(m) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. 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 International Branch, send it to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov*. 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. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they

are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(n) Related Information

Refer to MCAI EASA Airworthiness Directive 2011–0157, dated August 25, 2011, and the service information specified in paragraphs (n)(1), (n)(2), and (n)(3) of this AD, for related information.

(1) Fokker Services B.V. Report SE–473, ''Fokker 70/100 Certification Maintenance Requirements,'' Issue 8, dated September 1, 2009.

(2) Fokker Services B.V. Report SE–623, ''Fokker 70/100 Airworthiness Limitation Items and Safe Life Limits,'' Issue 8, dated December 20, 2010.

(3) Fokker Services B.V. Report SE–672, ''Fokker 70/100 Fuel Airworthiness Limitation Items (ALI) and Critical Design Configuration Control Limitations (CDCCL),'' Issue 2, dated December 1, 2006.

Issued in Renton, Washington, on February 1, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–3906 Filed 2–17–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0057; Directorate Identifier 2012–NE–04–AD]

RIN 2120–AA64

Airworthiness Directives; Turbomeca S.A. Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for Turbomeca S.A. Arriel 2C1, 2C2, and 2S2 turboshaft engines. This proposed AD was prompted by a report of a helicopter experiencing a digital engine control unit (DECU) malfunction during flight. We are proposing this AD to prevent loss of automatic control on one or both engines installed on the same helicopter, which could result in an uncommanded in-flight engine shutdown, forced autorotation landing, or accident.

DATES: We must receive comments on this proposed AD by April 23, 2012.

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

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

For service information identified in this proposed AD, contact Turbomeca, 40220 Tarnos, France; phone: 33 05 59 74 40 00; fax: 33 05 59 74 45 15. You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Rose Len, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7772; fax: 781–238–7199; email: *rose.len@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0057; Directorate Identifier 2012–NE–04–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 based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2011–0249, dated December 22, 2011 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> An incident has been reported of a helicopter which experienced a Digital Engine Control Unit (DECU) malfunction in flight from one of its Arriel 2C1 engines. The indicating system of the helicopter displayed a ''FADEC FAIL'' message, with a concurrent loss of automatic control of the engine. The mission was aborted and the helicopter returned to its base without any further incident.
>
> The subsequent technical investigations carried out by Turbomeca revealed that a Digital Engine Control Unit (DECU) assembly non-conformity was at the origin of this event. Further investigations performed with the supplier of the DECU led to the conclusion that only a limited number of DECU are potentially affected by the non-conformity.

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

Relevant Service Information

Turbomeca S.A. has issued Alert Mandatory Service Bulletin No. A292 73 2845, Version A, dated December 19, 2011. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination of This Proposed AD

This product has been approved by the aviation authority of France, and is approved for operation in the United States. Pursuant to our bilateral agreement with EASA, EASA has notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists

and is likely to exist or develop on other products of the same type design.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about two engines installed on helicopters of U.S. registry. We also estimate that it would take about one work-hour per engine to comply with this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $12,551 per engine. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $25,272. Our cost estimate is exclusive of possible warranty coverage.

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); and

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

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

List of Subjects in 14 CFR Part 39

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

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 AD:

Turbomeca S.A.: Docket No. FAA–2012–0057; Directorate Identifier 2012–NE–04–AD.

(a) Comments Due Date

We must receive comments by April 23, 2012.

(b) Affected Airworthiness Directives (ADs)

None.

(c) Applicability

This AD applies to Turbomeca S.A. Arriel 2C1, 2C2, and 2S2 turboshaft engines with any of the digital engine control units (DECUs) listed in Table 1 of this AD installed.

TABLE 1—SERIAL NUMBERS OF AFFECTED DECU

529	558	560	655
696	869	878	939
983	1039	1050	1052
1150	1195	1208	1236
1302	1304	1329	1330
1350	1384	1408	1412
1416	1429	1430	1440
1464	1468	1472	1499
1508	1528	1557	1558
1560	1567	1578	1615
1616	1656	1689	N/A

(d) Reason

This AD was prompted by a report of a helicopter experiencing a DECU malfunction during flight. We are issuing this AD to prevent loss of automatic control on one or both engines installed on the same helicopter, which could result in an uncommanded in-flight engine shutdown, forced autorotation landing, or accident.

(e) Actions and Compliance

Unless already done, do the following actions.

(1) For any helicopter fitted with two DECUs listed in Table 1 of this AD:

(i) Within 50 engine hours after the effective date of this AD, replace one of the two DECUs with a DECU that is not listed in Table 1 of this AD.

(ii) Within 1,000 engine hours or 12 months after the effective date of this AD, whichever occurs first, replace the other DECU with a DECU that is not listed in Table 1 of this AD.

(2) For any helicopter fitted with one DECU listed in Table 1 of this AD, within 1,000 engine hours or 12 months after the effective date of this AD, whichever occurs first, replace the DECU with a DECU that is not listed in Table 1 of this AD.

(f) Installation Prohibition

From the effective date of this AD, do not install a DECU listed in Table 1 of this AD onto any engine, and do not install any engine having a DECU listed in Table 1 of this AD, onto a helicopter.

(g) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, may approve AMOCs for this AD. Use the procedures found in 14 CFR 39.19 to make your request.

(h) Related Information

(1) For more information about this AD, contact Rose Len, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7772; fax: 781–238–7199; email: *rose.len@faa.gov.*

(2) Refer to European Aviation Safety Agency AD 2011–0249, dated December 22, 2011, and Turbomeca Alert Mandatory Service Bulletin No. A292 73 2845, Version A, dated December 19, 2011, for related information.

(3) For service information identified in this AD, contact Turbomeca, 40220 Tarnos, France; phone: 33 05 59 74 40 00; fax: 33 05 59 74 45 15. You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Issued in Burlington, Massachusetts, on February 10, 2012.

Peter A. White,

Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2012–3860 Filed 2–17–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–0055; Airspace Docket No. 11–ACE–12]

RIN 2120–AA66

Proposed Modification of VOR Federal Airways V–10, V–12, and V–508 in the Vicinity of Olathe, KS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify three VHF Omnidirectional Range (VOR) Federal airways V–10, V–12, and V–508 in the vicinity of Olathe, KS. The FAA is proposing this action to adjust the airway route structure due to the planned decommissioning of the Johnson County VOR/DME navigation aid located on Johnson County Executive Airport, Olathe, KS.

DATES: Comments must be received on or before April 6, 2012.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2012–0055 and Airspace Docket No. 11–ACE–12 at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace, Regulations and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2012–0055 and Airspace Docket No. 11–ACE–12) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2012–0055 and Airspace Docket No. 11–ACE–12.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, Operations Support Group, Federal Aviation Administration, 2601 Meacham Blvd., Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

The Kansas City Air Route Traffic Control Center requested the decommissioning of the Johnson County (OJC) VOR/DME navigation aid located on the Johnson County Executive Airport, Olathe, KS, due to poor performance of the navigation aid. The OJC VOR/DME performs poorly due to suburban encroachment into the facility's critical areas. Approach procedures using the facility as the primary navigational aid have been cancelled while other procedures serving the airport are being amended to discontinue use of the facility. Additionally, building infrastructure housing the VOR/DME equipment is deteriorating rapidly. The building is prone to water leakage jeopardizing the equipment and creating hazardous working conditions for maintenance personnel. As a result, the OJC VOR/DME is no longer cost effective to maintain and operate and is planned to be decommissioned without replacement.

The FAA conducted an aeronautical study of the proposal to decommission the Johnson County VOR/DME in 2009 and issued a determination of non-objection with the special provision that all instrument procedures that utilize the OJC VOR/DME be modified with minimal impact to the aviation community. This proposed action would modify the affected airways to provide continued navigation capability in the Olathe, KS, area.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to modify V–10, V–12, and V–508 in the vicinity of Olathe, KS. These changes are required due to the planned decommissioning of the OJC VOR/DME in July 2012.

The proposed changes to V–10 and V–12 are administrative in nature and intended to keep the route segments in the vicinity of Olathe, KS, between Emporia, KS, and Napoleon, MO, unchanged. To retain the airway structure of these airways, the FAA would establish the WETZL fix at the same location depicting the OJC VOR/DME navigation aid. The modification to V–10 and V–12 would replace the OJC VOR/DME in the current airway descriptions with the WETZL fix (described as the intersection of the navigation aid radials that define WETZL). Specifically, the proposed modification to the V–10 and V–12 descriptions would replace the ''Johnson County, KS'' reference with ''INT Emporia 063°(T)/055°(M) and Napoleon, MO, 242°(T)/235°(M) radials''. The magnetic radial information would be removed in the final rule.

As currently established, V–508 ends at the OJC VOR/DME. The proposed change to V–508 would eliminate the

last 21 NM of the airway; terminating the route at the existing RUGBB fix, shared with V–502. Ending the modified V–508 at the RUGBB fix would provide eastbound IFR aircraft with the ability to continue to destinations further east or northeast via transition from V–508 to V–502.

VOR Federal airways are published in paragraph 6010(a) 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 VOR Federal Airways listed in this document would be subsequently published in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed 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 United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it proposes to modify VOR Federal Airways in the vicinity of Olathe, KS.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures,'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

1. The authority citation for 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 FAA Order 7400.9V, Airspace Designations and Reporting Points, dated August 9, 2011, and effective September 15, 2011, is amended as follows:

Paragraph 6010(a) Domestic VOR federal airways.

* * * * *

V–10 [Amended]

From Pueblo, CO; 18 miles, 48 miles, 60 MSL, Lamar, CO; Garden City, KS; Dodge City, KS; Hutchinson, KS; Emporia, KS; INT Emporia 063°(T)/055°(M) and Napoleon, MO, 242°(T)/235°(M) radials; Napoleon; Kirksville, MO; Burlington, IA; Bradford, IL; to INT Bradford 058° and Joliet, IL, 287° radials. From INT Chicago Heights, IL, 358° and Gipper, MI, 271° radials; Gipper; Litchfield, MI; INT Litchfield 101° and Carleton, MI, 262° radials; Carleton; INT Jefferson, OH, 279° and Youngstown, OH, 320° radials; Youngstown; INT Youngstown 116° and Revloc, PA, 300° radials; Revloc; INT Revloc 107° and Lancaster, PA, 280° radials; to Lancaster. The airspace within Canada is excluded.

* * * * *

V–12 [Amended]

From Gaviota, CA; San Marcus, CA; Palmdale, CA; 38 miles, 6 miles wide, Hector, CA; 12 miles, 38 miles, 85 MSL, 14 miles, 75 MSL, Needles, CA; 45 miles, 34 miles, 95 MSL, Drake, AZ; Winslow, AZ; 30 miles, 85 MSL, Zuni, NM; Albuquerque, NM; Otto, NM; Anton Chico, NM; Tucumcari, NM; Amarillo, TX; Mitbee, OK; Anthony, KS; Wichita, KS; Emporia, KS; INT Emporia 063°(T)/055°(M) and Napoleon, MO, 242°(T)/235°(M) radials; Napoleon; INT Napoleon 095° and Columbia, MO, 292° radials; Columbia; Foristell, MO; Troy, IL; Bible Grove, IL; Shelbyville, IN; Richmond, IN; Dayton, OH; Appleton, OH; Newcomerstown, OH; Allegheny, PA; Johnstown, PA; Harrisburg, PA; INT Harrisburg 092° and Pottstown, PA, 278° radials; to Pottstown.

* * * * *

V–508 [Amended]

From Hill City, KS; Hays, KS; Salina, KS, INT Salina 082° and Manhattan, KS, 207° radials; Manhattan; INT Manhattan 078° and Topeka, KS, 293° radials; Topeka; to INT Topeka 112°(T)/107°(M) and Kansas City, MO, 228°(T)/223°(M) radials.

Issued in Washington, DC, on February 9, 2012.

Gary A. Norek,

Acting Manager, Airspace, Regulations & ATC Procedures Group.

[FR Doc. 2012–3820 Filed 2–17–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–130302–10]

RIN 1545–BJ69

Reporting of Specified Foreign Financial Assets; Correction

AGENCY: Internal Revenue Service (IRS).

ACTION: Proposed rule; correction.

SUMMARY: This document contains corrections to a notice of proposed rulemaking (REG–130302–10), which was published in the **Federal Register** on Monday, December 19, 2011, relating to the reporting of specified foreign financial assets.

FOR FURTHER INFORMATION CONTACT: Joseph S. Henderson (202) 622–3880 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking that is the subject of these corrections are under section 6038 of the Internal Revenue Code.

Need for Correction

As published on December 19, 2011, (76 FR 78594), the notice of proposed rulemaking (REG–130302–10), contains errors which may prove to be misleading and are in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

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

PART 1—[CORRECTED]

Par. 2. Section 1.6038D–6 is amended by revising paragraph (d)(3) to read as follows:

§ 1.6038D–6 Specified domestic entities.

* * * * *

(d) * * *

(3) * * * A trust described in section 7701(a)(30)(E) to the extent such trust or any portion thereof is treated as owned by one or more specified persons under sections 671 through 678 and the regulations issued under those sections.

* * * * *

Guy R. Traynor,

Federal Register Liaison, Legal Processing Division, Publications and Regulations Br., Procedure and Administration.

[FR Doc. 2012–3933 Filed 2–17–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF JUSTICE

28 CFR Part 16

[CPCLO Order No. 003–2012]

Privacy Act of 1974; Implementation

AGENCY: Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: Elsewhere in the **Federal Register**, the Department of Justice (DOJ or Department) has published a notice of a new Department-wide Privacy Act system of records, Debt Collection Enforcement System, JUSTICE/DOJ–016. In this notice of proposed rulemaking, the DOJ proposes to exempt certain records in this system from certain provisions of the Privacy Act in order to avoid interference with the law enforcement functions and responsibilities of the DOJ. Public comment is invited.

DATES: Comments must be received by March 22, 2012.

ADDRESSES: Address all comments to the Department of Justice, ATTN: Privacy Analyst, Office of Privacy and Civil Liberties, National Place Building, 1331 Pennsylvania Avenue NW., Suite 1000, Washington, DC 20530, or facsimile (202) 307–0693. To ensure proper handling, please reference the CPCLO Order number in your correspondence. You may review an electronic version of the proposed rule at *http://www.regulations.gov.* You may also submit a comment via the Internet by emailing *DOJPrivacyActProposed Regulations@usdoj.gov* or by using the comment form for this regulation at *http://www.regulation.gov.* Please include the CPCLO Order number in the subject box.

Please note that the Department is requesting that electronic comments be submitted before midnight Eastern standard time on the day the comment period closes because *http://www.regulations.gov* terminates the public's ability to submit comments at that time. Commenters in time zones other than Eastern standard time may want to consider this so that their electronic comments are received. All comments sent via regular or express mail will be considered timely if postmarked on the day the comment period closes.

Posting of Public Comments: Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov* and in the Department's public docket. Such information includes personally identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personally identifying information (such as your name, address, etc.) as part of your comment but do not want it to be posted online or made available in the public docket, you must include the term ''PERSONALLY IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also place all the personally identifying information you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online or made available in the public docket, you must include the term ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personally identifying information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, will be posted online and placed in the Department's public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

FOR FURTHER INFORMATION CONTACT: Holley B. O'Brien, Director, Debt Collection Management Staff, Justice Management Division, Department of Justice, at (202) 514–5343.

SUPPLEMENTARY INFORMATION: In the Notice section of today's **Federal Register,** the DOJ published a new Department-wide Privacy Act system of records, Debt Collection Enforcement System, JUSTICE/DOJ–016, to reflect the consolidation of the Department's debt collection enforcement systems, that were previously maintained in various individual DOJ components, into a single, centralized system. This system of records is maintained by the Department of Justice to cover records used by the Department's components or offices, and/or contract private counsel retained by DOJ to perform legal, financial and administrative services associated with the collection of debts due the United States, including related negotiation, settlement, litigation, and enforcement efforts.

In this rulemaking, the DOJ proposes to exempt certain records in this Privacy Act system of records from certain provisions of the Privacy Act because the system contains material compiled for law enforcement purposes.

Regulatory Flexibility Act

This proposed rule relates to individuals, as opposed to small business entities. Pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–612, the proposed rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), requires that the DOJ consider the impact of paperwork and other information collection burdens imposed on the public. There are no current or new information collection requirements associated with this proposed rule. The records that are contributed to the Debt Collection Enforcement system would be created in any event by law enforcement entities and their sharing of this information electronically will not increase the paperwork burden on the public.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, 109 Stat. 48, requires Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments, and the private sector. UMRA requires a written

statement of economic and regulatory alternatives for proposed and final rules that contain Federal mandates. A ''Federal mandate'' is a new or additional enforceable duty, imposed on any State, local, or tribal government, or the private sector. If any Federal mandate causes those entities to spend, in aggregate, $100 million or more in any one year the UMRA analysis is required. This proposed rule would not impose Federal mandates on any State, local, or tribal government or the private sector.

List of Subjects in 28 CFR Part 16

Administrative practices and procedures, Courts, Freedom of Information Act, Government in the Sunshine Act, and the Privacy Act.

Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order 2940–2008, it is proposed to amend 28 CFR part 16 as follows:

PART 16—[AMENDED]

1. The authority citation for part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

Subpart E—Exemption of Records Systems Under the Privacy Act

2. Section 16.134 is added to read as follows:

§ 16.134 Exemption of Debt Collection Enforcement System, Justice/DOJ–016.

(a) The following system of records is exempt from 5 U.S.C. 552a(c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (4)(G), (H) and (I), (5) and (8); (f) and (g) of the Privacy Act. In addition, the system is exempt pursuant to 5 U.S.C. 552a(k)(2) from subsections (c)(3); (d)(1), (2), (3), and (4); (e)(1); (4)(G), (H), and (I); and (f). These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2) or (k)(2). Where compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system, or the overall law enforcement process, the applicable exemption may be waived by the DOJ in its sole discretion.

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3), the requirement that an accounting be made available to the named subject of a record, because certain records in this system are exempt from the access provisions of subsection (d). Also, because making available to a record subject the accounting of disclosures from records concerning him/her would specifically reveal any investigative interest in the individual. Revealing this information may thus compromise ongoing law enforcement efforts. Revealing this information may also permit the record subject to take measures to impede the investigation, such as destroying evidence, intimidating potential witnesses or fleeing the area to avoid the investigation.

(2) From subsection (c)(4) notification requirements because certain records in this system are exempt from the access and amendment provisions of subsection (d) as well as the access to accounting of disclosures provision of subsection (c)(3).

(3) From subsections (d)(1), (2), (3), and (4) because access to the records contained in this system might compromise ongoing investigations, reveal confidential informants, or constitute unwarranted invasions of the personal privacy of third parties who are involved in a certain investigation. Amendment of the records would interfere with ongoing debt collection investigations or other law enforcement proceedings and impose an impossible administrative burden by requiring investigations to be continuously reinvestigated.

(4) From subsection (e)(1) because it is not always possible to know in advance what information is relevant and necessary for law enforcement purposes.

(5) From subsection (e)(2) to avoid impeding law enforcement efforts associated with debt collection by putting the subject of an investigation on notice of that fact, thereby permitting the subject to engage in conduct intended to frustrate or impede that investigation.

(6) From subsection (e)(3) to avoid impeding law enforcement efforts in conjunction with debt collection by putting the subject of an investigation on notice of that fact, thereby permitting the subject to engage in conduct intended to frustrate or impede that investigation.

(7) From subsection (e)(4)(G), (H) and (I) because portions of this system are exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(8) From subsection (e)(5) because many of the records in this system are records contributed by other agencies and the restrictions imposed by (e)(5) would limit the utility of the system.

(9) From subsection (e)(8), because to require individual notice of disclosure of information due to compulsory legal process would pose an impossible administrative burden on the DOJ and may alert the subjects of law enforcement investigations, who might be otherwise unaware, to the fact of those investigations.

(10) From subsections (f) and (g) to the extent that the system is exempt from other specific subsections of the Privacy Act.

Dated: January 31, 2012.

Nancy C. Libin,

Chief Privacy and Civil Liberties Officer, United States Department of Justice.

[FR Doc. 2012–3914 Filed 2–17–12; 8:45 am]

BILLING CODE 4410–CN–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–0032]

RIN 1625–AA00

Safety Zone; Lake Pontchartrain, New Orleans, LA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone in the vicinity of the South shores of Lake Pontchartrain adjacent to the East bank of the Lakefront Airport runways in New Orleans, Louisiana. This temporary safety zone is necessary to protect persons and vessels from the potential safety hazards associated with high-speed aerobatic displays by the participants of the 1812 Blue Angels Air Show, during the War of 1812 Commemoration.

DATES: Comments and related material must be received by the Coast Guard on or before March 22, 2012.

ADDRESSES: You may submit comments identified by docket number USCG–2010–0012 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Lieutenant Commander (LCDR) Marcie Kohn, Sector New Orleans, Coast Guard; telephone 504–365–2281, email *Marcie.L.Kohn@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2012–0032), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the ''submit a comment'' box, which will then become highlighted in blue. In the ''Document Type'' drop down menu select ''Proposed Rule'' and insert ''USCG–2012–0032'' in the ''Keyword'' box. Click ''Search'' then click on the balloon shape in the ''Actions'' column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2012–0032'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one on or before February 28, 2012 using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

For information on facilities or services for individuals with disabilities or to request special assistance at the public meeting, contact LCDR Marcie Kohn at the telephone number or email address indicated under the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Basis and Purpose

In conjunction with the War of 1812 Commemoration celebrations taking place in the city of New Orleans, the Coast Guard has received an application request for a marine permit in support of the Blue Angels Air Show, to take place over the waters of Lake Pontchartrain. The Blue Angels Air Show is scheduled to take scheduled to occur daily between the hours of 10 a.m. and 5 p.m, beginning April 19, 2012 through April 22, 2012. The request calls for a safety zone to be created over the Lake to accommodate the air show participants with an aerobatic display box. The Coast Guard has determined that the safety zone is necessary to protect persons and vessels from the potential safety hazards associated with the high speed aerobatic displays of the air show participants.

Discussion of Proposed Rule

The Coast Guard proposes a temporary safety zone extending approximately 3,000′ from the South shores of Lake Pontchartrain, adjacent to the East bank of the Lakefront Airport runways. This temporary safety zone is necessary to protect persons and vessels from the potential safety hazards associated with high speed aerobatic displays from the participants of the Blue Angels Air Show. There will be a 12,000′ × 3,000′ aerobatic display area, which requires the surface of the water to be sterile of non-participants. The Blue Angels Air Show is scheduled to take scheduled to occur daily between the hours of 10 a.m. and 5 p.m., beginning April 19, 2012 through April 22, 2012. The coordinates for the aerobatic display area are as follows:

SE corner: N 30°02′07.71″ & W 90°01′53.56″

SW corner: N 30°02′07.71″ & W 90°04′10.05″

NW corner: N 30°02′38.37″ & W 90°04′10.05″

NE corner: N 30°02′38.37″ & W 90°01′53.56″

Regulatory Analyses

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

Regulatory Planning and Review

This 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 Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under that those Orders.

The impacts on routine navigation are expected to be minimal because the proposed enforcement periods are short in duration. Additionally, closure of the Inner Harbor Navigation Canal entrance to Lake Pontchartrain, in support of the Seabrook Surge Barrier construction project by the Army Corps of Engineers, restricts the majority of commercial traffic. As a result, the proposed safety zone will have minimal impact, if any, on the area which is used primarily by recreational boaters.

Small Entities

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

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

This safety zone would not have a significant economic impact on a substantial number of small entities for the following reasons. This safety zone would be activated, and thus subject to enforcement, for only 7 hours daily during the Air Show display. The small entities that may be affected include small entities engaged in the business of recreational boating in the area or other marine traffic in the area. Vessel traffic could pass safely around the safety zone. If you are a small business entity and are significantly affected by this regulation please contact Lieutenant Commander (LCDR) Marcie Kohn, Sector New Orleans, at 504–365–2281 or email *Marcie.L.Kohn@uscg.mil.*

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact LCDR Marcie Kohn. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. A preliminary environmental analysis checklist supporting this determination is available in the docket where indicated under **ADDRESSES**. This proposed rule involves establishing a safety zone and as such is categorically excluded, under figure 2–1, paragraph (34)(g) of the Instruction. A preliminary ''Environmental Analysis Check List'' supporting this determination is available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

2. Add § 165.T08–0032 to read as follows:

§ 165.T08–0032 Safety Zone; Lake Pontchartrain, New Orleans, LA

(a) *Location.* The following area is a temporary safety zone: All waters on the South shores of Lake Pontchartrain adjacent to the East bank of Lakefront Airport runways, extending along the Southern banks of the Lake, and including the Inner Harbor Navigational Canal entrance to Lake Pontchartrain. The coordinates are: latitude 30°02′38.37″ N, longitude 90°01′53.56″ W to latitude 30°02′38.37″ N, longitude 90°04′10.05″ W to latitude 30°02′07.71″ N, longitude 90°04′10.05″ W to latitude 30°02′07.71″ N, longitude 90°01′53.56″ W.

(b) *Effective Dates.* This rule is effective beginning April 19, 2012 through April 22, 2012, daily between the hours of 10 a.m. and 5 p.m., local time.

(c) *Regulations.* (1) In accordance with the general regulations in 33 CFR part 165, Subpart C of this title, entry into this zone is prohibited unless authorized by the Captain of the Port New Orleans. The Captain of the Port New Orleans may be contacted at (504) 365–2543.

(2) Vessels requiring entry into or passage through the Safety Zone must request permission from the Captain of the Port New Orleans, or a designated representative. They may be contacted on VHF 16, or by telephone at (504) 365–2543.

(3) All persons and vessels shall comply with the instructions of the Captain of the Port New Orleans and designated personnel. Designated personnel include commissioned, warrant, and petty officers of the U.S. Coast Guard.

Dated: February 1, 2012.

P.W. Gautier,

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

[FR Doc. 2012–3870 Filed 2–17–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 141 and 142

[FRL–9635–1]

Arsenic Small Systems Compliance and Alternative Affordability Criteria Working Group; public meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public meeting.

SUMMARY: EPA is holding an initial meeting of the Arsenic Small Systems Working Group to provide input and recommendations on barriers to the use of point-of-use and point-of-entry treatment units, package plant, and modular units, as well as alternative affordability criteria that give extra weight to small, rural, and lower income communities. This meeting will be held via Webcast and the public may attend this meeting.

DATES: The Work Group meeting will be held on March 2, 2012 (1 p.m. to 4 p.m., Eastern Time (ET)). Persons wishing to participate must register in advance as described in the **SUPPLEMENTARY INFORMATION** section.

ADDRESSES: The meeting will be held via the Internet using a Webcast and teleconference. Registrants will receive an Internet access link and dial in number upon registration for the Webcast. To participate in the Webcast, you must register in advance at the following Web address: *https://www3.gotomeeting.com/register/679236510.*

FOR FURTHER INFORMATION CONTACT: For questions about this specific meeting, contact Russ Perkinson, Office of Ground Water and Drinking Water, U.S. Environmental Protection Agency; telephone (202) 564–4901 or by email to *perkinson.russ@epa.gov.*

SUPPLEMENTARY INFORMATION: Congressional language contained in the Conference Report (H.R. 2055) accompanying the Consolidated Appropriations Act of 2012 directs the Environmental Protection Agency to convene an Arsenic Small Systems Working Group composed of representatives from States, small publicly owned water systems, local public health officials, drinking water consumers and treatment manufacturers to provide input and recommendations on barriers to the use of point-of-use and point-of-entry treatment units, package plant, and modular units, as well as alternative affordability criteria that give extra weight to small, rural, and lower income communities. Based upon input from the work group, the EPA will submit to Congress a report on actions to make alternative compliance methods more accessible to water systems and a report on alternative affordability criteria.

To participate in the Webcast, you must register in advance at the following Web address: *https://www3.gotomeeting.com/register/679236510.* The number of connections available for the Webcast is limited and will be available on a first come, first served basis. During the Webcast, a public comment period will be held for persons wishing to participate that have registered in advance to speak. Individual comments should be limited to no more than three minutes and it is preferred that only one person present the statement on behalf of a group or organization. Individuals wishing to speak during the public comment period or individuals without Internet access seeking alternative means to participate in the meeting must contact Russ Perkinson at (202) 564–4901 or by email to *perkinson.russ@epa.gov* no later than February 28, 2012.

Special Accommodations

To request special accommodations for individuals with disabilities, please contact Russ Perkinson at (202) 564–4910 or by email to *perkinson.russ@epa.gov.* Please allow at least five business days prior to the meeting to allow time to process your request.

Dated: February 15, 2012.

Cynthia C. Dougherty,

Director, Office of Ground Water and Drinking Water.

[FR Doc. 2012–3912 Filed 2–17–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1357

Tribal Consultation Meetings Regarding Requirements Applicable to Title IV–B Child and Family Services Plan

AGENCY: Children's Bureau, Administration on Children, Youth and Families (ACYF), ACF, HHS.

ACTION: Notice of tribal consultation.

SUMMARY: The title IV–B regulations regarding the title IV–B plan and fiscal requirements are outdated due to statutory changes over the last 15 years. The Children's Bureau (CB) is deciding whether to revise the regulations accordingly. Per the ACF Tribal Consultation Policy (76 FR 55678, published September 8, 2011), we request comments from Indian Tribes that operate a title IV–B, subpart 1 and/or title IV–B, subpart 2 program and any other interested party. We provide further information on these statutory changes below, under **SUPPLEMENTARY INFORMATION**.

DATES: Please submit written comments to the office listed in the **ADDRESSES** section below on or before April 6, 2012. Please see **SUPPLEMENTARY INFORMATION** for additional details on consultation meetings.

ADDRESSES: Interested persons may submit written comments by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: CBComments@acf.hhs.gov.* Please include ''Comments on 45 CFR 1357 **Federal Register** Notice'' in the subject line of the message.
- *Mail or Courier Delivery:* Jan Rothstein, Division of Policy, Children's Bureau, Administration on Children, Youth and Families, Administration for Children and Families, 1250 Maryland Avenue SW., 8th Floor, Washington, DC 20024.

Instructions: If you choose to use an express, overnight or other special delivery method, you must ensure that delivery is made at the address listed under the **ADDRESSES** section. We urge interested parties to submit comments electronically to ensure that we receive them in a timely manner. We will post all comments without change to *www.regulations.gov.* This will include any personal information provided. We will provide equal consideration to comments provided during a meeting or written responses to this **Federal Register** notice.

FOR FURTHER INFORMATION CONTACT: Jan Rothstein, Division of Policy, Children's Bureau, Administration on Children, Youth and Families, 1250 Maryland Avenue SW., 8th Floor, Washington, DC 20024; phone: (202) 401–5073; email at: *jrothstein@acf.hhs.gov.* Do not email comments on the Notice to this address.

SUPPLEMENTARY INFORMATION: Federal regulations at 45 CFR 1357, originally published in 1996, implement title IV–B of the Social Security Act (the Act). Legislation enacted over the last 15 years added new plan and fiscal requirements to title IV–B for States and Tribes to implement. While we have addressed these title IV–B requirements in Program Instructions and Information Memorandums, we are considering regulatory amendments to bring the regulations in line with the Act. Additionally, these regulations refer to numerous obsolete dates and timelines. Below, we provide a list of the major changes in the law since 1996 that relate to the title IV–B program requirements.

Several regulatory provisions have been superseded by statute including:

- *45 CFR 1357.50:* The Child and Family Services Improvement and Innovation Act (Public Law (Pub. L.) 112–34) amended section 431 of the Act to define ''Indian Tribe'' for title IV–B, subpart 2 the same way it is defined for title IV–B, subpart 1; this makes the definitions of Indian Tribe in 1357.50 obsolete.
- *45 CFR 1357.50(f)(1)(ii):* Amendments to section 432(b)(2) of the Act in the Child and Family Services Improvement Act of 2006 (Pub. L. 109–288) supersede the Secretary's authority to waive for Indian Tribes only the requirement that title IV–B, subpart 2 funds will not be used to supplant Federal or non-Federal funds expended under title IV–B, subpart 2. ACF continues to have the authority to waive for Indian Tribes only the requirement that not more than 10 percent of expenditures will be for administrative costs and the requirement that a significant portion of expenditures will be for family preservation services, community-based family support services, time limited family reunification services, and adoption promotion and support services; and
- *45 CFR 1357.50(f)(2):* Further amendments in Public Law 109–288 to section 432(b)(2) of the Act supersede the Secretary's authority to waive other State plan requirements requested by the Tribe (only those listed in paragraphs (f)(1)(i) and (iii) may still be waived) contrary to what is stated in 45 CFR 1357.50(f)(2).

The Child and Family Services Plan requirements have been revised by statutory changes including:

- A requirement that title IV–B agencies coordinate and collaborate with the State Medicaid agency and, in consultation with pediatricians and others, develop a plan for the ongoing oversight and coordination of health care services for any child in a foster care placement in accordance with the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Pub. L. 110–351).
- A description of the standards for the content and frequency of caseworker visits for children in foster care as described in sections 422(b)(17) of the Act pursuant to Public Law 112–34; and
- A description of activities to reduce the length of time children under five years of age are without a permanent family and to address the developmental needs of such children who receive benefits or services under titles IV–B/IV–E in accordance with Public Law 112–34.

Amendments to the Act over the years removed several title IV–B requirements including:

- *45 CFR 1357.15(c)(3):* Assurance of a plan for the training and use of paid paraprofessional staff and for the use of volunteers; and
- *45 FR 1357.15(c)(4):* Requirement to assure day care facility standards and requirements correspond with the child care standards imposed under title XX.

Consultation Opportunities: As specified in the **ADDRESSES** section, you may submit written comments. In addition, we plan to hold conference calls and in-person consultations in ACF Regions II, VI, VII and X and in our Washington, DC office. We invite Tribal leaders and/or their representatives to personally attend these meetings or call in to provide input on the proposed

changes. You may provide written comments as noted in the **ADDRESSES** section, regardless of participation in a meeting. The consultation sessions and contact information are listed below:

CB conference call: February 27, 2012, 10 a.m.–12 p.m. EST.

Call-in number: 888–769–8931.

Passcode: 3683365.

Contact: Jan Rothstein at (202) 401–5073 or email at: *jrothstein@acf.hhs.gov*.

CB conference call: March 2, 2012, 10 a.m.–12 p.m. EST.

Call-in number: 888–769–8931.

Passcode: 3683365.

Contact: Jan Rothstein at (202) 401–5073 or email at: *jrothstein@acf.hhs.gov*.

Region II meeting/conference call March 15, 2012, 10 a.m.–11:30 a.m. EST.

Contact: Shari Brown at (212) 264–2890 or email at: *Shari.Brown@acf.hhs.gov*.

Region VI meeting/conference call March 6, 2012, 10 a.m.–12 p.m. CT.

Contact: Nanette Bishop at (214) 767–5241 or email at: *nanette.bishop@acf.hhs.gov*.

Region VII meeting/conference call February 24, 2012, 1–3 p.m. CT.

Contact: Rosalyn Wilson at 816–426–2262 or email at: *Rosalyn.wilson@acf.hhs.gov*.

Region X meeting/conference call on March 19, 2012, 11 a.m.–1 p.m. PT.

Contact: Jennifer Zanella at (206) 615–2604 or email at: *Jennifer.zanella@acf.hhs.gov*.

Authority: 42 U.S.C. 620 *et seq.,* 42 U.S.C. 670 *et seq.;* 42 U.S.C. 1302.

Dated: February 7, 2012.

Bryan Samuels,

Commissioner, Administration on Children, Youth and Families.

[FR Doc. 2012–3442 Filed 2–17–12; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R9–IA–2011–0093; 96300–1671–0000–P5]

RIN 1018–AX96

Endangered and Threatened Wildlife and Plants; Publishing Notice of Receipt of Captive-Bred Wildlife Registration Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to amend the regulations that implement the Endangered Species Act (Act) by establishing public notice and comment procedures for applications to conduct certain otherwise prohibited activities under the Act that are authorized under the Captive Bred Wildlife (CBW) regulations. This action would add procedural requirements to the processing of applications for registration under the CBW regulations. Notices of receipt of each application would be published in the **Federal Register**, and the Service would accept public comment on each application for 30 days. If the registration were granted, the Service would publish certain findings in the **Federal Register**. In addition, for persons meeting the criteria for registering under the CBW Program, each registration could remain effective for 5 years.

DATES: We will accept comments received or postmarked on or before March 22, 2012.

ADDRESSES: You may submit comments by one of the following methods:

Electronically: Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Enter Keyword or ID box, enter FWS–R9–IA–2011–0093, which is the docket number for this rulemaking. You may submit a comment by clicking on ''Send a Comment''.

By hard copy: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R9–IA–2011–0093; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will not accept emails or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section at the end of **SUPPLEMENTARY INFORMATION** for further information about submitting comments).

FOR FURTHER INFORMATION CONTACT: Timothy J. Van Norman, Chief, Branch of Permits, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 212, Arlington, VA 22203; telephone 703–358–2104; fax 703–358–2281. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), and its implementing regulations prohibit any person subject to the jurisdiction of the United States from conducting certain activities unless authorized by a permit. These activities include take, import, export, and interstate or foreign commerce of fish or wildlife species listed as threatened or endangered under the Act. In the case of endangered species, the Service may permit otherwise prohibited activities for scientific research or enhancement of the propagation or survival of the species. In the case of threatened species, regulations allow permits to be issued for the above-mentioned purposes, as well as zoological, horticultural, or botanical exhibition; education; and special purposes consistent with the Act.

In 1979, the Service published the Captive-Bred Wildlife (CBW) regulations at 50 CFR 17.21(g) (44 FR 54002, September 17, 1979) to reduce Federal permitting requirements and facilitate captive breeding of endangered and threatened species under certain prescribed conditions. Specifically, under these regulations, the Service promulgated a general permit to authorize persons to take; export or reimport; deliver, receive, carry, transport, or ship in interstate or foreign commerce, in the course of a commercial activity; or sell or offer for sale in interstate or foreign commerce endangered or threatened wildlife bred in captivity in the United States. Qualifying persons and facilities seeking such authorization under the regulations are required to register with the Service. By establishing a more flexible management scheme to regulate routine activities related to captive propagation, these regulations have benefited wild populations by, for example, increasing sources of genetic stock that can be used to bolster or reestablish wild populations, decreasing the need to take stock from the wild, and providing for research opportunities.

The authorization granted under the CBW regulations is limited by several conditions. These conditions include:

(1) The wildlife is of a species having a natural geographic distribution not including any part of the United States or the wildlife is of a species that the Director has determined to be eligible in accordance with 50 CFR 17.21(g)(5);

(2) The purpose of authorized activities is to enhance the propagation or survival of the affected species;

(3) Activities do not involve interstate or foreign commerce, in the course of commercial activity, with respect to nonliving wildlife;

(4) That each specimen of wildlife to be reimported is uniquely identified by

a band, tattoo, or other means that was reported in writing to an official of the Service at a port of export prior to the export from the United States; and

(5) Any person subject to the jurisdiction of the United States who engages in any of the authorized activities does so in accordance with 50 CFR 17.21(g) and with all other applicable regulations.

The regulations also specify application requirements for registration that are designed to provide the Service with information needed to determine whether the applicant has the means of enhancing the propagation or survival of the affected species. For example, the application must include a description of the applicant's experience in maintaining and propagating the types of wildlife sought to be covered under the registration and documentation depicting the facilities in which the subject wildlife will be maintained.

Under this proposed rule, the Service would amend the CBW regulations to provide the public with notice of receipt of applications for CBW registration and an opportunity to comment on an applicant's eligibility to register under the regulations. If we determine that the registration should be granted, we will notify the public by publishing our findings in the **Federal Register** that each registration was applied for in good faith, will not operate to the disadvantage of the affected species, and is consistent with the purposes and policy set forth in section 2 of the Act. These procedures will apply to both original and renewal applications for registration, as well as applications for amendment of the registration. In addition, we will make information received as part of each application available to the public upon request, including, but not limited to, information needed to assess the eligibility of the applicant such as the original application materials, any intervening renewal applications documenting a change in location or personnel, and the most recent annual report.

By incorporating these procedural amendments to the CBW regulations, the Service intends to increase transparency and openness in the CBW registration process, consistent with Executive Order 13576, ''Delivering an Efficient, Effective, and Accountable Government,'' and the Presidential Memorandum of January 21, 2009, which encourage government agencies to establish a system of transparency, public participation, and collaboration by disclosing information to the public. In addition, with these amendments, we believe that increased public participation in the CBW registration process will lead to better decisions by assisting the Service in assessing whether the applicants are capable of enhancing the propagation or survival of the species. By incorporating these procedures to increase transparency and openness in the registration process, interested persons' perceptions of the fairness of the registration process will improve, as well as their acceptance of our ultimate determination as to whether the registration should be granted.

Effects of the Proposed Rule

One of the factors that led to the Service establishing the CBW program was the desire to avoid permitting delays that might hinder the propagation of endangered and threatened species for conservation purposes. The Service receives an annual average of 26 applications to establish new CBW registrations and 80 applications to renew already approved CBW registrations. Because the ESA prohibitions remain in place during the initial application process, new applicants are unable to carry out activities under a CBW registration until it is issued. While the publication of the receipt of an application under the CBW program would increase the processing time for the application by approximately 35 or 40 days, we do not believe that this increase in processing time would adversely affect the potential CBW registrant's conservation work. In addition, in the event of an emergency situation where the health or life of a protected species is threatened and no reasonable alternative is available to the applicant, the Service shall waive this 30-day public comment period.

Regulations are already in place (50 CFR 13.22(c)) that allow for the continuation of authorized activities if a CBW registrant submits a renewal application at least 30 days before the expiration of the current CBW authorization and the registration is in good standing (i.e., annual reports have been submitted and the registration is not suspended). Provided that the current CBW holders submit their renewal request at least 30 days before the expiration date, the comment period would have no impact on their ability to carry out previously approved activities. The current registration would continue to be valid until the renewal process, including the 30-day comment period, ends and we make a final determination.

The Service will also extend the registration period associated with approved CBW registrations up to 5 years, provided that the registrant remains in good standing. This increase in the registration period from 3 years to 5 years will both reduce the application renewal burden on CBW registrants and reduce the workload on the Service to process renewal requests. Furthermore, the annual reporting requirement will remain in place, and because the Service uses these reports to monitor CBW registrants, the Service does not believe that extending the registration period would adversely affect the oversight of the CBW program.

Required Determinations

Regulatory Planning and Review—Executive Order 12866: The Office of Management and Budget (OMB) has determined that this rule is not significant under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria.

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act: Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions) (5 U.S.C. 601 *et seq.*). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for ''significant impact'' and a threshold for a ''substantial number of small entities''. See 5 U.S.C. 605(b). SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic

impact on a substantial number of small entities.

The U.S. Small Business Administration (SBA) defines a small business as one with annual revenue or employment that meets or is below an established size standard. We expect that the majority of the entities involved in activities authorized under the CBW program would be considered small as defined by the SBA.

This rule would require the Service to publish notices in the **Federal Register** announcing the receipt of all CBW applications and provide the public with a 30-day comment period to provide the Service with any relevant information about the applicant or their operation. In addition, the rule would require the Service to publish a notice in the **Federal Register** of specified findings for approved registrations. The regulatory change is not major in scope and would create no financial or paperwork burden on the affected members of the general public. In fact, the extension of the effective period of a CBW registration from 3 to 5 years will result in a reduction of the paperwork burden on the public because of the reduced frequency of completing a renewal application.

We, therefore, certify that this proposed rule would not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). A Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

Small Business Regulatory Enforcement Fairness Act: This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This proposed rule:

a. Would not have an annual effect on the economy of $100 million or more. This rule would codify a public notice-and-comment process for the receipt of CBW applications and require the publication of certain findings for registrations granted under the CBW regulations. The Service would publish no more than two notices in the **Federal Register**, and would require nothing from the applicant as far as additional cost or paperwork. This rule would not have a negative effect on this part of the economy. It will affect all businesses, whether large or small, the same. There is not a disproportionate share of benefits for small or large businesses.

b. Would not cause a major increase in costs or prices for consumers; individual industries; Federal, State, tribal, or local government agencies; or geographic regions. This rule would not result in an increase in the number of applications for registration to conduct otherwise-prohibited activities with endangered and threatened species.

c. Would not have any adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act: Under the Unfunded Mandates Reform Act (2 U.S.C. 1501, *et seq.*):

a. This rule would not significantly or uniquely affect small governments. A Small Government Agency Plan is not required.

b. This rule would not produce a Federal requirement of $100 million or greater in any year and is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Takings: Under Executive Order 12630, this rule would not have significant takings implications. A takings implication assessment is not required. This rule is not considered to have takings implications because it allows individuals to register under the CBW Registration program when issuance criteria are met.

Federalism: This revision to part 17 does not contain significant Federalism implications. A Federalism Assessment under Executive Order 13132 is not required.

Civil Justice Reform: Under Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of subsections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act: The Office of Management and Budget approved the information collection in part 17 and assigned OMB Control Number 1018–0093, which expires February 28, 2014. This rule does not contain any new information collections or recordkeeping requirements for which OMB approval is required under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA): The Service has determined that this action is a regulatory change that is administrative and procedural in nature. As such, the amendment is categorically excluded from further NEPA review as provided by 43 CFR 46.210(i), of the Department of the Interior Implementation of the National Environmental Policy Act of 1969; final rule (73 FR 61292; October 15, 2008). No further documentation will be made.

Government-to-Government Relationship with Tribes: Under the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951; May 4, 1994) and 512 DM 2, we have evaluated possible effects on federally recognized Indian Tribes and have determined that there are no effects.

Energy Supply, Distribution, or Use: Executive Order 13211 pertains to regulations that significantly affect energy supply, distribution, and use. This rule would not significantly affect energy supplies, distribution, and use. Therefore, this action is a not a significant energy action and no Statement of Energy Effects is required.

Clarity of this Regulation: We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Public Comments

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We will not accept comments sent by email or fax or to an address not listed in **ADDRESSES**.

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov*. If you provide personal identifying information in your written comments, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business

hours, at the U.S. Fish and Wildlife Service; Division of Management Authority; 4401 N. Fairfax Drive, Suite 212; Arlington, VA 22203; telephone, (703) 358–2093.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

For the reasons given in the preamble, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.21 by revising paragraph (g)(3) to read as follows:

§ 17.21 Prohibitions.

* * * * *

(g) * * *

(3) Upon receipt of a complete application for registration, or the renewal or amendment of an existing registration, under this section, the Service will publish notice of the application in the **Federal Register**. Each notice will invite the submission from interested parties, within 30 days after the date of the notice, of written data, views, or arguments with respect to the application. All information received as part of each application will be made available to the public, upon request, as a matter of public record at every stage of the proceeding, including, but not limited to, information needed to assess the eligibility of the applicant such as the original application, materials, any intervening renewal applications documenting a change in location or personnel, and the most recent annual report.

(i) At the completion of this comment period, the Director will decide whether to approve the registration. In making this decision, the Director will consider, in addition to the general criteria in § 13.21(b) of this subchapter, whether the expertise, facilities, or other resources available to the applicant appear adequate to enhance the propagation or survival of the affected wildlife. Public education activities may not be the sole basis to justify issuance of a registration or to otherwise establish eligibility for the exception granted in paragraph (g)(1) of this section.

(ii) If the Director approves the registration, the Service will publish notice of the decision in the **Federal Register** that the registration was applied for in good faith, that issuing the registration will not operate to the disadvantage of the species for which registration was sought, and that issuing the registration will be consistent with the purposes and policy set forth in section 2 of the Act.

(iii) Each person so registered must maintain accurate written records of activities conducted under the registration, and allow reasonable access to Service agents for inspection purposes as set forth in §§ 13.46 and 13.47 of this chapter. Each person so registered must also submit to the Director an individual written annual report of activities, including all births, deaths, and transfers of any type.

* * * * *

Dated: February 10, 2012.

Rachel Jacobsen,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–3878 Filed 2–17–12; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register

Vol. 77, No. 34

Tuesday, February 21, 2012

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

Agricultural Research Service

Notice of Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to North Carolina State University of Raleigh, North Carolina, an exclusive license to the soybean variety named ''N7003CN''.

DATES: Comments must be received on or before March 22, 2012.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Rm. 4–1174, Beltsville, Maryland 20705–5131.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5989.

SUPPLEMENTARY INFORMATION: The Federal Government's rights in this plant variety are assigned to the United States of America, as represented by the Secretary of Agriculture. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within thirty (30) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Richard J. Brenner,

Assistant Administrator.

[FR Doc. 2012–3850 Filed 2–17–12; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2010–0023]

Shiga Toxin-Producing *Escherichia coli* in Certain Raw Beef Products

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: New schedule for implementation of routine testing and verification activities.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing a new date for when it will implement routine verification sampling and testing for raw beef manufacturing trimmings for six non-O157 Shiga toxin-producing *Escherichia coli* (STEC) serogroups (O26, O45, O103, O111, O121, and O145). This new date will provide additional time for establishments and laboratories to validate their test methods. FSIS announced in September 2011 plans to test certain raw beef products for these six STEC serogroups in addition to O157:H7. FSIS has determined that these organisms are adulterants of raw ground beef products and product components under the Federal Meat Inspection Act (FMIA).

DATES: Beginning June 4, 2012, FSIS will implement routine verification activities, including testing, for the six additional STEC discussed in this document (O26, O45, O103, O111, O121, and O145), of raw beef manufacturing trimmings (domestic or imported) derived from cattle slaughtered on or after June 4, 2012. To facilitate compliance with the policy, and to allow industry time to implement any necessary changes in their food safety systems, FSIS will generally not regard raw, non-intact beef products or the components of these products found to have these pathogens as adulterated until June 4, 2012.

FOR FURTHER INFORMATION CONTACT: Daniel Engeljohn, Ph.D., Assistant Administrator, Office of Policy and Program Development, Food Safety and Inspection Service, U.S. Department of Agriculture, (202) 205–0495.

SUPPLEMENTARY INFORMATION:

Background

On September 20, 2011, FSIS published a **Federal Register** notice announcing a final determination that raw, non-intact beef products or raw, intact beef products that are intended for use in raw, non-intact product, that are contaminated with Shiga toxin-producing *Escherichia coli* (STEC) O26, O45, O103, O111, O121, and O145, are adulterated within the meaning of 21 U.S.C. 601(m)(1) and (m)(3)(76 FR 58157; Sep. 20, 2011).

FSIS announced that it intended to implement a verification sampling and testing program for the six non-O157 STEC, as it already does for *E. coli* O157:H7. The Agency intended to begin this verification sampling and testing on March 5, 2012. The Agency noted that it would initially sample raw beef manufacturing trimmings and other ground beef components for the six non-O157 STEC, but that it would consider other products, including raw ground beef, contaminated with these STEC to be adulterated (76 FR 58160). The Agency asked for comments on its plans for implementing the program (76 FR 58157, 58164).

In addition, FSIS asked for comments on: Agency plans for a baseline survey of relevant *STEC* prevalence in raw beef products, whether to hold technical or other public meetings, validation guidance for pathogen detection test kits, various cost estimates, the type of outreach and information that would be most useful to establishments preparing for implementation of the Agency's policy, and information that foreign governments might need to address inspection equivalency or implementation concerns.

In response to comments, FSIS extended the public comment period from November 21, 2011, to December 21, 2011, and held a public meeting by teleconference on December 1, 2011 to solicit comments (76 FR 72331; Nov. 23, 2011). FSIS intends to publish a **Federal Register** notice discussing and responding to the comments that it received.

Many of the comments requested a delay of the implementation date for testing for the relevant STECs for various reasons, including the need for test kits to detect these organisms to become more widely available.

While FSIS is confident that reliable test kits will be available for commercial use before March 5, allowing additional time for beef establishments to begin sampling and testing with these new

kits will facilitate compliance with the non-O157 STEC policy. Accordingly, beginning the week of June 4, 2012, rather than on March 5, FSIS will begin scheduling verification tasks for non-O157 STEC control of raw beef manufacturing trimmings. FSIS will collect excision (N60) samples for testing raw beef manufacturing trimmings derived from cattle slaughtered on or after June 4, 2012, for the seven relevant STECs (O157:H7 plus O26, O45, O103, O111, O121, and O145). For production lots of raw beef manufacturing trimmings not accompanied by documentation showing the date of slaughter of the cattle from which the beef was derived, or for production lots that contain mixtures of raw beef manufacturing trimmings derived from cattle slaughtered before and after June 4, 2012, FSIS will sample the production lot only for O157–STEC. For production lots of raw beef manufacturing trimmings not accompanied by documentation showing that the date of slaughter of the cattle from which the beef was derived, or for production lots that contain mixtures of raw beef manufacturing trimmings derived from cattle slaughtered before and after June 4, 2012, FSIS will sample the production lot only for O157 STEC. For production lots with documentation that the beef in the production lot contains only product derived from cattle slaughtered on or after June 4, 2012, FSIS will test the samples for the seven relevant STECs. The slaughter date of June 4, 2012, is important for implementing the verification testing program for raw beef manufacturing trimmings because FSIS can be certain that, as of this date, trimmings derived from cattle slaughtered on or after this date will have been produced under a slaughter and further processing system that the Agency expects to control for the six additional STEC.

With the implementation of verification testing for beef manufacturing trimmings on June 4, FSIS will also consider raw, non-intact beef products or raw, intact products intended for use in non-intact beef products that are contaminated with STEC O26, O45, O103, O111, O121, and O145, to be adulterated within the meaning of 21 U.S.C. 601(m)(1) and (m)(3). FSIS will generally not regard raw, non-intact beef products found to have these pathogens as adulterated until it implements this verification testing program. However, if product is associated with an STEC outbreak before that time, the product will be deemed adulterated and subject to recall, consistent with current FSIS practice.

Finally, the Agency notes that in February 2012, it contacted foreign governments already approved for the export of raw beef to the United States and informed them that FSIS would make a limited amount of reagents used in the FSIS laboratory method for non-O157 STECs available to a foreign government if that government wanted to conduct a comparative analysis of its method and methods used with test kits assessed by FSIS. Although these comparative analyses are not a necessary precondition for FSIS to begin verification testing of raw beef manufacturing trimmings on June 4, 2012, FSIS believes that the results of such comparative analyses could be useful.

USDA Nondiscrimination Statement

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's Target Center at 202–720–2600 (voice and TTY).

To file a written complaint of discrimination, write USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW., Washington, DC 20250–9410 or call 202–720–5964 (voice and TTY). USDA is an equal opportunity provider and employer.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce it on-line through the FSIS Web page located at: *http://www.fsis.usda.gov/regulations_&_policies/Federal_Register_Notices/index.asp.*

FSIS also will make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The Update is communicated via Listserv, a free email subscription service consisting of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included. The Update also is available on the FSIS Web page. Through Listserv and the Web page, FSIS is able to provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/News_&_Events/Email_Subscription/.* Options range from recalls, export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

Done at Washington, DC, on February 14, 2012.

Alfred V. Almanza,

Administrator.

[FR Doc. 2012–3888 Filed 2–17–12; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Forest Service

Black Hills National Forest Advisory Board Public Meeting Dates Announced

AGENCY: Forest Service, USDA.

ACTION: Notice of meetings.

SUMMARY: The Black Hills National Forest Advisory Board (NFAB) has announced its meeting dates for 2012. These meetings are open to the public, and public comment is accepted at any time in writing, at the pleasure of the Chair, and during the last 15 minutes of each meeting, limited to three (3) minutes per person for oral comments.

Meeting dates are the third Wednesday of each month unless otherwise indicated:

March 21.
April 18.
May 16.
June 20.
July (No Meeting).
August 15 (Summer Field Trip—TBA).
September 19.
October 17.
November 14 (Second Wednesday).
December (No Meeting).
January 2, 2013 (First Wednesday, Tentative).

ADDRESSES: Meetings will begin at 1 p.m. and end no later than 5 p.m. at the Forest Service Center, 8221 South Highway 16, Rapid City, SD 57702.

Agendas: The Board will consider a variety of issues related to national forest management. Agendas will be

announced in advance but principally concern implementing the Forest Land and Resource Management Plan. The Board will consider such topics as integrated vegetation management (wild and prescribed fire, fuels reduction, controlling insect epidemics, invasive species), travel management (off highway vehicles, the new OHV rule, and related topics), and continuing access to multiple-use management of public lands, among others.

FOR FURTHER INFORMATION CONTACT: Committee Management Officer, Black Hills National Forest, 1019 N. 5th Street, Custer, SD 57730, (605) 673–9200.

Dated: February 9, 2012.

Craig Bobzien,

Forest Supervisor.

[FR Doc. 2012–3851 Filed 2–17–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

National Institute of Food and Agriculture

Solicitation of Input From Stakeholders Regarding the Smith-Lever 3(d) Children, Youth, and Families at Risk Sustainable Community Projects

AGENCY: National Institute of Food and Agriculture, USDA.

ACTION: Notice of public meeting and request for stakeholder input.

SUMMARY: Section 7403 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246) (FCEA) amended section 3(d) of the Smith-Lever Act (7 U.S.C. 343(d)) to provide the opportunity for 1862 and 1890 Land-Grant Institutions, including Tuskegee University and West Virginia State University to compete for section 3(d) funds. Section 7417 of FCEA also provided the University of the District of Columbia the opportunity to compete for section 3(d) funds. The Children, Youth, and Families at Risk (CYFAR) Sustainable Community Projects is among the Extension programs funded under this authority. The National Institute of Food and Agriculture (NIFA) plans to consider stakeholder input received from written comments in developing future competitive RFAs for this program.

DATES: Webinars will be held on Thursday, February 22, 2012 from 2 p.m. to 3:30 p.m. Eastern time and Friday, March 9, 2012 from 2 p.m. to 3:30 p.m. Eastern time. All comments not otherwise presented or submitted for the record at the meeting must be submitted by close of business Friday, March 30, 2012 to assure consideration in the next RFA.

Instructions: To register for the February 22, 2012 webinar, please use the link provided: *cyfarstakeholderinput2.eventbrite.com*. To register for the March 9, 2012 webinar, please use the link provided: *cyfarstakeholderinput3.eventbrite.com*. You may submit comments, identified by NIFA–2012–0005 by any of the following methods:

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

Email: cyfar@nifa.usda.gov. Include NIFA–2012–0005 in the subject line of the message.

Fax: 202–720–9366.

Mail: Paper, disk or CD–ROM submissions should be submitted to Division of Youth and 4–H, National Institute of Food and Agriculture, U.S. Department of Agriculture; STOP 2225, 1400 Independence Avenue SW., Washington, DC 20250–2225.

Hand Delivery/Courier: Division of Youth and 4–H, National Institute of Food and Agriculture, U.S. Department of Agriculture; Room 4316, Waterfront Centre, 800 9th Street SW., Washington, DC 20024.

All submissions received must include the agency name and the identifier NIFA–2012–0005. All comments received will be posted to *http://www.regulations.gov*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Bonita Williams (202)720–3566, (FAX) 202.720.9366, *bwilliams@nifa.usda.gov* or Lindsey Jewell (202) 720–6962, (FAX) 202.720.9366, *ljewell@nifa.usda.gov*.

SUPPLEMENTARY INFORMATION: Reservations for oral comments will be confirmed on a first-come, first-serve basis during the listening session. All comments and the official transcript of the meeting, when they become available, may be reviewed on the NIFA Web page for six months.

Background and Purpose

The mission of the CYFAR Program is to marshal resources of Land-Grant and Cooperative Extension Systems, so that, in collaboration with other organizations, they can develop and deliver educational programs that equip youth who are at risk for not meeting basic human needs with the skills they need to lead positive, productive, and contributing lives. Through an annual congressional appropriation for the CYFAR Program, NIFA allocates funding to land-grant university Extension services for community-based programs for at-risk children and their families. NIFA is seeking stakeholder input regarding CYFAR's structure of the professional development and technical support program for fiscal year 2013. The focus of the webinar will be to address the following questions:

1. What should change about CYFAR, if anything?
2. What specific audiences should CYFAR target within at-risk populations?
3. Are there audiences for which CYFAR could have greater impact?
4. CYFERnet.org, are you using this, if so, please explain how?
5. CYFERnetSEARCH.org, are you using this, if so, please explain how?
6. How should the role of the CYFAR liaison be changed, if at all?
7. Have the capacity building workshops been effective, please explain?
8. Should we have a CYFAR liaison who is responsible specifically for capacity building, please explain?
9. CYFAR Conference, how effective has the CYFAR Conference been for your professional development in working with at-risk populations?
10. What percentage of the CYFAR funds should go to building the capacity of the system to serve at-risk audiences vs. building the capacity of the grantees?

Stakeholders' comments provided on the questions above will provide guidance to NIFA in restructuring the program and assisting NIFA leadership in more fully addressing stakeholder needs.

Implementation Plans

NIFA plans to consider stakeholder input received from this public meeting as well as other written comments in developing the FY 2013 program guidelines. NIFA anticipates releasing the FY 2013 Request for Applications (RFA) by winter 2012.

Done at Washington, DC, this 10th day of February, 2012.

Chavonda Jacobs-Young,

Acting Director, National Institute of Food and Agriculture.

[FR Doc. 2012–3856 Filed 2–17–12; 8:45 am]

BILLING CODE 3410–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Fishery Capacity Reduction Program Buyback Requests.

OMB Control Number: 0648–0376.
Form Number(s): NA.
Type of Request: Regular submission (extension of a current information collection).
Number of Respondents: 923.
Average Hours per Response: Implementation plans, 6,634 hours; state approval/buyback, 270 hours; advance and post referenda, bids and buyer annual reports and seller/buyer reports, 4 hours each; fish tickets, 10 minutes; buyer monthly reports, 2 hours; advisements of conflict in ownership claims, 10 hours.
Burden Hours: 18,922.
Needs and Uses: This request is for an extension of a current information collection.

NOAA has established a program to reduce excess fishing capacity by paying fishermen to (1) surrender their fishing permits or (2) surrender their permits, and either scrap their vessels or restrict vessel titles to prevent fishing. These fishing capacity reduction programs, or buybacks, can be funded by a Federal loan to the industry or by direct Federal or other funding. These buybacks are conducted pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, and the Magnuson-Stevens Reauthorization Act (Pub. L. 109–479). The regulations implementing the buybacks are at 50 CFR part 600.

Depending upon the type of buyback involved, the program can entail the submission of buyback requests by industry, the submission of bids, referenda of fishery participants, and reporting of the collection of fees to repay a Federal loan. For buybacks involving State-managed fisheries, the State may need to develop the buyback plan and comply with other information requirements. The information collected by NMFS is required to request a buyback, submit supporting data for requested buybacks, to submit bids, and to conduct referenda of fishery participants.

The recordkeeping and reporting requirements at 50 CFR 600.1013 through 600.1017 form the basis for this collection of information on fee payment and collection. NMFS requests information from participating buyback participants. This information, upon receipt, tracks the repayment of the Federal loans that are issued as part of the buybacks, and ensures accurate management and monitoring of the loans during the repayment term.

Affected Public: Business or other for-profit organizations.
Frequency: Annually, monthly and on occasion.
Respondent's Obligation: Required to obtain or maintain benefits.
OMB Desk Officer: *OIRA_Submission@omb.eop.gov.*

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov.*

Dated: February 15, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–3932 Filed 2–17–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–937]

Citric Acid and Certain Citrate Salts from the People's Republic of China: Amended Final Results of the First Administrative Review of the Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On December 14, 2011, the Department of Commerce (''Department'') published the final results of the first administrative review of the antidumping duty order on citric acid and certain citrate salts (''citric acid'') from the People's Republic of China (''PRC'').[1] The period of review is November 20, 2008, through April 30, 2010. We are amending our *Final Results* to correct a ministerial error made in the calculation of the antidumping duty margin for Yixing Union Biochemical Co., Ltd. (''Yixing Union'') pursuant to section 751(h) of the Tariff Act of 1930, as amended (''the Act'').

DATES: *Effective Date:* February 21, 2012.

FOR FURTHER INFORMATION CONTACT: Krisha Hill or Maisha Cryor, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington DC, 20230; telephone: (202) 482–4037 or (202) 482–5831, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 19, 2011, Yixing Union timely submitted an allegation of a ministerial error with respect to the *Final Results* of the November 20, 2008, through April 30, 2010, administrative review, in accordance with 19 CFR 351.224(c)(ii). No other party submitted comments regarding ministerial error allegations.

Ministerial Errors

A ministerial error as defined in section 751(h) of the Act includes ''errors in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.'' *See also* 19 CFR 351.224(f).

After analyzing Yixing Union's comments, we have determined, in accordance with 19 CFR 351.224(e), that a ministerial error existed in a certain calculation in the *Final Results.* Specifically, the Department inadvertently applied marine insurance to all, rather than a portion, of Yixing Union's U.S. sales. Correction of this error results in a change to Yixing Union's final antidumping duty margin. For a detailed discussion of this ministerial error, as well as the Department's analysis, *see* Final Results of the 2008–2010 Administrative Review of the Antidumping Duty Order for Citric Acid and Certain Citrate Salts from the People's Republic of China: Allegation of Ministerial Error, dated concurrently with this notice.

Therefore, in accordance with section 751(h) of the Act and 19 CFR 351.224(e), we are amending the *Final Results* of the administrative review of citric acid from the PRC. Listed below is the revised weighted-average dumping margin resulting from these amended final results:

Exporter	Original final margin	Amended final margin
Yixing Union Biochemical Co., Ltd.	1.11%	1.01%

Disclosure

We will disclose the calculation performed for these amended final results within five days of the date of publication of this notice to interested

[1] *See Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of the First Administrative Review of the Antidumping Duty Order,* 76 FR 77772 (December 14, 2011) (''*Final Results*'').

parties in accordance with 19 CFR 351.224(b).

Assessment Rate

Pursuant to section 751(a)(2)(A) of the Act, and 19 CFR 351.212(b), the Department will determine, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with these amended final results of review. For assessment purposes, we calculated importer (or customer)-specific assessment rates for merchandise subject to this review consistent with 19 CFR 351.212(b)(1). Where appropriate, we calculated an *ad valorem* rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total entered values associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting *ad valorem* rate against the entered customs values for the subject merchandise. Where appropriate, we calculated a per-unit rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total sales quantity associated with those transactions. For duty-assessment rates calculated on this basis, we will direct CBP to assess the resulting per-unit rate against the entered quantity of the subject merchandise. Where an importer (or customer)-specific assessment rate is *de minimis* (*i.e.,* less than 0.50 percent), the Department will instruct CBP to assess that importer's (or customer's) entries of subject merchandise without regard to antidumping duties, in accordance with 19 CFR 351.106(c)(2). The Court of International Trade has issued a preliminary injunction enjoining the liquidation of certain entries during the period of review, therefore, assessment instructions will be issued as appropriate.

Cash Deposit Requirements

The following cash deposit requirements will be effective retroactively on any entries made on or after December 14, 2011, the date of publication of the *Final Results,* 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 Yixing Union, the cash deposit rate will be the amended final margin rate shown above in the ''Ministerial Errors'' section of this notice; (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 156.87 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. These deposit requirements shall remain in effect until further notice.

These amended final results are published in accordance with sections 751(h) and 777(i)(1) of the Act.

Dated: February 10, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–3971 Filed 2–17–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–825]

Polyethylene Terephthalate Film, Sheet and Strip from India: Preliminary Intent to Rescind Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* February 21, 2012.

FOR FURTHER INFORMATION CONTACT: Toni Page, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1398.

SUPPLEMENTARY INFORMATION:

Background

On July 1, 2011, the Department of Commerce (Department) published a notice of opportunity to request an administrative review of the countervailing duty (CVD) order on polyethylene terephthalate film, sheet and strip from India covering the period January 1, 2010, through December 31, 2010. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 76 FR 38609, 38610 (July 1, 2011). The Department received a timely request from Petitioners [1] for a CVD administrative review of five companies: Ester Industries Limited (Ester), Garware Polyester Ltd. (Garware), Jindal Poly Films Limited of India (Jindal), Polyplex Corporation Ltd. (Polyplex), and SRF Limited (SRF). The Department also received timely requests for a CVD review from Vacmet India Ltd. (Vacmet) and Polypacks Industries of India (Polypacks).

On August 26, 2011, the Department published a notice of initiation of administrative review with respect to Ester, Garware, Jindal, Polyplex, SRF, Vacmet, and Polypacks. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 76 FR 53404 (August 26, 2011). Subsequently, Vacmet and Polypacks timely withdrew their requests for an administrative review; on September 20, 2011, the Department published a rescission, in part, of the CVD administrative review with respect to Vacmet and Polypacks. *See Polyethylene Terephthalate Film, Sheet and Strip From India: Rescission, In Part, of Countervailing Duty Administrative Review,* 76 FR 58248 (September 20, 2011).

On September 12, 2011, SRF filed a certification of no shipments and requested that the Department rescind the CVD administrative review of the company.

On November 25, 2011, Petitioners timely withdrew their request for CVD administrative reviews of Ester, Garware, Polyplex, and Jindal. The Department published a rescission, in part, of the CVD administrative review with respect to Ester, Garware, Polyplex, and Jindal on January 11, 2012. *See Polyethylene Terephthalate Film, Sheet and Strip From India: Rescission, In Part, of Countervailing Duty Administrative Review,* 77 FR 1668 (January 11, 2012). The administrative review of SRF continued.

Scope of the Order

The products covered by the order are all gauges of raw, pretreated, or primed polyethylene terephthalate film, sheet and strip, whether extruded or coextruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer of more than 0.00001 inches thick. Imports of polyethylene terephthalate film, sheet and strip are classifiable in the Harmonized Tariff

[1] Petitioners are DuPont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc. and Toray Plastics (America), Inc.

Schedule of the United States (HTSUS) under item number 3920.62.00.90. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of the order is dispositive.

Intent To Rescind the 2010 Countervailing Duty Administrative Review

SRF submitted a letter to the Department on September 12, 2011, certifying that it had no shipments of subject merchandise that entered the United States during calendar year 2010, which is the period of review (POR). Petitioners did not comment on SRF's claim of no shipments or entries.

Previously, on September 1, 2011, the Department released the results of a U.S. Customs and Border Protection (CBP) data query to interested parties with an administrative protective order for this segment of the administrative review, which showed SRF had no suspended entries of subject merchandise during the POR. After the receipt of SRF's no shipment certification, we sent a ''no shipments inquiry'' message to CBP, which posted the message on October 12, 2011.[2] We have not received any responses from CBP regarding the no shipments inquiry indicating that there were any suspended entries from SRF during the POR. *See* Memorandum to the File through Barbara E. Tillman, Director, AD/CVD Operations, Office 6, ''Claim of No Shipments from SRF Limited in the 2010 Administrative Review of the Countervailing Duty Order on Polyethylene Terephthalate Film, Sheet and Strip from India'' (dated concurrently with this notice).

Based on our analysis of all of the information on the record, we preliminarily determine that SRF had no shipments or entries of subject merchandise during the POR. Therefore, in accordance with 19 CFR 351.213(d)(3), and consistent with our practice,[3] we preliminarily determine to rescind the review for SRF. Because SRF is the sole remaining company in this administrative review, the rescission of the review with respect to SRF would result in a rescission of the administrative review in its entirety.

Public Comment

The Department is setting aside a period for interested parties to raise issues regarding the Department's preliminary intent to rescind the administrative review for SRF. Interested parties should submit such comments within 20 calendar days of the publication of this notice. Comments must be filed electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS) (*https://iaaccess.trade.gov/*). The period for public comment is intended to provide the Department with ample opportunity to consider all views prior to making a final determination concerning whether to rescind the administrative review.

We are issuing this notice in accordance with section 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: February 14, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–3972 Filed 2–17–12; 8:45 am]

BILLING CODE 3510–DS–P

[2] *See* Message number 1285302, available at *http://addcvd.cbp.gov/index.asp*.

[3] *See, e.g., Welded Carbon Steel Standard Pipe and Tube from Turkey: Notice of Rescission of Countervailing Duty Administrative Review, In Part,* 74 FR 47921 (September 18, 2009).

DEPARTMENT OF COMMERCE

International Trade Administration

Notice of Scope Rulings

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* February 21, 2012.

SUMMARY: The Department of Commerce (''Department'') hereby publishes a list of scope rulings completed between April 1, 2011, and June 30, 2011. In conjunction with this list, the Department is also publishing a list of requests for scope rulings and anticircumvention determinations pending as of June 30, 2011. We intend to publish future lists after the close of the next calendar quarter.

FOR FURTHER INFORMATION CONTACT: Julia Hancock, AD/CVD Operations, China/NME Group, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: 202–482–1394.

SUPPLEMENTARY INFORMATION:

Background

The Department's regulations provide that the Secretary will publish in the **Federal Register** a list of scope rulings on a quarterly basis. *See* 19 CFR 351.225(o). Our most recent notification of scope rulings was published on November 29, 2011. *See Notice of Scope Rulings,* 76 FR 73596 (November 29, 2011). This current notice covers all scope rulings and anticircumvention determinations completed by Import Administration between April 1, 2011, and June 30, 2011, inclusive, and it also lists any scope or anticircumvention inquiries pending as of June 30, 2011. As described below, subsequent lists will follow after the close of each calendar quarter.

Scope Rulings Completed Between April 1, 2011, and June 30, 2011

People's Republic of China

A–570–504: Petroleum Wax Candles from the People's Republic of China.

Requestor: R&D Chemicals, Inc.; ''Bite Lite'' brand candles are not within the scope of the antidumping duty order; April 18, 2011.

A–570–601: Tapered Roller Bearings from the People's Republic of China.

Requestor: New Trend Engineering Limited; its wheel hub units are within the scope of the antidumping duty order; April 18, 2011.

A–570–601: Tapered Roller Bearings from the People's Republic of China.

Requestor: Bosda International (USA) LLC and Kingdom Auto Parts Ltd.; its wheel hub units are within the scope of the antidumping duty order; June 14, 2011.

A–570–803: Heavy Forged Hand Tools from the People's Republic of China.

Requestor: Lucky Distributing, Inc.; Lucky Distributing, Inc.'s cast smart splitter is not within the scope of the antidumping duty order; June 6, 2011.

A–570–868: Folding Metal Tables and Chairs from the People's Republic of China.

Requestor: Lifetime Products, Inc.; its 33-inch round tables are not within the scope of the antidumping duty order; May 2, 2011.

A–570–868: Folding Metal Tables and Chairs from the People's Republic of China.

Requestor: Meco Corporation; its pedestal tables are not within the scope of the antidumping duty order; May 19, 2011.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China.

Requestor: Acme Furniture Industry Inc.; partially upholstered daybed with trundle unit is within the scope of the antidumping duty order; fully upholstered daybed without trundle unit is not within the scope of the antidumping duty order; April 15, 2011.

A–570–890: Wooden Bedroom Furniture from the People's Republic of China.

Requestor: Ashley Furniture Industries Inc.; certain polyurethane mirrors and an upholstered mirror are

not within the scope of the antidumping duty order; April 26, 2011.

A–570–900: Diamond Sawblades and Parts Thereof from the People's Republic of China.

Requestor: Gang Yan Diamond Products, Inc.; certain rescue/demolition blades are not within the scope of the antidumping duty order; June 27, 2011.

A–570–912/C–570–913: Certain New Pneumatic Off-The-Road Tires from the People's Republic of China.

Requestor: OTR Wheel Engineering, Inc.; its Trac Master and Traction Master tires are within the scope of the antidumping duty and countervailing duty orders; April 26, 2011.

A–570–916/C–570–917: Laminated Woven Sacks from the People's Republic of China.

Requestor: The Super Poly Partnership; the laminated woven sacks produced by The Super Poly Partnership from imported woven fabric are not within the scope of the antidumping duty and countervailing duty orders; May 18, 2011.

A–570–922/C–570–923: Raw Flexible Magnets from the People's Republic of China.

Requestor: Smith-Western Co.; certain decorative refrigerator magnets are not within the scope of the antidumping duty and countervailing duty orders; April 15, 2011.

A–570–928: Uncovered Innersprings from the People's Republic of China.

Requestor: Wickline Bedding Enterprises; Wickline's premium and standard unfinished mattresses are not within the scope of the antidumping duty order; May 31, 2011.

A–570–932: Certain Steel Threaded Rod from the People's Republic of China.

Requestor: Powerline Hardware, LLC; the spool bolts and shank pins it imports are not within the scope of the antidumping duty order; May 13, 2011.

A–570–932: Certain Steel Threaded Rod from the People's Republic of China.

Requestor: A.L. Patterson; its engineered steel coil rod is within the scope of the antidumping duty order; May 24, 2011.

A–570–937/C–570–938: Citric Acid and Certain Citrate Salts from the People's Republic of China.

Requestor: Global Commodity Group LLC (''GCG''); the People's Republic of China (''PRC'')-origin portion of GCG's ''blended'' citric acid is within the scope of the antidumping duty and countervailing duty orders, and is dutiable according to the amount of citric acid from the PRC that it contains; May 2, 2011.

A–570–941/C–570–942: Kitchen Appliance Shelving and Racks from the People's Republic of China.

Requestor: Olson Wire Products Co., Ltd.; its certain supermarket shelving units and commercial oven racks that fit within size parameters of the scope of the antidumping duty order are subject to the antidumping duty order; its certain supermarket shelving units and commercial oven racks that do not fit within the size parameters of the scope (*i.e.* shelving and racks with dimensions ranging from 3 inches by 5 inches by 0.10 inch to 28 inches by 34 inches by 6 inches; baskets with dimensions ranging from 2 inches by 4 inches by 3 inches to 28 inches by 34 inches by 16 inches; side racks from 6 inches by 8 inches by 0.1 inch to 16 inches by 30 inches by 4 inches; or subframes from 6 inches by 10 inches by 0.1 inch to 28 inches by 34 inches by 6 inches) are not within the scope of the antidumping duty and countervailing duty orders; June 8, 2011.

A–570–951: Certain Woven Electric Blankets from the People's Republic of China.

Requestor: Eurow & O'Reilly Corporation; knitted fleece automotive electric blanket is not within the scope of the antidumping duty order; April 14, 2011.

Japan

A–588–804: Ball Bearings and Parts Thereof from Japan.

Requestor: Aisin Holdings of America; worm assemblies and seat track rollers are not within the scope of the antidumping duty order; May 12, 2011.

A–588–804: Ball Bearings and Parts Thereof from Japan.

Requestor: American NTN Bearing Manufacturing Corporation; magnetic encoders used in antilock braking systems in automobiles are not within the scope of the antidumping duty order; June 1, 2011.

Multiple Countries

A–570–922/C–570–923/A–583–842: Raw Flexible Magnets from the People's Republic of China and Taiwan.

Requestor: Jingzhou Meihou Flexible Magnet Co. Ltd; its rolls of meter-wide magnet sheeting, craft magnets, and door gasket extrusions are within the scope of the antidumping duty and countervailing duty orders; May 10, 2011.

Anticircumvention Determinations Completed Between April 1, 2011, and June 30, 2011

None.

Scope Inquiries Pending as of June 30, 2011

People's Republic of China

A–570–504: Petroleum Wax Candles from the People's Republic of China.

Requestor: Trade Associates Group, Ltd.; whether its candles (multiple designs) are within the scope of the antidumping duty order; requested June 11, 2009.

A–570–504: Petroleum Wax Candles from the People's Republic of China.

Requestor: Sourcing International, LLC; whether its flower candles are within the scope of the antidumping duty order; requested June 24, 2009.

A–570–504: Petroleum Wax Candles from the People's Republic of China.

Requestor: Sourcing International; whether its candles (multiple designs) are within the scope of the antidumping duty order; requested July 28, 2009.

A–570–504: Petroleum Wax Candles from the People's Republic of China.

Requestor: Sourcing International; whether its floral bouquet candles are within the scope of the antidumping duty order; requested August 25, 2009.

A–570–504: Petroleum Wax Candles from the People's Republic of China.

Requestor: Candym Enterprises Ltd.; whether its vegetable candles are within the scope of the antidumping duty order; requested November 9, 2009.

A–570–601: Tapered Roller Bearings from the People's Republic of China.

Requestor: DF Machinery International, Inc.; whether certain agricultural hub units are within the scope of the antidumping duty order; requested May 12, 2011.

A–570–831: Fresh Garlic from the People's Republic of China.

Requestor: General Mills, Inc.; whether minced garlic is within the scope of the antidumping duty order; requested April 13, 2011.

A–570–864: Pure Magnesium in Granular Form from the People's Republic of China.

Requestor: ESM; whether U.S.-origin pure magnesium exported to the PRC for atomization and re-exported to the U.S. is within the scope of the order; requested February 11, 2011; initiated May 2, 2011.

A–570–864: Pure Magnesium in Granular Form from the People's Republic of China.

Requestor: US Magnesium LLC; whether pure magnesium feedstock exported from the PRC to Mexico and then processed into granular magnesium before exportation to the U.S. is within the scope of the order; requested April 29, 2011; initiated July 5, 2011.

A–570–891: Hand Trucks from the People's Republic of China.

Requestor: WelCom Products; whether its MC2 Magna Cart, MCI Magna Cart and MCK Magna Cart are within the scope of the antidumping duty order; requested October 12, 2010; initiated October 27, 2010; preliminary ruling May 9, 2011.

A–570–920/C–570–921: Lightweight Thermal Paper from the People's Republic of China.

Requestor: Paper Resources, LLC.; whether certain lightweight thermal paper (''LWTP'') converted into smaller LWTP rolls in the PRC, from jumbo LWTP rolls produced in certain third countries, is within the scope of the antidumping duty and countervailing duty orders; requested February 24, 2011; initiated April 4, 2011.

A–570–951: Certain Woven Electric Blankets from the People's Republic of China.

Requestor: HoMedics Inc.; whether its knitted electric heating blanket is within the scope of the antidumping duty order; requested June 22, 2011.

A–570–967: Aluminum Extrusions from the People's Republic of China.

Requestor: A.O. Smith Corporation; whether water heater anodes are within the scope of the antidumping duty order; requested June 14, 2011.

A–570–967/C–570–968: Aluminum Extrusions from the People's Republic of China.

Requestor: American Fence Manufacturing Company LLC; whether fence sections, posts and gates are within the scope of the antidumping duty and countervailing duty orders; requested June 15, 2011.

A–570–967/C–570–968: Aluminum Extrusions from the People's Republic of China.

Requestor: Endura Products; whether door thresholds containing aluminum extrusions imported from the PRC are within the scope of the antidumping duty and countervailing duty orders; requested: June 2, 2011.

A–570–967/C–570–968: Aluminum Extrusions from the People's Republic of China.

Requestor: Origin Point Brands; whether imported aluminum fencing systems are within the scope of the antidumping duty and countervailing duty orders; requested June 27, 2011.

Mexico

A–201–830: Carbon and Certain Alloy Steel Wire Rod from Mexico.

Requestor: Nucor Corporation and Cascade Steel Rolling Mills, Inc.; whether wire rod with an actual diameter between 4.75 and 5.00 millimeters is within the scope of the antidumping order; requested 2/14/2011; initiated May 31, 2011.

Italy

A–475–822: Stainless Steel Plate in Coils from Italy.

Requestor: AAVID Thermalloy LLC. (''AAVID''); whether 24 steel clips imported by AAVID are within the scope of the antidumping duty order; requested June 1, 2011.

Multiple Countries

A–201–837/A–570–954/C–570–955: Magnesia Carbon Bricks from Mexico and the People's Republic of China.

Requestor: Fedmet Resources Corporation: whether its magnesia alumina carbon bricks are within the scope of the antidumping duty and countervailing duty orders; accepted June 28, 2011.

A–533–838/C–533–839/A–570–892: Carbazole Violet Pigment 23 from India and the People's Republic of China.

Requestor: Nation Ford Chemical Co., and Sun Chemical Corp.; whether finished carbazole violet pigment exported from Japan is within the scope of the antidumping duty and countervailing duty orders; requested February 23, 2010; preliminary ruling May 6, 2011.

A–570–958/C–570–959/A–560–823/C–560–824: Coated Paper from the People's Republic of China and Indonesia.

Requestor: Gold East Paper (Jiangsu) Co., Ltd. and its subsidiaries, Pindo Deli Pulp and Paper Mills, PT. Indah Kiat Pulp & Paper Tbk, and Paper Max, Ltd.; whether certain packaging paperboard products and certain playing card products are within the scope of the antidumping and countervailing duty orders; requested June 2, 2011.

Anticircumvention Rulings Pending as of June 30, 2011

A–570–836: Glycine from the People's Republic of China.

Requestor: Geo Specialty Chemicals, Inc. and Chattem Chemicals, Inc.; whether glycine from the PRC, when processed and re-packaged in India and exported as Indian-origin glycine, is circumventing the antidumping duty order; requested December 18, 2009; initiated October 22, 2010.

A–570–849: Certain Cut-to-Length Carbon Steel from the People's Republic of China.

Requestor: ArcelorMittal USA, Inc.; Nucor Corporation; SSAB N.A.D., Evraz Claymont Steel and Evraz Oregon Steel Mills; whether certain cut-to-length carbon steel plate from the PRC that contains a small level of boron is circumventing the antidumping duty order; requested February 17, 2010; preliminary determination published February 22, 2011.

A–570–894: Certain Tissue Paper Products from the People's Republic of China.

Requestor: Seaman Paper Company of Massachusetts, Inc.; whether certain imports of tissue paper from the Socialist Republic of Vietnam are circumventing the antidumping duty order through means of third country assembly or completion; requested February 18, 2010; initiated March 29, 2010; preliminary determination published April 6, 2011.

A–570–916/C–570–917: Laminated Woven Sacks from the People's Republic of China.

Requestor: Coating Excellence International, LLC and Polytex Fibers Corporation; whether laminated woven sacks that are printed with two ink colors, but have the appearance of three or more colors in register, are circumventing the antidumping and countervailing duty orders; requested January 26, 2011; initiated April 22, 2011.

A–570–918: Steel Wire Garment Hangers from the People's Republic of China.

Requestor: M&B Metal Products Inc.; whether certain imports of steel wire garment hangers from the Socialist Republic of Vietnam are circumventing the antidumping duty order through means of third country assembly or completion of merchandise imported from the PRC; requested May 5, 2010; initiated July 22, 2010; preliminary determination published May 10, 2011.

A–570–929: Small Diameter Graphite Electrodes from the People's Republic of China.

Requestor: SGL Carbon LLC and Superior Graphite Co.; whether unfinished small diameter graphite electrodes produced in the PRC and completed and assembled in the United Kingdom are circumventing the antidumping duty order; requested November 30, 2010; initiated February 17, 2011.

Russia

A–821–807: Ferrovanadium and Nitrided Vanadium from Russia.

Requestor: AMG Vanadium, Inc.; whether vanadium pentoxide imports from Russia that are converted into ferrovanadium in the United States are circumventing the antidumping duty order; requested February 25, 2011; initiated May 2, 2011.

Interested parties are invited to comment on the completeness of this list of pending scope and anticircumvention inquiries. Any comments should be submitted to the Deputy Assistant Secretary for AD/CVD

Operations, Import Administration, International Trade

Administration, 14th Street and Constitution Avenue NW., APO/Dockets Unit, Room 1870, Washington, DC 20230. This notice is published in accordance with 19 CFR 351.225(o).

Dated: February 8, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–3711 Filed 2–17–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Questionnaire To Support Review of Federal Assistance Applications

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before April 23, 2012.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Cristi Reid, (301) 713–1622 x206 or *Cristi.Reid@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a currently approved information collection.

The National Environmental Policy Act (NEPA) (42 U.S.C. 4321 through 4327) and the Council on Environmental Quality (CEQ) implementing regulations (40 CFR parts 1500 through 1508) require that an environmental analysis be completed for all major Federal actions significantly affecting the environment. NEPA applies only to the actions of Federal agencies. While those Federal actions may include a Federal agency's decision to fund non-Federal projects under grants and cooperative agreements, NEPA requires agencies to assess the environmental impacts of actions proposed to be taken by these recipients only when the Federal agency has sufficient discretion or control over the recipient's activities to deem those actions as Federal actions. To determine whether the activities of the recipient of a Federal financial assistance award (i.e., grant or cooperative agreement) involve sufficient Federal discretion or control, and to undertake the appropriate environmental analysis when NEPA is required, NOAA must assess information which can only be provided by the Federal financial assistance applicant. Thus, NOAA has developed an environmental information questionnaire to provide grantees and Federal grant managers with a simple tool to ensure that project and environmental information is obtained. The questionnaire applies only to those programs where actions are considered major Federal actions or to those where NOAA must determine if the action is a major Federal action. The questionnaire includes a list of questions that encompasses a broad range of subject areas. The applicants are not required to answer every question in the questionnaire. Each program draws from the comprehensive list of questions to create a relevant subset of questions for applicants to answer. The information provided in answers to the questionnaire is used by NOAA staff to determine compliance requirements for NEPA and conduct subsequent NEPA analysis as needed. The information provided in the questionnaire may also be used for other regulatory review requirements associated with the proposed project, such as issuance of permits.

II. Method of Collection

Methods of submittal include paper forms via the mail, Internet, and facsimile transmission.

III. Data

OMB Control Number: 0648–0538.

Form Number: None.

Type of Review: Regular submission (extension of a currently approved collection).

Affected Public: Business or other for profit organizations; individuals or households; not-for-profit institutions; state, local, or tribal government; and Federal government.

Estimated Number of Respondents: 1,000.

Estimated Time per Response: 3 hours.

Estimated Total Annual Burden Hours: 3,000.

Estimated Total Annual Cost to Public: $1,000 in reporting/recordkeeping costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: February 15, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–3949 Filed 2–17–12; 8:45 am]

BILLING CODE 3510–NW–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Application and Reports for Scientific Research and Enhancement Permits Under the Endangered Species Act

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before April 23, 2012.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Gary Rule, (503) 230–5424 or *Gary.Rule@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for an extension of a currently approved information collection.

The Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 et seq.) imposed prohibitions against the taking of endangered species. Section 10 of the ESA allows permits authorizing the taking of endangered species for research/enhancement purposes. The corresponding regulations established procedures for persons to apply for such permits. In addition, the regulations set forth specific reporting requirements for such permit holders. The regulations contain two sets of information collections:

(1) Applications for research/enhancement permits, and (2) reporting requirements for permits issued.

The required information is used to evaluate the impacts of the proposed activity on endangered species, to make the determinations required by the ESA prior to issuing a permit, and to establish appropriate permit conditions. To issue permits under ESA Section 10(a)(1)(A), the National Marine Fisheries Service (NMFS) must determine that (1) such exceptions were applied for in good faith, (2) if granted and exercised, will not operate to the disadvantage of such endangered species, and (3) will be consistent with the purposes and policy set forth in Section 2 of the ESA.

The currently approved application and reporting requirements apply to Pacific marine and anadromous fish species; requirements regarding other species are being addressed in a separate information collection.

II. Method of Collection

Submissions may be in paper or electronic format.

III. Data

OMB Control Number: 0648–0402.

Form Number: None.

Type of Review: Regular submission (extension of a currently approved collection).

Affected Public: Federal government; State, local, or tribal government; business or other for-profit organizations.

Estimated Number of Respondents: 160.

Estimated Time per Response: Permit applications, 12 hours; permit modification requests 6 hours; and annual or final reports, 2 hours.

Estimated Total Annual Burden Hours: 835.

Estimated Total Annual Cost to Public: $500 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: February 15, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–3948 Filed 2–17–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XB012

Gulf of Mexico Fishery Management Council; Public Meetings

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will convene its Special Coral Scientific and Statistical Committee.

DATES: The meeting will convene at 8:30 a.m. on Thursday, March 8, 2012 and conclude no later than 4:30 p.m.

ADDRESSES: The meeting will be held at the Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607.

Council address: Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: John Froeschke, Fishery Biologist and Mark Mueller, GIS Analyst, Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico Fishery Management Council (Council) will convene the Special Coral Scientific and Statistical Committee to discuss and provide expert guidance to Council staff on two projects being conducted as part of a NOAA Coral Reef Conservation Program grant that address the relationship between trends in coral reef communities and their associated fisheries. The first project involves development of a publicly-accessible spatial database of Gulf of Mexico corals (shallow, mesophotic and deep sea) and related fisheries information that will be used to enhance spatial planning and management actions. The Committee will be asked to provide expert advice and recommendations about datasets and data sources as well as data gaps and needs. The second project involves convening a workshop of respected coral experts and managers to examine the interrelationships between corals and fisheries relative to long-term trends in coral condition. The Committee will be asked to provide expert advice and recommendations about participants and various potential conference topics including threats to coral health, management, coral habitats, habitat suitability models, and emerging research.

Copies of the agenda and other related materials can be obtained by calling (813) 348–1630 or can be downloaded from the Council's ftp site, *ftp.gulfcouncil.org.*

Although other non-emergency issues not on the agenda may come before the Special Coral Scientific and Statistical Committee for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Special Coral Scientific and Statistical Committee will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under

Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Council (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: February 15, 2012.

Tracey L. Thompson,

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

[FR Doc. 2012–3874 Filed 2–17–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XB021

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The North Pacific Fishery Management Council's (Council) Golden King Crab Price Formula Committee is meeting in Seattle, WA.

DATES: The meeting will be held on March 8, 2012, from 9 a.m. to 4 p.m.

ADDRESSES: The meeting will be held at Fishermen's Terminal, Norby Conference Room, 3919 18th Avenue West, Seattle, WA 98199; telephone: (206) 787–3395.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Mark Fina, Council staff; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: The Committee is meeting concerning the arbitration system that is part of the Bering Sea and Aleutian Islands crab rationalization program. The Committee will give specific attention to the development of the price formula for golden king crab under the arbitration system. Additional information is posted on the Council Web site: *http://www.alaskafisheries.noaa.gov/npfmc/.*

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen at (907) 271–2809 at least 7 working days prior to the meeting date.

Dated: February 15, 2012.

Tracey L. Thompson,

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

[FR Doc. 2012–3960 Filed 2–17–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XB020

Gulf of Mexico Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene three Web based meetings of the ABC Control Rule Working Group.

DATES: The first Webinar meeting will convene on Thursday, March 8, 2012. The second Webinar meeting will convene on Thursday, March 15, 2012. The third Webinar meeting will convene on Thursday, March 22, 2012. Each Webinar will begin at 12 noon eastern time and is expected end by 4 p.m.

ADDRESSES: The Webinars will be accessible via Internet. Please go to the Gulf of Mexico Fishery Management Council's Web site at *www.gulfcouncil.org* for instructions.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Steven Atran, Population Dynamics Statistician; Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The ABC Control Rule Working Group will meet to discuss potential revisions to the acceptable biological catch (ABC) control rule that was recently implemented as part of the Council's Generic Annual Catch Limits/Accountability Measures Amendment. While all areas of the control rule will be subject to review, particular attention will be given to whether the P-star approach used to determine ABC in Tier 1 of the control rule realistically captures scientific uncertainty, and possible revisions to the Tier 2 method for data poor stocks. Recommendations from the Working Group will be presented to the Scientific and Statistical Committee when it meets in late March.

Copies of the agenda and other related materials can be obtained by calling (813) 348–1630. Materials will also be available to download from the ABC Control Rule Working Group folder of the Council's FTP site, which is accessible from the Quick Links section of the Council Web site (*http://www.gulfcouncil.org*).

Although other non-emergency issues not on the agenda may come before the ABC Control Rule Working Group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during these meetings. Actions of the Working Group will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

These Webinars are accessible to people with disabilities. For assistance with any of our Webinars contact Kathy Pereira at the Council (see **ADDRESSES**) at least 5 working days prior to the Webinar.

Dated: February 15, 2012.

Tracey L. Thompson,

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

[FR Doc. 2012–3951 Filed 2–17–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–BB69

New England Fishery Management Council; Notice of Intent To Prepare an Environmental Impact Statement (EIS); Northeast Multispecies Fishery; Notice of Public Scoping Meetings; Correction

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

ACTION: Notice; correction.

SUMMARY: This action makes a correction to a notice published on December 21, 2011. The notice referenced a control date of March 7, 2011; however the correct date is April 7, 2011. This notice inserts the correct April 7, 2011, control date, as intended.

FOR FURTHER INFORMATION CONTACT: Travis Ford, Fishery Management Specialist, 978–281–9233.

SUPPLEMENTARY INFORMATION: NMFS published a Notice of Intent (NOI) to prepare an Environmental Impact Statement and announced public scoping meetings for the New England Fishery Management Council's (Council) Amendment 18 to the Northeast Multispecies Fishery Management Plan (Amendment 18) on December 21, 2011 (76 FR 79153). The subject document contained an error that needs to be corrected.

In the background information for the December 21, 2011 notice there is a reference to a March 7, 2011 control date for the NE multispecies fishery. Because the date reflects the wrong month, therefore, NMFS, through this notice, corrects the control date to April 7, 2011. Other published materials referencing the control date reflect the correct date of April 7, 2011.

Correction

The NOI published on December 21, 2011, in FR Doc. 2011–32694, on page 79154, in column 2, in the first full paragraph, line 2, correct the month ''March'' to read as ''April.''

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

Dated: February 14, 2012.

Carrie Selberg,

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

[FR Doc. 2012–3846 Filed 2–17–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 11–54]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

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 11–54 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: February 14, 2012.

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

FEB 2 2012

The Honorable John A. Boehner
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

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. 11-54, concerning the Department of the Air Force's proposed Letter(s) of Offer and Acceptance to Poland for defense articles and services estimated to cost $447 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,

William E. Landay III

William E. Landay III
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 11–54

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:* Poland

(ii) *Total Estimated Value:*

Major Defense Equipment*	$219 million.
Other	$228 million.
Total	$447 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:* 93 AIM–9X–2 SIDEWINDER Block II Tactical Missiles, 4 CATM–9X–2 Captive Air Training Missiles, 65 AIM–120C–7 Advanced Medium Range Air-to-Air Missiles, 42 GBU–49 Enhanced PAVEWAY II 500 lb Bombs, 200 GBU–54 (2000 lb) Laser Joint Direct Attack Munitions (JDAM) Bombs, 642 BLU–111 (500 lb) General Purpose Bombs, 127 MK–82 (500 lb) General Purpose Bombs, 80 BLU–117 (2000 lb) General Purpose Bombs, 4 MK–84 (2000 lb) Inert General Purpose Bombs, 9 F–100–PW–229 Engine Core Modules, 28 Night Vision Devices plus 6 spare intensifier tubes, 12 Autonomous Air Combat Maneuvering Instrumentation P5 pods, a Joint Mission Planning System, and five years of follow-on support and sustainment services for Poland's F–16 fleet, spare and repair parts, support and test equipment, publications and technical documentation, system

overhauls and upgrades, personnel training and training equipment, U.S. Government and contractor technical support, and other related elements of program support.

(iv) *Military Department:* Air Force (SAC, Amd #12) Navy (GAP)

(v) *Prior Related Cases:* FMS case SAC (thru Amd #11)—$6M–23Mar00; FMS case GAP (thru Amd #xx)—$10M–18Apr02

(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:* February 2, 2012

Policy Justification

Poland—F–16 Follow-On Support and Additional Munitions

The Government of Poland has requested a possible sale of 93 AIM–9X–2 SIDEWINDER Block II Tactical Missiles, 4 CATM–9X–2 Captive Air Training Missiles, 65 AIM–120C–7 Advanced Medium Range Air-to-Air Missiles, 42 GBU–49 Enhanced PAVEWAY II 500 lb Bombs, 200 GBU–54 (2000 lb) Laser Joint Direct Attack Munitions (JDAM) Bombs, 642 BLU–111 (500 lb) General Purpose Bombs, 127 MK–82 (500 lb) General Purpose Bombs, 80 BLU–117 (2000 lb) General Purpose Bombs, 4 MK–84 (2000 lb) Inert General Purpose Bombs, 9 F–100–PW–229 Engine Core Modules, 28 Night Vision Devices plus 6 spare intensifier tubes, 12 Autonomous Air Combat Maneuvering Instrumentation P5 pods, a Joint Mission Planning System, and five years of follow-on support and sustainment services for Poland's F–16 fleet, spare and repair parts, support and test equipment, publications and technical documentation, system overhauls and upgrades, personnel training and training equipment, U.S. Government and contractor technical support, and other related elements of program support. The estimated cost is $447 million.

Poland is an important ally in Northern Europe, contributing to NATO activities and ongoing U.S. interests in the pursuit of peace and stability. Poland's efforts in peacekeeping operations in Iraq and Afghanistan continue to serve U.S. national security interests. It is vital to the U.S. national interest to assist Poland to develop and maintain a strong and ready self-defense capability.

The proposed sale will improve Poland's capability to meet current and future operational needs. The upgrade will allow Poland to continue to bolster its regional leadership while increasing NATO interoperability. Poland already has these missiles and munitions in its inventory and will have no difficulty absorbing the additional systems into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractors will be Raytheon Corporation in Tucson, Arizona, Raytheon Corporation in Waltham, Massachusetts, The Boeing Company in St. Charles, Missouri, McAlester Army Ammunition Plant in McAlester, Oklahoma, and United Technologies Corporation in Hartford, Connecticut. 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 Poland. However, periodic travel to Poland will be required on a temporary basis in conjunction with program, technical, and management oversight and support requirements.

There will be no adverse impact on the U.S. defense readiness as a result of this proposed sale.

Transmittal No. 11–54

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex Item No. vii

(vii) *Sensitivity of Technology:*

1. The AIM–9X–2 SIDEWINDER Block II Missile represents a substantial increase in missile acquisition and kinematics performance over the AIM–9M and replaces the AIM–9X–1 Block I missile configuration. The missile includes a high off bore-sight seeker, enhanced countermeasure rejection capability, low drag/high angle of attack airframe and the ability to integrate the Helmet Mounted Cueing System. The software algorithms are the most sensitive portion of the AIM–9X–2 missile. The software continues to be modified via a pre-planned product improvement (P^3I) program in order to improve its counter-countermeasures capabilities. No software source code or algorithms will be released.

2. The AIM–9X–2 will result in the transfer of sensitive technology and information. The equipment, hardware, and documentation are classified Confidential. The software and operational performance are classified Secret. The seeker/guidance control section and the target detector are Confidential and contain sensitive state-of-the-art technology. Manuals and technical documentation that are necessary or support operational use and organizational management are classified up to Secret. Performance and operating logic of the counter-countermeasures circuits are classified Secret. The hardware, software, and data identified are classified to protect vulnerabilities, design and performance parameters and similar critical information.

3. The GBU–54 is a 2000lb Joint Direct Attack Munition (JDAM) variant that includes a DSU–40 Laser Sensor. The GBU–54 uses global position system aided inertial navigation and/or laser detection to guide to threat targets. The Laser sensor enhances the standard JDAM's reactive target capability by allowing rapid prosecution of fixed targets with large initial target location errors (TLE). The DSU–40 Laser sensor also provides the capability to engage some mobile targets. The DSU–40 Laser sensor is attached to an MK–84 or BLU–117 bomb body in the forward fuze well. The addition of the DSU–40 Laser sensor, combined with additional cabling and mounting hardware, turns a standard GBU–31 JDAM into a GBU–54 Laser JDAM. Information that might reveal target designation tactics and associated aircraft maneuvers, the probability of destroying specific/peculiar targets, vulnerabilities regarding countermeasures, and the electromagnetic environment is classified Secret.

4. The JDAM is actually a guidance kit that converts existing unguided free-fall bombs into precision-guided ''smart'' munitions. By adding a new tail section containing Inertial Navigation System (INS) guidance/Global Positioning System (GPS) guidance to unguided bombs, the cost effective JDAM provides highly accurate weapon delivery in any ''flyable'' weather. The INS, using updates from the GPS, helps guide the bomb to the target via the use of movable tail fins.

5. The AIM–120C Advanced Medium Range Air-to-Air Missile (AMRAAM) is a guided missile featuring digital technology and micro-miniature solid-state electronics. The AMRAAM capabilities include look-down/shoot-down, multiple launches against multiple targets, resistance to electronic countermeasures, and interception of high- and low-flying and maneuvering targets. The AMRAAM All Up Round (AUR) is classified Confidential. The major components and subsystems range from Unclassified to Confidential,

and technical data and other documentation are classified up to Secret.

6. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

[FR Doc. 2012–3848 Filed 2–17–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID USAF–2012–0004]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice to alter a system of records.

SUMMARY: The Department of the Air Force proposes to alter a system of records in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The proposed action will be effective on March 22, 2012 unless comments are received that would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

• *Federal Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mr. Charles J. Shedrick, Department of the Air Force Privacy Office, Air Force Privacy Act Office, Office of Warfighting Integration and Chief Information officer, ATTN: SAF/CIO A6, 1800 Air Force Pentagon, Washington, DC 20330–1800, or by phone at 202–404–6575.

SUPPLEMENTARY INFORMATION: The Department of the Air Force's notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act, were submitted on February 14, 2012 to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996, (February 20, 1996, 61 FR 6427).

Dated: February 14, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

F044 AF TRANSCOM A

SYSTEM NAME:

Joint Medical Evacuation System (TRAC²ES) (June 16, 2003, 68 FR 35646).

CHANGES:

* * * * *

CATEGORY OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with ''All Active Duty, Air National Guard, Army National Guard and Reserve components of Air Force, Army, Navy, Marine Corps, Coast Guard, Public Health Services or National Oceanic and Atmospheric Administration who have been called to Federal Service, retired personnel of all seven uniformed services, and their family members. All Veterans who are transported to or from a Department of Veterans Affairs (DVA) medical facility or of transporting the remains of deceased Veterans who died after transport to a DVA Medical facility. All Active Duty and Reserve components of Air Force, Army, Navy and Coast Guard and other uniformed service members of the North Atlantic Treaty Organization (NATO) and Secretary of Defense identified coalition National forces, DoD civilian employees, contractors supporting global U.S. operations, Department of Defense detainees and Prisoners of War. Individuals who are employed or contracted by the Federal Emergency Management Agency (FEMA), Department of Homeland Security (DHS), Department of Health and Human Services (DHHS) or other United States (US) government agencies providing health care service, and patient movement in support of identified patients during Presidential disaster or emergency declaration. Employees and their dependents of any mission essential agency of the U.S. Government including non-appropriated fund and Exchange Service employees, Air Reserve technicians performing duties as civil servants, family members (dependents) who reside overseas and their civil service personnel sponsor stationed overseas requiring transfer to another medical treatment facility at the request of U.S. Government medical treatment facilities.''

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with ''TRAC²ES contains information reported by the transferring medical facility which includes, patient identity, service affiliation and grade or status, name, Social Security Number (SSN), gender, medical diagnosis, medical condition, special procedures or requirements needed, medical specialties required, administrative considerations, personal considerations, home address of patient and/or duty station, and other information having an impact on the transfer.''

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with ''10 U.S.C. 8013, Secretary of the Air Force; 10 U.S.C. Chapter 55, Medical and Dental Care; 10 U.S.C. 2641, Transportation of Certain Veterans on DoD Aeromedical Evacuation Aircraft; DoD Directive 5154.6, Armed Services Medical Regulating; DoD Instruction 6000.11, Patient Movement; and E.O. 9397 (SSN), as amended.''

* * * * *

STORAGE:

Delete entry and replace with ''Paper records in file folders and electronic storage media.''

RETRIEVABILITY:

Delete entry and replace with ''By individual's name and SSN.''

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''System Administrator, United States Transportation Command, Office of the Command Surgeon, 203 West Losey Street, Suite 1700, Scott AFB, IL 62225–5357.''

* * * * *

RECORD SOURCE CATEGORIES:

Delete entry and replace with ''Transferring and receiving treatment facilities, medical regulating offices, evacuation offices, agencies and commands relevant to the patient transfer, and from the Military Health Information System.''

* * * * *

[FR Doc. 2012–3814 Filed 2–17–12; 8:45 am]

BILLING CODE 5001–06–P

DELAWARE RIVER BASIN COMMISSION

Notice of Commission Meeting and Public Hearing

Notice is hereby given that the Delaware River Basin Commission will hold an informal conference followed by a public hearing on Wednesday, March 7, 2012. The hearing will be part of the Commission's regularly scheduled business meeting. The conference session and business meeting both are open to the public and will be held at the West Trenton Volunteer Fire Company, located at 40 West Upper Ferry Road, West Trenton, New Jersey.

The morning conference session will begin at 10:30 a.m. and will consist of presentations on: (a) the *Final Report: Delaware River Priority Conservation Areas and Recommended Conservation Strategies,* prepared by The Nature Conservancy under a grant from the National Fish and Wildlife Foundation; (b) the Christina River Basin water protection area ordinance and mapping project; and (c) DRBC's new Web site.

Items for Public Hearing. The subjects of the public hearing to be held during the 1:30 p.m. business meeting on March 7, 2012 include draft dockets for which the names and brief descriptions will be posted on the Commission's Web site at www.nj.gov/drbc at least 10 days prior to the meeting date. Complete draft dockets will be posted on the Web site ten days prior to the meeting date. Additional public records relating to the dockets may be examined at the Commission's offices. Please contact William Muszynski at 609–883–9500, extension 221, with any docket-related questions.

In addition to the hearings on draft dockets, a public hearing also will be held during the 1:30 p.m. business meeting on a resolution authorizing the Executive Director to extend the Commission's agreements with Axys Analytical Services, Ltd. for the analysis of ambient water, wastewater and sediment samples (agreement of July 2010) and fish tissue samples (agreement of September 2006) in connection with the control of certain toxic substances in the Delaware Estuary.

Other Agenda Items. Other agenda items consist of the standard business meeting items: adoption of the Minutes of the Commission's December 8, 2011 business meeting, announcements of upcoming meetings and events, a report on hydrologic conditions, reports by the Executive Director and the Commission's General Counsel, and a public dialogue session.

Opportunities to Comment. Individuals who wish to comment for the record on a hearing item or to address the Commissioners informally during the public dialogue portion of the meeting are asked to sign up in advance by contacting Ms. Paula Schmitt of the Commission staff, at *paula.schmitt@drbc.state.nj.us* or by phoning Ms. Schmitt at 609–883–9500 ext. 224. Written comment on items scheduled for hearing may be submitted in advance of the meeting date to: Commission Secretary, P.O. Box 7360, 25 State Police Drive, West Trenton, NJ 08628; by fax to Commission Secretary, DRBC at 609–883–9522 or by email to paula.schmitt@drbc.state.nj.us. Written comment on dockets should also be furnished directly to the Project Review Section at the above address or fax number or by email to *william.muszynski@drbc.state.nj.us.*

Individuals in need of an accommodation as provided for in the Americans with Disabilities Act who wish to attend the informational meeting, conference session or hearings should contact the Commission Secretary directly at 609–883–9500 ext. 203 or through the Telecommunications Relay Services (TRS) at 711, to discuss how we can accommodate your needs.

Agenda Updates. Note that conference items are subject to change and items scheduled for hearing are occasionally postponed to allow more time for the Commission to consider them. Please check the Commission's Web site, drbc.net, closer to the meeting date for changes that may be made after the deadline for filing this notice.

Dated: February 14, 2012.

Pamela M. Bush,

Commission Secretary.

[FR Doc. 2012–3907 Filed 2–17–12; 8:45 am]

BILLING CODE 6360–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment request.

SUMMARY: The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Interested persons are invited to submit comments on or before April 23, 2012.

ADDRESSES: Written comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: February 15, 2012.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Federal Student Aid

Type of Review: Revision.

Title of Collection: William D. Ford Federal Direct Loan (Direct Loan) Program/Federal Family Education Loan (FFEL) Program Deferment Request Forms.

OMB Control Number: 1845–0011.

Agency Form Number(s): N/A.

Total Estimated Number of Annual Responses: 3,130,831.

Total Estimated Number of Annual Burden Hours: 500,933.

Abstract: These forms serve as the means by which borrowers in the William D. Ford Federal Direct Loan (Direct Loan) and Federal Family Education Loan (FFEL) Programs may requires deferment of repayment on their loans if they meet certain statutory and regulaotry criteria. The U.S. Department of Education uses the information collected on these forms to determine whether a borrower meets the eligibility requirements for the specific deferment type that the borrower has requested. The burden hours associated with this collection is increasing for one reason; namely, that the collection is being combined with the soon-to-be discontinued 1845–0005 so that the forms associated with this collection may be used in both the FFEL and Direct Loan Program.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 04789. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2012–3931 Filed 2–17–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment request.

SUMMARY: The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Interested persons are invited to submit comments on or before April 23, 2012.

ADDRESSES: Written comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: February 15, 2012.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Federal Student Aid

Type of Review: Revision.

Title of Collection: Income Contingent Repayment Plan and Income-Based Repayment Plan Alternative Documentation of Income.

OMB Control Number: 1845–0016.

Agency Form Number(s): N/A.

Total Estimated Number of Annual Responses: 294,924.

Total Estimated Number of Annual Burden Hours: 123,868.

Abstract: This form serves as the means by which a borrower who is repaying Direct Loan Program loans under the Income-Contigent Repayment (ICR) Plan or the Income-Based Repayment (IBR) Plan provides the U.S. Department of Education (the Department) with alternative documentation of the borrower's income if the borrower's adjusted gross income (AGI) is not available from the IRS, or if the Department believes that the borrower's most recently reported AGI does not accurately reflect the borrower's current income. Under the Direct Loan Program regulations, a borrower's AGI is used to calculate the monthly loan repayment amount under the ICR and IBR plans.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 04793. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2012–3929 Filed 2–17–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Comment request.

SUMMARY: The Department of Education (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the reporting burden on the public and helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Interested persons are invited to submit comments on or before April 23, 2012.

ADDRESSES: Written comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Please note that written comments received in response to this notice will be considered public records.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: February 15, 2012.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

Federal Student Aid

Type of Review: Revision.

Title of Collection: William D. Ford Federal Direct Loan (Direct Loan) and Federal Family Education Loan (FFEL) Program: Mandatory Forbearance Requests.

OMB Control Number: 1845–0018.

Agency Form Number(s): N/A.

Total Estimated Number of Annual Responses: 25,842.

Total Estimated Number of Annual Burden Hours: 5,814.

Abstract: These forms serve as the means by which a borrower may request forbearance of repayment on his or her William D. Ford Federal Direct Loan (Direct Loan) or Federal Family Education Loan (FFEL) Program loans based on participation in an eligible intersnhip/residency program, national guard duty, receiving benefits under the Department of Defense's Student Loan Repayment Program, or having a federal education loan debt burden that equals or exceeds 20 percent of the borrower's monthly gross income. The U.S. Department of Education and FFEL Program lenders and servicers use the information collected on these forms to determine whether a borrower meets the eligibility requirements for the specific forbearance type that the borrower has reqested. This collection is being revised so that it may be used by both the Direct Loan and FFEL Programs and also expands one of the mandatory forbearance forms to include additional mandatory forbearances; as a result additional data elements have been added to spport the additional forbearances.

Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 04798. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2012–3917 Filed 2–17–12; 8:45 am]

BILLING CODE 4000–01–P

ELECTION ASSISTANCE COMMISSION

Proposed Information Collection; Election Administration in Urban and Rural Areas; Comment Request

AGENCY: U.S. Election Assistance Commission (EAC).

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, EAC announces an information collection and seeks public comment on the provisions thereof. The EAC, pursuant to 5 CFR 1320.5(a)(iii), intends to submit this proposed information collection (Election Administration in Urban and Rural Areas) to the Director of the Office of Management and Budget for approval. The Election Administration in Urban and Rural Areas survey asks election officials questions concerning voter outreach and election personnel. EAC will conduct the survey as a way to obtain data and information for a mandatory report to Congress as stipulated under HAVA 241 (B)(15), which requires EAC to study ''[m]atters particularly relevant to voting and administering election in rural and urban areas.'' Further, Section 202(3) of HAVA authorizes EAC to conduct studies and to carry out other duties and activities to promote the effective administration of Federal elections.

DATES: Written comments must be submitted on or before 4 p.m. EDT on April 23, 2012.

Comments: Public comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments on the proposed information collection should be submitted electronically to *HAVAinfo@eac.gov* with Urban/Rural study as the subject line. Written comments on the proposed information collection can also be sent to the U.S. Election Assistance Commission, 1201 New York Avenue NW., Suite 300, Washington, DC 20005, ATTN: Urban/Rural Study.

Obtaining a Copy of the Survey: To obtain a free copy of the survey: (1) Access the EAC Web site at *www.eac.gov;* (2) write to the EAC (including your address and phone number) at U.S. Election Assistance Commission, 1201 New York Avenue NW., Suite 300, Washington, DC 20005, ATTN: Urban/Rural Study.

FOR FURTHER INFORMATION CONTACT: Ms. Karen Lynn-Dyson or Ms. Shelly Anderson at (202) 566–3100.

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Election Administration in Urban and Rural Areas; OMB Number Pending.

Summary of the Collection of Information: The survey requests information at the local level concerning the following categories:

Background: (1) Number of years served as an election official; (2) number of registered voters; (3) jurisdiction described as urban or rural; (4) jurisdiction required to provide language assistance; (5) office have full responsibility for elections in the jurisdiction; (6) alternative forms of voting allowed in the jurisdiction (absentee-excuse required, no-excuse absentee, early voting, all vote-by-mail).

Voter Outreach: (7) Type of voter outreach provided to the public; (8) outreach efforts coordinated with third-party/civic organizations; type of voter outreach coordinated; type of organizations with which the jurisdiction works; (9) voter outreach activities that focus on specific groups; (10) cost of voter outreach efforts in 2010; (11) estimated cost of voter outreach efforts in 2012; (12) how voter outreach efforts were paid for; (13) ease or difficulty of engaging in voter outreach; (14) reasons outreach may have been difficult.

Personnel: (15) Number of paid full-time, part-time, and temporary staff in 2010; 16) number of poll workers used in 2010; (17) number of paid full-time, part-time, and temporary staff in 2012; (18) number of poll workers used in 2012; (19) poll worker pay; (20) sources for recruiting poll workers; (21) ease or difficulty of obtaining poll workers; (22) reasons obtaining poll workers may have been difficult; (23) jurisdiction offer split shifts for poll workers; (24) additional comments.

Affected Public (Respondents): Local governments that administer Federal elections.

Affected Public: Local government.

Number of Respondents: 5,000.

Responses per Respondent: 1.

Estimated Burden Per Response: 45 minutes.

Estimated Total Annual Burden Hours: 2,250 hours.

Frequency: One-time data collection.

Mark A. Robbins,

Acting Executive Director, U.S. Election Assistance Commission.

[FR Doc. 2012–3737 Filed 2–17–12; 8:45 am]

BILLING CODE 6820–KF–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Nationwide Categorical Waivers Under Section 1605 (Buy American) of the American Recovery and Reinvestment Act of 2009 (Recovery Act)

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy (DOE).

ACTION: Notice of limited waivers.

SUMMARY: The U.S. Department of Energy (DOE) is hereby granting a nationwide limited waiver of the Buy American requirements of section 1605 of the Recovery Act under the authority of Section 1605(b)(2), (iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality), with respect to Recovery Act projects funded by EERE for ((1) 400 amp Dual Element Time-Delay Fuses for electric vehicle supply equipment (EVSE) charging station; (2) Video imaging card rack mounted boards for vehicle presence and data detection; (3) 20-ton split system heat pump that meets a minimum static pressure requirement of 3.0 inches of water column (only where the 3.0 water column is a requirement of the system); and (4) network manager for conversion of proprietary protocol—Staefa brand system—to a non-proprietary open source protocol.

DATES: Effective Date: 01/24/2012.

FOR FURTHER INFORMATION CONTACT: Christine Platt-Patrick, Office of Energy Efficiency and Renewable Energy (EERE), (202) 287–1553, Department of Energy, 1000 Independence Avenue SW., Mailstop EE–2K, Washington, DC 20585.

SUPPLEMENTARY INFORMATION: Under the authority of American Recovery and Reinvestment Act of 2009 (Recovery Act), Public Law 111–5, section 1605(b)(2), the head of a Federal department or agency may issue a ''determination of inapplicability'' (a waiver of the Buy American provision) if the iron, steel, or relevant manufactured good is not produced or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality (''nonavailability''). The authority of the Secretary of Energy to make all inapplicability determinations was re-delegated to the Assistant Secretary for Energy Efficiency and Renewable Energy (EERE), for EERE projects under the Recovery Act, in Redelegation Order No. 00–002.01E, dated April 25, 2011. Pursuant to this delegation the Acting Assistant Secretary, EERE, has concluded that: (1) 400amp Dual Element Time-Delay Fuses for electric vehicle supply equipment (EVSE) charging station; (2) Video imaging card rack mounted boards for vehicle presence and data detection; (3) 20-ton split system heat pump that meets a minimum static pressure requirement of 3.0 inches of water column (only where the 3.0 water column is a requirement of the system); and (4) network manager for conversion of proprietary protocol—Staefa brand system—to a non-proprietary open source protocol, are not produced or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality. The above items, when used on eligible EERE Recovery Act-funded projects, qualify for the ''nonavailability'' waiver determination.

EERE has developed a robust process to ascertain in a systematic and expedient manner whether or not there is domestic manufacturing capacity for the items submitted for a waiver of the Recovery Act Buy American provision. This process involves a close collaboration with the United States Department of Commerce National Institute of Standards and Technology (NIST) Manufacturing Extension Partnership (MEP), in order to scour the domestic manufacturing landscape in search of producers before making any nonavailability determinations.

The MEP has 59 regional centers with substantial knowledge of, and connections to, the domestic manufacturing sector. MEP uses their regional centers to 'scout' for current or potential manufacturers of the product(s) submitted in a waiver request. In the course of this interagency collaboration, MEP has been able to find exact or partial matches for

manufactured goods that EERE grantees had been unable to locate. As a result, in those cases, EERE was able to work with the grantees to procure American-made products rather than granting a waiver.

Upon receipt of completed waiver requests for the four products in the current waiver, EERE reviewed the information provided and submitted the relevant technical information to the MEP. The MEP then used their network of nationwide centers to scout for domestic manufacturers. The MEP reported that their scouting process did not locate any domestic manufacturers for these exact or equivalent items.

In addition to the MEP collaboration outlined above, the EERE Buy American Coordinator worked with other manufacturing stakeholders to scout for domestic manufacturing capacity or an equivalent product for each item contained in this waiver.

EERE also conducted significant amounts of independent research to supplement MEP's scouting efforts, including utilizing the solar experts employed by the Department of Energy's National Renewable Energy Laboratory. EERE's research efforts confirmed the MEP findings that the goods included in this waiver are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.

The nonavailability determination is also informed by the inquiries and petitions to EERE from recipients of EERE Recovery Act funds, and from suppliers, distributors, retailers and trade associations—all stating that their individual efforts to locate domestic manufacturers for these items have been unsuccessful.

Specific technical information for the manufactured goods included in this non-availability determination is detailed below:

(1) 400amp Dual Element Time-Delay Fuses for electric vehicle supply equipment (EVSE) charging station

These are used in the installation of EV charging stations. Two national trade organizations representing American manufacturers of this equipment verified that these are not manufactured in the US. Further, MEP did not identify a potential manufacturer.

(2) Video imaging card rack mounted boards for vehicle presence and data detection

These card racks are installed into existing traffic systems and are not manufactured domestically. Neither transportation manufacturing trade associations nor MEP identified any US manufacturer of this product.

(3) 20-ton split system heat pump that meets a minimum static pressure requirement of 3.0 inches of water column (only where the 3.0 water column is a requirement of the system)

This waiver is limited to systems that require compatibility with this extremely high water column. No US manufacturers (four manufacturers of this type of equipment were identified by EERE and MEP and contacted) were able to meet this need.

(4) Network manager for conversion of proprietary protocol- Staefa brand system to a non-proprietary open source protocol

For use where a Staefa system was installed previously, and where utilizing a domestic control module would mean that the existing energy management controls would have to be removed and a new energy management controls system would have to replace the existing Staefa system. This product allows the grantee to convert from the proprietary protocol to an open-source protocol- providing a wider variety of controls in the future.

In these cases, the grantee is unable to use a domestic control module because the existing system runs off of a proprietary communication protocol (rather than LON or BACnet), and the entire system would have to be replaced to install additional controllers. Trade organizations, DOE and MEP all agreed that this was the only controller capable of properly interfacing with this protocol.

In light of the foregoing, and under the authority of section 1605(b)(2) of Public Law 111–5 and Redelegation Order 00–002–01E, with respect to Recovery Act projects funded by EERE, I hereby issue a ''determination of inapplicability'' (a waiver under the Recovery Act Buy American provision) for: ((1) 400amp Dual Element Time-Delay Fuses for electric vehicle supply equipment (EVSE) charging station; (2) Video imaging card rack mounted boards for vehicle presence and data detection; (3) 20-ton split system heat pump that meets a minimum static pressure requirement of 3.0 inches of water column (only where the 3.0 water column is a requirement of the system); and (4) network manager for conversion of proprietary protocol- Staefa brand system- to a non-proprietary open source protocol.

Having established a proper justification based on domestic nonavailability, EERE hereby provides notice that on January 24, 2012, four (4) nationwide categorical waivers of section 1605 of the Recovery Act were issued as detailed *supra.* This notice constitutes the detailed written justification required by Section 1605(c) for waivers based on a finding under subsection (b).

This waiver determination is pursuant to the delegation of authority by the Secretary of Energy to the Assistant Secretary for Energy Efficiency and Renewable Energy with respect to expenditures within the purview of his responsibility. Consequently, this waiver applies to all EERE projects carried out under the Recovery Act.

Authority: Pub. L. 111–5, section 1605.

Dated: Issued in Washington, DC, on January 24, 2012.

Henry Kelly,

Acting Assistant Secretary, Energy Efficiency and Renewable Energy, U.S. Department of Energy.

[FR Doc. 2012–3939 Filed 2–17–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. CW–023]

Notice of Petition for Waiver of LG Electronics U.S.A., Inc. From the Department of Energy Clothes Washer Test Procedure, and Grant of Interim Waiver

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of petition for waiver, notice of grant of interim waiver, and request for comments.

SUMMARY: This notice announces receipt of and publishes the LG Electronics U.S.A., Inc. (LG) petition for waiver and application for interim waiver (hereafter, ''petition'') from specified portions of the U.S. Department of Energy (DOE) test procedure for determining the energy consumption of clothes washers. Today's notice also grants an interim waiver of the clothes washer test procedure. Through this notice, DOE also solicits comments with respect to the LG petition.

DATES: DOE will accept comments, data, and information with respect to the LG petition March 22, 2012.

ADDRESSES: You may submit comments, identified by case number CW–023, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: AS_Waiver_Requests@ee.doe.gov.* Include ''Case No. CW–023'' in the subject line of the message.

• *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J/ 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.

• *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Docket: For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza SW., Washington, DC 20024; (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Available documents include the following items: (1) This notice; (2) public comments received; (3) the petition for waiver and application for interim waiver; and (4) prior DOE waivers and rulemakings regarding similar clothes washer products. Please call Ms. Brenda Edwards at the above telephone number for additional information.

FOR FURTHER INFORMATION CONTACT: Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. Email: *Bryan.Berringer@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0103. Telephone: (202) 586–7796. Email: *Elizabeth.Kohl@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309, as codified), established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, which includes the clothes washers that are the focus of this notice.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)). The test procedure for automatic and semi-automatic clothes washers is contained in 10 CFR part 430, subpart B, appendix J1.

The regulations set forth in 10 CFR 430.27 contain provisions that enable a person to seek a waiver from the test procedure requirements for covered products. The Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) will grant a waiver if it is determined that the basic model for which the petition for waiver was submitted contains one or more design characteristics that prevents testing of the basic model according to the prescribed test procedures, or if the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(l)), 431.401(f)(4). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 430.27(b)(1)(iii), 430.401(b)(1)(iii). The Assistant Secretary may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l), 431.401(f)(4). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m) or 430.401(g), as appropriate.

The waiver process also allows the Assistant Secretary to grant an interim waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. 10 CFR 430.27(g), 430.401(e)(3). An interim waiver remains in effect for 180 days or until DOE issues its determination on the petition for waiver, whichever is sooner. DOE may extend an interim waiver for an additional 180 days. 10 CFR 430.27(h), 430.401(e)(4).

On December 23, 2010, DOE issued enforcement guidance on the application of waivers for large-capacity clothes washers and announced steps to improve the waiver process and refrain from certain enforcement actions. This guidance can be found on DOE's Web site at *http://energy.gov/sites/prod/files/gcprod/documents/LargeCapacityRCW_guidance_122210.pdf.*

II. Application for Interim Waiver and Petition for Waiver

On November 28, 2011, LG submitted a petition for waiver from the DOE test procedure applicable to automatic and semi-automatic clothes washers set forth in 10 CFR part 430, subpart B, appendix J1. LG requested the waiver for specified basic models with capacities greater than 3.8 cubic feet because the mass of the test load used in the procedure, which is based on the basket volume of the test unit, is currently not defined for basket sizes greater than 3.8 cubic feet. Table 5.1 of Appendix J1 defines the test load sizes used in the test procedure as linear functions of the basket volume. LG requests that DOE grant a waiver for testing and rating based on a revised Table 5.1. The table is identical to the Table 5.1 found in DOE's clothes washer test procedure Notice of Proposed Rulemaking (NOPR). 75 FR 57556 (September 21, 1010). DOE notes that the Table 5.1 proposed in the September 2010 NOPR was amended to correct rounding errors in the supplemental proposed rule issued on July 26, 2011 *http://www.eere.energy.gov/buildings/appliance_standards/residential/pdfs/rcw_tp_snopr.pdf* (76 FR 49238, Aug. 9, 2011).

An interim waiver may be granted if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. (10 CFR 430.27(g), 430.401(e)(3)).

DOE has determined that LG's application for interim waiver does not provide sufficient market, equipment price, shipments, and other manufacturer impact information to permit DOE to evaluate the economic hardship LG might experience absent a favorable determination on its application for interim waiver. DOE has determined, however, that it is likely LG's petition will be granted, and that it is desirable for public policy reasons to grant LG relief pending a determination on the petition. Previously, DOE granted test procedure waivers to other manufacturers for products with capacities larger than currently specified in the test procedure. *See, e.g.,* Electrolux (76 FR 11440 (Mar. 2, 2011)) and Samsung (76 FR 13169 (Mar. 10, 2011), 76 FR 50207 (Aug. 12, 2011), 76 FR 70996, (Nov. 16, 2011)). DOE has also granted previous waivers to LG for similar products. *See,*

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

e.g., 76 FR 11233, Mar. 1, 2011; 76 FR 21879, Apr. 19, 2011; 76 FR 64330, Oct. 18, 2011; 77 FR 4999, Feb. 1, 2012. In these waivers, DOE established an alternate test procedure extending the linear relationship between the maximum test load size and clothes washer container volume up to 6.0 cubic feet. As noted above, this revised table would be established by adoption of DOE's September 2010 test procedure NOPR, as amended in the supplemental proposal issued on July 26, 2011.

The current DOE test procedure specifies test load sizes only for machines with capacities up to 3.8 cubic feet. For the reasons set forth in DOE's September 2010 NOPR, DOE believes that extending the linear relationship between test load size and container capacity to larger capacities is valid. In addition, testing a basic model with a capacity larger than 3.8 cubic feet using the current procedure could evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. Based on these considerations, and the waivers granted to LG and other manufacturers for similar models, it appears likely that the petition for waiver will be granted. DOE also believes that the energy efficiency of similar products should be tested and rated in the same manner. As a result, DOE grants an interim waiver to LG for the basic models of clothes washers with container volumes greater than 3.8 cubic feet specified in its petition for waiver, pursuant to 10 CFR 430.27(g) . DOE also provides for the use of an alternative test procedure extending the linear relationship between test load size and container capacity, described below. Therefore, *it is ordered that:*

The application for interim waiver filed by LG is hereby granted for the specified LG clothes washer basic models, subject to the specifications and conditions below.

LG shall be required to test and rate the specified clothes washer products according to the alternate test procedure as set forth in section III, ''Alternate Test Procedure.''

The interim waiver applies to the following basic residential model groups:

Model	Brand
WT5070C*	LG.
WM8000H**	LG.
4147#21#	Kenmore.

DOE makes decisions on waivers and interim waivers for only those models specifically set out in the petition, not future models that may be manufactured by the petitioner. LG may submit a subsequent petition for waiver and request for grant of interim waiver, as appropriate, for additional models of clothes washers for which it seeks a waiver from the DOE test procedure. In addition, DOE notes that grant of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR part 429.

III. Alternate Test Procedure

EPCA requires that manufacturers use DOE test procedures to make representations about the energy consumption and energy consumption costs of products covered by the statute. (42 U.S.C. 6293(c)) Consistent representations are important for manufacturers to use in making representations about the energy efficiency of their products and to demonstrate compliance with applicable DOE energy conservation standards. Pursuant to its regulations applicable to waivers and interim waivers from applicable test procedures at 10 CFR 430.27, DOE will consider setting an alternate test procedure for LG in a subsequent Decision and Order.

The alternate procedure approved today is intended to allow LG to make valid representations regarding its clothes washers with basket capacities larger than provided for in the current test procedure. This alternate test procedure is based on the expanded Table 5.1 of Appendix J1 that appears in DOE's clothes washer test procedure NOPR (75 FR 57556, Sept. 21, 1010), altered slightly to correct rounding errors as specified in DOE's supplemental proposal issued on July 26, 2011.

During the period of the interim waiver granted in this notice, LG shall test its clothes washer basic models according to the provisions of 10 CFR part 430 subpart B, appendix J1, except that the expanded Table 5.1 below shall be substituted for Table 5.1 of appendix J1.

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	2.40
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
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

TABLE 5.1—TEST LOAD SIZES—Continued

Container volume		Minimum load		Maximum load		Average load	
cu. ft.	liter	lb	kg	lb	kg	lb	kg
≥ <	≥ <						
2.80–2.90	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).

IV. Summary and Request for Comments

Through today's notice, DOE announces receipt of LG's petition for waiver from certain parts of the test procedure that apply to clothes washers and grants an interim waiver to LG. DOE is publishing LG's petition for waiver in its entirety pursuant to 10 CFR 430.27(b)(1)(iv), 430.401(b)(1)(iv). The petition contains no confidential information. The petition includes a suggested alternate test procedure to measure the energy consumption of clothes washers with capacities larger than the 3.8 cubic feet specified in the current DOE test procedure.

DOE solicits comments from interested parties on all aspects of the petition. Pursuant to 10 CFR 430.27(b)(1)(iv), 430.401(c)(1), any person submitting written comments to DOE must also send a copy of such comments to the petitioner. The contact information for the petitioner is John I. Taylor, Vice President, Government Relations and Communications, LG Electronics USA, Inc., 1776 K Street NW., Washington, DC 20006.

All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

Issued in Washington, DC, on February 7, 2012.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

November 28, 2011
The Honorable Henry Kelly
Acting Assistant Secretary, Energy Efficiency and Renewable Energy
United States Department of Energy
Mail Station EE–10
Forrestal Building
1000 Independence Avenue SW
Washington, DC 20585

Re: Petition for Waiver and Application for Interim Waiver, *Test Procedure for Clothes Washers*

Dear Assistant Secretary Kelly:

LG Electronics, Inc. (LG) respectfully submits this Petition for Waiver and Application for Interim Waiver, pursuant to 10 C.F.R. § 430.27, as related to DOE's test procedure for clothes washers. DOE has already granted LG waivers relating to testing of certain models. 76 Fed. Reg. 70999 (Nov. 16, 2011); id. 64330 (Oct. 18, 2011); id. 21879 (April 19, 2011); id. 11228 (March 1, 2011); id. 11233 (March 1, 2011); 75 Fed. Reg. 71680 (Nov. 24, 2010). The current Petition and Application would expand the number of models subject to the grant of a waiver. *LG requests expedited treatment of the Petition and Application.*

LG is a manufacturer of clothes washers and other products sold worldwide, including in the United States. LG's U.S. operations are LG Electronics USA, Inc., with headquarters at 1000 Sylvan Avenue, Englewood Cliffs, NJ 07632 (tel. 201–

816–2000). Its worldwide headquarters are located at LG Twin Towers 20, Yoido-dong, Youngdungpo-gu Seoul, Korea 150–721; (tel. 011–82–2–3777–1114); URL: http.www.LGE.com. LG's principal brands include LG® and OEM brands, including GE® and Kenmore®.

The test procedure under the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6291 et seq., provides for clothes washers to be tested with specified allowable test load sizes. See 10 C.F.R. Pt. 430, Subpt. B, App. Jl, Table 5.1. The largest average load under Table 5.1 is 9.20 lbs. LG believes that it is appropriate for DOE to grant a waiver that would allow for testing and rating of specified models (see Appendix 1 hereto) with larger test loads where the model has a container volume that is greater than the largest volume shown on Table 5.1.

DOE has already granted waivers and/or interim waivers to a number of manufacturers, including LG, Whirlpool, General Electric, Samsung, and Electrolux for testing with larger test loads for specified models with container volumes in excess of 3.8 cubic feet. See, e.g., 76 Fed. Reg. 70999 (Nov. 16, 2011) (LG); id. 70996 (Nov. 16, 2011) (Samsung); id. 64330 (Oct. 18, 2011) (LG); id. 48149 (Aug. 8, 2011) (Samsung); id. 21879 (April 19, 2011 (LG); id. 21881 (April 19, 2011) (Samsung); id. 13169 (March 10, 2011) (Samsung); id. 11440 (March 2, 2011) (Electrolux); id. 11228 (March 1, 2011) (LG); id. 11233 (March 1, 2011) (LG); 75 Fed. Reg. 81258 (Dec. 27, 2010) (Electrolux); id. 76968 (Dec. 10, 2010) (GE); id. 71680 (Nov. 24, 2010) (LG); id. 57915 (Sept. 23, 2010) (GE); id. 57937 (Sept. 23, 2010) (Samsung); id. 69653 (Nov. 15, 2010) (Whirlpool); id. 76962 (Dec. 10, 2010) (Electrolux); id. 76968 (Dec. 10, 2010) (GE); id. 81258 (Dec. 27, 2010) (Electrolux); 71 Fed. Reg. 48913 (Aug. 22, 2006) (Whirlpool). The Association of Home Appliance Manufacturers (AHAM) has submitted comments to DOE suggesting that the DOE test procedure be amended to provide for testing with loads in excess of those shown in Table 5.1 when testing is done on clothes washers with volumes in excess of 3.8 cubic feet. See AHAM Comments on the Framework Document for Residential Clothes Washers; EERE–2008–BT–STD–0019; RIN 1904–AB90, at Appendix B—AHAM Proposed Changes to J1 Table 5.1 (Oct. 2, 2009). In addition, DOE has issued a Notice of Proposed Rulemaking proposing to amend the DOE test procedure to adopt the AHAM proposed Table 5.1. 75 Fed. Reg. 57556 (Sept. 21, 2010). And it has issued Supplemental Notices of Proposed Rulemakings to the same effect. 76 Fed. Reg. 69870 (Nov. 9, 2011); id. 49238 (Aug. 9, 2011). Further, DOE has issued a guidance document indicating the appropriateness of waivers for testing with larger test loads for clothes washers with volumes in excess of 3.8 cubic feet. DOE, IGC Enforcement Guidance on the Application of Waivers and on the Waiver Process (Dec. 23, 2010), at *http://www.gc.energy.gov/documents/LargeCapacityRCW_guidance22210.pdf*.

LG requests that DOE grant a waiver for testing and rating based on the revised Table 5.1 in Appendix 2 hereto. This is the Table 5.1 as already set forth in the waivers granted to LG for certain models. See 76 Fed. Reg. 70999 (Nov. 16, 2011); id. 64330 (Oct. 18, 2011); id. 21879 (April 19, 2011); id. 11228 (March 1, 2011); id. 11233 (March 1, 2011); 75 Fed. Reg. 71680 (Nov. 24, 2010). The revised Table 5.1 should be applied to LG's testing and rating of other models as specified in Appendix 1 hereto.[1]

The waiver should continue until DOE adopts an applicable amended test procedure.

LG also requests an interim waiver for its testing and rating of the foregoing models. The petition for waiver is likely to be granted, as evidenced not only by its merits, but also because DOE has granted waivers and/or interim waivers to LG, Whirlpool, GE, Samsung, and Electrolux and has proposed a corresponding amendment to its test procedure. Hence, grant of an interim waiver for LG is appropriate.

We would be pleased to discuss this request with DOE and provide further information as needed.

LG requests expedited treatment of the Petition and Application. In that regard, DOE has stated in its December 23, 2010 Enforcement Guidance (supra) that it ''commits to act promptly on waiver requests.'' LG repeated this in its March 7, 2011 notice concerning its certification, compliance and enforcement rule. 76 Fed. Reg.12422, 12442 (''The Department renews its commitment to act swiftly on waiver requests'').[2] LG appreciates this commitment by DOE.

We hereby certify that all manufacturers of domestically marketed units of the same product type have been notified by letter of this petition and application, copies of which letters are set forth in Appendix 3 hereto.

Sincerely,

John I. Taylor
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Appendix 1

The waiver and interim waiver requested herein should apply to testing and rating of the following model series of LG-manufactured clothes washers. Please note that the actual model numbers will vary to account for such factors as year of manufacture, product color, or other features. Nonetheless, they will always have volumes in excess of 3.8 cubic feet.

(In the chart below, ''#'' represents a number; ''*'' represents a letter.)

Appendix 2

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] All LG models are measured in accordance with DOE's final guidance for measuring clothes container capacity under the test procedure in 10 C.F.R. Part 430, Subpart B, Appendix J1.

[2] DOE goes on to state that ''DOE, as a matter of policy, will refrain from enforcement actions related to a waiver request that is pending with the Department'' Id.

TABLE 5.1—TEST LOAD SIZES—Continued

Container volume		Minimum load		Maximum load		Average load	
cu. ft. ≥ <	liter ≥ <	lb	kg	lb	kg	lb	kg
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
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	10.80	4.91
4.60–4.70	130.3–133.1	3.00	1.36	19.10	8.65	11.00	5.00
4.70–4.80	133.1–135.9	3.00	1.36	19.50	8.83	11.20	5.10
4.80–4.90	135.9–138.8	3.00	1.36	19.90	9.02	11.40	5.19
4.90–5.00	138.8–141.6	3.00	1.36	20.30	9.20	11.60	5.28
5.00–5.10	141.6–144.4	3.00	1.36	20.70	9.39	11.90	5.38
5.10–5.20	144.4–147.2	3.00	1.36	21.10	9.58	12.10	5.47
5.20–5.30	147.2–150.1	3.00	1.36	21.50	9.76	12.30	5.56
5.30–5.40	150.1–152.9	3.00	1.36	21.90	9.95	12.50	5.65
5.40–5.50	152.9–155.7	3.00	1.36	22.30	10.13	12.70	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).

[FR Doc. 2012–3942 Filed 2–17–12; 8:45 am]
BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2670–004; ER10–2669–004; ER10–2671–005; ER10–2673–004; ER10–2253–005; ER10–3319–006; ER10–2674–004; ER10–1543–004; ER10–1544–004; ER10–2627–005; ER10–2629–006; ER10–1546–006; ER10–1547–004; ER10–1549–004; ER10–2675–005; ER10–2676–004; ER10–2636–005; ER10–1975–006; ER10–1974–006; ER10–1550–005; ER11–2424–007; ER10–2677–004; ER10–1551–004; ER10–2678–003; ER10–2638–004.

Applicants: Hopewell Cogeneration Ltd Partnership, Troy Energy, LLC, FirstLight Hydro Generating Company, Astoria Energy LLC, Mt. Tom Generating Company, LLC, Pleasants Energy, LLC, Waterbury Generation LLC, Choctaw Gas Generation, LLC, Syracuse Energy Corporation, Astoria Energy II LLC, GDF SUEZ Energy Marketing NA, Inc., IPA Trading, LLC, Northeastern Power Company, Choctaw Generation Limited Partnership, Hot Spring Power Company, LLC, FirstLight

Power Resources Management, LLC, Pinetree Power-Tamworth, Inc., ANP Blackstone Energy Company, LLC, ANP Bellingham Energy Company, LLC, North Jersey Energy Associates, A L.P., Milford Power Limited Partnership, Northeast Energy Associates, A Limited P, ANP Funding I, LLC, Armstrong Energy Limited Partnership, L., Calumet Energy Team, LLC.

Description: GDF SUEZ Companies submit Notice of Change in Status.

Filed Date: 2/10/12.

Accession Number: 20120210–5205.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–75–003.

Applicants: Public Power, LLC.

Description: Compliance Filing for MBR Tariff to be effective 10/13/2011.

Filed Date: 2/10/12.

Accession Number: 20120210–5138.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–743–001.

Applicants: Black Hills Power, Inc.

Description: GDEMA Revised Schedule B to be effective 1/1/2012.

Filed Date: 2/10/12.

Accession Number: 20120210–5177.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–748–001.

Applicants: Black Hills Power, Inc.

Description: GDEMA Revised Schedule B to be effective 1/1/2012.

Filed Date: 2/10/12.

Accession Number: 20120210–5178.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–750–001.

Applicants: Black Hills Power, Inc.

Description: GDEMA Revised Schedule B to be effective 1/1/2012.

Filed Date: 2/10/12.

Accession Number: 20120210–5179.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–751–001.

Applicants: Black Hills Power, Inc.

Description: GDEMA Revised Schedule B to be effective 1/1/2012.

Filed Date: 2/10/12.

Accession Number: 20120210–5180.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–952–001.

Applicants: Essential Power, LLC.

Description: Supplement to Market-Based Rate Application to be effective 4/1/2012.

Filed Date: 2/10/12.

Accession Number: 20120210–5117.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–1052–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: PJM Original Service Agreement No. 3185; Queue No. W4–046 to be effective 1/16/2012.

Filed Date: 2/10/12.

Accession Number: 20120210–5067.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–1053–000.

Applicants: Public Service Company of Colorado.

Description: Public Service Company of Colorado submits tariff filing per 35.13(a)(2)(iii: 2012–2–10_CGTRX E&P Agreement 293 NOC to be effective 4/10/2012.

Filed Date: 2/10/12.

Accession Number: 20120210–5093.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–1054–000.

Applicants: Southwestern Public Service Company.

Description: Southwestern Public Service Company submits tariff filing per 35.15: 2–10–12_RS102 SPS–PNM_Srvc Schedule C Cancel to be effective 5/31/2011.

Filed Date: 2/10/12.

Accession Number: 20120210–5098.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–1055–000.

Applicants: PJM Interconnection, L.L.C., American Transmission Systems, Incorporation.

Description: ATSI submits PJM Service Agreement No. 3235 ATSI–Buckeye-CEC South Scioto Cons. Agreement to be effective 10/28/2011.

Filed Date: 2/10/12.

Accession Number: 20120210–5118.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–1056–000.

Applicants: Southern California Edison Company.

Description: Amended Letter Agreement WDT SCE–Houweling Nurseries Oxnard Proj. with HNO to be effective 1/12/2012.

Filed Date: 2/10/12.

Accession Number: 20120210–5131.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–1057–000.

Applicants: Falcon Energy, LLC.

Description: Falcon Energy MBR Tariff to be effective 2/1/2012.

Filed Date: 2/10/12.

Accession Number: 20120210–5132.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–1058–000.

Applicants: Oklahoma Gas and Electric Company.

Description: Ministerial Filing to Incorporate Changes to eTariff Approved in ER11–112 to be effective 1/1/2011.

Filed Date: 2/10/12.

Accession Number: 20120210–5147.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–1059–000.

Applicants: Choctaw Gas Generation, LLC.

Description: Choctaw Gas Cancellation of MBR Tariff to be effective 2/10/2012.

Filed Date: 2/10/12.

Accession Number: 20120210–5153.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–1060–000.

Applicants: Coolidge Power LLC, Quantum Choctaw Power, LLC.

Description: Compliance Filing to be effective 2/10/2012.

Filed Date: 2/10/12.

Accession Number: 20120210–5154.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–1061–000.

Applicants: Public Service Company of New Mexico.

Description: PNM Certificate of Concurrence to be effective 12/15/2011.

Filed Date: 2/10/12.

Accession Number: 20120210–5155.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–1062–000.

Applicants: Entergy Arkansas, Inc.

Description: GenOn LGIA to be effective 2/11/2012.

Filed Date: 2/10/12.

Accession Number: 20120210–5168.

Comments Due: 5 p.m. ET 3/2/12.

Docket Numbers: ER12–1063–000.

Applicants: Black River Commodity Energy Fund LLC.

Description: MBR Tariff Baseline to be effective 5/15/2006.

Filed Date: 2/13/12.

Accession Number: 20120213–5000.

Comments Due: 5 p.m. ET 3/5/12.

Docket Numbers: ER12–1064–000.

Applicants: Black River Macro Discretionary Fund Ltd.

Description: MBR Tariff Baseline to be effective 5/15/2006.

Filed Date: 2/13/12.

Accession Number: 20120213–5001.

Comments Due: 5 p.m. ET 3/5/12.

Docket Numbers: ER12–1065–000.

Applicants: New England Power Company.

Description: New England Power Company submits Notice of Termination of Large Generator Interconnection Agreement.

Filed Date: 2/10/12.

Accession Number: 20120210–5189.

Comments Due: 5 p.m. ET 3/2/12.

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 5:00 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: February 13, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–3881 Filed 2–17–12; 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 rate filings:

Docket Numbers: ER12–420–000.
Applicants: Consumers Energy Company.
Description: Response of Consumers Energy Company to January 12, 2012 Deficiency Letter.
Filed Date: 2/8/12.
Accession Number: 20120208–5143.
Comments Due: 5 p.m. ET 2/29/12.

Docket Numbers: ER12–1025–000.
Applicants: AEP Texas North Company.
Description: 20120208 TNC–Kaiser Creek SUA Cancellation to be effective 1/10/2012.
Filed Date: 2/8/12.
Accession Number: 20120208–5081.
Comments Due: 5 p.m. ET 2/29/12.

Docket Numbers: ER12–1026–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: C005–P11 FCA Filing to be effective 2/9/2012.
Filed Date: 2/8/12.
Accession Number: 20120208–5083.
Comments Due: 5 p.m. ET 2/29/12.

Docket Numbers: ER12–1027–000.
Applicants: AEP Texas North Company.
Description: 20120208 TNC–FRV Bryan Solar IA to be effective 12/28/2011.
Filed Date: 2/8/12.
Accession Number: 20120208–5087.
Comments Due: 5 p.m. ET 2/29/12.

Docket Numbers: ER12–1028–000.
Applicants: Duke Energy Carolinas, LLC.
Description: Rutherford PPA Filing to be effective 1/1/2011.
Filed Date: 2/8/12.
Accession Number: 20120208–5088.
Comments Due: 5 p.m. ET 2/29/12.

Docket Numbers: ER12–1029–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: 02–08–12 Schedule 31 Annual Update to be effective 4/9/2012.
Filed Date: 2/8/12.
Accession Number: 20120208–5128.
Comments Due: 5 p.m. ET 2/29/12.

Docket Numbers: ER12–1030–000.
Applicants: Spinning Spur Wind LLC, Spinning Spur Interconnect LLC, Spinning Spur Wind Two LLC.
Description: Spinning Spur Baseline Common Facilities Agreement and Company Agreement Filing to be effective 4/8/2012.
Filed Date: 2/8/12.
Accession Number: 20120208–5129.
Comments Due: 5 p.m. ET 2/29/12.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA11–3–000.
Applicants: Black Hills Power, Inc., Black Hills/Colorado Electric Utility Company, LP, Black Hills Wyoming, LLC, Cheyenne Light, Fuel and Power Company, Enserco Energy, Inc.
Description: Black Hills Utilities submits revised Third Quarter 2011 Site Control Quarterly Filing.
Filed Date: 2/8/12.
Accession Number: 20120208–5142.
Comments Due: 5 p.m. ET 2/29/12.

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 5:00 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: February 9, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–3885 Filed 2–17–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–2701–005.
Applicants: Mountain View Power Partners IV, LLC.
Description: Mountain View IV Revised Compliance Filing to be effective 7/1/2011.
Filed Date: 2/8/12.
Accession Number: 20120208–5103.
Comments Due: 5 p.m. ET 2/29/12.

Docket Numbers: ER12–471–000.
Applicants: Northern States Power Company, a Wisconsin corporation
Description: 2012_2–9_NSPW–DPC_Refund Report_290 to be effective N/A.
Filed Date: 2/9/12.
Accession Number: 20120209–5026.
Comments Due: 5 p.m. ET 3/1/12.

Docket Numbers: ER12–742–001.
Applicants: Lakewood Cogeneration Limited Partnership.
Description: Update to Dec. 30 Category Seller Filing to be effective 12/30/2011.
Filed Date: 2/9/12.
Accession Number: 20120209–5082.
Comments Due: 5 p.m. ET 3/1/12.

Docket Numbers: ER12–1031–000.
Applicants: Interstate Power and Light Company.
Description: IPL Concurrence to MISO Coordination Agreement to be effective 12/31/9998.
Filed Date: 2/9/12.
Accession Number: 20120209–5018.
Comments Due: 5 p.m. ET 3/1/12.

Docket Numbers: ER12–1032–000.
Applicants: PJM Interconnection, LLC.
Description: PJM Original Service Agreement No. 3189; Queue No. O33/P14/P26 to be effective 1/16/2012.
Filed Date: 2/9/12.
Accession Number: 20120209–5027.
Comments Due: 5 p.m. ET 3/1/12.

Docket Numbers: ER12–1033–000.
Applicants: Spinning Spur Wind Two LLC.
Description: Spinning Spur Two Baseline Filing of Concurrences to CFA and Company Agreement to be effective 4/8/2012.
Filed Date: 2/9/12.
Accession Number: 20120209–5040.
Comments Due: 5 p.m. ET 3/1/12.

Docket Numbers: ER12–1034–000.
Applicants: Public Service Company of Colorado.

Description: 2012–2–9 WAPA–TSGT Limon Dyn Mtr 320–PSCo to be effective 3/11/2011.

Filed Date: 2/9/12.

Accession Number: 20120209–5042.

Comments Due: 5 p.m. ET 3/1/12.

Docket Numbers: ER12–1035–000.

Applicants: PJM Interconnection, LLC, Virginia Electric and Power Company.

Description: Dominion submits PJM Tariff Attachment H–16AA per Settlement Agreement to be effective 12/31/9998.

Filed Date: 2/9/12.

Accession Number: 20120209–5058.

Comments Due: 5 p.m. ET 3/1/12.

Docket Numbers: ER12–1036–000.

Applicants: Spinning Spur Interconnect LLC.

Description: Spinning Spur Interconnect Baseline Filing—Concurrences to CFA & Company Agreement to be effective 4/8/2012.

Filed Date: 2/9/12.

Accession Number: 20120209–5071.

Comments Due: 5 p.m. ET 3/1/12.

Docket Numbers: ER12–1037–000.

Applicants: South Carolina Electric & Gas Company.

Description: New Horizon Assignment of NITSA and NOA to be effective 8/30/2010.

Filed Date: 2/9/12.

Accession Number: 20120209–5096.

Comments Due: 5 p.m. ET 3/1/12.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA11–4–000.

Applicants: Iberdrola Renewables, Inc., Atlantic Renewable Projects II LLC, Barton Windpower LLC, Big Horn Wind Project LLC, Big Horn II Wind Project LLC, Blue Creek Wind Farm LLC, Buffalo Ridge I LLC, Buffalo Ridge II LLC, Casselman Windpower LLC, Colorado Green Holdings LLC, Dillon Wind LLC, Dry Lake Wind Power, LLC, Dry Lake Wind Power II LLC, Elk River Windfarm, LLC, Elm Creek Wind, LLC, Elm Creek Wind II LLC, Farmers City Wind, LLC, Flat Rock Windpower LLC, Flat Rock Windpower II LLC, Flying Cloud Power Partners, LLC, Hardscrabble Wind Power LLC, Hay Canyon Wind LLC, Juniper Canyon Wind Power LLC, Klamath Energy LLC, Klamath Generation LLC, Klondike Wind Power LLC, Klondike Wind Power II LLC, Klondike Wind Power III LLC, Leaning Juniper Wind Power II LLC, Lempster Wind, LLC, Locust Ridge Wind Farm, LLC, Locust Ridge II, LLC, Manzana Wind LLC, MinnDakota Wind LLC, Moraine Wind LLC, Moraine Wind II LLC, Mountain View Power Partners III, LLC, New England Wind, LLC, New Harvest Wind Project LLC, Northern Iowa Windpower II LLC, Pebble Springs Wind LLC, Providence Heights Wind, LLC, Rugby Wind LLC, San Luis Solar LLC, Shiloh I Wind Project, LLC, South Chestnut LLC, Star Point Wind Project LLC, Streator-Cayuga Ridge Wind Power LLC, Trimont Wind I LLC, Twin Buttes Wind LLC.

Description: Land Acquisition Report of Atlantic Renewable Projects II LLC, *et al.*

Filed Date: 2/8/12.

Accession Number: 20120208–5148.

Comments Due: 5 p.m. ET 2/29/12.

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: February 09, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–3886 Filed 2–17–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice Announcing Preliminary Permit Drawing

Lock+ Hydro Friends Fund XLI.	Project No. 14182–000
FFP Project 54, LLC	Project No. 14192–000

The Commission has received two preliminary permit applications deemed filed on May 3, 2011, at 8:30 a.m.,[1] for proposed projects to be located on the Tombigbee River, in Pickens County, Alabama. The applications were filed by Lock+ Hydro Friends Fund XLI for Project No. 14182–000 and FFP Project 54, LLC for Project No. 14192–000.

On February 22, 2012, at 9:00 a.m. (Eastern Time), the Secretary of the Commission, or her designee, will conduct a random drawing to determine the filing priority of the applicants identified in this notice. The Commission will select among competing permit applications as provided in section 4.37 of its regulations.[2] The priority established by this drawing will be used to determine which applicant, among those with identical filing times, will be considered to have the first-filed application.

The drawing is open to the public and will be held in room 2C, the Commission Meeting Room, located at 888 First St. NE., Washington, DC 20426. A subsequent notice will be issued by the Secretary announcing the results of the drawing.

Dated: February 13, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–3884 Filed 2–17–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14179–000; Project No. 14194–000]

Lock+ Hydro Friends Fund XLIV; FFP Project 51, LLC; Notice Announcing Preliminary Permit Drawing

The Commission has received two preliminary permit applications deemed filed on May 3, 2011, at 8:30 a.m.,[1] for proposed projects to be located on the Arkansas River, in Jefferson County, Arkansas. The applications were filed by Lock+ Hydro Friends Fund XLIV for Project No. 14179–000 and FFP Project 51, LLC for Project No. 14194–000.

On February 22, 2012, at 9 a.m. (Eastern Time), the Secretary of the Commission, or her designee, will conduct a random drawing to determine the filing priority of the applicants identified in this notice. The Commission will select among competing permit applications as provided in section 4.37 of its regulations.[2] The priority established by this drawing will be used to determine which applicant, among those with

[1] Under the Commission's Rules of Practice and Procedure, any document received after regular business hours is considered filed at 8:30 a.m. on the next regular business day. 18 CFR 385.2001(a)(2) (2011).

[2] 18 CFR 4.37 (2011).

[1] Under the Commission's Rules of Practice and Procedure, any document received after regular business hours is considered filed at 8:30 a.m. on the next regular business day. 18 CFR 385.2001(a)(2) (2011).

[2] 18 CFR 4.37 (2011).

identical filing times, will be considered to have the first-filed application.

The drawing is open to the public and will be held in room 2C, the Commission Meeting Room, located at 888 First St. NE., Washington, DC 20426. A subsequent notice will be issued by the Secretary announcing the results of the drawing.

Dated: February 13, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–3883 Filed 2–17–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 14130–000; 14137–000]

Riverbank Hydro No. 2, LLC; Lock+ Hydro Friends Fund XXXVI; Notice Announcing Preliminary Permit Drawing

The Commission has received two preliminary permit applications deemed filed on April 1, 2011, at 8:30 a.m.,[1] for proposed projects to be located on the Arkansas River, in Lincoln County and Jefferson County, Arkansas. The applications were filed by Riverbank Hydro No. 2, LLC for Project No. 14130–000 and Lock+ Hydro Friends Fund XXXVI for Project No. 14137–000.

On February 22, 2012, at 9 a.m. (Eastern Time), the Secretary of the Commission, or her designee, will conduct a random drawing to determine the filing priority of the applicants identified in this notice. The Commission will select among competing permit applications as provided in section 4.37 of its regulations.[2] The priority established by this drawing will be used to determine which applicant, among those with identical filing times, will be considered to have the first-filed application.

The drawing is open to the public and will be held in room 2C, the Commission Meeting Room, located at 888 First St. NE., Washington, DC 20426. A subsequent notice will be issued by the Secretary announcing the results of the drawing.

[1] Under the Commission's Rules of Practice and Procedure, any document received after regular business hours is considered filed at 8:30 a.m. on the next regular business day. 18 CFR 385.2001(a)(2) (2011).

[2] 18 CFR 4.37 (2011).

Dated: February 13, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–3882 Filed 2–17–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–57–000]

Williston Basin Interstate Pipeline Company; Notice of Request Under Blanket Authorization

Take notice that on February 6, 2012, Williston Basin Interstate Pipeline Company (Williston Basin), 1250 West Century Avenue, Bismarck, North Dakota 58503, filed in Docket No. CP12–57–000, an application pursuant to section 157.21 of the Commission's Regulations under the Natural Gas Act (NGA) as amended, to replace natural gas compression facilities at its Elk Basin compressor station in Park County, Wyoming, under Williston Basin's blanket certificate issued in Docket No. CP82–487–000 *et al.,* [1] all as more fully set forth in the application which is on file with the Commission and open to the public for inspection.

Williston Basin proposes to replace two natural gas-fired 225-horsepower (HP) compressor units installed in 1941, two natural gas-fired 330–HP compressor units installed in 1950, and one natural gas-fired 1,100–HP compressor unit installed in 1970 with one electric-driven 2,500–HP compressor unit. Williston Basin states that the new 2,500–HP electric compressor unit will also increase the certificated horsepower at the Elk Basin compressor station from 4,610 HP to 4,900 Hp. Williston Basin estimates that the proposed electric replacement compressor unit would cost $8,706,486 to install.

Any questions concerning this application may be directed to Keith A. Tiggelaar, Director of Regulatory Affairs, Williston Basin Interstate Pipeline Company, 1250 West Century Avenue, Bismarck, North Dakota 58503, telephone (701) 530–1560 or Email: *keith.tiggelaar@wbip.com.*

This filing is available for review at the Commission or may be viewed on the Commission's web site at *http://www.ferc.gov,* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, please contact FERC Online Support at FERC *OnlineSupport@ferc.gov* or call toll-free at (866) 206–3676, or, for TTY, contact (202) 502–8659. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages intervenors to file electronically.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the NGA.

[1] 30 FERC ¶ 61,143 (1985).

Dated: February 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–3817 Filed 2–17–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9633–7]

California State Motor Vehicle and Nonroad Engine Pollution Control Standards; Mobile Cargo Handling Equipment Regulation at Ports and Intermodal Rail Yards; Notice of Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of decision granting an authorization and waiver of preemption for California's mobile cargo handling equipment regulation at ports and intermodal rail yards.

SUMMARY: Pursuant to section 209(e) of the Clean Air Act (Act), 42 U.S.C. 7543(e), EPA is granting California its request for authorization to enforce it emission standards and other requirements for its mobile cargo handling equipment regulation. To the extent that the mobile cargo handling equipment regulation pertains to the control of emissions from new motor vehicles or new motor vehicle engines

EPA is, pursuant to section 209(b) of the Act, 42 U.S.C. 7543(b), granting California its request for a waiver of preemption.

DATES: Under 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by April 23, 2012. Under 307(b)(2) of the Act, judicial review of this final action may not be obtained in subsequent enforcement proceedings.

ADDRESSES: EPA has established a docket for this action under Docket ID EPA–HQ–OAR–2010–0862. All documents relied upon in making this decision, including those submitted to EPA by CARB, and public comments, are contained in the public docket. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, located at 1301 Constitution Avenue NW., Washington, DC 20460. The public reading room is open to the public on all federal government work days between 8 a.m. and 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room (202) 566–1744. The Air and Radiation Docket and Information Center's Web site is *http://www.epa.gov/oar/docket.html.* The electronic mail (email) address for the Air and Radiation Docket is: *a-and-r-Docket@epa.gov,* the telephone number is (202) 566–1742, and the fax number is (202) 566–9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at *http://www.regulations.gov.* After opening the *www.regulations.gov* Web site, enter EPA–HQ–OAR–2010–0862 in the ''Enter Keyword or ID'' fill-in box to view documents in the record of CARB's mobile cargo handling equipment waiver and authorization request. Although a part of the official docket, the public docket does not include Confidential Business Information (''CBI'') or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality (''OTAQ'') maintains a Web page that contains general information on its review of California waiver requests. Included on that page are links to prior waiver **Federal Register** notices, some of which are cited in today's notice; the page can be accessed at *http://www.epa.gov/otaq/cafr.htm.*

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SUPPLEMENTARY INFORMATION:

I. Background

A. Chronology

In a letter dated January 29, 2007, the California Air Resources Board (CARB) submitted to EPA its waiver and authorization request pursuant to section 209 of the Clean Air Act (CAA or Act), regarding its regulations for Mobile Cargo Handling Equipment at Ports and Intermodal Rail yards (Mobile Cargo Handling Equipment or CHE).[1] CARB's CHE regulations were adopted at CARB's December 8, 2005 public hearing (by Resolution 05–62) and were subsequently modified after making the regulation available for supplemental public comment by CARB's Executive Officer through Executive Order R–06–007 on June 2, 2006. The CHE regulations are codified at title 12, California Code of Regulations section 2479.[2]

EPA published a **Federal Register** notice for public hearing and comment on CARB's request on February 1, 2011.[3] No hearing request was received and thus no hearing took place. EPA received a total of three written comments from BNSF Railway Company and Union Pacific Railway Company, SSAT Terminal Pier A (SSAT), and Ports America Equipment Services (Ports America).[4] EPA also received supplemental comment from CARB.[5]

CARB has requested that EPA grant a waiver of preemption or grant a new authorization for certain portions of its CHE regulations. For other portions of its CHE regulation, CARB has requested that EPA find the requirements fall within the scope of a previously granted waiver or authorization, or in the alternative grant a new waiver of preemption or authorization. Finally, for one portion of its CHE regulation, CARB has requested that EPA find the requirements are not preempted by section 209 of the Clear Air Act, that if EPA finds they are preempted, the requirements fall within the scope of a previously granted waiver or, in the alternative, EPA grant a new waiver of preemption.[6]

B. CARB Mobile Cargo Handling Equipment Regulations

CARB's CHE regulations set performance standards for engines equipped in newly purchased, leased, or rented (collectively known as ''newly acquired''), as well as in-use, mobile cargo handling equipment used at ports or intermodal rail yards in California. The standards vary depending on the type of vehicle, whether the engine is used in off-road equipment or a vehicle registered as an on-road motor vehicle, and whether they are newly acquired or already in-use.[7]

Yard trucks and other mobile cargo handling equipment registered to operate on California highways acquired after January 1, 2007 must be equipped with engines that are certified to the on-road engine emission standards for the model year in which they are acquired.

Any yard truck not registered for on-road operation (off-road yard trucks) acquired after January 1, 2007 must be equipped either with an engine certified to the on-road emission standards for the model year in which it is acquired or the final Tier-4 off-road emission

[1] *See* CARB's January 29, 2007 request at EPA–HQ–OAR–2010–0862–0001 (CARB's Request). EPA's review of CARB's mobile source standards relating to the control of emissions for new motor vehicles and new motor vehicle engines conducted under section 209(b) of the Act are treated as ''waiver'' requests from CARB. EPA's review of CARB's regulations relating to standards and other requirements relating to the control of emissions from nonroad vehicles and nonroad engines conducted under section 209(e) of the Act are treated as ''authorization'' requests from CARB.

[2] The CHE regulation is designed to use best available control technology (BACT) to reduce diesel PM and NO_X emissions from mobile cargo handling equipment at ports and intermodal rail yards. Mobile cargo handling equipment is any engine-propelled vehicle used to handle cargo at ports and intermodal rail facilities and vehicles used to perform maintenance and repair activities and includes, but is not limited to, yard trucks, top handlers, rubber-tired gantry (RTG) cranes, forklifts, dozers, and loaders.

[3] 76 FR 5586 (February 1, 2011).

[4] *See* EPA–HQ–OAR–2010–0862–0024.1, EPA–HQ–OAR–2010–0862–0025.1, and EPA–HQ–OAR–2010–0862–0026.1, respectively.

[5] *See* EPA–HQ–OAR–2010–0862–0028, CARB's comments submitted on March 17, 2011; and EPA–HQ–OAR–0862–0029, CARB's comments submitted on May 2, 2011.

[6] CARB's initial waiver and authorization request submitted on January 29, 2007 (which full set forth the requisite information to support the granting of a full waiver and authorization), in combination with supplemental comments submitted by CARB on March 17, 2011, make clear CARB's intent to receive a full waiver and authorization to the extent that EPA deems a within the scope determination is inappropriate. As explained below, EPA finds that due to the new application of CARB's standards a full waiver and authorization is necessary.

[7] CARB normally uses the term ''off-road'' while EPA uses the term ''nonroad.'' Similarly, CARB uses the term ''on-road'' while EPA uses the term ''on-highway'' or ''motor vehicles.''

standard applicable to the engine's rated power.

Engines in newly acquired CHE other than yard trucks that are not registered for on-road operation (non-yard trucks) must—if technically feasible and available for purchase, lease, or rental—meet one of two certification standards: (1) The on-road engine certification standards or (2) the off-road Tier 4 certification standards for the model year and rated power of the engine. Alternatively, if neither of the options is feasible or available, a newly acquired non-yard truck must be equipped with an engine that is certified to the most stringent off-road engine emission standards for the type of vehicle and application for the model year in which it is acquired. In addition, under this alternative, within one year of acquiring the vehicle, the owner or operator must install the highest level verified diesel emission control strategy (VDECS) that is approved by CARB and available for that engine. If no VDECS is verified by CARB and available by the end of the one-year period, the owner or operator must install the highest level VDECS within six months after one becomes available.

For in-use yard trucks, whether on-road or off-road, the regulations require they meet one of three compliance options: such vehicles must (1) be certified to the 2007 or later model year on-road engine standards; (2) be certified to Tier 4 off-road standards; or (3) apply VDECS that reduce emissions to levels that comply with diesel PM and NOx emissions of a certified final Tier 4 off-road diesel engine for the same power rating.

The date by which each in-use yard truck in an owner or operator's fleet must be brought into compliance depends on the number of trucks in the fleet, the model year of the trucks, whether the trucks are equipped with on-road or off-road engines, and whether the engines were equipped with VDECS by December 31, 2006.

For in-use non-yard trucks, the regulations identify and establish separate requirements for three categories or vehicles: Basic cargo handling equipment, bulk cargo handling equipment and rubber-tired gantry (RTG) cranes. Basic cargo handling equipment consists of top handlers, side handlers, reach stackers, forklifts, straddle carriers and any other type of equipment (other than RTG cranes) that handles cargo containers. Bulk cargo handling equipment consists of dozers, loaders, excavators, mobile cranes, sweepers, railcar movers, aerial lifts and any other type of equipment (except forklifts) that handles non-containerized or bulk cargo.

For all three categories of in-use non-yard trucks, vehicles can be brought into compliance using any of three options. Option 1 is the same for all three categories: Use of an engine or power system—including diesel, alternative fueled, or heavy-duty pilot ignition engine—certified to the 2007 or later model year on-road or Tier 4 off-road engine standards for the rated power and model year of the engine.

Option 2 two is identical for basic cargo handling equipment and bulk cargo handling equipment, but varies slightly for RTG cranes. Basic cargo handling equipment and bulk cargo handling equipment must comply by installing a pre-2007 model year certified on-road engine or a certified Tier 2 or Tier 3 off-road engine and applying the highest level VDECS that is certified for the specific engine family and model year. However, if no Level 2 or higher VDECS is available, the engine must be upgraded to either a certified Tier 4 off-road engine or a Level 3 VDECS must be installed by December 31, 2015.

Under option 2, RTG cranes use a certified Tier 2 or Tier 3 off-road engine and the highest VDECS available but, in contrast to basic and bulk cargo handling equipment, need not upgrade, regardless of whether or not the highest VDECS available was Level 2 or below.

Option 3 is similar for both basic and bulk cargo handling equipment. Basic cargo handling equipment may comply using a pre-Tier 1 or a Tier 1 off-road engine equipped with the highest level VDECS available. However, if the highest level VDECS available is not Level 3 or higher, the engine must be upgraded to either a certified Tier 4 off-road engine or a Level 3 VDECS by December 31, 2015. For bulk cargo handling equipment, the requirements of this option are the same except an upgrade is required if no Level 2 or higher VDECS is initially available. Lastly, under the option 3, RTG cranes may comply using a pre Tier 1 or certified Tier 1 off-road engine equipped with the highest level VDECS available. However, if no VDECS is available or the highest level VDECS is a Level 1 or 2, then the RTG crane engine must be replaced with a Tier 4 certified off-road engine or a Level 3 VDECS must be installed by the later of December 31, 2015 or December 31st of the model year of the initially compliant engine plus 12 years.

The date by which each in-use non-yard truck in an owner or operator's fleet must be brought into compliance depends on the size and model-year composition of the in-use non-yard trucks in the fleet

C. Previously Granted Waivers and Authorizations

By letter dated July 26, 2004, CARB requested that EPA grant California a waiver of federal preemption for its 2007 California Heavy Duty Diesel Engines Standards, which primarily align California's standards and test procedures with the federal standards and test procedures for 2007 and subsequent model year heavy-duty motor vehicles and motor vehicle engines.[8] After offering an opportunity for hearing and public comment, on August 26, 2005 EPA granted California's request for waiver.[9]

On July 18, 2008, CARB notified EPA of additional regulations and amendments to its new nonroad compression ignition engine regulations. EPA determined that a portion of those regulations fell within the scope of the previously granted authorization and granted a new authorization for the remainder of the regulations.[10]

D. Clean Air Act Waivers of Preemption and Authorizations

Section 209(a) of the Clean Air Act preempts states and local governments from setting emission standards for new motor vehicles and engines. It provides:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No state shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Through operation of section 209(b) of the Act, California is able to seek and receive a waiver of section 209(a)'s preemption. Section 209(b)(1) requires a waiver to be granted for any State that had adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966,[11] if the State

[8] 70 FR 50322 (August 26, 2006)

[9] *Id.*

[10] 75 FR 8056 (February 23, 2010). EPA previously granted an authorization for California's new heavy-duty off-road diesel-cycle engines greater than 130 kW at 60 FR 48981 (September 21, 1995) and subsequently confirmed that amendments to those standards were within the scope of the prior authorization at 69 FR 38958 (June 29, 2004).

[11] Because California was the only state to have adopted standards prior to 1966, it is the only state

determines that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards (this is known as California's ''protectiveness determination''). However, no waiver is to be granted if EPA finds that: (A) California's ''protectiveness determination'' is arbitrary and capricious [12]; (B) California does not need such State standards to meet compelling and extraordinary conditions [13]; or (C) California's standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act.[14] Regarding consistency with section 202(a), EPA reviews California's standards for technological feasibility and evaluates testing and enforcement procedures to determine whether they would be inconsistent with federal test procedures (e.g., if manufacturers would be unable to meet both California and federal test requirements using the same test vehicle).[15]

If California amends regulations that were previously granted a waiver of preemption, EPA can confirm that the amended regulations are within the scope of the previously granted waiver if three conditions are met. These conditions for confirming a within-the-scope request are discussed below.

Section 209(e)(1) of the Act permanently preempts any State, or political subdivision thereof, from adopting or attempting to enforce any standard or other requirement relating to the control of emissions for certain new nonroad engines or vehicles. Section 209(e)(2) of the Act requires the Administrator to grant California authorization to enforce its own standards for new nonroad engines or vehicles which are not listed under section 209(e)(1), subject to certain restrictions. On July 20, 1994, EPA promulgated a rule that sets forth, among other things, the criteria, as found in section 209(e)(2), which EPA must consider before granting any California authorization request for new nonroad engine or vehicle emission standards. On October 8, 2008, the regulations promulgated in that rule were moved to 40 CFR part 1074, and modified slightly. The applicable regulations, 40 CFR § 1074.105, provide:

(a) The Administrator will grant the authorization if California determines that its standards will be, in the aggregate, at least as protective of public health and welfare as otherwise applicable federal standards.

(b) The authorization will not be granted if the Administrator finds that any of the following are true:

(1) California's determination is arbitrary and capricious.

(2) California does not need such standards to meet compelling and extraordinary conditions.

(3) The California standards and accompanying enforcement procedures are not consistent with section 209 of the Act.

(c) In considering any request from California to authorize the state to adopt or enforce standards or other requirements relating to the control of emissions from new nonroad spark-ignition engines smaller than 50 horsepower, the Administrator will give appropriate consideration to safety factors (including the potential increased risk of burn or fire) associated with compliance with the California standard.

As stated in the preamble to the section 209(e) rule, EPA has historically interpreted the section 209(e)(2)(iii) ''consistency'' inquiry to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C) (as EPA has interpreted that subsection in the context of section 209(b) motor vehicle waivers).[16]

In order to be consistent with section 209(a), California's nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California's nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation under section 209(e)(1). To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same ''consistency'' criteria that are applied to motor vehicle waiver requests. Pursuant to section 209(b)(1)(C), the Administrator shall not grant California a motor vehicle waiver if she finds that California ''standards and accompanying enforcement procedures are not consistent with section 202(a)'' of the Act. Previous decisions granting waivers and authorizations have noted that state standards are inconsistent with section 202(a) if: (1) There is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time, or (2) the federal and state testing procedures impose inconsistent certification requirements.

EPA can confirm that amended regulations are within the scope of a previously granted waiver of preemption or authorization if three conditions are met. First, the amended regulations must not undermine California's determination that its standards, in the aggregate, are at least as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not undermine our previous determination with respect to consistency with section 202(a) of the Act. Third, the amended regulations must not raise any new issues affecting EPA's prior waiver determinations.

E. Burden of Proof

In *MEMA I,* the U.S. Court of Appeals stated that the Administrator's role in a section 209 proceeding is to:

> Consider all evidence that passes the threshold test of materiality and * * * thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown that the factual circumstances exist in which Congress intended a denial of the waiver.[17]

The court in *MEMA I* considered the standards of proof under section 209 for the two findings related to granting a waiver for an ''accompanying enforcement procedure'' (as opposed to the standards themselves): (1) Protectiveness in the aggregate and (2) consistency with section 202(a) findings. The court instructed that ''the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.'' [18]

The court upheld the Administrator's position that, to deny a waiver, there must be 'clear and compelling evidence' to show that proposed procedures undermine the protectiveness of California's standards.[19] The court noted that this standard of proof also accords with the congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.[20]

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. Although *MEMA I* did not

that is qualified to seek and receive a waiver. *See* S.Rep. No. 90–403 at 632 (1967).

[12] CAA section 209(b)(1)(A).

[13] CAA section 209(b)(1)(B).

[14] CAA section 209(b)(1)(C).

[15] *See, e.g.,* 74 FR at 32767 (July 8, 2009); *see also Motor and Equip. Mfrs Assoc.* v. *EPA,* 627 F.2d 1095 (D.C. Cir. 1979) (''*MEMA I*'').

[16] *See* 59 FR 36969 (July 20, 1994).

[17] *MEMA I,* 627 F.2d at 1122.

[18] *Id.*

[19] *Id.*

[20] *Id.*

explicitly consider the standards of proof under section 209 concerning a waiver request for ''standards,'' as compared to accompanying enforcement procedures, there is nothing in the opinion to suggest that the court's analysis would not apply with equal force to such determinations. EPA's past waiver decisions have consistently made clear that: ''[E]ven in the two areas concededly reserved for Federal judgment by this legislation—the existence of 'compelling and extraordinary' conditions and whether the standards are technologically feasible—Congress intended that the standards of EPA review of the State decision to be a narrow one.'' [21]

Opponents of the waiver bear the burden of showing that the criteria for a denial of California's waiver request have been met. As found in *MEMA I,* this obligation rests firmly with opponents of the waiver in a section 209 proceeding:

> [t]he language of the statute and its legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.[22]

The Administrator's burden, on the other hand, is to make a reasonable evaluation of the information in the record in coming to the waiver decision. As the court in *MEMA I* stated: ''Here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as 'arbitrary and capricious.' '' [23] Therefore, the Administrator's burden is to act ''reasonably.'' [24]

F. EPA's Consideration of CARB's Request

EPA sought comment on a range of issues, including whether certain or all of CARBs CHE regulation should be evaluated under the within the scope criteria or under the criteria for a full authorization and waiver of preemption. EPA did not receive any comments contending that any portions of the CHE regulations should be subjected to full waiver or authorization analysis.

CARB maintains that its requirements for newly acquired *on-highway* yard and non-yard trucks are covered by a waiver granted by EPA for 2007 and later model year (MY) on-highway heavy-duty diesel engines, or conversely its requirements are within the scope of that waiver decision.[25]

CARB also maintains that its requirements for newly acquired off-road yard trucks should be analyzed under the within the scope criteria since the compliance options involve either the use of a 2007 and later MY on-highway heavy-duty diesel engine (and thus the same within the scope rationale noted above) or the use of an engine meeting the final Tier 4 off-road engine standards which EPA previously authorized.[26] Similarly, for the requirements associated with newly acquired off-road non-yard trucks CARB also states that options 1 and 2 should be considered within the scope of the prior waiver and authorization noted above, and that option 3 (the VDECS option) should be granted a full authorization.

In addition to the requirements associated with newly acquired mobile cargo handling equipment, the CHE regulations also set forth in-use performance standards applicable to non-new yard and non-yard trucks. To the extent the in-use standards apply to yard and non-yard trucks registered on-road, CARB maintains such requirements are not preempted by section 209(a) of the Act and therefore do not require a waiver from EPA. To the extent the in-use standards apply to non-new off-road yard and non-yard trucks (those not registered for on-road operation) CARB requests a full authorization from EPA.

Despite CARB's contentions, EPA has determined that California's CHE regulations to the extent they apply to nonroad engines require a full authorization and to the extent they apply to new motor vehicles or new motor vehicle engines require a full waiver of preemption. While CARB acknowledges their CHE requirements are standards relating to the control of emissions they nevertheless suggest that such standards have either been previously waived or authorized by EPA. However, the analysis does not end there. The United States Supreme Court's interpretation of ''standard relating to the control of emissions from new motor vehicles or new motor vehicle engines'' in *Engine Manufacturers Association* v. *South Coast Air Quality Management District,* 541 U.S. 246 (2004) supports the conclusion that ''standards'' not merely be limited to a design or performance standard relating to the production of certain vehicles that meet particular emission characteristics but also that the means of enforcing the emission limits is pertinent. California's new engine requirements should be considered as standards relating to the control of emissions. As the Court noted, ''Manufacturers (or purchasers) can be made responsible for ensuring that vehicles *comply* with emission standards, but the standards themselves are separate from those enforcement techniques. While standards target vehicles or engines, standard-enforcement efforts that are proscribed by § 209 can be directed to manufacturers or purchasers.'' [27] In this instance, while the underlying standards as applied toward the production of new heavy-duty diesel highway engines or new nonroad diesel engines have either previously been waived or authorized by EPA, CARB is newly applying the standards to operators at ports and rail yards and requiring them to acquire CHE with specific emission characteristics to the exclusion of other CHE.

Therefore, with respect to newly acquired yard and non-yard trucks EPA will evaluate such requirements under the full waiver criteria. Similarly, for newly acquired off-road yard and non-yard trucks EPA will evaluate such requirements under the full authorization criteria.

In addition to the extent the CHE in-use standards apply to yard and non-yard trucks registered on-road EPA agrees with CARB's assessment that such requirements are not preempted by section 209(a) of the Act (which only applies to ''new'' motor vehicles and ''new'' motor vehicle engines) and therefore do not require a waiver from EPA. Lastly, to the extent the in-use standards apply to non-new off-road yard and non-yard trucks (those not registered for on-road operation) EPA will evaluate such requirements under the full authorization criteria as requested by CARB.

II. Discussion

A. California's Protectiveness Determination

Section 209(b)(1)(A) of the Act requires EPA to deny a waiver if the Administrator finds that California was

[21] *See, e.g.,* 40 FR 21102–103 (May 28, 1975).

[22] *MEMA I,* 627 F.2d at 1121.

[23] *Id.* at 1126.

[24] *Id.* at 1126.

[25] 70 FR 50322 (August 26, 2005).

[26] 75 FR 8056 (February 23, 2010).

[27] *Engine Manufacturers Association* v. *South Coast Air Quality Management District,* 541 U.S. 246,253 (2004).

arbitrary and capricious in its determination that its State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. When evaluating California's protectiveness determination, EPA compares the stringency of the California and Federal standards at issue in a given waiver request. That comparison is undertaken within the broader context of the previously waived California program, which relies upon protectiveness determinations that EPA previously found were not arbitrary and capricious.

Similarly, section 209(e)(2)(i) of the Act instructs that EPA cannot grant an authorization if the Administrator finds that CARB was arbitrary and capricious in its determination that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

EPA previously found that CARBs regulations establishing emission standards for 2007 and subsequent model year heavy duty on-road diesel engines are as protective of the public health and welfare as comparable federal standards.[28] CARB has found that to the extent the CHE regulations permit newly acquired on-road yard trucks, newly acquired on-road non-yard trucks and in-use yard trucks to comply by using current model year certified on-road diesel engines, they do not undermine the board's previous determination that its emission standards, in the aggregate, are at least as protective of public health and welfare as comparable federal standards.[29]

EPA previously found that CARB's regulations for new nonroad Tier 4 engines are at least as protective of the public health and welfare as comparable federal standards.[30] CARB has found that to the extent the CHE regulations permit newly acquired off-road yard trucks, newly acquired off-road non-yard trucks and in-use yard trucks to comply by using Tier 4 off-road CI emission standards engines, they do not undermine the board's previous determination that its emission standards, in the aggregate, are at least as protective of public health and welfare as comparable federal standards.[31]

No commenter expressed an opinion or presented any evidence suggesting that CARB was arbitrary and capricious in making its above-noted protectiveness findings. Therefore, based on the record, EPA cannot find that California was arbitrary and capricious in its findings that California's CHE requirements are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.

B. Compelling and Extraordinary Conditions

Under section 209(b)(1)(B) of the Act, EPA cannot grant a waiver if California ''does not need such State standards to meet compelling and extraordinary conditions.'' To evaluate this criterion, EPA considers whether California needs a separate motor vehicle emissions program to meet compelling and extraordinary conditions.

Similarly, section 209(e)(2)(ii) of the Act instructs that EPA cannot grant an authorization if the Administrator finds that California does not need such standards to meet compelling and extraordinary conditions. This criterion restricts EPA's inquiry to whether California needs its own mobile source pollution program to meet compelling and extraordinary conditions, and not whether any given standards are necessary to meet such conditions.[32]

Over the past forty years, CARB has repeatedly demonstrated the need for its motor vehicle emissions program to address compelling and extraordinary conditions in California.[33] In Resolution 05–62, CARB affirmed its longstanding position that California continues to need its own motor vehicle and engine program to meet its serious air pollution problems. Likewise, EPA has consistently recognized that California continues to have the same ''geographical and climatic conditions that, when combined with the large numbers and high concentrations of automobiles, create serious pollution problems.'' [34] Furthermore, no commenter has presented any argument or evidence to suggest that California no longer needs a separate motor vehicle emissions program to address compelling and extraordinary conditions in California. Therefore, EPA has determined that we cannot deny California a waiver or authorization for its CHE requirements under section 209(b)(1)(B) or section 209(e)(2)(ii), respectively.

C. Consistency With Section 202(a) and 209 of the Clean Air Act

Under section 209(b)(1)(C) of the Act, EPA must deny a California waiver request if the Agency finds that California standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act. The scope of EPA's review under this criterion is narrow. EPA has stated on many occasions that the determination is limited to whether those opposed to the waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with federal test procedures. Previous waivers of federal preemption have stated that California's standards are not consistent with section 202(a) if there is inadequate lead time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to the cost of compliance within that time. California's accompanying enforcement procedures would be inconsistent with section 202(a) if the federal and California test procedures conflict, *i.e.,* if manufacturers would be unable to meet both the California and federal test requirements with the same test vehicle.

Similarly, Section 209(e)(2)(iii) of the Act instructs that EPA cannot grant an authorization if California's standards and enforcement procedures are not consistent with section 209. As described above, EPA has historically evaluated this criterion for consistency with sections 209(a), 209(e)(1), and 209(b)(1)(C).

1. Consistency With Section 209(a)

As noted above, EPA considers CARB's nonroad authorization requests under certain criteria including whether CARB's requirements are consistent with section 209(a) of the Act (to be consistent with section 209(a) of the Clean Air Act, California's requirements must not apply to new motor vehicles or engines). However, in this instance California's CHE requirements affect both new motor vehicles and engines along with affecting nonroad vehicles and engines. To the extent the CHE requirements do affect motor vehicles and engines (CHE motor vehicle requirements) CARB explicitly requests a waiver of preemption under section 209(b) rather than an authorization under section 209(e)(2). EPA is evaluating the CHE motor vehicle requirements under section 209(b). The

[28] 70 FR 50322 (August 26, 2005).

[29] *See* CARB Resolution 05–62.

[30] 75 FR 8056 (February 23, 2010).

[31] *See* CARB Resolution 05–62.

[32] *See* 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889–18890 (May 3, 1984).

[33] *See, e.g.,* Approval and Promulgation of State Implementation Plans; California—South Coast, 64 FR 1770, 1771 (January 12, 1999). *See also* 69 FR 23858, 23881–90 (April 30, 2004) (designating 15 areas in California as nonattainment for the federal 8-hour ozone national ambient air quality standard).

[34] 49 FR 18887, 18890 (May 3, 1984); *see also* 76 FR 34693 (June 14, 2011), 74 FR 32744, 32763 (July 8, 2009), and 73 FR 52042 (September 8, 2008).

purpose of section 209(b) is to waive the preemption otherwise created by section 209(a). To the extent the CHE requirements affect nonroad vehicles and engines (CHE nonroad requirements) CARB explicitly requests an authorization under section 209(e)(2). By logical extension and definition such CHE nonroad requirements only pertain to nonroad vehicles and engines and are thus not motor vehicles under section 209(a).

No commenter presented otherwise; therefore, EPA cannot deny California's authorization request on the basis that California's CHE requirements are not consistent with section 209(a).

2. Consistency With Section 209(e)(1)

To be consistent with section 209(e)(1) of the Clean Air Act, California's CHE nonroad requirements must not affect new farming or construction vehicles or engines that are below 175 horsepower, or new locomotives or their engines. CARB presents that CHE equipment is not used in farm and construction equipment or vehicles or engines used in locomotives.[35] No commenter presented otherwise; therefore, EPA cannot deny California's request on the basis that California's APS requirements are not consistent with section 209(e)(1).[36]

3. Consistency With Section 209(b)(1)(C) and Section 202(a)

As noted above, EPA's evaluation of CARB nonroad authorization requests (e.g. the CHE nonroad requirements) includes consideration of whether their requirements are consistent with section 209(b)(1)(C) of the Act. In addition, EPA's evaluation of CARB waiver requests (e.g., the CHE motor vehicle requirements) includes consideration of whether their requirements are consistent with section 209(b)(1)(C). Under section 209(b)(1)(C) of the Act, EPA must deny a California request if the Agency finds that California standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act. The scope of EPA's review under this criterion is narrow. EPA has stated on many occasions that the determination is limited to whether those opposed to the waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with federal test procedures. Previous waivers of federal preemption have stated that California's standards are not consistent with section 202(a) if there is inadequate lead time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to the cost of compliance within that time. California's accompanying enforcement procedures would be inconsistent with section 202(a) if the federal and California test procedures conflict, i.e., if manufacturers would be unable to meet both the California and federal test requirements with the same test vehicle.

CARB states that the CHE regulations are consistent with section 202(a). CARB states that the technological feasibility of the emission requirements related to yard trucks registered for operation on-road is not disputed since such vehicles need only meet the 2007 on-road engines standards previously waived by EPA. CARB's CHE regulations do not change the underlying test procedures for on-road engines. CARB notes that newly acquired non-yard trucks registered for operation on-road are similar to yard trucks noted above in terms of applicable emission standards and test procedures.

With respect to off-road yard and non-yard trucks CARB notes that the applicable emission standards (either the 2007 on-road standards previously waived by EPA or the Tier 4 nonroad standards previously authorized by EPA) are technologically feasible. CARB also notes that to the extent operators use option 3 (the use of a lower tier engine if option 1 and 2 are not available, and the subsequent installation of VDECS) it is feasible given the number of VDECS verified to date.

EPA received comment from SSAT noting problems with ''post 07 yard truck issues'' and challenges associated with non-yard trucks and VDECs. With respect to the yard truck issue it appears that SSAT is concerned that it is only able to use a certain manufacturer's engine and such engine has exhaust gas leak issues that includes disabling the EGR system. SSAT contends that it is dealing with a 25% failure rate. CARB notes in response that the exact nature of the failure rate at the terminals is unclear and its conclusions seem to be based on opinion rather than any data in the record. CARB surmises the problem may be associated with maintenance or operational practices. SSAT provided no further explanation as to why the engine it identified is the only usable engine. Based on the limited information submitted by SSAT, and as CARB notes the fact that 38 other terminals have voluntarily acquired new yard trucks equipped with new on-road CI engines with none reporting EGR problems and none submitting comment to EPA, we find that opponents of the waiver have not met their burden of proof to demonstrate that the new yard truck emission standards are infeasible or otherwise inconsistent with section 202(a).

With regard to non-yard trucks EPA received comment from SSAT and Ports America regarding the use of VDECS for compliance.[37] The commenters' comments include: VDECS become plugged and do not operate properly; the compliance extension provisions are ambiguous, forcing fleet owners to undergo an arduous and expensive process; and the VDECS are expensive.

CARB provides several responses to concerns of improper operating and plugging VDECS. CARB notes that nine Level 3 emission control devices have been verified for non-yard truck applications and that at least 77 VDECS have been installed on a wide-variety of vehicle applications. CARB understands that while excess soot may plug some VDECS there is strong evidence to suggest that fleet owners are not properly performing manual regeneration or that improper sizing of VDECS with engines may be occurring. This coupled with a lack of concrete information and data from the commenters causes CARB to suggest that a showing of infeasibility had not been shown.

CARB also notes that to the extent the use of VDECS is not available its compliance extension provisions provide ample opportunity for fleet operators to comply with the CHE regulations. CARB responds to the commenters' suggestion that the compliance extension provisions are

[35] CARB's waiver and authorization request letter at p. 21, citing section 2479(e)(1)(B) of its regulations.

[36] BNSF Railway Company and Union Pacific Railroad Company note that they are currently complying with the CHE regulation in their efforts to work with the state and to reduce emissions from rail operations. Further, they state that ''Regardless of whether or not EPA issues a waiver for the retrofit component of the CHE rule, the Railroads are not waiving any aspect of preemption or setting any precedent as to preemption or voluntary compliance with other rules or agreements.'' EPA's decision granting a waiver and authorization for CARB's CHE regulations addresses only the specific criteria set forth in sections 209(b) and (e) of the Clean Air Act. It does not address ancillary issues related to harmonizing CAA authority with other federal preemptions, such as Interstate Commerce Commission Termination Act (ICCTA), that restrict the authority of local governments to regulate railroads.

[37] Similar to SSAT's comments on yard trucks it is unclear whether the commenters are raising concerns with newly acquired non-yard trucks or in-use non-yard trucks. EPA notes that in-use requirements for on-road vehicles are not preempted by section 209 of the Act.

ambiguous (extensions are granted by CARB if the VDECS are ''not available'' and ''not feasible'') by pointing to its initial request to EPA for a waiver and authorization where CARB discussed compliance flexibility and relief.[38] CARB maintains that nothing in the comments contradicts CARB's reasons for the provisions or that the terms of the provisions are illusory. CARB notes that to date SSAT has never requested an extension and Ports America has requested and received an extension. CARB also provides an accounting of 88 compliance extension requests it has received with no indication of any problems. In addition, CARB provides a detailed explanation of its administrative process for handling such requests.

Based on the lack of concrete evidence from the commenters that it has incurred unreasonable delays or other difficulties making its compliance with the CHE regulations infeasible, EPA cannot deny CARB's request based on the infeasibility of CARB's compliance provisions.

Finally, with regard to the costs associated with VDECS the commenters note ''The cost of [VDECS] typically cost 40k each dropped 50% on 'some' systems when the economy took a down turn. We are looking at spending millions of dollars to one or two vendors who charge whatever they feel they can get away with.'' CARB replies by noting that nowhere do the commenters assert that the costs make the CHE regulation infeasible. CARB notes that the nature or port terminals and intermodal railroads make them multimillion-dollar businesses with highly polluting equipment. Without hard evidence from the commenters as to why the costs render the regulations infeasible, CARB suggests that costs are a policy question for CARB to consider when adopting the regulation and that EPA should follow its historical practice of deference.

EPA notes that it is required to closely examine costs when making a determination of whether there is evidence in the record to support a finding that CARB's regulations are technologically infeasible. In this instance there is insufficient evidence in the record to demonstrate why the costs of VDECS are inappropriately high when compared to the costs of the underlying vehicles or why the costs are otherwise inappropriately prohibitive. Therefore, based on the record, EPA cannot make a finding that CARB's CHE regulations are inconsistent with section 202(a) based on considerations of costs.

As noted above, EPA's consideration of the consistency with section 202(a) includes a review of whether California's test procedures impose requirements inconsistent with federal test procedures. Because CARB's test procedures are incorporated in previously waived and authorized regulations (e.g., the Tier 4 nonroad standards and the 2007 heavy-duty diesel engine regulations) and such regulations harmonize their test procedures with applicable federal test procedures CARB maintains there is no test procedure inconsistency. We have received no comments presented otherwise; therefore, based on the record before me I cannot deny CARB's request based on a lack of test procedure consistency.

III. Decision

EPA's analysis finds that the criteria for granting a full authorization and a full waiver of preemption have been met for CARB's CHE regulations.

The Administrator has delegated the authority to grant California a section 209(b) waiver to enforce its own emission standards for new motor vehicles and engines and to grant California a section 209(e) authorization to enforce its own emission standards for nonroad engines and equipment to the Assistant Administrator for the Office of Air and Radiation. Having given consideration to all the material submitted for this record, and other relevant information, I find that I cannot make the determinations required for a denial of a waiver request pursuant to section 209(b) of the Act nor can I make the determination required for a denial of an authorization pursuant to section 209(e) of the Act. Therefore I grant both a waiver of preemption and authorization to the State of California with respect to its CHE regulations as set for the above.

My decision will affect not only persons in California but also manufacturers outside the State who must comply with California's requirements in order to produce engines for sale in California. For this reason, I determine and find that this is a final action of national applicability for purposes of section 307(b)(1) of the Act.

Pursuant to section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by April 23, 2012. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Further, the Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. 804(3).

Dated: November 28, 2011.

Gina McCarthy,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. 2012–3793 Filed 2–17–12; 8:45 am]

BILLING CODE 6560–50–P

[38] *See* CARB's January 29, 2007 request at pp. 11–12, and 34 where CARB sets out 5 different types of extensions (e.g., a one year extension if an engine is within one year of retirement, a two-year extension if no VDECS is available, etc.).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of Information Collection—Extension Without Change: Demographic Information on Applicants for Federal Employment.

SUMMARY: In accordance with the Paperwork Reduction Act, the Equal Employment Opportunity Commission (EEOC or Commission) announces that it intends to submit to the Office of Management and Budget (OMB) a request for a one-year extension of the Demographic Information on Applicants, OMB No. 3046–0046.

DATES: Written comments on this notice must be submitted on or before April 23, 2012.

ADDRESSES: Comments should be sent to the Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 131 M Street NE., Washington, DC 20507. As a convenience to commenters, the Executive Secretariat will accept comments totaling six or fewer pages by facsimile (''FAX'') machine. This limitation is necessary to assure access to the equipment. The telephone number of the fax receiver is (202) 663–4114. (This is not a toll-free number). Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Executive Secretariat staff at (202) 663–4070 (voice) or (202) 663–4074 (TTY). (These are not toll-free

telephone numbers.) Instead of sending written comments to the EEOC, you may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments. All comments received through this portal will be posted without change, including any personal information you provide. Copies of comments submitted by the public to the EEOC directly or through the Federal eRulemaking Portal will be available for review, by advance appointment only, at the Commission's library between the hours of 9:00 a.m. and 5 p.m. or can be reviewed at *http://www.regulations.gov*. To schedule an appointment to inspect the comments at EEOC's library, contact the library staff at (202) 663–4630 (voice) or (202) 663–4641 (TTY). (These are not toll-free numbers.)

FOR FURTHER INFORMATION CONTACT: Veta Hurst, Federal Sector Programs, Office of Federal Operations, 131 M Street NE., Washington, DC 20507, (202) 663–4498 (voice); (202) 663–4593 (TTY). Copies of this notice are available in the following alternate formats: large print, Braille, electronic computer disk, and audio-tape. Requests for this notice in an alternate format should be made to the Publications Center at 1–800–699–3362 (voice), 1–800–800–3302 (TTY), or (301) 206–9789 (FAX—this is not a toll free number). A copy of the form may be accessed on the EEOC's Web site at *http://www.eeoc.gov/federal/upload/OMB–3046–0046.pdf*.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 and OMB regulation *5 CFR 1320.8*(d)(1), the Commission solicits public comment to enable it to:

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

(2) Evaluate the accuracy of the Commission'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, e.g., permitting electronic submission of responses.

Overview of Information Collection

Collection Title: Demographic Information on Applicants.

OMB Control No.: 3046–0046.

Description of Affected Public: Individuals submitting applications for federal employment.

Number of Responses: 26,854,281.

Estimated Time Per Response: 3 minutes.

Total Burden Hours: 1,342,714 [(26,854,281 × 3)/60].

Number of Forms: One.

Federal Cost: None.

Abstract: Under section 717 of Title VII of the Civil Rights Act (Title VII) and section 501 of the Rehabilitation Act, the Commission is charged with reviewing and approving federal agencies' plans to affirmatively address potential discrimination before it occurs. Pursuant to such oversight responsibilities, the Commission has established systems to monitor compliance with Title VII and the Rehabilitation Act by requiring federal agencies to evaluate their employment practices through the collection and analysis of data on the race, national origin, sex, and disability status of applicants for both permanent and temporary employment.

While several federal agencies (or components of such agencies) have obtained OMB approval for the use of forms collecting data on the race, national origin, sex, and disability status of applicants, it is not an efficient use of government resources for each federal agency to separately seek OMB approval. Accordingly, in order to avoid unnecessary duplication of effort and a proliferation of forms, the EEOC seeks approval of a form that may be used by all (?) federal agencies.

Response by applicants is optional. The information obtained will be used by federal agencies only for evaluating whether an agency's recruitment activities are effectively reaching all segments of the relevant labor pool and whether the agency's selection procedures allow all applicants to compete on a level playing field regardless of race, national origin, sex, or disability status. The voluntary responses are treated in a highly confidential manner and play no part in the job selection process. The information is not provided to any panel rating the applications, to selecting officials, to anyone who can affect the application, or to the public. Rather, the information is used in summary form to determine trends over many selections within a given occupational or organization area. No information from the form is entered into an official personnel file.

Burden Statement: In fiscal year 2011, the EEOC gathered data on the number of applicants during fiscal year 2010 from the 59 federal agencies required to collect applicant data. Based on the agency responses, we expect that 26,854,281 applicants will be asked to complete the form.

Because of the predominant use of online application systems, which require only pointing and clicking on the selected responses, and because the form requests only eight questions regarding basic information, the EEOC estimates that an applicant can complete the form in approximately 3 minutes or less.

Dated: February 13, 2012.

For the Commission.

Jacqueline A. Berrien,

Chair.

[FR Doc. 2012–3812 Filed 2–17–12; 8:45 am]

BILLING CODE 6570–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Update listing of financial institutions in liquidation.

SUMMARY: Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing. This list (as updated from time to time in the **Federal Register**) may be relied upon as ''of record'' notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992 issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation Web site at *www.fdic.gov/bank/individual/failed/banklist.html* or contact the Manager of Receivership Oversight in the appropriate service center.

Dated: February 13, 2012.

Federal Deposit Insurance Corporation

Pamela Johnson,

Regulatory Editing Specialist.

INSTITUTIONS IN LIQUIDATION

[In alphabetical order]

FDIC Ref. No.	Bank Name	City	State	Date closed
10424	Charter National Bank and Trust	Hoffman Estates	IL	2/10/2012
10425	SCB Bank	Shelbyville	IN	2/10/2012

[FR Doc. 2012–3889 Filed 2–17–12; 8:45 am]

BILLING CODE P

FEDERAL ELECTION COMMISSION

[Notice 2012–02]

Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Threshold

AGENCY: Federal Election Commission.

ACTION: Notice of adjustments to expenditure limitations and lobbyist bundling disclosure threshold.

SUMMARY: As mandated by provisions of the Federal Election Campaign Act of 1971, as amended (''FECA'' or ''the Act''), the Federal Election Commission (''FEC'' or ''the Commission'') is adjusting certain expenditure limitations and the lobbyist bundling disclosure threshold set forth in the Act, to index the amounts for inflation. Additional details appear in the supplemental information that follows.

DATES: *Effective Date:* January 1, 2012.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth S. Kurland, Information Division, 999 E Street NW., Washington, DC 20463; (202) 694–1100 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: Under the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.,* coordinated party expenditure limits (2 U.S.C. 441a(d)(2) and (3)(A), (B)) and the disclosure threshold for contributions bundled by lobbyists (2 U.S.C. 434(i)(3)(A)) are adjusted periodically to reflect changes in the consumer price index. *See* 2 U.S.C. 434(i)(3)(B) and 441a(c)(1), 11 CFR 104.22(g), 109.32 and 110.17(a), (f). The Commission is publishing this notice to announce the adjusted limits and disclosure threshold.

Coordinated Party Expenditure Limits for 2012

Under 2 U.S.C. 441a(c), the Commission must adjust the expenditure limitations established by 2 U.S.C. 441a(d) (the limits on expenditures by national party committees, state party committees, or their subordinate committees in connection with the general election campaign of candidates for Federal office) annually to account for inflation. This expenditure limitation is increased by the percent difference between the price index, as certified to the Commission by the Secretary of Labor, for the 12 months preceding the beginning of the calendar year and the price index for the base period (calendar year 1974).

1. Expenditure Limitation for House of Representatives in States With More Than One Congressional District

Both the national and state party committees have an expenditure limitation for each general election held to fill a seat in the House of Representatives in states with more than one congressional district. This limitation also applies to those states and territories that elect individuals to the office of Delegate or Resident Commissioner.[1] The formula used to calculate the expenditure limitation in such states multiplies the base figure of $10,000 by the difference in the price index (4.56207), rounding to the nearest $100. *See* 2 U.S.C. 441a(c)(1)(B) and 441a(d)(3)(B), and 11 CFR 109.32(b) and 110.17. Based upon this formula, the expenditure limitation for 2012 general elections for House candidates in these states is $45,600.

2. Expenditure Limitation for Senate and for House of Representatives in States With Only One Congressional District

Both the national and state party committees have an expenditure limitation for a general election held to fill a seat in the Senate or in the House of Representatives in states with only one congressional district. The formula used to calculate this expenditure limitation considers not only the price index but also the voting age population (''VAP'') of the state. The VAP of each state is published annually in the **Federal Register** by the Department of Commerce. 11 CFR 110.18. The general election expenditure limitation is the greater of: The base figure ($20,000) multiplied by the difference in the price index, 4.56207 (which totals $91,200); or $0.02 multiplied by the VAP of the state, multiplied by 4.56207. Amounts are rounded to the nearest $100. *See* 2 U.S.C. 441a(c)(1)(B) and 441a(d)(3)(A), and 11 CFR 109.32(b) and 110.17. The chart below provides the state-by-state breakdown of the 2012 general election expenditure limitation for Senate elections. The expenditure limitation for 2012 House elections in states with only one congressional district[2] is $91,200.

SENATE GENERAL ELECTION EXPENDITURE LIMITATIONS—2012 ELECTIONS

State	Voting age population (VAP)	VAP × .02 × the price index (4.56207)	Senate expenditure limit (the greater of the amount in column 3 or $91,200)
Alabama	3,675,597	$335,400	$335,400
Alaska	534,277	48,700	91,200
Arizona	4,857,391	443,200	443,200
Arkansas	2,227,505	203,200	203,200

[1] Currently, these states are the District of Columbia, the Commonwealth of Puerto Rico, and the territories of American Samoa, Guam, the United States Virgin Islands and the Northern Mariana Islands. *See http://www.house.gov/house/MemberWWW_by_State.shtml and http://about.dc.gov/statehood.asp.*

[2] Currently, these states are: Alaska, Delaware, Montana, North Dakota, Rhode Island, South Dakota, Vermont and Wyoming. *See http://www.house.gov/house/MemberWWW_by_State.shtml.*

SENATE GENERAL ELECTION EXPENDITURE LIMITATIONS—2012 ELECTIONS—Continued

State	Voting age population (VAP)	VAP × .02 × the price index (4.56207)	Senate expenditure limit (the greater of the amount in column 3 or $91,200)
California	28,419,993	2,593,100	2,593,100
Colorado	3,886,708	354,600	354,600
Connecticut	2,777,395	253,400	253,400
Delaware	702,467	64,100	91,200
Florida	15,063,111	1,374,400	1,374,400
Georgia	7,325,352	668,400	668,400
Hawaii	1,070,206	97,600	97,600
Idaho	1,156,869	105,600	105,600
Illinois	9,771,132	891,500	891,500
Indiana	4,919,319	448,800	448,800
Iowa	2,337,939	213,300	213,300
Kansas	2,147,316	195,900	195,900
Kentucky	3,348,401	305,500	305,500
Louisiana	3,456,640	315,400	315,400
Maine	1,058,970	96,600	96,600
Maryland	4,481,654	408,900	408,900
Massachusetts	5,182,521	472,900	472,900
Michigan	7,580,375	691,600	691,600
Minnesota	4,067,335	371,100	371,100
Mississippi	2,228,273	203,300	203,300
Missouri	4,598,567	419,600	419,600
Montana	775,845	70,800	91,200
Nebraska	1,382,576	126,100	126,100
Nevada	2,059,547	187,900	187,900
New Hampshire	1,038,210	94,700	94,700
New Jersey	6,778,345	618,500	618,500
New Mexico	1,562,805	142,600	142,600
New York	15,179,189	1,385,000	1,385,000
North Carolina	7,368,808	672,300	672,300
North Dakota	532,776	48,600	91,200
Ohio	8,851,859	807,700	807,700
Oklahoma	2,855,349	260,500	260,500
Oregon	3,008,092	274,500	274,500
Pennsylvania	9,981,727	910,700	910,700
Rhode Island	831,766	75,900	91,200
South Carolina	3,598,675	328,300	328,300
South Dakota	620,926	56,700	91,200
Tennessee	4,911,217	448,100	448,100
Texas	18,713,943	1,707,500	1,707,500
Utah	1,936,913	176,700	176,700
Vermont	500,413	45,700	91,200
Virginia	6,243,058	569,600	569,600
Washington	5,248,281	478,900	478,900
West Virginia	1,470,570	134,200	134,200
Wisconsin	4,385,559	400,100	400,100
Wyoming	433,221	39,500	91,200

3. Expenditure Limitation for President

The national party committees have an expenditure limitation for their general election nominee for President. The formula used to calculate the Presidential expenditure limitation considers not only the price index but also the total VAP of the United States. The Department of Commerce also publishes the total VAP of the United States annually in the **Federal Register**. 11 CFR 110.18. The formula used to calculate this expenditure limitation is $0.02 multiplied by the total VAP of the United States (237,657,645), multiplied by the price index, 4.56207. Amounts are rounded to the nearest $100. *See* 2 U.S.C. 441a(d)(2) and 11 CFR 109.32(a). Based upon this formula, the expenditure limitation for 2012 Presidential nominees is $21,684,200.

Limitations on Contributions by Individuals, Non-Multicandidate Committees and Certain Political Party Committees Giving to U.S. Senate Candidates for the 2011–2012 Election Cycle

For the convenience of the readers, the Commission is also republishing the contribution limitations for individuals, non-multicandidate committees and for certain political party committees giving to U.S. Senate candidates for the 2011–2012 election cycle:

Statutory provision	Statutory amount	2011–2012 Limitation
2 U.S.C. 441a(a)(1)(A)	$2,000	$2,500.
2 U.S.C. 441a(a)(1)(B)	$25,000	$30,800.
2 U.S.C. 441a(a)(3)(A)	$37,500	$46,200.
2 U.S.C. 441a(a)(3)(B)	$57,500 (of which no more than $37,500 may be attributable to contributions to political committees that are not political committees of national political parties).	$70,800 (of which no more than $46,200 may be attributable to contributions to political committees that are not political committees of national political parties) The overall biennial limit for 2011–12 is $117,000.
2 U.S.C. 441a(h)	$35,000	$43,100.

Lobbyist Bundling Disclosure Threshold for 2012

The Act requires certain political committees to disclose contributions bundled by lobbyists/registrants and lobbyist/registrant political action committees once the contributions exceed a specified threshold amount. The Commission must adjust this threshold amount annually to account for inflation. The disclosure threshold is increased by multiplying the $15,000 statutory disclosure threshold by 1.11578, the difference between the price index, as certified to the Commission by the Secretary of Labor, for the 12 months preceding the beginning of the calendar year and the price index for the base period (calendar year 2006). The resulting amount is rounded to the nearest multiple of $100. *See* 2 U.S.C. 434(i)(3)(A) and (B), 441a(c)(1)(B) and 11 CFR 104.22(g). Based upon this formula ($15,000 × 1.11578), the lobbyist bundling disclosure threshold for calendar year 2012 is $16,700.

Dated: February 14, 2012.

On behalf of the Commission.

Caroline C. Hunter,

Chair, Federal Election Commission.

[FR Doc. 2012–3841 Filed 2–17–12; 8:45 am]

BILLING CODE 6715–01–P

FEDERAL ELECTION COMMISSION

[Notice 2012–01]

Filing Dates for the Arizona Special Election in the 8th Congressional District

AGENCY: Federal Election Commission.

ACTION: Notice of filing dates for special election.

SUMMARY: Arizona has scheduled elections on April 17, 2012, and June 12, 2012, to fill the U.S. House seat in the 8th Congressional District vacated by Representative Gabrielle Giffords.

Committees required to file reports in connection with the Special Primary Election on April 17, 2012, shall file a 12-day Pre-Primary Report. Committees required to file reports in connection with both the Special Primary and Special General Election on June 12, 2012, shall file a 12-day Pre-Primary Report, a 12-day Pre-General Report, and a 30-day Post-General Report.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth S. Kurland, Information Division, 999 E Street NW., Washington, DC 20463; Telephone: (202) 694–1100; Toll Free (800) 424–9530.

SUPPLEMENTARY INFORMATION:

Principal Campaign Committees

All principal campaign committees of candidates who participate in the Arizona Special Primary and Special General Elections shall file a 12-day Pre-Primary Report on April 5, 2012; a 12-day Pre-General Report on May 31, 2012; and a 30-day Post-General Report on July 12, 2012. (See chart below for the closing date for each report).

All principal campaign committees of candidates participating *only* in the Special Primary Election shall file a 12-day Pre-Primary Report on April 5, 2012. (See chart below for the closing date for each report).

Unauthorized Committees (PACs and Party Committees)

Political committees filing on a quarterly basis in 2012 are subject to special election reporting if they make previously undisclosed contributions or expenditures in connection with the Arizona Special Primary or Special General Election by the close of books for the applicable report(s). (See chart below for the closing date for each report).

Committees filing monthly that make contributions or expenditures in connection with the Arizona Special Primary or General Elections will continue to file according to the monthly reporting schedule.

Additional disclosure information in connection with the Arizona Special Election may be found on the FEC Web site at *http://www.fec.gov/info/report_dates.shtml.*

Disclosure of Lobbyist Bundling Activity

Principal campaign committees, party committees and Leadership PACs that are otherwise required to file reports in connection with the special elections must simultaneously file FEC Form 3L if they receive two or more bundled contributions from lobbyists/registrants or lobbyist/registrant PACs that aggregate in excess of the lobbyist bundling disclosure threshold during the special election reporting periods (see charts below for closing date of each period). 11 CFR 104.22(a)(5)(v).

The lobbyist bundling disclosure threshold for calendar year 2011 was $16,200. This threshold amount may change in 2012 based upon the annual cost of living adjustment (COLA). Once the adjusted threshold amount becomes available, the Commission will publish it in the **Federal Register** and post it on its Web site.

CALENDAR OF REPORTING DATES FOR ARIZONA SPECIAL ELECTION

Report	Close of books [1]	Reg./cert. & overnight mailing deadline	Filing deadline
COMMITTEES INVOLVED IN *ONLY* THE SPECIAL PRIMARY (04/17/12) MUST FILE:			
Pre-Primary	03/28/12	04/02/12	04/05/12
April Quarterly	WAIVED		

CALENDAR OF REPORTING DATES FOR ARIZONA SPECIAL ELECTION—Continued

Report	Close of books [1]	Reg./cert. & overnight mailing deadline	Filing deadline
July Quarterly	06/30/12	07/15/12	[2] 07/15/12
COMMITTEES INVOLVED IN BOTH THE SPECIAL PRIMARY (06/12/12) AND SPECIAL GENERAL (06/12/12) MUST FILE:			
Pre-Primary	03/28/12	04/02/12	04/05/12
April Quarterly	WAIVED		
Pre-General	05/23/12	[3] 05/28/12	05/31/12
Post-General	07/02/12	07/12/12	07/12/12
July Quarterly	WAIVED		
October Quarterly	09/30/12	10/15/12	10/15/12
COMMITTEES INVOLVED IN *ONLY* THE SPECIAL GENERAL (06/12/12) MUST FILE:			
Pre-General	05/23/12	[3] 05/28/12	05/31/12
Post-General	07/02/12	07/12/12	07/12/12
July Quarterly	— WAIVED —		
October Quarterly	09/30/12	10/15/12	10/15/12

[1] These dates indicate the end of the reporting period. A reporting period always begins the day after the closing date of the last report filed. If the committee is new and has not previously filed a report, the first report must cover all activity that occurred before the committee registered as a political committee with the Commission up through the close of books for the first report due.

[2] Notice that this filing deadline falls on a weekend. Filing deadlines are not extended when they fall on nonworking days. Accordingly, reports filed by methods other than Registered, Certified, or Overnight Mail, or electronically, must be received before the Commission's close of business on the last business day before the deadline.

[3] Notice that the registered/certified & overnight mailing deadline falls on a federal holiday. The report should be postmarked on or before that date.

Dated: February 14, 2012.

On behalf of the Commission.

Caroline C. Hunter,

Chair, Federal Election Commission.

[FR Doc. 2012–3818 Filed 2–17–12; 8:45 am]

BILLING CODE 6715–01–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 March 16, 2012.

A. Federal Reserve Bank of Atlanta (Clifford Stanford, Vice President) 1000 Peachtree Street, NE., Atlanta, Georgia 30309:

1. *First Volunteer Corporation, Chattanooga, Tennessee,* to merge with Gateway Bancshares, Inc. and thereby acquire Gateway Bank & Trust, both of Ringgold, Georgia.

Board of Governors of the Federal Reserve System, February 15, 2012.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2012–3893 Filed 2–17–12; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–New; 30-day Notice]

Agency Information Collection Request. 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, email your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov,* or call the Reports Clearance Office on (202) 690–5683. Send written comments and recommendations for the proposed information collections within 30 days of this notice directly to the OS OMB Desk Officer; faxed to OMB at 202–395–5806.

Proposed Project: Consumer Survey of Attitudes Toward the Privacy and Security Aspects of Electronic Health Records and Electronic Health Information Exchange (New)—OMB No. 0990–NEW—Office of the National Coordinator for Health Information Technology

Abstract: The widespread use of electronic health records and electronic health information exchange promises an array of potential benefits for individuals and the U.S. health care system through improved health care quality, safety, and efficiency. At the same time, this environment poses new challenges and opportunities for protecting health information. The proposed information collection will permit us to better understand individuals' attitudes toward the privacy and security aspects of the use of electronic health records and electronic health information exchange as well as inform policy and programmatic objectives. The Office of the National Coordinator for Health Information Technology (ONC) is proposing to conduct a nationwide survey which will use computer-assisted telephone interviews (CATI) to interview a representative sample of the general population annually for 5 years looking at the percentage of individuals who are concerned about the privacy and security of electronic health records, who report having kept any part of their medical history from their doctor due to privacy concerns, and who are concerned that an unauthorized person would see their medical information if it is sent electronically, among other key measures. ONC will assess whether these numbers increase, remain steady or decrease from 2012 (pre-implementation) to 2016 (post-implementation) in support of the ONC Coordinated Federal Health IT Strategic Plan to engage consumers and inspire confidence and trust in health IT. The data will be analyzed using statistical methods and a draft report will be prepared. ONC will hold a Web seminar prior to the publication of the final report to convey the findings to the general public. A final report will be posted on *http://healthit.hhs.gov.*

ONC expects to interview 100 individuals for the pretest survey as part of the initial implementation year and interview 2,000 individuals for the main survey administered annually for 5 years. The estimated annualized respondent burden is 842 hours.

ESTIMATED ANNUALIZED BURDEN TABLE

Forms	Type of respondent	Number of respondents	Number of responses per respondent	Average burden (in hours) per response	Total burden hours
Pretest Survey	General Public	100	1	25/60	42
Main Survey	General Public	10,000	1	25/60	4167
Total		10,100	1	25/60	4209

For more information regarding an Estimated Annual Respondent Burden specifically for cognitive testing please refer to OMB Control No: 0990–0376, Communications Testing for Comprehensive Communication Campaign for HITECH Act (expiration date 07/31/2014; ICR Reference No: 201106–0990–005).

Keith A. Tucker,

Office of the Secretary, Paperwork Reduction Act Clearance Officer.

[FR Doc. 2012–3879 Filed 2–17–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–12–12EF]

Proposed Data Collections Submitted for Public Comment and Recommendations

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 Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 and send comments to Kimberly Lane CDC Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Evaluating the Effectiveness of Occupational Safety and Health Program Elements in the Wholesale Retail Trade Sector—New—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The mission of the National Institute for Occupational Safety and Health (NIOSH) is to promote safety and health at work for all people through research and prevention. Under Public Law 91–596, sections 20 and 22 (Section 20–22, Occupational Safety and Health Act of 1970), NIOSH has the responsibility to conduct research to advance the health and safety of workers. In this capacity, NIOSH proposes to conduct a study to assess the effectiveness of occupational safety and health (OSH) program elements in the wholesale/retail trade (WRT) sector.

Liberty Mutual has estimated direct workers compensation costs to industry in the United States in 2009 to be $50 billion. The WRT industry sector employs over 21 million workers or 19% of the workforce in private industry. In 2007, the majority of non-fatal injuries and illnesses involving days away from work in the WRT sector involved musculoskeletal disorders (MSDs, 29%) or slip/trip/falls (STFs, 22%). For this reason, major strategic NIOSH goals in the WRT sector are to reduce MSDs, STFs and other injuries/illnesses in part by assessing the effectiveness of occupational safety and health (OSH) programs designed to prevent these outcomes. There is some evidence that OSH prevention programs built on key elements (management leadership, employee participation, hazard identification and control, medical management, training, and program evaluation) reduce losses. However, little evidence exists on the relative effectiveness of program elements compared to each other. There is a need for research to develop reliable OSH program metrics and determine which elements have the greatest impact on injuries, illnesses and work disability. A renewed partnership between NIOSH and the Ohio Bureau of Workers Compensation (OBWC) provides a timely opportunity to conduct such research in a relevant and efficient manner.

A collaborative study involving NIOSH and the OBWC will examine the association between survey-assessed OSH program elements (organizational policies, procedures, practices) and workers compensation (WC) injury/illness outcomes in a stratified sample of OBWC-insured wholesale/retail trade (WRT) firms. Crucial OSH program elements with particularly high impact on WC losses will be identified in this study and disseminated to the WRT sector. This study will provide important information that is not currently available elsewhere on the effectiveness of OSH programs for the WRT sector. This project fits the mission of CDC–NIOSH to conduct scientific intervention effectiveness research to support the evidenced based prevention of occupational injuries and illnesses.

For this study, the target population includes United States WRT firms (North American Industry Classification System codes 42, 44, 45). The sampling frame includes OBWC-insured WRT firms in Ohio. The study sample includes OBWC-insured WRT firms who volunteer to participate in the OBWC–NIOSH research project.

The proposed research involves a firm-level survey of a series of organizational metrics considered to be potential predictors of injury and illness WC claim rates and duration in a stratified sample of OBWC-insured WRT firms in Ohio. There are expected to be up to 4,404 participants per year; surveys will be administered twice to the same firms in successive years (*e.g.* from January–December 2012 and again from January–December 2013).

An individual responsible for the OSH program at each firm will be asked to complete a survey that includes a background section related to respondent and company demographics and a main section where individuals will be asked to evaluate organizational metrics related to their firm's OSH program. The firm-level survey data will be linked to five years of retrospective injury and illness WC claims data and two years of prospective injury and illness WC claims data from OBWC to determine which organizational metrics are related to firm-level injury and illness WC claim rates. A nested study will ask multiple respondents at a subset of 60 firms to participate by completing surveys. A five-minute interview will be conducted with a 10% sample of non-responders (up to 792 individuals).

In order to maximize efficiency and reduce burden, a Web-based survey is proposed for the majority (95%) of survey data collection. Collected information will be used to determine whether a significant relationship exists between self-reported firm OSH elements and firm WC outcomes while controlling for covariates. Once the study is completed, benchmarking reports about OSH elements that have the highest impact on WC losses in the WRT sector will be made available through the NIOSH–OBWC Internet sites and peer-reviewed publications.

In summary, this study will determine the effectiveness of OSH program elements in the WRT sector and enable evidence-based prevention practices to be shared with the greatest audience possible. NIOSH expects to complete data collection in 2014. There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hours)	Total burden (in hours)
Safety and Health Managers in	Occupational Safety and Health Program Survey.	4,404	1	20/60	1,468
	Informed Consent Form	4,404	1	2/60	147
	Non Responder Interview	792	1	5/60	66
Total Hours	.....	.....	.....	.....	1,681

Dated: February 10, 2012.

Ronald Otten,

Deputy Chief, Centers for Disease Control and Prevention.

[FR Doc. 2012–3622 Filed 2–17–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10418]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Reopening of Comment Period

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Title of Information Collection:* Medical Loss Ratio Annual Reporting *Form Number:* CMS–10418 (OCN: 0938–New). For policy questions regarding this collection contact Carol Jimenez at 301–492–4109. For all other issues call 410–786–1326.

Reopening of Comment Period

The Type of Information Collection Request, Use, Frequency, Affected Public and Total Respondents are described in the 60-day notice that published on December 16, 2011 (76 FR 78265) and are not repeated here. However, the Total Annual Responses, and Total Annual Hours have been revised to 331,178 and 1,805,301, respectively. In addition, the model notices associated with this information collection request are now available for public viewing and comments. The model notices were still under development when the 60-day notice published. In the interest of ensuring that the public is aware of the revised supporting materials and has additional time to review and comment on those materials, we are publishing this notice and are reopening the public comment period for 15 days.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by March 2, 2012:

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number CMS–10418 (OCN 0938–NEW), Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: February 14, 2012.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2012–3844 Filed 2–16–12; 11:15 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–9069–N]

Medicare and Medicaid Programs; Quarterly Listing of Program Issuances—October Through December 2011

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

ACTION: Notice.

SUMMARY: This quarterly notice lists CMS manual instructions, substantive and interpretive regulations, and other **Federal Register** notices that were published from October through December 2011, relating to the Medicare and Medicaid programs and other programs administered by CMS.

FOR FURTHER INFORMATION CONTACT: It is possible that an interested party may need specific information and not be able to determine from the listed information whether the issuance or regulation would fulfill that need. Consequently, we are providing contact persons to answer general questions concerning each of the addenda published in this notice.

Addenda	Contact	Phone No.
I CMS Manual Instructions	Ismael Torres	(410) 786–1864
II Regulation Documents Published in the **Federal Register**	Terri Plumb	(410) 786–4481
III CMS Rulings	Tiffany Lafferty	(410) 786–7548
IV Medicare National Coverage Determinations	Wanda Belle	(410) 786–7491
V FDA-Approved Category B IDEs	John Manlove	(410) 786–6877
VI Collections of Information	Mitch Bryman	(410) 786–5258
VII Medicare-Approved Carotid Stent Facilities	Sarah J. McClain	(410) 786–2294
VIII American College of Cardiology-National Cardiovascular Data Registry Sites	JoAnna Baldwin, MS	(410) 786–7205
IX Medicare's Active Coverage-Related Guidance Documents	Lori Ashby	(410) 786–6322
X One-time Notices Regarding National Coverage Provisions	Lori Ashby	(410) 786–6322
XI National Oncologic Positron Emission Tomography Registry Sites	Stuart Caplan, RN, MAS	(410) 786–8564
XII Medicare-Approved Ventricular Assist Device (Destination Therapy) Facilities	JoAnna Baldwin, MS	(410) 786–7205
XIII Medicare-Approved Lung Volume Reduction Surgery Facilities	JoAnna Baldwin, MS	(410) 786–7205
XIV Medicare-Approved Bariatric Surgery Facilities	Kate Tillman, RN, MAS	(410) 786–9252
XV Fluorodeoxyglucose Positron Emission Tomography for Dementia Trials	Stuart Caplan, RN, MAS	(410) 786–8564

Addenda	Contact	Phone No.
All Other Information	Annette Brewer	(410) 786–6580

I. Background

Among other things, the Centers for Medicare & Medicaid Services (CMS) is responsible for administering the Medicare and Medicaid programs and coordination and oversight of private health insurance. Administration and oversight of these programs involves the following: (1) Furnishing information to Medicare and Medicaid beneficiaries, health care providers, and the public; and (2) maintaining effective communications with CMS regional offices, State governments, State Medicaid agencies, State survey agencies, various providers of health care, all Medicare contractors that process claims and pay bills, National Association of Insurance Commissioners (NAIC), health insurers, and other stakeholders. To implement the various statutes on which the programs are based, we issue regulations under the authority granted to the Secretary of the Department of Health and Human Services under sections 1102, 1871, 1902, and related provisions of the Social Security Act (the Act) and Public Health Service Act. We also issue various manuals, memoranda, and statements necessary to administer and oversee the programs efficiently.

Section 1871(c) of the Act requires that we publish a list of all Medicare manual instructions, interpretive rules, statements of policy, and guidelines of general applicability not issued as regulations at least every 3 months in the **Federal Register**.

II. Revised Format for the Quarterly Issuance Notices

While we are publishing the quarterly notice required by section 1871(c) of the Act, we will no longer republish duplicative information that is available to the public elsewhere. We believe this approach is in alignment with CMS' commitment to the general principles of the President's Executive Order 13563 released January 2011 entitled ''Improving Regulation and Regulatory Review,'' which promotes modifying and streamlining an agency's regulatory program to be more effective in achieving regulatory objectives. Section 6 of Executive Order 13563 requires agencies to identify regulations that may be ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand or repeal them in accordance with what has been learned.'' This approach is also in alignment with the President's Open Government and Transparency Initiative that establishes a system of transparency, public participation, and collaboration.

Therefore, this quarterly notice provides only the specific updates that have occurred in the 3-month period along with a hyperlink to the full listing that is available on the CMS Web site or the appropriate data registries that are used as our resources. This information is the most current up-to-date information, and will be available earlier than we publish our quarterly notice. We believe the Web site list provides more timely access for beneficiaries, providers, and suppliers. We also believe the Web site offers a more convenient tool for the public to find the full list of qualified providers for these specific services and offers more flexibility and ''real time'' accessibility. In addition, many of the Web sites have listservs; that is, the public can subscribe and receive immediate notification of any updates to the Web site. These listservs avoid the need to check the Web site, as notification of updates is automatic and sent to the subscriber as they occur. If assessing a Web site proves to be difficult, the contact person listed can provide information.

III. How To Use the Notice

This notice is organized into 15 addenda so that a reader may access the subjects published during the quarter covered by the notice to determine whether any are of particular interest. We expect this notice to be used in concert with previously published notices. Those unfamiliar with a description of our Medicare manuals should view the manuals at *http://www.cms.gov/manuals*.

Authority: Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance, Program No. 93.774, Medicare—Supplementary Medical Insurance Program, and Program No. 93.714, Medical Assistance Program.

Dated: February 6, 2012.

Olen Clybourn,

Deputy Director, Office of Strategic Operations and Regulatory Affairs.

BILLING CODE 4120–01–P

Publication Dates for the Previous Four Quarterly Notices

We publish this notice at the end of each quarter reflecting information released by CMS during the previous quarter. The publication dates of the previous four Quarterly Listing of Program Issuances notices are: March 31, 2011 (76 FR 17873), August 8, 2011 (76 FR 48564), November 4, 2011 (76 FR 68467), and December 16, 2011 (76 FR 78267). For the purposes of this quarterly notice, we are providing only the specific updates that have occurred in the 3-month period along with a hyperlink to the Web site to access this information and a contact person for questions or additional information.

Addendum I: Medicare and Medicaid Manual Instructions (October through December 2011)

The CMS Manual System is used by CMS program components, partners, providers, contractors, Medicare Advantage organizations, and State Survey Agencies to administer CMS programs. It offers day-to-day operating instructions, policies, and procedures based on statutes and regulations, guidelines, models, and directives. In 2003, we transformed the CMS Program Manuals into a web user-friendly presentation and renamed it the CMS Online Manual System.

How to Obtain Manuals

The Internet-only Manuals (IOMs) are a replica of the Agency's official record copy. Paper-based manuals are CMS manuals that were officially released in hardcopy. The majority of these manuals were transferred into the Internet-only manual (IOM) or retired. Pub 15-1, Pub 15-2 and Pub 45 are exceptions to this rule and are still active paper-based manuals. The remaining paper-based manuals are for reference purposes only. If you notice policy contained in the paper-based manuals that was not transferred to the IOM, send a message via the CMS Feedback tool.

Those wishing to subscribe to old versions of CMS manuals should contact the National Technical Information Service, Department of Commerce, 5301 Shawnee Road, Alexandria, VA 22312 Telephone (703-605-6050). You can download copies of the listed material free of charge at: http://cms.gov/manuals.

How to Review Transmittals or Program Memoranda

Those wishing to review transmittals and program memoranda can access this information at a local Federal Depository Library (FDL). Under the FDL program, government publications are sent to approximately 1,400 designated libraries throughout the United States. Some FDLs may have arrangements to transfer material to a local library not designated as an FDL. Contact any library to locate the nearest FDL. This information is available at http://www.gpo.gov/libraries/

In addition, individuals may contact regional depository libraries that receive and retain at least one copy of most Federal government publications, either in printed or microfilm form, for use by the general public. These libraries provide reference services and interlibrary loans; however, they are not sales outlets. Individuals may obtain information about the location of the nearest regional depository library from any library. CMS publication and transmittal numbers are shown in the listing entitled Medicare and Medicaid Manual Instructions. To help FDLs locate the materials, use the CMS publication and transmittal numbers. For example, to find the Medicare National Coverage Determination publication titled Autologous Cellular Immunotherapy Treatment of Metastatic Prostate Cancer -use CMS-Pub. 100-03, Transmittal No. 136.

Addendum I lists a unique CMS transmittal number for each instruction in our manuals or program memoranda and its subject number. A transmittal may consist of a single or multiple instruction(s). Often, it is necessary to use information in a transmittal in conjunction with information currently in the manual. For the purposes of this quarterly notice, we list only the specific updates to the list of manual instructions that have occurred in the 3-month period. This information is available on our Web site at www.cms.gov/Manuals.

Transmittal Number	Manual/Subject/Publication Number
	Medicare General Information (CMS-Pub. 100-01)
71	January 2012 Quarterly Updates to the CMS Standard File for Reason Codes for the Fiscal Intermediary Shared System (FISS)
72	Update to Medicare Deductible, Coinsurance and Premium Rates for 2012
73	April 2012 Quarterly Updates to the CMS Standard File for Reason Codes for the Fiscal Intermediary Shared System (FISS)
74	Update to Medicare Deductible, Coinsurance and Premium Rates for 2012 Basis for Determining the Part A Coinsurance Amounts
75	Contractor Implementation of Change Requests and Compliance with Technical Direction Letters CR Implementation Report (CRIR) Template TDL Compliance Report (TCR) Template Sample Cover Letter/Attestation Statement
	Medicare Benefit Policy (CMS-Pub. 100-02)
148	Billing for Donor Post-Kidney Transplant Complication Services
149	Implementation of Changes in End Stage Renal Disease (ESRD) Payment for Calendar Year (CY) 2012
150	Implementation of Changes in End Stage Renal Disease (ESRD) Payment for Calendar Year (CY) 2012
151	Expansion of Medicare Telehealth Services for CY 2012
152	January 2012 Update of the Hospital Outpatient Prospective Payment System (OPPS) Coverage of Outpatient Diagnostic Services Furnished on or after January 1, 2010 Coverage of Outpatient Therapeutic Services Incident to a Physician's Service Furnished on or after January 1, 2010
	Medicare National Coverage Determination (CMS-Pub. 100-03)
136	Autologous Cellular Immunotherapy Treatment of Metastatic Prostate Cancer
137	Intensive Behavioral Therapy for Cardiovascular Disease
138	Screening and Behavioral Counseling Interventions in Primary Care to Reduce Alcohol Misuse
139	Screening for Depression in Adults
	Medicare Claims Processing (CMS-Pub. 100-04)
2315	Issued to a specific audience, not posted to Internet/Intranet/ due to

Transmittal Number	Manual/Subject/Publication Number
	Confidentiality of Instruction
2316	Hospice Claims Processing Procedures When Required Face-to-Face Encounters Do Not Occur Timely
2317	Annual Update of HCPCS Codes Used for Home Health Consolidated Billing Enforcement
2318	Updates to the Internet Only Manual Pub.100-04, Chapter 15-Ambulance to include The Medicare and Medicaid Extenders Act of 2010 (MMEA) Provisions
2319	Calendar Year (CY) 2012 Participation Enrollment and Medicare Participating Physicians and Suppliers Directory (MEDPARD) Procedures
2320	Changes to the Laboratory National Coverage Determination (NCD) Edit Software for January 2012
2321	New Waived Tests
2322	Quarterly Update to the Correct Coding Initiative (CCI) Edits, Version 18.0, Effective January 1, 2012
2323	Inpatient Rehabilitation Facility (IRF) and Inpatient Psychiatric Facility (IPF) Cost-to-Charge Ratios (CCRs)
2324	Issued to a specific audience, not posted to Internet/Intranet/ due to Confidentiality of Instruction
2325	Annual Type of Service (TOS) Update
2326	Discontinuation of Hospice Late Charge Claims
2327	Issued to a specific audience, not posted to Internet/Intranet/ due to Confidentiality of Instruction
2328	Claim Adjustment Reason Code (CARC) Used for Therapy Claims Subject to the Multiple Procedure Payment Reduction
2329	Influenza Vaccine Payment Allowances - Annual Update for 2011-2012 Season
2330	Issued to a specific audience, not posted to Internet/Intranet/ due to Confidentiality of Instruction
2331	January 2012 Quarterly Average Sales Price (ASP) Medicare Part B Drug Pricing Files and Revisions to Prior Quarterly Pricing Files
2332	Diagnosis Code Update for Add-on Payments for Blood Clotting Factor Administered to Hemophilia Inpatients
2333	Payment for Multiple Surgeries in a Method II Critical Access Hospital (CAH)
2334	Billing for Donor Post-Kidney Transplant Complication Services
2335	Clarification and Revisions for Claims Submitted for End Stage Renal Disease (ESRD) Patients
2336	FISS Claims Processing Updates for Ambulance Services
2337	New Influenza Virus Vaccine Code y
2338	Issued to a specific audience, not posted to Internet/Intranet/ due to Confidentiality of Instruction
2339	Autologous Cellular Immunotherapy Treatment of Metastatic Prostate Cancer
2340	CY 2012 Update for Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) Fee Schedule
2341	January 2012 Quarterly Update for the DMEPOS Competitive Bidding Program
2342	Annual Medicare Physician Fee Schedule Files Delivery and Implementation Manualization
2343	Announcement of Medicare Rural Health Clinic (RHC) and Federally Qualified Health Centers (FQHC) Payment Rate Increases
2344	Changes to the Laboratory National Coverage Determination (NCD) Edit Software for January 2012

Transmittal Number	Manual/Subject/Publication Number
2345	Influenza Vaccine Payment Allowances – Annual Update for 2011-2012 Season
2346	Medicare Claims Processing Pub. 100-04 Chapter 24 Update for HIPAA 5010 and EDI Enhancements
2347	Recoupment of Incorrect Payments Made Under the End Stage Renal Disease (ESRD) Prospective Payment System (PPS) for the Low-Volume Payment Adjustment
2348	Instructions for Retrieving the 2012 Pricing and HCPCS Data Files through CMS Mainframe Telecommunications Systems
2349	Reasonable Charge Update for 2012 for Splints, Casts, and Certain Intraocular Lenses
2350	Annual Update to the Therapy Code List
2351	Therapy Cap Values for Calendar Year (CY) 2012
2352	Issued to a specific audience, not posted to Internet/Intranet/ due to Confidentiality of Instruction
2353	Instructions for Downloading the Medicare ZIP Code File for April 2012
2354	Expansion of Medicare Telehealth Services for CY 2012 List of Medicare Telehealth Services Telehealth Consultation Services, Emergency Department or Initial Inpatient versus Inpatient Evaluation and Management (E/M) Visits Telehealth Consultation Services, Emergency Department or Initial Inpatient Defined Originating Site Facility Fee Payment Methodology
2355	Issued to a specific audience, not posted to Internet/Intranet/ due to Confidentiality of Instruction
2356	Home Health Prospective Payment System (HH PPS) Rate Update for Calendar Year (CY) 2012
2357	Intensive Behavioral Therapy for Cardiovascular Disease Table of Contents Intensive Behavioral Therapy for Cardiovascular Disease (CVD) Claims Processing Requirements for IBT for CVD Correct Place of Services (POS) Codes for IBT for CVD on Professional Claims Provider Specialty Edits for IBT for CVD on Professional Claims Correct Types of Bill (TOB) for IBT for CVD on Institutional Claims Frequency Edits for IBT for CVD Claims Common Working File (CWF) Edits for IBT for CVD Claims
2358	Screening and Behavioral Counseling Interventions in Primary Care to Reduce Alcohol Misuse Alcohol Screening and Behavioral Counseling Interventions in Primary Care to Reduce Alcohol Misuse Policy Institutional Billing Requirements Claim Adjustment Reason Codes, Remittance Advice Remark Codes, Group Codes and Medicare Summary Common Working File (CWF) Requirements
2359	Screening for Depression in Adults Table of Contents Screening for Depression in Adults A/B Medicare Administrative Contractor (MAC) and Carrier Billing Requirements Frequency Place of Service (POS) Common Working File (CWF) Edits

Transmittal Number	Manual/Subject/Publication Number
	Professional Billing Requirements Institutional Billing Requirements CARCs, RARCs, Group Codes, and MSN Messages
2360	Instructions for Retrieving the 2012 Pricing and HCPCS Data Files through CMS Mainframe Telecommunications Systems
2361	Clarification and Revisions for Claims Submitted for End Stage Renal Disease (ESRD) Patients Emergency Room (ER) Services That Span Multiple Service Dates Calculation of the Basic Case-Mix Adjusted Composite Rate and the ESRD Prospective Payment System Rate Laboratory Services Performed During Emergency Room Service Coding for Adequacy of Dialysis, Vascular Access and Infection Separately Billable ESRD Drugs Epoetin Alfa (EPO) Darbepoetin Alfa (Aranesp) for ESRD Patients
2362	Home Health Advance Beneficiary Notice, (HHABN), Form CMS-R-296
2363	Table of Contents Form CMS-R-296 Home Health Advance Beneficiary Notice (HHABN) Background on the HHABN Scope of the HHABN Triggering Events for HHABN/ Written Notice Completing the HHABN HHABN Delivery Effective HHABNs Defective HHABNs Collection of Funds and Liability Related to the HHABN Special Issues Associated with the HHABN
2364	April 2012 Quarterly Update for the DMEPOS Competitive Bidding Program
2365	Issued to a specific audience, not posted to Internet/Intranet/ due to Confidentiality of Instruction
2366	Off-Cycle Release of the Inpatient Prospective Payment System (IPPS) Fiscal Year (FY) 2012 Pricer
2367	Verification of Status for all Hospitals Qualifying for Disproportionate Share Hospital (DSH) Payments under 42 CFR Section 412.106(c)(2), also known as the "Pickle Amendment"
2368	Additional Payment Amounts for Hospitals with Disproportionate Share of Low-Income Patients
2369	Summary of Policies in the CY 2012 Medicare Physician Fee Schedule (MPFS) Final Rule and the Telehealth Originating Site Facility Fee Payment Amount
2370	January 2012 Integrated Outpatient Code Editor (I/OCE) Specifications Version 13.0
2371	Claim Status Category and Claim Status Codes Update
2372	Claim Adjustment Reason Code (CARC), Remittance Advice Remark Code (RARC), and Medicare Remit Easy Print (MREP) and PC Print Update
2373	Bundling of Payments for Services Provided to Outpatients Who Later Are Admitted as Inpatients: 3-Day Payment Window Policy and the Impact on Wholly Owned or Wholly Operated Physician Practices
2374	Additional Instructions Regarding Demand Bills Under the Home Health Prospective Payment System
2375	Annual Type of Service (TOS) Update
2376	January 2012 Update of the Hospital Outpatient Prospective Payment System

Transmittal Number	Manual/Subject/Publication Number
	(OPPS) Policy and Billing Instructions for Condition Code 44 Table of Contents Cardiac Resynchronization Therapy Payment Window for Outpatient Services Treated as Inpatient Services Use of Modifiers for Discontinued Services
2377	Manual Revision to Chapter 6, Section 20.1.1 Physician's Services and Other Professional Services Excluded From Part A PPS Payment and the Consolidated Billing Requirement Physician's Services and Other Professional Services Excluded From Part A PPS Payment and the Consolidated Billing Requirement
2378	January 2012 Update of the Ambulatory Surgery Center Payment System (ASC)
Medicare Secondary Payer (CMS-Pub. 100-05)	
00	None
Medicare Financial Management (CMS-Pub. 100-06)	
196	Notice of New Interest Rate for Medicare Overpayments and Underpayments - First Notification for FY 2012
197	Notice of New Interest Rate for Medicare Overpayments and Underpayments - 1st Notification for FY 2012
198	Medicare Financial Management Manual, Chapter 4 - Debts Returned to Agency (RTA) by Treasury Table of Contents Debts Returned to Agency (RTA) by the United States Department of the Treasury (Treasury) Debts RTA by Treasury Due to Bankruptcy (RB) Debts RTA By Treasury as Uncollectible (RU) or Out of Business (RN) Debts RTA by Treasury as Dispute Response not Received Timely (RX) Debts RTA by Treasury as a Miscellaneous Dispute, a Manual RTA, Complaint or as Recall Approved (RD) Debts RTA by Treasury as paid in Full (RP), Satisfied Payment Agreement (RS) or Satisfied Compromise (RC)
199	Instructions for Processing Physicians and other Suppliers Debts that have been Confirmed as Identity Theft Table of Contents Confirmed Identity Theft 1 IRS Form 1099 MISC 2 Seized Monies Received from Law Enforcement
200	Recovery Audit Program Tracking Appeals and Reopenings Table of Contents Tracking Appeals and Reopenings
201	Issued to a specific audience, not posted to Internet/Intranet/ due to Confidentiality of Instruction
Medicare State Operations Manual (CMS-Pub. 100-07)	
72	Revised Appendix A: Conditions of Participation and Interpretive Guidelines for Hospitals Standard: Respiratory Services Standard: Nursing Services Standard: Rehabilitation Services Standard: Rehabilitation Services Standard: Rehabilitation Services Standard: Respiratory Services

Transmittal Number	Manual/Subject/Publication Number
	Standard: Pharmaceutical Services
73	
74	Revised Appendix A, Interpretive Guidelines for Hospitals Standard: Post-anesthesia Evaluation Standard: Pre-anesthesia Evaluation Condition of Participation: Anesthesia Services
75	Revised Appendix A, Interpretive Guidelines for Hospitals, and Appendix W, Interpretive Guidelines for Critical Access Hospitals (CAHs) Standard: Notice of Rights/A-0117 Standard: Exercise of Rights/A-0130 Standard: Exercise of Rights/A-0131 Standard: Exercise of Rights/A-0132 Standard: Patient Visitation Rights/C-1002 Standard: Patient Visitation Rights/A-0215 Standard: Patient Visitation Rights/A-0216 Standard: Patient Visitation Rights/A-0217 Standard: Compliance With Federal Laws and Regulations/A-0151 Standard: Patient Visitation Rights/C-1000 Standard: Patient Visitation Rights/C-1001 Standard: Exercise of Rights/A-0133
76	Clarifications to Appendix L, Ambulatory Surgical Center Interpretive Guidelines – Obtaining Consent before Observing Surgical Procedures
77	Revised Appendix A, Interpretive Guidelines for Hospitals
78	Revised Appendix A, Interpretive Guidelines for Hospitals, and Revised Appendix W, Interpretive Guidelines for Critical Access Hospitals (CAHs)
Medicare Program Integrity (CMS-Pub. 100-08)	
390	Issued to a specific audience, not posted to Internet/Intranet/ due to Confidentiality of Instruction
391	Issued to a specific audience, not posted to Internet/Intranet due to Confidentiality of Instruction
392	Update to Notifications Sent to State Medicaid Agencies and Child Health Plans of Medicare Terminations for Certified Providers and Suppliers and Medicare Revocations for Providers and Suppliers. This CR rescinds and fully replaces CR 7017, 7074 and 7334. Contractor Issued Revocations
Medicare Contractor Beneficiary and Provider Communications (CMS-Pub. 100-09)	
00	None
Medicare End-Stage Renal Disease Network Organizations (CMS Pub 100-14)	
00	None
Medicare Managed Care (CMS-Pub. 100-16)	
00	None
Medicare Business Partners Systems Security (CMS-Pub. 100-17)	
00	None
Demonstrations (CMS-Pub. 100-19)	
00	None
One Time Notification (CMS-Pub. 100-20)	
963	*Expansion of the Current Scope of Editing for Ordering/Referring Providers for Durable Medical Equipment, Prosthetics, Orthotics, and Supplier* (DMEPOS) Suppliers Claims Process by Durable Medical Equipment Medicare Administrative Contractors (DMEMACs)

Transmittal Number	Manual/Subject/Publication Number
964	Expansion of the Current Scope of Editing for Ordering/Referring Providers for claims processed by Medicare Carriers and Part B Medicare Administrative Contractors (MACs)
965	Issued to specific audience, not posted to Internet/ Intranet due to Confidentiality of Instruction
966	Health Insurance Portability and Accountability Act (HIPAA) 5010 837 Institutional (837I) Edits and 5010 837 Professional (837P) Edits – April 2012 Version
967	Issued to specific audience, not posted to Internet/ Intranet due to Confidentiality of Instruction
968	Automated Tracking and Reporting of Recovery Audit-Associated Reopenings and Appeals
969	Issued to specific audience, not posted to Internet/ Intranet due to Confidentiality of Instruction
970	VMS Modifications to Oxygen CMN Editing s
971	Instructions for the Fiscal Intermediary Shared System (FISS) to modify the Workers Compensation Set Aside (WCSA) Claims Process to Capture the Amount Medicare would have paid when the Claim is returned by CWF. This change request also updates the MSP Savings Report to add Special Project Savings Total on the Savings Report to include totals from all Special Projects.
972	Common Edits and Enhancements Modules (CEM) Code Set Update
973	Revisions to Common Working File (CWF) Edits that Deny Claims for Prosthetics, Orthotics, and Supplies (POS) Furnished to Beneficiaries in a Skilled Nursing Facility (SNF) Stay
974	Issued to specific audience, not posted to Internet/ Intranet due to Confidentiality of Instruction
975	Format Revisions to the Special Incentive Remittance Advice used to Report Quarterly Incentive Payments for Health Professional Shortage Areas (HPSAs), the Primary Care Incentive Payment Program (PCIP), and the HPSA Surgical Incentive Payment Program (HSIP)
976	Determining Claims Processing Timeliness When Held Claims Are Later Subject to an Additional Documentation Request
977	Enhancements to the Recovery Audit Mass Adjustment/Reporting Process in the Fiscal Intermediary Shared System (FISS)
978	Modify the Interchange Control Number (ICN) for Medicare Advantage Encounters
979	Processing Multiple Home Health Unsolicited Responses
980	Modify the Interchange Control Number (ICN) for Medicare Advantage Encounters
981	Issued to specific audience, not posted to Internet/ Intranet due to Confidentiality of Instruction
982	Issued to specific audience, not posted to Internet/ Intranet due to Confidentiality of Instruction
983	Health Insurance Portability and Accountability (HIPAA) 5010/D.0 Fixes - April 2012
984	Issued to specific audience, not posted to Internet/ Intranet due to Confidentiality of Instruction
985	Fee for Service Common Eligibility Services Conference Calls and Research
986	Issued to specific audience, not posted to Internet/ Intranet due to Confidentiality of Instruction
987	Issued to specific audience, not posted to Internet/ Intranet due to

Transmittal Number	Manual/Subject/Publication Number
	Confidentiality of Instruction
988	Enhancements to the Recovery Audit Mass Adjustment/Reporting Process in the Multi-Carrier System (MCS)
989	Change Management Process -- Enterprise Electronic Change Information Management Portal (ECHIMP)
990	CMS Standard Edit 009H is Obsolete
991	Expansion of the Current Scope of Editing for Ordering/Referring Providers for Claims processed by Medicare Carriers and Part B Medicare Administrative Contractors (MACs)
992	Issued to specific audience, not posted to Internet/ Intranet due to Confidentiality of Instruction E
993	Reporting of Recoupment for Overpayment on the Remittance Advice (RA) with Patient Control Number
994	Issued to a specific audience, not posted to Intranet/Intranet due to Confidentiality of Instruction
995	Multiple Procedure Payment Reduction (MPPR) on Certain Diagnostic Imaging Procedures
996	Creating Payor ID for Medicare Advantage Encounter Data Submission
997	Creating Payor ID for Medicare Advantage Encounter Data Submission
998	HIPAA 5010 Outbound File Compliance Check
999	MCS ICD-10 Changes
1000	Issued to a specific audience, not posted to Intranet/Intranet due to Confidentiality of Instruction
1001	Request to Require Hours for Research and Conference Calls with Maintainers, MACs, and EDCs and Additional Requirements for IDR Shared Systems
1002	Automated Tracking and Reporting of Recovery Audit-Associated Reopenings And Appeals
1003	Instructions to Accept and Process All Ambulance Transportation Healthcare Common Procedure Coding System (HCPCS) Codes
1004	Requirement to Report Medicare Fee for Service Rendering Provider Place of Service Address Information to the Common Working File
1005	Implementation of the Award for the Jurisdiction F (J-F) Part A and Part B Medicare Administrative Contractor (A/B MAC) including New Workload Numbers for Alaska, Idaho, Oregon and Washington
1006	Issued to specific audience, not posted to Internet/ Intranet due to Confidentiality of Instruction
1007	Medicare Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Competitive Bidding Program: Allowing Contract or Non-Contract Suppliers to Maintain and Service the Enteral Nutrition Equipment That They Provided in the 15th Continuous Month of Rental
1008	Medicare Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Competitive Bidding Program: Allowing Contract or Non-contract Suppliers to Maintain and Service the Enteral Nutrition Equipment that They Provided in the 15th Continuous Month of Rental
1009	Issued to specific audience, not posted to Internet/ Intranet due to Sensitivity of Instruction
1010	Instructions to Teaching Hospitals for Reporting the Internal Revenue Service (IRS) Refund of Medical Resident FICA Taxes
1011	Review and Analysis of Draft Accredited Standards Committee X12 Technical Report 3s

Addendum II: Regulation Documents Published in the Federal Register (October through December 2011)

Regulations and Notices

Regulations and notices are published in the daily **Federal Register**. To purchase individual copies or subscribe to the **Federal Register,** contact GPO at www.gpo.gov/fdsys. When ordering individual copies, it is necessary to cite either the date of publication or the volume number and page number.

The **Federal Register** is available as an online database through GPO Access. The online database is updated by 6 a.m. each day the **Federal Register** is published. The database includes both text and graphics from Volume 59, Number 1 (January 2, 1994) through the present date and can be accessed at http://www.gpoaccess.gov/fr/index.html. The following Web site http://www.archives.gov/federal-register/ provides information on how to access electronic editions, printed editions, and reference copies.

This information is available on our Web site at:
http://www.cms.gov/quarterlyproviderupdates/downloads/Regs-4Q11QPU.pdf
For questions or additional information, contact Terri Plumb (410-786-4481).

Addendum III: CMS Rulings

CMS Rulings are decisions of the Administrator that serve as precedent final opinions and orders and statements of policy and interpretation. They provide clarification and interpretation of complex or ambiguous provisions of the law or regulations relating to Medicare, Medicaid, Utilization and Quality Control Peer Review, private health insurance, and related matters. The rulings can be accessed at http://www.cms.gov/Rulings/CMSR/list.asp#TopOfPage. For questions or additional information, contact Tiffany Lafferty (410-786-7548).

Addendum IV: Medicare National Coverage Determinations (October through December 2011)

Addendum IV includes completed national coverage determinations (NCDs), or reconsiderations of completed NCDs, from the quarter covered by this notice. Completed decisions are identified by the section of the NCD Manual (NCDM) in which the decision appears, the title, the date the publication was issued, and the effective date of the decision. An NCD is a determination by the Secretary for whether or not a particular item or service is covered nationally under the Medicare Program (title XVIII of the Act), but does not include a determination of the code, if any, that is assigned to a particular covered item or service, or payment determination for a particular covered item or service. The entries below include information concerning completed decisions, as well as sections on program and decision memoranda, which also announce decisions or, in some cases, explain why it was not appropriate to issue an NCD. Information on completed decisions as well as pending decisions has also been posted on the CMS Web site. For the purposes of this quarterly notice, we list

only the specific updates that have occurred in the 3-month period. This information is available on our Web site at: www.cms.gov/medicare-coverage-database/. For questions or additional information, contact Wanda Belle (410-786-7491).

Title	NCDM Section	Transmittal Number	Issue Date	Effective Date
Screening for Depression in Adults	210.10	R139NCD	11/23/2011	10/14/2011
Screening and Behavioral Counseling Interventions in Primary Care to Reduce Alcohol Misuse	210.9	R138NCD	11/23/2011	10/14/2011
Intensive Behavioral Therapy for Cardiovascular Disease	210.11	R137NCD	11/23/2011	11/08/2011
October Clinical Lab Edits	190	R2344CP	11/04/2011	10/01/2011
Autologous Cellular Immunotherapy for Prostate Cancer	110.22	R136NCD	11/02/2011	06/30/2011

Addendum V: FDA-Approved Category B Investigational Device Exemptions (IDEs) (October through December 2011)

Addendum V includes listings of the FDA-approved investigational device exemption (IDE) numbers that the FDA assigns. The listings are organized according to the categories to which the devices are assigned (that is, Category A or Category B), and identified by the IDE number. For the purposes of this quarterly notice, we list only the specific updates to the Category B IDEs as of the ending date of the period covered by this notice and a contact person for questions or additional information. For questions or additional information, contact John Manlove (410-786-6877).

Under the Food, Drug, and Cosmetic Act (21 U.S.C. 360c) devices fall into one of three classes. To assist CMS under this categorization process, the FDA assigns one of two categories to each FDA-approved investigational device exemption (IDE). Category A refers to experimental IDEs, and Category B refers to non-experimental IDEs. To obtain more information about the classes or categories, please refer to the notice published in the April 21, 1997 **Federal Register** (62 FR 19328).

IDE	Device	Start Date
G110172	Small Particle Hyaluronic Acid with Lidocaine (SPHAL)	10/06/11
G110071	SpaceOAR System	10/14/11
G110096	Becton Dickinson Continuous Glucose Monitor Generation 2	10/14/11
G110177	DAKO EGFRVIII IHC Pharmdx Kit	10/18/11
G110048	Hydrus Aqueous Implant	10/20/11
BB14861	Cell Isolation System (CIS)	10/26/11
G100310	TransMedics Organ Care System (OCS) - Lung	10/26/11
G110191	Real-Time RT-PCR EGFRVIII Companion Diagnostics Assay	11/10/11
G110195	PTA Dilatation Catheter	11/10/11
G110198	Small Molecule Functional Kinase Inhibitor Screen	11/16/11
G110199	Deep Brain Stimulation	11/16/11
G110201	ISOMETRIC HANDGRIP THERAPY DEVICE	11/18/11
G110204	ACRYSOF IQ RESTOR +2.5 D MULTIFOCAL INTRAOCULAR LENS	11/22/11
G110206	COSTATUS SYETEM	11/23/11
G110209	ZIMMER MAXERA ACETABULAR SYSTEM	12/01/11
G110213	ANTI-MUC1 (H23) MOUSE MONOCLONAL ANTIBODY ASSAY	12/01/11
G110215	AURORA ENDOMETRIAL ABLATION SYSTEM	12/07/11
BB14923	Magnetic-Activated Cell Sorter (CliniMACS, Miltenyi)	12/16/11
G110235	TAQMAN BASED REAL TIME RT-PCR EGFRVIII COMPANION DIAGNOSTIC ASSAY	12/23/11

Addendum VI: Approval Numbers for Collections of Information (October through December 2011)

All approval numbers are available to the public at Reginfo.gov. Under the review process, approved information collection requests are assigned OMB control numbers. A single control number may apply to several related information collections. This information is available at www.reginfo.gov/public/do/PRAMain. For questions or additional information, contact Mitch Bryman (410-786-5258).

Addendum VII: Medicare-Approved Carotid Stent Facilities, (October through December 2011)

Addendum VII includes listings of Medicare-approved carotid stent facilities. All facilities listed meet CMS standards for performing carotid artery stenting for high risk patients. On March 17, 2005, we issued our decision memorandum on carotid artery stenting. We determined that carotid artery stenting with embolic protection is reasonable and necessary only if performed in facilities that have been determined to be competent in performing the evaluation, procedure, and follow-up necessary to ensure optimal patient outcomes. We have created a list of minimum standards for facilities modeled in part on professional society statements on competency. All facilities must at least meet our standards in order to receive coverage for carotid artery stenting for high risk patients. For the purposes of this quarterly notice, we are providing only the specific updates that have occurred in the 3-month period. This information is available on our Web site at: http://www.cms.gov/MedicareApprovedFacilitie/CASF/list.asp#TopOfPage. For questions or additional information, contact Sarah J. McClain (410-786-2294).

Facility	Provider Number	Effective Date	State
The following facilities are new listings for this quarter.			
Davis Hospital and Medical Center 1600 West Antelope Drive, Layton, UT 84041	460041	10/21/2011	UT
The Jewish Hospital Mercy Health Partners 4777 E. Galbraith Road, Cincinnati, OH 45236	1336478163	10/21/2011	OH
St. Francis Medical Center 601 Hamilton Avenue, Trenton, NJ 08629-1986	31-0021	10/19/2011	NJ
Editorial changes (shown in bold) were made to the facilities listed below.			
Saint Joseph Regional Medical Center **5215 Holy Cross Pkwy** **Mishawaka, IN 46545-1469**	150012	01/26/2006	IN
Arizona Heart Hospital 1930 E. Thomas Road, Phoenix, AZ 85016	**030030**	04/18/2005	AZ

Facility	Provider Number	Effective Date	State
From: Medical Center East **To: St. Vincent's East** 50 Medical Park East Drive, Birmingham, AL 35235	010011	11/21/2005	AL
From: **Methodist Le Bonheur Germantown Hospital** **To: Methodist Hospital Germantown** 7691 Poplar Avenue, Germantown, TN 38138	440049	11/14/2005	TN
From: Methodist North Hospital **To: Methodist Hospital North** 3960 New Covington Pike, Memphis, TN 38128	440049	11/14/2005	TN
From: Methodist University Hospital **To: Methodist Hospital University** 1211 Union Avenue, Memphis, TN 38104	440049	11/14/2005	TN

Addendum VIII:
American College of Cardiology's National Cardiovascular Data Registry Sites (October through December 2011)

Addendum VIII includes a list of the American College of Cardiology's National Cardiovascular Data Registry Sites. We cover implantable cardioverter defibrillators (ICDs) for certain clinical indications, as long as information about the procedures is reported to a central registry. Detailed descriptions of the covered indications are available in the NCD. In January 2005, CMS established the ICD Abstraction Tool through the Quality Network Exchange (QNet) as a temporary data collecton mechanism. On October 27, 2005, CMS announced that the American College of Cardiology's National Cardiovascular Data Registry (ACC-NCDR) ICD Registry satisfies the data reporting requirements in the NCD. Hospitals needed to transition to the ACC-NCDR ICD Registry by April 2006.

Effective January 27, 2005, to obtain reimbursement, Medicare NCD policy requires that providers implanting ICDs for primary prevention clinical indications (that is, patients without a history of cardiac arrest or spontaneous arrhythmia) report data on each primary prevention ICD procedure. Details of the clinical indications that are covered by Medicare and their respective data reporting requirements are available in the Medicare NCD Manual, which is on the CMS Web site at http://www.cms.hhs.gov/Manuals/IOM/itemdetail.asp?filterType=none&filterByDID=99&sortByDID=1&sortOrder=ascending&itemID=CMS014961 .

A provider can use either of two mechanisms to satisfy the data reporting requirement. Patients may be enrolled either in an Investigational Device Exemption trial studying ICDs as identified by the FDA or in the ACC-NCDR ICD registry. Therefore, for a beneficiary to receive a Medicare-covered ICD implantation for primary prevention, the beneficiary must receive the scan in a facility that participates in the ACC-NCDR ICD registry. The entire list of facilities that participate in the ACC-NCDR ICD registry can be found at www.ncdr.com/webncdr/common

For the purposes of this quarterly notice, we are providing only the specific updates that have occurred to the list of Medicare-approved ICD facilities in the 3-month period. This information is available by accessing our Web site and clicking on the link for the American College of Cardiology's National Cardiovascular Data Registry at: www.ncdr.com/webncdr/common. For questions or additional information, contact Joanna Baldwin, MS (410-786-7205).

Facility Name	Address 1	City	State	Zip Code
The following facilities are new listings for this quarter.				
Barnes Jewish St. Peters Hospital	10 Hospital Drive, MO	St. Peters	MO	63376
Children's Healthcare of Atlanta	1405 Clifton Road, NE	Atlanta	GA	30322
Fairbanks Memorial Hospital	1650 Cowles Street	Fairbanks	AK	99701
Highlands Regional Medical	3600 S Highlands Avenue	Sebring	FL	33870
Franciscan Healthcare Jackson Memorial Hospital (JACKSON HEALTH SYSTEM)	1611 NW 12th Avenue	Miami	FL	33136
Nacogdoches Memorial Hospital	1204 Mound Street	Nacogdoches	TX	75961
Pampa Regional Medical Center	One Medical Plaza	Pampa	TX	79065
Parker Adventist Hospital	9395 Crown Crest Boulevard	Parker	CO	80138
Providence Hospital	1150 Varnum Street, N.E.	Washington	DC	20017
Riley Hospital for Children Indiana University Health	705 Riley Drive	Indianapolis	IN	46202
Tanner Medical Center	705 Dixie Street	Carrollton	GA	30117
Viera Hospital	8745 North Wickham Road	Melbourne	FL	32940
The following facility is no longer a participant in the ACC-NCDR-ICD Registry as of this notice.				
East Cooper Medical Center	2000 Hospital Drive	Charleston	SC	29464

Addendum IX: Active CMS Coverage-Related Guidance Documents (October through December 2011)

There were no CMS coverage-related guidance documents published in the October through December 2011 quarter. To obtain full-text copies of these documents, visit the CMS Coverage Web site at http://www.cms.gov/mcd/index_list.asp?list_type=mcd_1 and click on the archives link. For questions or additional information, contact Lori Ashby (410-786-6322).

Addendum X:
List of Special One-Time Notices Regarding National Coverage Provisions (October through December 2011)

There were no special one-time notices regarding national coverage provisions published in the October through December 2011 quarter. This information is

available at www.cms.hhs.gov/coverage. For questions or additional information, contact Lori Ashby (410-786-6322).

Addendum XI: National Oncologic PET Registry (NOPR) (October through December 2011)

Addendum XI includes a listing of National Oncologic Positron Emission Tomography Registry (NOPR) sites. We cover positron emission tomography (PET) scans for particular oncologic indications when they are performed in a facility that participates in the NOPR.

In January 2005, we issued our decision memorandum on **positron emission tomography** (PET) scans, which stated that CMS would cover PET scans for particular oncologic indications, as long as they were performed in the context of a clinical study. We have since recognized the National Oncologic PET Registry as one of these clinical studies. Therefore, in order for a beneficiary to receive a Medicare-covered PET scan, the beneficiary must receive the scan in a facility that participates in the registry.

There were no new facilities that meet CMS's requirements for performing PET scans under National Coverage Determination CAG-00181N published in the July through September 2011 quarter.

This information is available at http://www.cms.gov/MedicareApprovedFacilitie/NOPR/list.asp#TopOfPage.

For questions or additional information, contact Stuart Caplan, RN, MAS (410-786-8564)

Editorial changes (shown in bold) were made to the facilities listed below.				
Facility Name	**Address 1**	**City**	**State**	**Zip Code**
Capital Health System	**1 Capital Way**	**Pennington**	**NJ**	**08534**
Old name: **Positron Imaging Of Austin** **New name:** **Texas Oncology Cancer Center**	6101 Balcones Drive	Austin,	TX	78731

Addendum XII: Medicare-Approved Ventricular Assist Device (Destination Therapy) Facilities (October through December 2011)

Addendum XII includes a listing of Medicare-approved facilities that receive coverage for ventricular assist devices (VADs) used as destination therapy. All facilities were required to meet our standards in order to receive coverage for VADs implanted as destination therapy. On October 1, 2003, we issued our decision memorandum on VADs for the clinical indication of destination therapy. We determined that VADs used as destination therapy are reasonable and necessary only if performed in facilities that have been determined to have the experience and infrastructure to ensure optimal patient outcomes. We established facility standards and an application process. All facilities were required to meet our standards in order to receive coverage for VADs implanted as destination therapy.

For the purposes of this quarterly notice, we are providing only the specific updates that have occurred to the list of Medicare-approved facilities that meet our standards in the 3-month period. This information is available on our Web site at http://www.cms.gov/MedicareApprovedFacilitie/VAD/list.asp#TopOfPage. For questions or additional information, contact JoAnna Baldwin, MS (410-786-7205).

Facility	**Provider Number**	**Date Approved**		**State**
The following are new listings for this quarter.				
University of California San Diego Medical Center 9300 Campus Point Drive La Jolla, CA 92037	050025	11/18/2011		CA
Providence St. Vincent Medical Center 9205 Southwest Barnes Road Portland, OR 97225	380004	12/08/2011		OR
Scott & White Memorial Hospital 2401 South 31st Street Temple, TX 76508	450054	12/08/2011		TX
Bon Secours – St. Mary's Hospital 5801 Bremo Road Richmond, VA 23226	490059	12/22/2011		VA
Facility Name	**Provider Number**	**Date Approved**	**Date De-certified**	**State**
Editorial changes (shown in bold) were made to the facilities listed below.				
Maine Medical Center 22 Bramhall Street Portland, ME	060024	02/03/2009 Joint Commision certified on 02/03/09.	**10/06/2010**	ME
OSF St Francis Medical Center 530 NE Glen Oak Avenue Peoria, Illinois 61637	140067	08/31/2009	**11/22/2011**	IL

Addendum XIII: Lung Volume Reduction Surgery (LVRS)
(October through December 2011)

Addendum XIII includes a listing of Medicare-approved facilities that are eligible to receive coverage for lung volume reduction surgery. Until May 17, 2007, facilities that participated in the National Emphysema Treatment Trial were also eligible to receive coverage. The following three types of facilities are eligible for reimbursement for Lung Volume Reduction Surgery (LVRS):

- National Emphysema Treatment Trial (NETT) approved (Beginning 05/07/2007, these will no longer automatically qualify and can qualify only with the other programs);
- Credentialed by the Joint Commission (formerly, the Joint Commision on Accreditation of Healthcare Organizations (JCAHO)) under their Disease Specific Certification Program for LVRS; and
- Medicare approved for lung transplants.

Only the first two types are in the list. There were no additions to the listing of facilities for lung volume reduction surgery published in the October through December 2011 quarter.This information is available on our Web site at www.cms.gov/MedicareApprovedFacilitie/LVRS/list.asp#TopOfPage. For questions or additional information, contact JoAnna Baldwin, MS (410-786-7205).

Addendum XIV: Medicare-Approved Bariatric Surgery Facilities
(October through December 2011)

Addendum XIV includes a listing of Medicare-approved facilities that meet minimum standards for facilities modeled in part on professional society statements on competency. All facilities must meet our standards in order to receive coverage for bariatric surgery procedures. On February 21, 2006, we issued our decision memorandum on bariatric surgery procedures. We determined that bariatric surgical procedures are reasonable and necessary for Medicare beneficiaries who have a body-mass index (BMI) greater than or equal to 35, have at least one co-morbidity related to obesity and have been previously unsuccessful with medical treatment for obesity. This decision also stipulated that covered bariatric surgery procedures are reasonable and necessary only when performed at facilities that are: (1) certified by the American College of Surgeons (ACS) as a Level 1 Bariatric Surgery Center (program standards and requirements in effect on February 15, 2006); or (2) certified by the American Society for Bariatric Surgery (ASBS) as a Bariatric Surgery Center of Excellence (BSCOE) (program standards and requirements in effect on February 15, 2006).

For the purposes of this quarterly notice, we list only the specific updates to Medicare-approved facilities that meet CMS's minimum facility standards for bariatric surgery and have been certified by ACS and/or ASMBS in the 3-month period. This information is available on our Web site at www.cms.gov/MedicareApprovedFacilitie/BSF/list.asp#TopOfPage. For questions or additional information, contact Kate Tillman, RN, MAS (410-786-9252).

Facility Name	Provider Number	Date Approved	State	Other Information
The following facilities are new listings for this quarter.				
University of California San Francisco Medical Center 500 Parnassus Avenue San Francisco, CA 94143-0790	1689772592	05/13/2011	CA	ACS
Baylor Regional Medical Center at Grapevine 2020 West Highway 114 Grapevine, TX 76051	45-0563	11/18/2011	TX	ASMBS
Metropolitan Methodist Hospital 1310 McCullough Avenue San Antonio, TX 78212	450388	11/18/2011	TX	ASMBS
Lafayette General Medical Center 1214 Coolidge Boulevard Lafayette, LA 70503	190002	11/29/2011	LA	ASMBS
Orlando Health 1414 Kuhl Avenue Orlando, FL 32806	100006	11/30/2011	FL	ASMBS
Lawrence Hospital Center 55 Palmer Avenue Bronxville, NY 10708	330061	11/05/2011	NY	ACS
Thomas Jefferson University Hospital 125 S. 11th Street Philadelphia, PA 19107	39-0174	11/18/2011	PA	ASMBS
The following facilities are deletions for this quarter.				
The Regional Medical Center of Acadiana 2810 Ambassador Caffery Parkway Lafayette, LA 70506	190205	09/23/2005	LA	ASMBS
Mount Sinai Hospital One Gustave L. Levy Place, 1190 5th Avenue New York, NY 10029	330024	07/06/2006	NY	ASMBS
Editorial changes (shown in bold) were made to the facilities listed below.				
St. Anthony's Hospital 2807 Little York Road Houston, TX **77093**	450795	03/18/2009	TX	ASMBS
Aurora Sinai Medical Center 945 North 12 Street Milwaukee, WI53233	520138	**09/30/2005**	WI	ASMBS
Centennial Center for the Treatment of Obesity 2200 Murphy Ave**nue** Nashville, TN 37203	440161	**08/22/2005**	TN	ASMBS
Abbott Northwestern Hospital 800 East 28th Street Minneapolis, MN 55407	240057	**08/10/2005**	MN	ASMBS

Facility Name	Provider Number	Date Approved	State	Other Information
St. Mary's Hospital 5801 Bremo Road Richmond, VA 23226	490059	**11/4/2005**	VA	ASMBS
Northwestern Memorial Hospital 251 East Huron Street Chicago, IL 60611	140281	**09/25/2005**	IL	ASMBS
From: Southwest Washington Medical Center **To: PeaceHealth Southwest** 400 NE Mother Joseph Place Vancouver, WA 98664	500050	09/08/2008	WA	ASMBS
From: St. Mary's Medical Center **To: Essentia Health** 400 East 3rd Street Duluth, MN 55805	1457393035	11/03/2011	MN	ACS
Sacred Heart Hospital 421 Chew Street Allentown, PA 18102	390197	**02/01/2007**	PA	ASMBS
Frye Regional Medical Center **420 N Center Street** Hickory, NC 28601	340116	**8/31/2005**	NC	ASMBS
From: St. John Providence Weight Loss To: St. John Hospital and Medical Center 21101 Moross Road Detroit, MI 48236	230165	05/14/2011	MI	ACS
York Hospital 1001 South George Street York, PA 17405-7198	390046	**9/30/2005**	PA	ASMBS
Spectrum Health Hospital 1840 Wealthy Street, SE Grand Rapids, MI 49506	23-0038	**8/10/2005**	MI	ASMBS
Was: Gratiot Medical Center Now: MidMichigan Medical Center-Gratiot 300 E. Warwick Drive Alma, MI 48801	23-0030	07/30/2007	MI	ASMBS
Bon Secours Mary Immaculate Hospital **2 Bernardine Drive Newport News, VA 23602**	49-0041	08/30/2011	VA	ASMBS
Was: USC University Hospital Now: Keck Medical Center of USC 1500 San Pablo Street Los Angeles, CA 90033	05-0696	01/30/2008	CA	ASMBS
Methodist Dallas Medical Center P.O. Box 655999 Dallas, TX 75265-5999	45-0051	**05/15/2005**	TX	ASMBS
Virginia Commonwealth University Medical Center 1200 East Marshall Street Richmond, VA 23298-5049	Kellum: 20000094; Maher: 004732m98	**10/14/2005**	VA	ASMBS

Addendum XV: FDG-PET for Dementia and Neurodegenerative Diseases Clinical Trials (October through December 2011)

There were no FDG-PET for Dementia and Neurodegenerative Diseases Clinical Trials published in the October through December 2011 quarter.

This information is available on our Web site at www.cms.gov/MedicareApprovedFacilitie/PETDT/list.asp#TopOfPage.

For questions or additional information, contact Stuart Caplan, RN, MAS (410-786-8564)

[FR Doc. 2012–3967 Filed 2–17–12; 8:45 am]

BILLING CODE 4120–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Emergency Contingency Fund for Temporary Assistance for Needy Families (TANF) Programs OFA–100.

OMB No.: 0970–0366.

Description

On February 17, 2009, the President signed the American Recovery and Reinvestment Act of 2009 (Recovery Act), which establishes the Emergency Contingency Fund for State TANF Programs (Emergency Fund) as section 403(c) of the Social Security Act (the Act). This legislation provides up to $5 billion to help States, Territories, and Tribes in fiscal year (FY) 2009 and FY 2010 that have an increase in assistance caseloads and basic assistance expenditures, or in expenditures related to short-term benefits or subsidized employment. The Recovery Act made additional changes to TANF extending supplemental grants through FY 2010, expanding flexibility in the use of TANF funds carried over from one fiscal year to the next, and adding a hold-harmless provision to the caseload reduction credit for States and Territories serving more TANF families.

The Emergency Fund is intended to build upon and renew the principles of work and responsibility that underlie successful welfare reform initiatives. The Emergency Fund provides resources to States, Territories, and Tribes to support work and families during this difficult economic period.

On July 20, 2009 we issued a Program Instruction accompanied by the Emergency Fund Request Form (OFA–100), and instructions for jurisdictions to complete the OFA–100 to apply for emergency funds.

Failure to collect this data would compromise ACF's ability to monitor caseload and expenditure data that must increase in order for jurisdictions to receive awards under the Emergency Fund.

Documentation maintenance on financial reporting for the Emergency Fund is governed by 45 CFR 92.20 and 45 CFR 92.42.

ACF is planning to extend the information collection with the adjustment to the Estimated Annual Burden shown in the table below. Based on our projections for a lower Estimated Annual Burden, we have revised the Number of Responses per Respondent to 1 from its previous number of 5. Because the Number of Responses per Respondent has been revised, the Estimated Total Burden Hours is now 2,232, down from its previous number of 11,160.

Respondents

State, Territory, and Tribal agencies administering the Temporary Assistance for Needy Families (TANF) Program that are applying for the Emergency Fund.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
TANF Emergency Fund Request Form, OFA–100	93	1	24	2,232

Estimated Total Annual Burden Hours: 2,232.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov*. All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2012–3873 Filed 2–17–12; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: TANF Quarterly Financial Report, ACF–196.

OMB No.: 0970–0247.

Description: This information collection is authorized under Section 411(a)(3) of the Social Security Act. This request is for renewal of approval to use the Administration for Children and Families' (ACF) 196 form for periodic financial reporting under the Temporary Assistance for Needy Families (TANF) program. Approval of this information collection expires on April 30, 2012. States participating in the TANF program are required by statute to report financial data on a quarterly basis. This form meets the legal standard and provides essential data on the use of Federal funds. Failure to collect the data would seriously compromise ACF's ability to monitor program expenditures, estimate funding needs, and to prepare budget submissions required by Congress. Financial reporting under the TANF program is governed by 45 CFR part 265.

Respondents: TANF Agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ACF–196T	51	4	2	408
ACF–196	51	4	8	1,632

Estimated Total Annual Burden Hours: 2,040.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. Email address: *infocollection@acf.hhs.gov*. All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2012–3895 Filed 2–17–12; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–P–0170]

Determination That REQUIP XL (Ropinerole Hydrochloride) Extended-Release Tablets, 3 Milligrams, Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined that REQUIP XL (ropinerole hydrochloride) extended-release tablets, 3 milligrams (mg), were not withdrawn from sale for reasons of safety or effectiveness. This determination will allow FDA to approve abbreviated new drug applications (ANDAs) for ropinerole hydrochloride extended-release tablets, 3 mg, if all other legal and regulatory requirements are met.

FOR FURTHER INFORMATION CONTACT: Jay Sitlani, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6370, Silver Spring, MD 20993–0002, 301–796–3601.

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products under an ANDA procedure. ANDA applicants must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the ''listed drug,'' which is a version of the drug that was previously approved. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA). The only clinical data required in an ANDA are data to show that the drug that is the subject of the ANDA is bioequivalent to the listed drug.

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products With Therapeutic Equivalence Evaluations,'' which is known generally as the ''Orange Book.'' Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (§ 314.162 (21 CFR 314.162)).

A person may petition the Agency to determine, or the Agency may determine on its own initiative, whether a listed drug was withdrawn from sale for reasons of safety or effectiveness. This determination may be made at any time after the drug has been withdrawn from sale, but must be made prior to approving an ANDA that refers to the listed drug (§ 314.161 (21 CFR 314.161)). FDA may not approve an ANDA that does not refer to a listed drug.

REQUIP XL (ropinerole hydrochloride) extended-release tablets, 3 mg, are the subject of NDA 22–008, held by GlaxoSmithKline, and initially approved on June 13, 2008. REQUIP XL is indicated for the treatment of treatment of signs and symptoms of idiopathic Parkinson's disease.

REQUIP XL (ropinerole hydrochloride) extended-release tablets, 3 mg, are currently listed in the ''Discontinued Drug Product List'' section of the Orange Book. GlaxoSmithKline has never marketed REQUIP XL (ropinerole hydrochloride) extended-release tablets, 3 mg. In previous instances (see, e.g., 72 FR 9763, 61 FR 25497), the Agency has determined that, for purposes of §§ 314.161 and 314.162, never marketing an approved drug product is equivalent to withdrawing the drug from sale.

Lachman Consultant Services, Inc. submitted a citizen petition dated April 1, 2009 (Docket No. FDA–2009–P–0170), under 21 CFR 10.30, requesting that the Agency determine whether REQUIP XL (ropinerole hydrochloride) extended-release tablets, 3 mg, were withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records and based on the information we have at this time, FDA has determined under § 314.161 that REQUIP XL (ropinerole hydrochloride) extended-release tablets, 3 mg, were not withdrawn for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that REQUIP XL (ropinerole hydrochloride) extended-release tablets, 3 mg, were withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of REQUIP XL (ropinerole hydrochloride) extended-release tablets, 3 mg, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events. We have found no information that would indicate that this product was withdrawn from sale for reasons of safety or effectiveness.

Accordingly, the Agency will continue to list REQUIP XL (ropinerole hydrochloride) extended-release tablets, 3 mg, in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. ANDAs that refer to REQUIP XL (ropinerole hydrochloride) extended-release tablets, 3 mg, may be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling for this drug product should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: February 14, 2012.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2012–3954 Filed 2–17–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–D–0097]

Draft Guidance for Industry on Providing Submissions in Electronic Format—Standardized Study Data; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''Providing Submissions in Electronic Format—Standardized Study Data.'' This draft guidance establishes FDA's recommendation that sponsors and applicants submit nonclinical and clinical study data in a standardized electronic format. The draft guidance recognizes that standardized study data promotes the efficient review of this information. The purpose of this draft guidance is to promote the use of data standards for study data, and increase the number of standardized study data submissions to the Center for Drug Evaluation and Research, the Center for Biologics Evaluation and Research, and the Center for Devices and Radiological Health.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by April 23, 2012.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002 or the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Kieu Pham, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 21, Rm. 4677, Silver Spring, MD 20993–0002, 301–796–1616, or

Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852–1448, 301–827–6210, or

Terrie Reed, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 3324, Silver Spring, MD 20993–0002, 301–796–6130.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Providing Submissions in Electronic Format—Standardized Study Data.'' FDA routinely receives submissions of the results of scientific studies, including clinical trials and animal studies. For many years, FDA has requested that clinical study data be submitted electronically because paper case report tabulations (CRTs) are universally recognized as being highly inefficient to support analysis and review. The data in paper CRTs are not machine-readable and therefore cannot be easily analyzed using modern analytic software. Although submission of clinical study data in electronic format has become relatively routine, these data are often submitted using nonstandard formats.

FDA has long recognized the advantage of standardizing study data, as have many sponsors and applicants. Data submitted in a standard electronic format are easier to understand, analyze, and review.

This draft guidance establishes FDA's recommendation that sponsors and applicants submit clinical and nonclinical study data in a standard electronic format. As sponsors and applicants move toward standardized electronic study data submissions, there is a need to understand FDA's expectations for such data submissions. This draft guidance provides FDA's current thinking on the submission of study data in a standard electronic format.

The draft guidance refers submitters to FDA's Study Data Standards Resource Web page at *http://www.fda.gov/For Industry/DataStandards/StudyData Standards/default.htm,* where there is useful information describing which data standards to use and how to use them.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on submitting standardized study data in electronic format. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the

requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 314 and 21 CFR part 312 have been approved under OMB control numbers 0910–0001 and 0910–0014, respectively. The collections of information in 21 CFR part 807, subpart E have been approved under 0910–0120; the collections of information in 21 CFR part 812 have been approved under 0910–0078; and the collections of information in 21 CFR part 814 have been approved under 0910–0231.

IV. Electronic Access

Persons with access to the Internet may obtain the document at *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm, http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm,* or *http://www.regulations.gov.*

Dated: February 14, 2012.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2012–3956 Filed 2–17–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2006–D–0036] (Formerly Docket No. 2006D–0344)

Draft Guidance for Industry on Drug Interaction Studies—Study Design, Data Analysis, Implications for Dosing, and Labeling Recommendations; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a revised draft guidance for industry entitled ''Drug Interaction Studies—Study Design, Data Analysis, Implications for Dosing, and Labeling Recommendations.'' The revised draft guidance is intended to provide recommendations for sponsors of new drug applications (NDAs) and biologics license applications (BLAs) for therapeutic biologics regarding in vitro and in vivo studies of drug metabolism, drug transport, and drug-drug, or drug-therapeutic protein interactions.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this revised draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by May 21, 2012.

ADDRESSES: Submit written requests for single copies of the revised draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:

Shiew-Mei Huang, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 3188, Silver Spring, MD 20993–0002, 301–796–1541; or

Lei Zhang, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 3106, Silver Spring, MD 20993–0002, 301–796–1635.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a revised draft guidance for industry entitled ''Drug Interaction Studies—Study Design, Data Analysis, Implications for Dosing, and Labeling Recommendations.'' Drug interactions can result when one drug alters the pharmacokinetics of another drug or its metabolites. Drug interactions also can reflect the additive nature of the pharmacodynamic effect of either drug when taken with the other drug. The main focus of this draft guidance is pharmacokinetic drug interactions. The revised draft guidance reflects the Agency's view that the pharmacokinetic interactions between an investigational new drug and other drugs should be defined during drug development, as part of an adequate assessment of safety and effectiveness. It is important to understand the nature and magnitude of drug-drug interactions for several reasons. Concomitant medications, dietary supplements, and some foods, such as grapefruit juice, may alter metabolism and/or drug transport abruptly in individuals who previously had been receiving and tolerating a particular dose of a drug. Such an abrupt alteration in metabolism or transport can change the known safety and efficacy of a drug.

The revised draft guidance provides recommendations for sponsors of NDAs and BLAs regarding in vitro and in vivo studies of drug metabolism, drug transport, and drug-drug, or drug-therapeutic protein interactions. Namely, the guidance describes in vitro study methodologies, criteria for in vivo studies, in vivo study design, and data analysis in the context of identifying potential drug interactions. The guidance also addresses the implications of drug interactions for dosing and labeling.

In the **Federal Register** of September 12, 2006 (71 FR 53696), FDA announced the availability of a draft guidance entitled ''Drug Interaction Studies—Study Design, Data Analysis, and Implications for Dosing and Labeling.'' Comments were received and have been considered during revision of the draft guidance. In addition, new developments in the field have been incorporated to reflect the Agency's current thinking. The Agency is publishing the draft guidance as a revised draft guidance to collect additional public comments. The revised draft guidance includes detailed discussion of several major changes, including the following: (1) When transporter-mediated drug interaction information is needed (including decision-trees); (2) drug-therapeutic protein interactions, (3) the utility of pharmacogenetic data; and (4) the use of physiologically based pharmacokinetic modeling.

This revised draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when

finalized, will represent the Agency's current thinking on conducting drug interaction studies during drug development to support marketing approval. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirement of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This revised draft guidance refers to previously approved collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR 201.57 have been approved under OMB control number 0910–0572.

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances* or *http://www.regulations.gov*.

Dated: February 15, 2012.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2012–3958 Filed 2–17–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–D–0500]

Guidance for Industry: Early Clinical Trials With Live Biotherapeutic Products: Chemistry, Manufacturing, and Control Information; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a document entitled ''Guidance for Industry: Early Clinical Trials With Live Biotherapeutic Products: Chemistry, Manufacturing, and Control Information '' dated February 2012. The guidance provides certain Investigational New Drug Application (IND) sponsors with recommendations in connection with the submission of INDs for early clinical trials with live biotherapeutic products (LBPs). The guidance announced in this notice finalizes the draft guidance of the same title dated September 2010.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: Submit written requests for single copies of this guidance to the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to *http://www.regulations.gov*. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Benjamin A. Chacko, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a document entitled ''Guidance for Industry: Early Clinical Trials With Live Biotherapeutic Products: Chemistry, Manufacturing, and Control Information'' dated February 2012. The guidance provides certain IND sponsors with recommendations in connection with IND submissions for early clinical trials for LBPs in the United States. The guidance focuses on the chemistry, manufacturing, and control information that should be provided in an IND for early clinical trials evaluating LBPs. The guidance is applicable to INDs of LBPs, whether clinical trials are conducted commercially, in an academic setting, or otherwise.

In the **Federal Register** of October 14, 2010 (75 FR 63188), FDA announced the availability of the draft guidance of the same title dated September 2010. FDA received a few comments on the draft guidance and those comments were considered as the guidance was finalized. In response to comments, changes incorporated in the final guidance include the addition of text related to the scope, definitions and background section of the guidance. In addition, editorial changes were made to improve clarity. The guidance announced in this notice finalizes the draft guidance dated September 2010.

The guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents FDA's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

The guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 312 have been approved under 0910–0014.

III. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IV. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov*.

Dated: February 14, 2012.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2012–3957 Filed 2–17–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0528]

International Conference on Harmonisation; Guidance on E7 Studies in Support of Special Populations; Geriatrics; Questions and Answers; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance entitled ''E7 Studies in Support of Special Populations: Geriatrics; Questions and Answers.'' The guidance was prepared under the auspices of the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH). The questions and answers (Q&A) guidance addresses special considerations for the design and conduct of clinical trials of drugs likely to have significant use in the elderly. The Q&As are intended to provide guidance on the use of geriatric data to adequately characterize and represent the safety and efficacy of a drug for a marketing application, including data collected postmarketing.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002, or the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Regarding the guidance:

Robert Temple, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, rm. 4212, Silver Spring, MD 20993–0002 301–796–2270; or

Nisha Jain, Center for Biologics Evaluation and Research (HFM–392), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–6110.

Regarding the ICH:

Michelle Limoli, Office of International Programs, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 3506, Silver Spring, MD 20993–0002, 301–796–4600.

SUPPLEMENTARY INFORMATION:

I. Background

In recent years, many important initiatives have been undertaken by regulatory authorities and industry associations to promote international harmonization of regulatory requirements. FDA has participated in many meetings designed to enhance harmonization and is committed to seeking scientifically based harmonized technical procedures for pharmaceutical development. One of the goals of harmonization is to identify and then reduce differences in technical requirements for drug development among regulatory Agencies.

ICH was organized to provide an opportunity for tripartite harmonization initiatives to be developed with input from both regulatory and industry representatives. FDA also seeks input from consumer representatives and others. ICH is concerned with harmonization of technical requirements for the registration of pharmaceutical products among three regions: The European Union, Japan, and the United States. The six ICH sponsors are the European Commission; the European Federation of Pharmaceutical Industries Associations; the Japanese Ministry of Health, Labour, and Welfare; the Japanese Pharmaceutical Manufacturers Association; the Centers for Drug Evaluation and Research and Biologics Evaluation and Research, FDA; and the Pharmaceutical Research and Manufacturers of America. The ICH Secretariat, which coordinates the preparation of documentation, is provided by the International Federation of Pharmaceutical Manufacturers Associations (IFPMA).

The ICH Steering Committee includes representatives from each of the ICH sponsors and the IFPMA, as well as observers from the World Health Organization, Health Canada, and the European Free Trade Area.

In the **Federal Register** of November 10, 2009 (74 FR 58024), FDA published a notice announcing the availability of a draft guidance entitled ''E7 Studies in Support of Special Populations: Geriatrics Questions & Answers.'' The notice gave interested persons an opportunity to submit comments by January 11, 2010.

After consideration of the comments received and revisions to the guidance, a final draft of the guidance was submitted to the ICH Steering Committee and endorsed by the three participating regulatory Agencies in July 2010.

The Q&A guidance addresses special considerations for the design and conduct of clinical trials of drugs that are likely to have significant use in the elderly. The Q&As are intended to provide guidance on the use of geriatric data to adequately characterize and represent the safety and efficacy of a drug for a marketing application, including data collected postmarketing.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the Agency's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the document at *http://www.regulations.gov*, *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm*, or *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm.*

Dated: February 14, 2012.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2012–3955 Filed 2–17–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (Section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call the HRSA Reports Clearance Officer at (301) 443–1984.

Comments are invited on: (a) The proposed collection of information for the proper performance of the functions of the Agency; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: Rural Health Information Technology Network Development (OMB No. 0915–xxxx) – [New]

The purpose of the Rural Health Information Technology Network Development (RHITND) Program, authorized under the Public Health Service Act, Section 330A(f) (42 U.S.C. 254c) as amended by Section 201, Public Law 107–251 of the Health Care Safety Net Amendments of 2002, is to improve health care and support the adoption of Health Information Technology (HIT) in rural America by providing targeted HIT support to rural health networks. HIT plays a significant role in the advancement of the Department of Health and Human Services' (HHS) priority policies to improve health care delivery. Some of these priorities include: improving health care quality, safety, and efficiency, reducing disparities, engaging both patients and families in managing their health, enhancing care coordination, improving population and public health, and ensuring adequate privacy and security of health information.

The intent of RHITND is to support the adoption and use of electronic health records (EHR) in coordination with the ongoing HHS activities related to the Health Information Technology for Economic and Clinical Health (HITECH) Act (Pub. L. 111–5). This legislation provides HHS with the authority to establish programs to improve health care quality, safety, and efficiency through the promotion of health information technology, including EHR.

For this program, performance measures were drafted to provide data useful to the program and to enable HRSA to provide aggregate program data required by Congress under the Government Performance and Results Act (GPRA) of 1993 (Pub. L. 103–62). These measures cover the principal topic areas of interest to the Office of Rural Health Policy (ORHP), including: (a) Access to care; (b) the underinsured and uninsured; (c) workforce recruitment and retention; (d) sustainability; (e) health information technology; (f) network development; and (g) health-related clinical measures. Several measures will be used for this program. These measures will speak to ORHP's progress toward meeting the goals set.

The annual estimate of burden is as follows:

Instrument	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden hours
Rural Health Information Technology Network Development Program	41	1	41	4.12	168.92
Total	41	1	41	4.12	168.92

Email comments to *paperwork@hrsa.gov* or mail the HRSA Reports Clearance Officer, Room 10–29, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: February 14, 2012.

Reva Harris,

Acting Director, Division of Policy and Information Coordination.

[FR Doc. 2012–3919 Filed 2–17–12; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2011–1074]

Collection of Information Under Review by Office of Management and Budget

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding Information Collection Requests (ICRs), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting approval of a revision to the following collection of information: 1625–0010, Defect/Noncompliance Report and Campaign Update Report. Our ICRs describe the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: Comments must reach the Coast Guard and OIRA on or before March 22, 2012.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2011–1074 to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT) and/or to OIRA. To avoid

duplicate submissions, please use only one of the following means:

(1) *Online:* (a) To Coast Guard docket at *http://www.regulations.gov.* (b) To OIRA by email via: *OIRA-submission@omb.eop.gov.*

(2) *Mail:* (a) DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. (b) To OIRA, 725 17th Street NW., Washington, DC 20503, attention Desk Officer for the Coast Guard.

(3) *Hand Delivery:* To DMF address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* (a) To DMF, 202–493–2251. (b) To OIRA at 202–395–6566. To ensure your comments are received in a timely manner, mark the fax, attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov.*

Copies of the ICRs are available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–611), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2100 2nd St SW., Stop 7101, Washington DC 20593–7101.

FOR FURTHER INFORMATION CONTACT: Ms. Kenlinishia Tyler, Office of Information Management, telephone 202–475–3652 or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collections. There is one ICR for each Collection.

The Coast Guard invites comments on whether these ICRs should be granted based on the Collections being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collections; (2) the accuracy of the estimated burden of the Collections; (3) ways to enhance the quality, utility, and clarity of information subject to the Collections; and (4) ways to minimize the burden of the Collections on respondents, including the use of automated collection techniques or other forms of information technology. These comments will help OIRA determine whether to approve the ICRs referred to in this Notice.

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG 2011–1074, and must be received by March 22, 2012. We will post all comments received, without change, to *http://www.regulations.gov.* They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the ''Privacy Act'' paragraph below.

Submitting Comments

If you submit a comment, please include the docket number [USCG–2011–1074], indicate the specific section of the document to which each comment applies, providing a reason for each comment. If you submit a comment online via *www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the DMF. We recommend you include your name, mailing address, an email address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission.

You may submit comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**, but please submit them by only one means. To submit your comment online, go to *http://www.regulations.gov,* and type ''USCG–2011–1074'' in the ''Keyword'' box. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and will address them accordingly.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this Notice as being available in the docket, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2011–1074'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the DMF in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

OIRA posts its decisions on ICRs online at *http://www.reginfo.gov/public/do/PRAMain* after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Number: 1625–0010.

Privacy Act

Anyone can search the electronic form of comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act statement regarding Coast Guard public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (76 FR 77243, December 12, 2011) required by 44 U.S.C. 3506(c)(2). That Notice elicited no comments.

Information Collection Request

Title: Defect/Noncompliance Report and Campaign Update Report.

OMB Control Number: 1625–0010.

Type of Request: Revision of a currently approved collection.

Respondents: Manufacturers of boats and certain items of ''designated'' associated equipment (inboard engines, outboard motors, sterndrive engines or an inflatable personal flotation device approved under 46 CFR 160.076).

Abstract: Manufacturers whose products contain defects that create a substantial risk of personal injury to the public or fail to comply with an applicable Coast Guard safety standard are required to conduct defect notification and recall campaigns in accordance with 46 U.S.C. 4310. Regulations in 33 CFR part 179 require manufacturers to submit certain reports to the Coast Guard concerning progress made in notifying owners and making repairs.

Forms: CG–4917 & CG–4918.

Burden Estimate: The estimated burden has decreased from 291 to 252 hours annually.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: February 10, 2012.

R.E. Day,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2012–3867 Filed 2–17–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2012–0077]

Information Collection Requests to Office of Management and Budget

AGENCY: Coast Guard, DHS.

ACTION: Sixty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit Information Collection Requests (ICRs) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting approval of revisions to the following collections of information: 1625–0014, Request for Designation and Exemption of Oceanographic Research Vessels and 1625–0088, Voyage Planning for Tank Barge Transits in the Northeast United States. Our ICRs describe the information we seek to collect from the public. Before submitting these ICRs to OIRA, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before April 23, 2012.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2012–0077] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT). To avoid duplicate submissions, please use only one of the following means:

(1) *Online: http://www.regulations.gov.*

(2) *Mail:* DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251. To ensure your comments are received in a timely manner, mark the fax, to attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov.*

Copies of the ICRs are available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–611), Attn Paperwork Reduction Act Manager, US Coast Guard, 2100 2ND ST SW STOP 7101, Washington DC 20593–7101.

FOR FURTHER INFORMATION CONTACT: Ms. Kenlinishia Tyler, Office of Information Management, telephone 202–475–3652, or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collections. There is one ICR for each Collection.

The Coast Guard invites comments on whether these ICRs should be granted based on the Collections being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collections; (2) the accuracy of the estimated burden of the Collections; (3) ways to enhance the quality, utility, and clarity of information subject to the Collections; and (4) ways to minimize the burden of the Collections on respondents, including the use of automated collection techniques or other forms of information technology. In response to your comments, we may revise these ICRs or decide not to seek approval for the Collections. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2012–0077], and must be received by April 23, 2012. We will post all comments received, without change, to *http://www.regulations.gov.* They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the ''Privacy Act'' paragraph below.

Submitting Comments

If you submit a comment, please include the docket number [USCG–2012–0077], indicate the specific section of the document to which each comment applies, providing a reason for each comment. You may submit your comments and material online (*via http://www.regulations.gov*), by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the DMF. We recommend you include your name, mailing address, an email address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission.

You may submit your comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. To submit your comment online, go to *http://www.regulations.gov,* and type ''USCG–2012–0077'' in the ''Keyword'' box. If you submit your comments by mail or hand delivery, submit them in an

unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and will address them accordingly.

Viewing comments and documents: To view comments, as well as documents mentioned in this Notice as being available in the docket, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2012–0077'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the DMF in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act

Anyone can search the electronic form of comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act statement regarding Coast Guard public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Information Collection Requests

1. *Title:* Request for Designation and Exemption of Oceanographic Research Vessels.

OMB Control Number: 1625–0014.

Summary: This collection requires submission of specific information about a vessel in order for the vessel to be designated as an Oceanographic Research Vessel (ORV).

Need: Title 46 U.S.C. 2113 authorizes the Secretary of the Department of Homeland Security to exempt Oceanographic Research Vessels (ORV), by regulation, from provisions of Subtitle II, of Title 46, Shipping, of the United States Code, concerning maritime safety and seaman's welfare laws. This information is necessary to ensure a vessel qualifies for the designation of ORV under 46 CFR Part 3 and 46 CFR part 14, subpart D.

Forms: None.

Respondents: Owners or operators of certain vessels.

Frequency: On occasion.

Burden Estimate: The estimated burden has increased from 35 hours to 51 hours a year.

2. *Title:* Voyage Planning for Tank Barge Transits in the Northeast United States.

OMB Control Number: 1625–0088.

Summary: The information collection requirement for a voyage plan serves as a preventive measure and assists in ensuring the successful execution and completion of a voyage in the First Coast Guard District. This rule (33 CFR 165.100) applies to primary towing vessels engaged in towing certain tank barges carrying petroleum oil in bulk as cargo.

Need: Section 311 of the Coast Guard Authorization Act of 1998, Public Law 105–383, 33 U.S.C. 1231, and 46 U.S.C. 3719 authorize the Coast Guard to promulgate regulations for towing vessel and barge safety for the waters of the Northeast subject to the jurisdiction of the First Coast Guard District. This regulation is contained in 33 CFR 165.100. The information for a voyage plan will provide a mechanism for assisting vessels towing tank barges to identify those specific risks, potential equipment failures, or human errors that may lead to accidents.

Forms: None.

Respondents: Owners and operators of towing vessels.

Frequency: On occasion.

Burden Estimate: The estimated burden has decreased from 2,692 hours to 1,116 hours a year.

Dated: February 10, 2012.

R.E. Day,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2012–3865 Filed 2–17–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2011–0038; OMB No. 1660–0034]

Agency Information Collection Activities: Proposed Collection; Comment Request, Emergency Management Institute Course Evaluation 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 revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the Emergency Management Institute Course Evaluation Form, which is used to evaluate the quality of course deliveries, facilities, and instructors at the Emergency Management Institute (EMI).

DATES: Comments must be submitted on or before March 22, 2012.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or email address *FEMA–Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: Emergency Management Institute Course Evaluation Form.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0034.

Form Titles and Numbers: FEMA Form 092–0–3, Emergency Management Institute Course Evaluation Form.

Affected Public: State, Local, or Tribal Government, Individuals or households.

Estimated Number of Respondents: 36,444.

Frequency of Response: On occasion.

Estimated Average Hour Burden per Respondent: .08 hours.

Estimated Total Annual Burden Hours: 2,746.

Estimated Cost: The estimated annual cost to respondents for the hour burden is $135,981.37. There is no estimated annual cost to respondents for operations and maintenance costs for technical services. There are no annual

start-up or capital costs. The cost to the Federal government is $77,775.50.

John G. Jenkins, Jr.,

Acting Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2012–3847 Filed 2–17–12; 8:45 am]

BILLING CODE 9111–72–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2007–0008]

National Advisory Council

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Committee Management; Request for Applicants for Appointment to the National Advisory Council.

SUMMARY: The Federal Emergency Management Agency (FEMA) is requesting individuals who are interested in serving on the National Advisory Council (NAC) to apply for appointment. As provided for in the *Department of Homeland Security Appropriations Act of 2007,* the NAC shall advise the Administrator of the Federal Emergency Management Agency (FEMA) on all aspects of emergency management. The NAC shall incorporate State, local and tribal government and private sector input in the development and revision of the national preparedness goal, the national preparedness system, the National Incident Management System, the National Response Plan, and other related plans and strategies. Currently, the NAC consists of 35 members, all of whom are experts and leaders in their respective fields. The terms for nine positions on the Council will expire June 15, 2012. FEMA invites interested applicants to apply as identified in this notice.

DATES: The membership application period is from Friday, February 10, 2012 to Friday, March 9, 2012, 5 p.m. EST.

ADDRESSES: Applications for membership should be submitted by:

- *Email: FEMA–NAC@dhs.gov.*
- *Fax:* (540) 504–2331.
- *Mail:* The National Advisory Council Office, Federal Emergency Management Agency (Room 832), 500 C Street SW., Washington, DC 20472–3100.

FOR FURTHER INFORMATION CONTACT: Alexandra Woodruff, The Office of the National Advisory Council, Federal Emergency Management Agency (Room 832), 500 C Street SW., Washington, DC 20472–3100; telephone (202) 646–3746; fax (540) 504–2331; and email *FEMA–NAC@dhs.gov.* For more information on the National Advisory Council, please visit *http://www.fema.gov/about/nac.*

SUPPLEMENTARY INFORMATION: The National Advisory Council (NAC) is an advisory committee established in accordance with the provisions of the *Federal Advisory Committee Act* (FACA), 5 U.S.C. App. 1, *et seq.* (Pub. L. 92–463). As required by the Homeland Security Act, the Secretary of Homeland Security established the NAC to ensure effective and ongoing coordination of Federal preparedness, protection, response, recovery, and mitigation for natural disasters, acts of terrorism, and other man-made disasters (6 U.S.C. 318). The Federal Emergency Management Agency (FEMA) is requesting individuals who are interested in serving on the NAC to apply for appointment. The terms for nine positions on the Council will expire June 15, 2012. Accordingly, the following discipline areas are open for applications and nominations: Emergency Management (one representative appointment), Emergency Response (two representative appointments), State Elected Official (one representative appointment), FEMA Administrator Selection (one representative or Special Government Employee (SGE) appointment), In-Patient Medical Provider (one SGE appointment), Cyber Security (one SGE appointment), and Local Elected Official (one representative appointment). Additionally, there is an *Ex Officio* position for a representative from Homeland Security Advisory Council which will be filled by a current member of the Homeland Security Advisory Council.

Qualified individuals interested in serving on the NAC are invited to apply for appointment by submitting a Resume or Curriculum Vitae (CV) to the Office of the National Advisory Council as listed in the **ADDRESSES** section of this notice. Letters of recommendation may also be provided, but are not required. Applications must include the following information: the applicant's full name, home and business phone numbers, preferred email address, home and business mailing addresses, current position title & organization, and the discipline area of interest (i.e., Emergency Management). Current Council members whose terms are ending should notify the Office of the National Advisory Council of their interest in reappointment in lieu of submitting a new application, and if desired, provide an updated resume or CV and letters of recommendation for consideration.

Appointees may be designated as Special Government Employees (SGE) as defined in section 202(a) of title 18, United States Code, or as a Representative appointment. Candidates selected for appointment as SGEs are required to complete a Confidential Financial Disclosure Form (Office of Government Ethics (OGE) Form 450). OGE Form 450 or the information contained therein may not be released to the public except under an order issued by a Federal court or as otherwise provided under the *Privacy Act* (5 U.S.C. 552a). This form can be obtained by visiting the Web Site of the Office of Government Ethics (), or by contacting the Office of the National Advisory Council. Contact information is provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

The NAC will meet in plenary session approximately once per quarter. With respect to the quarterly meetings, it is anticipated that the Council will hold at least one teleconference meeting with public call-in lines. Members may be reimbursed for travel and per diem, and all travel for Council business must be approved in advance by the Designated Federal Officer. The Department of Homeland Security (DHS) does not discriminate in employment on the basis of race, color, religion, sex, national origin, political affiliation, sexual orientation, gender identity, marital status, disability and genetic information, age, membership in an employee organization, or other non-merit factor. DHS strives to achieve a widely diverse candidate pool for all of its recruitment actions. Registered lobbyists, current FEMA employees, Disaster Assistance Employees, FEMA Contractors, and potential FEMA Contractors will not be considered for membership.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–3845 Filed 2–17–12; 8:45 am]

BILLING CODE 9111–48–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs And Border Protection

Agency Information Collection Activities: Declaration of Owner and Declaration of Consignee When Entry Is Made by an Agent

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; Extension of an existing information collection.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Declaration of Owner and Declaration of Consignee When Entry is made by an Agent (CBP Forms 3347 and 3347A). This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (76 FR 75893) on December 5, 2011, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before March 22, 2012.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

SUPPLEMENTARY INFORMATION: U.S. Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act (Pub. L. 104–13). Your comments should address one of the following four points:

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

(2) Evaluate the accuracy of the agencies/components 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 collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information.

Title: Declaration of Owner and Declaration of Consignee When Entry is made by an Agent.

OMB Number: 1651–0093.

Form Number: CBP Forms 3347 and 3347A.

Abstract: CBP Form 3347, *Declaration of Owner,* is a declaration from the owner of imported merchandise stating that he/she agrees to pay additional or increased duties, therefore releasing the importer of record from paying such duties. This form must be filed within 90 days from the date of entry. CBP Form 3347 is provided for by 19 CFR 24.11 and 141.20.

When entry is made in a consignee's name by an agent who has knowledge of the facts and who is authorized under a proper power of attorney by that consignee, a declaration from the consignee on CBP Form 3347A, *Declaration of Consignee When Entry is Made by an Agent,* shall be filed with the entry summary. If this declaration is filed, then no bond to produce a declaration of the consignee is required. CBP Form 3347 is provided for by 19 CFR 141.19(b)(2).

CBP Forms 3347 and 3347A are authorized by 19 U.S.C. 1485(d) and are accessible at *http://www.cbp.gov/xp/cgov/toolbox/forms/.*

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

CBP Form 3347

Estimated Number of Respondents: 900.

Estimated Number of Responses per Respondent: 6.

Estimated Total Annual Responses: 5,400.

Estimated Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 540.

CBP Form 3347A

Estimated Number of Respondents: 50.

Estimated Number of Responses per Respondent: 6.

Estimated Total Annual Responses: 300.

Estimated Time per Response: 6 minutes.

Estimated Total Annual Burden Hours: 30.

If additional information is required contact: Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

Dated: February 13, 2012.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2012–3852 Filed 2–17–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: NAFTA Regulations and Certificate of Origin

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day Notice and request for comments; Extension of an existing collection of information: 1651–0098.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: NAFTA Regulations and Certificate of Origin. This is a proposed revision and extension of an information collection that was previously approved. CBP is proposing that this information collection be revised with a change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (77 FR 76983) on December 9, 2011, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before March 22, 2012.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or recordkeepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: NAFTA Regulations and Certificate of Origin.

OMB Number: 1651–0098.

Form Number: CBP Forms 434, 446, and 447.

Abstract: On December 17, 1992, the U.S., Mexico and Canada entered into an agreement, ''The North American Free Trade Agreement'' (NAFTA). The provisions of NAFTA were adopted by the U.S. with the enactment of the North American Free Trade Agreement Implementation Act of 1993 (Pub. L. 103–182).

CBP Form 434, *North American Free Trade Certificate of Origin,* is used to certify that a good being exported either from the United States into Canada or Mexico or from Canada or Mexico into the United States qualifies as an originating good for purposes of preferential tariff treatment under the NAFTA. This form is completed by exporters and/or producers and furnished to CBP upon request. CBP Form 434 is provided for by 19 CFR 181.11 and is accessible at: *http://forms.cbp.gov/pdf/CBP_Form_434.pdf.*

The CBP Form 446, *NAFTA Verification of Origin Questionnaire,* is a questionnaire that CBP personnel use to gather sufficient information from exporters and/or producers to determine whether goods imported into the United States qualify as originating goods for the purposes of preferential tariff treatment under NAFTA. CBP Form 446 is provided for by 19 CFR 181.72 and is accessible at: *http://forms.cbp.gov/pdf/CBP_Form_446.pdf.*

CBP is also seeking approval of Form 447, *North American Free Trade Agreement Motor Vehicle Averaging Election,* in order to gather information required by 19 CFR 181 Appendix, Section 11, (2) ''Information Required When Producer Chooses to Average for Motor Vehicles.'' This form is provided to CBP when a manufacturer chooses to average motor vehicles for the purpose of obtaining NAFTA preference.

Current Actions: This submission is being made to extend the expiration date for CBP Forms 434 and 446, and to add Form 447.

Type of Review: Revision.

Affected Public: Businesses.

Form 434, NAFTA Certificate of Origin

Estimated Number of Respondents: 40,000.

Estimated Number of Responses per Respondent: 3.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 30,000.

Form 446, NAFTA Questionnaire

Estimated Number of Respondents: 400.

Estimated Number of Responses per Respondent: 1.

Estimated Time per Response: 45 minutes.

Estimated Total Annual Burden Hours: 300.

Form 447, NAFTA Motor Vehicle Averaging Election

Estimated Number of Respondents: 11.

Estimated Number of Responses per Respondent: 1.28.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 14.

Dated: February 13, 2012.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2012–3825 Filed 2–17–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5500–FA–33]

Announcement of Funding Awards for the Community Challenge Planning Grant Program for Fiscal Year 2011

AGENCY: Office of Sustainable Housing and Communities, HUD.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department in a competition for funding under the Fiscal Year 2011 (FY 2011) Notice of Funding Availability (NOFA) for the Community Challenge Planning Grant Program (Challenge Grants). This announcement contains the consolidated names and addresses of this year's award recipients.

FOR FURTHER INFORMATION CONTACT: Dwayne S. Marsh, Office of Sustainable Housing and Communities, U.S. Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410–4500, telephone (202) 402–6316. Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Community Challenge Planning Grant Program fosters reform and reduces barriers to achieving affordable, economically vital, and sustainable communities. Such efforts may include amending or replacing local master plans, zoning codes, and building codes, either on a jurisdiction-wide basis or in a specific neighborhood, district, corridor, or sector to promote mixed-use development, affordable housing, the reuse of older buildings and structures for new purposes, and similar activities with the goal of promoting sustainability at the local or neighborhood level. This Program also

supports the development of affordable housing through the development and adoption of inclusionary zoning ordinances and other activities to support plan implementation.

The FY 2011 awards announced in this Notice were selected for funding in a competition posted on Grants.gov and HUD's Web site on July 27, 2011. Applications were scored and selected for funding based on the selection criteria in that NOFA. The amount appropriated in FY 2011 to fund the Challenge Grant Program was $30 million of which $1 million had been reserved for capacity support grants distributed separately. This notice announces the allocation of $28 million for Community Challenge Planning Grants, of which not less than $3 million is awarded to jurisdictions with populations of less than 50,000.

In accordance with Section 102 (a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat.1987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and amounts of the 27 awards made under the competition in Appendix A to this document.

Dated: December 22, 2011.

Shelley Poticha,

Director, Office of Sustainable Housing and Communities.

Appendix A

COMMUNITY CHALLENGE PLANNING GRANT PROGRAM GRANT AWARDS FROM FY 2011 NOTICE OF FUNDING AVAILABILITY

City of Boston, 26 Court Street, Boston, MA: Massachusetts 02108–2501	$1,865,160
City of Beaverton, 4755 SW Griffith Drive, PO Box 4755, Beaverton, OR: Oregon 97076–4755	1,000,000
The Hopi Tribe, P.O. Box 123, Kykotsmovi, AZ: Arizona 86039–123	150,000
Thurston Regional Planning Council, 2424 Heritage Ct. SW., Suite A, Olympia, WA: Washington 98502–6013	763,962
City of Seattle, P.O. Box 94725, Seattle, WA: Washington 98124–4725	2,999,257
City of Phoenix, AZ, 200 W. Washington Street, 3rd Floor, Phoenix, AZ: Arizona 85003–1611	2,935,634
New Hampshire Housing Finance Authority, 32 Constitution Drive, Bedford, NH: New Hampshire 03110–6000	1,000,000
Pueblo de Cochiti Housing Authority, P.O. Box 98, Cochiti, NM: New Mexico 87072–0000	292,023
Town of Mansfield, Audrey P. Beck Municipal Building, 4 South Eagleville Road, Mansfield, CT: Connecticut 06268–2599	610,596
City of Stamford, 888 Washington Boulevard, Stamford, CT: Connecticut 06904–2152	1,105,288
Montachusett Regional Planning Commission, 1427 Water Street Rear Building, Fitchburg, MA: Massachusetts 01420–7266	129,500
City of Worcester, 455 Main St., Worchester, MA: Massachusetts 01608–1821	930,000
Mid-America Regional Council, 600 Broadway, Suite 200, Kansas City, MO: Missouri 64105–1659	403,432
City of Austin, 1000 E. 11th St., Austin, TX: Texas 78702–1943	3,000,000
City of Freeport, Illinois, 230 West Stephenson Street, Freeport, IL: Illinois 61032–4359	295,419
The Village of Oak Park, 123 Madison Street, Oak Park, IL: Illinois 60302–4272	2,916,272
City of Grand Rapids, 1120 Monroe Avenue NW., Suite 300, Grand Rapids, MI: Michigan 49503–1038	459,224
County of Washtenaw, 220 N. Main Street, P.O. Box 8645, Ann Arbor, MI: Michigan 48107–8645	3,000,000
City of Warren, 391 Mahoning Avenue, Warren, OH: Ohio 44483–1000	356,964
Housing Authority of the County of Sacramento, 801 12th Street, Sacramento, CA: California 95814–2404	150,000
City of West Sacramento, 1110 West Capitol Avenue, West Sacramento, CA: California 95691–2717	400,000
Parish of St. Charles, 15045 River Road, P.O. Box 302, Hahnville, LA: Louisiana 70057–0302	442,422
City of High Point, 211 South Hamilton Street, High Point, NC: North Carolina 27260–5232	239,141
City of Binghamton, 38 Hawley Street, Binghamton, NY: New York 13901–3767	486,058
City of Garland, TX, P.O. Box 469002, 800 Main Street, Garland, TX: Texas 75046–9002	106,500
City of Opa-locka, 780 Fisherman Street, 4th Floor, Opa-locka, FL: Florida 33054–3806	624,479
Palm Beach County Board of County Commissioners, 301 North Olive Avenue, West Palm Beach, FL: Florida 33401–4700	1,980,504
Total	28,641,835

[FR Doc. 2012–3947 Filed 2–17–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5500–FA–30]

Announcement of Funding Awards for the Sustainable Communities Regional Planning Grant Program for Fiscal Year 2011

AGENCY: Office of Sustainable Housing and Communities, HUD.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department in a competition for funding under the Fiscal Year 2011 (FY 2011) Notice of Funding Availability (NOFA) for the Sustainable Communities Regional Planning Grant Program (Regional Grants). This announcement contains the consolidated names and addresses of this year's award recipients.

FOR FURTHER INFORMATION CONTACT: Dwayne S. Marsh, Office of Sustainable Housing and Communities, U.S. Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410–4500, telephone (202) 402–6316. Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Sustainable Communities Regional Planning Grant Program (Program) supports metropolitan and multijurisdictional planning efforts that integrate housing, land use, economic and workforce development, transportation, and infrastructure investments in a manner that empowers jurisdictions to consider the interdependent challenges of: (1) Economic competitiveness and revitalization; (2) social equity, inclusion, and access to opportunity; (3) energy use and climate change; and (4) public health and environmental impact. The Program places a priority on investing in partnerships, including nontraditional partnerships (e.g., arts and culture, recreation, public health, food systems, regional planning agencies and public education entities) that translate the Livability Principles (Section I.C.1) into strategies that direct long-term development and reinvestment, demonstrate a commitment to addressing issues of regional significance, use data to set and monitor progress toward performance goals, and engage stakeholders and

residents in meaningful decision-making roles.

Funding from this Program will support the development and implementation of Regional Plans for Sustainable Development (RPSD) that:

a. Identify affordable housing, transportation, water infrastructure, economic development, land use planning, environmental conservation, energy system, open space, and other infrastructure priorities for the region;

b. Clearly define a single, integrated plan for regional development that addresses potential population growth or decline over a minimum 20-year time frame, sets appropriate 3- to 5-year benchmark performance targets, and delineates strategies to meet established performance goals;

c. Establish performance goals and measures that are, at a minimum, consistent with the Sustainability Partnership's Livability Principles;

d. Use geo-coded data sets and other metrics in developing, implementing, monitoring, and assessing the performance goals of various reinvestment scenarios;

e. Provide detailed plans, maps, policies, and implementation strategies to be adopted by all participating jurisdictions over time to meet planning goals;

f. Prioritize projects that facilitate the implementation of the regional plan and identify responsible implementing entities (public, nonprofit, or private) and funding sources;

g. Show how the proposed plan will establish consistency with HUD, Department of Transportation (DOT), and Environmental Protection Agency (EPA) programs and policies, such as Consolidated Plans, Analysis of Impediments to Fair Housing Choice, Long Range Transportation Plans, Indian Housing Plans, and Asset Management Plans, including strategies to modify existing plans, where appropriate; and

h. Engage residents and other stakeholders substantively and meaningfully in the development of the shared vision and its implementation early and throughout the process, including communities traditionally marginalized from such processes, while accommodating limited English speakers, persons with disabilities, and the elderly.

The FY 2011 awards announced in this Notice were selected for funding in a competition posted on *Grants.gov* and HUD's Web site on July 25, 2011. Applications were scored and selected for funding based on the selection criteria in that NOFA. The amount appropriated in FY 2011 to fund the Regional Grant Program was $70 million of which $2 million has been reserved for capacity support grants distributed separately. This notice announces the allocation of $67 million for Sustainable Community Regional Planning Grants, of which not less than $17.5 million is awarded to regions with populations of less than 500,000.

In accordance with Section 102 (a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat. 1987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and amounts of the 29 awards made under the competition in Appendix A to this document.

Dated: December 22, 2011.

Shelley Poticha,

Director, Office of Sustainable Housing and Communities.

Appendix A

SUSTAINABLE COMMUNITIES REGIONAL PLANNING GRANT PROGRAM

Grant Awards from FY 2011 Notice of Funding Availability

Rutgers, The State University of New Jersey, 3 Rutgers Plaza ASB III, 2nd Floor, New Brunswick, NJ: New Jersey 08901–8559	$5,000,000
Niagara Frontier Transportation Authority, 181 Ellicott Street, Buffalo, NY: New York 14203–0032	2,000,000
State of Rhode Island, 1 Capitol Hill, Providence, RI: Rhode Island 02908–5872	1,934,961
Metropolitan Transportation Commission, 101 Eighth Street, Oakland, CA: California 94607–4707	4,991,336
Denver Regional Council of Governments, 1290 Broadway, Suite 700, Denver, CO: Colorado 80203–5606	4,500,000
Opportunity Link, Inc., 2229 5th Avenue, P.O. Box 80, Havre, MT: Montana 59501–0080	1,500,000
Centralina Council of Governments, 525 North Tryon Street, 12th Floor, Charlotte, NC: North Carolina 28202–0202	4,907,544
Nashua Regional Planning Commission, 9 Executive Park Drive, Suite 201, Merrimack, NH: New Hampshire 03054–4045	3,369,648
City of Henderson on behalf of the SNRPC, 240 Water St., P.O. Box 95050, Henderson, NV: Nevada 89009–5050	3,488,000
Northwest Regional Planning Commission, 155 Lake Street, St. Albans, VT: Vermont 05478–2219	480,000
East Arkansas Planning and Development District, P.O. Box 1403, 2905 King Street, Jonesboro, AR: Arkansas 72403–1403	2,600,000
East Central Florida Regional Planning Council, 309 Cranes Roost Blvd., Suite 2000, Altamonte Springs, FL: Florida 32701–3422	2,400,000
Fremont County Idaho, 125 North Bridge Street, St. Anthony, ID: Idaho 834455004	1,500,000
Rural Economic Area Partnership Investment Fund, Inc., P.O. Box 2024, Minot, ND: North Dakota 58702–2024	1,500,000
Doña Ana County, 845 N. Motel Blvd., Las Cruces, NM: New Mexico 80007–845	2,000,000
Adirondack Gateway Council Inc., 42 Ridge Street, Glens Falls, NY: New York 12801–3610	750,000
Cape Fear Council of Governments, 1480 Harbour Drive, Wilmington, NC: North Carolina 28401–7776	1,130,000
Baltimore Metropolitan Council, 1500 Whetstone Way, Suite 300, Baltimore, MD: Maryland 212304767	3,503,677
Shelby County Government, 160 North Main, Suite 850, Memphis, TN: Tennessee 38103–1812	2,619,999
Heart of Texas Council of Governments, 1514 South New Road, Waco, TX: Texas 76711–1316	660,000
Regional Economic Area Partnership, 1845 Fairmount St., Wichita, KS: Kansas 67260–0155	1,500,000
Flint Hills Regional Council, Inc., 500 Huebner Road, Fort Riley, KS: Kansas 66442–7409	1,980,000
Northwest Michigan Council of Governments, P.O. Box 506, Traverse City, MI: Michigan 49685–0506	660,000
Tri-County Regional Planning Commission, 913 W. Holmes Rd. Ste., 201, Lansing, MI: Michigan 48910–0411	3,000,000
Omaha-Council Bluffs Metropolitan Area Planning Agency (MAPA), 2222 Cuming, Omaha, NE: Nebraska 68102–4328	2,045,000
County of Erie, Erie County Courthouse, Room 111, 140 West Sixth Street, Erie, PA: Pennsylvania 16501–1092	1,800,000
Lehigh Valley Economic Development Corporation, 2158 Ave. C, Bethlehem, PA: Pennsylvania 18017–2148	3,400,000
Two Rivers-Ottauquechee Regional Commission, 128 King Farm Rd., Woodstock, VT: Vermont 05091–1052	540,000
Metroplan, 501 W. Markham, Ste. B, Little Rock, AR: Arkansas 72201–1409	1,400,000
Total	67,160,165

[FR Doc. 2012–3952 Filed 2–17–12; 8:45 am]
BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2011–N195; FXES11150400000F4–123–FF04E00000]

Spring Pygmy Sunfish Candidate Conservation Agreement With Assurances; Receipt of Application for Enhancement of Survival Permit; Beaverdam Springs, Limestone County, AL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the Fish and Wildlife Service (Service), have received an application from Mr. Banks Sewell of Belle Mina Farm Ltd. (applicant) for an enhancement of survival permit (permit) under the Endangered Species Act of 1973, as amended (Act). The permit application includes a proposed candidate conservation agreement with assurances (CCAA), between the applicant, the Land Trust of Huntsville and North Alabama, and the Service for the spring pygmy sunfish. The CCAA would be implemented at the Beaverdam—Moss Creek/Spring Complex within Limestone County, Alabama. We have made a preliminary determination that the proposed CCAA and permit application are eligible for categorical exclusion under the National Environmental Policy Act of 1969 (NEPA). The basis for this preliminary determination is contained in a draft environmental action statement (EAS). We are accepting comments on the permit application, the proposed CCAA, and the draft EAS.

DATES: We must receive comments no later than March 22, 2012.

ADDRESSES: Persons wishing to review the application, the draft CCAA, and the draft EAS may obtain copies by request from Daniel Drennen, Mississippi Field Office, by phone at 601–321–1127, or via mail or email (see below). The application and related documents will also be available for public inspection, by appointment only, during normal business hours (8 a.m. to 4:30 p.m.) at the Jackson, Mississippi, Field Office (address listed below) or on our Web site at *http://www.fws.gov/mississippiES/endsp.html*.

Comments concerning the application, the draft CCAA, and the draft EAS should be submitted in writing, by one of the following methods:

Email: daniel_drennen@fws.gov.

Fax: 601–965–4340.

U.S. mail: Daniel Drennen, Mississippi Field Office, U.S. Fish and Wildlife Service, 6578 Dogwood View Parkway, Jackson, MS 39213.

Please refer to Permit number TE–40219A–0 when submitting comments.

FOR FURTHER INFORMATION CONTACT: Daniel Drennen, Fish and Wildlife Biologist, Mississippi Field Office, 601–321–1127. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION: We furnish this notice to provide the public, other State and Federal agencies, and interested Tribes an opportunity to review and comment on the permit application, including the draft CCAA and draft EAS. We specifically request information, views, and opinions from the public on the proposed Federal action of issuing a permit. Further, we solicit information regarding the adequacy of the permit application, including the proposed CCAA, as measured against our permit issuance criteria found in the Code of Federal Regulations (CFR) at 50 CFR 17.22(d) and 17.32(d).

Background

Under a Candidate Conservation Agreement with Assurances, participating landowners voluntarily undertake management activities on their property to enhance, restore, or maintain habitat benefiting species that are proposed for listing under the Act, candidates for listing, or that may become candidates or proposed for listing. Candidate Conservation Agreements with Assurances (CCAAs), and the associated permits we issue under section 10(a)(l)(A) of the Act (16 U.S.C. 1531. et seq.), encourage private and other non-Federal property owners to implement conservation efforts for species by assuring property owners that they will not be subjected to increased land use restrictions if that species becomes listed under the Act in the future provided certain conditions are met. Application requirements and issuance criteria for permits through CCAAs are found in the Code of Federal Regulations (CFR) at 50 CFR 17.22(d) and 17.32(d). See also our policy on CCAAs (64 FR 32 726; June 17, 1999).

The conservation of the spring pygmy sunfish (*Elassoma alabamae*) is of concern to the Service, other biologists, and the landowners whose properties contain the species. The spring pygmy sunfish is a spring-associated fish, endemic to the Tennessee River drainage of Lauderdale and Limestone Counties in northern Alabama. The species historically occurred in three distinct spring complexes (Cave Springs, Lauderdale County; Beaverdam Springs and Pryor Springs, Limestone County). The single remaining population of this species occupies about 5 river miles (mi) (8.05 river kilometers (km)) within four spring pools (Moss, Beaverdam, Thorsen, and Horton Springs) associated with the upper Beaverdam Springs complex in Limestone County, Alabama.

The preferred habitat for the spring pygmy sunfish is clear and colorless to slightly stained spring water, spring runs, and associated spring-fed wetlands (Warren 2004). The species is highly localized within these spring pools and is found in association with patches of dense, filamentous submergent vegetation. Spring pygmy sunfish abundance is correlated with specific water quantity and quality parameters (i.e., water flow velocity, turbidity, and water temperatures) and certain associated species such as amphipods, isopods, spring salamanders, crayfish, and snails (Sandel, pers. comm., 2007).

On April 1, 2011, the Service published a 90-day finding on a petition to list the spring pygmy sunfish as endangered under the Act (76 FR 18138). The Service found that the petition presented substantial scientific or commercial information indicating that listing this species may be warranted, and announced the initiation of a formal status review. For further information on previous Federal actions regarding the species, please refer to the 90-day finding. As a result of our ''substantial'' 90-day finding, we are currently collecting and analyzing data to assess the species' status. At the end of the yearlong period, the Service will publish a finding, known commonly as a ''12-month finding,'' on whether or not listing is warranted. In accordance with court-approved settlement entered into last year with Wild Earth Guardians and the Center for Biological Diversity, if we determine that listing is warranted, our 12-month finding will include a proposed rule to list the spring pygmy sunfish under the Act.

The area to be covered under the proposed CCAA is approximately 3,200 acres within the Beaverdam Springs complex, owned by the applicant and located in Limestone County, Alabama. The proposed CCAA represents a significant milestone in the cooperative conservation efforts for this species and

is consistent with section 2(a)(5) of the Act, which encourages creative partnerships among public, private, and government entities to conserve imperiled species and their habitats.

The applicant agrees to implement conservation measures to address known threats to the spring pygmy sunfish. These measures will help protect the species in the near term and also minimize any incidental take of the species that might occur as a result of conducting other covered activities, if the species becomes listed under the Act in the future. Conservation measures to be implemented by the applicant include: (1) Maintaining up to a 150-foot vegetated buffer zone around Moss Spring Pond; (2) prohibiting cattle access to Moss Spring Pond and the buffer zone described above; (3) creating a protected area of approximately 150 acres, with a 100–150 foot vegetated buffer zone, within the Beaverdam Spring/Creek area, including a portion of ''Lowe Ditch''; and (4) refraining from any deforestation, land clearing, industrial development, residential development, aquaculture, temporary or permanent ground water removal installations, stocked farm ponds, pesticide and herbicide use, and impervious surface installation without prior consultation with the Service and the Service's written agreement.

The Land Trust of Huntsville and North Alabama agrees: (1) To be responsible for all reporting requirements, including any changes to the monitoring when necessary for adaptive management; (2) to ensure that annual habitat analyses and site samplings are performed as specified by the CCAA; and (3) to provide funding for part or all of said monitoring activities.

The Service agrees to authorize the applicant to engage in incidental take of the spring pygmy sunfish consistent with this CCAA and to provide technical assistance, including management advice.

The term of the proposed CCAA and associated enhancement of survival permit is twenty (20) years. However, under a special provision of this CCAA, if at any time a 15-percent decline in the status of the species is determined, there will be a reevaluation of the conservation measures set forth in the CCAA. If such a reevaluation reflects a need to change the conservation measures, the revised measures will be implemented by the applicant, or the CCAA will be terminated and the permit surrendered.

When determining whether to issue the permit, we will consider a number of factors and information sources, including the project's administrative record, any public comments we receive, and the application requirements and issuance criteria for CCAAs contained in 50 CFR 17.22(d) and 17.32(d). We will also evaluate whether the issuance of the permit complies with section 7 of the Act by conducting an intra-Service consultation. Our decision to issue the permit will be based on the results of this consultation, as well as on the above findings, our regulations, and public comments.

The proposed CCAA also provides regulatory assurances to the applicant that, in the event of changed and/or unforeseen circumstances, we would not require additional conservation measures, or commitment of additional land, water, or resource use restrictions, beyond the level obligated in this agreement, without the consent of the applicant provided certain conditions are met.

We will evaluate this permit application, associated documents, and comments submitted thereon to determine whether the permit application meets the requirements of section 10(a)(1) of the Act, our regulations, and NEPA regulations at 40 CFR 1506.6. If we determine that the requirements are met, we will enter into the CCAA and issue a permit under section 10(a)(l)(A) of the Act to the applicant for take of the spring pygmy sunfish in accordance with the terms of the agreement. We will not make a final decision in this matter until after the end of the 30-day comment period, and we will fully consider all comments received during the comment period.

Authority

We provide this notice under both section 10(c) of the Act (16 U.S.C. 1531. et seq.) and its implementing regulations (50 CFR 17.22 and 17.32), and the National Environmental Policy Act (42 U.S.C 4371 et seq.) and its implementing regulations (40 CFR 1506.6).

Public Availability of Comments

All comments we receive become part of our administrative record in this matter. Requests for copies of comments will be handled in accordance with the Freedom of Information Act, Privacy Act, NEPA, and Service and Department of the Interior policies and procedures. 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 personal identifying information—may be made available to the public at any time. While you may ask us to withhold your personal identifying information from public disclosure, we cannot guarantee that we will be able to do so.

Dated: February 14, 2012.

Stephen M. Ricks,

Field Supervisor, Jackson, Mississippi, Field Office, Southeast Region.

[FR Doc. 2012–3880 Filed 2–17–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CACA 50123, LLCA920000 L1310000 FI0000]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease CACA 50123, California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement of oil and gas lease CACA 50123 from West Coast Land Service. The petition was filed on time and was accompanied by all required rentals and royalties accruing from November 1, 2010, the date of termination.

FOR FURTHER INFORMATION CONTACT: Rita Altamira, Land Law Examiner, Branch of Adjudication, Division of Energy and Minerals, BLM California State Office, 2800 Cottage Way, W–1623, Sacramento, California 95825, (916) 978–4378.

SUPPLEMENTARY INFORMATION: No valid lease has been issued affecting the lands. The lessee has agreed to new lease terms for rentals and royalties at rates of $10 per acre or fraction thereof and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and has reimbursed the BLM for the cost of this **Federal Register** notice. The Lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate the lease effective November 1, 2010, subject to the original terms and

condition of the lease and the increased rental and royalty rates cited above.

Debra Marsh,

Supervisor, Branch of Adjudication, Division of Energy & Minerals.

[FR Doc. 2012–3897 Filed 2–17–12; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–PWR–PWRO–1103–8840; 2051–P580–579]

Final Environmental Impact Statement for Extension of F–Line Streetcar Service to Fort Mason Center, San Francisco, CA

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of Availability of the Final Environmental Impact Statement for the Extension of F–Line Streetcar Service to Fort Mason Center, San Francisco, California.

SUMMARY: Pursuant to National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), the National Park Service announces availability of the Final Environmental Impact Statement (Final EIS) for the extension of the historic streetcar F-line from Fisherman's Wharf to the Fort Mason Center, in San Francisco, California.

DATES: The National Park Service (NPS) will execute a Record of Decision (ROD) not sooner than 30 days after publication in the **Federal Register** by the Environmental Protection Agency (EPA) of its notice of filing of the Final EIS.

ADDRESSES: The Final EIS is available for public inspection as follows: at the Office of the Superintendent, Golden Gate National Recreation Area (Bldg. 201 Fort Mason, San Francisco, California), and at local public libraries as noted on the Project Web site *http://parkplanning.np.gov/goga.* An electronic version may also be accessed at the Project Web site. For further information, please contact Mr. Steve Ortega, Bldg. 201 Fort Mason, San Francisco, CA 94123–0022 (415) 561–2841 or *steve_ortega@nps.gov.*

SUPPLEMENTARY INFORMATION: The proposed action would extend the historic streetcar F-line from Fisherman's Wharf to the San Francisco Maritime National Historical Park (SF Maritime NHP) and to the Fort Mason Center in the Golden Gate National Recreation Area (GGNRA). The intended effect of the proposed action is to provide park visitors and transit-dependent residents with high-quality rail transit that improves transportation access and mobility between existing streetcar service at Fisherman's Wharf and SF Maritime NHP and the Fort Mason Center in GGNRA, with connection to the regional transit rail services. The Final EIS evaluates potential environmental consequences of implementing the alternatives. Impact topics include the cultural, natural, and socioeconomic environments.

The proposed action is the culmination of a cooperative effort by the National Park Service, the San Francisco Municipal Transportation Agency (SFMTA), and the Federal Transit Administration. Studies from these agencies identified a need for improved regional and local transit connectivity between the identified urban national parks and existing transit infrastructure. Transit improvements between these parks would help accommodate existing and future visitor demand and enhance operational effectiveness. Based on the agency studies, conceptual approaches to address alternative transportation needs were identified and evaluated against the purpose and need of the project, park management objectives, and operability constraints.

Through an intensive public review process, two action alternatives were identified in addition to the No Action Alternative (Alternative 1)—the Preferred Action Alternative has two options for the track turnaround configuration (Alternatives 2A and 2B). Common elements of the Preferred Action Alternatives include the extension of approximately 0.85 mile of new rail track; associated features such as signals, crossings, wires and poles; approximately 8–9 new platforms; new designated stops; retrofitting of the historic State Belt Railroad tunnelFort Mason Tunnel: tunnel (Fort Mason Tunnel). The primary difference between Alternatives 2A and 2B involves the location in which the streetcar would turn around at the terminus of the proposed track extension. Under Alternative 2A, the streetcar would turn around via a loop in the Fort Mason Center parking lot (North Loop). Under Alternative 2B, the streetcar would turn around via a loop in the Great Meadow (South Loop).

The Draft EIS was made available for public review for 60 days (March 18–May 23, 2011); the full text and graphics were also posted on the NPS Planning, Environment and Public Comment Web site. A public open house on the proposed action was held on April 20, 2011, and attended by a total of 81 people, during which the Project team collected oral and written comments. In addition, throughout the review period, NPS received a total of 98 comment letters on the proposed action. The majority of those that commented on the Draft EIS supported the proposed action. The public's primary concerns about the preferred alternative included mitigating the loss of parking, displacement of street artist sales spaces, increased traffic congestion, noise and congestion near the Marina neighborhood, conflicts with other planned projects, and mitigating impacts to National Historic Landmark resources. Many also suggested various design ideas and other measures to help reduce these impacts.

In coordination with other affected agencies, and after considering all oral and written comments, the NPS prepared the Final EIS. The analysis revealed Alternative 1 (No Action) to be the Environmentally Preferred Alternative. Alternative 2 was found to be the superior alternative with Alternative 2A (North Loop) the preferred option for the Turnaround, and thus NPS's Final Preferred Action Alternative.

Decision Process: The NPS will prepare a Record of Decision no sooner than 30 days following EPA's notice in the **Federal Register** of filing of the Final EIS. As a delegated EIS, the official responsible for approval of the extension of F–Line streetcar service from Fisherman's Wharf to the Fort Mason Center is the Regional Director; subsequently the officials responsible for implementation will the Superintendents of San Francisco Maritime National Historical Park and Golden Gate National Recreation Area.

Dated: December 6, 2012.

Martha J. Lee,

Acting Regional Director, Pacific West Region.

[FR Doc. 2012–3959 Filed 2–17–12; 8:45 am]

BILLING CODE 4312–FN–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–0112–9383; 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 January 21, 2012. 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 March 7, 2012. 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.

ALASKA

Anchorage Borough-Census Area

Fort Richardson National Cemetery, Bldg. 58–512, Davis Hwy., Fort Richardson, 12000056

Sitka Borough-Census Area

Sitka National Cemetery, 803 Sawmill Creek Rd., Sitka, 12000057

HAWAII

Honolulu County

Withington House, 3150 Huelani Pl., Honolulu, 12000058

ILLINOIS

Lee County

Dixon Downtown Historic District, Roughly bounded by River St., Dixon Ave., 3rd St., & Monroe Ave., Dixon, 12000059

Marion County

Centralia Commercial Historic District, 126 W. Broadway to 331 E. Broadway, Centralia, 12000060

McHenry County

Plum Tree Farm, 1001 Plum Tree Rd., Barrington Hills, 12000061

Whiteside County

Fulton Commercial Historic District, 4th St. between 10th & 12th Aves., Fulton, 12000062

IOWA

Polk County

Sherman Hill Historic District (Boundary Increase and Decrease), Generally between 15th St., Woodland Ave., MLK Pkwy., & I–235, Des Moines, 12000063

KANSAS

Sedgwick County

Kansas Gas & Electric Company Building, 120 E. 1st St., Wichita, 12000064

MAINE

Cumberland County

Children's Hospital, 68 High St., Portland, 12000065

Portland Waterfront (Boundary Increase), Merrill's Wharf, 252–260 Commercial St., Portland, 12000066

MASSACHUSETTS

Essex County

LAMARTINE (shipwreck), (Granite Vessel Shipwrecks in the Stellwagen Bank NMS MPS) Address Restricted, Gloucester, 12000067

Hampden County

Outing Park Historic District, Roughly bounded by Saratoga, Niagara, Oswego, & Bayoone Sts., Springfield, 12000068

Suffolk County

Revere City Hall and Police Station, 281 Broadway & 23 Pleasant St., Revere, 12000070

MINNESOTA

Winona County

Central Grade School, 317 Market St., Winona, 12000071

Jefferson School, (Federal Relief Construction in Minnesota MPS) 1268 W. 5th St., Winona, 12000072

Madison School, 515 W. Wabasha St., Winona, 12000073

Washington—Kosciusko School, (Federal Relief Construction in Minnesota MPS AD) 365 Mankato Ave., Winona, 12000074

NEBRASKA

Lincoln County

Fort McPherson National Cemetery, 12004 S. Spur 56A, Maxwell, 12000075

NEW JERSEY

Monmouth County

Camp Evans Historic District (Boundary Increase and Decrease), 2201 Marconi Rd. (Wall Township), New Bedford, 12000076

White, Robert, House, 20 South St., Red Bank, 12000077

OREGON

Columbia County

Clatskanie IOOF Hall, 75 S. Nehalem St., Clatskanie, 12000078

Douglas County

Oregon State Soldier's Home Hospital, 1624 W. Harvard Ave., Roseburg, 12000079

Jackson County

Talent Elementary School, 206 Main St., Talent, 12000080

Lane County

Cottage Grove Armory, 628 E. Washington Ave., Cottage Grove, 12000081

Lincoln County

Depoe Bay Ocean Wayside, 119 SW US 101, Depoe Bay, 12000082

Wallowa County

Enterprise IOOF Hall, (Downtown Enterprise MPS) 105 NE 1st St., Enterprise, 12000083

Enterprise Mercantile and Milling Company Building, Downtown Enterprise MPS) 115 E. Main St., Enterprise, 12000084

O.K. Theatre, (Downtown Enterprise MPS) 208 W. Main St., Enterprise, 12000085

SOUTH DAKOTA

Clay County

Forest Avenue Historic District (Boundary Increase), 15–322 Forest Ave., 205–221 Lewis St., Vermillion, 12000086

WASHINGTON

Pierce County

Curran, Charles and Mary Louise, House, 4009 Curran Ln., University Place, 12000088

Whatcom County

Axtell, Dr. William H. and Frances C., House, 413 E. Maple St., Bellingham, 12000087

In the interest of preservation a three day comment period is requested for the following resource:

MASSACHUSETTS

Suffolk County

Fenway Park, 24, & 2–4 Yawkey Wy., 64–76 Brookline Ave., & 70–80 Lansdowne St., Boston, 12000069

[FR Doc. 2012–3833 Filed 2–17–12; 8:45 am]

BILLING CODE 4312–51–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–AKR–WRST; 9865–NZM]

Notice of Availability

AGENCY: National Park Service, Interior.

ACTION: Notice of availability.

SUMMARY: Notice is hereby given that pursuant to the provisions of Section 2 of the Act of Sept 28, 1976, 16 U.S.C. 1901, and in accordance with the provisions of 36 CFR 9.17, Randy Elliott has filed a proposed plan of operations to conduct mining operations on lands embracing Mineral Survey No. 923, patented mineral property within Wrangell-St. Elias National Park and Preserve.

Public Availability: This plan of operations is available for inspection during normal business hours at the following locations: Wrangell-St. Elias National Park and Preserve—Headquarters, Mile 106.8 Richardson Highway, Post Office Box 439, Copper Center, Alaska 99573.

National Park Service, Alaska Regional Office—Natural Resources

Division, 240 West 5th Avenue, Anchorage, Alaska 99501.

FOR FURTHER INFORMATION CONTACT: Rick Obernesser, Superintendent, and Danny Rosenkrans, Senior Management Analyst, (907) 822–5234, Wrangell-St. Elias National Park and Preserve, PO Box 439, Copper Center, Alaska 99573.

Sue E. Masica,

Regional Director, Alaska.

[FR Doc. 2012–3962 Filed 2–17–12; 8:45 am]

BILLING CODE 4312–GY–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[OMB Number 1010–0072]

Information Collection; Prospecting for Minerals Other Than Oil, Gas, and Sulphur on the Outer Continental Shelf; Submitted for OMB Review; Comment Request

ACTION: 30-day notice.

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), we are notifying the public that we have submitted to OMB an information collection request (ICR) to renew approval of the paperwork requirements in the regulations under Prospecting for Minerals Other than Oil, Gas, and Sulphur on the Outer Continental Shelf, and, in particular, that we are revising form BOEM–0134 to clarify requirements for environmental compliance.

DATES: Submit written comments by March 22, 2012.

ADDRESSES: Submit comments by either fax (202) 395–5806 or email (*OIRA_DOCKET@omb.eop.gov*) directly to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for the Department of the Interior (1010–0072). Please also submit a copy of your comments by either email to *arlene.bajusz@boem.gov* or mail to Arlene Bajusz, Information Collection Clearance Officer, Bureau of Ocean Energy Management, MS HM–3127, 381 Elden Street, Herndon, Virginia 20170–4817. Please reference ICR 1010–0072 in your comment and include your name and return address.

FOR FURTHER INFORMATION CONTACT: Arlene Bajusz, Office of Policy, Regulations, and Analysis at *arlene.bajusz@boem.gov* or (703) 787–1025. You may review the ICR online at *http://www.reginfo.gov.* Follow the instructions to review Department of the Interior collections under review by OMB.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 1010–0072.

Title: 30 CFR Part 580, Prospecting for Minerals Other than Oil, Gas, and Sulphur on the Outer Continental Shelf.

Form: BOEM–0134.

Abstract: The Outer Continental Shelf (OCS) Lands Act, as amended (43 U.S.C. 1331 *et seq.* and 43 U.S.C. 1801 *et seq.*), authorizes the Secretary of the Interior to prescribe rules and regulations to administer leasing of mineral resources on the OCS. An amendment to the OCS Lands Act (Pub. L. 103–426) authorizes the Secretary to negotiate agreements (in lieu of the previously required competitive bidding process) for the use of OCS sand, gravel, and shell resources for specified types of public uses. Such specified uses will support construction of governmental projects for beach nourishment, shore protection, and wetlands enhancement or constitute a project authorized by the Federal Government.

Section 1340 states that ''* * * any person authorized by the Secretary may conduct geological and geophysical [G&G] explorations in the outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this Act, and which are not unduly harmful to aquatic life in such area.'' Section 1352 further requires that certain costs be reimbursed to the parties submitting required G&G information and data. Regulations implementing these responsibilities are in 30 CFR Part 580 and are the responsibility of the Bureau of Ocean Energy Management (BOEM).

The Independent Offices Appropriations Act (31 U.S.C. 9701), the Omnibus Appropriations Bill (Pub. L. 104–133, 110 Stat. 1321, April 26, 1996), and the OMB Circular A–25, authorize Federal agencies to recover the full cost of services that confer special benefits. Prospecting permits are subject to cost recovery under Department of the Interior's implementing policy, and BOEM regulations specify service fees for these requests.

We use the information collected under these regulations to: (1) Ensure there is no environmental degradation, personal harm or unsafe operations and conditions; (2) ensure activities do not damage historical or archaeological sites or interfere with other uses; (3) analyze and evaluate preliminary or planned drilling activities; (4) monitor progress and activities in the OCS; (5) acquire G&G data and information collected under a Federal permit offshore; (6) determine eligibility for reimbursement from the Government for certain costs; and (7) determine the qualifications of applicants. BOEM also uses the information collected to understand the G&G characteristics of hard mineral-bearing physiographic regions of the OCS.

We will protect information considered proprietary according to 30 CFR 580.70, ''What data and information will be protected from public disclosure?'' 30 CFR 550.197, ''Data and information to be made available to the public or for limited inspection,'' 30 CFR part 552, ''OCS Oil and Gas Information Program,'' and the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR 2). No items of a sensitive nature are collected. Responses are mandatory.

Frequency: On occasion; and as required in the permit.

Description of Respondents: Permittee(s).

Estimated Reporting and Recordkeeping Hour Burden: The estimated annual hour burden for this collection is 128 hours. The following table details the individual components and estimated hour burdens. In calculating the burdens, we assumed that respondents perform certain requirements in the normal course of their activities. We consider these to be usual and customary and took that into account in estimating the burden.

Citation 30 CFR part 580	Reporting and recordkeeping requirements	Non-hour cost burden		
		Hour burden	Average Number of annual responses	Annual burden hours
Subpart B				
10; 11(a); 12; 13; Permit Form	Apply for permit (Form BOEM–0134) to conduct prospecting or G&G scientific research activities, including prospecting/scientific research plan and environmental assessment or required drilling plan.	10	3 permits	30
		$2,012 permit application fee × 3 permits = $6,036		
11(b); 12(c)	File notice to conduct scientific research activities related to hard minerals, including notice to BOEM prior to beginning and after concluding activities.	8	3 notices	24
Subtotal			6 responses	54
Subpart C				
21(a)	Report to BOEM if hydrocarbon/other mineral occurrences or environmental hazards are detected or adverse effects occur.	1	1 report	1
22	Request approval to modify operations	1	1 request	1
23(b)	Request reimbursement for expenses for BOEM inspection.	1	3 requests	3
24	Submit status and final reports on specified schedule	8	4 reports	32
28	Request relinquishment of permit.	1	*1 Relinquishment.	*1
31(b); 73	Governor(s) of adjacent State(s) submissions to BOEM: Comments on activities involving an environmental assessment; request for proprietary data, information, and samples; and disclosure agreement.	1	3 submissions.	3
33, 34	Appeal penalty, order, or decision—burden exempt under 5 CFR 1320.4(a)(2), (c)			0
Subtotal			13 responses	41
Subpart D				
40; 41; 50; 51; Permit Form	Notify BOEM and submit G&G data/information collected under a permit and/or processed by permittees or 3rd parties, including reports, logs or charts, results, analyses, descriptions, etc.	6	3 submissions.	18
42(b); 52(b)	Advise 3rd party recipient of obligations. Part of licensing agreement between parties; no submission to BOEM.	⅓	3 notices	1
42(c), 42(d); 52(c), 52(d)	Notify BOEM of 3rd party transactions	1	1 notice	1
60; 61(a)	Request reimbursement for costs of reproducing data/information & certain processing costs.	1	1 request*	*1
72(b)	Submit in not less than 5 days comments on BOEM's intent to disclose data/information.	1	3 responses	3
72(d)	Contractor submits written commitment not to sell, trade, license, or disclose data/information.	1	3 submissions.	3
Subtotal			14 responses	27
General				
Part 580	General departure and alternative compliance requests not specifically covered elsewhere in part 580 regulations.	2	1 request	2
Permits**	Request extension of permit time period	1	1 extension	1
Permits**	Retain G&G data/information for 10 years and make available to BOEM upon request.	1	3 respondents.	3
Subtotal			5 responses	6
Total Burden			38 responses	128
			$6,036 Non-Hour Cost Burdens	

* **Note:** No requests received for many years. Minimal burden for regulatory (PRA) purposes only.

** These permits are prepared by BOEM and sent to respondents; therefore, the forms themselves do not incur burden hours.

Estimated Reporting and Recordkeeping Non-Hour Cost Burden: We have identified one non-hour paperwork cost burden for this collection: A $2,012 permit application fee.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obliged to respond.

Comments: On August 24, 2011, we published a **Federal Register** notice (76 FR 52963) announcing that we would submit this ICR to OMB for approval. The notice provided the required 60-day comment period. We received two comments in response. One did not pertain to the information collection, and the other expressed support for competitive bidding processes.

In addition, § 580.80 provides the OMB control number for the information collection requirements imposed by the 30 CFR 580 regulation, informs the public that they may comment at any time on the collections of information, and provides the address to which they should send comments.

We again request comments on this information collection on: (1) Whether or not the collection of information is necessary, including whether or not the information is useful; (2) the accuracy of our estimate of the burden for this collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden on the respondents.

Public Availability of Comments: 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.

Dated: February 13, 2012.

Deanna Meyer-Pietruszka,

Chief, Office of Policy, Regulations, and Analysis.

[FR Doc. 2012–3853 Filed 2–17–12; 8:45 am]

BILLING CODE 4310–VH–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Availability of the Reclamation National Environmental Policy Act Handbook

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Reclamation (Reclamation) is announcing the availability of its updated National Environmental Policy Act (NEPA) Handbook. This handbook is intended for use as guidance by Reclamation's NEPA practitioners. It provides a quick reference for existing laws, regulations, policies, and other guidance. It is a guidance document, and as such, does not create or alter any policy or otherwise implement any law and should not be cited as a source of authority. Reclamation is announcing the availability of its NEPA Handbook to assure transparency of its efforts to the public.

ADDRESSES: The updated Reclamation NEPA Handbook is available online at *www.usbr.gov/NEPA.*

FOR FURTHER INFORMATION CONTACT: Cathy Cunningham, Water and Environmental Resources Division, Bureau of Reclamation, P.O. Box 25007, Denver, Colorado 80225; telephone 303–445–2875.

Grayford F. Payne,

Deputy Commissioner—Policy, Administration and Budget.

[FR Doc. 2012–3963 Filed 2–17–12; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–828]

Certain Video Displays and Products Using and Containing Same

Institution of Investigation Pursuant to 19 U.S.C. 1337

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on January 13, 2012, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Mondis Technology, Ltd., of London, England. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain video displays and products using and containing same by reason of infringement of certain claims of U.S. Patent No. 6,247,090 (''the '090 patent'') and U.S. Patent No. 7,089,342 (''the '342 patent''). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained therein, is 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., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (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*.

FOR FURTHER INFORMATION CONTACT: The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2011).

Scope Of Investigation: Having considered the complaint, the U.S. International Trade Commission, on February 14, 2012, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain video displays and products using and containing same

that infringe one or more of claim 15 of the '090 patent and claim 15 of the '342 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is:

Mondis Technology, Ltd., Suite 3C, Lyttelton House, 2 Lyttelton Road London N2 0EF, England.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Chimei Innolux Corporation, 160 Kesyue Road, Miaoli County, Taiwan; Innolux Corporation, 2525 Brockton Drive Austin, TX 78759.

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d)-(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: February 14, 2012.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2012–3875 Filed 2–17–12; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[CPCLO Order No. 002–2012]

Privacy Act of 1974; System of Records

AGENCY: Department of Justice.

ACTION: Notice of a new system of records and removal of three systems of records notices.

SUMMARY: Pursuant to the Privacy Act of 1974, 5 U.S.C. 552a, and the Office of Management and Budget (OMB) Circular A–130, notice is hereby given that the Department of Justice (DOJ or Department) proposes to establish a new Department-wide system of records notice, entitled Debt Collection Enforcement System, JUSTICE/DOJ–016. The purpose of publishing this Department-wide system notice is to reflect the Department's consolidation of its multiple debt collection systems, which were previously maintained in various individual DOJ components, into a single, centralized system. The new system will be used by all DOJ components that currently have debt collection and enforcement responsibilities. The Department's consolidation of its debt collection systems enables the Department to improve data integrity, facilitate communication among DOJ components, support Department-wide debt collection initiatives, provide for better accountability and timely reporting, and centralize administrative functions and payment processing.

Because this system notice reflects the consolidation of existing DOJ debt collection and enforcement systems, this notice replaces, and the Department hereby removes the following system notices previously published by individual DOJ components:

1. Executive Office for United States Attorneys, ''Debt Collection Enforcement System,'' JUSTICE/USA–015 (71 FR 42118, Jul. 25, 2006);

2. Justice Management Division (JMD), ''Debt Collection Management System,''

JUSTICE/JMD–006 (58 FR 60058, Nov. 12, 1993); and

3. JMD, ''Debt Collection Offset Payment System,'' JUSTICE/JMD–009 (62 FR 33438, Jun. 19, 1997).

Also, this notice now covers debt collection records that previously have been part of or included in the following systems of records notices:

1. Antitrust Division, ''Antitrust Information Management Information System (AMIS)—Monthly Report,'' JUSTICE/ATR–006 (63 FR 8659, Feb. 20, 1998) and ''Antitrust Division Case Cards,'' JUSTICE/ATR–007 (60 FR 52692, Oct. 10, 1995);

2. Civil Division, ''Central Civil Division Case File System,'' JUSTICE/CIV–001 (63 FR 8659, Feb. 20, 1998);

3. Civil Rights Division, ''Central Civil Rights Division Index File and Associated Records,'' JUSTICE/CRT–001 (68 FR 47611, Aug. 11, 2003);

4. Criminal Division, ''Central Criminal Division Index File and Associated Records,'' JUSTICE/CRM–001 (72 FR 44182, Aug. 7, 2007);

5. Environment and Natural Resources Division, ''Environment and Natural Resources Division Case and Related Files,'' JUSTICE/ENRD–003 (65 FR 8990, Feb. 23, 2000); and

6. Tax Division, ''Criminal Tax Files, Special Project Files, Docket Cards and Associated Records,'' JUSTICE/TAX–001 (71 FR 11447, Mar. 7, 2006) and ''Tax Division Civil Tax Case Files, Docket Cards, and Associated Records,'' JUSTICE/TAX–002 (71 FR 11449, Mar. 7, 2006).

DATES: In accordance with 5 U.S.C. 552a(e)(4) and (11), the public is given a 30-day period in which to comment. Therefore, please submit any comments by March 22, 2012.

ADDRESSES: The public, Office of Management and Budget (OMB), and Congress are invited to submit any comments to the Department of Justice, ATTN: Privacy Analyst, Office of Privacy and Civil Liberties, Department of Justice, National Place Building, 1331 Pennsylvania Avenue NW., Suite 1000, Washington, DC 20530, or by facsimile at (202) 307–0693.

FOR FURTHER INFORMATION CONTACT: Holley B. O'Brien, Director, Debt Collection Management Staff (DCM), Justice Management Division, Department of Justice, 145 N Street, NE., Room 5E.101, Washington, DC 20530, at (202) 514–5343.

In accordance with 5 U.S.C. 552a(r) the Department has provided a report to OMB and Congress on the new system of records.

Dated: January 31, 2012.

Nancy C. Libin,

Chief Privacy and Civil Liberties Officer, United States Department of Justice.

JUSTICE/DOJ–016

SYSTEM NAME:

Debt Collection Enforcement System

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

The Justice Data Center, Rockville, MD 20854; and the DOJ components and offices throughout the country that have debt collection and enforcement records and/or responsibilities, including the Antitrust Division, the Civil Division, the Civil Rights Division, the Criminal Division, the Justice Management Division (JMD) Debt Collection Management Staff (DCM), the Executive Office for United States Attorneys (EOUSA), the Environment and Natural Resources Division (ENRD), and the Tax Division. Records may also reside in offices of private counsel retained by DOJ pursuant to contract (contract private counsel) to assist with debt collection.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals indebted to the United States who have either: (1) Allowed their debts to become delinquent and whose delinquent debts have been referred to a DOJ litigating division, a United States Attorney Office (USAO), or to contract private counsel retained by DOJ, for settlement or enforced collection through litigation; and/or (2) incurred debts assessed by a federal court, e.g., fines or penalties in connection with civil or criminal proceedings.

In addition, the categories of individuals covered by the system include persons who are authorized to access and use the system. These individuals are Department of Justice employees and contractors.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system of records contains records relating to the negotiation, compromise, settlement, and litigation of debts owed the United States, as well as for any amounts that the United States is authorized by law to collect for the benefit of any person or entity. Records consist of debt collection case files, as well as automated and/or hard-copy supporting data, as summarized below.

Case files include: evidence of indebtedness, judgment, or discharge; court filings such as legal briefs, pleadings, judgments, orders, and settlement agreements; litigation reports and related attorney work product; and agency status reports, memoranda, correspondence, and other documentation developed during the negotiation, compromise, settlement and/or litigation of debt collection activities.

Automated and/or hard-copy supporting data include information extracted from the case file and information generated or developed in support of federal debt collection activities. Such information may include: personal data (e.g., name, social security number, date of birth, taxpayer identification number, locator information, etc.); claim details (e.g., value and type of claim, such as benefit overpayment, loan default, bankruptcy, etc.); demand information, settlement negotiations, and compromise offered; account information (e.g., debtors' payments, including principal, penalties, interest, and balances, etc.); information regarding debtors' employment, assets, ability to pay, property liens, etc.; data regarding debtors' loans or benefits from client agencies or other entities; information on the status and disposition of cases at various times; data related to the Treasury Offset Program (TOP), which includes offsets by the Internal Revenue Service against income tax refunds, offsets of the salaries and benefits of federal employees or members of the Armed Forces, and other administrative offsets; and any other information related to the negotiation, compromise, settlement, or litigation of debts owed the United States and others, or to the administrative management of debt collection efforts.

The system also contains records regarding authorized system users, including audit log information and records relating to verification or authorization of an individual's access to the system. This information includes user name, date and time of use, search terms and filters, results that the user accessed, and a user's permissions and authorizations for particular data at that time.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

This system is established and maintained pursuant to the Debt Collection Act of 1982, Public Law 97–365, 96 Stat. 1749 (1982), as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701–3720E (original version at Pub. L. 104–134, 110 Stat. 132 (1996)), the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. 3001–3307 (original version at Pub. L. 101–647, 104 Stat. 4933 (1990)), 28 U.S.C. 516, 28 U.S.C. 547, and 44 U.S.C. 3101. More specifically, 28 U.S.C. 516, 519, and 547 authorize the Attorney General to conduct litigation to collect delinquent debts due the United States. In addition, 31 U.S.C. 3718(b) authorizes the Attorney General to contract with private counsel to assist DOJ in collecting debts due the United States. The Attorney General is further authorized by 28 U.S.C. 3101 et seq. and 3201 et seq. to obtain both pre-judgment and post-judgment remedies against delinquent debtors. Moreover, under 28 U.S.C. 3201(a) and (e), a judgment against such a debtor creates a lien on all real property of the debtor, and renders that debtor ineligible for any grant or loan insured, financed, guaranteed, or made by the United States Government.

PURPOSES:

This system of records is maintained by the Department to cover records used by Department components or offices and/or contract private counsel to perform legal, financial, and administrative services associated with the collection of debts due the United States, including related negotiation, settlement, litigation, and enforcement efforts in accordance with the Debt Collection Act and related authority.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

(a) Information from this system may be disclosed to any federal, state, local, territorial, foreign, or tribal agency, or to an individual or organization, if there is reason to believe that such agency, individual, or organization possesses information relating to the verification or collection of debts owed the United States Government, and if the disclosure seeks to elicit information from such entities: (a) Regarding the status of such debts, including settlement, litigation, or other collection efforts; (b) regarding the identification or location of such debtors; (c) regarding the debtor's ability to pay; or (d) relating to the civil action, trial, or hearing, and the disclosure is reasonably necessary to elicit such information or to obtain the cooperation of an agency, individual, or organization.

(b) Information may be disclosed to federal agencies pursuant to the Debt Collection Improvement Act and related authority for any purpose related to debt collection, including locating debtors for debt collection efforts and/or effecting remedies against monies payable to such debtors by the Federal Government. In accordance with computer matching or data sharing programs, information may be disclosed to federal agencies, including the Department of Treasury, Treasury Offset Program, to effect tax refund, salary, and/or administrative offset against federal payments to collect a delinquent debt owed the United States; to the Department of Treasury, Internal Revenue Service, Taxpayer Address

Request Program, to obtain the last known mailing address of a taxpayer for the purpose of locating such taxpayer to collect or to compromise a debt owed by the taxpayer to the United States; and to the Department of Housing and Urban Development, Credit Alert Interactive Verification Reporting System, for its use in providing information to federal agencies and private lenders to assist in evaluating the credit worthiness of federal loan applicants.

(c) Information from this system may be disclosed to client agencies who have referred outstanding debts to the DOJ for debt collection efforts including settlement or litigation, to notify such agencies of case developments, the status of accounts receivable or payable, case-related decisions or determinations, or to make such other inquiries and reports related to debt collection efforts.

(d) Information from this system may be disclosed to any federal agency that employs and/or pays pension, annuity, and/or other benefits to an individual who has been identified as a delinquent debtor for purposes of offsetting the individual's salary and/or pension, annuity, or other benefit payment received from that agency, when DOJ is responsible for the enforced collection of a judgment or claim against that person.

(e) Information from this system may be disclosed to any individual or organization requiring such information for the purpose of performing audit, oversight, and training operations of DOJ and to meet related reporting requirements.

(f) In accordance with regulations issued by the Secretary of the Treasury to implement the Debt Collection Improvement Act of 1996, information from this system may be disclosed to publish or otherwise publicly disseminate the identity of debtors and/or the existence of non-tax debts, in order to direct actions under the law toward delinquent debtors that have assets or income sufficient to pay their delinquent non-tax debts. However, such action may only be taken after reasonable steps have been taken to ensure the accuracy of the identity of a debtor, such debtor has had an opportunity to verify, contest, and pay (in whole or in part) a non-tax debt, and a review has been conducted by the Secretary of the Treasury or designee.

(g) Where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law—criminal, civil, or regulatory in nature—the relevant records may be referred to the appropriate federal, state, local, territorial, tribal or foreign law enforcement authority or other appropriate entity charged with the responsibility for investigating or prosecuting such violation or charged with enforcing or implementing such law.

(h) Information from this system may be disclosed in an appropriate proceeding before a court, grand jury, or administrative or adjudicative body, when the Department of Justice determines that the records are arguably relevant to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

(i) Information from this system may be disclosed to an actual or potential party to litigation or the party's authorized representative for the purpose of negotiation or discussion of such matters as settlement, plea bargaining, or in informal discovery proceedings.

(j) Information from this system may be disclosed to appropriate officials and employees of a federal agency or entity that requires information relevant to a decision concerning the hiring, appointment, or retention of an employee; the assignment, detail, or deployment of an employee; the issuance, renewal, suspension, or revocation of a security clearance; the execution of a security or suitability investigation; the letting of a contract, or the issuance of a grant or benefit.

(k) Information from this system may be disclosed to federal, state, local, territorial, tribal, foreign, or international licensing agencies or associations which require information concerning the suitability or eligibility of an individual for a license or permit.

(l) Information may be disclosed to contractors, grantees, experts, consultants, students, 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.

(m) Information may be disclosed to a former employee of the Department for purposes of: responding to an official inquiry by a federal, state, or local government entity or professional licensing authority, in accordance with applicable Department regulations; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where the Department requires information and/or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

(n) Information from this system may be disclosed to the National Archives and Records Administration for purposes of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

(o) Information from this system may be disclosed to the news media and the public, including disclosures pursuant to 28 CFR 50.2, unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

(p) Information from this system may be disclosed to a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

(q) Information from this system relating to health care fraud may be disclosed to private health plans, or associations of private health plans, and health insurers, or associations of health insurers, for the following purposes: to promote the coordination of efforts to prevent, detect, investigate, and prosecute health care fraud; to assist efforts by victims of health care fraud to obtain restitution; to enable private health plans to participate in local, regional, and national health care fraud task force activities; and to assist tribunals having jurisdiction over claims against private health plans.

(r) Information from this system may be disclosed to complainants and/or victims, to the extent necessary to provide such persons with information and explanations concerning the progress and/or results of the investigation or case arising from the matters of which they complained and/or of which they were a victim.

(s) Information from this system may be disclosed to appropriate agencies, entities, and persons when (1) the Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the 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 the Department or another agency or entity) 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 the Department's efforts to respond to the suspected or

confirmed compromise and prevent, minimize, or remedy such harm.

(t) Information from this system may be disclosed to such recipients and under such circumstances and procedures as are mandated by federal statute or treaty.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Information from this system of records may be disclosed to a credit or consumer reporting agency, as such terms are used in the Fair Credit Reporting Act (15 U.S.C. 1681a–1681u) and the Debt Collection Act (31 U.S.C. 3701–3720E) when such information is necessary or relevant to federal debt collection efforts, including, but not limited to, obtaining a credit report on a debtor, payor, or other party-in-interest; reporting on debts due the Government; and/or pursuing the collection of such debts through settlement, negotiation, or litigation.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

While in the custody of DOJ, certain records in this system are maintained in automated computer information systems and stored in electronic format for use or reproduction in documents or report form at various times. Other records in this system are maintained in paper format and stored in file cabinets, safes, and similar storage containers by the component and/or office enforcing the collection of the debt.

RETRIEVABILITY:

Data in this system of records may be retrieved by debtor names, other personal identifiers, or case numbers, through computerized queries and other keyword searches.

SAFEGUARDS:

The Debt Collection Enforcement System security protocols meet multiple NIST Security Standards from authentication to certification and accreditation. Records in the Debt Collection Enforcement System are maintained in a secure, password protected electronic system environment that utilizes security hardware and software including: multiple firewalls, active intruder detection, and role-based access controls. Additional safeguards may vary by component.

RETENTION AND DISPOSAL:

Debt Collection Records maintained by DOJ Components are maintained in accordance with approved records retention schedules. The records (Master File) of the Department-wide debt collection system are maintained for seven years after close of the case. (N1–060–08–02)

SYSTEM MANAGER(S) AND ADDRESS:

For Debt Collection Management Staff/JMD information contact: FOIA/PA Contact, DOJ/Justice Management Division, 950 Pennsylvania Avenue NW., Room 1111, Washington, DC 20530–0001.

For Antitrust Division information contact: FOIA/PA Unit, DOJ/Antitrust Division, Liberty Square Building, Suite 1000, 450 Fifth Street NW., Washington, DC 20530–0001.

For Civil Division information contact: FOIA/PA Office, DOJ/Civil Division, Room 7304, 20 Massachusetts Avenue NW., Washington, DC 20530–0001.

For Civil Rights Division information contact: FOIA/PA Branch, DOJ/Civil Rights Division, 950 Pennsylvania Avenue NW., BICN, Washington, DC 20530–0001.

For Criminal Division information contact: FOIA/PA Unit, DOJ/Criminal Division, Keeney Building, Suite 1127, Washington, DC 20530–0001.

For Environment and Natural Resources Division information contact: FOIA/PA Office, Law and Policy Section, DOJ/ENRD, P.O. Box 4390, Ben Franklin Station, Washington, DC 20044–4390.

For Executive Office for United States Attorneys (United States Attorneys Offices) information contact: FOIA/PA Staff, DOJ/EOUSA, 600 E Street NW., Room 7300, Washington, DC 20530–0001. Contact information for the individual United States Attorneys Offices in the 94 Federal judicial districts nationwide can be located at *www.usdoj.gov/usao*.

For Tax Division information contact: Assistant Attorney General, Tax Division, U.S. Department of Justice, 950 Pennsylvania Avenue NW., Washington, DC 20530.

NOTIFICATION PROCEDURE:

Same as Record Access Procedures.

RECORD ACCESS PROCEDURES:

To the extent that information in this system of records is not subject to exemption, it is subject to access and amendment. A determination as to the applicability of an exemption to a specific record shall be made at the time a request for access is received. Requests for access must be in writing and should be addressed to the appropriate System Manager listed above. The envelope and letter should be clearly marked ''Privacy Act Request'' and comply with 28 CFR 16.41 (Requests for Access to Records). Access requests must contain the requester's full name, current address, date and place of birth, and should include a clear description of the records sought and any other information that would help to locate the record (e.g., name of the case and federal agency to whom the debtor is indebted). Access requests must be signed and dated and either notarized or submitted under penalty of perjury pursuant to 28 U.S.C. 1746.

CONTESTING RECORD PROCEDURES:

Individuals desiring to contest or amend information maintained in the system should clearly and concisely state what information is being contested, the reasons for contesting it, and the proposed amendment to the information. Address such inquiries to the appropriate System Manager listed above. The envelope and letter should clearly be marked ''Privacy Act Request'' and comply with 28 CFR 16.46 (Request for Amendment or Correction of Records).

RECORD SOURCE CATEGORIES:

Sources of information contained in this system primarily consist of the individuals covered by the system; DOJ and/or agencies to whom the individual is indebted, seeks benefits, or has furnished information; attorneys or other representatives of debtors and/or payors; and Federal, state, local, tribal, territorial, foreign, or private organizations or individuals who may have information regarding the debt, the debtor's ability to pay, or any other information relevant or necessary to assist in debt collection efforts.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The Privacy Act authorizes an agency to promulgate rules to exempt a system of records (or parts of a system of records) from certain Privacy Act requirements. The Attorney General has exempted this system from subsections (c)(3) and (4); (d)(1), (2), (3) and (4); (e)(1), (2), (3), (4) (G), (H), and (I), (5), and (8); (f); and (g) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2) for any criminal law enforcement information within the system; in addition, the system is exempt pursuant to 5 U.S.C. 552a(k)(2) from subsections (c)(3); (d)(1), (2), (3), and (4); (e)(1), (4)(G), (H), and (I); and (f). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c), and (e) and have been published in today's **Federal Register**.

[FR Doc. 2012–3913 Filed 2–17–12; 8:45 am]

BILLING CODE 4410–CN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–80,463]

Clow Water Systems Company Including On-Site Leased Workers From Carol Harris Stafffing Including Workers Whose Unemployment Insurance (UI) Wages Are Reported Through McWane, Inc., Coshocton, OH; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), (19 U.S.C. 2273), the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on December 14, 2011, applicable to workers of Clow Water Systems Company, including on-site leased workers from Carol Harris Staffing, Coshocton, Ohio. The workers are engaged in activities related to the production of iron pipe and utility fittings. The notice was published in the **Federal Register** on December 29, 2011(76 FR 81988).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. New information shows that McWane, Inc. is the parent firm of Clow Water Systems Company. Some workers separated from employment at the Coshocton, Ohio location of Clow Water Systems Company had their wages reported through a separate unemployment insurance (UI) tax account under the name McWane, Inc.

Accordingly, the Department is amending this certification to include workers of the subject firm whose unemployment insurance (UI) wages are reported through McWane, Inc. The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by increased imports of iron pipe and utility fittings.

The amended notice applicable to TA–W–80,463 is hereby issued as follows:

All workers of Clow Water Systems Company, including on-site leased workers from Carol Harris Staffing, including workers whose unemployment insurance (UI) wages are reported through McWane, Inc., Coshocton, Ohio, who became totally or partially separated from employment on or after September 23, 2010, through December 14, 2013, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 3rd day of February 2012.

Michael W. Jaffe

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–3925 Filed 2–17–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–73,074]

Johnson Controls D/B/A Hoover Universal, Inc. Including On-Site Leased Workers from Kelly Services Sycamore, Illinois; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on June 1, 2010, applicable to workers of Johnson Controls, including on-site leased workers from Kelly Services, Sycamore, Illinois. The notice was published in the **Federal Register** on June 16, 2010 (75 FR 34177).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers produce seating for automobiles.

The company reports that in the state of Illinois, Johnson Controls and Hoover Universal, Inc. are one and the same companies. Some workers separated from employment at the subject firm had their wages reported under a separate unemployment insurance (UI) tax account under the name Hoover Universal, Inc.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected as a secondary component supplier of automotive seating for an active TAA certified firm.

The amended notice applicable to TA–W–73,074 is hereby issued as follows:

''All workers of Johnston Controls, d/b/a Hoover Universal, Inc., including on-site leased workers from Kelly services, Sycamore, Illinois, who became totally or partially separated from who became totally or partially separated from employment on or after December 9, 2008, through June 1, 2012, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.''

Signed at Washington, DC, this 8th day of February 2012.

Michael W. Jaffe.

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–3922 Filed 2–17–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–80,286]

Affinity Express, Inc., a Wholly-Owned Subsidiary of LiveIT Investment, Ltd, a Member of the Ayala Group of Companies, Including On-Site Leased Workers From Creative Group, Including Workers Whose Unemployment Insurance (UI) Wages Are Reported Through Staff Management, Inc., Columbus, OH; Amended Revised Determination on Reconsideration

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), (19 U.S.C. 2273), the Department of Labor issued a Revised Determination on Reconsideration on December 15, 2011, applicable to workers of Affinity Express, Inc., a wholly-owned subsidiary of LiveIT Investment, LTD, a member of Ayala Group of Companies, including on-site leased workers from Creative Group, Columbus, Ohio. The workers' firm supplies print and advertising services. The revised notice was published in the **Federal Register** on December 29, 2011(76 FR 81991).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. New information shows that Staff Management, Inc. provides payroll services for the Columbus, Ohio location of Affinity Express, Inc., a wholly-owned subsidiary of LiveIT Investment, LTD, a member of the Ayala Group of Companies. Some workers separated from employment at the Columbus, Ohio location of the subject firm had their wages reported through a separate unemployment insurance (UI) tax account under the name Staff Management, Inc. Accordingly, the Department is amending this revised determination to include workers of the subject firm whose unemployment insurance (UI) wages are reported through Staff Management, Inc.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by the shift in services from a foreign country the supply of services that is like or directly competitive to the printing and advertising services supplied by the workers of the subject firm.

The amended notice applicable to TA–W–80,286 is hereby issued as follows:

All workers of Affinity Express, Inc., a wholly-owned subsidiary of LiveIT Investment, LTD, a member of the Ayala Group of Companies, including on-site leased workers from Creative Group, including workers whose unemployment insurance (UI) wages are reported through Staff Management, Inc., Columbus, Ohio, who became totally or partially separated from employment on or after July 12, 2010, through December 15, 2013, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC, this 3rd day of February 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–3926 Filed 2–17–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of January 30, 2012 through February 3, 2012.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) Imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) Imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) Imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) Imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) The increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) There has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) There has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) The shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) A significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) The acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) A significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) The workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) An affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) An affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) An affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) The petition is filed during the 1-year period beginning on the date on which—

(A) A summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) Notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) The workers have become totally or partially separated from the workers' firm within—

(A) The 1-year period described in paragraph (2); or

(B) Notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
80,456	Woodinville Lumber, Inc	Woodinville, WA	September 15, 2010.
80,530	The Timken Company, Altavista Bearing Plant, 2M, PIC and Adecco.	Altavista, VA	October 18, 2010.
81,015	Pageland Screen Printers, Inc	Pageland, SC	February 13, 2010.
81,020	Turner & Seymour Manufacturing Company	Torrington, CT	February 13, 2010.
81,021	Bayer Cropscience, LP, Leased Workers: Jacobs PSG, Middough Assoc, Adecco, CDI, Becht, etc.	Institute, WV	February 13, 2010.
81,022	Apex Tool Group, Campbell Chain Division; On-site Leased Workers from Adecco.	York, PA	February 13, 2010.
81,060	Rodney Hunt Company	Orange, MA	February 13, 2010.
81,073	RadiciSpandex Corporation	Tuscaloosa, AL	February 13, 2010.
81,073A	RadiciSpandex Corporation	Gastonia, NC	February 13, 2010.
81,114	PlumChoice, Inc., Balance Staffing and Insight Global Staffing	Scarborough, ME	February 13, 2010.
81,167	American Lighting Fixture Corporation, d/b/a Wilshire Manufacturing	Taunton, MA	February 13, 2010.
81,196	Microfibres, Inc., Rhode Island Operations Division	Pawtucket, RI	November 5, 2011.
81,197	Hanes Dye & Finishing Company, Butner, Branch 0314, Hanes Co., Leggett & Platt, Hal Muetzel-Express, etc.	Butner, NC	September 12, 2010.
81,200	Wausau Paper, Brokaw Mill (Including On-Site Leased Workers from ABR Employment Services).	Brokaw, WI	February 13, 2010.
81,212	Sunshine 368, Inc	Corona, NY	February 13, 2010.
81,214	Peninsula Plywood Group, LLC	Port Angeles, WA	February 13, 2010.
81,221	J&M Manufacturing	El Paso, TX	February 13, 2010.
81,233	Clarcor Air Filtration Products	Campbellsville, KY	October 7, 2011.
81,248	Burke Hosiery Mills, Inc	Hickory, NC	February 19, 2012.
81,260	Cinram Distribution, LLC, Cinram International Income Fund; Good People.	Aurora, IL	January 20, 2011.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
80,371	PAETEC, f/k/a Cavalier Telephone; Palm Harbor Division	Palm Harbor, FL	August 12, 2010.
80,439	Yahoo! Inc	Hillsboro, OR	September 15, 2010.
80,502	Lexis Nexis, Quality & Metrics Division	Miamisburg, OH	October 6, 2010.
81,166	AVX Corporation, Myrtle Beach Complex	Myrtle Beach, SC	January 6, 2012.
81,166A	AVX Corporation, Myrtle Beach Complex, IHT and Huff Consulting	Conway, SC	January 6, 2012.
81,174	Charles Navasky & Co., Inc., d/b/a Don Mart Clothes, Inc	Philipsburg, PA	February 13, 2010.
81,181	Bosch Security Systems, Inc	Morrilton, AR	February 13, 2010.
81,195	Boston Scientific	Miami, FL	February 27, 2012.
81,202	TE Connectivity, Medical Division Customer Service Unit	Wilsonville, OR	February 13, 2010.
81,209	Aplegen, Inc., Including workers whose wages were reported thru TriNet.	Goleta, CA	February 13, 2010.
81,220	Aetna International, Inc., Aetna Global Benefits, Including on-site leased workers from ProcureStaff.	Tampa, FL	February 13, 2010.
81,230	ExpressPoint Technology Services, Inc., Operations Division, Ajilon Staffing, Aerotek Staffing and Kelly Services.	Minneapolis, MN	February 13, 2010.
81,232	Image Scan, LLC, TE Connectivity	East Providence, RI	February 13, 2010.
81,235	Danfoss , LLC	Arkadelphia, AR	September 25, 2011.
81,241	Flextronics America LLC	Charlotte, NC	July 1, 2011.
81,244	International Business Machines (IBM) Corporation, Systems & Technology, Systems Software Development, Z/OS Applications, etc.	Poughkeepsie, NY	February 13, 2010.
81,246	Peacehealth St. Joseph Medical Centers, Whatcom Region, Transcription Services Division.	Bellingham, WA	February 13, 2010.
81,258	DTC Communications, Inc., Subsidiary of Cobham Survelliance	Nashua, NH	February 13, 2010.

TA–W No.	Subject firm	Location	Impact date
81,266	Wells Manufacturing, L.P	Fond du Lac, WI	January 24, 2011.
81,267	Kimball Electronics Tampa, Inc., Kimball Electronics, Inc	Tampa, FL	January 25, 2011.

The following certifications have been issued. The requirements of Section 222(c) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
81,210	Verso Paper Corporation	Sartell, MN	February 13, 2010.
81,238	Westark Diversified Enterprises, Whirlpool Cost Center	Van Buren, AR	February 13, 2010.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criterion under paragraph (a)(1), or (b)(1), or (c)(1) (employment decline or threat of separation) of section 222 has not been met.

TA–W No.	Subject firm	Location	Impact date
81,134	Bosley, Inc. f.k.a. Bosley Medical Institute	Beverly Hills, CA.	
81,154	Automotive Components Holdings, LLC	Sandusky, OH.	
81,154A	Automotive Components Holdings	Bellevue, OH.	

The investigation revealed that the criteria under paragraphs (a)(2)(A)(i) (decline in sales or production, or both) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
81,152	Bristol Compressors International, Inc	Bristol, VA.	

The investigation revealed that the criteria under paragraphs(a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
80,457	Northpoint Precision, Inc., Northpoint Holding Corporation	Manistee, MI.	
80,459	Roseburg Forest Products, Composite Panels Division	Missoula, MT.	
80,485	RR Donnelley, Inc., Including On-Site Leased Workers From Manpower & Kelly Services.	Bloomsburg, PA.	
81,096	Quibids Holdings, LLC	Oklahoma City, OK.	
81,124	Asheville Drafting Services, Inc	Asheville, NC.	
81,172	Dominion Energy New England, LLC	Salem, MA.	
81,172A	Dominion Energy New England, LLC	Somerset, MA.	
81,205	Lakeshore Visiting Physicians	Edmore, MI.	

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioner has requested that the petition be withdrawn.

TA–W No.	Subject firm	Location	Impact date
81,112	MMICMAN	Clearwater, FL.	

The following determinations terminating investigations were issued because the petitioning groups of workers are covered by active certifications. Consequently, further investigation in these cases would serve no purpose since the petitioning group of workers cannot be covered by more than one certification at a time.

TA–W No.	Subject firm	Location	Impact date
81,188	Shreveport Ramp Services, LLC	Shreveport, LA.	

I hereby certify that the aforementioned determinations were issued during the period of *January 30, 2012 through February 3, 2012.* These determinations are available on the Department's Web site *tradeact/taa/taa search form.cfm* under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll-free at 888–365–6822.

Dated: February 9, 2012.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–3924 Filed 2–17–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221 (a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221 (a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than March 2, 2012.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than March 2, 2012.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue NW., Washington, DC 20210.

Signed at Washington, DC this 8th day of February 2012.

Michael Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

APPENDIX

[35 TAA petitions instituted between 1/23/12 and 2/3/12]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
81259	MISA Metal Blanking, Inc. (Company)	Howell, MI	01/23/12	01/20/12
81260	Cinram Distribution, LLC (Company)	Aurora, IL	01/23/12	01/20/12
81261	Hanesbrands, Inc. (Company)	Mt. Airy, NC	01/24/12	01/20/12
81262	Thermadyne (Workers)	Chesterfield, MO	01/24/12	01/23/12
81263	AIG Chartis/American General (State/One-Stop)	Houston, TX	01/24/12	01/18/12
81264	Phillips-Vanhuesen (State/One-Stop)	New York City, NY	01/25/12	01/24/12
81265	Seagate Technology, Reliability (Quality) Engineering Group (Company).	Shrewsbury, MA	01/25/12	01/20/12
81266	Wells Manufacturing, L.P. (Company)	Fond du Lac, WI	01/25/12	01/24/12
81267	Kimball Electronics Tampa, Inc. (Company)	Tampa, FL	01/26/12	01/25/12
81268	Louis Berkman LLC West Virginia (Union)	Follansbee, WV	01/26/12	01/26/12
81269	Cummins Filtration—Cookeville (Company)	Cookeville, TN	01/26/12	01/24/12
81270	Header Products, Inc. (Company)	Romulus, MI	01/27/12	01/21/12
81271	CFV Plastics LLC (Workers)	Hermann, MO	01/27/12	01/24/12
81272	Electro Scientific Industries (Workers)	Portland, OR	01/27/12	01/24/12
81273	Sunoco Inc. (Company)	Lester, PA	01/27/12	01/26/12
81274	Aosom LLC (Company)	Lake Oswego, OR	01/30/12	01/26/12
81275	Cooper Bussmann (Company)	Gibsonia, PA	01/31/12	01/30/12
81276	Rock-Tenn Company (Workers)	New Hartford, NY	01/31/12	01/25/12
81277	GCC RioGrande, Inc. (Workers)	Tijeras, NM	01/31/12	12/22/11
81278	Bemis Flexible Packaging—Milprint Division (Company)	Newark, CA	01/31/12	01/18/12
81279	Springs Window Fashions, LLC (Company)	Montgomery, PA	01/31/12	01/30/12
81280	PAR Technology Corporation (PTC) (Workers)	New Hartford, NY	01/31/12	01/25/12
81281	Time Warner Cable (Workers)	Coudersport, PA	01/31/12	01/24/12
81282	International Paper (Workers)	El Paso, TX	01/31/12	01/27/12
81283	SolarWorld Industries America (State/One-Stop)	Camarillo, CA	01/31/12	01/03/12
81284	BASF (Workers)	Suffolk, VA	02/01/12	01/30/12
81285	Invacare Corporation/TAG West (State/One-Stop)	Sacramento, CA	02/01/12	01/30/12
81286	CHF Industries, Inc. (Company)	Fall River, MA	02/01/12	01/31/12
81287	American Woodmark Corporation (Workers)	Moorefield, WV	02/02/12	02/01/12
81288	Criticare Systems, Inc. (Workers)	Waukesha, WI	02/02/12	01/30/12
81289	Transcom (State/One-Stop)	Lafayette, LA	02/03/12	02/01/12
81290	Isaacsons Steel, Inc. (State/One-Stop)	Berlin, NH	02/03/12	02/03/12

APPENDIX—Continued

[35 TAA petitions instituted between 1/23/12 and 2/3/12]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
81291	ITT Exelis (Union)	Roanoke, VA	02/03/12	02/01/12
81292	Siemens Medical Solutions, USA, Inc. (Company)	Concord, CA	02/03/12	02/01/12
81293	NCO Financial Systems (Workers)	Canonsburg, PA	02/03/12	02/02/12

[FR Doc. 2012–3923 Filed 2–17–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

2002 Reopened—Previously Denied Determinations; Notice of Negative Determinations On Reconsideration under the Trade Adjustment Assistance Extension Act of 2011 Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) (Act) the Department of Labor (Department) herein presents summaries of negative determinations on reconsideration regarding eligibility to apply for Trade Adjustment Assistance for workers by case (TA–W–) number regarding negative determinations issued during the period of February 13, 2011 through October 21, 2011. Notices of negative determinations were published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271). As required by the Trade Adjustment Assistance Extension Act of 2011 (TAAEA), all petitions that were denied during this time period were automatically reopened. The reconsideration investigation revealed that the following workers groups have not met the certification criteria under the provisions of TAAEA.

After careful review of the additional facts obtained, the following negative determinations on reconsideration have been issued.

TA–W–80,112; STK, LLC, Lemont Furnace, PA.

TA–W–80,112A; STK, Inc, Coconut Creek, FL.

TA–W–80,430; Product Dynamics Ltd, Levittown, PA.

I hereby certify that the aforementioned negative determinations on reconsideration were issued on January 30, 2012 through February 2, 2012. These determinations are available on the Department's Web site at *tradeact/taa/taa_search_form.cfm* under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll-free at 888–365–6822.

Dated: February 10, 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–3921 Filed 2–17–12; 8:45 am]

BILLING CODE 4510–FN–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 12–01]

Notice of Entering Into a Compact With the Republic of Cape Verde

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: In accordance with Section 610(b)(2) of the Millennium Challenge Act of 2003 (Pub. L. 108–199, Division D), the Millennium Challenge Corporation (MCC) is publishing a summary and the complete text of the Millennium Challenge Compact between the United States of America, acting through the Millennium Challenge Corporation, and the Republic of Cape Verde. Representatives of the United States Government and the Republic of Cape Verde executed the Compact documents on February 10, 2012.

Dated: February 14, 2012.

Melvin F. Williams, Jr.,

VP/General Counsel and Corporate Secretary, Millennium Challenge Corporation.

Summary of Millennium Challenge Compact with the Republic of Cape Verde

The five-year, $66.2 million compact with the Government of Cape Verde (the ''GoCV'') is aimed at reducing poverty through economic growth (the ''Compact''). To this end, the Compact's two projects are intended to increase household incomes in project areas by reforming the water and sanitation and land management sectors, both critical constraints to economic growth.

1. Project Overview and Activity Descriptions

To advance the goal of reducing poverty through economic growth, the Compact will fund two projects.

The $41.1 million *Water, Sanitation, and Hygiene Project* is designed to establish a financially sound, transparent, and accountable institutional basis for the delivery of water and sanitation services to Cape Verdean households and businesses. The $17.3 million *Land Management for Investment Project* is designed to reduce the time required to establish secure property rights and to provide conclusive land information in areas of near-term high development potential in Cape Verde.

Water, Sanitation and Hygiene (WASH) Project

Cape Verde is an extremely water-scarce country, and relies heavily on desalinization of water, which is an expensive and energy-intensive process. The WASH sector is characterized by relatively poor levels of service, including intermittent water supply. In addition, domestic water consumption in Cape Verde is, at approximately 35 liters per day, half that of a low-income peer group of countries, and barely above subsistence levels; not surprising given that Cape Verde has the highest water tariff in Africa and among the highest in the world. The poor, and particularly female-headed households, are especially vulnerable as only 9% of poor households have access to the networked public water supply network. Additionally, Cape Verde is not on track to meet its Millennium Development Goal for sanitation. Low levels of water supply, combined with a population in which over 50% is without any access to improved sanitation services, results in significant public health problems, including diarrhea, malaria and dengue.

The GoCV has worked closely with MCC to develop an ambitious performance-based project. Through extensive consultation with civil society, private sector and government stakeholders, as well as MCC technical assistance, the Cape Verdean team

identified the core of the problem as policy and institutional challenges, in addition to lack of infrastructure. The GoCV therefore developed a clear policy and institutional reform action plan for the sector, and has already demonstrated political will and reform momentum by approving a policy reform paper for the sector, and establishing a policy reform commission.

The $41.1 million project is expected to improve delivery of water and sanitation services to Cape Verdean households and firms. The approach to improving sector performance relies on a three-pronged strategy: (i) Reforming national policy and regulatory institutions; (ii) transforming inefficient utilities into autonomous corporate entities operating on a commercial basis; and (iii) improving the quality and reach of infrastructure in the sector.

The WASH Project comprises the following three activities:

• *National Institutional and Regulatory Reform Activity.* Institutional and regulatory reform activities at the national level are expected to improve planning systems and regulatory processes including tariff setting. MCC will support the creation of a new National Agency for Water and Sanitation responsible for policy and planning of all water resources, domestic water supply, wastewater and sanitation. MCC will also strengthen the existing regulatory organization to better regulate economic and technical aspects of the WASH sector. Finally, the project will build the capacity of the environmental directorate to expand its existing environmental protection functions to include water and wastewater quality. As part of the proposed reform of institutions and regulation, the WASH project will provide technical assistance and resources for the integration of gender and social analysis and objectives into national policies and planning.

• *Utility Reform Activity.* The objective of this activity is to assist highly inefficient municipal utility departments to merge and restructure themselves into financially and administratively independent corporate entities. Regulatory changes will be required to support this transition. Once formed, the new utilities will require support and capacity building to improve their planning capacities and operating efficiency, and to reduce their high levels of commercial losses. MCC efforts will focus on supporting the formation of the proposed utility on the island of Santiago, which represents half the population of Cape Verde, and will be designed so as to facilitate similar utility restructurings elsewhere in the country. The social and gender assessment (SGA) work at this level will integrate these objectives into policy, planning, human resources and budgets.

• *Infrastructure Grant Facility.* The proposed compact will provide funding for an Infrastructure Grant Facility to fund much needed infrastructure capital improvements in the WASH sector while also promoting continued national level reform and providing an incentive for utilities to accelerate the corporatization process. MCC will only release funds into the Infrastructure Grant Facility once broad national policy and utility reform conditions precedent have been met. The Infrastructure Grant Facility will provide grants to any eligible utility, qualifying based on continuous improvement on commercialization of utility operations. Project grant applications from qualified applicants will be evaluated based on a set of transparent financial, economic, technical, implementation, environmental, and social criteria. Given the central role that women and girls play in water and sanitation at the household level, ensuring that infrastructure investments are selected and designed with due attention to social and gender considerations and appropriate information, education, and communication is critical to meeting the ultimate health and economic objectives of the WASH project.

Land Management for Investment Project

No conclusive source of information about land property exists in Cape Verde. Research suggests that up to 92 percent of land rights claims in Cape Verde do not have the legal protection that would be accorded by proper rights registration. Two different land registries, judicial and municipal, each contain partial information about only a fraction of the country's land parcels. Additional records systems hold information about state-owned land. The information tends to be outdated and is often conflicting. No source contains map-based information indicating actual location of a parcel of land over which a right is claimed. Confusion over ownership and boundaries has resulted in unauthorized land sales and the delay or cancellation of public as well as private investment projects. Confusion also limits the ability of small firms and households to create value and increase incomes through investment in their property. When coupled with lengthy procedures across a range of institutions, inconclusive information also generates time-consuming and costly land rights registration processes for all land users, further hampering domestic and foreign investment and economic growth. Cape Verde ranks #104 out of 183 economies in the property registration indicator in the 2011 IFC Doing Business report.

The $17.3 million project is expected to improve Cape Verde's investment climate by: (i) Refining the legal, institutional, and procedural environment to increase the reliability of land information, achieve greater efficiency in land administration transactions, and to strengthen protection of land rights; (ii) developing and implementing a new land information management system; and (iii) clarifying parcel rights and boundaries on targeted islands with high investment potential.

The project supports the GoCV creating a single reliable and easily accessible source of land rights and land boundaries information, which is expected to strengthen Cape Verde's investment climate for large and small investors and to reduce land registration costs for all users. The project comprises two activities:

• *Legal and Institutional Foundations Activity.* This activity will work at a national level to support necessary legal reform, as well as the creation of a new, common information and transaction system for each of the country's core land administration institutions. This system is designed to achieve greater efficiency in land registration-related transactions and land administration in the short term, and more efficient tax administration in the long term.

• *Rights and Boundaries Activity.* Building on the legal and institutional groundwork, the Rights and Boundaries Activity will support actual clarification of parcel rights and boundaries in targeted islands of high tourism investment potential. This new information will be input into the information system, enabling all land users to more quickly and conclusively identify land parcel boundaries and rights.

2. Compact Budget

Projects and activities	Budget (millions)
Water, Sanitation, and Hygiene (WASH) Project	$41.10
National Institutional and Regulatory Reform Activity	*6.68*
Utility Reform Activity	*12.07*
Infrastructure Grant Facility	*22.35*
Land Management for Investment Project	17.26
Legal and Institutional Foundations Activity	*4.22*

Projects and activities	Budget (millions)
Rights and Boundaries Activity	*13.04*
Monitoring and Evaluation	1.39
Program Administration	6.48
Total MCC Funding	66.23
GoCV Contribution	*9.93*
Total (including GoCV contribution)	76.16

3. Administration

The Compact includes program administration costs estimated at $6.48 million over a five year timeframe, including the costs of administration, management, auditing, and fiscal and procurement services. In addition, the cost of monitoring and evaluation of the Compact is budgeted at $1.39 million.

4. Benefits and Beneficiaries

The *Water, Sanitation and Hygiene Project* is expected to yield an economic rate of return (ERR) of 13 percent. ERR calculations are an estimate, using the best information available at the time. This figure represents a potential range of outcomes that account for the uncertainty of core parameters. The National Institutional and Regulatory Reform Activity and the Utility Reform Activity are expected to: (i) Reduce the average cost of water; (ii) reduce commercial losses; and (iii) release government resources from unproductive subsidization of the sector to productive spending to increase growth. The expected ERR for the proposed institutional development activities is 15 percent, and the initial beneficiaries are the population of Santiago Island, which numbered approximately 278,000 in 2010. With GoCV and other donor efforts, the corporatization of utilities is expected to extend throughout Cape Verde during or following compact completion.

The second part of the economic analysis considers the cost effectiveness of operating the Infrastructure Grant Facility to finance infrastructure investments among corporatized utilities. The expected ERR for the Infrastructure Grant Facility is 11 percent, with a wide variance because of the uncertainty regarding the number and types of projects to be financed, and the entities meeting the criteria. Any project financed under the facility must meet a minimum ERR of 12 percent. The analysis estimates that, on average, a population of 48,000, or just over 10 percent of the current national population, would benefit from the operation of the Infrastructure Grant Facility.

The ERR for the *Land Management for Investment Project* is expected to be 22 percent. Based on estimates of incremental employment opportunities, it is estimated that at least 13,000 people would benefit from increased tourism development as a consequence of improving the process of land registration. This number does not include the broader population on the islands, which also is expected to benefit from land registration improvements. Based on incremental employment beneficiaries (i.e., new jobs created), investment costs are relatively high per beneficiary, but the payoffs to the economy in terms of the accelerated development of tourism-related employment are potentially significant.

Because tourism is a key economic driver, the projected tourism impact was selected as the most quantifiable ERR model with demonstrable and observable impact within a short to medium timeframe. Other potential benefits at the national level due to the legal and institutional change and new information systems, or other benefits to the 118,000 people living in the target islands beyond tourism impact, are not included in the ERR model, but will be tracked as part of the monitoring strategy and impact evaluation.

Millennium Challenge Compact Between the United States of America Acting Through the Millennium Challenge Corporation and The Republic of Cape Verde

Millennium Challenge Compact

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Millennium Challenge Compact

Preamble

This Millennium Challenge Compact (this ''*Compact*'') is between the United States of America, acting through the Millennium Challenge Corporation, a United States government corporation (''*MCC*''), and the Republic of Cape Verde (''*Cape Verde*''), acting through its government (the ''*Government*'') as represented by the Ministry of Finance and Planning. MCC and the Government are referred to in this Compact individually as a ''*Party*'' and collectively as the ''*Parties.*'' Capitalized terms used in this Compact shall have the meanings provided in Annex V.

Recalling that the Parties successfully concluded an initial Millennium Challenge Compact that advanced the progress of Cape Verde in achieving lasting economic growth and poverty reduction, demonstrated the strong partnership between the Parties, and was implemented in accordance with MCC's core policies and standards;

Recognizing that the Parties are committed to the shared goals of promoting economic growth and the elimination of extreme poverty in Cape Verde and that MCC assistance under this subsequent Compact supports Cape Verde's demonstrated commitment to

strengthening good governance, economic freedom and investments in people;

Recalling that the Government consulted with the private sector and civil society of Cape Verde to determine the priorities for the use of MCC assistance and developed and submitted to MCC a proposal consistent with those priorities; and

Recognizing that MCC wishes to help Cape Verde implement a program to achieve the goal and objectives described herein (as such program description and objectives may be amended from time to time in accordance with the terms hereof, the ''*Program*'');

The Parties hereby agree as follows:

Article 1. Goal and Objectives

Section 1.1 Compact Goal

The goal of this Compact is to reduce poverty through economic growth in Cape Verde (the ''*Compact Goal*''). MCC's assistance will be provided in a manner that strengthens good governance, economic freedom, and investments in the people of Cape Verde.

Section 1.2 Program Objectives

The objectives of the Program are to reduce the costs upon the economy of inefficiently provided public services and to remove institutional conditions that impede private sector investment (the ''*Program Objectives*''). The Program consists of the projects described in Annex I (each a ''*Project*'' and collectively, the ''*Projects*'').

Section 1.3 Project Objectives

The objectives of the Projects (each a ''*Project Objective*'' and collectively, the ''*Project Objectives*'') are as follows:

(a) The objective of the Water, Sanitation and Hygiene Project is to establish a financially sound, transparent, and accountable institutional basis for the delivery of water and sanitation services to Cape Verdean households and firms by: (i) Reforming national policy and regulatory institutions; (ii) transforming inefficient utilities into autonomous corporate entities operating on a commercial basis; and (iii) improving the quality and reach of infrastructure in the sector; and

(b) The objective of the Land Management for Investment Project is to reduce the time required for establishing secure property rights and to establish more conclusive land information in areas of near-term, high development potential in Cape Verde by: (i) Refining the legal, institutional and procedural environment to increase reliability of land information, achieve greater efficiency in land administration transactions, and strengthen protection of land rights; (ii) developing and implementing a new land information management system; and (iii) clarifying parcel rights and boundaries on targeted islands with high investment potential.

Article 2. Funding and Resources

Section 2.1 Program Funding

Upon entry into force of this Compact in accordance with Section 7.3, MCC shall grant to the Government, under the terms of this Compact, an amount not to exceed Sixty Two Million Two Hundred Thirty Thousand United States Dollars (US$62,230,000) (''*Program Funding*'') for use by the Government to implement the Program. The allocation of Program Funding is generally described in Annex II.

Section 2.2 Compact Implementation Funding

(a) Upon signing of this Compact, MCC shall grant to the Government, under the terms of this Compact and in addition to the Program Funding described in Section 2.1, an amount not to exceed Four Million United States Dollars (US$4,000,000) (''*Compact Implementation Funding*'') under Section 609(g) of the Millennium Challenge Act of 2003, as amended (the ''*Act*''), for use by the Government to facilitate implementation of the Compact, including for the following purposes:

(i) Financial management and procurement activities (including costs related to agents procured by MCC to provide standby fiscal and procurement agent services, if required);

(ii) Administrative activities (including start-up costs such as staff salaries) and administrative support expenses such as rent, computers and other information technology or capital equipment;

(iii) Monitoring and evaluation activities;

(iv) Feasibility studies; and

(v) Other activities to facilitate Compact implementation as approved by MCC.

The allocation of Compact Implementation Funding is generally described in Annex II.

(b) Each Disbursement of Compact Implementation Funding is subject to satisfaction of the conditions precedent to such disbursement as set forth in Annex IV.

(c) If MCC determines that the full amount of Compact Implementation Funding available under Section 2.2(a) exceeds the amount that reasonably can be utilized for the purposes set forth in Section 2.2(a), MCC, by written notice to the Government, may withdraw the excess amount, thereby reducing the amount of the Compact Implementation Funding available under Section 2.2(a) (such excess, the ''*Excess CIF Amount*''). In such event, the amount of Compact Implementation Funding granted to the Government under Section 2.2(a) shall be reduced by the Excess CIF Amount, and MCC shall have no further obligations with respect to such Excess CIF Amount.

(d) MCC, at its option by written notice to the Government, may elect to grant to the Government an amount equal to all or a portion of such Excess CIF Amount as an increase in the Program Funding, and such additional Program Funding shall be subject to the terms and conditions of this Compact applicable to Program Funding.

Section 2.3 MCC Funding

Program Funding and Compact Implementation Funding are collectively referred to in this Compact as ''*MCC Funding,*'' and includes any refunds or reimbursements of Program Funding or Compact Implementation Funding paid by the Government in accordance with this Compact.

Section 2.4 Disbursement

In accordance with this Compact and the Program Implementation Agreement, MCC shall disburse MCC Funding for expenditures incurred in furtherance of the Program (each instance, a ''*Disbursement*''). Subject to the satisfaction of all applicable conditions precedent, the proceeds of Disbursements shall be made available to the Government, at MCC's sole election, by (a) deposit to one or more bank accounts established by the Government and acceptable to MCC (each, a ''*Permitted Account*'') or (b) direct payment to the relevant provider of goods, works or services for the implementation of the Program. MCC Funding may be expended only for Program expenditures.

Section 2.5 Interest

The Government shall pay or transfer to MCC, in accordance with the Program Implementation Agreement, any interest or other earnings that accrue on MCC Funding prior to such funding being used for a Program purpose.

Section 2.6 Government Resources; Budget

(a) Consistent with Section 609(b)(2) of the Act, the Government shall make a contribution towards meeting the

Program Objectives and Project Objectives of this Compact. Annex II describes such contribution in more detail. In addition, the Government shall provide all funds and other resources, and shall take all actions, that are necessary to carry out the Government's responsibilities under this Compact.

(b) The Government shall use its best efforts to ensure that all MCC Funding it receives or is projected to receive in each of its fiscal years is fully accounted for in its annual budget for the duration of the Program.

(c) The Government shall not reduce the normal and expected resources that it would otherwise receive or budget from sources other than MCC for the activities contemplated under this Compact and the Program.

(d) Unless the Government discloses otherwise to MCC in writing, MCC Funding shall be in addition to the resources that the Government would otherwise receive or budget for the activities contemplated under this Compact and the Program.

Section 2.7 Limitations on the Use of MCC Funding

The Government shall ensure that MCC Funding is not used for any purpose that would violate United States law or policy, as specified in this Compact or as further notified to the Government in writing or by posting from time to time on the MCC Web site at *www.mcc.gov* (the ''*MCC Web site*''), including but not limited to the following purposes:

(a) For assistance to, or training of, the military, police, militia, national guard or other quasi-military organization or unit;

(b) For any activity that is likely to cause a substantial loss of United States jobs or a substantial displacement of United States production;

(c) To undertake, fund or otherwise support any activity that is likely to cause a significant environmental, health, or safety hazard, as further described in MCC's environmental and social assessment guidelines and any guidance documents issued in connection with the guidelines posted from time to time on the MCC Web site or otherwise made available to the Government (collectively, the ''*MCC Environmental Guidelines*''); or

(d) To pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions, to pay for the performance of involuntary sterilizations as a method of family planning or to coerce or provide any financial incentive to any person to undergo sterilizations or to pay for any biomedical research which relates, in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning.

Section 2.8 Taxes

(a) Unless the Parties specifically agree otherwise in writing, the Government shall ensure that all MCC Funding is free from the payment or imposition of any existing or future taxes, duties, levies, contributions or other similar charges (but not fees or charges for services that are generally applicable in Cape Verde, reasonable in amount and imposed on a non-discriminatory basis) (''*Taxes*'') of or in Cape Verde (including any such Taxes imposed by a national, regional, local or other governmental or taxing authority of or in Cape Verde). Specifically, and without limiting the generality of the foregoing, MCC Funding shall be free from the payment of (i) any tariffs, customs duties, import taxes, export taxes, and other similar charges on any goods, works or services introduced into Cape Verde in connection with the Program; (ii) sales tax, value added tax, excise tax, property transfer tax, and other similar charges on any transactions involving goods, works or services in connection with the Program, (iii) taxes and other similar charges on ownership, possession or use of any property in connection with the Program, and (iv) taxes and other similar charges on income, profits or gross receipts attributable to work performed in connection with the Program and related social security taxes and other similar charges on all natural or legal persons performing work in connection with the Program except (x) natural persons who are citizens or permanent residents of Cape Verde, (y) social security taxes or other similar charges levied on an employer in connection with hiring employees who are citizens or permanent residents of Cape Verde, and (z) legal persons formed under the laws of Cape Verde (but excluding MCA-Cape Verde II and any other entity formed for the purpose of implementing the Government's obligations hereunder).

(b) The mechanisms that the Government shall use to implement the tax exemption required by Section 2.8(a) are set forth in the Program Implementation Agreement. Such mechanisms may include exemptions from the payment of Taxes that have been granted in accordance with applicable law, refund or reimbursement of Taxes by the Government to MCC, MCA-Cape Verde II or to the taxpayer, or payment by the Government to MCA-Cape Verde II or MCC, for the benefit of the Program, of an agreed amount representing any collectible Taxes on the items described in Section 2.8(a).

(c) If a Tax has been paid contrary to the requirements of Section 2.8(a) or the Program Implementation Agreement, the Government shall refund promptly to MCC (or to another party as designated by MCC) the amount of such Tax in United States dollars or the currency of Cape Verde within sixty (60) days (or such other period as may be agreed in writing by the Parties) after the Government is notified in writing (whether by MCC or MCA-Cape Verde II) that such Tax has been paid.

(d) No MCC Funding, proceeds thereof or Program Assets may be applied by the Government in satisfaction of its obligations under Section 2.8(c).

Section 2.9 Lower Middle Income Countries

Section 606(b) of the Act restricts the amount of assistance that MCC may provide to ''lower middle income countries,'' a term that is defined in the Act and includes Cape Verde. To the extent that MCC determines, in MCC's reasonable discretion, that the amount of Program Funding granted to the Government in this Compact may result in a violation of Section 606(b) of the Act, MCC, at any time and from time to time upon written notice to the Government, may reduce the amount of Program Funding, or withhold any Disbursement of Program Funding, to avoid or remedy such a violation.

Article 3. Implementation

Section 3.1 Program Implementation Agreement

The Parties shall enter into an agreement providing further detail on the implementation arrangements, fiscal accountability and disbursement and use of MCC Funding, among other matters (the ''*Program Implementation Agreement*'' or ''*PIA*''); and the Government shall implement the Program in accordance with this Compact, the PIA, any other Supplemental Agreement and any Implementation Letter.

Section 3.2 Government Responsibilities

(a) The Government has principal responsibility for overseeing and managing the implementation of the Program.

(b) The Government will create and designate Millennium Challenge

Account—Cape Verde II, as the accountable entity to implement the Program and to exercise and perform the Government's right and obligation to oversee, manage and implement the Program, including without limitation, managing the implementation of Projects and their Activities, allocating resources and managing procurements. Such entity shall be referred to herein as ''*MCA-Cape Verde II,*'' and shall have the authority to bind the Government with regard to all Program activities. The designation contemplated by this Section 3.2(b) shall not relieve the Government of any obligations or responsibilities hereunder or under any related agreement, for which the Government remains fully responsible. MCC hereby acknowledges and consents to the designation in this Section 3.2(b).

(c) The Government shall ensure that any Program Assets or services funded in whole or in part (directly or indirectly) by MCC Funding are used solely in furtherance of this Compact and the Program unless MCC agrees otherwise in writing.

(d) The Government shall take all necessary or appropriate steps to achieve the Program Objectives and the Project Objectives during the Compact Term (including, without limiting Section 2.6(a), funding all costs that exceed MCC Funding and are required to carry out the terms hereof and achieve such objectives, unless MCC agrees otherwise in writing).

(e) The Government shall fully comply with the Program Guidelines, as applicable, in its implementation of the Program.

(f) The Government will grant to MCC a perpetual, irrevocable, royalty-free, worldwide, fully paid, assignable right and license to practice or have practiced on its behalf (including the right to produce, reproduce, publish, repurpose, use, store, modify, or make available) any portion or portions of Intellectual Property as MCC sees fit in any medium, now known or hereafter developed, for any purpose whatsoever.

Section 3.3 Policy Performance

In addition to undertaking the specific policy, legal and regulatory reform commitments identified in Annex I, the Government shall seek to maintain and to improve its level of performance under the policy criteria identified in Section 607 of the Act, and the selection criteria and methodology used by MCC.

Section 3.4 Accuracy of Information

The Government assures MCC that, as of the date this Compact is signed by the Government, the information provided to MCC by or on behalf of the Government in the course of reaching agreement with MCC on this Compact is true, correct and complete in all material respects.

Section 3.5 Implementation Letters

From time to time, MCC may provide guidance to the Government in writing on any matters relating to this Compact, MCC Funding or implementation of the Program (each, an ''*Implementation Letter*''). The Government shall apply such guidance in implementing the Program. The Parties may also issue jointly agreed-upon Implementation Letters to confirm and record their mutual understanding on aspects related to the implementation of this Compact, the PIA or other related agreements.

Section 3.6 Procurement and Grants

(a) The Government shall ensure that the procurement of all goods, works and services by the Government or any Provider to implement the Program shall be consistent with the ''MCC Program Procurement Guidelines'' posted from time to time on the MCC Web site (the ''*MCC Program Procurement Guidelines*''). The MCC Program Procurement Guidelines include the following requirements, among others:

(i) Open, fair, and competitive procedures must be used in a transparent manner to solicit, award and administer contracts and to procure goods, works and services;

(ii) Solicitations for goods, works, and services must be based upon a clear and accurate description of the goods, works and services to be acquired;

(iii) Contracts must be awarded only to qualified contractors that have the capability and willingness to perform the contracts in accordance with their terms on a cost effective and timely basis; and

(iv) No more than a commercially reasonable price, as determined, for example, by a comparison of price quotations and market prices, shall be paid to procure goods, works and services.

(b) The Government shall ensure that any grant issued to any non-governmental entity in furtherance of the Program (the ''*Grant*'') is selected, implemented and administered pursuant to open, fair, and competitive procedures administered in a transparent manner. In furtherance of this requirement, and prior to the issuance of any Grant, the Government and MCC shall agree upon written procedures to govern the identification of potential recipients, the selection and the award of Grants. Such agreed procedures shall be posted on the MCA-Cape Verde II Web site.

Section 3.7 Records; Accounting; Covered Providers; Access

(a) Government Books and Records. The Government shall maintain, and shall use its best efforts to ensure that all Covered Providers maintain, accounting books, records, documents and other evidence relating to the Program adequate to show, to MCC's satisfaction, the use of all MCC Funding and the implementation and results of the Program (''*Compact Records*''). In addition, the Government shall furnish or cause to be furnished to MCC, upon its request, originals or copies of such Compact Records.

(b) Accounting. The Government shall maintain and shall use its best efforts to ensure that all Covered Providers maintain Compact Records in accordance with generally accepted accounting principles prevailing in the United States, or at the Government's option and with MCC's prior written approval, other accounting principles, such as those (i) prescribed by the International Accounting Standards Board, or (ii) then prevailing in Cape Verde. Compact Records must be maintained for at least five (5) years after the end of the Compact Term or for such longer period, if any, required to resolve any litigation, claims or audit findings or any applicable legal requirements.

(c) Providers and Covered Providers. Unless the Parties agree otherwise in writing, a ''*Provider*'' is (i) any entity of the Government that receives or uses MCC Funding or any other Program Asset in carrying out activities in furtherance of this Compact or (ii) any third party that receives at least US$50,000 in the aggregate of MCC Funding (other than as salary or compensation as an employee of an entity of the Government) during the Compact Term. A ''*Covered Provider*'' is (i) a non-United States Provider that receives (other than pursuant to a direct contract or agreement with MCC) US$300,000 or more of MCC Funding in any Government fiscal year or any other non-United States person or entity that receives, directly or indirectly, US$300,000 or more of MCC Funding from any Provider in such fiscal year, or (ii) any United States Provider that receives (other than pursuant to a direct contract or agreement with MCC) US$500,000 or more of MCC Funding in any Government fiscal year or any other United States person or entity that receives, directly or indirectly, US$500,000 or more of MCC Funding from any Provider in such fiscal year.

(d) Access. Upon MCC's request, the Government, at all reasonable times, shall permit, or cause to be permitted, authorized representatives of MCC, an authorized Inspector General of MCC (''*Inspector General*''), the United States Government Accountability Office, any auditor responsible for an audit contemplated herein or otherwise conducted in furtherance of this Compact, and any agents or representatives engaged by MCC or the Government to conduct any assessment, review or evaluation of the Program, the opportunity to audit, review, evaluate or inspect facilities, assets and activities funded in whole or in part by MCC Funding.

Section 3.8 Audits; Reviews

(a) Government Audits. The Government shall, on an annual basis (or on a more frequent basis if requested by MCC in writing), conduct, or cause to be conducted, financial audits of all disbursements of MCC Funding covering the period from signing of this Compact until the following December 31 and covering each twelve-month period thereafter ending December 31, through the end of the Compact Term. In addition, upon MCC's request, the Government shall ensure that such audits are conducted by an independent auditor approved by MCC and named on the list of local auditors approved by the Inspector General or a United States-based certified public accounting firm selected in accordance with the ''Guidelines for Financial Audits Contracted by MCA'' (the ''*Audit Guidelines*'') issued and revised from time to time by the Inspector General, which are posted on the MCC Web site. Audits shall be performed in accordance with the Audit Guidelines and be subject to quality assurance oversight by the Inspector General. Each audit must be completed and the audit report delivered to MCC no later than 90 days after the first period to be audited and no later than 90 days after the end of the audit period, or such other period as the Parties may otherwise agree in writing.

(b) Audits of Other Entities. The Government shall ensure that MCC financed agreements between the Government or any Provider, on the one hand, and (i) a United States nonprofit organization, on the other hand, state that the United States nonprofit organization is subject to the applicable audit requirements contained in OMB Circular A–133, ''Audits of States, Local Governments, and Non-Profit Organizations,'' issued by the United States Office of Management and Budget; (ii) a United States for-profit Covered Provider, on the other hand, state that the United States for-profit organization is subject to audit by the applicable United States Government agency, unless the Government and MCC agree otherwise in writing; and (iii) a non-US Covered Provider, on the other hand, state that the non-US Covered Provider is subject to audit in accordance with the Audit Guidelines.

(c) Corrective Actions. The Government shall use its best efforts to ensure that each Covered Provider (i) takes, where necessary, appropriate and timely corrective actions in response to audits, (ii) considers whether the results of the Covered Provider's audit necessitates adjustment of the Government's records, and (iii) permits independent auditors to have access to its records and financial statements as necessary.

(d) Audit by MCC. MCC shall have the right to arrange for audits of the Government's use of MCC Funding.

(e) Cost of Audits, Reviews or Evaluations. MCC Funding may be used to fund the costs of any audits, reviews or evaluations required under this Compact.

Article 4. Communications

Section 4.1 Communications

Any document or communication required or submitted by either Party to the other under this Compact must be in writing and, except as otherwise agreed with MCC, in English. For this purpose, the address of each Party is set forth below.

To MCC

Millennium Challenge Corporation, Attention: Vice President, Compact Operations, (with a copy to the Vice President and General Counsel), 875 Fifteenth Street NW., Washington, DC 20005, United States of America, Telephone: (202) 521–3600, Facsimile: (202) 521–3700, Email: *VPOperations@mcc.gov* (Vice President, Compact Operations), *VPGeneralCounsel@mcc.gov* (Vice President and General Counsel).

To the Government

Ministry of Finance and Planning, Attention: Minister of Finance and Planning, (with a copy to the National Director of Planning), Avenida Amilcar Cabral, P.O. Box #30, Praia, Cape Verde, Telephone: +238 260 7500/1, Facsimile: +238 261 3897.

To MCA-Cape Verde II

Upon establishment of MCA-Cape Verde II, MCA-Cape Verde II will notify the Parties of its contact details.

Section 4.2 Representatives

For all purposes of this Compact, the Government shall be represented by the individual holding the position of, or acting as, Minister of Finance and Planning of the Republic of Cape Verde, and MCC shall be represented by any of the individuals holding the positions of, or acting as, the Vice President or Deputy Vice President for Compact Operations (each of the foregoing, a ''*Principal Representative*''). Each Party, by written notice to the other Party, may designate one or more additional representatives (each, an ''*Additional Representative*'') for all purposes other than signing amendments to this Compact. The Government will designate an Additional Representative. A Party may change its Principal Representative to a new representative that holds a position of equal or higher authority upon written notice to the other Party.

Section 4.3 Signatures

Signatures to this Compact and to any amendment to this Compact shall be original signatures appearing on the same page or in an exchange of letters or diplomatic notes. With respect to all documents arising out of this Compact (other than the Program Implementation Agreement) and amendments thereto, signatures may, as appropriate, be delivered by facsimile or electronic mail and in counterparts and shall be binding on the Party delivering such signature to the same extent as an original signature would be.

Article 5. Termination; Suspension; Expiration

Section 5.1 Termination; Suspension

(a) Either Party may terminate this Compact without cause in its entirety by giving the other Party thirty (30) days' prior written notice. MCC may also terminate this Compact or MCC Funding without cause in part by giving the Government thirty (30) days' prior written notice.

(b) MCC may, immediately, upon written notice to the Government, suspend or terminate this Compact or MCC Funding, in whole or in part, and any obligation related thereto, if MCC determines that any circumstance identified by MCC, as a basis for suspension or termination (whether in writing to the Government or by posting on the MCC Web site) has occurred, which circumstances include but are not limited to the following:

(i) The Government fails to comply with its obligations under this Compact or any other agreement or arrangement entered into by the Government in

connection with this Compact or the Program;

(ii) An event or series of events has occurred that makes it probable that the Program Objectives or any of the Project Objectives shall not be achieved during the Compact Term or that the Government shall not be able to perform its obligations under this Compact;

(iii) A use of MCC Funding or continued implementation of this Compact or the Program violates applicable law or United States Government policy, whether now or hereafter in effect;

(iv) The Government or any other person or entity receiving MCC Funding or using Program Assets is engaged in activities that are contrary to the national security interests of the United States;

(v) An act has been committed or an omission or an event has occurred that would render Cape Verde ineligible to receive United States economic assistance under Part I of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2151 *et seq.*), by reason of the application of any provision of such act or any other provision of law;

(vi) The Government has engaged in a pattern of actions inconsistent with the criteria used to determine the eligibility of Cape Verde for assistance under the Act; and

(vii) The Government or another person or entity receiving MCC Funding or using Program Assets is found to have been convicted of a narcotics offense or to have been engaged in drug trafficking.

Section 5.2 Consequences of Termination, Suspension or Expiration

(a) Upon the suspension or termination, in whole or in part, of this Compact or any MCC Funding, or upon the expiration of this Compact, the provisions of Section 4.2 of the Program Implementation Agreement shall govern the post-suspension, post-termination or post-expiration treatment of MCC Funding, any related Disbursements and Program Assets. Any portion of this Compact, MCC Funding, the Program Implementation Agreement or any other Supplemental Agreement that is not suspended or terminated shall remain in full force and effect.

(b) MCC may reinstate any suspended or terminated MCC Funding under this Compact if MCC determines that the Government or other relevant person or entity has committed to correct each condition for which MCC Funding was suspended or terminated.

Section 5.3 Refunds; Violation

(a) If any MCC Funding, any interest or earnings thereon, or any Program Asset is used for any purpose in violation of the terms of this Compact, then MCC may require the Government to repay to MCC in United States Dollars the value of the misused MCC Funding, interest, earnings, or asset, plus interest within thirty (30) days after the Government's receipt of MCC's request for repayment. The Government shall not use MCC Funding, proceeds thereof or Program Assets to make such payment.

(b) Notwithstanding any other provision in this Compact or any other existing agreement to the contrary, MCC's right under Section 5.3(a) for a refund shall continue during the Compact Term and for a period of (i) five (5) years thereafter or (ii) one (1) year after MCC receives actual knowledge of such violation, whichever is later.

Section 5.4 Survival

The Government's responsibilities under this Section and Sections 2.7, 3.7, 3.8, 5.2, 5.3, and 6.4 shall survive the expiration, suspension or termination of this Compact.

Article 6. Compact Annexes; Amendments; Governing Law

Section 6.1 Annexes

Each annex to this Compact constitutes an integral part hereof, and references to ''Annex'' mean an annex to this Compact unless otherwise expressly stated.

Section 6.2 Amendments

(a) The Parties may amend this Compact only by a written agreement signed by the Principal Representatives (or such other government official designated by the relevant Principal Representative).

(b) Notwithstanding Section 6.2(a), the Parties may agree in writing, signed by the Principal Representatives (or such other government official designated by the relevant Principal Representative) or any Additional Representative, to modify any Annex to (i) suspend, terminate or modify any Project or Activity, or to create a new project, (ii) change the allocations of funds as set forth in Annex II as of the date hereof (including to allocate funds to a new project), (iii) modify the implementation framework described in Annex I or (iv) add, delete or waive any condition precedent described in Annex IV; *provided that,* in each case, any such modification (A) is consistent in all material respects with the Program Objectives and Project Objectives, (B) does not cause the amount of Program Funding to exceed the aggregate amount specified in Section 2.1 (as may be modified by operation of Section 2.2(d)), (C) does not cause the amount of Compact Implementation Funding to exceed the aggregate amount specified in Section 2.2(a), (D) does not reduce the Government's responsibilities or contribution of resources required under Section 2.6(a), and (E) does not extend the Compact Term.

Section 6.3 Inconsistencies

In the event of any conflict or inconsistency between:

(a) Any Annex and any of Articles 1 through 7, such Articles 1 through 7, as applicable, shall prevail; or

(b) this Compact and any other agreement between the Parties regarding the Program, this Compact shall prevail.

Section 6.4 Governing Law

This Compact is an international agreement and as such shall be governed by the principles of international law.

Section 6.5 Additional Instruments

Any reference to activities, obligations or rights undertaken or existing under or in furtherance of this Compact or similar language shall include activities, obligations and rights undertaken by, or existing under or in furtherance of any agreement, document or instrument related to this Compact and the Program.

Section 6.6 References to MCC Web Site

Any reference in this Compact, the PIA or any other agreement entered into in connection with this Compact, to a document or information available on, or notified by posting on the MCC Web site shall be deemed a reference to such document or information as updated or substituted on the MCC Web site from time to time.

Section 6.7 References to Laws, Regulations, Policies and Guidelines

Each reference in this Compact, the PIA or any other agreement entered into in connection with this Compact, to a law, regulation, policy, guideline or similar document shall be construed as a reference to such law, regulation, policy, guideline or similar document as it may, from time to time, be amended, revised, replaced, or extended and shall include any law, regulation, policy, guideline or similar document issued under or otherwise applicable or related to such law, regulation, policy, guideline or similar document.

Section 6.8 MCC Status

MCC is a United States government corporation acting on behalf of the United States Government in the implementation of this Compact. MCC and the United States Government assume no liability for any claims or loss arising out of activities or omissions under this Compact. The Government waives any and all claims against MCC or the United States Government or any current or former officer or employee of MCC or the United States Government for all loss, damage, injury, or death arising out of activities or omissions under this Compact, and agrees that it shall not bring any claim or legal proceeding of any kind against any of the above entities or persons for any such loss, damage, injury, or death. The Government agrees that MCC and the United States Government or any current or former officer or employee of MCC or the United States Government shall be immune from the jurisdiction of all courts and tribunals of Cape Verde for any claim or loss arising out of activities or omissions under this Compact.

Article 7. Entry Into Force

Section 7.1 Domestic Requirements

The Government shall proceed in a timely manner to complete all of its domestic requirements for each of the Compact and PIA to enter into force as an international agreement.

Section 7.2 Conditions Precedent to Entry Into Force

Before this Compact enters into force:

(a) The Program Implementation Agreement must have been signed by the parties thereto;

(b) The Government must have delivered to MCC:

(i) A letter signed and dated by the Principal Representative of the Government, or such other duly authorized representative of the Government acceptable to MCC, confirming that the Government has completed its domestic requirements for this Compact to enter into force and that the other conditions precedent to entry into force in this Section 7.2 have been met;

(ii) A signed legal opinion from the Attorney General of Cape Verde (or such other legal representative of the Government acceptable to MCC), in form and substance satisfactory to MCC;

(iii) Complete, certified copies of all decrees, legislation, regulations or other governmental documents relating to the Government's domestic requirements for this Compact to enter into force and the satisfaction of Section 7.1, which MCC may post on its Web site or otherwise make publicly available; and

(c) MCC shall not have determined that after signature of this Compact, the Government has engaged in a pattern of actions inconsistent with the eligibility criteria for MCC Funding.

Section 7.3 Date of Entry Into Force

This Compact shall enter into force on the date of the letter from MCC to the Government in an exchange of letters confirming that MCC has completed its domestic requirements for entry into force of this Compact and that the conditions precedent to entry into force in Section 7.2 have been met.

Section 7.4 Compact Term

This Compact shall remain in force for five (5) years after its entry into force, unless terminated earlier under Section 5.1 (the ''*Compact Term*'').

Section 7.5 Provisional Application

Upon signature of this Compact, and until this Compact has entered into force in accordance with Section 7.3, the Parties shall provisionally apply the terms of this Compact; *provided that,* no MCC Funding, other than Compact Implementation Funding, shall be made available or disbursed before this Compact enters into force.

In Witness Whereof, the undersigned, duly authorized by their respective governments, have signed this Compact.

Done at Praia, Cape Verde, this 10th day of February, in the English language only.

For the United States of America, acting through the Millennium Challenge Corporation, Name: Daniel W. Yohannes, Title: Chief Executive Officer.

For the Republic of Cape Verde, Name: Cristina Duarte, Title: Minister of Finance and Planning.

Annex I Program Description

This Annex I describes the Program that MCC Funding will support in Cape Verde during the Compact Term.

A. Program Overview

1. Background

Strategically located at the crossroads of mid-Atlantic air and sea lanes, Cape Verde continues to exhibit one of Africa's most stable and democratic governments. In 2001, Cape Verde embarked on a transformation agenda aimed at building a self-sustaining high growth economy through policy reforms, private sector led growth, infrastructure development, and institutional changes. The Government recognizes that in order to alleviate poverty it must continue to improve performance and accelerate important reforms.

The Government and MCC entered into a Millennium Challenge Compact in 2005 with the objective of increasing agricultural production, improving infrastructure, and developing the private sector. The Parties successfully completed the first compact, representing a new form of partnership with donors for the country. Based on Cape Verde's continued performance on MCC's eligibility criteria and the successful implementation of the first compact, the MCC Board selected Cape Verde as eligible for a second compact in December 2009.

2. Constraints Analysis and Consultative Process

In January 2010, the Government assembled a task force under the Ministry of Finance and Planning to develop a second compact. The task force conducted a constraints analysis and through extensive consultation with national and local government stakeholders, civil society, and private sector identified both the water and sanitation and land sectors as critical constraints to achieving the country's economic transformation agenda.

3. Program Objective

The Compact Goal is to reduce poverty through economic growth in Cape Verde. MCC's assistance will be provided in a manner that strengthens good governance, economic freedom, and investments in the people of Cape Verde. The Program Objectives are to reduce the costs upon the economy of inefficiently provided public services and remove institutional conditions that impede private sector investment. The Program consists of the Water, Sanitation and Hygiene Project and the Land Management for Investment Project, as further described in this Annex I.

B. Description of Projects

Set forth below is a description of each of the Projects that the Government will implement, or cause to be implemented, using MCC Funding to advance the applicable Project Objectives. Specific activities that will be undertaken within each Project (each, an ''*Activity*''), including sub-activities, are also described.

1. Water, Sanitation and Hygiene Project

(a) Background

Cape Verde is an extremely water-scarce country and relies heavily on desalinization of water, which is an expensive and energy-intensive process. The water, sanitation and hygiene

(''*WASH*'') sector in Cape Verde is characterized by relatively poor levels of service including intermittent water supply. Domestic water consumption per capita is approximately 35 liters per day, half that of a lower-middle income peer group of countries, and barely above subsistence levels. As a result, Cape Verde has one of the highest water tariffs in Africa and the world. The poor, and particularly female-headed households, are especially vulnerable as only 9 percent of poor households have access to the networked public water supply. Additionally, Cape Verde is not on track to meet its Millennium Development Goal for sanitation. Low levels of water supply, combined with a population in which over 50 percent is without any access to improved sanitation services, results in significant public health problems, including diarrhea, malaria, and dengue.

The WASH sector is marked by dispersed responsibilities across a large number of stakeholders, skewed incentives, a lack of institutional accountability, fragmented and overlapping authority, and conflicting legislation which impedes good planning and efficient operations in the sector. The Government has recently undertaken a number of important preliminary steps to improve the legal and regulatory framework. However, further significant reform and restructuring of the sector are required to ensure that the benefits of planned infrastructure improvements can be achieved.

(b) Summary of Project and Activities

The objective of the Water, Sanitation and Hygiene Project (the ''*WASH Project*'') is to install a financially sound, transparent and accountable institutional basis for the delivery of water and sanitation services to Cape Verdean households and firms by: reforming national policy and regulatory institutions; transforming inefficient utilities into autonomous corporate entities operating on a commercial basis; and improving the quality and reach of infrastructure in the sector. The WASH Project is comprised of three Activities as described below.

(i) National Institutional and Regulatory Reform Activity

The Government is committed to undertaking institutional and regulatory reform activities at the national level to improve planning systems and regulatory processes including tariff setting (the ''*National Institutional and Regulatory Reform Activity*''). During the Compact Term, the Government will create a new National Agency for Water and Sanitation (''*ANAS*''), which will be responsible for policy and planning of all water resources, domestic water supply, wastewater, and sanitation. ANAS will be guided by a National Water and Sanitation Council (''*CNAS*''), where core ministries, municipalities, private sector and civil society will be represented and will ensure that sector policies are aligned with overall government policy direction. The Government will also strengthen the existing Economic Regulatory Agency (''*ARE*'') to better regulate economic and technical aspects of the WASH sector, including tariff setting. Finally, the General Directorate of the Environment (''*DGA*'') will expand its existing functions on environmental protection, to include water and wastewater quality. The Government will support the operational costs for the new and strengthened agencies with its own resources.

MCC will support the design and operationalization of the proposed institutional changes with MCC Funding for the following three sub-activities:

(A) Improve allocation of resources, planning, and coordination. This sub-activity aims to improve the allocation of resources mobilized for the sector, improve the coordination of sector activities and improve sector planning with a clear definition of sector priorities. During the project development process and to facilitate implementation of this Compact, MCC agreed to support the development of a Strategic National Master Plan (''*Master Plan*'') and strategic environmental and social assessment (''*SESA*'') for the WASH sector. This document will serve as the basis for sector planning, resource allocation, and investment coordination.

Under the Compact, MCC Funding will support:

(1) A review of all relevant legislation, regulations and organizational documents pertaining to the establishment and operations of CNAS, ANAS and the strengthening of ARE and DGA, which will assist the Government in drafting new legislation and regulations for the WASH sector;

(2) Technical assistance, capacity building and training to enable ANAS, CNAS, ARE, and DGA to execute their new roles and responsibilities;

(3) Technical assistance and resources for the integration of gender and social analysis and objectives into national policies, planning, human resources, and budgets, including establishment of a social and gender unit in ANAS, as well as the development of consultative processes, public information strategies, and opportunities for private sector participation; and

(4) Information, education, and communication (''*IEC*'') activities focused on: (a) Identifying water, sanitation, and hygiene practices that should inform national master planning for the sector; (b) encouraging public input on new regulations and planning; (c) articulating the role of the public in the tariff setting process; and (d) creating a culture of paying for services among water and sanitation users.

(B) Support transparent and fair tariff setting. This sub-activity will support the move to transparent and fair tariff setting, to better reflect the cost of service, and to improve the financial well-being and sustainability of utilities. Tariff support will also include assistance for the formation of appropriate pro-poor tariff policies. Specifically, MCC Funding will assess the current financial state of utilities nationally, and on Santiago particularly, with the goal of identifying the true cost of the existing systemic sector inefficiencies, impacts of these costs and inefficiencies on cost of service rates, and tariff and regulatory strategies for transitioning to a financially self-sustaining system.

(C) Improve water quality standards and environmental oversight. MCC Funding will support technical assistance to DGA for the development of existing functions on environmental protection, with an emphasis on potable water and wastewater quality, and to develop new water quality and wastewater discharge standards, including appropriate wastewater treatment technologies and associated standards for wastewater reuse.

(ii) Utility Reform Activity

The Utility Reform Activity will promote the transition of existing service providers to increased financial and administrative autonomy and operation based on commercial principles (the ''*Utility Reform Activity*''). MCC will focus its assistance on the Island of Santiago to support the formation of a new, multi-municipal utility that covers all or most of the island (''*Aguas de Santiago*''). The Parties expect that this Activity will create a blueprint for utilities in other parts of the country.

(A) Encourage corporatization of utilities. MCC Funding will support the design and establishment of Aguas de Santiago, including a legal review and the preparation of organizational documents, staffing requirements, position descriptions, internal policies and operating procedures, and a plan for

recruiting and transitioning staff to the new utility.

(B) Strengthen management and planning of Aguas de Santiago. MCC Funding will support:

(1) A long-term strategic investment and business plan, capital improvement, and business plans for the water and sanitation sector on Santiago pursuant to the guidance emerging from the Master Plan and SESA. While these plans will be long-term and strategic in nature, they will assess the condition of existing water and sanitation systems and identify any immediate infrastructure and operational needs. The plans will also improve the management of water resources by ensuring an integrated approach to infrastructure planning;

(2) Technical assistance for water sector utility operations and management, including technical, financial, commercial, legal, environmental, investment planning, procurement, contract management, and social and gender practices;

(3) The acquisition and implementation of, and training on, management information systems and identified hardware and software, such as GIS, asset management, billing and customer management systems, and office equipment;

(4) IEC campaigns that include outreach by utilities and/or NGOs. The objective of the IEC campaigns is to improve communication between the utility and its customers, with a focus on developing an understanding of the cost of services and culture of payment by users, promoting efficient water use and conservation, and other aspects necessary to increase impact and sustainability of the reforms; and

(5) Technical and vocational education and training (''*TVET*'') to the staff of Aguas de Santiago to improve their ability to carry out their roles and responsibilities and to any redundant staff to assist their transition to new functions and responsibilities in other government agencies or in the private sector.

(C) Reduce commercial losses in Santiago. Non-revenue water (''*NRW*'') at existing municipal water and sanitation entities (known as ''*SAAS*'') in Santiago is estimated to be approximately 50 percent. MCC Funding will support a NRW study for service providers on Santiago, SAAS, the Water Distribution Agency of Praia (''*ADA*''), and ELECTRA, the national electricity utility with responsibility for water provision in certain municipalities—in order to provide better estimates of the level of losses in each service provider, assess the reductions likely achievable through improved commercial and technical management practices, and identify potential solutions to improve both technical and commercial aspects of NRW management. The study will provide a detailed strategy, and identify specific management actions and physical investments, for reducing NRW. Support from sub-activity (ii)(B) will be provided to improve customer billing databases, asset inventories, and other business operational elements that contribute to high NRW. Subject to prior approval by MCC, MCC Funding may be used to implement priority investments identified in the aforementioned study to reduce NRW losses for Aguas de Santiago under this sub-activity; these may include but are not limited to instituting demand management areas and meter replacement programs.

MCC Funding for the Utility Reform Activity is subject to the following conditions:

(1) Prior to disbursement of Program Funding for the Utility Reform Activity, the SAAS shall have committed to the transition to an independently operated and managed Aguas de Santiago in a memorandum of understanding among MAHOT and the municipalities or such other document acceptable to the Government and MCC; and

(2) Continued support for the sub-activities described in paragraphs (ii)(B) and (ii)(C) above is conditioned on the Government ensuring that Aguas de Santiago has sufficient equity contributions, or other non-reimbursable funding from its shareholders to support its operations and working capital needs, in accordance with the economic and financial viability study undertaken in sub-activity (i)(B) above and satisfactory to MCC.

(iii) Infrastructure Grant Facility

In order to promote continued national level reform, incentivize and reward utility reform, and improve investment planning, the Parties will support the establishment of an Infrastructure Grant Facility (the ''*IGF*'') to fund much needed infrastructure and capital improvements in the WASH sector.

MCC will make funds available to the IGF in three tranches as national policy and utility reform conditions have been met. The IGF will provide grants on a competitive basis to utilities that qualify based on continuous improvement on commercialization of operations. Grant applications from qualified utilities will be evaluated based on a set of transparent financial, economic, technical, operational, environmental, and gender and social criteria.

The IGF will provide grants for three categories of projects: Category I—studies and technical assistance; Category II—existing network improvements and off-network improvements; and Category III—network expansion. The categories reflect the level of complexity to implement these projects, and utility applicants will be required to demonstrate incremental progress towards corporatization to be eligible for funding under Categories II and III. Category II and III projects will include financial support for IEC and TVET activities connected to specific infrastructure projects as identified during the design phase. The IGF will have a pool of funds to assist poor and female-headed households to overcome barriers to WASH services.

The eligibility requirements, project selection criteria, and operations and management procedures of the IGF, will be set forth in an operations manual to be approved by the Government and MCC. The Parties expect that the IGF will initially be managed by MCA-Cape Verde II with the support of advisory services as the Parties deem necessary and eventually transferred to ANAS when it is deemed to have sufficient capacity to administer and manage the facility. A technical evaluation panel will carry out detailed evaluations, provide technical assessments, and score proposed projects. An executive committee of the MCA-Cape Verde II Steering Committee will oversee the IGF and approve projects that pass established selection criteria and technical evaluation. The amount of MCC funds allocated for feasibility studies under Category I of the IGF will not exceed 20 percent, unless otherwise agreed by MCC. Each grant will also be subject to MCC no objection.

MCC Funding will also support the development of an environmental and social management framework for the IGF, acceptable to the Government and MCC, to define the guiding environmental and social principles and to create procedures that will be included in the operations manual for assessing proposals against these objectives.

As set forth more specifically in the Program Implementation Agreement, MCC Funding for the IGF will be made available incrementally subject to the achievement of reform milestones.

(A) Prior to making the first tranche of funding available under the IGF: (1) the operations manual for the IGF shall have been approved by MCA-Cape Verde II and MCC; and (2) ANAS shall

have been created and CNAS shall have adopted the Master Plan;

(B) Prior to making the second tranche of funding available under the IGF, Aguas de Santiago shall have been created as an independent, corporatized entity that is subject to the regulatory jurisdiction of ARE and ARE will have in place a tariff mechanism that is based on cost-of-service by rate class and which addresses pro-poor tariffs; and

(C) Prior to making the third tranche of funding available under the IGF, the Government shall make an appropriate matching contribution to the IGF as per the agreed Government contribution schedule in the Program Implementation Agreement.

(c) Beneficiaries

The Parties expect that together the National Institutional and Regulatory Reform and Utility Reform Activities will initially benefit the approximately 278,000 people living on the Island of Santiago, as a result of reductions in the average cost of water supply and commercial losses by utilities and the incremental growth effect of shifting government resources from less productive to more productive spending. As utility reform extends throughout the other islands during and after the Compact, the entire population of Cape Verde should eventually benefit from these Activities.

The benefits of the IGF will depend on the returns of proposals presented for financing. To be selected, each proposal must demonstrate an expected economic rate of return of at least 12 percent. Based on estimates of potential projects, the Parties expect that the IGF will benefit on average a population of 48,000 (approximately 11,000 households), or just over 10 percent of the population of Cape Verde.

(d) Gender and Social Integration

The Parties agree to integrate gender and social factors in the WASH Project into each of the core Activities. Gender and social analyses and objectives are currently largely absent from WASH sector policies and planning, despite considerable inequalities in access to water and sanitation. MCC Funding will support technical assistance and resources for the integration of gender and social analysis and objectives into policies, planning, human resources, and budgets, at both the national and utility levels.

Given the central role that women and girls play in water and sanitation at the household level, ensuring that infrastructure investments are selected and designed with due attention to social and gender considerations and appropriate IEC are critical to meeting the ultimate impact objectives of the IGF. Social and gender considerations will thus be embedded in the project selection criteria for the IGF, and the IGF will support IEC activities. Training and employment opportunities for women in the WASH sector will also be promoted through support for TVET activities at national, utility, and IGF levels.

(e) Environmental and Social Assessment

The National Institutional and Regulatory Reform and the Utility Reform Activities have been classified as Category C projects in accordance with MCC Environmental Guidelines. These Activities are unlikely to have adverse environmental and social impacts. MCC reserves the right, however, to require specific environmental and social impact studies and mitigation measures. As an initial step, MCC has provided pre-Compact funding for a SESA in conjunction with the Master Plan for the Island of Santiago. MCC Funding will also support capacity building at DGA to strengthen Cape Verde's water quality standards and improve environmental oversight.

The IGF has been classified as a Category D project since specific projects and activities will be funded through a facility. Based on the potential pipeline of projects, certain activities may potentially result in adverse environmental and social impacts, if appropriate mitigation measures are not taken. Operational procedures and an environmental and social management framework will be established to ensure that environmental and social risks and impacts are appropriately considered and managed in accordance with the laws and regulations in Cape Verde and MCC Environmental Guidelines.

(f) Sustainability

The National Institutional and Regulatory Reform and Utility Reform Activities of the WASH Project are specifically targeted at improving the sustainability of the sector by addressing key constraints in the policy and regulatory environment and at the operational level. One of the challenges to maintaining and sustaining the reform process is strong civic engagement. To that end, the Activities include resources for broad-based public consultation and engagement but also focus efforts on ensuring that women and disadvantaged groups are being engaged at the earliest stages of planning all the way through construction.

(g) Donor Coordination

The WASH Project has and will continue to benefit from coordination among the Parties and other donors. Whereas in the past the sector has been marked by a lack of integration at the Government and donor levels, and whereas the Government has made recent strides in setting the stage for sector reform and donors have responded by improving their internal coordination and their coordination with the Government, the Parties acknowledge that in the context of limited resources improved government management and coordination with its partners is necessary to the successful implementation of the WASH Project. The Parties agree that transparency and coordination are essential elements of meeting the ambitious reform agenda established by the Government.

2. Land Management for Investment Project

(a) Background

In Cape Verde, no conclusive source of information about land property exists. Two different land registries each contain partial information about only a limited share of the country's land parcels. Additional records systems hold information about state-owned land. No source contains complete map-based information indicating actual location of a parcel of land over which a right is claimed. Confusion over ownership and boundaries has resulted in unauthorized land sales and the delay or cancellation of public as well as private investment projects and limits the ability of small firms and households to create value and increase incomes through investment in their property. The land rights registration process is time-consuming and costly for all land users, hampering domestic and foreign investment and economic growth. The Government seeks to create a single reliable and more easily accessible source of land rights and land boundaries information in order to strengthen Cape Verde's investment climate and to reduce land rights registration and transaction time and cost.

(b) Summary of Project and Activities

The objective of the Land Management for Investment Project (the ''*Land Project*'') is to reduce the time required for establishing secure property rights and to establish more conclusive land information in areas of near-term high development potential in Cape Verde by: Refining the legal,

institutional and procedural environment to create conditions for increased reliability of land information, greater efficiency in land administration transactions, and strengthened protection of land rights; developing and implementing a new land information management system; and clarifying parcel rights and boundaries on targeted islands with high investment potential.

(i) Legal and Institutional Foundations Activity

The Legal and Institutional Foundations Activity (the ''*Foundations Activity*'') will consist of the two principal sub-activities described below.

(A) Develop legal, institutional, and procedural foundations. Under this sub-activity, MCC Funding will support:

(1) Legal and regulatory analysis, recommendations, and drafting of regulatory texts and procedural manuals for improved operations and coordination by land administration institutions over the long term;

(2) Design of legal, regulatory and procedural tools and manuals enabling implementation and achievement of the objectives of the Rights and Boundaries Activity (described below); and

(3) Stakeholder workshops and public outreach.

(B) Develop and install land information and transaction systems. Under this sub-activity MCC Funding will support:

(1) Technical assistance to computerize and link existing information about land rights and land parcels held in the paper-based Ministry of Justice registry system and in different municipal departments;

(2) Design of a computerized land information system that will be used by the Ministry of Justice's Registry and Notary and by municipal governments to efficiently manage and access information within their area of legal competence;

(3) System programming work consistent with the new institutional and procedural arrangements and data access protocols; and

(4) Installation of the system, acquisition of relevant hardware and software for system operations, training for users, and public outreach.

(ii) Rights and Boundaries Activity

Building on the Foundations Activity, the Rights and Boundaries Activity (the ''*Rights and Boundaries Activity*'') will support actual clarification of parcel rights and boundaries in targeted islands with high tourism investment potential, including through capacity building of key institutions.

Subject to the satisfaction of the conditions set forth below, MCC Funding will support: Communications; outreach and training, including on topics of environmental and social risk management and planning and geographic information production and management; office-based linking of rights and boundary information where data exists; field-based clarification of boundaries through map consultation and surveying; field-based clarification of rights through consultation of existing records and information gathering and consultation with current occupants; rights adjudication recommendations made based on regulations and procedures agreed as a result of the Foundations Activity; public noticing of rights and boundary claims and requirements/opportunities for submission of or objection to claims; dispute resolution assistance; utilization of a resettlement policy framework tool as needed per International Finance Corporation, Performance Standard 5; registration of rights that can be adjudicated; and inputting of final boundary and rights information into the land information and transaction management system created under the Foundations Activity.

The Rights and Boundaries Activity will cover areas of land claimed or held as private property, as property of the national government, and as property of municipal governments. The Activity will commence as a pilot on the island of Sal and be scaled to up to three other target islands subject to satisfaction of the conditions below. Should the Parties agree that additional funds remain in the Rights and Boundaries Activity after completion of Sal and commitment of sufficient funding (including adequate contingencies) for the three additional islands, the Parties may allocate any remaining funds to implement the Activity on other islands, based on criteria to be agreed by MCC and MCA-Cape Verde II.

MCC Funding for fieldwork and fieldwork-related training under this Activity is subject to the following conditions:

(A) Any new or amended laws or regulatory texts (regulations, ordinances and directives) determined to be necessary under the Foundations Activity, shall have been adopted by the Parliament or the relevant Government ministry and be in full force and effect;

(B) An operations manual for the Rights and Boundaries Activity fieldwork satisfactory to MCC, including environmental and social safeguards and provisions, shall have been completed and adopted by the Ministry of Justice and the Ministry of Environment, Housing and Territorial Management through such instrument as the Parties agree is required to give full force and effect to such manual; and

(C) Prior to disbursement of MCC Funding to implement the Activity on additional islands, the Government shall have completed the activity on Sal island, to a degree satisfactory to MCC, and any modifications to the implementation approach for remaining islands agreed shall have been agreed among MCC, the Government and MCA-Cape Verde II.

(c) Beneficiaries

Based on estimates of incremental employment opportunities, the Parties expect that at least 3,000 households (approximately 13,000 people) will benefit from increased tourism development as a consequence of project interventions. This number excludes the current population on the islands who are expected to benefit from reduced time and cost of land registration and more conclusive rights and boundaries information. The benefits would be expected to result from cost savings, from increased investment in property, and from increased property values. Additional benefits and beneficiaries will be monitored during the Compact Term.

(d) Environmental and Social Mitigation Measures

The Land Project has been classified as a Category B project in accordance with MCC's Environmental Guidelines. This is based on a number of risks and potential impacts, which the Parties expect to mitigate through environmental and social (including gender-based) approaches integrated into the Land Project. The Parties will integrate several safeguards into the Rights and Boundaries Activity in an effort to minimize the risk of claimants losing rights given the imprecisions, gaps, and potential for overlaps in existing land rights information. The outreach activities will support increased public awareness, particularly among vulnerable populations, of the types of land rights and the procedures and resources available for formalizing those rights. The procedures developed under the Foundations Activity and the resettlement policy framework will assist stakeholders with dispute resolution, with clarifying links between planning and zoning requirements and rights and responsibilities of rights holders, and with adequate analysis, planning and decision-making in contexts of informal occupation or of secondary rights, particularly for vulnerable groups.

Environmental and social risks related to increased economic development induced by the Land Project will be mitigated by public consultation and outreach, and by the development of tools for improved land administration and for integration of land information. This will help relevant institutions better manage land use and land rights over the long term. The Parties will evaluate ways in which existing environmental and social data, information on legal requirements associated with public lands, protected areas, critical habitats, and encumbrances can be built into land information systems to aid municipal and tourism planning, including integration of social safeguards.

(e) Sustainability

Institutional and financial sustainability is fundamental to achieving the results of the Land Project. MCC has provided pre-Compact support for detailed analyses of financial sustainability drivers, projected revenue flows, and workforce requirements for the land information management and transaction systems. The Parties will review the findings and recommendations of these studies and agree to modify approaches and methodologies as appropriate, to assure that system design is commensurate with the Government's capacity to use and maintain the system over the long term.

The Land Project will assure that legal, regulatory, and methodological approaches to collecting and maintaining boundary and rights information over time are consistent with principles of cost-effectiveness and equitable access to land administration services.

(f) Donor Coordination

The Land Project builds from recent investments in the Government's land sector initiatives by Spain, the Canary Islands, and the World Bank. A portion of the investment from other donors has supported specific land sector studies, including one completed by the Institute for Liberty and Democracy. Additionally, because the Rights and Boundaries Activities is a pilot that can be scaled up and implemented throughout the country, the Government is committed to continued donor coordination to identify additional funding to support rights and boundary clarification on other islands.

C. Implementation Framework

1. Overview

The implementation framework and the plan for ensuring adequate governance, oversight, management, monitoring and evaluation, and fiscal accountability for the use of MCC Funding are summarized below. MCC and the Government will enter into a Program Implementation Agreement, and may enter into such other Supplemental Agreements and Implementation Letters in furtherance of this Compact as the Parties deem necessary, all of which, together with this Compact, set out the rights, responsibilities, duties and other terms relating to the implementation of the Program.

2. MCC

MCC will take all appropriate actions to carry out its responsibilities in connection with this Compact and the Program Implementation Agreement, including the exercise of its approval rights in connection with the implementation of the Program.

3. MCA-Cape Verde II

In accordance with Section 3.2(b) of this Compact and the Program Implementation Agreement, MCA-Cape Verde II will act on the Government's behalf to implement the Program and to exercise and perform the Government's rights and responsibilities with respect to the oversight, management, monitoring and evaluation, and implementation of the Program, including, without limitation, managing the implementation of Projects and their Activities, allocating resources, and managing procurements. The Government will ensure that MCA-Cape Verde II takes all appropriate actions to implement the Program, including the exercise and performance of the rights and responsibilities designated to it by the Government pursuant to this Compact and the Program Implementation Agreement. Without limiting the foregoing, the Government will also ensure that MCA-Cape Verde II has full decision-making autonomy, including, *inter alia,* the ability, without consultation with, or the consent or approval of, any other party, to: (i) Enter into contracts in its own name; (ii) sue and be sued; (iii) establish Permitted Accounts in a financial institution in the name of MCA-Cape Verde II and hold MCC Funding in such accounts; (iv) expend MCC Funding; (v) engage a fiscal agent who will act on behalf of MCA-Cape Verde II on terms acceptable to MCC; (vi) engage one or more procurement agents who will act on behalf of MCA-Cape Verde II, on terms acceptable to MCC, to manage the acquisition of the goods, works, and services required by MCA-Cape Verde II to implement the Program; and (vii) engage one or more auditors to conduct audits of its accounts. The Government will take the necessary actions to establish, operate, manage and maintain MCA-Cape Verde II, in accordance with the applicable conditions precedent to the disbursement of Compact Implementation Funding set forth in Annex IV to this Compact.

The Government will create MCA-Cape Verde II as a legally established program management unit under the Ministry of Finance. MCA-Cape Verde II will be formed through a cabinet resolution, which resolution will be included in the Program Implementation Agreement. MCA-Cape Verde II will be created in accordance with MCC's Guidelines for Accountable Entities and Implementation Structures, published on the MCC Web site (the ''*Governance Guidelines*''), and will be in form and substance satisfactory to MCC. MCA-Cape Verde II, on behalf of the Government, will administer the MCC Funding. MCA-Cape Verde II will consist of the following bodies: a steering committee (the ''*Steering Committee*''); a management team (the ''*Management Unit*''); and two stakeholders committees (each a ''*Stakeholders Committee*'' and, collectively, the ''*Stakeholders Committees*''). As a recipient of MCC Funding, MCA-Cape Verde II will be subject to MCC audit requirements. MCA-Cape Verde II will be based in Praia, Cape Verde.

(a) Steering Committee

(i) Composition. The Steering Committee will have ultimate responsibility for the oversight, direction, and decisions of MCA-Cape Verde II, as well as the overall implementation of the Program. The Parties expect that the Steering Committee will initially be comprised of nine voting members consisting of representatives of national and municipal government, civil society and private sector and two non-voting observers. Membership to the Steering Committee is anticipated to include the following voting members: Minister of Finance and Planning; Minister of Environment, Housing and Land Planning; Minister of Justice; Minister of Rural Development; Chief Advisor to the Prime Minister; President of the National Municipalities Association; President of the Chamber of Commerce Association; President of the Tourism Chamber; and President of the

Non-Governmental Organization Association. The Steering Committee will also include the following non-voting observers: a representative of the Ministry of External Affairs; and the MCC Resident Country Director. The Steering Committee will be chaired by the Minister of Finance and Planning.

(ii) Roles and Responsibilities. The Steering Committee will be responsible for the oversight, direction, and decisions of MCA-Cape Verde II, as well as the overall implementation of the Program. The Steering Committee will hold regular meetings in accordance with the Governance Guidelines, at a minimum once per quarter. The specific roles of the voting members and non-voting observers will be set forth in the MCA-Cape Verde II Regulations. On at least an annual basis or as otherwise required by the Government, the Steering Committee will report to the Government on the status and progress of the Compact regarding implementation, financial matters, procurements, and other matters identified by the Government.

(b) Management Unit

(i) Composition. The Management Unit will be led by a competitively selected Managing Director and is expected to be initially comprised of the following full-time officers: Managing Director; Administration and Finance Director; Economist/Monitoring and Evaluation Manager; Water and Sanitation Project Manager; Land Project Manager; Gender & Social Manager; Environment Manager; Policy Reform and Institutional Development Manager; and Procurement Manager. These key officers will be supported by appropriate additional staff to enable the Management Unit to execute its roles and responsibilities. Such additional staff is expected to include: Procurement Specialist; Administrative and Financial Specialist; and Communication Specialist, among others.

(ii) Roles and Responsibilities. With oversight from the Steering Committee, the Management Unit will have the principal responsibility for the day-to-day management of the Program, including those roles and responsibilities specifically set forth in the Program Implementation Agreement. The Management Unit will serve as the principal link between MCC and the Government, and will be accountable for the successful execution of the Program, each Project, and each Activity.

(c) Stakeholders Committees

(i) Composition. Program beneficiaries will be represented by two project-level Stakeholder Committees composed of representatives from relevant ministries, municipalities, private sector and non-governmental organizations as agreed by the Government and MCC. The two Stakeholders Committees will provide input to the Steering Committee and the Management Unit on matters that relate to the Program, promoting transparency and ongoing consultation.

(ii) Roles and Responsibilities. Consistent with the Governance Guidelines, the Stakeholders Committees will be responsible for continuing the consultative process throughout implementation of the Program. While the Stakeholders Committees will not have any decision-making authority, they will be responsible for, *inter alia,* reviewing, at the request of the Steering Committee or the Management Unit, certain reports, agreements, and documents related to the implementation of the Program in order to provide input to MCA-Cape Verde II regarding the implementation of the Program.

4. Environmental and Social Safeguards

All of the Projects will be implemented in compliance with the MCC Environmental Guidelines, the MCC Gender Policy, the MCC Gender Integration Guidelines, and the International Finance Corporation's Performance Standards. Any involuntary resettlement will be carried out in accordance with the IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement in a manner acceptable to MCC. In the case of retrenchments and redundancies resulting from the implementation of the Projects, the Government will ensure that the Projects comply with national labor laws and best practices for managing retrenchment according to the IFC Good Practice Note: Managing Retrenchment. The Government also will ensure that the Projects comply with all national environmental laws and regulations, licenses and permits, except to the extent such compliance would be inconsistent with this Compact.

Specifically, the Government will: cooperate with or complete, as the case may be, any ongoing environmental and social impact assessments, or if necessary undertake and complete any additional environmental and social assessments, environment and social management frameworks, environmental and social management plans, environmental and social audits, resettlement policy frameworks, and resettlement action plans required under the laws of Cape Verde, the MCC Environmental Guidelines, the MCC Gender Integration Guidelines, this Compact, the Program Implementation Agreement, or any other Supplemental Agreement, or as otherwise required by MCC, each in form and substance satisfactory to MCC; ensure that Project-specific environmental and social management plans are developed and all relevant measures contained in such plans are integrated into project design, the applicable procurement documents and associated finalized contracts, in each case in form and substance satisfactory to MCC; and implement to MCC's satisfaction appropriate environmental and social mitigation measures identified in such assessments or plans or developed to address environmental and social issues identified during implementation. Unless MCC agrees otherwise in writing, the Government will fund all necessary costs of environmental and social mitigation measures (including, without limitation, costs of resettlement) not specifically provided for, or that exceed the MCC Funding specifically allocated for such costs, in the Detailed Financial Plan for any Project.

To maximize the positive social impacts of the Projects, address cross-cutting social and gender issues such as human trafficking, child and forced labor, and HIV/AIDS, and to ensure compliance with the MCC Gender Policy and MCC Gender Integration Guidelines, MCA-Cape Verde II, on behalf of the Government, will develop a comprehensive social and gender integration plan which, at a minimum, incorporates the findings of a comprehensive gender analysis, identifies approaches for regular, meaningful and inclusive consultations with women and other vulnerable/underrepresented groups, consolidates the findings and recommendations of Project-specific social and gender analyses and sets forth strategies for incorporating findings of the social and gender analyses into final Project designs, as appropriate (''*Social and Gender Integration Plan*''); and ensure, through monitoring and coordination during implementation, that final Activity designs, construction tender documents, other bidding documents, implementation plans, and M&E plans are consistent with and incorporate the outcomes of the social and gender analyses and Social and Gender Integration Plan.

5. Implementing Entities

Subject to the terms and conditions of this Compact, the Program Implementation Agreement, and any other related agreement entered into in connection with this Compact, the

Government, through MCA-Cape Verde II, may engage one or more entities of the Government to implement or assist in the implementation of any Project or Activity (or a component thereof) in furtherance of this Compact (each, an ''*Implementing Entity*''). The appointment of any Implementing Entity will be subject to review and approval by MCC. The Government will ensure that the roles and responsibilities of each Implementing Entity and other appropriate terms are set forth in an agreement, in form and substance satisfactory to MCC (each an ''*Implementing Entity Agreement*'').

6. Fiscal Agent

The Ministry of Finance and Planning will be responsible for assisting MCA-Cape Verde II with fiscal management and ensuring appropriate fiscal accountability of MCC Funding (in such capacity, the ''*Fiscal Agent*''). The duties of the Fiscal Agent will include those set forth in the Program Implementation Agreement and in such agreements or documents as MCA-Cape Verde II enters into with the Fiscal Agent, which agreement shall be in form and substance satisfactory to MCC. If the Fiscal Agent is not able to perform its duties in compliance with MCC standards, MCC may require that MCA-Cape Verde II engage a new fiscal agent to carry out those duties.

7. Procurement

The Parties expect that a dedicated unit within MCA-Cape Verde II will conduct and certify specified procurement activities in furtherance of this Compact with appropriate staffing and technical assistance support acceptable to MCC (in such capacity, the ''*Procurement Agent*''). Once the unit is staffed, and prior to entry into force of the Compact, MCC will assess capability and performance of the MCA-Cape Verde II procurement unit and determine whether staffing is adequate and to what extent, if any, external advisory support is needed. If MCC determines that the MCA-Cape Verde II procurement unit is not able to perform its duties in compliance with MCC standards and guidelines, MCC may require that MCA-Cape Verde II engage additional external advisory support or an external procurement agent to carry out those duties. The roles and responsibilities of the Procurement Agent will be set forth in the Program Implementation Agreement and in such other agreements as MCA-Cape Verde II enters into with each Procurement Agent, which agreement will be in form and substance satisfactory to MCC. Each Procurement Agent will adhere to the procurement standards set forth in the MCC Program Procurement Guidelines and ensure that procurements are consistent with the procurement plan adopted by MCA-Cape Verde II pursuant to the Program Implementation Agreement, unless MCC otherwise agrees in writing.

Annex II Multi-Year Financial Plan Summary

This Annex II summarizes the Multi-Year Financial Plan for the Program.

1. General

A multi-year financial plan summary (''*Multi-Year Financial Plan Summary*'') is attached hereto as Exhibit A to this Annex II. By such time as specified in the PIA, the Government will adopt, subject to MCC approval, a multi-year financial plan that includes, in addition to the multi-year summary of estimated MCC Funding and the Government's contribution of funds and resources, the annual and quarterly funding requirements for the Program (including administrative costs) and for each Project, projected both on a commitment and cash requirement basis.

2. Government LMIC Contribution

During the Compact Term, the Government will make contributions of at least US$9,934,500 (equal to 15 percent of the amount of MCC Funding committed under this Compact), to carry out the Government's responsibilities under Section 2.6(a) of this Compact. These contributions may include in-kind and financial contributions toward meeting the Program and Project Objectives. In connection with this obligation, the Government has developed a budget of the contributions it anticipates making over the five year term of the Compact. Such contributions will be in addition to the Government's spending allocated toward the Program and Project Objectives in its budget for the year immediately preceding the establishment of this Compact. The Government's contribution will be subject to any legal requirements in Cape Verde for the budgeting and appropriation of such contribution, including approval of the Government's annual budget by its legislature. The Parties shall set forth in the Program Implementation Agreement or other appropriate Supplemental Agreements certain requirements regarding this Government contribution, which requirements may be conditions precedent to the Disbursement of MCC Funding.

EXHIBIT A—MULTI-YEAR FINANCIAL PLAN SUMMARY

(US$ millions)

Projects	CIF	Year 1	Year 2	Year 3	Year 4	Year 5	Total
1. Water, Sanitation and Hygiene Project: National Institutional and Regulatory Reform Activity. Utility Reform Activity. Infrastructure Grant Facility.							
Sub-Total	2.25	4.55	9.80	13.35	9.80	1.35	41.10
2. Land Management for Investment Project: Foundations Activity. Rights and Boundaries Activity.							
Sub-Total	1.16	2.70	3.69	2.57	4.56	2.58	17.26
3. Monitoring and Evaluation (M&E)							
Sub-Total	0.09	0.22	0.31	0.26	0.30	0.21	1.39
4. Program Administration							

EXHIBIT A—MULTI-YEAR FINANCIAL PLAN SUMMARY—Continued

(US$ millions)

Projects	CIF	Year 1	Year 2	Year 3	Year 4	Year 5	Total
Sub-Total	0.50	1.06	1.12	1.12	1.18	1.50	6.48
Grand Total	4.00	8.53	14.92	17.30	15.84	5.64	66.23

Annex III Description of Monitoring and Evaluation Plan

This Annex III generally describes the components of the Monitoring and Evaluation Plan (''*M&E Plan*'') for the Program. The actual content and form of the M&E Plan will be agreed to by MCC and the Government in accordance with MCC's Policy for Monitoring and Evaluation of Compacts and Threshold Programs as posted from time to time on the MCC Web site (the ''*MCC Policy for Monitoring and Evaluation of Compacts and Threshold Programs*''). The M&E Plan may be modified as outlined in MCC's Policy for Monitoring and Evaluation of Compacts and Threshold Programs with MCC approval without requiring an amendment to this Annex III.

1. Overview

MCC and the Government will formulate and agree to, and the Government will implement or cause to be implemented, an M&E Plan that specifies: (a) How progress toward the Compact Goal, Program Objectives and Project Objectives will be monitored (''*Monitoring Component*''); (b) a process and timeline for the monitoring of planned, ongoing, or completed Activities to determine their efficiency and effectiveness; and (c) a methodology for assessment and rigorous evaluation of the outcomes and impact of the Program (''*Evaluation Component*''). Information regarding the Program's performance, including the M&E Plan, and any amendments or modifications thereto, as well as progress and other reports, will be made publicly available on the Web site of MCC, MCA-Cape Verde II and elsewhere.

2. Program Logic

The M&E Plan will follow a rationale that describes how proposed Activities are expected to contribute to the achievement of the Project Objectives, Program Objectives and Compact Goal.

The Compact Goal is to reduce poverty through economic growth in Cape Verde. The Program Objectives are to reduce the costs upon the economy of inefficiently provided public services and to remove institutional conditions that impede private sector investment. The Project Objective of the Water, Sanitation and Hygiene Project is to establish a financially sound, transparent and accountable institutional basis for the delivery of water and sanitation services to Cape Verdean households and firms. The outcomes of the Project Activities are: (a) Institutions and procedures required for the regulation of corporatized utilities providing water and sanitation services and operating according to commercial principles; (b) the establishment and operation of commercially oriented water utilities; (c) improved cost-effectiveness of services; and (d) improved extent, quality and reliability of services provided. The Project Objective of the Land Management for Investment Project is to reduce the time required for establishing secure property rights and to establish more conclusive land information in areas of near-term high development potential in Cape Verde. The outcomes of the Project Activities are: (a) A reduction in the average time required to establish a clear property right and to complete other land-related transactions; (b) an increase in the reliability of land rights and boundaries information; and (c) an increase in the level of development activity on targeted islands, resulting in higher levels of employment, in response to reductions in lead time to investment. The combined results of the Program are expected to contribute to Cape Verde's own poverty-reduction and economic growth goals as defined in the Cape Verde development strategy.

3. Monitoring Component

To monitor progress toward the achievement of the impact and outcomes of the Compact, the Monitoring Component of the M&E Plan will identify: (i) The Indicators (as defined below), (ii) the definitions of the Indicators, (iii) the sources and methods for data collection, (iv) the frequency for data collection, (v) the party or parties responsible for collecting and analyzing relevant data, and (vi) the timeline for reporting on each Indicator to MCC.

Further, the Monitoring Component will track changes in the selected Indicators for measuring progress towards the achievement of the Program Objectives and Project Objectives during the Compact Term. MCC also intends to continue monitoring and evaluating the long-term impacts of the Compact after Compact expiration. The M&E Plan will establish baselines which measure the situation prior to a development intervention, against which progress can be assessed or comparisons made (each a, ''*Baseline*''). The Government will collect Baselines on the selected Indicators or verify already collected Baselines where applicable and as set forth in the M&E Plan. Gender disaggregated data and indicators will be developed for the full version of the M&E Plan.

(a) Compact Indicators. The M&E Plan will measure the results of the Program using quantitative, objective and reliable data (''*Indicators*''). Each Indicator will have benchmarks that specify the expected value and the expected time by which that result will be achieved (''*Target*''). All Indicators will be disaggregated by gender, income level and age, and beneficiary types to the extent practical and applicable. Subject to prior written approval from MCC, the Government or MCA-Cape Verde II may add Indicators or refine the definitions and Targets of existing Indicators.

(b) Program Goal Indicator. The M&E Plan will contain an indicator related to the Compact Goal that seeks to measure the long-term sustainable performance of the Water, Sanitation and Hygiene Project and Land Management for Investment Project institutions.

(c) Other Indicators. Indicators are used to measure progress toward the expected results throughout the implementation period. Different types of indicators are needed at different points in time and to trace the Program logic. The M&E Plan will contain the indicators listed in Annex III as well as other indicators, including ''common indicators,'' necessary for MCC management oversight and communicating progress towards the achievement of compact results. Common Indicators are used by MCC to measure progress across Compacts within certain sectors and enable MCC to aggregate results across countries for reporting externally to key stakeholders.

Common indicators may be specified at all indicator levels (process milestone, output, outcome, objective, and goal).

The M&E Plan indicators should be kept to the minimum necessary for Program oversight, Project management and for measuring and communicating progress toward expected results for planned activities. MCA-Cape Verde II may monitor additional indicators at the Activity level for their own management and communication purposes but these need not be included in the M&E Plan nor reported to MCC, unless requested by an MCC sector lead. MCA-Cape Verde II will compile and update baselines, pending MCC written approval, for key indicators as new data becomes available.

Table 1: Water, Sanitation and Hygiene Project

The following are Indicators and Targets for the monitoring of the Water, Sanitation and Hygiene Project. Common indicators will be revised from their Annex III abbreviated form to conform to the MCC Common Indicator Guidance in the M&E Plan. Disaggregation by urban/rural, gender of head of household and other relevant categories will be identified in the M&E Plan.

TABLE 1—WATER, SANITATION AND HYGIENE PROJECT

Result	Indicator	Definition	Unit	Baseline	Year 5 target
Objective Level Indicators					
Reduced household cost of water needs.	Unit cost of all water consumed by Santiago households.	Total cost to consumer should include tariffs paid, connection costs (direct and otherwise), commercial purchases, value of time collecting water and household coping costs (direct and otherwise) due to reliability concerns. Information will be disaggregated, to the extent possible, by gender head of household and income quartiles.	US$/m^3	TBD	TBD [1]
Reduced subsidies to WASH sector.	Value of implicit subsidy reduction.	TBD	US$	TBD	TBD [2]
Reduced cost of network water delivery.	Average recovery price of water for corporatized utilities.	Cost of operation + 24 hour supply factor + maintenance investment (c.f., IB–NET definitions and toolkits).	US$/m^3	TBD [3]	Greater than 15% reduction per year within two years of corporatization[4]
Increased population served by corporatized utilities.	Service coverage by corporatized utilities.	Percentage of national population served by regulated, corporatized utilities.	Percentage	TBD[5]	50[6]
Activity 1. National Institutional and Regulatory Reform Outcome Level Indicators					
. Constraints to corporatized water utilities reduced.	Satisfactory progress against MCC approved work plan on legal and regulatory reforms.	Evaluation by an independent assessment mechanism.[7]	TBD	TBD	TBD
Core functionalities of institutions in place.	Indicators of core competencies of ANAS and ARE.	TBD prior to entry into force in conjunction with independent assessment mechanism.[8]	TBD	TBD	TBD
Activity 2. Utility Reform Outcome Level Indicators					
Sustainable performance of Aguas de Santiago.	Operating cost coverage.	Total annual operating revenues divided by total annual operating costs.	Percentage	TBD	TBD [9]
Improved reliability and quality of network water delivery.	Client satisfaction with supply reliability; i.e., continuity of service.	Total number of water and waste water complaints per year expressed as a percentage of the total number of water and waste water connections disaggregated by income quartile.	Percentage	TBD[10]	TBD
	Objective measure of supply reliability; i.e., continuity of service.	Average hours of service per day for water and wastewater supply on Santiago..	Hours per day	TBD	TBD [11]

TABLE 1—WATER, SANITATION AND HYGIENE PROJECT—Continued

Result	Indicator	Definition	Unit	Baseline	Year 5 target
	Client satisfaction with water quality.	Total number of potable water complaints per year expressed as a percentage of the total number of potable water connections disaggregated by income quartile..	Percentage	TBD[12]	TBD
	Objective measure of water quality.	Fecal coliform counts (and/or residual C12) at the water treatment works and points of use (IB–NET).	Number 100ml (and/or mg/l).	TBD	TBD
Operational efficiency of Aguas de Santiago strengthened.	Non-revenue water of Aguas de Santiago.	Difference between water supplied and water sold (i.e. volume of water "lost") expressed as a percentage of net water supplied.	Percentage	50%[13]	40–50% reduction over baseline
	Annual budgets and independent annual audits of participating Santiago municipal water utilities published.	Published and audited statements by Aguas de Santiago.	Number	0	TBD
Increased access to improved drinking water source.	Proportion of population using an improved drinking water source.	Proportion of Santiago population (households) using an improved drinking water source. M&E Plan will include disaggregation by income quartile and gender of head of household..	Percentage	86[14]	TBD[15]
Increased access to improved sanitation.	Proportion of population using an improved sanitation facility.	Proportion of Santiago population (households) using an improved sanitation facility disaggregated by on and off network connections. M&E Plan will include disaggregation by income quartile and gender of head of household.[16]	Percentage	41 (on-network) 19 (off-network)	TBD[17]
Total water consumption.	Residential water consumption.	Average water consumption in liters per person per day for Santiago households, disaggregated by income quartile. The M&E Plan will include additional disaggregation based on the gender of head of household.[18]	Liters per capita per day.	17.1 (quartile 1) 31.7 (quartile 2) 33.0 (quartile 3) 62.7 (quartile 4).	TBD[19]
Activity 3. Infrastructure Grant Facility Outcome Level Indicators					
Demonstrated performance as defined under IGF operations manual.	TBD for individual investments at signing of grant agreements.	TBD	TBD	TBD	TBD

[1] Targets will be established based on assumptions of decreasing costs for populations served by regulated, corporatized utilities. Baselines and the manner of calculation will be established in collaboration with an independent impact evaluation firm, and will use a combination of statistically representative surveys.

[2] Indicator and definition to be determined based on further analysis of best available data sources.

[3] Baseline and targets will be established based on inputs from an economic viability study to be financed by the Compact, as well as through the support of technical assistance consultants.

[4] Baseline will be established, and targets verified, based on inputs from the economic viability study.

[5] Electra is the only company regulated by ARE, and currently operates in Praia, Sao Vicente, Boa Vista and Sal. The baseline data will be sourced from the 2010 Census or ARE databases, and shall be included in the M&E Plan.

[6] Target is based on Santiago population as a percent of national population.

[7] Assessment mechanism and strategy to monitor and evaluate the *quality* of reform will be outlined in the M&E Plan, and shall be fully developed by year 1 of Compact implementation. The assessment mechanisms will include a plan detailing reform milestones based on Compact conditions precedent, IGF set-up criteria, and the results of studies performed prior to entry into force, including national legal reform and new institutional environment for WASH sector studies.

[8] Core competency indicators will be determined through a national institutional environment study to be financed by the Compact prior to entry into force. It is expected that the core competencies arising from this design study shall be codified in the appropriate legislative reforms.

[9] Baseline and target will be included in the M&E Plan. Targets will be established using data generated from the economic viability study.

[10] Results from the 2010 Water and Sanitation Survey collected by the National Statistical Institute (INE) show that 36 percent of head of household respondents are either "*very dissatisfied*" (11 percent) or "*dissatisfied*" (25 percent) with the reliability of piped public water in Santiago, whereas 46 percent of respondents indicate that they are either "*satisfied*" (41 percent) or "*very satisfied*" (5 percent) with the reliability of piped public water in Santiago. M&E Plan will provide income disaggregation for this indicator.

[11] Non-revenue water study and Santiago infrastructure needs and master plan study, to be financed by the Compact prior to entry into force, will aid in establishing baseline(s), annual targets and end-of-Compact targets as necessary. Targets for increased supply reliability will be based on estimated reductions of technical losses as opposed to increases in water production.

[12] Results from the 2010 Water and Sanitation Survey collected by INE show that 38 percent of head of household respondents are either ''*very dissatisfied*'' (18 percent) or ''*dissatisfied*'' (20 percent) with the potability of piped public water in Santiago, whereas 49 percent of respondents indicated that they are either ''*satisfied*'' (44 percent) or ''*very satisfied*'' (5 percent) with the potability of piped public water in Santiago. M&E Plan will provide income disaggregation of data for this indicator.

[13] Non-revenue water study financed prior to entry into force will update baseline figure.

[14] Improved sanitation and improved water sources classifications are based on the Joint Monitoring Program for Water Supply and Sanitation by the World Health Organization and UNICEF. Baseline data is sourced from the 2010 Water and Sanitation Survey conducted by the National Statistical Institute (INE) financed through 609(g) resources. Improved water source includes ''household connected to the network [public water network, different from the sewer network] using a flush to piped sewer system, flush to septic system, borehole or flush or pour over to somewhere else.''

[15] Water consumption survey will be used to establish baseline for the M&E Plan.

[16] Improved sanitation and improved water sources classifications are based on the Joint Monitoring Program for Water Supply and Sanitation by the World Health Organization and UNICEF. Baseline is derived from the 2010 Water and Sanitation Survey conducted by the National Statistical Institute (INE). Improved water source includes ''household connected to the network [public water network, different from the sewer network] using a flush to piped sewer system, flush to septic system, borehole or flush or pour over to somewhere else.''

[17] Target to be determined based on assumptions of ERR model and information collected through immediate needs assessment study and Santiago master plan to be conducted prior to entry into force.

[18] Baseline derived from the 2010 Water and Sanitation Survey collected by INE. Quartile 1 refers to the lowest income group; quartile 4 refers to the highest income group.

[19] Targets for increased household water consumption will be based on estimated reductions of technical losses as opposed to increases in water production.

Table 2: Land Management for Investment Project

The following table describes the key Indicators and Targets for the monitoring the Land Management for Investment Project and its relevant components, as further described in paragraph 2(e) of Part B of Annex I.

TABLE 2—LAND MANAGEMENT FOR INVESTMENT PROJECT

Result	Indicator	Definition	Unit	Baseline	Year 5 target
Objective Level Indicators					
Increased investments.	Increased tourism related development in islands with high investment potential.	''Level step increase'' above trend in total bed capacity and total bed-nights developed on St. Vicente, Sal and Boa Vista.[20]	Percentage	2011–2015 trend: current projections estimate a capacity of approx. 16,200 beds, 3.8 million bed-nights in 2016[21]	Greater than 5% level increase above baseline trends for both bed capacity and bed-nights
Outcome Level Indicators					
Increase the efficiency and cost-effectiveness of land rights registration and transactions.	Time elapsed for property transactions.	Elapsed time from initiation to completion of a formal property transaction, disaggregated by island.	Days	73[22]	90% reduction over baseline.[23]
	Cost for property transactions.	Costs to conduct a formal property transaction disaggregated by island.	US$	TBD	TBD[24]
More conclusive rights and boundary information in islands of high investment potential.	Parcels incorporated into the land information system.	Parcels incorporated are those with boundaries identified and conclusive rights confirmed or newly registered, disaggregated by island.	Number	0	TBD[25]
	Land rights registered.	Parcels with a land rights newly registered at the Ministry of Justice disaggregated by island.	Number	0	TBD[26]

[20] Manner of calculation will be specified in the M&E Plan, in collaboration with an independent impact evaluation firm.

[21] Data and targets are linked to the economic analysis and economic rate of return analysis for the project.

[22] Source for baseline is World Bank Doing Business Survey, 2011. The baseline will be updated with more detailed information on time for property transactions compiled through project preparatory studies.

[23] Targets reflect linkages to the economic rate of return analysis. This analysis assumes the target will be achieved by end of Compact year 3.

[24] Targets will be established in the M&E Plan, and will reflect linkages to the Compact economic analysis.

[25] Targets shall be established following the completion of the preparatory geo-referencing activities. Information will be sourced from administrative records of the Registo Predial.

[26] Targets shall be established following the completion of the preparatory geo-referencing activities. Information will be sourced from administrative records of the Registo Predial.

(d) Data Collection and Reporting. The M&E Plan will establish guidelines for data collection and reporting, and identify the responsible parties. For the Water, Sanitation and Hygiene Project, studies that include baseline data financed by the Compact may include: municipal non-revenue water studies, a willingness to pay and barriers to service studies, financial and tariff-setting studies, and multiple municipal utility economic viability studies conducted in all nine municipalities on the island of Santiago, in collaboration with municipal water utility authorities. The M&E Plan budget will fund additional household surveys and qualitative studies as necessary. For the Land Management for Investment Project, data may be collected through baseline studies financed by the Compact, tourism receipts, labor statistics, qualitative studies, and information about parcel boundaries and rights refined during the project and held in the databases of the Ministry of Justice and municipal governments. Data collection will support monitoring of plausible additional benefits that may result from project outcomes. Compliance with data collection and reporting timelines will be conditions for Disbursements for the relevant Activities as set forth in the Program Implementation Agreement. The M&E Plan will specify the data collection methodologies, procedures, and analysis required for reporting on results at all levels. The M&E Plan will describe any interim MCC approvals for data collection, analysis, and reporting plans.

(e) Data Quality Reviews. As determined in the M&E Plan or as otherwise requested by MCC, the quality of the data gathered through the M&E Plan will be periodically reviewed to ensure that data reported are valid, reliable, timely, precise and of good integrity. The objective of any data quality review will be to verify the quality and the consistency of performance data across different implementation units and reporting institutions. Such data quality reviews also will serve to identify where those levels of quality are not possible, given the realities of data collection. Impact evaluation consultants will provide additional quality assurance oversight.

(f) Management Information System. The M&E Plan will describe the information system that will be used to collect data, store, process and deliver information to relevant stakeholders in such a way that the Program information collected and verified pursuant to the M&E Plan is at all times accessible and useful to those who wish to use it. The system development will take into consideration the requirement and data needs of the components of the Program, and will be aligned with existing MCC systems, other service providers, and ministries.

(g) Role of MCA-Cape Verde. The monitoring and evaluation of this Compact spans two discrete Projects and multiple Activities and sub-Activities, and will involve a variety of governmental, nongovernmental, and private sector institutions. In accordance with the designation contemplated by Section 3.2(b) of this Compact, MCA-Cape Verde II is responsible for implementation of the M&E Plan. MCA-Cape Verde II will oversee all Compact-related monitoring and evaluation activities conducted for each of the Activities, ensuring that data from all implementing entities are consistent, accurately reported and aggregated into regular performance reports as described in the M&E Plan.

4. Evaluation Component

The Evaluation Component of the M&E Plan may contain up to three types of evaluations: impact evaluations; project performance evaluations; and special studies. Impact and performance evaluations share a common objective of assessing the likely program effects on key program outcomes; special studies can be conducted to answer any other questions that inform either program implementation, or the design or interpretation of the program evaluations. All of these evaluations will generally employ both qualitative and quantitative survey methods to improve our understanding of study-relevant questions. MCC also expects to continue monitoring and evaluating the long-term impacts of strategically selected components of MCC Compacts even after Compact expiration. If warranted, components of this Compact may be selected for these special post-Compact evaluations. As needed, MCA and MCC will evaluate the relevance of other areas of research regarding costs and benefits, and determine, given budgetary constraints, how best to allocate time and other resources to pursue them.

The Evaluation Component of the M&E Plan will describe the purpose of the evaluation, methodology, timeline, required MCC approvals, and the process for collection and analysis of data for each evaluation. The results of all evaluations will be made publicly available in accordance with MCC's Policy for Monitoring and Evaluation of Compacts and Threshold Programs.

(a) Impact/Performance Evaluation. The M&E Plan will include a description of the methods to be used to evaluate the impacts of project activities and investments on economic outcomes. Where needed, these will include plans for integrating the evaluation method into Project design. Consultations with stakeholders will help clarify the strategies outlined below, and will help to jointly determine which approaches have the strongest potential for informative and rigorous impact evaluations. The M&E Plan will further outline in detail these methodologies. Final impact evaluation strategies are to be included in the M&E Plan. All evaluation strategies will incorporate procedures for integrating gender and social concerns into its analysis. The following is a summary of the potential impact evaluation methodologies.

(i) Water, Sanitation and Hygiene Project. The evaluation will focus on three main themes: independent reviews and, as warranted, independent specification and estimation of relevant project ERRs; examining the broad institutional benefits of the changes in national policies and utility organization and management; and assessing household-level impacts of program investments and activities. At the household level, the evaluations will focus on the following program impacts on household and individual outcomes: household expenditures on water purchases and coping mechanisms; imputed value of individual time devoted to water gathering and coping; and other household and individual costs attributable to the changing water and sanitation environment.

Institutional level impacts such as reduced operating costs or losses, and increased commercial efficiency may be evaluated using a before-after comparison of utility performance. The consistency of this indicator should be assessed using any historical and current high-frequency indicators, including water supplies, revenue collections, operating costs, etc. Estimates of household and individual costs and benefits should determine patterns across social, economic and demographic groups, including gender analysis.

(ii) Land Management for Investment Project. The evaluation will focus on independent review and, if warranted, re-specification and estimation of project ERRs to account for significant changes in value-added to the economy that might not be adequately approximated in the *ex ante* project analysis. Evaluation of benefits should focus on anticipated economic impacts of tourism-related sector investments plausibly attributable to the reduced time and other costs of securing land

rights and to more conclusive rights and boundaries information. If project improvements also broadly reduce the costs of securing land rights and increase the reliability of land information with effects across other sectors and regions, other plausible economic benefits attributable to these outcomes will also be explored. Estimates of such benefits should consider compelling evidence of clearly distinguished patterns across sectors, or across social, economic and demographic groups, including gender analysis.

(b) Special Studies. The M&E Plan will include a description of the methods to be used for special studies, as necessary, funded through this Compact or by MCC. Plans for conducting the special studies will be determined jointly between the Government or MCA-Cape Verde II and MCC before the approval of the M&E Plan. The M&E Plan will identify and make provision for any other special studies, *ad hoc* evaluations, and research that may be needed as part of the monitoring and evaluating of this Compact. Either MCC, MCA-Cape Verde II or the Government may request special studies or *ad hoc* evaluations of Activities, or the Project as a whole, prior to the expiration of the Compact Term. When the Government engages an evaluator, the engagement will be subject to the prior written approval of MCC. Contract terms must ensure non-biased results and the publication of results.

(c) Request for *Ad Hoc* Evaluation or Special Studies. If MCA-Cape Verde II or the Government require an *ad hoc* independent evaluation or special study at the request of the Government for any reason, including for the purpose of contesting an MCC determination with respect to a Project or Activity or to seek funding from other donors, no MCC funding resources may be applied to such evaluation or special study without MCC's prior written approval.

5. Other Components of the M&E Plan

In addition to the monitoring and evaluation components, the M&E Plan will include the following components for the Program, Project and Activities, including, where appropriate, roles and responsibilities of the relevant parties and providers:

(a) Costs. A detailed cost estimate for all components of the M&E Plan; and

(b) Assumptions and Risks. Any assumption or risk external to the Program that underlies the accomplishment of the Program Objective, Project Objective and Activity outcomes and outputs.

6. Approval and Implementation of the M&E Plan

The approval and implementation of the M&E Plan, as amended from time to time, will be in accordance with the Program Implementation Agreement, any other relevant Supplemental Agreement and the MCC Policy for Monitoring and Evaluation of Compacts and Threshold Programs.

Annex IV Conditions Precedent to Disbursement of Compact Implementation Funding

This Annex IV sets forth the conditions precedent applicable to Disbursements of Compact Implementation Funding (each a ''*CIF Disbursement*''). Capitalized terms used in this Annex IV and not defined in this Compact will have the respective meanings assigned thereto in the Program Implementation Agreement. Upon execution of the Program Implementation Agreement, each CIF Disbursement will be subject to the terms of the Program Implementation Agreement.

1. Conditions Precedent to Initial CIF Disbursement

Each of the following must have occurred or been satisfied prior to the Initial CIF Disbursement:

(a) The Government (or MCA-Cape Verde II) has delivered to MCC:

(i) An interim fiscal accountability plan acceptable to MCC; and

(ii) A CIF procurement plan acceptable to MCC.

2. Conditions Precedent to Each CIF Disbursement

Each of the following must have occurred or been satisfied prior to each CIF Disbursement:

(a) The Government (or MCA-Cape Verde II) has delivered to MCC the following documents, in form and substance satisfactory to MCC:

(i) A completed Disbursement Request, together with the applicable Periodic Reports, for the applicable Disbursement Period, all in accordance with the Reporting Guidelines;

(ii) A certificate of the Government (or MCA-Cape Verde II), dated as of the date of the CIF Disbursement Request, in such form as provided by MCC; and

(iii) If this Compact has entered into force in accordance with Article 7, (A) a Fiscal Agent Disbursement Certificate and (B) a Procurement Agent Disbursement Certificate;

(b) If any proceeds of the CIF Disbursement are to be deposited in a bank account, MCC has received satisfactory evidence that (i) the Bank Agreement has been executed and (ii) the Permitted Accounts have been established;

(c) Appointment of an entity or individual to provide fiscal agent services, as approved by MCC, until such time as the Government provides to MCC a true and complete copy of a Fiscal Agent Agreement, duly executed and in full force and effect, and the fiscal agent engaged thereby is mobilized;

(d) Appointment of an entity or individual to provide procurement agent services, as approved by MCC, until such time as the Government provides to MCC a true and complete copy of the Procurement Agent Agreement, duly executed and in full force and effect, and the procurement agent engaged thereby is mobilized; and

(e) MCC is satisfied, in its sole discretion, that:

(i) The activities being funded with such CIF Disbursement are necessary, advisable or otherwise consistent with the goal of facilitating the implementation of the Compact and will not violate any applicable law or regulation;

(ii) No material default or breach of any covenant, obligation or responsibility by the Government, MCA-Cape Verde II or any Government entity has occurred and is continuing under this Compact or any Supplemental Agreement;

(iii) There has been no violation of, and the use of requested funds for the purposes requested will not violate, the limitations on use or treatment of MCC Funding set forth in Section 2.7 of this Compact or in any applicable law or regulation;

(iv) Any Taxes paid with MCC Funding through the date ninety (90) days prior to the start of the applicable Disbursement Period have been reimbursed by the Government in full in accordance with Section 2.8(c) of this Compact; and

(v) The Government has satisfied all of its payment obligations, including any insurance, indemnification, tax payments or other obligations, and contributed all resources required from it, under this Compact and any Supplemental Agreement.

3. For Any CIF Disbursement Occurring After This Compact Has Entered Into Force in Accordance With Article 7

MCC is satisfied, in its sole discretion, that:

(a) MCC has received copies of any reports due from any technical consultants (including environmental auditors engaged by MCA-Cape Verde II) for any Activity since the previous Disbursement Request, and all such

reports are in form and substance satisfactory to MCC;

(b) The Implementation Plan Documents and Fiscal Accountability Plan are current and updated and are in form and substance satisfactory to MCC, and there has been progress satisfactory to MCC on the components of the Implementation Plan for the Projects or any relevant Activities related to such CIF Disbursement;

(c) There has been progress satisfactory to MCC on the M&E Plan and Social and Gender Integration Plan for the Program or Project or relevant Activity and substantial compliance with the requirements of the M&E Plan and Social and Gender Integration Plan (including the targets set forth therein and any applicable reporting requirements set forth therein for the relevant Disbursement Period);

(d) There has been no material weakness or significant deficiency identified in any financial audit report delivered in accordance with this Compact and the Audit Plan, for the prior audit period which is not being sufficiently addressed in a corrective action plan satisfactory to MCC;

(e) MCC does not have grounds for concluding that any matter certified to it in the related MCA Disbursement Certificate, the Fiscal Agent Disbursement Certificate or the Procurement Agent Disbursement Certificate is not as certified;

(f) If any of the officers or key staff of MCA-Cape Verde II have been removed or resigned and the position remains vacant, MCA-Cape Verde II actively engaged in recruiting a replacement; and

(g) MCC has not determined, in its sole discretion, that an act, omission, condition, or event has occurred that would be the basis for MCC to suspend or terminate, in whole or in part, the Compact or MCC Funding in accordance with Section 5.1 of this Compact.

Annex V Definitions

Act has the meaning provided in Section 2.2(a).

Activity has the meaning provided in Part B of Annex I.

ADA has the meaning provided in paragraph 1(b)(ii)(C) of Part B of Annex I.

Additional Representative has the meaning provided in Section 4.2.

Aguas de Santiago has the meaning provided in paragraph 1(b)(ii) of Part B of Annex I.

ANAS has the meaning provided in paragraph 1(b)(i) of Part B of Annex I.

ARE has the meaning provided in paragraph 1(b)(i) of Part B of Annex I.

Audit Guidelines has the meaning provided in Section 3.8(a).

Baseline has the meaning provided in paragraph 3 of Annex III.

Cape Verde means the Republic of Cape Verde.

CIF Disbursement has the meaning provided in Annex IV.

CNAS has the meaning provided in paragraph 1(b)(i) of Part B of Annex I.

Compact has the meaning provided in the Preamble.

Compact Goal has the meaning provided in Section 1.1.

Compact Implementation Funding has the meaning provided in Section 2.2(a).

Compact Records has the meaning provided in Section 3.7(a).

Compact Term has the meaning provided in Section 7.4.

Covered Provider has the meaning provided in Section 3.7(c).

DGA has the meaning provided in paragraph 1(b)(i) of Part B of Annex I.

Disbursement has the meaning provided in Section 2.4.

Evaluation Component has the meaning provided in paragraph 1 of Annex III.

Excess CIF Amount has the meaning provided in Section 2.2(c).

Fiscal Agent has the meaning provided in paragraph 6 of Part C of Annex I.

Foundations Activity has the meaning provided in paragraph 2(b)(i) of Part B of Annex I.

Governance Guidelines means MCC's Guidelines for Accountable Entities and Implementation Structures, as such may be posted on MCC's Web site from time to time.

Government has the meaning provided in the Preamble.

Grant has the meaning provided in Section 3.6(b).

IEC has the meaning provided in paragraph 1(b)(i)(A)(4) of Part B of Annex I.

IGF has the meaning provided in paragraph 1(b)(iii) of Part B of Annex I.

Implementation Letter has the meaning provided in Section 3.5.

Implementing Entity has the meaning provided in paragraph 5 of Part C of Annex I.

Implementing Entity Agreement has the meaning provided in paragraph 5 of Part C of Annex I.

Indicators has the meaning provided in paragraph 3(a) of Annex III.

Inspector General has the meaning provided in Section 3.7(d).

Intellectual Property means all registered and unregistered trademarks, service marks, logos, names, trade names and all other trademark rights; all registered and unregistered copyrights; all patents, inventions, shop rights, know how, trade secrets, designs, drawings, art work, plans, prints, manuals, computer files, computer software, hard copy files, catalogues, specifications, and other proprietary technology and similar information; and all registrations for, and applications for registration of, any of the foregoing, that are financed, in whole or in part, using MCC Funding.

Land Project has the meaning provided in paragraph 2(b) of Part B of Annex I.

M&E Annex has the meaning provided in Annex III.

M&E Plan has the meaning provided in Annex III.

Management Unit has the meaning provided in paragraph 3 of Part C of Annex I.

Master Plan has the meaning provided in paragraph 1(b)(i)(A) of Part B of Annex I.

MCA–Cape Verde II has the meaning provided in Section 3.2(b).

MCC has the meaning provided in the Preamble.

MCC Environmental Guidelines has the meaning provided in Section 2.7(c).

MCC Funding has the meaning provided in Section 2.3.

MCC Gender Policy means the MCC Gender Policy (including any guidance documents issued in connection with the guidelines) posted from time to time on the MCC Web site or otherwise made available to the Government.

MCC Policy for Monitoring and Evaluation of Compacts and Threshold Programs has the meaning provided in Annex III.

MCC Program Procurement Guidelines has the meaning provided in Section 3.6(a).

MCC Web site has the meaning provided in Section 2.7.

Monitoring Component has the meaning provided in paragraph 1 of Annex III.

Multi-Year Financial Plan Summary has the meaning provided in paragraph 1 of Annex II.

National Institutional and Regulatory Reform Activity has the meaning provided in paragraph 1(b)(i) of Part B of Annex I.

NRW has the meaning provided in paragraph 1(b)(ii)(C) of Part B of Annex I.

Party and *Parties* have the meaning provided in the Preamble.

Permitted Account has the meaning provided in Section 2.4.

Principal Representative has the meaning provided in Section 4.2.

Procurement Agent has the meaning provided in paragraph 7 of Part C of Annex I.

Program has the meaning provided in the Preamble.

Program Assets means any assets, goods or property (real, tangible or intangible) purchased or financed in whole or in part (directly or indirectly) by MCC Funding.

Program Funding has the meaning provided in Section 2.1.

Program Guidelines means collectively the Audit Guidelines, the MCC Environmental Guidelines, the MCC Gender Policy, the Governance Guidelines, the MCC Program Procurement Guidelines, the Reporting Guidelines, the MCC Policy for Monitoring and Evaluation of Compacts and Threshold Programs, the MCC Cost Principles for Government Affiliates Involved in Compact Implementation (including any successor to any of the foregoing) and any other guidelines, policies or guidance papers relating to the administration of MCC-funded compact programs and as from time to time published on the MCC Web site.

Program Implementation Agreement and *PIA* have the meaning provided in Section 3.1.

Program Objectives has the meaning provided in Section 1.2.

Project(s) has the meaning provided in Section 1.2.

Project Objective(s) has the meaning provided in Section 1.3.

Provider has the meaning provided in Section 3.7(c).

Reporting Guidelines means the MCC ''Guidance on Quarterly MCA Disbursement Request and Reporting Package'' posted by MCC on the MCC Web site or otherwise publicly made available.

Rights and Boundaries Activity has the meaning provided in paragraph 2(b)(ii) of Part B of Annex I.

SAAS has the meaning provided in paragraph 1(b)(ii)(C) of Part B of Annex I.

SESA has the meaning provided in paragraph 1(b)(i)(A) of Part B of Annex I.

Social and Gender Integration Plan has the meaning provided in paragraph 3 of Part A of Annex I.

Steering Committee has the meaning provided in paragraph 3 of Part C of Annex I.

Stakeholders Committee(s) has the meaning provided in paragraph 3 of Part C of Annex I.

Supplemental Agreement means any agreement between (a) the Government (or any Government affiliate, including MCA–Cape Verde II) and MCC (including, but not limited to, the PIA) or (b) MCC and/or the Government (or any Government affiliate, including MCA–Cape Verde II), on the one hand, and any third party, on the other hand, including any of the Providers, in each case, setting forth the details of any funding, implementing or other arrangements in furtherance of this Compact.

Target has the meaning provided in paragraph 3(a) of Annex III.

Taxes has the meaning provided in Section 2.8(a).

TVET has the meaning provided in paragraph 1(b)(ii)(B)(5) of Part B of Annex I.

United States Dollars or US$ means the lawful currency of the United States of America.

Utility Reform Activity has the meaning provided in paragraph 1(b)(ii) of Part B of Annex I.

WASH has the meaning provided in paragraph 1(a) of Part B of Annex I.

WASH Project has the meaning provided in paragraph 1(b) of Part B of Annex I.

[FR Doc. 2012–3832 Filed 2–17–12; 8:45 am]

BILLING CODE P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (12–016)]

NASA Advisory Council; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the NASA Advisory Council (NAC).

DATES: Thursday, March 8, 2012, 8 a.m.–5 p.m., local time and Friday, March 9, 2012, 8 a.m.–12 p.m., local time.

ADDRESSES: NASA Headquarters, 300 E Street SW., Room 9H40, (PRC), Washington, DC 20456.

FOR FURTHER INFORMATION CONTACT: Ms. Marla King, NAC Administrative Officer, National Aeronautics and Space Administration Headquarters, Washington, DC 20546, 202/358–1148.

SUPPLEMENTARY INFORMATION: The agenda for the meeting will include the following:

—NASA FY 2013 Budget Request.
—National Research Council Study on NASA Space Technology Roadmaps.
—Aeronautics Committee Report.
—Audit, Finance and Analysis Committee Report.
—Commercial Space Committee Report.
—Education and Public Outreach Committee Report.
—Human Exploration and Operations Committee Report.
—Information Technology Infrastructure Committee Report.
—Science Committee Report.
—Technology and Innovation Committee Report.

The meeting will be open to the public up to the seating capacity of the room. This meeting is also available telephonically and by WebEx. You must use a touch tone phone to participate in this meeting. Any interested person may dial the toll free access number, 1–866–753–1451 or toll access number 1–203–875–1553 and then the numeric participant passcode: 6957984 followed by the # sign. To join via WebEx, the link is *https://nasa.webex.com,* meeting number 394 377 706, and password NACMARCH8&9 (**Note:** Password is case sensitive.).

It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants. Visitors will need to show a valid picture identification such as a driver's license to enter the NASA Headquarters building (West Lobby—Visitor Control Center), and must state that they are attending the NASA Advisory Council meeting in room 9H40 before receiving an access badge. Foreign nationals attending this meeting will be required to provide a copy of their passport, visa, or green card in addition to providing the following information no less than 10 working days prior to the meeting: full name; gender; date/place of birth; citizenship; visa/green card information (number, type, expiration date); passport information (number, country, telephone); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee. To expedite admittance, attendees with U.S. citizenship can provide identifying information three working days in advance by contacting Ms. Marla King, via email at *marla.k.king@nasa.gov* or by telephone at (202) 358–1148.

Patricia D. Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2012–3898 Filed 2–17–12; 8:45 am]

BILLING CODE P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (12- 017)]

NASA Advisory Council; Audit, Finance and Analysis Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the Audit, Finance and Analysis Committee of the NASA Advisory Council.

DATES: Wednesday, March 7, 2012, 9 a.m.—10:45 a.m., local time.

ADDRESSES: NASA Headquarters. 300 E Street SW., Conference Room 8D48, Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Ms. Charlene Williams, Office of the Chief Financial Officer, National Aeronautics and Space Administration Headquarters, Washington, DC 20546. Phone: 202–358–2183.

SUPPLEMENTARY INFORMATION: The agenda for the meeting includes a briefing on:

- Administrative Savings.

The meeting will be open to the public up to the seating capacity of the room. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants.

Visitors will need to show a valid picture identification such as a driver's license to enter the NASA Headquarters building (West Lobby—Visitor Control Center), and must state that they are attending the Audit, Finance, and Analysis Committee meeting in room 8R40 before receiving an access badge. Foreign nationals attending this meeting will be required to provide a copy of their passport, visa, or green card in addition to providing the following

information no less than 10 working days prior to the meeting: full name; gender; date/place of birth; citizenship; visa/green card information (number, type, expiration date); passport information (number, country, telephone); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee. To expedite admittance, attendees with U.S. citizenship can provide identifying information 3 working days in advance by contacting Charlene Williams at (202) 358–2183, or fax: (202) 358–4336.

Patricia D. Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2012–3920 Filed 2–17–12; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0038]

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

Background

Pursuant to Section 189a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from January 26, 2012 to February 8, 2012. The last biweekly notice was published on February 7, 2012 (77 FR 6144).

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and is publicly-available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0038. You may submit comments by the following methods:

- *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0038. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

SUPPLEMENTARY INFORMATION:

Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0038 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and is publicly-available, by the following methods:

- *Federal Rulemaking Web Site:* Go to *http://www.regulations.gov* and search for Docket NRC–2012–0038.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS* Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.*
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2012–0038 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed. The NRC posts all comment submissions at *http://www.regulations.gov* as well as entering the comment submissions into ADAMS, and the NRC does not edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information in their comment submissions that they do not want to be publicly disclosed. Your request should state that the NRC will not edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in Title 10 of the Code of Federal Regulations (10 CFR) 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the

Commission make a final No Significant Hazards Consideration Determination, then any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. The NRC regulations are accessible electronically from the NRC Library on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in the NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with the NRC

guidance available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC's Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by email at *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–(866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

For further details with respect to this license amendment application, see the application for amendment which is available for public inspection at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's PDR Reference staff at 1–(800) 397–4209, (301) 415–4737, or by email to *pdr.resource@nrc.gov.*

Southern Nuclear Operating Company, Inc., Docket Nos. 50–348 and 50–364, Joseph M. Farley Nuclear Plant, Units 1 and 2, Houston County, Alabama

Date of amendment request: January 12, 2012.

Description of amendment request: The proposed amendments would extend the Reactor Coolant Pump (RCP) motor flywheel examination frequency from the currently approved 10-year examination frequency to an interval not to exceed 20 years. The changes are consistent with the Industry/Technical Specification Task Force (TSTF) Standard Technical Specification Change Traveler, TSTF–421–A, ''Revision to RCP Flywheel Inspection Program (WCAP–15666).'' The availability of this TS improvement was announced in the **Federal Register** on October 22, 2003 (68 FR 60422), as part of the Consolidated Line Item Improvement Process (CLIIP).

The NRC staff issued a notice of availability of a model safety evaluation and model no significant hazards consideration (NSHC) determination for referencing in license amendment applications in the **Federal Register** on June 24, 2003 (68 FR 37590). The licensee affirmed the applicability of the model NSHC determination in its application dated May 21, 2004.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The proposed change to the RCP flywheel examination frequency does not change the response of the plant to any accidents. The RCP will remain highly reliable and the proposed change will not result in a significant increase in the risk of plant operation. Given the extremely low failure probabilities for the RCP motor flywheel during normal and accident conditions, the extremely low probability of a loss-of-coolant accident (LOCA) with loss of offsite power (LOOP), and assuming a conditional core damage probability (CCDP) of 1.0 (complete failure of safety systems), the core damage frequency (CDF) and change in risk would still not exceed the NRC's acceptance guidelines contained in Regulatory Guide (RG) 1.174 (<1.0E–6 per year). Moreover, considering the uncertainties involved in this evaluation, the risk associated with the postulated failure of an RCP motor flywheel is significantly low. Even if all four RCP motor flywheels are considered in the bounding plant configuration case, the risk is still acceptably low.

The proposed change does not adversely affect accident initiators or precursors, nor alter the design assumptions, conditions, or configuration of the facility, or the manner in which the plant is operated and maintained; alter or prevent the ability of structures, systems, and components (SSCs) from performing their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits; or affect the source term, containment

isolation, or radiological release assumptions used in evaluating the radiological consequences of an accident previously evaluated. Further, the proposed change does not increase the type or amount of radioactive effluent that may be released offsite, nor significantly increase individual or cumulative occupational/public radiation exposure. The proposed change is consistent with the safety analysis assumptions and resultant consequences.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Accident Previously Evaluated

The proposed change in flywheel inspection frequency does not involve any change in the design or operation of the RCP. Nor does the change to examination frequency affect any existing accident scenarios, or create any new or different accident scenarios. Further, the change does not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or alter the methods governing normal plant operation. In addition, the change does not impose any new or different requirements or eliminate any existing requirements, and does not alter any assumptions made in the safety analysis. The proposed change is consistent with the safety analysis assumptions and current plant operating practice.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in a Margin of Safety

The proposed change does not alter the manner in which safety limits, limiting safety system settings, or limiting conditions for operation are determined. The safety analysis acceptance criteria are not impacted by this change. The proposed change will not result in plant operation in a configuration outside of the design basis. The calculated impact on risk is insignificant and meets the acceptance criteria contained in RG 1.174. There are no significant mechanisms for inservice degradation of the RCP flywheel.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: M. Stanford Blanton, Esq., Balch and Bingham, Post Office Box 306, 1710 Sixth Avenue North, Birmingham, Alabama 35201.

NRC Branch Chief: Nancy Salgado.

Virginia Electric and Power Company, Docket Nos. 50–280 and 50–281, Surry Power Station, Units 1 and 2, Surry County, Virginia and 50–338 and 50–339, North Anna Power Station Units 1 and 2, Mineral, Virginia

Date of amendment request: October 6, 2011.

Description of amendment request: To change the Emergency Action Levels (EALs) for North Anna Power Station (NAPS) and Surry Power Station (SPS). Several changes are proposed to incorporate lessons learned from the safety related breaker fire that occurred at NAPS on April 22, 2009 (Ref. NRC Event Notification Report 45013). The proposed changes are briefly summarized as follows: (1) Revise the definition of ''Affecting Safe Shutdown'' in the EAL Technical Basis Documents to specifically describe how this applies to NAPS and SPS; (2) revise applicable Hazards EALs to incorporate the intent of the revised definition for ''Affecting Safe Shutdown''; in addition, the main dam is added to the Initiating Condition (IC) for HA1 for NAPS and the low level intake structure is added to the IC for HA1 for SPS; (3) changing the IC for HA2 and HA3 to replace ''a safe shutdown area'' with ''any Table H–1 Area''; and (4) revise applicable System Malfunctions EAL to include a 15-minute threshold for RCS leaks.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

These changes affect the North Anna and Surry Power Station Emergency Action Levels, but do not alter any of the requirements of the Operating License or the Technical Specifications. The proposed changes do not modify any plant equipment and do not impact any failure modes that could lead to an accident. Additionally, the proposed changes have no effect on the consequences of any analyzed accident since the changes do not affect any equipment related to accident mitigation. Based on this discussion, the proposed amendment does not increase the probability or consequence of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

These changes affect the North Anna and Surry Power Station Emergency Action Levels, but do not alter any of the requirements of the Operating License or the Technical Specifications. They do not modify any plant equipment and there is no impact on the capability of the existing equipment to perform their intended functions. No system setpoints are being modified. No new failure modes are introduced by the proposed changes. The proposed amendment, does not introduce any accident initiators or malfunctions that would cause a new or different kind of accident.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

These changes affect the North Anna and Surry Power Station Emergency Action Levels, but do not alter any of the requirements of the Operating License or the Technical Specifications. The proposed changes do not affect any of the assumptions used in the accident analysis, nor do they affect any operability requirements for equipment important to plant safety.

Therefore, the proposed changes will not result in a significant reduction in the margin of safety in operation of the facility as discussed in this license amendment request.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Esq., Senior Counsel, Dominion Resources Services, Inc., 120 Tredegar St., RS–2, Richmond, VA 23219.

NRC Branch Chief: Nancy Salgado.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these

amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the NRC's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through the Agencywide Documents Access and Management System (ADAMS) in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR Reference staff at 1–(800) 397–4209, (301) 415–4737 or by email to *pdr.resource@nrc.gov*.

Entergy Nuclear Operations, Inc., Docket No. 50–255, Palisades Nuclear Plant, Van Buren County, Michigan

Date of application for amendment: January 31, 2011, supplemented by letter dated October 11, 2011.

Brief description of amendment: The amendment modifies the Spent Fuel Pool (SFP) storage requirements in PNP Technical Specifications (TS) Section 3.7.16 by revising a limiting condition for operation (LCO) for Region I fuel and non-fissile bearing component storage and by inserting tables containing spent fuel minimum burn-up for Regions 1B, 1C, 1D, and 1E; and also modifies the Region I fuel storage criticality requirements, and design features in TS section 4.3, by describing revised requirements for Regions 1B and 1E and adding requirements for new Regions 1C and 1D.

Date of issuance: January 27, 2012.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No.: 246.

Facility Operating License No. DPR–20: Amendment revised the Technical Specifications.

*Date of initial notice in **Federal Register***: May 10, 2011 (76 FR 27096).

The supplemental letter contained clarifying information and did not change the initial no significant hazards consideration determination, and did not expand the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated January 27, 2012.

No significant hazards consideration comments received: No.

Nebraska Public Power District, Docket No. 50–298, Cooper Nuclear Station, Nemaha County, Nebraska

Date of amendment request: January 5, 2011, as supplemented by letters dated October 6 and 18, 2011.

Brief description of amendment: The amendment revised Technical Specification (TS) 3.4.3, ''Safety/Relief Valves (SRVs) and Safety Valves (SVs).'' The original proposed TS changes would have revised the required number of SRVs required to be operable for overpressure protection and Anticipated Transient without Scram from eight to five. By letter dated October 6, 2011, the licensee revised its submittal by changing the proposed required number of SRVs to be operable from eight to seven.

Date of issuance: January 31, 2012.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No.: 240.

Renewed Facility Operating License No. DPR–46: Amendment revised the Facility Operating License and Technical Specifications.

*Date of initial notice in **Federal Register***: November 1, 2011 (76 FR 67488).

The supplemental letters dated October 6 and 18, 2011, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated January 31, 2012.

No significant hazards consideration comments received: No.

NextEra Energy Point Beach, LLC, Docket Nos. 50–266 and 50–301, Point Beach Nuclear Plant, Units 1 and 2, Town of Two Creeks, Manitowoc County, Wisconsin

Date of application for amendments: March 23, 2011.

Brief description of amendments: The amendments replace non-conservative values for five operating limits in the Technical Specifications with more conservative values that incorporate measurement uncertainty. Additionally, one of the operating limits will replace a tank volume expressed in cubic feet with a volume expressed in percent level to allow plant operators to directly verify the technical specification limit based on direct instrument readings.

Date of issuance: January 30, 2012.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment Nos.: 246 (Unit 1) and 250 (Unit 2).

Renewed Facility Operating License Nos. DPR–24 and DPR–27: Amendments revise the Renewed Facility Operating License and Technical Specifications.

*Date of initial notice in **Federal Register***: May 17, 2011 (76 FR 28475).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated January 30, 2012.

No significant hazards consideration comments received: No.

NextEra Energy Seabrook, LLC, Docket No. 50–443, Seabrook Station, Unit 1, Rockingham County, New Hampshire

Date of amendment request: July 14, 2011, as supplemented November 11, 2011.

Description of amendment request: The amendment replaces the Technical Specification surveillance 4.6.2.1.d 10-year surveillance frequency for testing the containment spray nozzles with an event-based frequency.

Date of issuance: January 30, 2012.

Effective date: As of its date of issuance and shall be implemented within 90 days.

Amendment No.: 128.

Facility Operating License No. NPF–86: The amendment revised the TS and the License.

*Date of initial notice in **Federal Register:*** September 6, 2011 (76 FR 55130).

The supplemental letter provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the U.S. Nuclear Regulatory Commission (NRC) staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated January 30, 2012.

No significant hazards consideration comments received: No.

PSEG Nuclear LLC, Docket No. 50–354, Hope Creek Generating Station, Salem County, New Jersey

Date of application for amendment: February 28, 2011, as supplemented by letters dated August 29, and December 16, 2011, and January 26, 2012.

Brief description of amendments: The amendment modifies the Hope Creek Generating Station Technical Specifications (TSs) to revise the existing TS for the control room emergency filtration system and to add a new TS for the control room air conditioning system. The amendment is based, in part, on Nuclear Regulatory Commission-approved Technical Specification Task Force (TSTF) Standard TS Change Traveler TSTF–477, Revision 3, ''Adding an Action Statement for Two Inoperable Control Room Air Conditioning Subsystems.''

Date of issuance: February 8, 2012.

Effective date: As of the date of issuance, to be implemented within 60 days.

Amendment No.: 191.

Facility Operating License No. NPF–57: The amendment revised the TSs and the Facility Operating License.

Date of initial notice in ***Federal Register:*** May 3, 2011 (76 FR 24929).

The letters dated August 29, and December 16, 2011, and January 26, 2012, provided clarifying information that did not change the initial proposed no significant hazards consideration determination or expand the application.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated February 8, 2012.

No significant hazards consideration comments received: No.

Yankee Atomic Electric Company, Docket No. 50–29, Yankee Nuclear Power Station, Franklin County, Massachusetts.

Date of application for amendment: August 10, 2011.

Brief Description of Amendment: The amendment revises License Condition C(3) ''Physical Protection''. It updates the title of the Physical Security Plan, from the ''Yankee Nuclear Power Station Defueled Security Plan'' Revision 0, dated October 13, 1992, and ''Yankee Defueled Security Training and Qualification Plan'' Revision 0, dated October 13, 1992, to the ''Physical Security Plan for Yankee Rowe Independent Spent Fuel Storage Installation.''

Amendment No.: 159.

Facility Operating License No. DPR–3. The amendment revised the Facility Operating License.

Date of Initial Notice in ***Federal Register***. October 4, 2011 (76 FR 61398).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated January 24, 2012.

No Significant Hazards Consideration Comments Received: No.

Dated at Rockville, Maryland, this 10th day of February 2012.

For the Nuclear Regulatory Commission.

Michele G. Evans,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–3822 Filed 2–17–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Reliability and PRA; Notice of Meeting

The ACRS Subcommittee on Reliability and PRA will hold a meeting on March 7, 2012, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, March 7, 2012—8:30 a.m. Until 5 p.m.

The Subcommittee will be briefed on the progress made for the tabletop exercises as part of the response to the SRM on SECY 10–0121, Modifying the Risk-Informed Regulatory Guidance For New Reactors. The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), John Lai (Telephone 301–415–5107 or Email: *John.Lai@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64126–64127).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (240–888–9835) to be escorted to the meeting room.

Dated: February 14, 2012.

Antonio Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–3953 Filed 2–17–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission, [NRC–2012–0002].

DATE: Week of February 20, 2012.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Additional Items To Be Considered

Week of February 20, 2012

Wednesday, February 22, 2012

8:55 a.m. Affirmation Session (Public Meeting) (Tentative).

a. *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station),

Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Pilgrim Watch's Requests for Hearing on New Contentions Relating to Fukushima Accident) Sept. 8, 2011 (Sept. 23, 2011) (Tentative).

b. *Crow Butte Resources, Inc. (License Renewal for the In Situ Leach Facility, Crawford, Nebraska), Docket No. 40–8943, Memorandum (Bringing Matter of Concern to Commission's Attention)* (Tentative)

This meeting will be webcast live at the Web address—*www.nrc.gov.*

* * * * *

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *www.nrc.gov/about-nrc/policy-making/schedule.html.*

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Bill Dosch, Chief, Work Life and Benefits Branch, at 301–415–6200, TDD: 301–415–2100, or by email at *william.dosch@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an email to *darlene.wright@nrc.gov.*

Dated: February 15, 2012.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2012–4047 Filed 2–16–12; 4:15 pm]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

CFC–50 Commission

AGENCY: Office of Personnel Management.

ACTION: Establishment of advisory committee.

SUMMARY: The CFC–50 Advisory Commission will hold its third and final meeting on March 2, 2012, at the time and location shown below. The Commission shall advise the Director of the U.S. Office of Personnel Management (OPM) on strengthening the integrity, the operation and effectiveness of the Combined Federal Campaign (CFC) to ensure its continued growth and success. The Commission is an advisory committee composed of Federal employees, private campaign administrators, charitable organizations and ''watchdog'' groups. The Commission is co-chaired by Thomas Davis and Beverly Byron.

The meeting is open to the public. Please contact the Office of Personnel Management at the address shown below if you wish to present material to the Commission at the meeting. The manner and time prescribed for presentations may be limited, depending upon the number of parties that express interest in presenting information.

DATES: March 2, 2012 at 1:00 p.m. CST.

Location: Crowne Plaza Riverwalk, 111 E. Pecan Street, San Antonio, TX, 78205.

FOR FURTHER INFORMATION CONTACT: Keith Willingham, Director, Combined Federal Campaign, U.S. Office of Personnel Management, 1900 E St. NW., Suite 6484, Washington, DC 20415. Phone (202) 606–2564 FAX (202) 606–5056 or email at *cfc@opm.gov*.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2012–3896 Filed 2–17–12; 8:45 am]

BILLING CODE 6325–46–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

C$ cMoney, Inc.; Order of Suspension of Trading

February 16, 2012.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of C$ cMoney, Inc. (''cMoney'') because of questions regarding the accuracy of assertions by cMoney, and by others, in press releases to investors and other public statements concerning, among other things, the identity of persons controlling the operations, management and securities of the company, the purported engagement of an independent auditor and the status of the company's audit.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EST, on February 16, 2012 through 11:59 p.m. EST, on March 1, 2012.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–4043 Filed 2–16–12; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Nikron Technologies, Inc.; Order of Suspension of Trading

February 16, 2012.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Nikron Technologies, Inc. (''Nikron'') because of possible manipulative conduct occurring in the market for the company's stock. Nikron is quoted on OTC Link operated by OTC Markets Group, Inc. under the ticker symbol ''NKRN.''

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EST, on February 16, 2012 through 11:59 p.m. EST, on March 1, 2012.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–4044 Filed 2–16–12; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66390; File No. SR–NYSEArca–2012–10]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating To Listing and Trading of Shares of the BNP Paribas S&P Dynamic Roll Global Commodities Fund Under NYSE Arca Equities Rule 8.200

February 14, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on January 30, 2012, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') 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 Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the BNP Paribas S&P Dynamic Roll Global Commodities Fund under NYSE Arca Equities Rule 8.200. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *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

NYSE Arca Equities Rule 8.200, Commentary .02 permits the trading of Trust Issued Receipts (''TIRs'') either by listing or pursuant to unlisted trading privileges (''UTP'').[3] The Exchange proposes to list and trade the shares (''Shares'') of the BNP Paribas S&P Dynamic Roll Global Commodities Fund (''Fund'') under NYSE Arca Equities Rule 8.200.

BNP Paribas Exchange Traded Trust (''Trust'') is organized in series as a Delaware statutory trust. As of the date hereof, the Trust consists of two series, one of which is the Fund.[4]

The Exchange notes that the Commission has previously approved the listing and trading of other issues of TIRs on the American Stock Exchange LLC (''Amex''),[5] trading on NYSE Arca pursuant to UTP,[6] and listing on NYSE Arca.[7] In addition, the Commission has approved other exchange-traded fund-like products linked to the performance of underlying commodities.[8]

Wilmington Trust Company (''Trustee''), a Delaware trust company, is the sole trustee of the Trust.

BNP Paribas Quantitative Strategies, LLC (''Managing Owner''), a Delaware limited liability company, serves as Managing Owner of the Trust and the Fund. The Managing Owner is a wholly-owned subsidiary of Paribas North America, Inc., which is a wholly-owned, indirect subsidiary of BNP Paribas, which is affiliated with a broker-dealer.[9] The Managing Owner is registered as a commodity pool operator with the Commodity Futures Trading Commission (''CFTC'') and is a member of the National Futures Association.

Standard and Poor's is the Index Sponsor.[10]

The Bank of New York Mellon is the administrator (''Administrator'') of the Fund, as well as the custodian (''Custodian'') and transfer agent (''Transfer Agent'').

Overview of the Fund [11]

According to the Registration Statement, the investment objective of the Fund is to track changes, whether positive or negative, in the level of the S&P GSCI® Dynamic Roll Excess Return Index (''Index'') over time. The Fund does not intend to outperform the Index. The Managing Owner will seek to cause changes in the net asset value (''NAV'') per Share of the Fund to track changes in the level of the Index during periods in which the Index is rising, flat or declining.

The Fund seeks to achieve its investment objective by investing in exchange-traded futures (''Designated Contracts'') on the commodities (as set forth in Table 1 below) comprising the Index (''Index Commodities''), with a view to tracking the Index over time.[12] In certain circumstances, and to a limited extent, the Fund may also invest in swap agreements based on an Index Commodity that are cleared through the relevant Futures Exchanges or their affiliated provider of clearing services (''Cleared-Swaps'') or in futures contracts referencing particular commodities other than the Index

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Commentary .02 to NYSE Arca Equities Rule 8.200 applies to TIRs that invest in ''Financial Instruments.'' The term ''Financial Instruments,'' as defined in Commentary .02(b)(4) to NYSE Arca Equities Rule 8.200, means any combination of investments, including cash; securities; options on securities and indices; futures contracts; options on futures contracts; forward contracts; equity caps, collars and floors; and swap agreements.

[4] Pre-Effective Amendment No. 2 to the Registration Statement on Form S–1 of the Trust (File No. 333–170314) was filed on August 26, 2011 (''Registration Statement'') under the Securities Act of 1933 in order to register common units of beneficial interests of the Fund, which is a series of the Trust. Pre-Effective Amendment No. 1 to the Registration Statement on Form S–1 of the Trust was filed on July 6, 2011. The Trust was previously named ''BNP Paribas L/S Commodities Trust'' and filed the original Registration Statement on Form S–1 on November 3, 2010. Additionally, the Trust, which was originally formed as a Delaware statutory trust, has been converted into a Delaware statutory trust organized in series. The descriptions of the Fund and the Shares contained herein are based, in part, on the Registration Statement.

[5] *See, e.g.,* Securities Exchange Act Release No. 58161 (July 15, 2008), 73 FR 42380 (July 21, 2008) (SR–Amex–2008–39) (order approving amendments to Amex Rule 1202, Commentary .07 and listing on Amex of 14 funds of the Commodities and Currency Trust).

[6] *See, e.g.,* Securities Exchange Act Release No. 58163 (July 15, 2008), 73 FR 42391 (July 21, 2008) (SR–NYSEArca–2008–73) (order approving UTP trading on NYSE Arca of 14 funds of the Commodities and Currency Trust).

[7] *See, e.g.,* Securities Exchange Act Release No. 58457 (September 3, 2008), 73 FR 52711 (September 10, 2008) (SR–NYSEArca–2008–91) (order approving listing on NYSE Arca of 14 funds of the Commodities and Currency Trust).

[8] *See, e.g.,* Securities Exchange Act Release Nos. 56932 (December 7, 2007), 72 FR 71178 (December 14, 2007) (SR–NYSEArca–2007–112) (order granting accelerated approval to list iShares S&P GSCI Commodity-Indexed Trust); 59895 (May 8, 2009), 74 FR 22993 (May 15, 2009) (SR–NYSEArca–2009–40) (order granting accelerated approval for NYSE Arca listing the ETFS Gold Trust).

[9] The Managing Owner is affiliated with a broker-dealer and has implemented procedures designed to prevent the use and dissemination of material, non-public information regarding the Fund's portfolio.

[10] Standard & Poor's is not a broker-dealer, is not affiliated with a broker-dealer, and has implemented procedures designed to prevent the use and dissemination of material, non-public information regarding the Index (as defined below).

[11] Terms relating to the Fund, the Shares and the Index (as defined below) referred to, but not defined, herein are defined in the Registration Statement.

[12] The Designated Contracts are traded on the Chicago Mercantile Exchange, Inc. (''CME''), COMEX (''CMX,'' a division of CME), Chicago Board of Trade (''CBT,'' a division of CME), NYMEX (''NYM,'' a division of CME), ICE Futures US (''ICE–US''), ICE Futures Europe (''ICE–UK''), Kansas City Board of Trade (''KBT''), and London Metal Exchange (''LME'') (collectively, ''Futures Exchanges'').

Commodities (*i.e.,* futures contracts traded on exchanges other than the Futures Exchanges indicated in Table 1, including foreign exchanges) (''Substitute Contracts''), or in Alternative Financial Instruments [13] referencing the particular Index Commodity in furtherance of its investment objective if, in the commercially reasonable judgment of the Managing Owner, such instruments tend to exhibit trading prices or returns that generally correlate with the Index Commodities. Alternative Financial Instruments will be forward agreements, exchange-traded cash settled options, swaps other than Cleared Swaps, and other over-the-counter transactions that will serve as proxies to one or more Index Commodities.

Specifically, once position limits in a Designated Contract are reached or a Futures Exchange imposes limitations on the Fund's ability to maintain or increase its positions in a Designated Contract after reaching accountability levels or a price limit is in effect on a Designated Contract during the last 30 minutes of its regular trading session, the Fund's intention is to invest first in Cleared Swaps to the extent permitted under the position limits applicable to Cleared Swaps and appropriate in light of the liquidity in the Cleared Swaps market, and then, using its commercially reasonable judgment, in Substitute Contracts or in Alternative Financial Instruments (collectively, ''Other Commodity Interests'' and together with Designated Contracts and Cleared Swaps, ''Index Commodity Interests''). By utilizing certain or all of these investments, the Managing Owner will endeavor to cause the Fund's performance to track the performance of the Index. The circumstances under which such investments in Other Commodity Interests may be utilized (*i.e.,* imposition of position limits) are discussed below.

According to the Registration Statement, the Fund seeks to achieve its investment objective by investing in Index Commodity Interests such that daily changes in the Fund's NAV per Share will be expected to track the changes in the level of the Index. The Fund's positions in Index Commodity Interests will be changed or ''rolled'' on a regular basis in order to track the changing nature of the Index. For example, at each monthly roll determination date, roll algorithms measure the current shape of the forward curves of the eligible futures contract prices for each Index Commodity to search for the optimal contract months along the curve to roll into, subject to using only the most liquid of all available contracts of a given commodity. Since the futures contract being rolled out of will no longer be included in the Index, the Fund's investments will have to be changed accordingly.

Consistent with achieving the Fund's investment objective of tracking the Index, the Managing Owner may, after reaching position limits in the Designated Contracts or when a Futures Exchange has imposed limitations on the Fund's ability to maintain or increase its positions in a Designated Contract after reaching accountability levels or a price limit is in effect on a Designated Contract during the last 30 minutes of its regular trading session, cause the Fund to first enter into or hold Cleared Swaps and then, if applicable, enter into or hold Other Commodity Interests. For example, certain Cleared Swaps have standardized terms similar to, and are priced by reference to, a corresponding Designated Contract. Additionally, Alternative Financial Instruments that do not have standardized terms and are not exchange-traded (''over-the-counter'' Alternative Financial Instruments), can generally be structured as the parties desire. Therefore, the Fund might first enter into multiple Cleared Swaps and then, if applicable, enter into over-the-counter Alternative Financial Instruments intended to replicate the performance of each of the Designated Contracts, or a single over-the-counter Alternative Financial Instrument designed to replicate the performance of the Index as a whole. According to the Registration Statement, assuming that there is no default by a counterparty to an over-the-counter Alternative Financial Instrument, the performance of the over-the-counter Alternative Financial Instrument will correlate with the performance of the Index or the applicable Designated Contract. After reaching position limits in the Designated Contracts or when a Futures Exchange has imposed limitations on the Fund's ability to maintain or increase its positions in a Designated Contract after reaching accountability levels or a price limit is in effect on a Designated Contract during the last 30 minutes of its regular trading session, and after entering into or holding Cleared Swaps, the Fund might also enter into or hold over-the-counter Alternative Financial Instruments to facilitate effective trading, consistent with the discussion of the Fund's ''roll'' strategy in the preceding paragraph. In addition, after reaching position limits in the Designated Contracts or when a Futures Exchange has imposed limitations on the Fund's ability to maintain or increase its positions in a Designated Contract after reaching accountability levels or a price limit is in effect on a Designated Contract during the last 30 minutes of its regular trading session, and after entering into or holding Cleared Swaps, the Fund might enter into or hold over-the-counter Alternative Financial Instruments that would be expected to alleviate overall deviation between the Fund's performance and that of the Index that may result from certain market and trading inefficiencies or other reasons.

The Fund will invest in Index Commodity Interests to the fullest extent possible without being leveraged or unable to satisfy its expected current or potential margin or collateral obligations with respect to its investments in Index Commodity Interests.[14] After fulfilling such margin and collateral requirements, the Fund will invest the remainder of its proceeds from the sale of baskets in obligations of the United States government (''U.S. Treasury Securities'') and/or hold such assets in cash, generally in interest-bearing accounts. Therefore, the focus of the Managing Owner in managing the Fund will be investing in Index Commodity Interests and in U.S. Treasury Securities, cash and/or cash equivalents. The Fund will earn interest income from the U.S. Treasury Securities and/or cash equivalents that it purchases and on the cash it holds through the Custodian.

According to the Registration Statement, the Managing Owner will employ an investment strategy intended to track changes in the level of the Index

[13] According to the Registration Statement, investing in Alternative Financial Instruments (if any) exposes the Fund to counterparty risk, or the risk that an Alternative Financial Instrument counterparty will default on its obligations under the Alternative Financial Instrument. The Managing Owner may select Alternative Financial Instrument (if any) counterparties giving due consideration to such factors as it deems appropriate, including, without limitation, creditworthiness, familiarity with the Index, and price. Under no circumstances will the Fund enter into Alternative Financial Instruments with any counterparty whose credit rating is lower than investment-grade as determined by a nationally recognized statistical rating organization (*e.g.,* BBB- and above as determined by Standard & Poor's, Baa3 and above as determined by Moody's) at the time the Alternative Financial Instrument is entered into. The Fund anticipates that the counterparties to these Alternative Financial Instruments are likely to be banks, broker dealers and other financial institutions. The Fund expects that these Alternative Financial Instruments (if any) will be on terms that are standard in the market for such Alternative Financial Instruments.

[14] The Managing Owner represents that the Fund will invest in exchange-traded futures, Cleared Swaps and Alternative Financial Instruments in a manner consistent with the Fund's investment objective and not to achieve additional leverage.

regardless of whether the Index is rising, flat or declining. The Fund's investment strategy will be designed to permit investors generally to purchase and sell the Fund's Shares for the purpose of investing indirectly in the global commodity markets in a cost-effective manner. The Managing Owner does not intend to operate the Fund in a fashion such that its NAV per Share will equal, in dollar terms, the aggregate of the spot prices of the Index Commodities or the price of any particular Designated Contract.

According to the Registration Statement, the Index is currently composed of Designated Contracts on 24 Index Commodities, each of which is subject to speculative position limits and other position limitations, as applicable, which are imposed by either the CFTC or the rules of the Futures Exchanges on which the Designated Contracts are traded. These position limits prohibit any person from holding a position of more than a specific number of such Designated Contracts (or Substitute Contracts, if applicable). The purposes of these limits are to diminish, eliminate or prevent sudden or unreasonable fluctuations or unwarranted changes in the prices of futures contracts. For example, speculative position limits in the physical delivery markets are set at a stricter level during the month when the futures contract matures and becomes deliverable, known as the ''spot month,'' versus the limits set for all other months. Position limits are fixed ceilings that the Fund would not be able to exceed without specific Futures Exchange authorization. Under current law, all Designated Contracts traded on a particular Futures Exchange that are held under the control of the Managing Owner, including those held by any future series of the Trust, are aggregated in determining the application of applicable position limits.

In addition to position limits, the Futures Exchanges may establish daily price fluctuation limits on futures contracts. The daily price fluctuation limit establishes the maximum amount that the price of futures contracts may vary either up or down from the previous day's settlement price. Once the daily price fluctuation limit has been reached in a particular futures contract, no trades may be made at a price beyond that limit. Futures Exchanges may also establish accountability levels applicable to futures contracts. A Futures Exchange may order a person who holds or controls aggregate positions in excess of specified position accountability levels not to further increase the positions, to comply with any prospective limit which exceeds the size of the position owned or controlled, or to reduce any open position which exceeds position accountability levels if the Futures Exchange determines that such action is necessary to maintain an orderly market. Position limits, accountability levels, and daily price fluctuation limits set by the Futures Exchanges have the potential to cause tracking error, which could cause changes in the NAV per Share to substantially vary from changes in the level of the Index and prevent an investor from being able to effectively use the Fund as a way to indirectly invest in the global commodity markets.

The Fund will be subject to these speculative position limits and other limitations, as applicable, and, consequently, the Fund's ability to issue new Baskets (as defined below) or to reinvest income in additional Designated Contracts may be limited to the extent these activities would cause the Fund to exceed its applicable limits unless the Fund trades Cleared Swaps, Substitute Contracts or other Alternative Financial Instruments (if any) in addition to and as a proxy for Designated Contracts. These limits and the use of Cleared Swaps, Substitute Contracts or other Alternative Financial Instruments (if any) in addition to or as a proxy for Designated Contracts may affect the correlation between changes in the NAV per Share and changes in the level of the Index, and the correlation between the market price of the Shares, as traded on NYSE Arca, and the NAV per Share.

The Fund does not intend to limit the size of the offering and will attempt to expose substantially all of its proceeds to the Index Commodities utilizing Index Commodity Interests. If the Fund encounters position limits, accountability levels, or price fluctuation limits for Designated Contracts and/or Cleared Swaps, it may then, if permitted under applicable regulatory requirements, purchase Alternative Financial Instruments and/or Substitute Contracts listed on other domestic or foreign exchanges. However, the commodity futures contracts available on such foreign exchanges may have different underlying sizes, deliveries, and prices. In addition, the commodity futures contracts available on these exchanges may be subject to their own position limits and accountability levels. In any case, notwithstanding the potential availability of these instruments in certain circumstances, position limits could force the Fund to limit the number of Baskets (as defined below) that it sells.

Description of the Index

The Index aims to reflect the return of an investment in a world production-weighted portfolio comprised of the principal physical commodities that are the subject of active, liquid futures markets. The Index employs a flexible and systematic futures contract rolling methodology, which seeks to maximize yield from rolling long futures contracts in certain markets (backwardated markets) and minimize roll loss from rolling long futures positions in certain markets (contangoed markets), as further described in the Registration Statement.

The Index was developed by the Index Sponsor and is an index on a world production-weighted basket of principal physical commodities. The Index reflects the level of commodity prices at a given time and is designed to be a measure of the return over time of the markets for these commodities. The Index is an excess return commodity index comprised of Designated Contracts that are replaced periodically.[15] The commodities represented in the Index, each an Index Commodity, are those physical commodities on which active and liquid contracts are traded on trading facilities in major industrialized countries. The Index Commodities are weighted, on a production basis, to reflect the relative significance (in the view of the Index Sponsor) of those Index Commodities to the world economy. The fluctuations in the level of the Index are intended generally to correlate with changes in the prices of those physical Index Commodities in global markets.

The Index utilizes the S&P GSCI® Dynamic Roll Index Methodology, a monthly futures contract rolling methodology that determines the new futures contract months for the underlying commodities, as described in the Registration Statement.

The S&P GSCI® Dynamic Roll Index Methodology is designed to maximize yield from rolling long futures contracts in backwardated markets and minimize roll loss from rolling long futures positions in contangoed markets. A ''backwardated'' market means a market in which the prices of certain commodity futures contracts are higher for contracts with shorter-term expirations than for contracts with longer-term expirations. A

[15] The process of periodically replacing a futures contract prior to its expiration is known as ''rolling'' a contract or position. An index that includes an assumed return on a hypothetical portfolio of 3-month Treasury bills or any other risk free component is known as a ''total return'' index. An ''excess return'' index excludes returns on a hypothetical portfolio of 3-month Treasury bills or any other risk free component.

''contangoed'' market means a market in which the prices of certain commodity futures contracts are lower for contracts with shorter-term expirations than for contracts with longer-term expirations.

The Index is comprised of Designated Contracts, which are futures contracts on the Index Commodities. The Index Commodities are diversified across five different categories: Energy, agriculture, industrial metals, precious metals and livestock. The Index reflects the return associated with the change in prices of the underlying Designated Contracts on the Index Commodities together with the ''roll yield'' (as discussed below) associated with these Designated Contracts (the price changes of the Designated Contracts and roll yield, taken together, constitute the ''excess return'' reflected by the Index). There is no limit on the number of Designated Contracts that may be included in the Index. Any contract satisfying the eligibility criteria will become a Designated Contract and will be included in the Index. All of the Designated Contracts are exchange-traded futures contracts.

According to the Registration Statement, a fundamental characteristic of the Index is that as a result of being comprised of futures contracts on the applicable Index Commodity, the Fund must be managed to ensure it does not take physical delivery of each respective Index Commodity. This is achieved through a process referred to as ''rolling'' under which a given futures contract during a month in which it approaches its settlement date is rolled forward to a new contract date (*i.e.,* the futures contract is effectively ''sold'' to ''buy'' a longer-dated futures contract). All Designated Contracts will be deemed to be rolled before their respective maturities into futures contracts in the more-distant future.

Roll yield is generated during the roll process from the difference in price between the near-term and longer-dated futures contracts. The futures curve is a hypothetical curve created by plotting futures contract prices for a particular Index Commodity. When longer-dated contracts are priced lower than the nearer contract and spot prices, the market is in ''backwardation'' represented by a downward sloping futures curve, and positive roll yield is generated when higher-priced near-term futures contracts are ''sold'' to ''buy'' lower priced longer-dated contracts. When the opposite is true and longer-dated contracts are priced higher, the market, which is in ''contango,'' is represented by an upward sloping futures curve, and negative roll yields result from the ''sale'' of lower priced near-term futures contracts to ''buy'' higher priced longer-dated contracts. While many of the Index Commodities may have historically exhibited consistent periods of backwardation, backwardation will most likely not exist at all times. Moreover, certain of the Index Commodities may have historically traded in contango markets.

Index Methodology

The Designated Contracts currently included in the Index, the Futures Exchanges on which they are traded, their market symbols and their reference percentage dollar weights are as follows:

TABLE 1

Futures exchange	Index commodity	Trading symbol	Trading times (eastern time)	2011 dollar weights (percent)
CBT	Chicago Wheat	W	09:30–13:15	3.00
KBT	Kansas City Wheat	KW	09:30–13:15	0.69
CBT	Corn	C	09:30–13:15	3.37
CBT	Soybeans	S	09:30–13:15	2.36
ICE–US	Coffee	KC	03:30–14:00	0.76
ICE–US	Sugar #11	SB	03:30–14:00	2.25
ICE–US	Cocoa	CC	04:00–14:00	0.39
ICE–US	Cotton #2	CT	21:00–14:30	1.24
CME	Lean Hogs	LH	09:05–13:00	1.59
CME	Live Cattle	LC	09:05–13:00	2.59
CME	Feeder Cattle	FC	09:05–13:00	0.44
NYM/ICE–US	Crude Oil	CL	09:00–14:30	34.71
NYM	Heating Oil	HO	09:00–14:30	4.66
NYM	RBOB Gasoline	RB	09:00–14:30	4.67
ICE–UK	Brent Crude Oil	LCO	19:00–17:00	15.22
ICE–UK	Gasoil	LGO	19:00–17:00	6.30
NYM/ICE–US	Natural Gas	NG	09:00–14:30	4.20
LME	Aluminum	MAL	11:00–10:45	2.70
LME	Copper	MCU	11:00–10:45	3.66
LME	Lead	MPB	11:00–10:45	0.51
LME	Nickel	MNI	11:00–10:45	0.82
LME	Zinc	MZN	11:00–10:45	0.72
CMX	Gold	GC	08:20–13:30	2.80
CMX	Silver	SI	08:25–13:25	0.36

The quantity of each of the Designated Contracts included in the Index (''Contract Production Weight'' or ''CPW'') is determined on the basis of a five-year average, referred to as the ''world production average,'' of the production quantity of the underlying commodity as published by a number of official sources as provided in the S&P GSCI® Dynamic Roll Index Methodology. However, if an Index Commodity is primarily a regional commodity, based on its production, use, pricing, transportation or other factors, the Index Sponsor, in consultation with the Index Committee (described below), may calculate the weight of that Index Commodity based on regional, rather than world, production data. At present, natural gas is the only Index Commodity the weights of which are calculated on the basis of regional production data, with the relevant region defined as North America.

The five-year average is updated annually for each Index Commodity

included in the Index, based on the most recent five-year period (ending approximately one and a half years prior to the date of calculation and moving backwards) for which complete data for all commodities is available. The calculation of the CPWs of each Designated Contract is derived from world or regional production averages, as applicable, of the relevant Index Commodities, and is based on the total quantity traded for the relevant Designated Contract and the world or regional production average, as applicable, of the underlying Index Commodity. However, if the volume of trading in the relevant Designated Contract, as a multiple of the production levels of the Index Commodity (''Trading Volume Multiple'' or ''TVM''),[16] is below a specified threshold (''Trading Volume Multiple Threshold'' or ''TVMT''),[17] the CPW of the Designated Contract is reduced until the threshold is satisfied. This is designed to ensure that trading in each Designated Contract is sufficiently liquid relative to the production of the Index Commodity.

In addition, the Index Sponsor performs this calculation on a monthly basis and, if the TVM of any Designated Contract is below the TVMT, the composition of the Index is reevaluated, based on the criteria and weighting procedure described above. This procedure is undertaken to allow the Index to shift from Designated Contracts that have lost substantial liquidity into more liquid contracts during the course of a given year. As a result, it is possible that the composition or weighting of the Index will change on one or more of these monthly evaluation dates. The likely circumstances under which the Index Sponsor would be expected to change the composition of the Index during a given year, however, are (1) a substantial shift of liquidity away from a Designated Contract included in the Index as described above, or (2) an emergency, such as a natural disaster or act of war or terrorism, that causes trading in a particular contract to cease permanently or for an extended period of time. In either event, the Index Sponsor will publish the nature of the changes, through Web sites, news media or other outlets, with as much prior notice to market participants as is reasonably practicable. Moreover, regardless of whether any changes have occurred during the year, the Index Sponsor reevaluates the composition of the Index at the conclusion of each year, based on the above criteria. Other commodities that satisfy that criteria, if any, will be added to the Index. Commodities included in the Index that no longer satisfy that criteria, if any, will be deleted.

The Index Sponsor also determines whether modifications in the selection criteria or the methodology for determining the composition and weights of and for calculating the Index are necessary or appropriate in order to assure that the Index represents a measure of commodity market return. The Index Sponsor has the discretion to make any such modifications.

Calculation of the Closing Value of the Index

The value, or the total dollar weight, of the Index on each business day is equal to the sum of the dollar weights of each of the Index Commodities. The dollar weight of each Index Commodity on any given day is equal to the product of (i) the weight of such Index Commodity, (ii) the daily contract reference price for the appropriate Designated Contracts, and (iii) the applicable ''roll weights'' during a Roll Period.[18]

The daily contract reference price used in calculating the dollar weight of each Index Commodity on any given day is the most recent daily contract reference price for the applicable Designated Contract made available by the relevant trading facility, except that the daily contract reference price for the most recent prior day will be used if the Futures Exchange is closed or otherwise fails to publish a daily contract reference price on that day. If the trading facility fails to make a daily contract reference price available or if the Index Sponsor determines, in its reasonable judgment, that the published daily contract reference price reflects manifest error, the relevant calculation will be delayed until the price is made available or corrected. If the daily contract reference price is not made available or corrected by 4 p.m., Eastern Time (''E.T.''), the Index Sponsor may determine, in its reasonable judgment, the appropriate daily contract reference price for the applicable Designated Contract in order to calculate the Index.

The Index Committee

The Index Sponsor has established an Index Committee to oversee the daily management and operations of the Index, and is responsible for all analytical methods and calculation of the Index. The Index Committee is comprised of full-time professional members of the Index Sponsor's staff. At each meeting, the Index Committee reviews any issues that may affect Index constituents, statistics comparing the composition of the Index to the market, commodities that are being considered as candidates for addition to the Index, and any significant market events. In addition, the Index Committee may revise Index policy covering rules for selecting commodities, or other matters.

The Index Sponsor considers information about changes to the Index and related matters to be potentially market moving and material. Therefore, all Index Committee discussions are confidential.

In addition, the Index Sponsor has established a ''Commodity Index Advisory Panel'' to assist it with the operation of the Index. The Commodity Index Advisory Panel meets on an annual basis and at other times at the request of the Index Committee. The principal purpose of the Commodity Index Advisory Panel is to advise the Index Committee with respect to, among other things, the calculation of the Index, the effectiveness of the Index as a measure of commodity futures market return, and the need for changes in the composition or the methodology of the Index. The Commodity Index Advisory Panel acts solely in an advisory and consultative capacity. The Index Committee makes all decisions with respect to the composition, calculation

[16] The TVM with respect to any Designated Contract is the quotient of (i) the product of (a) the total annualized quantity traded of such Designated Contract during the relevant calculation period and (b) the sum of the products of (x) the Designated Contract production weight of each Designated Contract included in the S&P GSCI index and (y) the corresponding average month-end settlement price of the first nearby contract expiration of such Designated Contracts during the relevant period, and (ii) the product of (a) the targeted amount of investment in the S&P GSCI and related indices that needs to be supported by liquidity in the relevant Designated Contracts (currently $190 billion) and (b) the Designated Contract production weight of such Designated Contract.

[17] The TVMT is the TVM level, specified by S&P, which triggers a recalculation of the Designated Contract production weights for all Designated Contracts on an Index Commodity if the TVM of any such Designated Contract falls below such level.

[18] The ''roll weight'' of each Index Commodity reflects the fact that the positions in the Designated Contracts must be liquidated or rolled forward into more distant contract expirations as they near expiration. If actual positions in the relevant markets were rolled forward, the roll would likely need to take place over a period of days. Because the Index is designed to replicate the return of actual investments in the underlying Designated Contracts, the rolling process incorporated in the Index also takes place over a period of days at the beginning of each month, referred to as the ''Roll Period.'' On each day of the Roll Period, the ''roll weights'' of the first nearby contract expirations on a particular Index Commodity and the more distant contract expiration into which it is rolled are adjusted, so that the hypothetical position in the Designated Contract on the Index Commodity that is included in the Index is gradually shifted from the first nearby contract expiration to the more distant contract expiration pursuant to the S&P GSCI® Dynamic Roll Index Methodology.

and operation of the Index. The Index Advisory Panel representatives include employees of S&P Indices, McGraw-Hill Financial and clients of S&P Indices. Also, certain of the members of the Index Advisory Panel may be affiliated with entities which, from time to time, may have investments linked to the S&P GSCI or other S&P Commodities Indices, either through transactions in the contracts included in the S&P GSCI and other S&P Commodities Indices, futures contracts or derivative products linked to the S&P Commodities Indices. The Index Committee and the Commodity Index Advisory Panel are subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the Index.

Additional information regarding the composition of the Index and Index Methodology is included in the Registration Statement.

Net Asset Value

According to the Registration Statement, the NAV with respect to the Fund means the total assets of the Fund including, but not limited to, all cash and cash equivalents or other debt securities less total liabilities of the Fund, each determined on the basis of generally accepted accounting principles. In particular, NAV includes any unrealized profit or loss on open Designated Contracts, Cleared Swaps, Substitute Contracts and Alternative Financial Instruments (if any) and any other credit or debit accruing to the Fund but unpaid or not received by the Fund. All open commodity futures contracts traded on a U.S. or non-U.S. exchange will be calculated at their then current market value, which will be based upon the settlement price for that particular commodity futures contract traded on the applicable U.S. or non-U.S. exchange on the date with respect to which NAV is being determined; provided, that if a commodity futures contract traded on a U.S. or non-U.S. exchange could not be liquidated on such day, due to the operation of daily limits (if applicable) or other rules of the exchange upon which that position is traded or otherwise, the settlement price on the most recent day on which the position could have been liquidated will be the basis for determining the market value of such position for such day.

The Managing Owner may in its discretion (and under extraordinary circumstances, including, but not limited to, periods during which a settlement price of a futures contract is not available due to exchange limit orders or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance) value any asset of the Fund pursuant to such other principles as the Managing Owner deems fair and equitable so long as such principles are consistent with normal industry standards.

In calculating the NAV of the Fund, the settlement value of an Alternative Financial Instrument (if any) will be determined by either applying the then-current disseminated value for the Designated Contracts or the terms as provided under the applicable Alternative Financial Instrument. However, in the event that the Designated Contracts are not trading due to the operation of daily limits or otherwise, the Managing Owner may in its sole discretion choose to value the Fund's Alternative Financial Instrument (if any) on a fair value basis in order to calculate the Fund's NAV.

NAV per Share will be the NAV of the Fund divided by the number of its outstanding Shares.

Creation and Redemption of Shares

The Fund will create and redeem Shares from time-to-time in one or more ''Baskets'' of 40,000 Shares each. Baskets may be created or redeemed only by Authorized Participants. Baskets will be created and redeemed continuously as of noon, E.T., on the business day immediately following the date on which a valid order to create or redeem a Basket is accepted by the Fund. Baskets will be created and redeemed at the NAV of 40,000 Shares as of the close of the NYSE Arca Core Trading Session (9:30 a.m. to 4 p.m., E.T.) or the last to close of the Futures Exchanges on which the Designated Contracts or Substitute Contracts are traded, whichever is later, on the date that a valid order to create or redeem a Basket is accepted by the Fund. For purposes of processing both purchase and redemption orders, a ''business day'' means any day other than a day when each of NYSE Arca and banks in both New York City and London are required or permitted to be closed. Except when aggregated in Baskets, the Shares are not redeemable securities.

Purchase and redemption orders must be placed by 10 a.m., E.T. The day on which the Managing Owner receives a valid purchase or redemption order will be the purchase or redemption order date. Purchase and redemption orders will be irrevocable.

The total cash payment required to create each Basket will be the NAV of 40,000 Shares as of the closing time of NYSE Arca Core Trading Session or the last to close of the Futures Exchanges on which the Fund's Designated Contracts or Substitute Contracts are traded, whichever is later, on the purchase order date. The redemption proceeds from the Fund will consist of the cash redemption amount. The cash redemption amount will be equal to the NAV of the number of Basket(s) requested in the Authorized Participant's redemption order as of the closing time of NYSE Arca Core Trading Session or the last to close of the Futures Exchanges on which the Fund's Designated Contracts or Substitute Contracts are traded, whichever is later, on the redemption order date.

The Fund may suspend the creation of Baskets if the Fund has reached speculative position or other limits with respect to the Fund's holdings of Designated Contracts on one or more Index Commodities and the Fund is unable to gain an exposure to the Index Commodities based upon Alternative Financial Instruments to the Designated Contracts on the Index Commodities.

The Fund will meet the initial and continued listing requirements applicable to TIRs in NYSE Arca Equities Rule 8.200 and Commentary .02 thereto. With respect to application of Rule 10A–3 under the Act,[19] the Fund relies on the exception contained in Rule 10A–3(c)(7).[20] A minimum of 100,000 Shares of the Fund will be outstanding as of the start of trading on the Exchange.

A more detailed description of the Shares, the Fund, the Index and the Index Commodities, as well as investment risks, creation and redemption procedures and fees is set forth in the Registration Statement.

Availability of Information Regarding the Shares

The Managing Owner's Web site, *www.stream.bnpparibas.com,* and/or the Exchange's Web site, which are publicly accessible at no charge, will contain the following information: (a) The current NAV per Share daily and the prior business day's NAV and the reported closing price; (b) the midpoint of the bid-ask price in relation to the NAV as of the time the NAV is calculated (''Bid-Ask Price''); (c) calculation of the premium or discount of such price against such NAV; (d) the bid-ask price of Shares determined using the highest bid and lowest offer as of the time of calculation of the NAV; (e) data in chart form displaying the frequency distribution of discounts and premiums of the Bid-Ask Price against the NAV, within appropriate ranges for each of the four previous calendar

[19] 17 CFR 240.10A–3.

[20] 17 CFR 240.10A–3(c)(7).

quarters; (f) the prospectus; and (g) other applicable quantitative information. The Fund will also disseminate Fund holdings on a daily basis on the Fund's Web site.

The Fund will provide Web site disclosure of portfolio holdings daily and will include, as applicable, the names, quantity, price and market value of Designated Contracts, Cleared Swaps, Substitute Contracts and Alternative Financial Instruments, if any, and the characteristics of such instruments and cash equivalents, and amount of cash held in the portfolio of the Fund. This Web site disclosure of the portfolio composition of the Fund will occur at the same time as the disclosure by the Managing Owner of the portfolio composition to Authorized Participants so that all market participants are provided portfolio composition information at the same time. Therefore, the same portfolio information will be provided on the public Web site as well as in electronic files provided to Authorized Participants. Accordingly, each investor will have access to the current portfolio composition of the Fund through the Fund's Web site. The prices of the Designated Contracts, Cleared Swaps, Substitute Contracts and exchange-traded cash settled options are available from the applicable exchanges and market data vendors. The Managing Owner will publish the NAV of the Fund and the NAV per Share daily.

The S&P GSCI® Dynamic Roll Index Methodology is provided by the Index Sponsor on its Web site. The Index Sponsor calculates and publishes the value of the Index continuously (''Intraday Index Value'') on each business day, with such values updated every 15 seconds. The Index Sponsor provides the Intraday Index Value and the closing levels of the Index for each business day to market data vendors.

The intra-day indicative value (''IIV'') per Share of the Fund will be based on the prior day's final NAV per Share, adjusted every 15 seconds during the Core Trading Session to reflect the continuous price changes of the Fund's Designated Contracts and other holdings. The IIV per Share will be be [sic] widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session [21] and on the Managing Owner's Web site (on a delayed basis).

The final NAV of the Fund and the final NAV per Share will be calculated as of the closing time of NYSE Arca Core Trading Session or the last to close of the Futures Exchanges on which the Designated Contracts or Substitute Contracts (which are listed on futures exchanges other than Futures Exchanges) are traded, whichever is later, and posted in the same manner. Although a time gap may exist between the close of the NYSE Arca Core Trading Session and the close of the Futures Exchanges on which the Designated Contracts or Substitute Contracts (which are listed on futures exchanges other than Futures Exchanges) are traded, there is no effect on the NAV calculations as a result.

The NAV for the Fund will be disseminated to all market participants at the same time. The Exchange will also make available on its Web site daily trading volume of the Shares, closing prices of such Shares, and the corresponding NAV. The closing prices and settlement prices of futures on the Index Commodities are also readily available from the Web sites of the applicable Futures Exchanges, automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters. The relevant futures exchanges on which the underlying futures contracts are listed also provide delayed futures information on current and past trading sessions and market news free of charge on their respective Web sites. The specific contract specifications for the futures contracts are also available on such Web sites, as well as other financial informational sources. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m., E.T. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

The trading of the Shares will be subject to NYSE Arca Equities Rule 8.200(e), which sets forth certain restrictions on Equity Trading Permit (''ETP'') Holders acting as registered Market Makers in TIRs to facilitate surveillance. See ''Surveillance'' below for more information.

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the underlying futures contracts; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in Shares will be subject to trading halts caused by extraordinary market volatility pursuant to the Exchange's ''circuit breaker'' rule [22] or by the halt or suspension of trading of the underlying futures contracts.

The Exchange represents that the Exchange may halt trading during the day in which an interruption to the dissemination of the IIV, the Index or the value of the underlying futures contracts occurs. If the interruption to the dissemination of the IIV, the Index or the value of the underlying futures contracts persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products, including TIRs, to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillances focus on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations. The Exchange is able to obtain information regarding trading in the Shares, the physical commodities included in, or options, futures or options on futures on, Shares through ETP Holders, in connection with such ETP Holders' proprietary or customer trades through ETP Holders which they effect on any relevant market. The Exchange can obtain market surveillance information, including

[21] Currently, it is the Exchange's understanding that several major market data vendors display and/or make widely available IIVs published on CTA or other data feeds.

[22] *See* NYSE Arca Equities Rule 7.12.

customer identity information, with respect to transactions occurring on the Futures Exchanges that are members of the Intermarket Surveillance Group (''ISG'').[23] CME Group, Inc. (which includes CME, CBT, NYM and CMX) and ICE Futures U.S. are members of ISG. In addition, the Exchange has entered into comprehensive surveillance sharing agreements with KBT, LME and ICE–U.K. that apply with respect to trading in Designated Contracts on the applicable Index Commodities. A list of ISG members is available at *www.isgportal.org*.

In addition, with respect to Fund assets traded on exchanges, not more than 10% of the weight of such assets in the aggregate shall consist of components whose principal trading market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

The Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (1) The risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated IIV will not be calculated or publicly disseminated; (2) the procedures for purchases and redemptions of Shares in Baskets (and that Shares are not individually redeemable); (3) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (4) how information regarding the IIV is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Information Bulletin will advise ETP Holders, prior to the commencement of trading, of the prospectus delivery requirements applicable to the Fund. The Exchange notes that investors purchasing Shares directly from the Fund will receive a prospectus. ETP Holders purchasing Shares from the Fund for resale to investors will deliver a prospectus to such investors. The Information Bulletin will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

In addition, the Information Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Information Bulletin will also reference that the CFTC has regulatory jurisdiction over the Index Commodities traded on U.S. markets.

The Information Bulletin will also disclose the trading hours of the Shares of the Fund and that the NAV for the Shares is calculated after 4 p.m., E.T. each trading day. The Bulletin will disclose that information about the Shares of the Fund is publicly available on the Fund's Web site.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[24] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.200 and Commentary .02 thereto. The Fund seeks to achieve its investment objective by investing in Designated Contracts on the Index Commodities, with a view to tracking the Index over time. In certain circumstances, and to a limited extent, the Fund may also invest in Cleared-Swaps or in Substitute Contracts, or in Alternative Financial Instruments referencing the particular Index Commodity in furtherance of its investment objective if, in the commercially reasonable judgment of the Managing Owner, such instruments tend to exhibit trading prices or returns that generally correlate with the Index Commodities. Once position limits in a Designated Contract are reached or a Futures Exchange imposes limitations on the Fund's ability to maintain or increase its positions in a Designated Contract after reaching accountability levels or a price limit is in effect on a Designated Contract during the last 30 minutes of its regular trading session, the Fund's intention is to invest first in Cleared Swaps to the extent permitted under the position limits applicable to Cleared Swaps and appropriate in light of the liquidity in the Cleared Swaps market, and then, using its commercially reasonable judgment, in Substitute Contracts or in Alternative Financial Instruments. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. With respect to Fund assets traded on exchanges, not more than 10% of the weight of such assets in the aggregate shall consist of components whose principal trading market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. The Managing Owner is affiliated with a broker-dealer and has implemented procedures designed to prevent the use and dissemination of material, non-public information regarding the Index. The Index Committee and the Commodity Index Advisory Panel are subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the Index. The NAV for the Fund will be disseminated to all market participants at the same time. The Fund will provide Web site disclosure of portfolio holdings daily, as described above. The Index value will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session and on the Managing Owner's Web site (on a delayed basis). The Exchange will also make available on its Web site daily trading volume of each of the Shares, closing prices of such Shares, and the corresponding NAV. The prices of the Designated Contracts, Cleared Swaps, Substitute Contracts and exchange-traded cash settled options are available from the applicable exchanges and market data vendors. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the underlying futures contracts, or (2) whether other unusual conditions or

[23] The Exchange notes that not all futures contracts or other financial instruments held by the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[24] 15 U.S.C. 78f(b)(5).

circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in Shares will be subject to trading halts caused by extraordinary market volatility pursuant to the Exchange's ''circuit breaker'' rule or by the halt or suspension of trading of the Designated Contracts. The Exchange represents that the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV, the Index or the value of the underlying futures contracts occurs. If the interruption to the dissemination of the IIV, the Index or the value of the underlying futures contracts persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following an interruption. In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that a large amount of information is publicly available regarding the Fund and the Shares, thereby promoting market transparency. The NAV for the Fund will be disseminated to all market participants at the same time. The IIV per Share will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session and on the Managing Owner's Web site. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Moreover, prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, IIV, and quotation and last sale information for the Shares.

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. 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–NYSEArca–2012–10 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–NYSEArca–2012–10. 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 Section, 100 F Street NE., Washington, DC 20549–1090, on official business days between 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the New York Stock Exchange's principal office and on its Internet Web site at *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 available publicly. All submissions should refer to File Number SR–NYSEArca–2012–10 and should be submitted on or before March 13, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3858 Filed 2–17–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66391; File No. SR–CHX–2012–05]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Fee Schedule To Implement a Clearing Submission Fee Credit for Institutional Brokers

February 14, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 2, 2012, the Chicago Stock Exchange, Inc. (''CHX'' or ''Exchange'') filed with

[25] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 CHX. CHX has filed the proposal pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] 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

CHX proposes to amend its Fee Schedule, effective February 16, 2012, to amend its Fee Schedule [sic] to implement a Clearing Submission Fee Credit for Institutional Brokers.

The text of this proposed rule change is available on the Exchange's Web site at (*www.chx.com*) and in the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

1. Purpose

Through this filing, the Exchange proposes to amend its Schedule of Fees and Assessments (the ''Fee Schedule''), effective February 16, 2012, to create a Clearing Submission Fee Credit to be paid to Institutional Brokers and make other technical changes. In October 2011, the Exchange added Article 21, Rule 6 authorizing the submission by the Exchange of non-CHX trades entered through an Institutional Broker to a Qualified Clearing Agency for clearance and settlement.[5] Among other things, the Exchange imposes a Trade Processing Fee on the Clearing Participants named in these clearing submissions, pursuant to the provisions of Section E.7. of the Fee Schedule. In November 2011, the Exchange modified the definition of the Trade Processing Fee to be based upon non-CHX executed trades for which clearing information is entered by an Exchange-registered Institutional Broker into the Exchange's systems and submitted to a Qualified Clearing Agency pursuant to Article 21, Rule 6(a).[6] The Exchange now proposes to rename the Trade Processing Fee as the ''Clearing Submission Fee'' for purposes of clarity and institute a Clearing Submission Fee Credit to share the revenue generated by these fees and incentivize this activity by its Institutional Brokers.[7] The Exchange previously had in place a Trade Processing Fee Credit beginning in August 2008 through April 2011, but repealed it pending the adoption of Article 21, Rule 6.[8] With the implementation of that rule, the Exchange proposes to reinstate the credit formerly paid to Institutional Brokers regarding clearing submissions for non-CHX trades, albeit at a different rate than previously.[9]

The Exchange proposes to pay on a monthly basis a credit equal to 8% of the Clearing Submission Fees collected by the Exchange pursuant to Section E.7. of the Fee Schedule to the Institutional Broker which acted as the broker for the ultimate Clearing Participant to the clearing submission (known as the ''Clearing Broker'').[10] The Exchange believes that payment of a Clearing Submission Fee Credit to the Clearing Broker based on activity handled by it will incent Institutional Brokers to utilize the Exchange's systems and services in forwarding non-CHX trades to NSCC, rather than using alternative mechanisms such as correspondent clearing or Nasdaq's Automated Confirmation Transaction (''ACT'') system. The Exchange proposes to provide a credit equal to 50% of the credit paid to Institutional Broker for transactions handled by it which are executed on the Exchange.[11] The Exchange believes that payment of a credit for non-CHX trades at a lower rate than for CHX trades appears to strike an appropriate balance between incentivizing Institutional Brokers to execute trades on the CHX's facilities and competing with other venues to make clearing submissions for trades executed by Institutional Brokers in the over-the-counter (''OTC'') marketplace.[12]

Only Institutional Brokers which are members of the Financial Industry Regulatory Authority, Inc. (''FINRA'') will be eligible for the Clearing Submission Fee Credit. Since the trading activities involved in the relevant clearing submissions by definition occurred in a market center other than the Exchange (normally the OTC marketplace), the provisions of Exchange Act Section 15(b)(8) are implicated.[13] Under Section 15(b)(8), a registered broker or dealer must be a member of a securities association registered under Section 15A of the Exchange Act, unless it effects transactions in securities solely on a national securities exchange of which it is a member. Currently, the only registered securities association is

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See,* Securities Exchange Act Release No. 65615 (Oct. 24, 2011), 76 FR 67239 (Oct. 31, 2011) (SR–CHX–2011–17). Currently, the National Securities Clearing Corporation (''NSCC'') is the Qualified Clearing Agency for such transactions.

[6] *See,* Securities Exchange Act Release No. 65792 (Nov. 18, 2011), 76 FR 72739 (Nov. 25, 2011) (SR–CHX–2011–31).

[7] The Exchange is also proposing to add text to Section E.3.a. of the Fee Schedule to emphasize that the fees imposed pursuant to that section are for trades executed in the Matching System and to distinguish that activity from transactions subject to Section E.7. of the Fee Schedule.

[8] *See,* Securities Exchange Act Release No. 58362, 73 FR 49511 (SR–CHX–2008–13) (Aug. 14, 2008) (adopting a Trade Processing Fee Credit); Securities Exchange Act. Release No. 60259 (July 7, 2009), 74 FR 34062 (July 14, 2009) (SR–CHX–2009–08) (changes to calculation and allocation of Trade Processing Fee Credits paid to Institutional Brokers); Securities Exchange Act Release No. 64173 (April 4, 2011), 76 FR 19818 (April 8, 2011) (SR–CHX–2011–02) (repealing Trade Processing Fee Credit).

[9] At the time it was repealed, the Trade Processing Fee Credit was set at the same rate as the current Transaction fee credit, *i.e.,* 16% of the fee paid by the Clearing Participant to the Exchange in the transaction.

[10] The broker representing the ultimate clearing participant is currently known as the ''broker of credit.'' Since both that broker and the ''originating broker'' (defined as the Institutional Broker that executes a trade) can receive a credit, the Exchange believes that it would be more accurate to use the term ''Clearing Broker.'' The Exchange also proposes to capitalize the terms ''Transaction Fee Credit,'' ''Clearing Broker'' and ''Originating Broker'' in the Fee Schedule to emphasize that those are defined terms. The Exchange notes that it is possible, although not required, for the same Institutional Broker to act as both the Originating Broker and Clearing Broker in any given transaction.

[11] A Transaction Fee Credit of 16% of the Transaction Fees generated pursuant to Section E.3.a. is paid to Institutional Brokers for trades submitted through that firm and which were executed on the Exchange. [sic] Section F.2. of the Fee Schedule. Of that amount, 4% is paid to the Originating Broker and 12% is paid to the Clearing Broker.

[12] The Exchange notes that it is uncertain as to whether the 8% level for the Clearing Submission Fee Credit will ultimately prove to be the correct amount in effectuating its purpose, which is to incent Institutional Brokers to enter clearing submissions for non-CHX trades through the Exchange's system. At some point, the Exchange may seek to raise the 8% level of the Clearing Submission Fee Credit in order to attract business. If so, the Exchange would make the appropriate filing to modify its Fee Schedule as required by the rules of the Commission.

[13] 15 U.S.C. 78o(b)(8).

FINRA. Since transactions giving rise to a Clearing Submission Fee Credit are normally executed in the OTC marketplace, the Exchange proposes to limit the payment of Clearing Submission Fee Credits to Institutional Brokers which are members of FINRA in order to avoid creating a violation of Section 15(b)(8) by the Institutional Brokers receiving such credits.[14]

The Exchange recognizes that the Commission has raised concerns about so-called payment for order flow programs in variety of scenarios. For example, the 2007 Report Concerning Examinations of Options Order Routing and Execution stated, ''The Commission previously has expressed concern that payment for order flow and internalization in the markets contribute to an environment in which quote competition is not always rewarded, thereby discouraging the display of aggressively priced quotes and impeding investor's ability to obtain better prices. [footnote omitted]'' [15] The Exchange believes that the proposed Clearing Submission Fee Credit materially differs from other programs inasmuch as payment of the credit does not depend on the execution of a trade on the CHX's facilities and therefore does not discourage aggressive quote competition. Rather, the credit is based on the receipt of a Clearing Submission Fee by the Exchange, which is assessed for the post-execution submission via the CHX's systems to NSCC for clearance and settlement.[16] As such, the Exchange does not believe that a payment of a credit for post-trade clearing submissions raises the same execution quality issues which underlie the Commission's stated concerns about payment for order flow programs.

Even taking the view that the Clearing Submission Fee Credit implicates market quality issues, the Exchange notes that a variety of other payment for order flow practices are prevalent in the securities industry. As the Commission has recognized, payment for order flow is not in itself unlawful.[17] For example, many options exchanges have created payment for order flow programs which are reflected in their rules and fee schedules.[18] It is also not uncommon for broker-dealers to ''internalize'' their order flow by trading as principal with their own clients. The Exchange's goal in creating a Clearing Submission Fee Credit is to incent transaction providers to conduct business using the CHX's systems and services, by which the Exchange can generate revenue. The implementation of a Clearing Submission Fee Credit should further this legitimate objective by encouraging Institutional Brokers to make clearing submissions for non-CHX trades using the Exchange's systems.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act [19] in general, and furthers the objectives of Section 6(b)(4) of the Act [20] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The fundamental purpose of the Clearing Submission Fee Credit is to incent the entry of post-trade clearing submissions for non-CHX trades by Institutional Brokers through the Exchange's systems, which generates revenue to the Exchange in the form of Clearing Submission Fees. The Exchange notes that most, if not all, other exchanges issue credits to their members in order to incent them to direct business to their facilities. For example, many exchanges offer a ''provide'' credit to members which provide liquidity by entering orders on the trading facilities of the exchange with which other orders can interact. Pursuant to Regulation NMS Rule 610 (the ''Access Rule''), the maximum rate an exchange can charge to execute against its protected quote is $0.003 per share for transactions in securities priced over $1 per share.[21] In most cases, exchanges offer a provide credit which is less than the maximum charge, although transactions in certain securities, most often Tape B securities, may offer a provide credit which is slightly higher than the maximum rate. The CHX notes that the proposed Clearing Submission Fee Credit is to be set at 8% of the Clearing Submission Fee. That Fee is currently set at the Access Rule maximum rate of $0.003/share (with a $100 cap per side) for securities priced over $1 per share, as specified in the Exchange's Schedule of Fees and Assessment. Thus, even assuming that the Clearing Submission Fee did not reach the $100 cap, the effective rate of the Clearing Submission Fee Credit is $0.00024 per share, which is far below the provide credits offered by many other exchanges.[22] Based upon these facts, the Exchange believes that the proposed Clearing Submission Fee Credit represents an equitable allocation of reasonable dues, fee, credits and other charges among its members and issuers and other persons using its facilities.

The Exchange further believes that the proposed rule change is consistent with Section 6(b) of the Act [23] in general, and furthers the objectives of Section 6(b)(5) of the Act [24] in particular, in that it provides for fees and credits which are not designed to permit unfair discrimination between customers, issuers, brokers or dealers. The Exchange notes that other exchanges have authorized credit payment programs which are available only to certain subcategories of their members. For example, the New York Stock Exchange (''NYSE'') pays a series of credits to its Designated Market Makers (''DMMs'').[25] The credits paid to DMMs can exceed the provide credits paid to non-DMMs (which is $0.0015/share) by a substantial percentage. For example, DMMs can receive a credit of $0.0035/

[14] Exchange Act Rule 15b9–1 provides a limited exemption if the broker-dealer carries no customer accounts and has annual gross income derived from purchases and sales of securities otherwise than on a national securities exchange of which it is a member in an amount no greater than $1,000. 17 CFR 240.15b9–1. Since broker-dealers can separately charge commissions, however, the Exchange will not ordinarily know whether a non-FINRA member has already received more than $1,000 compensation arising out of OTC transactions as commissions or some other means. The Exchange's proposed restriction will preclude an Institutional Broker's violation of these provisions by the receipt of Clearing Submission Fee Credits.

[15] Report Concerning Examinations of Options Order Routing and Execution, U.S. Securities and Exchange Commission (Mar. 8, 2007), p.2.

[16] *See,* Article 21, Rule 6 and Securities Exchange Act Release No. 65615, *supra,* note 3. Among other things, the Exchange permits the post-trade substitution of Clearing Participants on a non-CHX trade prior to making the clearing submission. This substitution process is particularly important in facilitating the execution of the equity component of stock-option or stock-futures orders. The Clearing Submission Fee is designed to compensate the Exchange for the costs of providing the systems used, and oversight of, such activities.

[17] *See,* Securities Exchange Act Release No. 43833 (January 10, 2001), 66 FR 7822 (January 25, 2001) (SR–ISE–00–10) [sic] at p.7825, note 28 and accompanying text.

[18] *Id.; See,* Securities Exchange Act Release No. 43112 (Aug. 3, 2000), 65 FR 49040 (Aug. 10, 2000) (SR–CBOE–00–28) [sic]; Securities Exchange Act Release No. 43177 (Aug. 18, 2000), 65 FR 51889 (Aug. 25, 2000) (SR–PHLX–00–77) [sic]; Securities Exchange Act Release No. 43228 (Aug. 30, 2000), 65 FR 54330 (Sept. 7, 2000) (SR–AMEX–00–38) [sic]; Securities Exchange Act Release No. 43290 (Sept. 13, 2000), 65 FR 57213 (Sept. 21, 2000) (SR–PCX–00–30) [sic].

[19] 15 U.S.C. 78f.

[20] 15 U.S.C. 78f(b)(4).

[21] 17 CFR 242.610(c)(1).

[22] If the value of the trade was sufficiently large to result in the application of the $100 maximum fee, the per share amount would necessarily decline.

[23] 15 U.S.C. 78f.

[24] 15 U.S.C. 78f(b)(5).

[25] *See,* NYSE Price List 2012, *Fees and Credits applicable to Designated Market Makers (''DMMs''),* p.4, available on the NYSE's public Web site. DMMs (f/k/a specialists) are a subcategory of NYSE members with special rights and obligations, particularly as they relate to the execution of orders on the NYSE's facilities.

share (or more than twice as much as paid to ordinary members) when adding liquidity in shares of less active securities under certain specified circumstances.[26] The payment by CHX of a much smaller Clearing Submission Fee Credit to its Institutional Brokers would appear to be well within the scope of this precedent. The Exchange also notes that the entry of clearing submissions pursuant to Article 21, Rule 6(a), which gives rise to the Clearing Submission Fee, is limited to Institutional Brokers. Since only Institutional Brokers can engage in the activity which results in Clearing Submission Fees, there would be no purpose served in offering a financial incentive which is based upon the generation of those fees to non-Institutional Brokers. For these reasons, the Exchange believes that the proposed Clearing Submission Fee Credit represents a lawful payment which is distributed in a manner which is reasonable and not unfairly discriminatory.

B. Self-Regulatory Organization's Statement of Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that payment of a Clearing Submission Fee Credit to the Clearing Broker based on activity handled by it will incent Institutional Brokers to utilize the Exchange's systems and services in forwarding non-CHX trades to NSCC, rather than using alternative mechanisms such as correspondent clearing or Nasdaq's ACT system.

C. Self-Regulatory Organization's Statement on Comments Regarding the Proposed Rule Changes Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

The proposed rule change is to take effect pursuant to Section 19(b)(3)(A)(ii) of the Act[27] and subparagraph (f)(2) of Rule 19b–4 thereunder[28] because it establishes or changes a due, fee or other charge applicable to the Exchange's members and non-members, which renders the proposed rule change effective upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal 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–CHX–2012–05 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 No. SR–CHX–2012–05. 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 changes 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 will also be available for inspection and copying at the principal office of the CHX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–CHX–2012–05 and should be submitted on or before March 13, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3899 Filed 2–17–12; 8:45 am]

BILLING CODE 8011–01–P

[26] *Id.,* p.5.

[27] 15 U.S.C. 78s(b)(3)(A)(ii).

[28] 17 CFR 240.19b–4(f)(2).

[29] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66392; File No. SR–ISE–2012–06]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fees for Certain Complex Orders Executed on the Exchange

February 14, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the '' Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 31, 2012, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') 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. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE is proposing to amend fees for certain complex orders executed on the Exchange. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.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 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend fees charged by the Exchange for complex orders in all symbols that are not in the Penny Pilot Program (''Non-Penny Pilot Symbols''). The fee change proposed herein is similar to fees the Exchange recently adopted for complex orders in two of the most actively-traded index option products, the NASDAQ 100 Index option (''NDX'') and the Russell 2000 Index option (''RUT'').[3] This fee change, however, differs from the NDX/RUT Fee Filing in that the fees proposed herein are lower than those adopted for complex orders in NDX and RUT. With this proposed rule change, the fees proposed below for Non-Penny Pilot Symbols shall now also apply to NDX and RUT as each of those symbols are Non-Penny Pilot Symbols.

For trading in Non-Penny Pilot Symbols, for both regular and complex orders, the Exchange currently charges $0.20 per contract for firm proprietary orders and Customer (Professional Orders),[4] and $0.45 per contract for Non-ISE Market Maker[5] orders. ISE market maker orders[6] in Non-Penny Pilot Symbols are subject to a sliding scale, ranging from $0.01 per contract to $0.18 per contract, depending on the amount of overall volume traded by a market maker during a month. Market makers also currently pay a payment for order flow (PFOF) fee of $0.65 per contract when trading against Priority Customers. Priority Customer orders are not charged for trading in Non-Penny Pilot Symbols.

The Exchange currently assesses a per contract transaction fee to market participants that add or remove liquidity in the Complex Order Book (''maker/taker fees'') in symbols that are in the Penny Pilot Program. Included therein is a subset of 101 symbols that are assessed a slightly higher taker fee (the ''Select Symbols'').[7] Additionally, pursuant to SEC approval which allows market makers to enter quotations for complex order strategies in the Complex Order Book,[8] the Exchange recently adopted maker/taker fees and rebates for orders in the following three symbols: XOP, XLB and EFA.[9] And, as noted above, the Exchange most recently adopted new fees for complex orders in NDX and RUT.[10]

The Exchange now proposes to extend its maker/taker pricing structure to complex orders in all Non-Penny Pilot Symbols. Specifically, for Customer (Professional Orders), firm proprietary and ISE market maker orders, ISE proposes to adopt a ''make'' fee of $0.10 per contract and a ''take'' fee of $0.60 per contract. For Non-ISE Market Maker orders, ISE proposes to adopt a ''make'' fee of $0.10 per contract and a ''take'' fee of $0.65 per contract. As Priority Customers are not charged for trading in Non-Penny Pilot Symbols, no fee will apply to Priority Customer complex orders.

For crossing complex orders in Non-Penny Pilot Symbols, i.e., orders executed in the Exchange's Facilitation Mechanism, Solicited Order Mechanism, Block Order Mechanism and Price Improvement Mechanism, and for Qualified Contingent Cross orders, the Exchange currently charges a fee of $0.20 per contract. The Exchange proposes to continue charging a fee of $0.20 per contract for crossing complex orders in the Non-Penny Pilot Symbols. The Exchange currently does not charge Priority Customers for crossing complex orders executed in the Non-Penny Pilot Symbols. The Exchange proposes to continue not charging Priority Customers for crossing complex orders executed in the Non-Penny Pilot Symbols. For responses to special complex orders,[11] ISE proposes to adopt a fee of $0.60 per contract for Customer (Professional Orders), firm proprietary and ISE market maker orders. For Non-ISE Market Maker orders, ISE proposes to adopt a fee of $0.65 per contract for responses to special complex orders in the Non-Penny Pilot Symbols. Priority Customers will not be assessed a fee when responding to special complex orders.

A number of Non-Penny Pilot Symbols are index options that are traded on the Exchange pursuant to license agreements for which the Exchange charges license surcharges. The Exchange charges the following license surcharges for all orders other than Priority Customer orders: $0.02 per contract for options on NXTQ; $0.05 per contract for options on FUM, HSX, POW, TNY and WMX; $0.10 per contract for options on BKX, MFX, MID, MSH, SML and UKX; $0.15 per contract for options on RMN, RUI, RUT and MVR; and $0.22 per contract for options on NDX and MNX. The license surcharge fees, which are charged by the Exchange to defray the licensing costs, are charged in addition to the transaction fees noted above. Because of competitive pressures in the industry, Priority Customer orders are not charged these surcharge fees, while Professional Orders are subject to the fee. For clarity, the Exchange is proposing to restate these surcharges in the notes applicable to complex orders in Non-Penny Pilot Symbols.

For Priority Customer complex orders in symbols that are in the Penny Pilot program, the Exchange currently provides a per contract rebate when these orders trade with non-Priority Customer orders in the Complex Order Book. The Exchange proposes to extend this rebate incentive for the Non-Penny Pilot Symbols. As such, the Exchange proposes to adopt a rebate of $0.50 per contract for Priority Customer complex orders in the Non-Penny Pilot Symbols when these orders trade with non-Priority Customer orders in the Complex Order Book.

Additionally, the Exchange currently provides ISE market makers with a two cent discount when trading against orders that are preferenced to them. The Exchange proposes to extend this discount for preferenced complex orders in the Non-Penny Pilot Symbols. Accordingly, ISE market makers who remove liquidity in the Non-Penny Pilot Symbols from the Complex Order Book will be charged $0.58 per contract when trading with orders that are preferenced to them.

With the proposed migration of the Non-Penny Pilot Symbols to the Exchange's complex order maker/taker pricing structure, the Exchange

[3] *See* Securities Exchange Act Release No. 66084 (January 3, 2012), 77 FR 1103 (January 9, 2012) (SR–ISE–2011–84) (''NDX/RUT Fee Filing'').

[4] The term ''Professional Order'' means an order that is for the account of a person or entity that is not a Priority Customer. *See* ISR [sic] Rule 100(a)(37C).

[5] The term ''Non-ISE Market Maker'' means a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934 (the ''Act'') registered in the same options class on another options exchange. *See* Schedule of Fees, page 4.

[6] The term ''market makers'' refers to ''Competitive Market Makers'' and ''Primary Market Makers'' collectively. *See* ISE Rule 100(a)(25).

[7] The Select Symbols are identified by their ticker symbol on the Exchange's Schedule of Fees.

[8] *See* Securities Exchange Act Release No. 65548 (October 13, 2011), 76 FR 64980 (October 19, 2011) (SR–ISE–2011–39).

[9] *See* Securities Exchange Act Release No. 65958 (December 15, 2011), 76 FR 79236 (December 21, 2011) (SR–ISE–2011–81).

[10] *See* note 1 [sic].

[11] A response to a special order is any contra-side interest submitted after the commencement of an auction in the Exchange's Facilitation Mechanism, Solicited Order Mechanism, Block Order Mechanism and Price Improvement Mechanism. This fee applies to Market Maker, Non-ISE Market Maker, Firm Proprietary and Customer (Professional) interest.

proposes to no longer charge a PFOF fee for complex orders in these symbols. The cancellation fee, however, which only applies to Priority Customer orders, will continue to apply.

The Exchange also notes that:

- Fees for orders in Non-Penny Pilot Symbols executed in the Exchange's Facilitation, Solicited Order, Price Improvement and Block Order Mechanisms are applied to contracts that are part of the originating or contra order.
- Complex orders in Non-Penny Pilot Symbols executed in the Facilitation and Solicited Order Mechanisms are charged fees only for the leg of the trade consisting of the most contracts.
- As noted above, the PFOF fees will not be collected for complex orders in the Non-Penny Pilot Symbols.
- As noted above, the cancellation fee, which only applies to Priority Customer orders, will continue to apply to the Non-Penny Pilot Symbols.
- The Exchange currently has a fee cap, with certain exclusions, applicable to transactions executed in a member's proprietary account. The cap also applies to crossing transactions for the account of entities affiliated with a member. The Exchange also has a service fee applicable to all QCC and non-QCC transactions that are eligible for the fee cap.[12] This fee cap will continue to apply to executions of complex orders in the Non-Penny Pilot Symbols.
- The Exchange currently has tiered rebates to encourage members to submit greater number of QCC orders and Solicitation orders to the Exchange. Once a member reaches a certain volume threshold in QCC orders and/or Solicitation orders during a month, the Exchange provides a rebate to that member for all of its QCC and Solicitation traded contracts for that month.[13] These tiered rebates will continue to apply.
- The license surcharge noted above will continue to apply to all orders except for Priority Customer orders in the Non-Penny Pilot Symbols.

With this proposed rule change, all non-customer orders will be assessed similar fees, thus eliminating the gap that currently exists between market makers and non-market makers when trading complex orders today. The proposed fees are consistent with the fees and rates of payment for order flow commonly applied to symbols that are not part of the Penny Pilot program. At the proposed levels, ISE market makers will in fact see their fees lowered compared to current levels, which include a transaction fee and a $0.65 per contract PFOF fee, while at the same time equitably distributing the costs of attracting complex orders. The Exchange's maker/taker fees and rebates for complex orders in Penny Pilot Symbols has proven to be an effective method of attracting order flow to the Exchange. The Exchange believes that extending its maker/taker fees and rebates for complex orders to the Non-Penny Pilot Symbols will assist the Exchange in increasing its market share in these symbols. The Exchange believes this proposed rule change will also serve to enhance the Exchange's competitive position and enable it to attract additional complex order volume in these symbols.

The Exchange also proposes to make a non-substantive, clarifying change in footnote 3 on page 18 of the Schedule of Fees, footnote 11 on page 19 of the Schedule of Fees and footnote 2 on page 21 of the Schedule of Fees by replacing the word 'non-customer' with 'non-Priority Customer' to accurately reflect that the rebate referenced in these three footnotes are payable when Priority Customer complex orders trade with non-Priority Customer orders in the Complex Order Book.

The Exchange proposes to make these fee changes operative on February 1, 2012.

2. Statutory Basis

The Exchange believes that its proposal to amend its Schedule of Fees is consistent with Section 6(b) of the Act[14] in general, and furthers the objectives of Section 6(b)(4) of the Act[15] in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and other persons using its facilities. The impact of the proposal upon the net fees paid by a particular market participant will depend on a number of variables, most important of which will be its propensity to add or remove liquidity in the Non-Penny Pilot Symbols in the Complex Order Book. Further, with this proposed rule change, and in an effort to standardize fees for complex orders, the Exchange is adopting fees that are lower than those previously adopted for two other Non-Penny Pilot Symbols, i.e., NDX and RUT. Approval of this proposed rule change will result in complex orders in the Non-Penny Pilot Symbols, including NDX and RUT, being charged the same fees.

The Exchange believes it is reasonable and equitable to charge all market participants (except Priority Customers) trading in complex orders in Non-Penny Pilot Symbols a standardized 'make' fee of $0.10 per contract. The Exchange currently charges a standardized 'make' fee of $0.32 per contract for complex orders in certain symbols when these orders trade against Priority Customer orders.[16] The Exchange further believes it is reasonable and equitable to charge ISE market maker, firm proprietary and Customer (Professional) orders a 'take' fee of $0.60 per contract ($0.65 per contract for Non-ISE Market Maker orders) for complex orders in Non-Penny Pilot Symbols in order to equitably distribute the cost of attracting order flow (similar to PFOF). The Exchange believes it is reasonable and equitable to charge ISE market maker, firm proprietary and Customer (Professional) orders a fee of $0.60 per contract ($0.65 per contract for Non-ISE Market Maker orders) when such members are responding to special orders because a response to a special order is akin to taking liquidity, thus the Exchange is proposing to adopt an identical fee for taking liquidity in these symbols. The Exchange has historically maintained a differential in the fees it charges ISE market makers from those it charges to Non-ISE Market Makers. The Exchange believes it is reasonable and equitable to treat these two groups of market participants differently because each has different commitments and obligations to the Exchange. ISE market makers, in particular, have quoting obligations and pay the Exchange non-transaction fees. Non-ISE Market Makers do not have any such obligations or financial commitments.

The Exchange further believes it is reasonable and equitable for the Exchange to charge a fee of $0.20 per contract for complex orders in the Non-Penny Pilot Symbols executed in the Exchange's various auctions and for Qualified Contingent Cross orders because these fees are identical to the fees the Exchange currently charges for similar orders in the symbols that are subject to the Exchange's maker/taker fees.

Additionally, the Exchange believes its proposed fees remain competitive with fees charged by other exchanges

[12] *See* Securities Exchange Act Release No. 64270 (April 8, 2011), 76 FR 20754 (April 13, 2011) (SR–ISE–2011–13).

[13] *See* Securities Exchange Act Release Nos. 65087 (August 10, 2011), 76 FR 50783 (August 16, 2011) (SR–ISE–2011–47); 65583 (October 18, 2011), 76 FR 65555 (October 21, 2011) (SR–ISE–2011–68); 65705 (November 8, 2011), 76 FR 70789 (November 15, 2011) (SR–ISE–2011–70); 65898 (December 6, 2011), 76 FR 77279 (December 12, 2011) (SR–ISE–2011–78); and 66169 (January 17, 2012), 77 FR 3295 (January 23, 2012) (SR–ISE–2012–01).

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(4).

[16] *See* note 7.

and are therefore reasonable and equitably allocated to those members that opt to direct orders to the Exchange rather than to a competing exchange. For example, the $0.60 per contract complex order 'take' fee in Non-Penny Pilot Symbols proposed by the Exchange for market maker, firm proprietary and Customer (Professional) orders remains considerably lower than that charged by the Boston Options Exchange (''BOX''). For a similar order, BOX charges both a transaction fee, which ranges anywhere from $0.13 per contract to $0.25 per contract, and a fee for adding liquidity in non-Penny Pilot classes of $0.65 per contract, for an 'all-in' rate of $0.90 or more per contract.[17]

The Exchange believes that it is reasonable and equitable to provide a rebate for Priority Customer complex orders when these orders trade with non-Priority Customer orders in the Complex Order Book because paying a rebate would continue to attract additional order flow to the Exchange and create liquidity in the symbols that are subject to the rebate, which the Exchange believes ultimately will benefit all market participants who trade on ISE. The Exchange already provides this rebate and is now proposing to extend the rebate for the Non-Penny Pilot Symbols, which the Exchange believes will attract greater order flow of complex orders in these symbols.

The Exchange also believes that it is reasonable and equitable to provide a two cent discount to ISE market makers on preferenced orders because this will provide an incentive for market makers to quote in the Complex Order Book.

The complex order pricing employed by the Exchange has proven to be an effective pricing mechanism and attractive to members and their customers. The Exchange believes that adopting maker/taker fees and rebates for complex orders in the Non-Penny Pilot Symbols will attract additional complex order business in these symbols. The Exchange further believes that the proposed fees are not unfairly discriminatory because the fee structure is consistent with fee structures that exist today at other options exchanges. Additionally, the Exchange believes that the proposed fees are fair, equitable and not unfairly discriminatory because they are consistent with price differentiation that exists today at other option exchanges. The Exchange believes it remains an attractive venue for market participants to trade complex orders as its fees remain competitive with those charged by other exchanges for similar trading strategies. The Exchange operates in a highly competitive market in which market participants can readily direct order flow to another exchange if they deem fee levels at a particular exchange to be excessive. With this proposed fee change, the Exchange believes it remains an attractive venue for market participants to trade complex orders.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act.[18] At any time within 60 days of the filing of such 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 Exchange Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ISE–2012–06 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–ISE–2012–06. 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 also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2012–06 and should be submitted on or before March 13, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Kevin M. O'Neill,

Deputy Secretary.

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[17] *See* BOX Fee Schedule, Sections 4 and 7.

[18] 15 U.S.C. 78s(b)(3)(A)(ii).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66393; File No. SR–C2–2012–004]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change Related to Stock-Option Processing

February 14, 2012.

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 February 7, 2012, the C2 Options Exchange, Incorporated (the ''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. 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 the Substance of the Proposed Rule Change

The Exchange is proposing to amend its electronic complex order rules to adopt procedures for processing stock-option orders. The text of the rule proposal is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/RuleFilings.aspx*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and the 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to adopt procedures for processing stock-option orders under Rule 6.13. In particular, the Exchange is proposing to amend Rule 6.13 to (i) adopt a definition of a stock-option order (as well as include a definition of a complex order); (ii) include procedures for routing the stock leg of a stock-option order; (iii) provide that there will be no ''legging'' of stock-options, except in one limited context; (iv) describe the electronic allocation algorithm applicable for stock-option orders in the complex order book (''COB'') and the complex order RFR auction (''COA'');[3] and (v) incorporate certain price check parameter and re-COA features (described in more detail below) applicable to the electronic processing of stock-option orders.

Definitions

The first purpose of this proposed rule change is to include a definition of stock-option order within Rule 6.13. The definition would provide that a stock-option order is as [sic] an order to buy or sell a stated number of units of an underlying stock or a security convertible into the underlying stock (''convertible security'') coupled with the purchase or sale of options contract(s) on the opposite side of the market representing either (i) the same number of units of the underlying stock or convertible security, or (ii) the number of units of the underlying stock necessary to create a delta neutral position, but in no case in a ratio greater than eight (8) options contracts per unit of trading of the underlying stock or convertible security established for that series by The Options Clearing Corporation (referred to in the text as the ''Clearing Corporation'') (or such lower ratio as may be determined by the Exchange on a class-by-class basis). In addition, only those stock-option orders with no more than the applicable number of legs, as determined by the Exchange on a class-by-class basis, will be eligible for processing.

The Exchange is also proposing to adopt a definition of a complex order. For purposes of the rule, a complex order will be defined as any order involving the execution of two or more different options series in the same underlying security, for the same account, occurring at or near the same time in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) (or such lower ratio as may be determined by the Exchange on a class-by-class basis) and for the purpose of executing a particular investment strategy. Only those complex orders with no more than the applicable number of legs,[4] as determined by the Exchange on a class-by-class basis, are eligible for processing.

These definitions would conform with definitions used in other exchanges' rules[5] and is modeled after the generic definitions approved for use for exemptions from Trade Through Liability by the Options Linkage Authority as described in the ''Plan For The Purpose of Creating And Operation An Intermarket Options Linkage'' and as provided in Exchange Chapter 6, Section E (which cross-references Chicago Board Options Exchange Incorporated (''CBOE'') Rule 6.80(4)).

Designated Broker-Dealer

The second purpose of this proposed rule change is to adopt procedures for routing the stock leg of a stock-option order. The Exchange proposes to provide that the Exchange will electronically transmit orders related to a stock leg for execution by a broker-dealer designated by the Exchange (a ''designated broker-dealer'') on behalf of the parties to the trade. The Exchange will transmit the underlying stock leg order to a designated broker-dealer for execution once the Exchange trading system determines that a stock-option order trade is possible and at what net prices. The stock leg component will be transmitted to the designated broker-dealer as two paired orders with a designated limit price, subject to one limited exception pertaining to the stock leg of an unmatched market stock-option order (which is described in more detail below). The designated broker-dealer will act as agent for the stock leg of the stock-option orders. The designated broker-dealer may determine to match the orders on an exchange or ''over-the-counter.''

To participate in this automated process for stock-option orders, an Exchange Permit Holder (''PH'') must enter into a customer agreement with one or more designated broker-dealers that are not affiliated with the Exchange.[6] In addition, PHs may only

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] COA is a process for auctioning eligible complex orders for price improvement. *See* Rule 6.13(c).

[4] Currently the rule limits the number of legs to four. *See* existing Rule 6.13(b)(2).

[5] *See, e.g.,* International Securities Exchange (''ISE'') Rule 722(a).

[6] This provision for a designated broker-dealer is similar to a provision in ISE Rule 722.02, except that C2's proposed provision makes it clear the broker-dealer(s) that are designated by the Exchange to perform this function are not affiliated with C2. The Exchange also notes that the stock-option processing provisions will include an order marking requirement for stock-option orders. In particular, the Exchange is proposing to provide that, if the stock leg of a stock-option order submitted to the COB or COA is a sell order, then the stock leg must be marked ''long, ''short,'' or ''short exempt'' in compliance with Regulation

submit complex orders with a stock component if such orders comply with the Qualified Contingent Trade Exemption (the ''QCT Exemption'') from Rule 611(a) of Regulation NMS.[7] PHs submitting such complex orders represent that such orders comply with the QCT Exemption. The Exchange intends to address fees related to routing the stock portion of stock-option trades in a separate rule change filing.

The Exchange believes that the electronic communication of the orders by the Exchange to the designated broker-dealer is an efficient means for processing stock-option orders. The designated broker-dealer will be responsible for the proper execution, trade reporting and submission to clearing of the stock trade that is part of a stock option order. In this regard, once the orders are communicated to the broker-dealer for execution, the broker-dealer has complete responsibility for determining whether the orders may be executed in accordance with all the rules applicable to execution of equity orders, including compliance with the applicable short sale, trade-through and trade reporting rules. If the broker-dealer cannot execute the equity orders at the designated price, the stock-option combination order will not be executed on the Exchange.

With respect to trade throughs in particular, the Exchange believes that the stock component of a stock-option order is eligible for the QCT Exemption from Rule 611(a) of Regulation NMS. A Qualified Contingent Trade (''QCT'') is a transaction consisting of two or more component orders, executed as agent or principal, that satisfy the six elements in the Commission's order exempting QCTs from the requirements of Rule 611(a), which requires trading centers to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs.[8] The Exchange believes that the stock portion of a complex order under this proposal complies with all six requirements.[9] Moreover, as explained below, the Exchange's system will validate compliance with each requirement such that any matched order received by a designated broker-dealer under this proposal has been checked for compliance with the exemption to the extent noted below:

(1) At least one component order is in an NMS stock: the stock component must be an NMS stock, which is validated by the Exchange's system;

(2) All components are effected with a product or price contingency that either has been agreed to by the respective counterparties or arranged for by a broker-dealer as principal or agent: a complex order, by definition, is executed at a single net credit/debit price and this price contingency applies to all the components of the order, such that the stock price computed and sent to the designated broker-dealer allows the stock order to be executed at the proper net debit/credit price based on the execution price of each of the option legs, which is determined by the Exchange's system;

(3) The execution of one component is contingent upon the execution of all other components at or near the same time: once a stock-option [sic] is accepted and validated by the Exchange's system, the entire package is processed as a single transaction and each of the option leg(s) and stock components are simultaneously processed;

(4) The specific relationship between the component orders (*e.g.,* the spread between the prices of the component orders) is determined at the time the contingent order is placed: stock-option orders, upon entry, must have a size for each component and a net debit/credit price (or market price), which the Exchange's system validates and processes to determine the ratio between the components; an order is rejected if the net debit/credit price (or market price) and size are not provided on the order;

(5) The component orders bear a derivative relationship to one another, represent different classes of shares of the same issuer, or involve the securities of participants in mergers or with intentions to merge that have been announced or since cancelled: under this proposal, the stock component must be the underlying security respecting the option leg(s), which is validated by the Exchange's system; and

(6) The transaction is fully hedged (without regard to any prior existing position) as a result of the other components of the contingent trade: under this proposal, the ratio between the options and stock must be a conforming ratio (*e.g.,* largest option leg to stock cannot exceed a ratio of eight-to-one and multiple options legs cannot exceed a ratio of three-to-one), which the Exchange's system validates, and which under reasonable risk valuation methodologies, means that the stock position is fully hedged. In addition, if all option and stock components are on the same side of the market, which the Exchange's system also validates, then the order will not be eligible for electronic processing pursuant to Rule 6.13.

Furthermore, as noted above, proposed Rule 6.13.06(a) provides that PHs may only submit complex orders with a stock component if such orders comply with the QCT Exemption. PHs submitting such complex orders with a stock component represent that such orders comply with the QCT Exemption. Thus, the Exchange believes that complex orders consisting of a stock component will comply with the exemption and that the Exchange's system will validate such compliance as noted above to assist its designed routing broker(s) in carrying out its responsibilities as agent for these orders.

The Exchange believes the proposed process offers effective and efficient automatic execution for both the options and stock components of a stock-option order and it should promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system by enhancing the electronic processing of the stock-option orders. However, this process is not exclusive. The Exchange notes that PHs can also utilize other exchanges' systems (several of which offer stock-option processing) or avoid using stock-option orders.

Legging

The third purpose of this proposed rule change is to provide that ''legging'' against the individual orders and quotes in the Exchange's electronic book (the ''Book'') will not occur for stock-option orders, except that that [sic] legging may occur in a limited instance described below for eligible market orders that have been subject to a COA.[10] The Exchange believes that limiting the electronic trading of stock-option orders pursuant to Rule 6.13 to executions

SHO, 17 CFR 242.200(g). *See* proposed Rule 6.13.06(e). This proposed marking provision is modeled after CBOE Rule 6.53C.06(g).

[7] 17 CFR 242.611(a).

[8] *See* Securities Exchange Act Release No. 57620 (April 4, 2008), 73 FR 19271 (April 9, 2008) (''QCT Release''); *see also* Securities Exchange Act Release No. 54389 (August 31, 2006), 71 FR 52829 (September 7, 2006).

[9] As discussed in more detail below, the stock component of all stock-option orders will be transmitted to a designated routing broker as paired stock orders with a specified limit price, with one limited exception. The exception pertains to the stock leg of an unmatched market stock-option order. In the limited circumstances when the Exchange transmits the stock component leg of an unmatched market stock-option order to the designed [sic] routing broker, such a stock component leg will be subject to NBBO pricing (and therefore not be processed subject to the QCT Exemption).

[10] The Exchange notes that at least one other options exchange that offers electronic complex order processing does not ''leg'' stock-option orders. *See, e.g.,* NASDAQ OMX PHLX LLC (''Phlx'') Rule 1080.08(f)(iii)(A)(1).

against other stock-option orders in the manner proposed will provide for more efficient execution and processing of stock-option orders and will assist with the maintenance of fair and orderly markets by helping to mitigate the potential risks associated with legging stock-option orders, including the risk of one leg of the stock-option order going unexecuted (and thereby not achieving a complete stock-option order execution and having a partial position that is unhedged).[11]

The limited exception where legging would be permitted would provide that, if at the conclusion of a COA a stock-option order that is an eligible market order[12] cannot be filled in whole or in a permissible ratio, then any remaining balance of the option leg(s) would be routed to the Exchange's system for processing as a simple market order(s) consistent with the Exchange's order execution rules and any remaining balance of the stock leg would be routed to the designated broker-dealer, who will represent the order on behalf of the party that submitted the stock-option order.[13] The Exchange notes that when a stock-option order is legged in this manner, it is possible for the Exchange to route the option leg(s) to another options exchange, consistent with its rules.[14]

This alternate legging functionality is intended to assist in the automatic execution and processing of stock-option orders that are market orders. The Exchange believes the order eligibility parameters provide the Exchange with the flexibility to assist with the maintenance of orderly markets by helping to mitigate the potential risks associated with legging stock option orders, *e.g.,* the risk of a order drilling through multiple price points on another exchange (thereby resulting in execution at prices that are away from the NBBO and potentially erroneous), and/or the risk of one leg of the stock-option order going unexecuted (thereby not achieving a complete stock-option order execution and having a partial position that is unhedged).

Allocation Algorithms

The fourth purpose of this proposed rule change is to describe the electronic allocation algorithm applicable for stock-option orders in COB and COA. With respect to COB, the Exchange is proposing to provide that stock-option orders that are marketable against each other will automatically execute. In the event there are multiple stock-option orders at the same price, they will be allocated pursuant to the rules of trading priority otherwise applicable to incoming electronic orders in the individual series legs (or such other allocation algorithm as the Exchange may designate pursuant to Rule 6.13.05).[15]

As a condition for a stock-option order to execute against another stock-option order in COB, the execution must be at a net price where the individual options series leg(s) of the stock-option order has priority over the individual orders and quotes residing in the Exchange's Book (the ''Book Priority Condition''). To satisfy the Book Priority Condition, the individual option series leg(s) of a stock-option order (i) must not trade through the Exchange's best bid (offer) in the individual component series, and (ii) must not trade at the Exchange's best bid (offer) in the individual component series if one or more public customer orders are resting at the best bid (offer) in each of the component series and the stock-option order could otherwise be executed in full (or in a permissible ratio).

With respect to COA, the Exchange is proposing to provide that, in the event there are multiple stock-option orders at the same price, they will trade in the following sequence: (i) Public customer stock-option orders resting in COB before, or that are received during, the COA Response Time Interval[16] and public customer responses collectively have first priority, with multiple orders ranked by time priority; (ii) non-public customer stock-option orders resting in the COB before the COA Response Time Interval have second priority, with multiple orders subject to the rules of trading priority otherwise applicable to incoming orders in the individual component legs; and (iii) non-public customer stock-option orders resting in COB that are received during the Response Time Interval and non-public customer responses collectively have third priority, with multiple orders subject to the rules of trading priority otherwise applicable to incoming orders in the individual component legs.

As with COB, as a condition for a stock-option order to execute against another stock-option order through COA, would be that the execution must satisfy the Book Priority Condition described above.

The system also has some features that would apply to the extent that a stock-option order is or becomes marketable. First, to the extent that a marketable stock-option order cannot automatically execute in full (or in a permissible ratio) when it is routed to COB or after being subject to COA because there are individual orders and quotes residing in the Book that have priority (but the order resting in COB would not trade against them because there will be no ''legging''), any part of the order that may be executed would be executed automatically and the part that cannot automatically execute would be cancelled. Second, to the extent that a stock-option order resting in COB becomes marketable against the derived net market (and cannot automatically execute because there is no ''legging''), the full order would be subject to COA (and the processing described above). For purposes of this feature, the ''derived net market'' for a given stock-option strategy would be calculated using the Exchange's best bid or offer in the individual option series leg(s) and the NBBO in the stock leg. The Exchange notes this feature would only be applicable to resting stock-option orders that become marketable against the derived net market. This feature would not be applicable to resting stock-option [sic] that would become marketable with other stock-option orders. Having the system automatically initiate a COA once such a stock-option order resting in COB becomes marketable against the derived net market provides an opportunity for other market participants to match or

[11] That is not to say that the Exchange would not determine to permit additional ''legging'' of stock-option orders under Rule 6.13 in the future. Any such change to the electronic processing of stock-option orders under Rule 6.13 would be subject to a separate rule change filing.

[12] For purposes of this legging functionality, an ''eligible market order'' would mean a stock-option order that is within designated size and order type parameters, determined by the Exchange on a class-by-class basis, and for which the national best bid or offer (''NBBO'') is within designated size and price parameters, as determined by the Exchange for the individual leg. The designated NBBO price parameters will be determined based on a minimum bid price for sell orders and a maximum offer price for buy orders. The Exchange may also determine to limit the trading times within regular trading hours that the legging functionality will be available. *See* proposed 6.13.06(d). Pursuant to Rule 6.13.01, any determination by the Exchange on these parameters would be announced via Regulatory Circular.

[13] Pursuant to Rule 6.13.01, any determination by the Exchange to route stock-option market orders in this manner will be announced via Regulatory Circular.

[14] *See, e.g.,* C2 Rule 6.36, *Order Routing to Other Exchanges.*

[15] The allocation algorithms for the individual series legs include price-time, pro-rata, and price-time with primary public customer and secondary trade participation right priority and an optional priority overlays [sic] pertaining to market turner priority. *See* Rules 6.12, *Order Execution and Priority.*

[16] The COA ''Responses [sic] Time Interval'' means the period of time during which responses to the RFR may be entered. The Exchange determines the length of the Response Time Interval on a class-by-class basis, however, the duration shall not exceed three (3) seconds. *See* Rule 6.13(c)(3)(B).

improve the net price and allows for an opportunity for an automatic execution before a marketable stock-option order is cancelled.[17] As noted above, after being subject to COA, any part of the order that may be executed would be executed automatically and the part of the order that cannot automatically execute would be cancelled.

The following examples illustrate the operation of the proposed system functionality:

Example 1: Assume an incoming market stock-option order for 75 units is submitted to COA, where the strategy involves the sale of 75 call contracts and purchase of 7,500 stock shares. At the conclusion of COA, assume the best net price response is $9.13 for 50 units and the best derived net market price is 9.15 for 100 units. The incoming market order to purchase 75 units of the stock-option strategy will receive a partial execution of 50 units at a net price of $9.13. Because the remaining 25 units are marketable against individual orders and quotes in the Book, the 25 units will be cancelled.[18]

Example 2: Assume a stock-option order for 75 units is resting in COB, where the strategy involves the sale of 75 call contracts and purchase of 7,500 stock shares at a net debit price of $9.13. By virtue of the fact that it is resting [sic] the COB, the stock-option order is not marketable—meaning there are no orders or quotes within the derived net market price or other stock-option orders within COB against which the resting stock-option order may trade. Assume there are no other stock-option orders representing [sic] in the COB for the strategy and also assume the best derived net market price for the strategy is a net price of $9.15 per unit for 100 units. If the price of the component option series leg or the stock is thereafter updated such that the derived net market price becomes $9.13 per unit for 100 units, then the full size of the resting stock-option order will become marketable but cannot automatically execute. As a result, the full size (75 units) of the resting stock-option order would be subject to COA. At the conclusion of COA, any part of the stock-option order that may be executed against other stock-option orders or auction responses will be automatically executed. Any part of the order that is marketable and cannot automatically execute (because the stock-option order cannot ''leg'' against the derived net market) will be cancelled. To the extent any part of the stock-option order is not marketable, it will continue resting in COB.

Price Protection and Re-COA Features

Finally, the fifth purpose of this proposed rule change is to adopt a new price check parameter applicable to the electronic processing of stock-option orders. In addition, the Exchange is proposing to extend the application of an existing price check parameter to include stock-option orders.

In particular, under the proposed new price check parameter, the Exchange is proposing to provide that, on a class-by-class basis, the Exchange may determine (and announce via Regulatory Circular) to not automatically execute a stock-option order that is marketable if, following COA, the execution would not be within the acceptable derived net market for the strategy that existed at the start of COA. As indicated above, a ''derived net market'' for a strategy will be calculated using the Exchange's best bid or offer in the individual option series leg(s) and the NBBO in the stock leg. The ''acceptable derived net market'' for a strategy will be calculated using the Exchange's best bid or offer in the individual option series leg(s) and the NBBO in the stock leg plus/minus an acceptable tick distance. The ''acceptable tick distance'' will be determined by the Exchange on a class-by-class and premium basis.[19] Such a stock-option order would be cancelled. The Exchange believes that users are more concerned about obtaining a net price execution of their stock-option strategy orders than about achieving an execution of the stock leg at the NBBO. The price check parameter, however, would serve to prevent automatic executions at extreme prices beyond the NBBO.

The following example illustrates the operation of the proposed system functionality:

Example 3: Assume that at the start of COA the Exchange's best bid and offer for the option leg of a stock-option strategy is $1.00–$1.20 (100 × 100) and the NBBO for the stock leg of the strategy is $10.05–$10.15 (10,000 × 10,000). Thus, the derived net market for the strategy is $8.85–$9.15 (calculated as $1.20–$10.05 and −$1.00 + $10.15, respectively). In addition, assume that the acceptable tick distance for the stock leg is two ticks ($0.02). Under this parameter, an order to sell stock could not execute at a price below $10.03 and an order to buy stock could not execute at a price above $10.17. Thus, the acceptable derived net market for the strategy would be calculated as $8.83–$9.17 (calculated as $1.20–$10.03 and −$1.00 + $10.17, respectively). Under this scenario, following COA, a marketable stock-option order to sell the option series and buy the stock that would trade with another stock-option order at net debit price of $9.17 (within the acceptable derived net market for the strategy) will be executed. However, a marketable stock-option to sell the option series and buy the stock that would trade with another stock-option order at a net debit price of $9.18 ($0.01 outside the acceptable derived net market for the strategy) will be cancelled.

In addition to the foregoing, additional parameters would apply. In classes where these price check parameters are available, they will also be available for COA stock-option responses under Rule 6.13(c), stock-option orders and responses under Rules 6.51, *Automated Improvement Mechanism (''AIM'')*, and 6.52, *Solicitation Auction Mechanism* (''SAM''), or AIM customer-to-customer immediate cross of stock-option orders

[17] The Exchange notes that, in these circumstances when a resting stock-option order becomes marketable, COA will automatically initiate regardless of whether a PH has requested that the stock-option order be COA'd pursuant to Rule 6.13.02. In this regard, the Exchange notes that, currently, all of its PHs have elected to have their COA-eligible orders COA'd. In addition, the Exchange notes that other markets have programs in place that provide for the automatic auctioning of complex orders. *See, e.g.,* Phlx Rule 1080(e)(i)(A) which, among other things, provides that a complex order live auction (''COLA'') will initiate if the Phlx system receives a complex order that improves the Phlx complex order best debit or credit price respecting the specific complex order strategy that is the subject of the complex order. During a COLA, Phlx market participants may bid and offer against the COLA-eligible order pursuant to the Phlx Rule.

[18] However, if the Exchange has activated the market stock-option order ''legging'' functionality and the and the [sic] order is eligible, in lieu of routing to PAR or a booth, any remaining balance of the option leg will route to the CBOE Hybrid Trading System for processing as a simple market order and any remaining balance of the stock leg will be electronically transmitted by the Exchange to a designated broker-dealer, who will represent the order on behalf of the party that submitted the stock-option order. *See* note 12, *supra,* and surrounding discussion on Legging.

[19] It should be noted that this is simply a parameter for determining whether a stock-option order will be subject to automatic execution, or routed to PAR, a booth or cancelled. A stock-option order that is subject to automatic execution remains subject to the applicable priority requirements prescribed in Rule 6.13.

It should also be noted that the Exchange has not proposed to prescribe a minimum acceptable tick distance for this parameter (*e.g.,* the acceptable tick distance may be established at 0). This will provide the Exchange with the flexibility to set the price check feature so that automatic executions of stock-option orders must be within the derived net market, which considers the Exchange's best bid or offer for the options component leg(s) and the NBBO for the stock component leg. The Exchange believes it is reasonable and appropriate to utilize the Exchange best bid and offer in the calculation as the option component leg(s) are not permitted to trade at a price inferior to the Exchange's best bid and offer. The Exchange also believes it is reasonable and appropriate to consider the NBBO for the stock component leg in the calculation as the NBBO should serve as a reasonable proxy for what may be considered a reasonable price for the automatic execution of the stock component leg. However, the Exchange also recognizes that some range outside the NBBO may also be appropriate for determining whether an automatic execution should occur as the QCT Exemption does not require the stock component leg of a qualifying stock- option order to be executed at the NBBO. The proposed parameter therefore provides the Exchange with the flexibility to determine to utilize the NBBO (which equates to an acceptable tick distance of 0) or some range outside the NBBO (which equates to the derived net part plus/minus an acceptable tick distance of 1, 2, 3 or some other number of ticks) for determining whether to automatically execute a stock-option order.

under Rule 6.51.08 (''CTC'').[20] Under these provisions, such paired stock-option orders and responses would not be accepted.[21] In this regard, if any paired stock-option order submitted by an order entry firm for AIM, SAM or CTC processing exceeds the parameters, then both the order that exceeds the parameters and the paired contra-side order would not be accepted regardless of whether the contra-side order exceeds the parameters. However, to the extent that only the paired contra-side order submitted by an order entry firm for AIM or SAM processing would exceed the price check parameter, the paired contra-side order would not be accepted while the original Agency Order would not be accepted or, at the order entry firm's discretion, would continue processing as an unpaired stock-option order (*e.g.,* the original Agency Order would route to COB or COA for processing). The proposal also provides that, to the extent a contra-side order or response is marketable, its price will be capped at the price inside the acceptable derived net market.

Example 4: Assume the acceptable derived net market is $1.00–$1.20. Also assume two paired stock-option orders are submitted to an AIM auction. If the original Agency Order to sell the option leg and buy the stock is a market order, but the contra-side order to buy the option leg and sell the stock has a net credit price of $1.25, the AIM auction will not initiate because the contra-side order does not satisfy the price check parameter. Such a contra-side order would not be accepted because it is outside the acceptable net market price range. The paired original Agency Order would either not be accepted along with the contra-side order or, at the order entry firm's discretion, would continue processing as an unpaired complex order. By comparison, if the contra-side order has a net credit price of $0.95, the price will be capped at $1.01.

The Exchange is also proposing to make two existing price protection features that it has available for other complex orders available for stock-option orders. In particular, the Exchange is proposing to modify its existing ''market width'' parameters under Rule 6.13.04(a) to extend the application of the individual series leg width parameters to stock-option orders. Under this price check parameter, eligible market complex orders will not be automatically executed if the width between the Exchange's best bid and best offer in any individual series leg is not within an acceptable price range.[22] As proposed, the Exchange may also determine on a class-by-class basis to make this price check parameter available for market and marketable limit stock-option orders. In addition, the Exchange has a price protection feature that it refers to as the ''buy-buy (sell-sell) strategy'' price check parameter under Rule 6.13.04(d). Under this parameter, the system will not automatically execute a limit order where (i) all the components of the strategy are to buy and the order is priced at zero, any net credit price, or a net debit price that is less than the number of individual option series legs in the strategy (or applicable ratio) multiplied by the applicable minimum net price increment for the complex order; or (ii) all the components of the strategy are to sell and the order is priced at zero, any net debit price, or a net credit price that is less than the number of individual option series legs in the strategy (or applicable ratio) multiplied by the applicable minimum net price increment for the complex order. Such complex orders under this price check parameter are rejected.[23] In classes where this price check parameter is available, the Exchange is also proposing to make it available for stock-option orders. In such instances, the minimum net price increment calculation noted above would only apply to the individual option series legs.[24]

The Exchange believes that the application of these price protection features will assist with the maintenance of fair and orderly markets by helping to mitigate the potential risks associated with stock-option orders drilling through multiple price points (thereby resulting in executions at prices that are extreme and potentially erroneous) and with stock-option orders entered at net limit prices that are inconsistent with the particular ''buy-buy'' or ''sell-sell'' strategy (thereby resulting in execution at prices that are extreme and potentially erroneous). Rather than automatically executing or booking orders at extreme and potentially erroneous prices, the Exchange would cancel orders that are not within the price check parameters so that the orders can be further evaluated.

Finally, the Exchange is proposing to extend the application of its ''re-COA'' feature to stock-option orders. Under this feature, to the extent any non-marketable order resting at the top of the COB is priced within the acceptable tick distance of the derived net market, the full order would be subject to COA (and the processing describe above) (referred to herein as a ''re-COA'').[25] The Exchange notes that this re-COA feature for resting orders would only be applicable to resting non-marketable stock-option orders that move close to the derived net market. This feature is not applicable to resting stock-option orders that become marketable with other stock-option orders. The Exchange may also determine on a class-by-class and strategy basis to limit the frequency of re-COA auctions initiated for stock-option orders resting in COB. For example, the Exchange might determine to limit the frequency of re-COA auctions to once every ''X'' seconds (the ''interval timer'') for a total of ''Y'' intervals. Once this cycle is complete, the Exchange may determine to wait for a period of time ''Z'' (the ''sleep timer'') and then reactivate the re-COA feature.[26] All timers would be reset if a new stock-option order improves the top of the COB (*i.e.,* improves the best net price bid or offer of the stock-option orders resting in COB). These limitations on the frequency of COA auctions due to the re-COA feature are intended to address system efficiency and effectiveness considerations, such as limiting repeated initiations of COA auctions (and related messaging) when there are flickering quotes. Once the re-COA feature is initiated for a resting order, all other aspects of the COA process described in Rule 6.13 would apply unchanged. The Exchange

[20] AIM, SAM and CTC are mechanisms that may be used to cross two paired orders. COA is a mechanism that may be used to expose an unpaired complex order for price improvement. Orders submitted for COA, AIM or SAM processing are exposed for price improvement through an auction (and thus other market participants may submit responses), whereas orders submitted for CTC processing are executed immediately without exposure.

[21] In conjunction with this rule change, the Exchange is also proposing a change to revise the text of Rule 6.13 in various places to use the phrase ''not be accepted'' to replace various references ''rejected.'' This change is non-substantive and is just intended to provide consistency in the wording of the text. *See* proposed changes to Rule 6.13.04(c) and (d).

[22] The ''acceptable price range'' is determined by the Exchange on a class-by-class basis (and announced via Regulatory Circular) on a series by series basis for each series comprising a complex order. *See also* SR–C2–2012–003 (wherein the Exchange is proposing, among other things, to expand the application of this price check parameter to include marketable limit orders (currently the rule text only addresses market complex orders) and to correct a typographical error by changing the minimum acceptable price range specified in the rule text for orders in option series where the bid is less than $2 from $0.37 to $0.375.

[23] The Exchange notes that it is proposing to amend the text to use the phrase ''not be accepted'' to replace the reference to ''rejected.'' *See* note 21, *supra.*

[24] *See* proposed changes to Rule 6.13(d).

[25] This feature will apply regardless of whether the stock-option order was subject to COA before it was booked in COB. *See* note 17, *supra.*

[26] Determinations by the Exchange regarding the classes where the re-COA feature is activated and related tick distance and frequency parameters will be announced via Regulatory Circular.

believes this re-COA feature facilitates the orderly execution of stock-option orders by providing an automated opportunity for price improvement to (and execution of) resting orders priced near the current market, similar to what a PH might seek to do if the PH were representing a stock-option order in open outcry on another exchange (or just entering an order initially into COB).

The following example illustrates the operation of this proposed system functionality:

Example 5: Assume that the acceptable tick distance to re-COA is 2 ticks ($0.02). Also assume the frequency for the re-COA feature is limited to once every 15 seconds (the interval timer) for 1 interval. Under this setting, only 1 re-COA auction could be triggered—the original re-COA auction.[27] No further auctions would be triggered until the sleep timer expires, and only then if a quote update which is received AFTER the sleep timer expires would result in the order being within 2 ticks of the derived net market. Assume the sleep timer is set at 60 minutes. Assume the current derived net market is $8.85–$9.15. If a stock-option order resting in the COB is priced at a net credit price of $8.88, the stock-option order is not marketable and is priced inside the derived net market by 3 ticks. If subsequently the individual leg prices are updated such that the current derived net market for the strategy moves to a net price of $8.86–$9.14, the resting order priced at a net credit price of $8.88 would trigger the re-COA feature and initiate the re-COA auction process (as the order is now priced within 2 ticks of the derived net market). If there are no responses, the order would be placed back in COB. The resting order would not initiate the re-COA feature again until the 60-minute sleep timer has expired, and then only if a quote update received AFTER the 60-minute sleep timer expires would result in the order being within 2 ticks of the derived net market.

If the number of attempts was set to a value greater than 1 (assume 2 for the below discussion), then when the 15-second interval timer expires, the order would be eligible to initiate the re-COA feature again if the current market moves after the expiration of the timer and the order meets the tick distance parameter (the order would not automatically initiate the re-COA feature after the expiration of the interval timer; instead there must be an update to the current market after the expiration of the interval timer and the order must meet the tick distance parameter for the system to re-COA again). For example, if after the end of the 15-second interval timer the derived net market moves to $8.87–$9.13 (or, for example, if the derived market moves back to $8.85–$9.15 and then, after the end of the 15-second interval timer moves back again to $8.86–$9.14), then the resting complex order would again initiate the re-COA feature. If there are no responses, the order would be placed back in COB. The cycle is complete. Now that the resting order has been subject to COA 2 times since it was booked in COB, the 60-minute sleep timer will begin and the resting order will not be eligible for the re-COA feature again until the sleep timer expires and there is a quote update after that timer expires that is within the tick distance parameter. All timers would be reset anytime there is a price change at the top of the COB. For example, if five minutes into the sleep interval a second stock-option order is entered to rest in COB at a price of $8.87 ($0.01 better than the original resting order priced at $8.88), the original resting order would no longer be at the top of the COB and subject to the re-COA feature. The timers would reset and the second complex order (which now represents the top of the COB) would be subject to the re-COA process. If, for example, the second order subsequently trades (constituting a price change at the top of the COB), the original order would be at the top of the COB again and could become subject to the re-COA feature again.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act[28] in general and furthers the objectives of Section 6(b)(5) of the Act[29] in particular in that it should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. The Exchange believes the proposed rule change will assist in the electronic processing of stock-option orders by providing an efficient mechanism for carrying out these strategies in the Exchange's electronic trading environment. The Exchange also believes the proposed stock-option related price check parameters will enhance the functionality and assist with the maintenance of fair and orderly markets by helping to mitigate the potential risks associated with an order drilling through multiple price points (thereby resulting in execution at prices that are extreme and potentially erroneous) and an order trading at prices that are inconsistent with particular stock-option strategies (thereby resulting in executions at prices that are extreme and potentially erroneous).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

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.

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–C2–2012–004 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–C2–2012–004. 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

[27] In a prior rule change filing, the Exchange provided an example indicating that if the setting for the interval timer was once every 15 seconds for 1 interval, then a total of 2 re-COA auctions would occur during the interval—the original re-COA auction and a second re-COA auction after the expiration of the 15-second interval timer. *See* Securities Exchange Act Release No. 65938 (December 12, 2011), 76 FR 78706 (December 19, 2011) (SR–C2–2011–039). However, the Exchange notes that only one re-COA auction will occur under these settings. Therefore, Example 5 above is intended to update the previous example and provide a more detailed illustration of the interval timer.

[28] 15 U.S.C. 78f(b).

[29] 15 U.S.C. 78f(b)(5).

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 20549–1090, 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 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–C2–2012–004, and should be submitted on or before March 13, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3901 Filed 2–17–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66394; File No. SR–CBOE–2012–005]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change Related to Stock-Option Processing

February 14, 2012.

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 February 7, 2012, 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. 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 the Substance of the Proposed Rule Change

The Exchange is proposing to amend its complex order processing rules to revise the procedures for electronically processing stock-option orders. The text of the rule proposal 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 the 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to revise is [sic] procedures for electronically processing stock-option orders under Rule 6.53C in order to (i) revise the procedures for routing the stock leg of a stock-option order; (ii) modify the procedure for executing for [sic] stock-option orders to no longer permit ''legging,'' except in one limited context; (iii) modify the default electronic allocation algorithm applicable for stock-option orders in the complex order book (''COB'') and the complex order RFR auction (''COA'');[3] (iv) incorporate an additional price check parameter specific to the electronic processing of stock-option orders and modify an existing price check parameter and re-COA features (described in more detail below) to apply to stock-option orders; and (v) make other changes to reorganize and simplify the rule text. In addition, the Exchange is proposing certain changes to simplify the definitions for complex orders, including stock-option orders, subject to electronic processing under Rule 6.53C.

Designated Broker-Dealer(s)

The first purpose of this proposed rule change is to revise the procedures for routing the stock leg of a stock-option order. Interpretation and Policy .06 to Rule 6.53C, *Complex Orders on the Hybrid System,* currently describes the procedure for processing electronic stock-option orders. The procedure provides that the stock portion of a stock-option order shall be electronically executed on the CBOE Stock Exchange, LLC (''CBSX,'' CBOE's stock execution facility) consistent with CBSX order execution rules. The Exchange proposes to revise the process to instead provide that the Exchange will electronically transmit orders related to a stock leg for execution by a broker-dealer designated by the Exchange (a ''designated broker-dealer'') on behalf of the parties to the trade. The Exchange will transmit the underlying stock leg order to a designated broker-dealer for execution once the Exchange trading system determines that a stock-option order trade is possible and at what net prices. The stock leg component will be transmitted to the designated broker-dealer as two paired orders with a designated limit price, subject to one limited exception pertaining to the stock leg of an unmatched market stock-option order (which is described in more detail below). The designated broker-dealer will act as agent for the stock leg of the stock-option orders. The designated broker-dealer may determine to match the orders on an exchange or ''over-the-counter.''

To participate in this automated process for stock-option orders, an Exchange Trading Permit Holder (''TPH'') must enter into a customer agreement with one or more designated broker-dealers that are not affiliated with the Exchange.[4] In addition, TPHs may only submit complex orders with a stock component if such orders comply with the Qualified Contingent Trade Exemption (the ''QCT Exemption'') from Rule 611(a) of Regulation NMS.[5] TPHs submitting such complex orders represent that such orders comply with the QCT Exemption. The Exchange intends to address fees related to routing

[30] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] COA is a process for auctioning eligible complex orders, including stock-option orders, for price improvement. *See* Rule 6.53C(d) and .06(d).

[4] This provision for a designated broker-dealer is similar to a provision in the International Securities Exchange Rule 722.02, except that CBOE's proposed provision makes it clear the broker-dealer(s) that are designated by the Exchange to perform this function are not affiliated with CBOE.

[5] 17 CFR 242.611(a).

the stock portion of stock-option trades in a separate rule change filing.

The Exchange believes that the electronic communication of the orders by the Exchange to the designated broker-dealer is a more efficient means for processing stock-option orders than the system of routing orders to CBSX. The designated broker-dealer will be responsible for the proper execution, trade reporting and submission to clearing of the stock trade that is part of a stock option order. In this regard, once the orders are communicated to the broker-dealer for execution, the broker-dealer has complete responsibility for determining whether the orders may be executed in accordance with all the rules applicable to execution of equity orders, including compliance with the applicable short sale, trade-through and trade reporting rules. As with the current procedure, if the broker-dealer cannot execute the equity orders at the designated price, the stock-option combination order will not be executed on the Exchange.[6]

With respect to trade throughs in particular, the Exchange believes that the stock component of a stock-option order is eligible for the QCT Exemption from Rule 611(a) of Regulation NMS. A Qualified Contingent Trade (''QCT'') is a transaction consisting of two or more component orders, executed as agent or principal, that satisfy the six elements in the Commission's order exempting QCTs from the requirements of Rule 611(a), which requires trading centers to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs.[7] The Exchange believes that the stock portion of a complex order under this proposal complies with all six requirements.[8] Moreover, as explained below, CBOE's Hybrid System will validate compliance with each requirement such that any matched order received by a designated broker-dealer under this proposal has been checked for compliance with the exemption to the extent noted below:

(1) At least one component order is in an NMS stock: The stock component must be an NMS stock, which is validated by the Hybrid System;

(2) All components are effected with a product or price contingency that either has been agreed to by the respective counterparties or arranged for by a broker-dealer as principal or agent: A complex order, by definition, is executed at a single net credit/debit price and this price contingency applies to all the components of the order, such that the stock price computed and sent to the designated broker-dealer allows the stock order to be executed at the proper net debit/credit price based on the execution price of each of the option legs, which is determined by the Hybrid System;

(3) The execution of one component is contingent upon the execution of all other components at or near the same time: Once a stock-option is accepted and validated by the Hybrid System, the entire package is processed as a single transaction and each of the option leg(s) and stock components are simultaneously processed;

(4) The specific relationship between the component orders (*e.g.,* the spread between the prices of the component orders) is determined at the time the contingent order is placed: Stock-option orders, upon entry, must have a size for each component and a net debit/credit price (or market price), which the Hybrid System validates and processes to determine the ratio between the components; an order is rejected if the net debit/credit price (or market price) and size are not provided on the order;

(5) The component orders bear a derivative relationship to one another, represent different classes of shares of the same issuer, or involve the securities of participants in mergers or with intentions to merge that have been announced or since cancelled: Under this proposal, the stock component must be the underlying security respecting the option leg(s), which is validated by the Hybrid System; and

(6) The transaction is fully hedged (without regard to any prior existing position) as a result of the other components of the contingent trade: Under this proposal and as discussed in more detail below, the ratio between the options and stock must be a conforming ratio (*e.g.,* largest option leg to stock cannot exceed a ratio of eight-to-one and multiple options legs cannot exceed a ratio of three-to-one), which the Hybrid System validates, and which under reasonable risk valuation methodologies, means that the stock position is fully hedged. In addition, if all option and stock component legs are on the same side of the market, which the Hybrid System also validates, then the order will not be eligible for electronic processing pursuant to Rule 6.53C.

Furthermore, as noted above, proposed Rule 6.53C.06(a) provides that TPHs may only submit complex orders with a stock component if such orders comply with the QCT Exemption. TPHs submitting such complex orders with a stock component represent that such orders comply with the QCT Exemption. Thus, the Exchange believes that complex orders consisting of a stock component will comply with the exemption and that the Hybrid System will validate such compliance as noted above to assist its designated routing broker(s) in carrying out its responsibilities as agent for these orders.

The Exchange believes the new process offers effective and efficient automatic execution for both the options and stock components of a stock-option order and it should promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system by enhancing the electronic processing of the stock-option orders. However, this process is not exclusive. The Exchange notes that TPHs will be able to continue using open outcry procedures for executing stock-option orders if they choose to do so.[9] TPHs can also utilize other exchanges' systems (several of which offer stock-option processing) or avoid using stock-option orders.

Legging

In conjunction with this change, the second purpose of this proposed rule change is to revise the stock-option procedure to provide that ''legging'' against the individual orders and quotes in the CBOE and CBSX electronic books (''EBooks'') will no longer occur for stock-option orders,[10] except that that legging may occur in the limited instance provided in Rule 6.53C.06(d) for eligible market orders that have been subject to a COA (which market order

[6] *See* existing Rule 6.53C.01(a) and proposed changes thereto.

[7] *See* Securities Exchange Act Release No. 57620 (April 4, 2008), 73 FR 19271 (April 9, 2008) (''QCT Release''); *see also* Securities Exchange Act Release No. 54389 (August 31, 2006), 71 FR 52829 (September 7, 2006).

[8] As discussed in more detail below, the stock component of all stock-option orders will be transmitted to a designated routing broker as paired stock orders with a specified limit price, with one limited exception. The exception pertains to the stock leg of an unmatched market stock-option order. In the limited circumstances when the Exchange transmits the stock component leg of an unmatched market stock-option order to the designed [sic] routing broker, such a stock component leg will be subject to NBBO pricing (and therefore not be processed subject to the QCT Exemption).

[9] Stock-option orders may be represented in open outcry by floor brokers or Exchange PAR Officials. *See, e.g.,* Rules 6.45A(b) and 6.45B(b).

[10] Currently under Rule 6.53C complex orders, including stock-option orders, are eligible to trade with other complex orders or by ''legging'' with the individual orders and quotes residing in the EBook for the individual component legs provided the complex order can be executed in full (or in a permissible ratio) by the orders and quotes in the EBook in those individual component legs. In the case of stock-option orders that are ''legged,'' the stock leg would trade with CBSX's EBook and the option series leg(s) with the CBOE EBook.

process is proposed to be revised as described below).[11] The Exchange believes that limiting the electronic trading of stock-option orders pursuant to Rule 6.53C to executions against other stock-option orders in the manner proposed will provide for more efficient execution and processing of stock-option orders and will assist with the maintenance of fair and orderly markets by helping to mitigate the potential risks associated with legging stock-option orders, including the risk of one leg of the stock-option order going unexecuted (and thereby not achieving a complete stock-option order execution and having a partial position that is unhedged).[12]

A limited exception will continue to apply for certain market stock-option orders, with certain modifications. Currently, under Rule 6.53C.06(d), if at the conclusion of a COA a stock-option order that is an eligible market order[13] cannot be filled in whole or in a permissible ratio, then any remaining balance of the option leg(s) routes to the CBOE Hybrid Trading System for processing as a simple market order(s) consistent with CBOE's order execution rules and any remaining balance of the stock leg routes to CBSX for processing as a simple market order consistent with CBSX's order execution rules.[14] This alternate legging functionality is intended to assist in the automatic execution and processing of stock-option orders that are market orders. The Exchange notes that when a stock-option order is legged in this manner, it is possible for CBOE to route the option leg(s) to another options exchange and/or for CBSX to route the stock leg to another stock exchange, consistent with their respective rules.[15] As proposed to be revised, the Exchange may determine to continue to make this ''legging'' functionality available for stock-option orders that are eligible market orders. The legging functionality will continue to operate in the same manner, with the exception that the stock leg will no longer route to CBSX and an order eligibility provision will be eliminated from the rule.[16] Instead, the Exchange will electronically transmit the stock leg to a designated broker-dealer, who will represent the order on behalf of the party that submitted the stock-option order.

This legging functionality is intended to assist in the automatic execution and processing of stock-option orders that are market orders. The Exchange believes the order eligibility parameters provide the Exchange with the flexibility to assist with the maintenance of orderly markets by helping to mitigate the potential risks associated with legging stock option orders, *e.g.,* the risk of a [sic] order drilling through multiple price points on another exchange (thereby resulting in execution at prices that are away from the NBBO and potentially erroneous), and/or the risk of one leg of the stock-option order going unexecuted (thereby not achieving a complete stock-option order execution and having a partial position that is unhedged).

Allocation Algorithms

The third purpose of this proposed rule change is to modify the default electronic allocation algorithm applicable for stock-option orders in COB and COA. With respect to COB, Interpretation and Policy .06(b), (c) and (f), taken together, currently provide that stock-option orders submitted to COB will trade in the following sequence: (i) Public customer orders resting in the EBook in each of the individual options leg(s) of a stock-option order have first priority; (ii) stock-option orders resting in COB have second priority, with public customer priority and then time priority; and (iii) individual orders and quotes resting in the EBook in each of the individual options leg(s) have third priority provided the order can be executed in full or in a permissible ratio. Because the Exchange is proposing to no longer permit ''legging'' of orders in COB against the individual orders and quotes in the component legs, the Exchange is proposing to the [sic] amend the algorithm with respect to COB to provide that stock-option orders that are marketable against each other will automatically execute. In the event there are multiple stock-option orders at the same price, they will be allocated pursuant to the rules of trading priority otherwise applicable to incoming electronic orders in the individual series legs (or such other allocation algorithm as the Exchange may designate pursuant to Rule 6.53C.09).[17]

As a condition for a stock-option order to execute against another stock-option order in COB, the execution must be at a net price where the individual options series leg(s) of the stock-option order has priority over the individual orders and quotes residing in the CBOE EBook (the ''EBook Priority Condition''). To satisfy the EBook Priority Condition, the individual option series leg(s) of a stock-option order (i) must not trade inferior to CBOE's best bid (offer) in the individual component series, and (ii) must not trade at CBOE's best bid (offer) in the individual component series if one or more public customer orders are resting at the best bid (offer) in each of the component series and the stock-option order could otherwise be executed in full (or in a permissible ratio).

Again, because there will be no legging, the Exchange is also proposing to amend the algorithm with respect to COA. Interpretation and Policy .06(b), (d) and (f), taken together, currently provide that stock-option orders submitted to COA will trade in the following sequence: (i) Public customer orders resting in the EBook in each of the individual options leg(s) of a stock-option order have first priority; (ii) public customer stock-option orders resting in COB before, or that are received during, the COA Response

[11] The Exchange notes that at least one other options exchange that offers electronic complex order processing does not ''leg'' stock-option orders. *See, e.g.,* NASDAQ OMX PHLX LLC (''Phlx'') Rule 1080.08(f)(iii)(A)(1).

[12] That is not to say that the Exchange would not determine to permit additional ''legging'' of stock-option orders under Rule 6.53C in the future. Any such change to the electronic processing of stock-option orders under Rule 6.53C would be subject to a separate rule change filing.

[13] For purposes of this legging functionality, an ''eligible market order'' means a stock-option order that is within the designated size and order type parameters, determined by the Exchange on a class-by-class basis, and for which the national best bid or offer (''NBBO'') is within designated size and price parameters, as determined by the Exchange for the individual leg. The rule currently provides that the designated NBBO price parameters will be determined based on a minimum bid price for sell orders and a maximum offer price for buy orders. The Exchange may also determine to limit the trading times within regular trading hours that the legging functionality will be available. *See* Rule 6.53C.06(d). Pursuant to Rule 6.53C.01, any determination by the Exchange on these parameters will be announced to TPHs via Regulatory Circular.

[14] Pursuant to Rule 6.53C.01, any determination by the Exchange to route stock-option market orders in this manner will be announced to TPHs via Regulatory Circular.

[15] *See, e.g.,* CBOE's Rules 6.14A, *Hybrid Agency Liaison 2 (HAL2),* and 6.14B, *Order Routing to Other Exchanges,* and CBSX's Rule 52.6, *Processing of Round-lot Orders.*

[16] *See* note 13, *supra,* for a description of ''eligible market orders.'' The Exchange is proposing to eliminate an eligible market order provision that permits the Exchange to specify a designated NBBO price parameter based on a maximum offer price for buy orders. The Exchange has no intention of utilizing this parameter feature and is therefore proposing to delete it from the rules at this time. (By contrast, the Exchange will maintain a provision that permits the Exchange to specify a designated NBBO price parameter based on a minimum bid price for sell orders.) *See* proposed changes to Rule 6.53C.06(d).

[17] The allocation algorithms for the individual series legs include price-time, pro-rata, and the ultimate matching algorithm (''UMA'') base priorities and a combination of various optional priority overlays pertaining to public customer priority, Market-Maker participation entitlements, small order preference, and market turner. *See* Rules 6.45A, *Priority and Allocation of Equity Option Trades on the CBOE Hybrid System,* and 6.45B, *Priority and Allocation of Trades in Index Options and Options on ETFs on the CBOE Hybrid System.*

Time Interval[18] and public customer responses collectively have second priority, with multiple orders ranked by time priority; (iii) non-public customer stock-option orders resting in the COB before the COA Response Time Interval have third priority, with multiple orders subject to the UMA allocation algorithm described in Rule 6.45A or 6.45B, as applicable; (iv) non-public customer stock-option orders resting in COB that are received during the Response Time Interval and non-public customer responses collectively have fourth priority, with multiple orders subject to the Capped UMA (''CUMA'') allocation described in Rule 6.45A or 6.45B, as applicable; and (iv) all other individual orders and quotes residing in the EBook have fifth priority, with multiple interest subject to the UMA allocation algorithm described in Rule 6.45A or 6.45B, as applicable. Because the Exchange is proposing to no longer permit ''legging'' of orders in COA against the individual orders and quotes in the component legs (except in the limited instance involving market orders described above), items (i) and (vi) above will no longer be applicable. Instead, the Exchange is proposing to amend the algorithm with respect to COA to provide that, in the event there are multiple stock-option orders at the same price, they will trade in the following sequence: (i) Public customer stock-option orders resting in COB before, or that are received during, the COA Response Time Interval and public customer responses collectively have first priority, with multiple orders ranked by time priority; (ii) non-public customer stock-option orders resting in the COB before the COA Response Time Interval have second priority, with multiple orders subject to the UMA allocation algorithm described in Rule 6.45A or 6.45B, as applicable; and (iii) non-public customer stock-option orders resting in COB that are received during the Response Time Interval and non-public customer responses collectively have third priority, with multiple orders subject to the CUMA allocation described in Rule 6.45A or 6.45B, as applicable.

As with COB, as a condition for a stock-option order to execute against another stock-option order through COA, the execution must satisfy the EBook Priority Condition described above.

The system also has some features that would apply to the extent that a stock-option order is or becomes marketable. First, to the extent that a marketable stock-option order cannot automatically execute in full (or in a permissible ratio) when it is routed to COB or after being subject to COA because there are individual orders and quotes residing in the EBook that have priority (but the order resting in COB would not trade against them because there will be no ''legging''), any part of the order that may be executed would be executed automatically and the part that cannot automatically execute would be routed on a class-by-class basis to PAR or, at the order entry firm's discretion, to the order entry firm's booth. If an order is not eligible to route to PAR, then the remaining balance would be cancelled. Second, to the extent that a stock-option order resting in COB becomes marketable against the derived net market (and cannot automatically execute because there is no ''legging''), the full order would be subject to COA (and the processing described above). For purposes of this feature, the ''derived net market'' for a given stock-option strategy would be calculated using the Exchange's best bid or offer in the individual option series leg(s) and the NBBO in the stock leg. The Exchange notes this feature would only be applicable to resting stock-option orders that become marketable against the derived net market. This feature would not be applicable to resting stock-option [sic] that would become marketable with other stock-option orders. Having the system automatically initiate a COA once such a stock-option order resting in COB becomes marketable against the derived net market provides an opportunity for other market participants to match or improve the net price and allows for an opportunity for an automatic execution before a marketable stock-option order is routed for manual handling to PAR or a booth.[19] As noted above, after being subject to COA, any part of the order that may be executed would be executed automatically and the part of the order that cannot automatically execute would be routed on a class-by-class basis to PAR or, at the order entry firm's discretion, to the order entry firm's booth. If an order is not eligible to route to PAR, then the remaining balance would be cancelled.

The following examples illustrate the operation of the proposed system functionality:

Example 1: Assume an incoming market stock-option order for 75 units is submitted to COA, where the strategy involves the sale of 75 call contracts and purchase of 7,500 stock shares. At the conclusion of COA, assume the best net price response is $9.13 for 50 units and the best derived net market price is 9.15 for 100 units. The incoming market order to purchase 75 units of the stock-option strategy would receive a partial execution of 50 units at a net price of $9.13. Because the remaining 25 units are marketable against individual orders and quotes in the EBook, the 25 units would be routed to PAR or, at the order entry firm's discretion, to the order entry firm's booth, for manual handling. If the order would otherwise route to PAR but is not eligible to route to PAR, then the remaining 25 units will be cancelled.[20]

Example 2: Assume a stock-option order for 75 units is resting in COB, where the strategy involves the sale of 75 call contracts and purchase of 7,500 stock shares at a net debit price of $9.13. By virtue of the fact that it is resting [sic] the COB, the stock-option order is not marketable—meaning there are no orders or quotes within the derived net market price or other stock-option orders within COB against which the resting stock-option order may trade. Assume there are no other stock-option orders representing [sic] in the COB for the strategy and also assume the best derived net market price for the strategy is a net price of $9.15 per unit for 100 units. If the price of the component option series leg or the stock is thereafter updated such that the derived net market price becomes $9.13 per unit for 100 units, then the full size of the resting stock-option order will become marketable but cannot automatically execute. As a result, the full size (75 units) of the resting stock-option order would be subject to COA. At the conclusion of COA, any part of the stock-option order that may be executed against other stock-option orders or auction responses will be automatically executed. Any part of the order that is marketable and cannot automatically execute

[18] The COA ''Responses [sic] Time Interval'' means the period of time during which responses to the RFR may be entered. The Exchange determines the length of the Response Time Interval on a class-by-class basis, however, the duration shall not exceed three (3) seconds. *See* Rule 6.53C(d)(iii)(2).

[19] The Exchange notes that, in these circumstances when a resting stock-option order becomes marketable, COA will automatically initiate regardless of whether a TPH has requested that the stock-option order be COA'd pursuant to Rule 6.53C.04. In this regard, the Exchange notes that, currently, all of its TPHs have elected to have their COA-eligible orders COA'd. In addition, the Exchange notes that other markets have programs in place that provide for the automatic auctioning of complex orders. *See, e.g.,* Phlx Rule 1080(e)(i)(A) which, among other things, provides that a complex order live auction (''COLA'') will initiate if the Phlx system receives a complex order that improves the Phlx complex order best debit or credit price respecting the specific complex order strategy that is the subject of the complex order. During a COLA, Phlx market participants may bid and offer against the COLA-eligible order pursuant to the Phlx Rule.

[20] However, if the Exchange has activated the market stock-option order ''legging'' functionality and the and the [sic] order is eligible, in lieu of routing to PAR or a booth, any remaining balance of the option leg will route to the CBOE Hybrid Trading System for processing as a simple market order and any remaining balance of the stock leg will be electronically transmitted by the Exchange to a designated broker-dealer, who will represent the order on behalf of the party that submitted the stock-option order. *See* note 13, *supra,* and surrounding discussion on Legging.

(because the stock-option order cannot ''leg'' against the derived net market) will be routed on a class-by-class basis to PAR or, at the order entry firm's discretion, to the order entry firm's booth. If an order is not eligible to route to PAR, then the remaining balance will be cancelled. To the extent any part of the stock-option order is not marketable, it will continue resting in COB.

Price Protection and Re-COA Features

The fourth purpose of this proposed rule change is to adopt a new price check parameter applicable to the electronic processing of stock-option orders and to make some modification to an existing price check parameter to address stock-option orders. In particular, the Exchange is proposing to provide that, on a class-by-class basis, the Exchange may determine (and announce to TPHs via Regulatory Circular) to not automatically execute a stock-option order that is marketable if, following COA, the execution would not be within the acceptable derived net market for the strategy that existed at the start of COA. As indicated above, a ''derived net market'' for a strategy will be calculated using the Exchange's best bid or offer in the individual option series leg(s) and the NBBO in the stock leg. An ''acceptable derived net market'' for a strategy will be calculated using the Exchange's best bid or offer in the individual option series leg(s) and the NBBO in the stock leg plus/minus an acceptable tick distance. The ''acceptable tick distance'' will be determined by the Exchange on a class-by-class and premium basis.[21] Such a stock-option order will route on a class-by-class basis to PAR or, at the order entry firm's discretion, to the order entry firm's booth. If an order is not eligible to route to PAR, then the remaining balance will be cancelled. The Exchange believes that users are more concerned about obtaining a net price execution of their stock-option strategy orders than about achieving an execution of the stock leg at the NBBO. The price check parameter, however, would serve to prevent automatic executions at extreme prices beyond the NBBO.

The following example illustrates the operation of the proposed system functionality:

Example 3: Assume that at the start of COA the CBOE best bid and offer for the option leg of a stock-option strategy is $1.00–$1.20 (100 × 100) and the NBBO for the stock leg of the strategy is $10.05–$10.15 (10,000 × 10,000). Thus, the derived net market for the strategy is $8.85–$9.15 (calculated as $1.20–$10.05 and −$1.00 + $10.15, respectively). In addition, assume that the acceptable tick distance for the stock leg is two ticks ($0.02). Under this parameter, an order to sell stock could not execute at a price below $10.03 and an order to buy stock could not execute at a price above $10.17. Thus, the acceptable derived net market for the strategy would be calculated as $8.83–$9.17 (calculated as $1.20–$10.03 and −$1.00 + $10.17, respectively). Under this scenario, following COA, a marketable stock-option order to sell the option series and buy the stock that would trade with another stock-option order at [sic] net debit price of $9.17 (within the acceptable derived net market for the strategy) will be executed. However, a marketable stock-option [sic] to sell the option series and buy the stock that would trade with another stock-option order at a net debit price of $9.18 ($0.01 outside the acceptable derived net market for the strategy) will be routed to PAR or, at the order entry firm's discretion, to the order entry firm's booth. If an order is not eligible to route to PAR, then the remaining balance will be cancelled.

In addition to the foregoing, additional parameters would apply. In classes where these price check parameters are available, they will also be available for COA stock-option responses under Rule 6.53C(d), stock-option orders and responses under Rules 6.74, *Automated Improvement Mechanism (''AIM''),* and 6.74B, *Solicitation Auction Mechanism* (''SAM''), or AIM customer-to-customer immediate cross of stock-option orders under Rule 6.74A.08 (''CTC'').[22] Under these provisions, such paired stock-option orders and responses would not be accepted. In this regard, if any paired stock-option order submitted by an order entry firm for AIM, SAM or CTC processing exceeds the parameters, then both the order that exceeds the parameters and the paired contra-side order would not be accepted regardless of whether the contra-side order exceeds the parameters. However, to the extent that only the paired contra-side order submitted by an order entry firm for AIM or SAM processing would exceed the price check parameter, the paired contra-side order would not be accepted while the original Agency Order would not be accepted or, at the order entry firm's discretion, continue processing as an unpaired stock-option order (*e.g.,* the original Agency Order would route to COB or COA for processing). The proposal also provides that, to the extent a contra-side order or response is marketable, its price will be capped at the price inside the acceptable derived net market.

Example 4: Assume the acceptable derived net market is $1.00–$1.20. Also assume two paired stock-option orders are submitted to an AIM auction. If the original Agency Order to sell the option leg and buy the stock is a market order, but the contra-side order to buy the option leg and sell the stock has a net credit price of $1.25, the AIM auction will not initiate because the contra-side order does not satisfy the price check parameter. Such a contra-side order would not be accepted because it is outside the acceptable net market price range. The paired original Agency Order would either not be accepted along with the contra-side order or, at the order entry firm's discretion, would continue processing as an unpaired complex order. By comparison, if the contra-side order has a net credit price of $0.95, the price will be capped at $1.01.

The Exchange is also proposing to modify its existing ''market width'' parameters under Rule 6.53C.08(a) to extend the application of the individual series leg width parameters to stock-option orders. Under this price check parameter, eligible market complex orders will not be automatically executed if the width between the Exchange's best bid and best offer in any individual series leg is not within an

[21] It should be noted that this is simply a parameter for determining whether a stock-option order will be subject to automatic execution, or routed to PAR, a booth or cancelled. A stock-option order that is subject to automatic execution remains subject to the applicable priority requirements prescribed in Rule 6.53C.

It should also be noted that the Exchange has not proposed to prescribe a minimum acceptable tick distance for this parameter (*e.g.,* the acceptable tick distance may be established at 0). This will provide the Exchange with the flexibility to set the price check feature so that automatic executions of stock-option orders must be within the derived net market, which considers the Exchange's best bid or offer for the options component leg(s) and the NBBO for the stock component leg. The Exchange believes it is reasonable and appropriate to utilize the Exchange best bid and offer in the calculation as the option component leg(s) are not permitted to trade at a price inferior to the Exchange's best bid and offer. The Exchange also believes it is reasonable and appropriate to consider the NBBO for the stock component leg in the calculation as the NBBO should serve as a reasonable proxy for what may be considered a reasonable price for the automatic execution of the stock component leg. However, the Exchange also recognizes that some range outside the NBBO may also be appropriate for determining whether an automatic execution should occur as the QCT Exemption does not require the stock component leg of a qualifying stock-option order to be executed at the NBBO. The proposed parameter therefore provides the Exchange with the flexibility to determine to utilize the NBBO (which equates to an acceptable tick distance of 0) or some range outside the NBBO (which equates to the derived net part plus/minus an acceptable tick distance of 1, 2, 3 or some other number of ticks) for determining whether to automatically execute a stock-option order.

[22] AIM, SAM and CTC are mechanisms that may be used to cross two paired orders. COA is a mechanism that may be used to expose an unpaired complex order for price improvement. Orders submitted for COA, AIM or SAM processing are exposed for price improvement through an auction (and thus other market participants may submit responses), whereas orders submitted for CTC processing are executed immediately without exposure.

acceptable price range.[23] As proposed, the Exchange may also determine on a class-by-class basis to make this price check parameter available for market and marketable limit stock-option orders.

The Exchange believes that the application of these price protection features will assist with the maintenance of fair and orderly markets by helping to mitigate the potential risks associated with stock-option orders drilling through multiple price points (thereby resulting in executions at prices that are extreme and potentially erroneous). Rather than automatically executing or booking orders at extreme and potentially erroneous prices, the Exchange would route orders that are not within the price check parameters to PAR or the order entry firm's booth so that the orders can be further evaluated.

In addition, the Exchange is proposing to extend the application of its ''re-COA'' feature to stock option orders. Under this feature, to the extent any non-marketable order resting at the top of the COB is priced within the acceptable tick distances of the derived net market, the full order would be subject to COA (referred to herein as a ''re-COA'').[24] The Exchange notes that this re-COA feature for resting orders would only be applicable to resting non-marketable stock-option orders that move close to the derived net market. This feature is not applicable to resting stock-option orders that become marketable with other stock-option orders. The Exchange may also determine on a class-by-class and strategy basis to limit the frequency of re-COA auctions initiated for stock-option orders resting in COB. For example, the Exchange might determine to limit the frequency of re-COA auctions to once every ''X'' seconds (the ''interval timer'') for a total of ''Y'' intervals. Once this cycle is complete, the Exchange may determine to wait for a period of time ''Z'' (the ''sleep timer'') and then reactivate the re-COA feature.[25] All timers would be reset if a new stock-option order improves the top of the COB (*i.e.,* improves the best net price bid or offer of the stock-option orders resting in COB). These limitations on the frequency of COA auctions due to the re-COA feature are intended to address system efficiency and effectiveness considerations, such as limiting repeated initiations of COA auctions (and related messaging) when there are flickering quotes. Once the re-COA feature is initiated for a resting order, all other aspects of the COA process described in Rule 6.53C would apply unchanged. The Exchange believes this re-COA feature facilitates the orderly execution of stock-option orders by providing an automated opportunity for price improvement to (and execution of) resting orders priced near the current market, similar to what a TPH might seek to do if the TPH were representing a stock-option order in open outcry (or just entering an order initially into COB).

The following example illustrates the operation of this proposed system functionality:

Example 5: Assume that the acceptable tick distance to re-COA is 2 ticks ($0.02). Also assume the frequency for the re-COA feature is limited to once every 15 seconds (the interval timer) for 1 interval. Under this setting, only 1 re-COA auctions [sic] could be triggered—the original re-COA auction.[26] No further auctions would be triggered until the sleep timer expires, and only then if a quote update which is received AFTER the sleep timer expires would result in the order being within 2 ticks of the derived net market. Assume the sleep timer is set at 60 minutes. Assume the current derived net market is $8.85–$9.15. If a stock-option order resting in the COB is priced at a net credit price of $8.88, the stock-option order is not marketable and is priced inside the derived net market by 3 ticks. If subsequently the individual leg prices are updated such that the current derived net market for the strategy moves to a net price of $8.86–$9.14 the resting order priced at a net credit price of $8.88 would trigger the re-COA feature and initiate the re-COA auction process (as the order is now priced within 2 ticks of the derived net market). If there are no responses, the order would be placed back in COB. The resting order would not initiate the re-COA feature again until the 60-minute sleep timer has expired, and only then if a quote update received AFTER the 60-minute sleep timer expires would result in the order being within 2 ticks of the derived net market.

If the number of attempts was set to a value greater than 1 (assume 2 for the below discussion), when the 15-second interval timer expires, the order would be eligible to initiate the re-COA feature again if the current market moves after the expiration of the timer and the order meets the tick distance parameter (the order would not automatically initiate the re-COA feature after the expiration of the interval timer; instead there must be an update to the current market after the expiration of the interval timer and the order must meet the tick distance parameter for the system to re-COA again). For example, if after the end of the 15-second interval timer the derived net market moves to $8.87–$9.13 (or, for example, if the derived market moves back to $8.85–$9.15 and then, after the end of the 15-second interval timer moves back again to $8.86–$9.14), then the resting complex order would again initiate the re-COA feature. If there are no responses, the order would be placed back in COB. The cycle is complete. Now that the resting order has been subject to COA 2 times since it was booked in COB, the 60-minute sleep timer will begin and the resting order will not be eligible for the re-COA feature again until the sleep timer expires and there is a quote update after that timer expires that is within the tick distance parameter. All timers would be reset anytime there is a price change at the top of the COB. For example, if five minutes into the sleep interval a second stock-option order is entered to rest in COB at a price of $8.87 ($0.01 better than the original resting order priced at $8.88), the original resting order would no longer be at the top of the COB and subject to the re-COA feature. The timers would reset and the second complex order (which now represents the top of the COB) would be subject to the re-COA process. If, for example, the second order subsequently trades (constituting a price change at the top of the COB), the original order would be at the top of the COB again and could become subject to the re-COA feature again.

Other Changes Related to Stock-Option Orders

The fifth purpose of this proposed rule change is to make certain other changes to generally reorganize and simplify the rule text pertaining to stock-option orders. As noted above, the current priority rules for stock-option orders for COB are contained in four locations—paragraphs (b), (c) and (f) of Interpretation and Policy .06 to Rule 6.53C. Similarly, the current priority rules for stock-option orders processed through COA are contained in three locations—paragraphs (b), (d) and (f) of

[23] The ''acceptable price range'' is determined by the Exchange on a class-by-class basis (and announced to TPHs via Regulatory Circular) on a series by series basis for each series comprising a complex order and is currently defined to be no less than 1.5 times the corresponding bid/ask differentials for individual series legs determined by the Exchange pursuant to Rule 8.7(b)(iv). *See also* SR–CBOE–2012–004 (wherein the Exchange is proposing, among other things, to expand the application of this price check parameter to include marketable limit orders (currently the rule text only addresses market complex orders) and to specify particular minimum acceptable price ranges within the rule that are equal to 1.5 times the bid/ask differential requirements that the Exchange had in its rules at the time the price check parameters were adopted and are the same as the acceptable price range parameters set forth in Rule 6.13(b)(v)–(vi)).

[24] This feature will apply regardless of whether the stock-option order was subject to COA before it was booked in COB. *See* note 19, *supra.*

[25] Determinations by the Exchange regarding the classes where the re-COA feature is activated and related tick distance and frequency parameters will be announced to TPHs via Regulatory Circular.

[26] In a prior rule change filing, the Exchange provided an example indicating that if the setting for the interval timer was once every 15 seconds for 1 interval, then a total of 2 re-COA auctions would occur during the interval—the original re-COA auction and a second re-COA auction after the expiration of the 15-second interval timer. See Securities Exchange Act Release No. 65939 (December 12, 2011), 76 FR 78708 (December 19, 2011)(SR–CBOE–2011–119). However, the Exchange notes that only one re-COA auction will occur under these settings. Therefore, Example 5 above is intended to update the previous example and provide a more detailed illustration of the interval timer.

Interpretation and Policy .06 of Rule 6.53C. The Exchange is proposing to eliminate paragraph (e)(which provides that the N-second group timer [27] for executions by market participants against orders in the COB shall not be in effect for stock-option orders) and to combine it with paragraph (c)(which also addresses executions against the COB). The Exchange is proposing to eliminate paragraph (f) (which relates to stock-option orders with more than one option leg) and to simplify and combine it with paragraph (b) (which relates to stock-option orders with one option leg). The Exchange is also proposing various other miscellaneous changes, such as revising the text to consistently use the term ''stock-option order(s)'' with no capitalization and to use the phrase ''not be accepted'' to replace various references to ''rejected.''

Complex Order Definitions

Finally, the sixth purpose of this proposed rule change is to simplify some of the definitions contained within Rule 6.53C. By way of background, for many years, the options exchanges have recognized that strategies involving more than one option series or more than one instrument associated with an underlying security are different from regular buy and sell orders for a single series, and an order to achieve such strategies should be defined separately. As the sophistication of the industry as [sic] grown, so have the strategies, and the options exchanges have regularly added new strategies to the list of defined complex order types. The investing industry, however, creates new, legitimate investment strategies that do not necessarily fit into one of the narrow definitions for complex order types that the exchanges presently use. These order types are often developed for a particular strategy, specific to a particular issue. To attempt to define every individual strategy, and file additional rules to memorialize them, would be a time consuming and extremely onerous process, and would serve only to confuse the investing public. As a result, bona fide transactions to limit risk are not afforded the facility of execution afforded more common complex orders.

Rule 6.53C currently defines at least ten specific complex strategies (including stock-option order strategies). These are the most comprehensive list of complex strategies defined in a rule set, yet they do not cover all of the possibilities of complex orders. To provide for greater flexibility in the design and use of complex strategies, the Exchange proposes to eliminate specific complex order types described in Rule 6.53C, and to adopt generic definitions. Specifically, under the proposed new definitions, first, a complex order will be defined as any order involving the execution of two or more different options series in the same underlying security, for the same account, occurring at or near the same time in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) (or such lower ratio as may be determined by the Exchange on a class-by-class basis) and for the purpose of executing a particular investment strategy. In addition, only those complex orders with no more than the applicable number of legs, as determined by the Exchange on a class-by-class basis, will be eligible for electronic processing.[28] Second, a stock-option order will be defined is as an order to buy or sell a stated number of units of an underlying stock or a security convertible into the underlying stock (''convertible security'') coupled with the purchase or sale of options contract(s) on the opposite side of the market representing either (i) the same number of units of the underlying stock or convertible security, or (ii) the number of units of the underlying stock necessary to create a delta neutral position, but in no case in a ratio greater than eight (8) options contracts per unit of trading of the underlying stock or convertible security established for that series by The Options Clearing Corporation (referred to in the text as the ''Clearing Corporation'') (or such lower ratio as may be determined by the Exchange on a class-by-class basis). Only those stock-option orders with no more than the applicable number of legs, as determined by the Exchange on a class-by-class basis, will be eligible for processing.

The Exchange believes adopting these generic definitions will give investors more flexibility in creating strategies with greater accuracy. Further, these definitions would conform with definitions used in other exchanges' rules [29] and is modeled after the generic definitions approved for use for exemptions from Trade Through Liability by the Options Linkage Authority as described in the ''Plan For The Purpose of Creating And Operation An Intermarket Options Linkage'' (the ''Linkage Plan'') and as provided in Exchange Rules 6.80(4) and 6.81(b)(7).

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act [30] in general and furthers the objectives of Section 6(b)(5) of the Act [31] in particular in that it should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. The Exchange believes the proposed rule change will assist in the electronic processing of stock-option orders by providing a more efficient mechanism for carrying out these strategies. The Exchange also believes the proposed additional stock-option order related price check parameters will enhance the functionality and assist with the maintenance of fair and orderly markets by helping to mitigate the potential risks associated with an order drilling through multiple price points (thereby resulting in execution at prices that are extreme and potentially erroneous). The Exchange believes the additional changes to reorganize and simplify the rule text will make it easier for users to read and understand the electronic processing procedures for stock-option orders. Finally, the Exchange believes adopting generic definitions for complex orders, including stock-option orders, as proposed, is appropriate in that complex orders and stock-option orders are widely recognized and utilized by market participants and are invaluable, both as an investment strategy and a risk management strategy. The proposed change will provide the opportunity for a more efficient mechanism for carrying out these strategies.

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.

[27] The ''N-second group timer'' refers to a timer that the Exchange may establish when market participants (as defined in Rule 6.45A or 6.45B, as applicable) quotes and/or orders interact with orders in the EBook. *See* Rules 6.45A(c), 6.45B(c), 6.53C.03 and proposed changes to Rule 6.53C.06 for additional information on the N-second timer group.

[28] Currently the rule limits the number of legs to four. *See* existing Rule 6.53C(b)(iii). This limitation is proposed to be removed. In addition, a duplicative reference to the one-to-three ratio for complex orders in Rule 6.53C(b)(iii) is proposed to be removed as the applicable ratio will now be included within the proposed definitions contained in proposed Rule 6.53C(a)(1).

[29] *See, e.g.,* International Securities Exchange Rule 722(a).

[30] 15 U.S.C. 78f(b).

[31] 15 U.S.C. 78f(b)(5).

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.

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–2012–005 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–2012–005. 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 20549–1090, 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 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–2012–005, and should be submitted on or before March 13, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–3902 Filed 2–17–12; 8:45 am]

BILLING CODE 8011–01–P

[32] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 7762]

Advisory Committee International Postal and Delivery Services

AGENCY: Department of State.

ACTION: Notice; FACA Committee meeting announcement.

SUMMARY: As required by the Federal Advisory Committee Act, Public Law 92–463, the Department of State gives notice of a meeting of the Advisory Committee on International Postal and Delivery Services. This Committee has been formed in fulfillment of the provisions of the 2006 Postal Accountability and Enhancement Act (Pub. L. 109–435) and in accordance with the Federal Advisory Committee Act.

Date and Time: The meeting will be held on Tuesday, March 20, 2012, from 1 to 5 p.m.

Location: The American Institute of Architects, 1735 New York Ave. NW., Washington, DC 20006.

Public input: Any member of the public interested in providing public input to the meeting should contact Mr. Matthew Hillsberg, whose contact information is listed under **FOR FURTHER INFORMATION CONTACT** section of this notice. Each individual providing oral input is requested to limit his or her comments to five minutes. Requests to be added to the speaker list must be received in writing (letter, email or fax) prior to the close of business on March 13, 2012; written comments from members of the public for distribution at this meeting must reach Mr. Hillsberg by letter, email or fax by this same date. A member of the public requesting reasonable accommodation should make the request to Mr. Hillsberg by that same date.

Meeting agenda: The agenda of the meeting will include a review of the results of the November 2011 UPU Council of Administration and the February–March 2012 joint session of the UPU Postal Operations Council and Council of Administration, issues and proposals related to the 2012 UPU Congress, and other subjects related to international postal and delivery services of interest to Advisory Committee members and the public.

For further information, please contact Mr. Matthew Hillsberg of the Office of Global Systems (IO/GS), Bureau of International Organization Affairs, U.S. Department of State, at (202) 736–7039 or by email at *HillsbergM@state.gov*.

Dated: February 14, 2012.

Patricia Lacina,

Director, Office of Global Systems, Bureau of International Organization Affairs, Department of State.

[FR Doc. 2012–3968 Filed 2–17–12; 8:45 am]

BILLING CODE 4710–19–P

DEPARTMENT OF STATE

[Public Notice: 7803]

30–Day Notice of Proposed Information Collection: Gender Assessment Surveys, OMB Control Number 1405-xxxx

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Gender Assessment Surveys.
- *OMB Control Number:* None.
- *Type of Request:* New Collection.
- *Originating Office:* Bureau of Educational and Cultural Affairs, Office of Policy and Evaluation, Evaluation Division (ECA/P/V).
- *Form Number:* SV2011–0027 (FORTUNE Survey); SV2011–0028

(American Fellows Program Survey); SV2011–0029 (Institute for Representative Government (IRG) Survey); SV2011–0030 (International Leaders in Education Program Survey).

• *Respondents:* Fortune/U.S. State Department Global Women's Mentoring Partnership Program participants from 2006 through 2010, International Leaders in Education Program (ILEP) participants from 2006 through 2010, Institute for Representative Government (IRG) participants from 2003 through 2010, and American Fellows Program participants from 2006–2010.

• *Estimated Number of Respondents:* 778 annually (146–Fortune; 257–ILEP; 200–IRG, 175–Fellows).

• *Estimated Number of Responses:* 778 annually (146–Fortune; 257–ILEP; 200–IRG, 175–Fellows).

• *Average Hours per Response:* 31 minutes (35–Fortune; 35–ILEP; 20–IRG; 35–Fellows).

• *Total Estimated Burden:* 404 hours annually (85–Fortune; 150–ILEP; 67–IRG; 102–Fellows).

• *Frequency:* One time.

• *Obligation to Respond:* Voluntary.

DATES: Submit comments to the Office of Management and Budget (OMB) for up to 30 days from February 21, 2012.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

• *Email: oira_submission@omb.eop.gov*. You must include the DS form number, information collection title, and OMB control number in the subject line of your message.

• *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the proposed information collection and supporting documents from Michelle Hale, ECA/P/V, SA–5, C2 Floor, Department of State, Washington, DC 20522–0505, who may be reached on 202–632–6312 or at *HaleMJ2@state.gov*.

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary to properly perform our functions.

• Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond.

Abstract of Proposed Collection

To meet OMB and Congressional reporting requirements, this request for a new information collection clearance will allow ECA/P/V, as part of the Gender Assessment Evaluation, to conduct surveys of exchange participants in the Fortune, ILEP, IRG, and American Fellows Program between the years of 2003 and 2010. Collecting this data will help ECA/P/V assess and measure the similar and different impacts the programs had on men and women participants.

Methodology

Evaluation data will be collected via Survey Gizmo, an on-line surveying tool. It is anticipated that a very limited number of participants may receive a hard copy of the surveys.

Dated: February 2, 2012.

Matt Lussenhop,

Director of the Office of Policy and Evaluation, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2012–3966 Filed 2–17–12; 8:45 am]

BILLING CODE 4710–05–P

SUSQUEHANNA RIVER BASIN COMMISSION

Public Hearing; Correction

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice; correction.

SUMMARY: The Susquehanna River Basin Commission published a document in the **Federal Register** of January 23, 2012, concerning a public hearing to be held on February 16, 2012, in Harrisburg, Pennsylvania. The document contained an incorrect location for one of the projects listed in the Supplementary Information section of such notice.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, telephone: (717) 238–0423, ext. 306; fax: (717) 238–2436; email: *rcairo@srbc.net* or Stephanie L. Richardson, Secretary to the Commission, telephone: (717) 238–0423, ext. 304; fax: (717) 238–2436; email: *srichardson@srbc.net*. Information concerning the applications for these projects is available at the SRBC Water Resource Portal at *www.srbc.net/wrp*. Materials and supporting documents are available to inspect and copy in accordance with the Commission's Access to Records Policy at *www.srbc.net/pubinfo/docs/2009–02%20Access%20to%20Records%20Policy%209–10–09.PDF*.

Correction

In the **Federal Register** of January 23, 2012, in FR Doc. 77–14, on page 3323, in the second column, correct project no. 34 to read:

34. Project Sponsor and Facility: Water Treatment Solutions, LLC (South Mountain Lake), Woodward Township, Lycoming County, Pa. Application for surface water withdrawal of up to 0.499 mgd (peak day).

Authority: Pub. L. 91–575, 84 Stat. 1509 et seq., 18 CFR parts 806–808.

Dated: February 14, 2012.

Thomas W. Beauduy,

Deputy Executive Director.

[FR Doc. 2012–3890 Filed 2–17–12; 8:45 am]

BILLING CODE 7040–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Generalized System of Preferences (GSP): Notice Regarding the 2011 GSP Annual Product Review

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: This notice announces which petitions submitted in connection with the 2011 GSP Annual Product Review have been accepted for further review. In addition, twelve cotton products will be reviewed for possible designation as eligible for GSP benefits for least-developed country beneficiaries of the GSP program. This notice also sets forth the schedule for submitting comments and for public hearings associated with the review of these petitions and products.

FOR FURTHER INFORMATION CONTACT: Tameka Cooper, GSP Program, Office of the United States Trade Representative, 600 17th Street NW., Room 422, Washington, DC 20508. The telephone number is (202) 395–6971, the fax number is (202) 395–9674, and the email address is *Tameka_Cooper@ustr.eop.gov*.

DATES: The GSP regulations (15 CFR Part 2007) provide the schedule of dates for conducting an annual review unless otherwise specified in a notice published in the **Federal Register**. The schedule for the 2011 GSP Annual Product Review is set forth below. Notification of any other changes will be published in the **Federal Register**.

March 6, 2012—Due date for submission of comments, pre-hearing briefs and requests to appear at the GSP Subcommittee Public Hearing on the 2011 GSP Annual Product Review.

March 20, 2012—GSP Subcommittee Public Hearing on all proposed or petitioned product additions and CNL waiver petitions accepted for the 2011 GSP Annual Product Review. The hearing will be held in Rooms 1 and 2, 1724 F St. NW., Washington, DC 20508, beginning at 9:30 a.m.

Late March 2012—A U.S. International Trade Commission (USITC) public hearing will be held on the probable economic effect of granting the proposed or petitioned product additions and CNL waiver petitions. (USITC will announce the date, time, and place of this hearing in a separate notice published in the **Federal Register**.)

April 10, 2012—Due date for submission of post-hearing comments or briefs in connection with the GSP Subcommittee Public Hearing.

Late May 2012—The USITC is scheduled to publish a public version of its report providing advice on the probable economic effect of the prospective addition of products and granting of CNL waiver petitions considered as part of 2011 GSP Annual Product Review. Comments on the USITC report on these products will be due 10 calendar days after the date of USITC's publication of the public version of the report.

July 1, 2012: Effective date for any modifications that the President proclaims to the list of articles eligible for duty-free treatment under the GSP resulting from the 2011 Annual Product Review and for determinations related to CNL waivers.

SUPPLEMENTARY INFORMATION: The GSP program provides for the duty-free importation of designated articles when imported from designated beneficiary developing countries. The GSP program is authorized by Title V of the Trade Act of 1974 (19 U.S.C. 2461, et seq.), as amended (the ''1974 Act''), and is implemented in accordance with Executive Order 11888 of November 24, 1975, as modified by subsequent Executive Orders and Presidential Proclamations.

Petitions Requesting Modifications of Product Eligibility

In a notice published in the **Federal Register** on November 1, 2011, USTR announced the initiation of the 2011 GSP Annual Review and indicated that the interagency GSP Subcommittee of the Trade Policy Staff Committee (TPSC) was prepared to receive petitions to modify the list of products that are eligible for duty-free treatment under the GSP program and petitions to waive CNLs on imports of certain products from specific beneficiary countries. On December 7, 2011, USTR announced that the deadline for the filing of such petitions had been extended to December 30, 2011 (76 FR 76477; see also 76 FR 67531).

The GSP Subcommittee of the TPSC has reviewed the product and CNL waiver petitions submitted in response to these announcements, and has decided to accept for review one petition to add a product to the list of those eligible for duty-free treatment under GSP and nine petitions to waive CNLs. Twelve cotton products will also be reviewed for possible designation as eligible for GSP benefits for least-developed country beneficiaries of the GSP program. The cotton products are being considered for GSP eligibility at the initiative of USTR consistent with USTR's December 2011 announcement of trade initiatives intended to enable least-developed countries to benefit more fully from global trade.

A list of all the petitions and products accepted for review is posted on the USTR Web site at *http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp/current-review-4* under the title ''Petitions Accepted in the 2011 GSP Annual Product Review.'' This list can also be found at *www.regulations.gov* in Docket Number USTR–2011–0015. No other petitions to modify the list of products eligible for duty-free treatment under GSP or to grant CNL waivers have been accepted for review. Acceptance of a petition for review does not indicate any opinion with respect to the disposition on the merits of the petition. Acceptance indicates only that the listed petitions have been found eligible for review by the TPSC and that such review will take place.

The GSP Subcommittee of the TPSC invites comments in support of or in opposition to any product or petition that has been accepted for the 2011 GSP Annual Product Review. The GSP Subcommittee of the TPSC will also convene a public hearing on these products and petitions. See below for information on how to submit a request to testify at this hearing.

Requirements for Submissions

Submissions in response to this notice (including requests to testify, written comments, and pre-hearing and post-hearing briefs), with the exception of business confidential submissions, must be submitted electronically by 5 p.m., Tuesday, March 6, 2012, or for post hearing briefs only by 5 p.m., Tuesday, April 10, 2012 using *www.regulations.gov,* docket number USTR–2011–0015. Instructions for submitting business confidential versions are provided below. Hand-delivered submissions will not be accepted. Submissions must be submitted in English to William D. Jackson, Chairman of the GSP Subcommittee, Trade Policy Staff Committee, by the applicable deadlines set forth in this notice.

All submissions for the GSP Annual Review must conform to the GSP regulations set forth at 15 CFR part 2007, except as modified below. These regulations are available on the USTR Web site at *http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp/gsp-program-inf.* Any person or party making a submission is strongly advised to review the GSP regulations as well as the GSP Guidebook, which is available at the same link.

To make a submission using *www.regulations.gov,* enter docket number USTR–2011–0015 in the ''Enter Keyword or ID'' field on the home page and click ''Search.'' The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting ''Notice'' under ''Document Type'' in the top-middle section of the search-results page, and click on the link entitled ''Submit a Comment'' on the right-hand side of the page under the heading ''Actions.'' The *www.regulations.gov* Web site offers the option of providing comments by filling in a ''Type Comment'' field or by attaching a document using the ''Upload file(s)'' field. Given the detailed nature of the information sought by the GSP Subcommittee, it is preferred that submissions be provided in an attached document. When attaching a document, type (1) 2011 GSP Annual Product Review; (2) the product description, case number, and related Harmonized Tariff System (HTS) tariff number; (3) ''See attached'' in the ''Type Comment'' field on the online submission form, and indicate on the attachment whether the document is, as appropriate, ''Written Comments,'' ''Notice of Intent to Testify,'' ''Pre-hearing brief,'' or a ''Post-hearing brief.'' The product description, case number and HTS subheading number can be found in the document ''Petitions Accepted in the 2011 GSP Annual Product Review,'' which can be found on the USTR Web site at *http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp/current-review-4.* Submissions should not exceed 30 single-spaced, standard letter-size pages in 12-point type, including attachments.

Any data attachments to the submission should be included in the same file as the submission itself, and not as separate files.

Each submitter will receive a submission tracking number upon completion of the submissions procedure at *http://www.regulations.gov.* The tracking number will be the submitter's confirmation that the submission was received into *http://www.regulations.gov.* The confirmation should be kept for the submitter's records. USTR is not able to provide technical assistance for the Web site. Documents not submitted in accordance with these instructions may not be considered in this review. If unable to provide submissions as requested, please contact the GSP Program at USTR to arrange for an alternative method of transmission.

Business Confidential Submissions

A person seeking to request that information contained in a submission from that person be treated as business confidential information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such. The submission must be marked ''BUSINESS CONFIDENTIAL'' at the top and bottom of the cover page and each succeeding page, and the submission should indicate, via brackets, the specific information that is confidential. Additionally, ''Business Confidential'' must be included in the ''Type Comment'' field. Any submission containing business confidential information must be accompanied by a separate non-confidential version of the confidential submission, indicating where confidential information has been redacted. The non-confidential version will be placed in the docket and open to public inspection.

Notice of Public Hearing

The GSP Subcommittee of the TPSC will hold a hearing on Tuesday, March 20, 2012, on products and petitions accepted for the 2011 GSP Annual Review beginning at 9:30 a.m. at the Office of the U.S. Trade Representative, Rooms 1 and 2, 1724 F St. NW., Washington, DC 20508. The hearing will be open to the public, and a transcript of the hearing will be made available on *www.regulations.gov* within two weeks of the hearing. No electronic media coverage will be allowed.

All interested parties wishing to make an oral presentation at the hearing must submit, following the above ''Requirements for Submissions'', the name, address, telephone number, and email address (if available), of the witness(es) representing their organization to William D. Jackson, Deputy Assistant U.S. Trade Representative for GSP by 5 p.m., Tuesday, March 6, 2012. Requests to present oral testimony in connection with the public hearing must be accompanied by a written brief or summary statement, in English, and also must be received by 5 p.m., Tuesday, March 6, 2012. Oral testimony before the GSP Subcommittee will be limited to five-minute presentations that summarize or supplement information contained in briefs or statements submitted for the record. Post-hearing briefs or statements will be accepted if they conform with the regulations cited above and are submitted, in English, by 5 p.m., Tuesday, April 10, 2012, following the ''Requirements for Submissions'' above. Parties not wishing to appear at the public hearing may submit pre-hearing briefs or statements, in English, by 5 p.m., Tuesday, March 6, 2012, and post-hearing written briefs or statements, in English, by 5 p.m., Tuesday, April 10, 2012, also in accordance with the ''Requirements for Submissions'' above. Public versions of all documents relating to the 2011 Annual Review will be made available for public viewing in docket USTR–2011–0015 at *www.regulations.gov* upon completion of processing and no later than one week after the due date.

Donnette R. Rimmer,

Director for the Generalized System of Preferences, Office of the U.S. Trade Representative.

[FR Doc. 2012–3974 Filed 2–17–12; 8:45 am]

BILLING CODE 3190–W2–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Designation of One Individual Pursuant to Executive Order 13566 of February 25, 2011

SUB–AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the name of an individual whose property and interests in property have been blocked pursuant to Executive Order 13566 of February 25, 2011, ''Blocking Property and Prohibiting Certain Transactions Related to Libya.''

DATES: The designation by the Acting Director of OFAC of the individual identified in this notice, pursuant to Executive Order 13566 of February 25, 2011 is effective February 14, 2012.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance and Evaluation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, Tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, Tel.: 202/622–0077.

Background

On February 25, 2011, the President issued Executive Order 13566, ''Blocking Property and Prohibiting Certain Transactions Related to Libya,'' (the ''Order'') pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.) (the NEA), and section 301 of title 3, United States Code.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, that come within the United States, or that are or come within the possession or control of any United States person, of persons listed in the Annex to the Order and of persons determined by the Secretary of the Treasury, in consultation the Secretary of State, to satisfy certain criteria set forth in the Order.

On February 14, 2012, the Acting Director of OFAC designated an individual whose property and interests in property are blocked pursuant to Section 1 of the Order. The listing for this individual is below.

Individual

'ABD–AL–SALAM, Humayd (a.k.a. A.A. ABDUSSALAM, Ahmid; a.k.a. 'ABD–AL–SALAM, Hmeid; a.k.a. ABDUL HADI ABDUL SALAM, Ahmid Abdussalam; a.k.a. ABDUSSALAM, Abdulhadi; a.k.a. ABDUSSALAM, Ahmid; a.k.a. ''ABDULHADI''; a.k.a. ''HUMAYD''); DOB 30 Dec 1965; Passport 55555 (Libya) (individual) [LIBYA2]

Dated: February 14, 2012.

Barbara C. Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2012–3970 Filed 2–17–12; 8:45 am]

BILLING CODE 4810–AL–P

FEDERAL REGISTER

Vol. 77 Tuesday,

No. 34 February 21, 2012

Part II

Department of Labor

Employment and Training Administration
20 CFR Part 655
Wage and Hour Division
29 CFR Part 503

Temporary Non-Agricultural Employment of H–2B Aliens in the United States; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Wage and Hour Division

29 CFR Part 503

RIN 1205–AB58

Temporary Non-Agricultural Employment of H–2B Aliens in the United States

AGENCY: Employment and Training Administration, and Wage and Hour Division, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (the Department) is amending its regulations governing the certification of the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment and the enforcement of the obligations applicable to employers of such nonimmigrant workers. This Final Rule revises the process by which employers obtain a temporary labor certification from the Department for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H–2B status. We have also created new regulations to provide for increased worker protections for both United States (U.S.) and foreign workers.

DATES: This Final Rule is effective April 23, 2012.

FOR FURTHER INFORMATION CONTACT: For further information on 20 CFR part 655, Subpart A, contact William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue NW., Room C–4312, Washington, DC 20210; Telephone (202) 693–3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

For further information on 29 CFR part 503 contact Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue NW., Room S–3510, Washington, DC 20210; Telephone (202) 693–0071 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Revisions to 20 CFR part 655 Subpart A

A. Statutory Standard and Current Department of Labor Regulations

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (INA or the Act) defines an H–2B worker as a nonimmigrant admitted to the U.S. on a temporary basis to perform temporary non-agricultural labor or services for which ''unemployed persons capable of performing such service or labor cannot be found in this country.'' 8 U.S.C. 1101(a)(15)(H)(ii)(b). Section 214(c)(1) of the INA requires DHS to consult with appropriate agencies before approving an H–2B visa petition. 8 U.S.C. 1184(c)(1). The regulations of the U.S. Citizenship and Immigration Services (USCIS), the agency within DHS which adjudicates requests for H–2B status, require that an intending employer first apply for a temporary labor certification from the Secretary of Labor (the Secretary). That certification informs USCIS that U.S. workers capable of performing the services or labor are not available, and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 CFR 214.2(h)(6). On Guam, H–2B employment requires certification from the Governor of Guam, not the Secretary. 8 CFR 214.2(h)(6)(iii).

Our regulations, at 20 CFR part 655, Subpart A, ''Labor Certification Process for Temporary Employment in Occupations other than Agriculture or Registered Nursing in the United States (H–2B Workers),'' govern the H–2B labor certification process, as well as the enforcement process to ensure U.S. and H–2B workers are employed in compliance with H–2B labor certification requirements. Applications for labor certification are processed by the Office of Foreign Labor Certification (OFLC) in the Employment and Training Administration (ETA), the agency to which the Secretary has delegated her responsibilities as described in the USCIS H–2B regulations. Enforcement of the attestations made by employers in the course of submission of H–2B applications for labor certification is conducted by the Wage and Hour Division (WHD) within the Department, to which DHS on January 16, 2009 delegated enforcement authority granted to it by the INA. 8 U.S.C. 1184(c)(14)(B).

Under the 2008 H–2B regulations published at 73 FR 29942, May 22, 2008 (the 2008 Final Rule), an employer seeking to fill job opportunities through the H–2B program must demonstrate that it has a temporary need for the services or labor, as defined by one of four regulatory standards: (1) A one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need. 8 CFR 214.2(h)(6)(ii)(B). Generally, that period of time will be limited to 1 year or less, except in the case of a one-time occurrence, which could last up to 3 years, consistent with the standard under DHS regulations at 8 CFR 214.2(h)(6) as well as current Department regulations at § 655.6(b).

The 2008 Final Rule also employed an attestation-based filing model, in which the employer conducted its recruitment with no direct Federal or State oversight. Lastly, the 2008 Final Rule provided WHD's enforcement authority under which WHD could impose civil money penalties and other remedies.

On August 30, 2010, the U.S. District Court for the Eastern District of Pennsylvania in *Comité de Apoyo a los Trabajadores Agricolas (CATA)* v. *Solis,* Civil No. 2:09–cv–240–LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), invalidated various provisions of the 2008 Final Rule and remanded the rule to the Department to correct its errors. In the Notice of Proposed Rulemaking (NPRM) published March 18, 2011 (76 FR 15130), we proposed to amend the particular provisions that were invalidated by the Court, including specifying when H–2B employers must contact unions as a potential source of labor at § 655.44 and providing a new definition of full-time and a slightly modified definition of job contractor in § 655.5 and 29 CFR 503.4.

B. The Need for Rulemaking

The Department determined for a variety of reasons that a new rulemaking effort is necessary for the H–2B program. These policy-related reasons, which were discussed at length in the NPRM, include expansion of opportunities for U.S. workers, evidence of violations of program requirements, some rising to a criminal level, need for better worker protections, and a lack of understanding of program obligations. We accordingly proposed to revert to the compliance-based certification model that had been used from the inception of the program until the 2008 Final Rule. We also proposed to add new recruitment and other requirements to broaden the dissemination of job offer information, such as introducing the electronic job registry and requiring the job offer to remain open to U.S. workers for a longer period and closer to the date of need. We stated that these changes were necessary to ensure that there was

an adequate test of the U.S. labor market to determine whether U.S. workers are available for the jobs. Further, we proposed additional worker protections, such as increasing the number of hours per week required for full-time employment and requiring that U.S. workers in corresponding employment who perform the same jobs at the same place as the H–2B workers receive the same wages and benefits as the H–2B workers. We discussed how increased worker protections were necessary to ensure that the employment of H–2B workers does not adversely affect the wages and working conditions of U.S. workers.

Summing the present value of the costs associated with this rulemaking in Years 1–10 results in total discounted costs over 10 years of $10.3 million to $12.8 million (with 7 percent and 3 percent discounting, respectively).

TABLE 1—SUMMARY OF COSTS AND TRANSFERS

[Millions of dollars]

Cost component	Transfers and costs by year (millions of dollars)		
	Year 1 costs	Year 2–10 costs	Year 1–10 costs
Undiscounted:			
Total Costs and Transfers—Low	$96.34	$94.73	$948.91
Total Costs and Transfers—High	131.38	129.76	1,299.26
Total Transfers—Low	93.37	93.37	933.71
Total Transfers—High	128.41	128.41	1,284.06
Total Costs to Employers	2.83	1.31	14.64
Total Costs to Government	0.14	0.05	0.56
Present Value—7% Real Interest Rate:			
Total Costs & Transfers—Low	.....	.....	623.22
Total Costs & Transfers—High	.....	.....	853.20
Total Transfers—Low	.....	.....	612.89
Total Transfers—High	.....	.....	842.87
Total Costs	.....	.....	10.33
Present Value—3% Real Interest Rate:			
Total Costs & Transfers—Low	.....	.....	786.05
Total Costs & Transfers—High	.....	.....	1,076.20
Total Transfers—Low	.....	.....	773.27
Total Transfers—High	.....	.....	1,063.42
Total Costs	.....	.....	12.78

Note: Totals may not sum due to rounding.

TABLE 2—SUMMARY OF ESTIMATED COST BY PROVISION

[Millions of dollars]

Cost component	Provision costs by year (in millions of dollars)		
	Year 1 costs	Year 2–10 costs	Year 1–10 costs
Transfers:			
Corresponding Workers' Wages—Low	$17.52	$17.52	$175.18
Corresponding Workers' Wages—High	52.55	52.55	525.53
Transportation	61.33	61.33	613.28
Subsistence	2.81	2.81	28.09
Lodging	1.58	1.58	15.83
Visa and Border Crossing Fees	10.13	10.13	101.33
Total Transfers—Low	93.37	93.37	933.71
Total Transfers—High	128.41	128.41	1,284.06
Costs to Employers:			
Read and Understand Rule	1.20	0	1.20
Document Retention	0.32	0	0.32
Additional Recruiting	1.04	1.04	10.36
Disclosure of Job Order	0.26	0.26	2.63
Other Provisions [a]	0.014	0.014	0.14
Total Costs to Employers	2.83	1.31	14.65
Costs to Government:			
Electronic Job Registry	0.14	0.05	0.56
Enhanced U.S. Worker Referral Period	Not	Not	Not
Total First Year Costs to Government	0.14	0.05	0.56
Total Costs & Transfers:			
Total Costs & Transfers—Low	96.34	94.73	948.91
Total Costs & Transfers—High	131.38	129.76	1,299.26

TABLE 2—SUMMARY OF ESTIMATED COST BY PROVISION—Continued

[millions of dollars]

Cost component	Provision costs by year (in millions of dollars)		
	Year 1 costs	Year 2–10 costs	Year 1–10 costs
Total Transfers—Low	93.37	93.37	933.71
Total Transfers—High	128.41	128.41	1,284.06
Total Costs	2.97	1.36	15.20

Note: Totals may not sum due to rounding.
[a] Includes the sum of: Elimination of Attestation-Based Model; Post Job Opportunity; Workers Rights Poster.

C. Overview of the Comments Received

We received 869 comments on the proposed rule. We have determined that 457 were completely unique including 8 representative form letters, 4 were duplicates, 407 were considered a form letter or based on a form letter, and 1 comment was withdrawn at the request of the commenter. Those comments that were received by means not listed in the proposed rule or that we received after the comment period closed were not considered in this Final Rule.

Commenters represented a broad range of constituencies for the H–2B program, including small business employers, U.S. and H–2B workers, worker advocacy groups, State Workforce Agencies (SWAs), agents, law firms, employer and industry advocacy groups, union organizations, members of the U.S. Congress, and various interested members of the public. We received comments both in support of and in opposition to the proposed regulation, which are discussed in greater detail below.

One commenter contended that we dismiss comments simply because they are similar in nature. This statement is incorrect. We read and analyzed all comments that we received within the comment period. For purposes of posting comments for the public to view, we posted all comments we deemed unique with at least one copy of a form letter so that there is an opportunity to see the concerns being addressed. All form letters are considered in the final count of comments received and we address them as required by the Administrative Procedure Act (APA) in this Final Rule. Another commenter argued that we did not allow enough time to comment on the proposed rulemaking. We disagree and believe that 60 days was enough time for the public to comment on the rulemaking. We note that the APA does not provide a specific time period during which agencies must accept public comments in response to proposed rules, see 5 U.S.C. 553, but the 60-day comment period that we provided during this rulemaking is consistent with the directive of Executive Order 13563, see Improving Regulation and Regulatory Review, 76 FR 3821–22 (Jan. 21, 2011). Moreover, in light of the Court's ruling in the *CATA* case invalidating some of the current regulations, we believe it was necessary to proceed as expeditiously as reasonable through the rulemaking process.

There were several issues which we deemed to be beyond the scope of the proposed rule. Some of these issues included general disapproval of any foreigners being allowed to work in the U.S., elimination of temporary foreign worker programs, activities and rules related to the H–2A program, and general foreign relations and immigration reform issues (including increasing or decreasing the number of available visas). Also beyond the scope of this rulemaking were the collective bargaining rights of H–2B workers, the wage methodology promulgated by the Wage Methodology for the Temporary Non-agricultural Employment H–2B Program, 76 FR 3452, Jan. 19, 2011 and the portability of visas.

Lastly, we received a large number of comments from the ski industry requesting an exemption from the regulations. Many of the commenters believed that because ski instructors require skills or experience, under the new rules they would be ineligible for the H–2B program. Generally, job positions certified under the H–2B program are low skilled, requiring little to no experience. We do recognize, however, that there are some occupations and categories under the H–2B program that may require experience and/or training. Employer applicants demonstrating a true need for a level of experience, training or certification in their application have never been prohibited in the H–2B program, given the breadth of the definition of H–2B under the INA. See 8 U.S.C. 1101(a)(15)(H)(ii)(b). We have determined that an exemption for the ski industry is not appropriate as the commenters presented no valid argument as to why exemption is necessary. There is nothing about the workers they seek to hire that prevents them from participating in the H–2B program. Ski resorts are fixed-site locations that run on a seasonal basis with standard operating procedures. We do not see a reason, nor was one presented, that prevents a ski resort from meeting all the recruitment requirements.

D. Elimination of the Attestation-Based Model

One of the overarching changes we made in the proposed rule was the elimination of the attestation-based model adopted in the 2008 Final Rule. We received comments supporting the elimination of the attestation-based model as well as opposing that change. Generally, commenters who supported our decision to revert to a compliance-based model focused on the Department's desire to reduce the susceptibility of the H–2B program to fraud and abuse. Several commenters expressed concern about the rise of criminal and civil prosecutions which they felt demonstrate abuse in the H–2 program. Most of the commenters cited our audit experience, as discussed in the NPRM, and agreed that this data alone should foreclose any debate on the necessity of ending the attestation-based model. One commenter specifically pointed out that changes in the 2008 Final Rule made it easier for unscrupulous employers and their agents to use H–2B visas for the illicit purpose of suppressing wages. This same commenter suggested that a return to a compliance-based model brings us back to the proper focus of administering the H–2B program in a manner that fairly balances the protection of workers with the desires of employers. Another commenter pointed out that the OFLC's experience of 2 years under the attestation-based model

is sufficient to demonstrate that the model cannot be retained without doing serious damage to the employment prospects and wages and working conditions of U.S. workers. Similarly, an advocacy group stated that many aspects of the attestation-based model deprive domestic workers of employment opportunities, adversely affect their wages and working conditions, and encourage, rather than curb, the well-documented fraud in the H–2B program.

Generally, commenters who advocated the retention of an attestation-based model encouraged us to use our current resources and enforcement authority to crack down on bad actors, rather than overhaul the program. A few commenters stated that we did not give the 2008 Final Rule and the attestation-based model sufficient time to be successful. Contrary to the comments supportive of a change, these commenters argued that our audit of a random sample of cases is misleading given that the NPRM does not disclose the number of cases audited and the details about the audit process and that all violations appear to be counted with equal weight. Another commenter believed that reverting to the compliance-based model would create extensive processing delays.

We disagree with the commenters who asserted that increased enforcement authority is the answer to resolving concerns about the attestation-based model. Our enforcement authority is a separate regulatory component, regardless of the certification model we use. Our experience, as presented in the NPRM, indicates that despite the fact that the 2008 Final Rule contained elevated penalties for non-compliance with the program provisions, the results of the audited cases demonstrate that an attestation-based process does not provide an adequate level of protection for either U.S. or foreign workers.

Commenters who assert we did not give the 2008 Final Rule and its attestation-based model a chance to be successful undervalue the experience we have had over the last 2 years with the program. In making our decision to depart from the attestation-based model, we took into account not only the audits we conducted as described in the NPRM, but also the various comments and concerns raised by employers, advocates, and workers about compliance with the program. The attestation-based model of the 2008 Final Rule is highly vulnerable to fraud. Under that model, only after an employer has been certified and the foreign workers have come to the U.S. and begun working for the employer, is there a probability that the employer's non-compliance will be discovered or that the foreign worker(s) will report a violation. Only if an employer is audited or investigated will we learn of any non-compliance, even minor violations of program obligations, since the attestation-based model relies on the employer's attestations.

Consistent with our concerns about the attestation-based model, the Department's Office of Inspector General (OIG) issued an audit report on October 17, 2011 in which OIG identified the attestation-based model as a weakness in the H–2B program [1]. OIG found that the existing attestation-based application process did not allow for meaningful validation before application approval and hampered the Department's ability to provide adequate protections for U.S. workers in the H–2B applications OIG reviewed. OIG noted that the Department's proposed transition to a model requiring pre-approval review of compliance through documentation, as adopted in this Final Rule, would strengthen the program.

As to commenter concerns about the audit sample discussed in the NPRM, we reiterate that we conducted two rounds of audits of a random sample of cases, both of which resulted in an indication that many of the employers were not in compliance with the attestations they agreed to. These audits we reviewed were a random sample. Employers were not selected based on specific industries or occupations, nor were they selected based on compliance with specific provisions. The indication of employer non-compliance from those audits is not acceptable by our standards. Additionally, contrary to the commenter's claim that all violations were given equal weight, regardless of the type of violations or their consequences, our concern is that these audits evidenced a pattern of non-compliance with program obligations toward workers, regardless of the degree of such non-compliance. Moreover, the results of these audits showed the existence of deficiencies in the applications that would have warranted further action, the least of which would have included issuing a Notice of Deficiency, and affording the employer the opportunity to correct the deficiencies, before adjudicating the application. Again, under the attestation-based program model, we are not aware of the non-compliance before certification.

Furthermore, despite the fact that H–2B cases continue to be processed under the 2008 Final Rule, which some commenters said implemented an ideal balance between the attestation-based model and stronger enforcement authority, we still see evidence in the H–2B program of a rising number of criminal violations. In addition to the specific cases cited in the NPRM, there has been more recent evidence of employers and agents filing fraudulent applications involving thousands of requested employees for non-existent job opportunities. For example, according to the OIG's ''Semiannual Report to Congress'' (October 2010 until March 2011),[2] OIG investigations found that emerging organized criminal groups are using the Department's foreign labor certification processes in illegal schemes, and in so doing are committing crimes that negatively impact workers. The report further lists at least 4 examples of fraud committed by employers or their attorneys/agents in the H–2B program.

Lastly, while some commenters were concerned about the processing delays that may result from reverting to a compliance-based certification model, our focus in administering the H–2B program is to provide employers with a viable workforce while protecting U.S. and foreign workers. We will, however, continue to endeavor to process applications as efficiently and quickly as possible and in accordance with the timeframes set forth in the application processing provisions of this Final Rule.

In the NPRM, we solicited comments on maintaining the 2008 Final Rule or some modification of the attestation-based program design. While we have chosen to adopt the certification-based model described in the NPRM, we discuss below the responses to the specific questions presented in the NPRM:

1. What kind of specific guidance could the Department provide that would benefit a first-time (or sporadic) employer in the H–2B program to avoid mistakes in making attestations of compliance with program obligations?

We received several comments directly addressing this question, one of which asserted that the attestation-based model was straightforward and that non-compliance is attributable to a

[1] *Program Design Issues Hampered ETA's Ability to Ensure the H–2B Visa Program Provided Adequate Protections for U.S. Forestry Workers in Oregon,* Office of the Inspector General of the U.S. Department of Labor, Report No. 17–12–001–03–321, Oct. 17, 2011. *http://www.oig.dol.gov/public/reports/oa/2012/17–12–001–03–321.pdf.*

[2] *Semiannual Report to Congress,* Office of the Inspector General of the U.S. Department of Labor, Volume 65 (October 1, 2010 to March 31, 2011); *http://www.oig.dol.gov/public/semiannuals/65.pdf http://www.oig.dol.gov/public/semiannuals/65.pdf.*

willful choice made by the employer or its attorney/agent. Another comment, submitted by several employer advocacy groups, encouraged us to establish additional ongoing education programs throughout the U.S. and to provide a hotline to answer questions about basic programmatic issues. The comment suggested the hotline be supplemented by the Certifying Officer (CO) notifying employers of any technical issues while the *Application for Temporary Employment Certification* is pending. An employer also expressed frustration with its inability to communicate directly with us to seek immediate guidance on program processes and policies.

While we have established an email box (*tlc.chicago@dol.gov*) to which employers can submit questions about their applications, we continue to rely on those questions to easily identify recurring issues for which we may need to issue a Frequently Asked Question (FAQ) and/or guidance or provide additional training to staff. We also anticipate stakeholder educational efforts to help familiarize program users and others with the regulatory requirements and changes in the H–2B program. Where feasible and necessary, we will provide additional educational outreach through briefings and other types of guidance documents for the benefit of all employers.

2. What kind of guidance would benefit frequent users of the program with respect to repetitive errors in recruitment? What kind of guidance would be beneficial in avoiding errors in unique situations for these users?

One commenter suggested that we implement a three-strike policy to eliminate willful violators from the H–2B program. Another commenter, including several employer advocacy groups, encouraged us to establish additional ongoing education programs throughout the U.S. and suggested that employers document their attendance, which we should consider in mitigation of employer error in the application process. The commenter also recommended that we provide a hotline to answer questions about basic programmatic issues and publish at appropriate intervals a top 10 errors and issues list and a public notice on the OFLC's Web site indicating where the CO identifies a trend.

We believe that debarment and other program integrity measures are sufficient to eliminate willful violators from the H–2B program, and therefore, do not consider a three strike policy to be necessary. As to the request for a hotline, as stated above, we have established an email box to which employers can submit questions about the status of their applications; we believe this will be more accurate than a telephone line for receiving information and questions that can then be translated into public guidance as appropriate. We rely on such emailed questions and information to identify recurring issues for which we may need to publish an FAQ and/or guidance. We also draft FAQs and other guidance documentation at the recommendation of the COs, based on recurring trends and/or issues identified by them. In an effort to better provide information to the employer community, we will consider publishing guidance responsive to specific issues, such as a way to avoid common filing mistakes, once those have been determined under the re-engineered model. Lastly, we also plan to implement rollout activities and briefings to help familiarize program users and others with the regulatory requirements and changes in the H–2B program. Where we determine that more guidance is needed, we will provide additional educational outreach to the filing community and other interested parties.

3. Could pre-certification audits augment a post-certification audit in an attestation-based program model? If not, how would you propose the Department obtain information in the absence of supervised activity in order to arrive at certification while ensuring compliance with program obligations?

Several commenters stated that they would be supportive of more post-certification audits as long as we retain the attestation-based certification model. In asking this question, we were trying to gauge whether a pre-certification audit process would be a viable way to alleviate the obvious compliance problems that occur under the attestation-based certification model. One commenter believed that by adding a pre-certification audit process, we would only be contributing to the existing burden on the H–2B worker to report non-compliance without actually removing those employer applicants that continue to do poorly. Another commenter stated that a pre-certification audit process would imply that a review of the documentation will ensure compliance with program requirements. This same commenter believed that a pre-certification review cannot ensure that proper wages will be paid or that U.S. referrals will be properly considered for a job. The commenter also affirmed that the current enforcement scheme provides significant incentive for program users to comply based on audits after an attestation has been made. Lastly, one commenter claimed that asking a hypothetical question about possible changes in the program structure, such as pre-certification audits, without actually proposing language or procedures does not qualify as appropriate notice and would require us to issue a new NPRM.

As discussed above, we sought comments about possible alternatives related to retaining the attestation-based certification model. Based on the comments on the retention of the attestation-based certification model and pre-certification audits, we have decided not to retain the attestation-based model. Therefore, we no longer consider the pre-certification audit process alternative, which was tied to the concept of the attestation-based model, to be an option.

4. What additional sanctions could be taken against employers to ensure compliance with program requirements, given the potential for fraud in the H–2B program?

We received several comments on sanctions. We discuss issues involving sanctions in the preamble discussions of 29 CFR part 503 and §§ 655.72 and 655.73.

5. What other kinds of actions could the Department take to prevent an H–2B employer from filing attestations that do not meet program requirements?

We did not receive specific alternatives in answer to this question. Any other incidental alternatives received that relate to specific sections of the Final Rule have been discussed under the appropriate related provisions.

For the reasons discussed above, we are reverting to a compliance-based model under the H–2B program as proposed.

II. Discussion of Comments Received

A. Introductory Sections

We address below those areas in which we received comments. For specific provisions on which we did not receive comments, we have retained the provisions as proposed, except where clarifying edits have been made.

1. § 655.1 Scope and Purpose of Subpart A

The proposed provision informs program users of the statutory basis and regulatory authority for the H–2B labor certification process. This provision also describes our role in receiving, reviewing, adjudicating, and preserving the integrity of an *Application for*

Temporary Employment Certification. We are adopting the provision as proposed. We received several general comments relating to this section. One commenter stated that the scope and purpose was to pay the highest of all the prevailing wages and to make sure that H–2B workers are offered the same protections under the law as any other worker. Another commenter stated that the original scope and purpose was to find temporary workers or certify applications for foreign workers. These comments misunderstand our responsibility and the criteria that must be met before we certify an H–2B *Application for Temporary Employment Certification.* Under DHS' regulations at 8 CFR 214.2(h)(6)(iv), the purpose of these regulations is for the Secretary of Labor to determine that: (1) There are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to import foreign workers; and (2) the employment of the H–2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed. It is through the regulatory provisions set forth below that the Department ensures that that the criteria for its labor certification determinations are met.

2. § 655.2 Authority of Agencies, Offices and Divisions in the Department of Labor

This section describes the authority and division of activities related to the H–2B program among the Department's agencies. The NPRM discussed the authority of OFLC, the office within ETA that exercises the Secretary's responsibility for determining the availability of U.S. workers and whether the employment of H–2B nonimmigrant workers will adversely affect the wages and working conditions of similarly employed workers. It also discussed the authority of WHD, the agency responsible for investigation and enforcement of the terms and conditions of H–2B labor certifications, as delegated by DHS. We are retaining this provision as proposed.

We received several comments from employer advocacy organizations on our authority to administer the H–2B labor certification program. These commenters alleged that Congress has not vested authority in the Department and that the statutory provision mandating consultation with other agencies does not necessarily give us the right to effectuate the requirements proposed under these regulations. We address this general assertion below; however, our authority for specific provisions of this Final Rule is addressed in the discussions of the sections containing those provisions.

Under the INA, Congress did not specifically address the issue of the Department's authority to engage in legislative rulemaking in the H–2B program but the legislative history of the Immigration Reform and Control Act (IRCA) specifically acknowledges the Department's practice of issuing legislative rules, *see* H.R. Rep. No. 99–682, pt. 1, at 79–80, 1986 WL 31950, at **34. Since 1968, DOL has had regulations governing the H–2 non-agricultural program, *see* 33 FR at 7570–71, and in enacting IRCA in 1986, Congress acknowledged DOL's rulemaking without withdrawing its authority to issue legislative rules, *see* H.R. Rep. No. 99–682, pt. 1, at 80. Ordinarily, when Congress adopts a new law incorporating sections of a prior law it is presumed to be aware of existing administrative regulations interpreting the prior law. *See Lorillard* v. *Pons,* 434 U.S. 575, 580–81 (1978). Moreover, when Congress re-enacts a statutory provision, an agency's prior long-standing administrative practice under that statutory provision is deemed to have received congressional approval. *Fribourg Nav. Co.* v. *CIR,* 383 U.S. 272, 283 (1966). In this case, Congress did more than re-enact the H–2 non-agricultural statutory provision, it expressly acknowledged DOL's rules governing the H–2 program. *See* H.R. Rep. No. 99–682, pt. 1, at 80. Thus, Congress approved of DOL's rulemaking authority in the H–2B program, and saw fit not to alter or further define DOL's practices, unlike the H–2A agricultural program. *Id.*

Even if the legislative history does not resolve the issue of DOL's rulemaking authority, when the statute does not delegate rulemaking authority explicitly, such statutory ambiguities are implicit delegations to the agency administering the statute to interpret the statute through its rulemaking authority. *Arnett* v. *CIR,* 473 F.3d 790, 792 (7th Cir. 2007).[3] Congress expected DOL to ensure that employers using the H–2B program would not adversely affect similarly situated United States workers. *See* 8 U.S.C. 1101(a)(15)(H)(ii)(b); H.R. Rep. No. 99–682, pt. 1, at 80. This involves policy-type determinations beyond disputed facts in a particular case, *see U.S.* v. *Fla. E. Coast Ry.,* 410 U.S. 224, 245–46 (1973), which renders DOL's use of legislative rulemaking more appropriate in the administration of the H–2B program than case-by-case adjudication, *see Ford Motor Co.* v. *FTC,* 673 F.2d 1008, 1009–10 (9th Cir. 1982). Given the type of global considerations confronting DOL in administering the program, it would defeat Congress's goals to conclude that DOL is only authorized to engage in case-by-case adjudication. *See USV Pharm. Corp.* v. *Weinberger,* 412 U.S. 655, 665 (1973). DOL's use of legislative rulemaking also comports with the judicial preference for filling in the interstices of the law through a quasi-legislative enactment of rules of general applicability. *See SEC* v. *Chenery Corp.,* 332 U.S. 194, 202 (1947). Courts encourage agencies to adopt legislative rules when seeking to establish norms of widespread application. *See Ford Motor Co.,* 673 F.2d at 1009. Notice and comment rulemaking provides important procedural protections to the public, allows agencies to apprise themselves of relevant issues and views, and promotes predictability. *See Int'l Union* v. *MSHA,* 626 F.3d 84, 95 (DC Cir. 2010). Without the use of this process, the public would be deprived of important protections that are unavailable in case-by-case adjudication. *Nat'l Petroleum Ref. Ass'n* v. *FTC,* 482 F.2d 672, 683–84 (1973).

Importantly, the *CATA* decision recently held that the Department is not permitted to adopt an H–2B prevailing wage regime without engaging in legislative rulemaking. *See CATA I,* 2010 WL 3431761, at *19 (E.D. Pa. Aug.30,2010). That decision specifically invalidated the Department's attempt to use guidance documents to announce the applicable prevailing wage methodology for H–2B employers, holding that doing so deprives the public of the opportunity to comment on important issues for the administration of the H–2B program. *Id.* Given the CATA decision's holding that the Department cannot use guidance documents to establish prevailing wage rates, without any legislative rulemaking authority, the Department would lack the authority to administer the H–2B program in a fair and predictable manner. Lastly, given Congress' delegation of enforcement authority under 8 U.S.C. 1184(c)(14)(B) to USCIS and the Department, it would be irrational to assume that Congress didn't intend for the Department to issue rules to define the terms of the H–2B program in the absence of statutory standards. *Cf. Nat'l Ass'n of*

[3] In recent decisions, the Supreme Court has affirmed this approach by applying *Chevron* deference to an agency's construction of a jurisdictional provision in its organic statute. *See Coeur Alaska* v. *Southeast Alaska Conserv. Council,* 129 S. Ct. 2458, 2469 (2009); *United States* v. *Eurodif,* 129 S. Ct. 878, 888 (2009).

Home Bds. v. *OSHA,* 602 F.3d 464, 467 (DC Cir. 2010).

3. § 655.3 Territory of Guam

As in the 2008 Final Rule, under the proposed rule, the granting of H–2B labor certifications and the enforcement of the H–2B visa program on Guam continue to reside with the Governor of Guam, under DHS regulations. However, the NPRM proposed that we would determine all H–2B prevailing wages, including those for Guam. Recently, DHS, which consults with the Governor of Guam about the admission of H–2B construction workers on Guam, has determined that prevailing wages for construction workers on Guam will be determined by the Secretary. 8 CFR 214.2(h)(6)(v)(E)(v). DHS and the Department agree that it is more appropriate for OFLC to issue H–2B prevailing wages for all workers, including construction workers on Guam, because OFLC already provides prevailing wage determinations (PWDs) for all other U.S. jurisdictions. We therefore proposed that the process for obtaining a prevailing wage in § 655.10 also would apply to H–2B job opportunities on Guam. Employment opportunities on Guam accordingly would be subject to the same process and methodology for calculating prevailing wages as any other jurisdiction within OFLC's purview. We received no comments on this section and therefore are retaining the provision as proposed.

4. § 655.4 Special Procedures

The proposed rule maintained our authority to establish, continue, revise, or revoke special procedures that establish variations for processing certain H–2B *Applications for Temporary Employment Certification.* These are situations where we recognize that variations from the normal H–2B labor certification processes are necessary to permit the temporary employment of foreign workers in specific industries or occupations when U.S. workers are not available and the employment of foreign workers will not adversely affect the wages or working conditions of similarly employed U.S. workers. These variations permit those who would otherwise be unable to readily comply with the program's established processes to participate, such as by allowing itinerary employment for reforestation employers and certain employers in the entertainment industry. These special procedures permit us to accommodate the unique circumstances of certain classes of employers without undermining our essential responsibilities. We are retaining the proposed section with one minor clarification reminding the employer that it must request special procedures.

We also proposed that special procedures already in place on the effective date of the regulations will remain in force until we otherwise modify or withdraw them. A couple of commenters objected to the continuance of current special procedures because they had not participated in the process. We see no need to upset the settled expectations of the employers who have relied upon the special procedures for many years at least to the extent they do not conflict with these regulations. To the extent that the current special procedures are in conflict with these regulations, the regulations will take precedence. An example of a possible conflict would be the current special procedure provision which allows pre-certification to Canadian musicians who enter the U.S. to perform within a 50-mile area adjacent to the Canadian border for a period of 30 days or less. TEGL 31–05 Procedures for Temporary Labor Certification in the Entertainment Industry under the H–2B Visa program, May 31, 2006, available at *http://wdr.doleta.gov/directives/attach/TEGL/TEGL 31–05.pdf.* Since the Final Rule does not provide for pre-certification for any occupations, such exemption would no longer be allowed.

A few commenters requested that we revise the proposed language under this section from ''the Administrator, OFLC may consult with affected employers and worker representatives'' to ''the Administrator, OFLC must consult with affected employers and worker representatives.'' In addition, some commenters, including labor organizations and employees in the reforestation industry, recommended that we should present special procedures through a notice and comment period similar to an NPRM. Finally, a couple of commenters felt that the special procedures process violates the APA.

We decline to make the changes proposed by the commenters. We have complied with the procedural requirements of the APA by proposing this provision and soliciting public comments. See 5 U.S.C. 553. The purpose of the special procedures is to allow a particular group of employers with a need for H–2B workers to participate in the program by waiving certain regulatory provisions when the provisions cannot be reconciled with the operational norms of the industry and when the employers comply with industry-specific alternative procedures. Although we are not required to provide procedures for requesting a waiver, see *FCC* v. *WNCN Listeners Guild,* 450 U.S. 582, 601 (1981), the Department is committed to ensuring that the views of affected employers and worker representatives are considered. The process under which a special procedure is considered is in most cases initiated by an industry or group of employers presenting us evidence that demonstrates their occupations are unique and that application of certain provisions in the regulations cannot be reconciled with the operational norms of the industry. Before effectuating such procedures, we will consult with other employer and worker representatives as well as agencies within and outside the Department, as appropriate, to identify necessary revisions which will, at the same time, keep the integrity and principal concepts of the program intact. We also will continue to look to our program experts in OFLC and WHD and review industry data gathered from employers that have previously used the H–2B program. Additionally, while special procedures allow for necessary and specific variations to regulations, we expect employers to adhere to all other aspects of the regulations not addressed in the special procedures. The application of a special procedure by an employer or an industry in no way relieves an employer from its obligation to obtain an approved temporary labor certification from the Department before submitting a request for workers to USCIS.

5. § 655.5 Definition of Terms

a. Area of substantial unemployment. We proposed to add a definition of area of substantial unemployment to the H–2B program. The proposed definition reflected the established definition of area of substantial unemployment in use within ETA as it relates to Workforce Investment Act (WIA) fund allocations. We have retained the proposed definition of area of substantial unemployment without change.

Some commenters suggested alternative methods of defining an area of substantial unemployment. Several commenters contended that a different threshold percentage than 6.5 percent (*e.g.,* 8 percent or 9 percent, the current national unemployment rate) or a different time period than 12 months (*e.g.,* 3 months or the period of need requested) should be used to identify an area of substantial unemployment. One labor organization proposed more than a definitional alternative, suggesting that employers in areas with 5 percent or higher unemployment should be subject to an automatic legal presumption that there is no labor

shortage sufficient to support an H–2B application and that those employers' applications should be given a strict, high level review, including review by a senior official in Washington, DC.

The definition proposed in the NPRM and retained in the Final Rule is the existing definition of area of substantial unemployment within ETA. ETA uses this definition to identify areas with concentrated unemployment and focus WIA funding for services to facilitate employment in those areas. We proposed using this existing definition, and have chosen to retain it in the Final Rule, both as a way to improve labor market test quality and for the sake of operational simplicity. This existing definition provides the appropriate standard for identifying areas of concentrated unemployment where additional recruitment could result in U.S. worker employment. Also, the process of collecting data and designating an area of substantial unemployment using the existing definition is already established, as discussed in ETA's Training and Employment Guidance Letter No. 5–11, Aug. 12, 2011,[4] providing OFLC with a ready resource for identifying areas to focus additional recruitment. Finally, using this definition of area of substantial unemployment in the Final Rule enables an employer to check the list of areas of substantial unemployment ETA publishes to determine whether its job opportunity may fall within an area of substantial unemployment and, as appropriate, be subject to enhanced recruitment.

Adopting a legal presumption of the availability of domestic workers in areas with 5 percent or higher unemployment would significantly impact employers' access to the H–2B program and could not be viewed as a logical outgrowth of the proposal. Furthermore, while we appreciate the commenter's concern, we disagree with the approach suggested. We thoroughly review all applications submitted for all areas of intended employment. We consider enhanced recruitment requirements, as proposed in the NPRM, to be the most appropriate way to handle job opportunities in areas of substantial unemployment. Accordingly, we will retain the provision as proposed in the Final Rule.

b. Corresponding employment. The NPRM proposed to include a definition of corresponding employment and to require that employers provide to workers engaged in corresponding employment at least the same protections and benefits as those provided to H–2B workers (except for border crossing and visa fees which would not be applicable). The NPRM defined corresponding employment as the employment of workers who are not H–2B workers by an employer that has an accepted H–2B application in any work included in the job order (*i.e.,* the certified job duties in places of employment or worksite locations specified by the employer) or in any work performed by the H–2B workers during the period of the job order (anywhere the H–2B employer places H–2B workers outside the scope of the labor certification), including any approved extension.

For the reasons discussed below, the Final Rule modifies the corresponding employment definition by deleting the word ''any'' from before the word ''work'' in two places and inserting the words ''doing substantially the same'' instead. The preamble also clarifies and provides examples of what is and is not covered. The Final Rule also excludes from the definition of corresponding employment two categories of incumbent employees: (1) Those employees who have been continuously employed by the H–2B employer in the relevant occupation for at least the prior 52 weeks, who have worked or been paid for at least 35 hours in at least 48 of the prior 52 workweeks, and have averaged at least 35 hours of work or pay over the prior 52 workweeks, and whose terms and conditions of employment are not substantially reduced during the period of the job order. In determining whether the standard is met, the employer may take credit for any hours that were reduced because the employee voluntarily chose not to work due to personal reasons such as illness or vacation; and (2) those employees who are covered by a collective bargaining agreement or individual employment contract that guarantees an offer of at least 35 hours of work each week and continued employment with the H–2B employer through at least the period of the job order, except that the employee may be dismissed for cause.

Significantly, the Final Rule retains in the definition the requirement that ''to qualify as corresponding employment, the work must be performed during the period of the job order, including any approved extension thereof.'' Any work performed by U.S. workers outside the specific period of the job order does not qualify as corresponding employment. Accordingly, the Final Rule does not require employers to offer their U.S. workers (part-time or full-time workers) corresponding employment protections outside of the period of the job order. If, for example, a U.S. worker works year-round and is in corresponding employment with the H–2B workers during the period of the job order, the employer must provide corresponding employment protections during the time period of the job order but may choose *not to do so* during the time period outside of the job order.

There were many comments related to the proposed protections for workers in corresponding employment. Employee advocates, unions, and a member of Congress strongly endorsed the proposed provision, stating that it was essential to ensuring that the employment of H–2B workers does not adversely affect the wages, benefits, and working conditions of similarly employed domestic workers. They emphasized that it is important for corresponding workers to receive not just the prevailing wage, but all the other assurances and benefits offered to H–2B workers, such as transportation, the three-fourths guarantee, and full-time employment, in order to place U.S. workers on at least the same footing as foreign workers. These commenters noted that the principle that there should be no preference for foreign workers is fundamental to the INA, and that a corresponding employment requirement prohibits employer practices that would hurt the employment prospects of U.S. workers. They also emphasized that the proposed rule's assurance of equal protection was a significant improvement for domestic workers who have, in the past, been bypassed in favor of foreign workers. Thus, they stated that this protection is necessary to provide a meaningful test of whether there are U.S. workers available for employment. The employee advocates also stated that the proposed definition's broadening of the requirement to protect incumbent employees, rather than just those newly hired in response to the H–2B recruitment, is important because many employers employ some U.S. workers on a year-round basis, and they should not be employed alongside H–2B workers who receive greater pay, benefits, and protections. Similarly, an employee advocate specifically commended the proposed rule's coverage of situations where employers place H–2B workers in occupations and/or job sites outside the scope of the labor certification, which the commenter stated happens regularly. Thus, it asserted that protecting U.S. workers (including incumbent workers)

[4] TEGL 5–11—Designation of Areas of Substantial Unemployment (ASUs) under the Workforce Investment Act (WIA) for Program Year (PY) 2012 has been added to the ETA Advisory Web site and is available at *http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3069.*

who are performing the same work as the H–2B workers is necessary to ensure that U.S. workers are not adversely affected by the presence of H–2B workers in the labor market. Finally, one union stated that this additional protection for U.S. workers would also protect H–2B workers, because U.S. workers would be empowered to assist in policing unscrupulous H–2B employers.

Employers, on the other hand, generally opposed the extension of protections to workers in corresponding employment. Some stated that they could not afford to provide the same terms and conditions of employment to corresponding workers, including paying the prevailing wage and guaranteeing three-fourths of the hours. For example, a golf course association stated that it would be financially impossible to provide the same wages and benefits to summer high school and college laborers as it provided to H–2B workers performing the same manual labor. Others stated that paying the prevailing wage to corresponding workers would not be problematic, but that they wanted to be able to continue to reward long-tenured employees (foreign or U.S.) or more skilled staff with higher pay than new workers, such as by providing a pay increase based upon years of service.

It appeared there was confusion about the impact of the corresponding employment requirement. Employers expressed concern because they have overlap in the job duties of various positions, with supervisors performing some of the same tasks as the workers they supervise. They believed that, if there is some slight nexus between what an H–2B workers does and what a higher-paid year-round worker does, the employer would have to pay all workers the higher wage. They stated that this requirement would compel changes to management techniques and eliminate or greatly reduce employers' flexibility to have employees perform whatever task is necessary to complete their work, thereby harming productivity. Employer representatives stated that the definition is so broadly worded (''any'' work included in the job order or ''any'' work performed by the H–2B workers) that it would cover the entire workforce of many businesses. One firm gave the example of a large resort with roughly 2000 employees where senior management (including the resident manager, the director of food and beverage, and even the finance manager) clean rooms on a busy day; supervisors carry guests' luggage; managers in the restaurant clear tables; and managers on the golf course pick up trash or cut the grass. The firm wondered what the H–2B workers should be paid in this case and whether every employee is a corresponding employee who would be entitled to the three-fourths guarantee. Other employers assumed that their laborers would have to be compensated at the same rate as a supervisor if the supervisor occasionally performed some of their same tasks, such as mowing, because of a weather event, large golf tournament, or shortage of staff due to illness. An employer association stated that employers, such as restaurants, needed the flexibility to have a waitress serve as a cashier or hostess, or to have a dishwasher assist with food preparation or cooking, in order to get the work done and keep employees working throughout the day.

Therefore, some employer representatives suggested that the rule should limit the definition to work in the occupation listed in the job order. They stated this would avoid a situation where all U.S. workers who dig holes and plant bushes would be viewed as corresponding employees if the H–2B job order was for a supervisory landscaper with knowledge of irrigation systems and plant species but the supervisor occasionally helped to dig or plant. These commenters also suggested that the Department limit the rule's scope to those U.S. workers who are newly hired by the employer on or after the beginning of the job order period, rather than extending it to workers employed prior to the employment of H–2B workers. Some employer commenters suggested that the Department delete the word ''any'' from before the word ''work.'' Other commenters questioned whether the Department has the legal authority to impose the requirement.

After carefully considering all of these comments, the Department has decided to modify the definition of corresponding employment to delete the word ''any'' from before ''work'' in two places and insert the words ''substantially the same,'' and to exclude two categories of incumbent employees: (1) Those who have worked in the relevant job continuously for the H–2B employer for at least the prior 52 weeks, have averaged at least 35 hours of work or pay over those 52 weeks and have received at least 35 hours of work or pay in at least 48 of the 52 weeks, as demonstrated by the employer's payroll records and whose terms and conditions of employment are not substantially reduced during the job order period (an employer may take credit for those hours that were reduced due to an employee's voluntary leave); and (2) those who are covered by a collective bargaining agreement or individual employment contract that guarantees at least 35 hours of work each week and continued employment with the H–2B employer at least through the end of the job order period. Incumbent employees who fall within one of these categories may have valuable terms of employment, including job security and benefits, that neither H–2B workers nor other temporary workers have. This may account for wage differentials between these incumbents and those who are entitled to the H–2B prevailing wage, as well as other differences in terms and conditions of employment.

The Final Rule continues to include other workers within the definition of corresponding employment as proposed in order to fulfill the DHS regulatory requirement that an *H–2B Petition* will not be approved unless the Secretary certifies that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 CFR 214.2(h)(6). As the NPRM explained, Congress has long intended that similarly employed U.S. workers should not be treated less favorably than temporary foreign workers. For example, a 1980 Senate Judiciary Report on Temporary Worker Programs stated that U.S. employers were required to offer domestic workers wages equal to foreign workers as a prerequisite for labor certification. See Congressional Research Service: ''Report to the Senate Committee on the Judiciary: Temporary Worker Programs: Background and Issues, 53 (1980)''; see also H.R. Rep. No. 99–682, pt. 1 at 80 (1986) (''The essential feature of the H–2 program has been and would continue to be the requirement that efforts be made to find domestic workers before admitting workers from abroad. A corollary rule, again preserved in the bill, is that the importation of foreign workers will not be allowed if it would adversely affect the wages and working conditions of domestic workers similarly employed''). Current § 655.22(a) reflects this principle, in part, by requiring that the terms and conditions of offered employment cannot be less favorable than those offered to H–2B workers. Thus, the current regulation provides for equal treatment of workers newly hired during the current 10-day H–2B recruitment process.

The current regulation, however, does not protect U.S. workers who engage in similar work performed by H–2B workers during the validity period of the job order, because it does not protect any incumbent employees. Therefore, for example, a U.S. employee hired three months previously performing the

same work as the work requested in the job order, but earning less than the advertised wage, would be required to quit the current employment and re-apply for the same job with the same employer to obtain the higher wage rate offered to H–2B workers. This would be disruptive for the employer and could create an additional administrative burden for the SWAs with respect to any workers being referred through them. It also puts too high a premium on employees understanding their rights under the regulations, and feeling secure enough—rare in low-wage employment—to quit a job with the expectation of being immediately rehired. Therefore, the Final Rule does not require incumbent employees to jump through this unnecessary hoop; U.S. workers generally would be entitled to the wage rates paid to H–2B employees without having to quit their jobs and be rehired.

There are only two categories of incumbent U.S. employees who would be excluded from the definition of corresponding employment. The first category covers those incumbents who have been continuously employed by the H–2B employer for at least the 52 weeks prior to the date of need, who have averaged at least 35 hours of work or pay over those 52 weeks, and who have worked or been paid for at least 35 hours in at least 48 of the 52 weeks, and whose terms and conditions of employment are not substantially reduced during the period of the job order. The employer may take credit for any hours that were reduced because the employee voluntarily chose for personal reasons not to work hours that the employer offered, such as due to illness or vacation. Thus, for example, assume an employee took six weeks of unpaid leave due to illness, and the employer offered the employee 40 hours of work each of those weeks. In that situation, the employer could take credit for all those hours in determining the employee's average number of hours worked in the prior year and could take credit for each of those six weeks in determining whether it provided at least 35 hours of work or pay in 48 of the prior 52 weeks. Similarly, if the employer provided a paid day off for Thanksgiving and an employee worked the other 32 hours in that workweek, the employer would be able to take credit for all 40 hours when computing the average number of hours worked and count that week toward the required 48 weeks. In contrast, assume another situation where the employer offered the employee only 15 hours of work during each of three weeks, and the employee did not work any of those hours. The employer could only take credit for the hours actually offered when computing the average number of hours worked or paid during the prior 52 weeks, and it would not be able to count those three weeks when determining whether it provided at least 35 hours of work or pay for the required 48 weeks.

The second category of incumbent workers excluded from the definition of corresponding employment includes those covered by a collective bargaining agreement or individual employment contract that guarantees both an offer of at least 35 hours of work each week and continued employment with the H–2B employer at least through the period of the job order (except that the employee may be dismissed for cause). As noted above, incumbent employees in the first category are year-round employees who began working for the employer before the employer took the first step in the H–2B process by filing an *Application for Temporary Employment Certification.* They work 35 hours per week for the employer, even during its slow season. The Department recognizes that there may be some weeks when, due to personal factors such as illness or vacation, the employee does not work 35 hours. The employer may still treat such a week as a week when the employee worked 35 hours for purposes of the corresponding employment definition, so long as the employer offered at least 35 hours of work and the employee voluntarily declined to work, as demonstrated by the employer's payroll records. Thus, these workers have valuable job security that H–2B workers and those hired during the recruitment period or the period of the job order lack. Such full-time, year-round employees may have other valuable benefits as well, such as health insurance or paid time off. Similarly, employees covered by a collective bargaining agreement or an individual employment contract with a guaranteed weekly number of hours and just cause provisions also have valuable job security; they may also have benefits beyond those guarantees provided by the H–2B program. These valuable terms and conditions of employment may account for any difference in wages between what they receive and what H–2B workers receive. Therefore, these U.S. workers are excluded from corresponding employment only if they continue to be employed full-time at substantially the same terms and conditions throughout the period covered by the job order, except that they may be dismissed for cause.

The Final Rule's inclusion of other workers within the definition of corresponding employment is important because the current regulation does not protect U.S. workers in the situation where an H–2B employer places H–2B workers in occupations and/or at job sites outside the scope of the labor certification, in violation of the regulations. For example, if an employer submits an application for workers to serve as landscape laborers, but then assigns the H–2B workers to serve as bricklayers constructing decorative landscaping walls, the employer has bypassed many of the H–2B program's protections for U.S. workers. The employer has deprived them of their right to protections such as domestic recruitment requirements, the right to be employed if available and qualified, and the prevailing wage requirement. The Final Rule guards against this abuse of the system and protects the integrity of the H–2B process by ensuring that the corresponding U.S. workers employed as bricklayers receive the prevailing wage for that work.

The current regulation also does not protect U.S. workers if the employer places H–2B workers at job sites outside the scope of the labor certification. For example, an employer may submit an application for workers to serve as landscape laborers in a rural county in southern Illinois, but instead assign its H–2B workers to work as landscape laborers in the Chicago area. Because the employer did not fulfill its recruitment obligations in Chicago, U.S. workers were not aware of the job opportunity, they could not apply and take advantage of their priority hiring right, and the prevailing wage assigned was not the correct rate for Chicago. Such a violation of the employer's attestations results both in the absence of a meaningful test of the labor market for available U.S. workers and U.S. workers being adversely affected by the presence of the underpaid H–2B workers. The Final Rule's definition of corresponding employment ensures that the employer's incumbent landscape laborers who work where the H–2B workers actually are assigned to work will receive the appropriate prevailing wage rate; paying the proper wage to such workers is necessary to protect against possible adverse effects on U.S. workers due to wage depression from the introduction of foreign workers. Therefore, adoption of the definition of corresponding employment in the Final Rule is necessary to allow the Department to fulfill its mandate from DHS to provide labor certifications only in appropriate circumstances.

On the other hand, it is important to clarify that the corresponding employment requirement does not apply in the way that a number of employer commenters feared it would apply. Employers expressed concern that, if a supervisor or manager picked up a piece of trash on a golf course, planted a tree, or cleared a dining room table (the duties of its H–2B workers), all its employees who performed such work would be entitled to the higher wage rate paid to the supervisor. This concern is misplaced because this is not what the definition of corresponding employment requires. Under the Final Rule, a U.S. employee who performs work that is either within the H–2B job order or work actually performed by H–2B workers is entitled to be paid at least the H–2B required wage for that work. However, as the employer commenters recognized, the supervisor already is earning more than the H–2B workers. The corresponding employment requirement does not impose obligations in the opposite direction. Thus it does not, for example, require an employer to bump up the wages it pays to its landscape laborers to the supervisor's wage rate simply because the supervisor performed some of their landscaping laborer duties. Of course, if the H–2B certification was for a landscaping supervisor, and one of its laborers actually worked as a supervisor (perhaps because the supervisor was away on vacation for a week or was out sick for a day or two), then that laborer would be entitled to the H–2B prevailing supervisory rate for those hours actually worked as a supervisor. The laborer would not be entitled to the supervisory wage rate on an ongoing basis after the worker has returned to performing laborer duties.

Employers also expressed concern about how the corresponding employment provision would affect their flexibility in assigning workers different tasks. It is the employer's obligation to state accurately on the *Application for Temporary Employment Certification* the job duties that their H–2B workers will perform and to comply with the terms of their labor certifications by limiting the H–2B workers to those duties. This will maximize the employers' flexibility with regard to their U.S. employees. For example, if a restaurant receives a labor certification based on its temporary need for dishwashers, and it limits its H–2B employees to such duties, the restaurant may freely assign any of its U.S. workers to other jobs as needed, such as cashiers, servers and cooks. If the restaurant had previously used both its H–2B and U.S. workers interchangeably in various jobs, it must plan more carefully in the future in order to comply with the terms of its certification.

Nevertheless, in order to address employer concerns that the proposed definition of corresponding employment (''any work included in the job order'' or ''any work performed by the H–2B workers'') was so broadly worded that it would encompass the entire workforce of a company, the Final Rule deletes the word ''any'' in both places and uses the term ''substantially the same'' instead. The Department did not intend for the word ''any'' to indicate that occasional or insignificant instances of overlapping job duties would transform a U.S. worker employed in one job into someone in corresponding employment with an H–2B worker employed in another job. The following explanation is intended to provide clarity regarding when work is substantially the same that it should be considered corresponding employment. We note that the Wage and Hour Division has considerable enforcement experience under a number of statutes in determining the extent to which employees who are assigned to one type of work actually perform other types of work and that employers are generally familiar with these analyses.

Where the U.S. worker is performing ''either substantially the same work included in the job order or substantially the same work performed by the H–2B workers * * * during the period of the job order, including an approved extension thereof,'' the U.S. worker is in corresponding employment and entitled to the H–2B prevailing wage if it is higher than the worker currently receives. This includes situations where the U.S. worker performs the same job as the H–2B worker as well as those situations where the U.S. worker regularly performs a significant number of the duties of the H–2B worker for extended periods of time, because that worker's job is substantially the same as the H–2B worker's job. The U.S. worker in both situations is in corresponding employment and thus entitled to the higher H–2B prevailing wage.

Because the definition of corresponding employment also applies to ''work performed by H–2B workers,'' it is important to note that corresponding employment can also arise where H–2B worker is assigned to perform a job that significantly deviates from the job order; effectively making the H–2B worker perform a different job than was stated in the labor certification. If this violation causes the H–2B worker to regularly perform a job for extended periods of time that U.S. workers perform, then the U.S. workers performing the same job are in corresponding employment. If the prevailing wage for that job is higher than the wages the U.S. workers earn, then the U.S. workers are entitled to the higher wage.

An issue of corresponding employment will arise if the employer assigns the H–2B worker to work at a different worksite(s) or place(s) of employment than the worksite(s) or place(s) of employment listed in the certified application. U.S. workers at the new, non-certified location may be performing the same or substantially the same job as the H–2B worker. Deviating from the labor certification in this manner and moving an H–2B worker to the non-certified place of employment will cause the U.S. workers who perform the same work to be deemed to be in corresponding employment. They will be entitled to the H–2B prevailing wage if it is higher than what they currently earn.

Finally, employers expressed their interest in continuing to reward their experienced employees with higher wage rates than those paid to new workers. The H–2B program does not prohibit such higher wage rates for an employer's experienced employees. Of course, an employer must offer at least the same terms and conditions of employment to its U.S. workers in corresponding employment as it offers, plans to offer, or will provide to its H–2B workers. So if an employer rewards an H–2B worker with extra pay and/or benefits based on the H–2B employee's previous work experience, the employer must offer and provide at least the same extra pay and/or benefits to U.S. workers in corresponding employment with same or similar level of previous work experience. Employers can and should indicate the additional pay amounts based upon years of experience on any *Application for Temporary Employment Certification,* and properly advertise and recruit for those positions.

c. Full-time. The Department proposed to change the definition of full-time from 30 or more hours of work per workweek to 35 or more hours of work per week. This proposal was precipitated by the District Court's decision in *CATA* v. *Solis,* 2010 WL 3431761 (E.D. Pa. 2010), invalidating the 2008 Final Rule's 30-hour definition. The Department stated in its NPRM that a 35-hour workweek was more reflective of empirical data, was consistent with other temporary work programs, and would comport with H–2B employment relationships that the

Department has encountered during its limited enforcement experience. In addition, the Department solicited comment for an alternative definition of 40 hours, noting that the December 2010 Bureau of Labor Statistics (BLS) Current Population Survey (CPS) found that the average workweek for employees who consider themselves full-time was 42.4 hours per week.[5]

Several trade associations and private businesses supported retaining the 2008 Final Rule's standard of 30 hours per workweek, citing the difficulties of scheduling work around unpredictable and uncontrollable events, particularly the weather. A number of those commenters suggested that full-time employment should be determined not in each individual workweek, but by averaging workweeks over the length of the certified employment period. Two trade associations and a private business claimed that increasing full-time to 35 hours per workweek would decrease employer flexibility and/or increase costs. Comments from several trade associations and a professional association stated that a 35-hour workweek would be burdensome in combination with other aspects of the proposed rule, particularly the three-quarter guarantee. Finally, one private business commented that the definition of full-time should be determined by industry standards.

A private business, a private citizen, a research institute, two unions, and a number of worker advocacy groups commented that a definition of full-time as 40 hours per workweek is preferable to 35, arguing that the higher standard is more representative of typical full-time jobs. Several of these commenters referred to the CPS findings cited by the Department. Two H–2B worker advocacy groups asserted their experience indicated that long hours are standard in many industries employing H–2B workers and, therefore, a 40-hour definition would be more representative of H–2B job opportunities. Another union and a research institute, in their support of a 40-hour standard, noted that the H–1B visa program also defines full-time as 40 hours per workweek. Finally, a private business, a union, a research organization, and two advocacy organizations argued that establishing a 40-hour standard is more protective of U.S. workers than a 35-hour standard, as more U.S. workers are likely to consider jobs that offer 40 hours of work. One union suggested changing the definition to 37.5 hours per workweek, arguing that this was a common measure.

In accord with the District Court's decision in *CATA* v. *Solis,* the Department has continued to carefully consider relevant factors in determining the hours threshold for full-time, including national labor market statistics, empirical evidence from a random sample of approved applications, and other employment laws. All available evidence suggests that the existing definition of 30 hours or more per workweek is not an accurate reflection of full-time employment. According to the May 2011 Employment Situation report published by BLS, the average number of hours worked per week for employees who consider themselves full-time was 42.7.[6] Another BLS publication, the Current Population Survey, uses a 35-hour threshold to define full-time employment. Employer practices also strongly suggest that the existing definition of 30 hours is not reflective of actual employer practices: in a randomly selected sample of 200 Applications that the Department certified or partially certified in 2009 and 2010, more than 99 percent reflected workweeks of at least 35 hours. This finding is consistent with the Department's enforcement experience: the vast majority of Applications that are the subject of investigations are certified for 35 or more hours per week. Under another similar nonimmigrant visa program the Department regulates, H–2A program for agricultural workers, full-time is defined as 35-hours per week.

The Department recognizes that there is no universally-accepted definition of full-time employment and, without such a standard, must determine a reasonable floor of hours per week below which a job is not considered full-time and therefore ineligible for inclusion in the H–2B program. After careful consideration, the Department has decided to retain the proposed definition of at least 35 hours per week, which more accurately reflects full-time employment expectations than the current 30-hour definition, will not compromise worker protections, and is consistent with other existing Department standards and practices in the industries that currently use the H–2B program to obtain workers.

Though a 40-hour threshold, as some commenters pointed out, would be more consistent with the BLS-reported average of workweek of nearly 43 hours, an average level, by definition, accounts for both higher and lower values. The average includes, for example, hours worked by exempt managerial and professional employees who are not entitled to overtime and who tend to work longer hours. The Department observes that it is entirely likely that the average calculation includes employment relationships in which both the employer and the workers consider full-time to be 35 hours of work per week. This assertion is borne out by some *Applications for Temporary Employment Certification* currently being filed with ETA that request such a weekly schedule.

The Department's decision to define full-time as 35 or more hours does not conflict with worker advocacy groups' claims that many H–2B jobs require 40 or more hours per week. The 35-hour floor simply allows employers access to the H–2B program for a relatively small number of full-time jobs that would not have been eligible under a 40-hour standard. H–2B employers are and will remain required to accurately represent the actual number of hours per week associated with the job, recruit U.S. workers on the basis of those hours, and pay for all hours of work. Therefore, the employer is obligated to disclose and offer those hours of employment—whether 35, 40 or 45, or more—that accurately reflect the job being certified. Failure to do so could result in a finding of violation of these regulations.

d. Job contractor. We proposed to amend the definition of job contractor to resolve concerns raised by the U.S. District Court for the Eastern District of Pennsylvania in *CATA* v. *Solis,* 2010 WL 3431761, about our adoption of language in the 2008 Final Rule that states a job contractor ''will not exercise any supervision or control in the performance of the services or labor to be performed other than hiring, paying, and firing the workers.'' The Court found that our explanation that we adopted this language to ''make clear that the job contractor, rather than the contractor's client, must control the work of the individual employee,'' 73 FR 78020, 78024, Dec. 19, 2008, ''did precisely the opposite—it clarified that it is the contractor's client who 'must control the work of the individual employee.' The explanation is therefore not rationally connected to the change, which will accordingly be invalidated as arbitrary.'' *CATA,* 2010 WL 3431761 at *16.

The proposed definition of job contractor included the phrase ''will not exercise substantial, direct day-to-day supervision or control.'' This addition further clarified that an entity exercising

[5] Bureau of Labor Statistics, *Labor Force Statistics,* Table A–24; Persons at work in agriculture and related nonagricultural industries by hours of work, Dec. 2010. *http://www.bls.gov/web/empsit/cpseea24.htm.*

[6] Bureau of Labor Statistics, *Employment Situation,* Table A–24: Persons at work in agriculture and related and in nonagricultural industries by hours of work, May 2011. *http://www.bls.gov/web/empsit/cpseea24.htm.*

some limited degree of supervision or control over the H–2B workers would still be considered a job contractor, while an entity exercising substantial, direct day-to-day supervision or control over the H–2B workers would not be considered a job contractor. For the reasons stated below, we have decided to amend the definition as proposed to include the phrase supervision and control rather than supervision or control.

While some commenters contended that the *CATA* decision was flawed and urged us to use existing enforcement mechanisms rather than change the definition, other commenters welcomed the additional language clarifying that an employer exercising substantial, daily supervision and control would not be considered a job contractor. A specialty bar association suggested that since an employer's status as a job contractor determines an employer's eligibility to use the H–2B program under the NPRM, we should provide more concrete examples of employers that we would or would not consider to be job contractors.

While we appreciate the bar association's suggestion, given the infinite variety of business arrangements employers can make with other employers for the provision of labor or services, it is impossible to provide a definitive list of types of employers that would or would not be deemed job contractors. However, the following examples may be instructive for illustrating the differences between an employer that is a job contractor and an employer that is not. Employer A is a temporary clerical staffing company. It sends several of its employees to Acme Corporation to answer phones and make copies for a week. While Employer A has hired these employees and will be issuing paychecks to these employees for the time worked at Acme Corporation, Employer A will not exercise substantial, direct day-to-day supervision and control over its employees during their performance of services at Acme Corporation. Rather, Acme Corporation will direct and supervise the Employer A's employees during that week. Under this particular set of facts, Employer A would be considered a job contractor. By contrast, Employer B is a landscaping company. It sends several of its employees to Acme Corporation once a week to do mowing, weeding, and trimming around the Acme campus. Among the employees that Employer B sends to Acme Corporation are several landscape laborers and one supervisor. The supervisor instructs and supervises the laborers as to the tasks to be performed on the Acme campus. Under this particular set of facts, Employer B would not be considered a job contractor. Note that the provision of services under a contract alone does not render an employer a job contractor; rather, each employment situation must be evaluated individually to determine the nature of the employer-employee relationship and accordingly, whether the petitioning employer is in fact a job contractor.

We believe that our discussion of reforestation employers in the NPRM also may help to further clarify the definition of job contractor. As described in the NPRM, a typical reforestation employer, such as those who have historically used the H–2B program, performs contract work using crews of workers subject to the employer's on-site, day-to-day supervision and control. Such an employer, whose relationship with its employees involves substantial, direct, on-site, day-to-day supervision and control would not be considered a job contractor under this Final Rule. However, if a reforestation employer were to send its workers to another company to work on that company's crew and did not provide substantial, direct, on-site, day-to-day supervision and control of the workers, that employer would be considered a job contractor under this Final Rule.

Some commenters asserted that a job contractor's degree of supervision does not change the fact that its need for workers is permanent. These commenters appear to misunderstand our objective in proposing to prohibit job contractors from participating in the H–2B program. The NPRM created an irrebuttable presumption that a job contractor's need for workers is inherently permanent. The implementation of that determination necessitates that we create a definition of job contractor. Only after a job contractor is identified through the definition can we conclude that the entity's need is permanent.

One commenter asserted that the language ''where the job contractor will not exercise substantial, direct day-to-day supervision or control in the performance of the services or labor to be performed other than hiring, paying and firing the workers'' created a loophole for job contractors to artificially increase their level of supervision in order to avoid being labeled job contractors. Another commenter was concerned that an employer performing contracts on a year-round basis with on-site supervised crews would avoid being designated a job contractor based on its level of supervision. Both suggested removing the supervision or control language from the definition. While we are concerned about job contractors artificially changing their business model to circumvent a job contractor designation, we believe that the permanency of such an employer's need will be evident and addressed during the registration and application processes. Moreover, we believe that retaining the supervision and control language in the definition is essential to continuing to provide access to employers with legitimate temporary needs who perform contracts for services (*e.g.* reforestation or landscaping). Therefore, we will not alter the definition of job contractor in such a way as to bar all employers that perform contracts for services.

A specialty bar association contended that the phrase ''substantial, direct day-to-day supervision or control'' is ambiguous and will lead to confusion and uncertainty. The commenter asserted that the word ''or'' could lead to proof of either supervision or control enabling an employer to avoid designation as a job contractor and suggested that the word substantial adds to interpretive difficulty. Contrary to the commenter's reading, we intended supervision or control to prevent an employer which did not exercise both supervision and control from avoiding designation as a job contractor. In order to resolve this ambiguity, we have changed ''or'' to ''and'' in the Final Rule. We believe the use of the word substantial is important because some job contractors do exercise minimal levels of supervision and control, for example, by sending a foreman to check that a crew is working. We have retained the rest of the definition without change because, as discussed above, we believe the language is essential to distinguishing between employers who perform contracts for services and employers who fill staffing contracts. The Final Rule now states that job contractors do not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.

e. Other definitions. As discussed under § 655.6, we have decided to permit job contractors to participate in H–2B program where they can demonstrate their own temporary need, not that of their clients. The particular procedures and requirements that govern their participation are set forth in § 655.19 and provide in greater detail the responsibilities of the job contractors and their clients. Accordingly, we are adding a definition

of employer-client to this Final Rule to define the characteristics of the employer that is served by the job contractor and the nature of their relationship.

We also proposed to define several terms not previously defined in the 2008 Final Rule, including job offer and job order. We proposed definitions for job offer and job order to ensure that employers understand the difference between the offer that is made to workers, which must contain all the material terms and conditions of the job, and the order that is the published document used by SWAs in the dissemination of the job opportunity. In response to comments about the definitions of job offer and job order, we have retained the definition of job offer without change but have revised the definition of job order to indicate that it must include some, but not all, of the material terms and conditions of employment as reflected in modified § 655.18 which identifies the minimum content required for job orders.

Some commenters expressed concern that both the definition of job offer and the definition of job order require the employer to include all material terms and conditions for the job opportunity. The commenters contended that since employment contracts typically incorporate employee handbooks and other documents by reference, it would be difficult, if not impossible, to draft a document that contains all material terms and conditions. In addition, the commenters argued that including such extensive content would infringe on an employer's legitimate business interest in maintaining the confidentiality of employment terms and subject employers to exorbitant fees when the document was used in mandatory advertising. We agree that including all material terms and conditions for the job opportunity in the job order and advertising would be difficult, if not impossible, as well as a dramatic departure from how employers hire for these positions. Accordingly, we have amended the definition of job order so that it now reads ''[t]he document containing the material terms and conditions of employment * * *'' rather than ''[t]he document containing all the material terms and conditions of employment * * *'' and ''including obligations and assurances under 29 CFR part 503 * * *'' and we have amended § 655.18 to reflect the minimum content requirements for job orders. We also removed the phrase ''on their inter- and intra-State job clearance systems'' as unnecessary. The definition of job offer remains unchanged and requires an employer's job offer to contain all material terms and conditions of employment.

We also proposed revising the definition of strike so that the term is defined more consistently with our 2010 H–2A regulations. We are retaining the proposed definition without change. Some worker advocacy organizations supported the revised definition, appreciating that the definition recognizes a broad range of protected concerted activity and clearly notifies employers and workers of their obligations when workers engage in these protected activities. Other commenters, representing employer concerns, opposed the revised definition, finding it too broad. These commenters contended that the proposed definition includes minor disagreements not rising to the level of what the commenters or prior regulatory language would consider a strike and that the definition covered an employer's local workforce, rather than just the H–2B position. Some commenters requested a return to the language of the 2008 Final Rule, arguing that the proposed definition rejects our longstanding position limiting the admission of H–2B workers where the specific job opportunity is vacant because the incumbent is on strike or being locked out in the course of a labor dispute. These commenters were concerned that two workers could claim to have a dispute and, thereby, prevent the employer from using the program.

Given our desire to align the definition of strike in this Final Rule with the definition in the 2010 H–2A regulations, we have decided to retain the definition as proposed. As we explained in the preamble to the 2010 H–2A Final Rule at 75 FR 6884, Feb. 12, 2010, we believe narrowing the provision as recommended by commenters would unjustifiably limit the freedom of workers to engage in concerted activity during a labor dispute.

6. § 655.6 Temporary Need

We proposed to interpret temporary need in accordance with the DHS definition of that term and of our experience in the H–2B program. The DHS regulations define temporary need as a need for a limited period of time, where the employer must ''establish that the need for the employee will end in the near, definable future.'' 8 CFR. 214.2(h)(6)(ii)(B). The Final Rule, as discussed in further detail below, is consistent with this approach.

Also, consistent with the definition of temporary need, we proposed to exclude job contractors from participation in the H–2B program, in that they have an ongoing business of supplying workers to other entities, even if the receiving entity's need for the services is temporary. The proposal was based on our view that a job contractor's ongoing need is by its very nature permanent rather than temporary and therefore the job contractor does not qualify to participate in the program. As discussed below, we have revised the proposed provisions in the Final Rule.

a. Job Contractors. We received a number of comments on our proposal to eliminate job contractors from the H–2B program. We received some comments related to the definition of job contractor and how we will identify a job contractor. Those comments related to the definition of job contractor rather than the nature of a job contractor's need. Specifically, commenters from the reforestation industry expressed concerns over being classified as job contractors. These comments are addressed in the discussion of § 655.5.

A number of commenters expressed support for the elimination of job contractors, agreeing that job contractors' need is permanent and that the job openings are actually with a job contractor's employer-client, rather than with the job contractor. A worker advocacy organization asserted that the proposed approach, ensuring that the program is reserved for temporary job openings and excluding job contractors whose need is inherently permanent, was consistent with Congressional intent with respect to the program. One commenter expressed support for the changes in the proposed rule which reflected the court's ruling in *CATA* v. *Solis* and which prohibited job contractors from filing in the program if their clients did not also submit an application to the Department.

Other commenters generally supported the elimination of job contractors from the program as a way of protecting workers from trafficking and forced labor. One commenter also asserted that the elimination of job contractors will prevent circumstances where the H–2B workers are left without sufficient work or pay while in the job contractor's employ and where H–2B workers, who may be willing to work for less pay or in worse conditions, compete with similarly situated U.S. workers.

Another commenter offered support for the prohibition on job contractors due to the difficulty in holding them accountable for program violations, either because they disappear at the threat of litigation or because they have so little money that they are judgment-proof when they violate employment and labor laws. This commenter

reasoned that the job contractors act as a shield for the employers who actually employ the workers and indicated that the proposed change to the regulations would stem violations of laws by both contractors and the employers who work in concert with them.

On the other hand, one commenter asserted that the bar on job contractors should not be complete because to the extent that any one job contractor does not have a year-round need and routinely does not employ workers in a particular occupation for a specific segment of the year, its needs are seasonal. This commenter argued that the standard for rejection from the H–2B program should be definitively permanent, not potentially permanent, with respect to whether or not a job contractor's need is permanent. Job contractors should be afforded the same opportunity as all other employers to prove they have a temporary need for services or labor. Relying on *Matter of Vito Volpe,* 91–INA–300 (BALCA 1994), this commenter indicated that any need that does not constitute ''permanent full-time work, such as where the occupation is one where employers have seasonal layoffs each year, the position is temporary.''

As discussed in the NPRM, a person or entity that is a job contractor, as defined under § 655.5, has no individual need for workers. Rather, its need is based on the underlying need of its employer-clients, some which may be concurrent and/or consecutive. However, we recognize the validity of the concern raised by the commenter that we should exclude from the program only those who have a definitively permanent need for workers, and that job contractors who only operate several months out of the year and thus have a genuine temporary need should not be excluded. Therefore, we are revising § 655.6 to permit only those contractors that demonstrate their own temporary need, not that of their employer-clients, to continue to participate in the H–2B program. Job contractors will only be permitted to file applications based on seasonal need or a one-time occurrence. In other words, in order to participate in the H–2B program, a job contractor would have to demonstrate, just as all employers seeking H–2B workers based on seasonal need have always been required: (1) If based on a seasonal need that the services or labor that it provides are traditionally tied to a season of the year, by an event or pattern and is of a recurring nature; or (2) if based on a one-time occurrence, that the employer has not employed workers to perform the services or labor in the past and will not need workers to perform the services in the future or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

For a job contractor with a seasonal need, the job contractor must specify the period(s) or time during each year in which it does not provide any services or labor. The employment is not seasonal if the period during which the services or labor is not provided is unpredictable or subject to change or is considered a vacation period for the contractor's permanent employees. For instance, a job contractor that regularly supplies workers for ski resorts from October to March but does not supply any workers outside of those months would have its own temporary need that is seasonal.

Limiting job contractor applications to seasonal need and a one-time occurrence is appropriate, as it is extremely difficult, if not impossible, to identify appropriate peakload or intermittent needs for job contractors with inherently variable client bases. The seminal, precedent decision in *Matter of Artee,* 18 I. & N. Dec 366, Interim Decision 2934, 1982 WL 190706 (Comm'r 1982), established that a determination of temporary need rests on the nature of the underlying need for the duties of the position. To the extent that a job contractor is applying for a temporary labor certification, the job contractor whose need rests on that of its clients has itself no independent need for the services or labor to be performed. The Board of Alien Labor Certification Appeals (BALCA) has further clarified the definition of temporary need in *Matter of Caballero Contracting & Consulting LLC,* 2009–TLN–00015 (Apr. 9, 2009), finding that ''the main point of *Artee* * * * is that a job contractor cannot use [solely] its client's needs to define the temporary nature of the job where focusing solely on the client's needs would misrepresent the reality of the application.'' The BALCA, in *Matter of Cajun Constructors, Inc.* 2009–TLN–00096 (Oct. 9, 2009), also decided that an employer that by the nature of its business works on a project until completion and then moves on to another has a permanent rather than a temporary need.

The limited circumstances under which job contractors may continue to participate in the H–2B program would still be subject to the limitations provided in the *CATA* decision, which resulted in the Department no longer being able to accept H–2B labor certification applications from job contractors if the job contractor's employer-clients also did not submit labor certification applications. Section 655.19 sets forth the procedures and requirements governing the filing of applications by job contractors.

The Department understands that in some cases the use of a job contractor may be advantageous to employers. However, the advantages provided to employers by using job contractors do not overcome the fact that many job opportunities with job contractors are inherently permanent and therefore such job contractors are not permitted to participate in the program. We recognize that by taking this position the result may be that some employers who have been clients of such job contractors, and who have not previously participated in the program, may now seek to do so. In the proposed rule, the Department encouraged employers to submit information about their changed circumstances as a result of the proposal to bar job contractors from the program, including the potential costs and savings that may result. The Department did not receive any comments from employers describing or quantifying the cost of the elimination of job contractors from the program to aid in the Department's estimation of the economic impact of this proposal.

One commenter was concerned that job contractors would get around this prohibition by representing employers as agents. Agents, by their role in the program, have no temporary need apart from the underlying need of the employer on whose behalf they are filing the *Application for Temporary Employment Certification.* When considering any employer's *H–2B Registration,* the Department will require that employer to substantiate its temporary need by providing evidence required to support such a need. The Department does not anticipate an issue with this type of misclassification.

b. Change in the Duration of Temporary Need. In addition to proposing to bar job contractors from the H–2B program based on their underlying permanent need for the employees, we proposed to define temporary need, except in the event of a one-time occurrence, as 9 months in duration, a decrease from the 10-month limitation under the 2008 Final Rule. As also discussed in the NPRM, this definition is more restrictive than, yet still consistent with, the DHS definition of temporary need, in which the ''period of time will be 1 year or less, but in the case of a one-time event could last up to 3 years.'' 8 CFR 214.2(h)(6)(ii)(B). We

are adopting this provision in the Final Rule as proposed.

We received a number of comments on this proposal. Most commenters supported the clarification of the temporary need standard. Two such commenters recommended a further reduction in the duration of temporary need to no more than 6 months. In support of their proposal, these commenters suggested that half a year is a reasonable amount of time for an employer to have an unskilled temporary foreign worker, because there are currently millions of unemployed unskilled U.S. workers seeking employment across the country. These commenters hoped that shortening the certification periods for H–2B workers will compel employers to increase recruitment of U.S. workers (because they will have to recruit more often), which better achieves the statutory mandate not to use H–2B labor unless ''unemployed persons capable of performing such service or labor cannot be found in this country.'' 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Other commenters opposed the proposal to change the maximum duration of temporary need from 10 months to 9 months. One commenter, who conducted a private survey of H–2B employers, indicated that 32 percent of its respondents indicated that curtailing the temporary work period to 9 from 10 months will have a severe effect on their bottom line. The remainder of respondents indicated moderate to no effect. This commenter indicated that some industries reported greater effects than others; those primarily concerned over the shorter season included: Landscaping, seafood processing, ski resorts, summer resorts, and forestry. As reported by this commenter, for some of these industries, a shorter season would mean less time for training and quality control, decreased revenues and loss of permanent full-time employees. Another commenter concurred that the adoption of a 9-month limit would have a devastating impact on many types of businesses, ranging from hospitality and food service to landscaping and numerous others. This commenter raised concerns about a significant drop in participation in the program by nearly a third of the businesses currently using the H–2B program and predicted substantial effects on the economy, including upstream ripple effects. In contrast to commenters who called for a yet shorter duration, most of these commenters agreed that they would not be able to use the H–2B program if we define a temporary need as less than 9 months.

Another commenter asserted that the standard for temporary need should be the employer's actual need (up to 1 year, or up to 3 years for one-time events) and not an arbitrary time period defined by the Department under the guise of ensuring the integrity of the program. Supporting the retention of a 10-month standard, this commenter challenged our reasoning for reducing the duration of seasonal, peakload, or intermittent need, including referring to the discussion under the 2008 Final Rule which indicated that a period of need in excess of 1 year may be justified in certain circumstances. Finally, an association of employers and temporary workers argued that temporary need should not be generally quantified because it is industry-specific and suggested that each employer should be able to argue that its need is temporary and consistent with the definition of seasonal or peakload.

DHS categorizes and defines temporary need into four classifications: seasonal need; peakload need; intermittent need; and one-time occurrence. A one-time occurrence may be for a period of up to 3 years. The other categories are limited to 1 year or less in duration. See, generally, 8 CFR 214.2(h)(6)(ii)(B).

We believe that the proposed time period is an appropriate interpretation of the one year *or less* limitation contained in the DHS regulations. Allowing employers to file seasonal, peakload or intermittent need applications for periods approaching a year (364 days is less than 1 year) would be inconsistent with the statutory requirement that H–2B job opportunities need to be temporary. The closer the period of employment is to one year, the more the opportunity resembles a permanent position. For instance, it would be difficult, if not impossible, to distinguish between a permanent job opportunity and one in which the work begins on March 1st and ends on February 20th, only to begin again on March 1st. We believe that a maximum employment period of 9 months definitively establishes the temporariness of the position, as there is an entire season in which there is simply no need for the worker(s). Where there are only a few days or even a month or two for which no work is required, the job becomes less distinguishable from the permanent position, particularly one that offers time off due to a slow-down in work activity. Recurring temporary needs of more than 9 months are, as a practical matter, permanent positions for which H–2B labor certification is not appropriate. The current approach that permits temporary certifications for periods up to 10 months encompasses job opportunities that we believe are permanent in nature and not consistent with Congressional intent to limit H–2B visas to employers with temporary or seasonal needs. However, we recognize that some employers may have a legitimate temporary need that lasts up to 9 months, and for that reason, we decline to reduce the duration of temporary need to 6 months. A job opportunity that does not exist in the winter months would likely be considered seasonal. We believe that the 9-month limitation that fairly describes the maximum scope of a seasonal need should also be applied to peakload need since there is no compelling rationale for creating a different standard for peakload.

While we recognize the impact that a movement from 10 months, which had been previously acceptable, to 9 months will have an adverse impact on some employers, the impact is not relevant to our legal obligation to protect the wages and working conditions of U.S. workers. The Department previously relied on the standard articulated in *In the Matter of Vito Volpe Landscaping,* 91–INA–300, 91–INA–301, 92–INA–170, 91–INA–339, 91–INA–323, 92–INA–11 (Sept. 29, 1994), which stated that a period of 10 months was not permanent. The Department may adopt through notice and comment rulemaking a new standard that is within our obligation to administer the program. See *United States* v. *Storer Broadcasting,* 351 U.S. 192, 203 (1956); *Heckler* v. *Campbell,* 461 U.S. 458, 467 (1983). We have determined that 9 months better reflects a recurring seasonal or temporary need and have accordingly proposed a new standard which has been adopted in this Final Rule. Recurring temporary needs of more than 9 months are, as a practical matter, permanent positions for which H–2B labor certifications are not appropriate. The majority of H–2B employer applicants will not be affected by this change. According to H–2B program data for FY 2007–2009, 68.7 percent of certified and partially certified employer applicants had a duration of temporary need less than or equal to 9 months, while 31.3 percent of certified or partially certified applicants had a duration of temporary need greater than 9 months. Many seasonal businesses experience ''shoulder seasons,'' which are periods of time at the beginning and end of the season when fewer workers are needed. Therefore, we anticipate that employers will be able to meet their labor needs during the short additional period they

must cover of the shoulder seasons with U.S. workers and, therefore, will not be impacted by the change from the 10-month standard.

Similarly, we have determined that limiting the duration of temporary need on a peakload basis would ensure that the employer is not mischaracterizing a permanent need as one that is temporary. For example, since temporary need on a peakload basis is not tied to a season, under the current 10-month standard, an employer may be able to characterize a permanent need for the services or labor by filing consecutive applications for workers on a peakload basis. To the extent that each application does not exceed the 10 months, the 2-month inactive period may correspond to a temporary reduction in workforce due to annual vacations or administrative periods. Increasing the duration of time during which an employer must discontinue operations from 2 months to 3 will ensure that the use of the program is reserved for employers with a genuine temporary need. Similarly, a 9-month limitation is appropriate for ensuring that the employer's intermittent need is, in fact, temporary. In addition, under the Final Rule, each employer with an intermittent need will be required to file a separate *H–2B Registration* and *Application for Temporary Employment Certification* to ensure that any disconnected periods of need are accurately portrayed and comply with the 9-month limitation.

With respect to one commenter's assertion that we have acknowledged in the 2008 Final Rule that temporary need may last longer than 1 year in some circumstances, the definition of a one-time occurrence as lasting up to 3 years is consistent with DHS regulations and is intended to address those limited circumstances where the employer has a one-time need for workers that will exceed the 9-month limitation.

With respect to the commenter's concern regarding the potential economic impact of the shorter standard on the operations of businesses and the drop in program participation, the Department has accounted in both the NPRM and this Final Rule for the potential drop in program use. Employers participating in the H–2B program must demonstrate that they have a temporary need for the labor or services to be performed which they are unable to meet with U.S. workers. In interpreting the DHS standard for defining temporary need, the Department has struck a balance between ensuring that each position certified will comport with the regulatory requirements and accommodating an employer's legitimate need to fill its job opportunities in cases where United States workers are not available.

c. Peakload need. In addition to re-defining the duration of temporary need, we expressed concern in the NPRM that certain employers who lack the ability to demonstrate temporary need on a seasonal basis may mischaracterize a permanent need as a short-term temporary need which would fit under the peakload need standard. We used as an example the landscaping industry in which the off season is primarily a product of the absence of H–2B workers rather than a reduction in the underlying need for the services or labor. In that context, we sought comments and ideas from the public on the factors or criteria that we should consider in determining whether the employer has a genuine peakload need based on short-term demand. In addition, we requested input on whether we should limit these occurrences to those resulting from climactic, environmental or other natural conditions, or on limiting short-term demand to 6 months.

We received several comments on this proposal. The majority of commenters opposed the restriction of the peakload need standard. One commenter indicated that approximately a quarter of all H–2B applications are filed for landscaping employment, and that the employer's underlying need may well depend on the location of the company and the climate in that location. This commenter suggested that these employers should not be precluded from program participation by virtue of where they are located, and requested that we retain our peakload need definition as proposed.

In response to commenters' suggestions, we have concluded that no commenters offered a practical rationale indicating that a 6 month limitation would be more effective at curbing the issue of misclassifying the nature of the employer's need, rather than a 9 month limitation but we received a large number of comments noting that such a change would have an unintended consequence of effectively barring at least one sustaining industry—landscaping—from the program. With respect to another commenter's suggestion that we estimate short-term demand in relation to the number of temporary workers on a peakload basis as a percentage of the employer's total workforce, we note that such a suggestion is not operationally feasible.

One commenter responded to the request for comments on establishing criteria for distinguishing genuine peakload need from a permanent need. The commenter proposed the application of a specific criterion, namely: a limitation of peakload need to 6 months, defining short-term demand in relation to the percentage of temporary workers on a peakload basis as a percentage of the employer's total workforce. This commenter proposed concrete numbers of workers and percentages based on the numbers of workers employed by the employer, indicating that such an approach ought to preclude employers that conduct year-round activities constituting permanent need from using the H–2B program.

Having considered all comments on this proposal, we have determined to retain the provision as proposed. We thank the commenters for their valuable suggestions; however, we have determined that this regulation, as proposed, better meets our program mandate than any of the suggested alternatives.. Therefore, we are retaining this provision as proposed.

d. One-Time Occurrence. In addition to barring job contractors, and reducing the duration of the seasonal/peakload need to 9 months, we proposed an interpretation of a one-time occurrence to be consistent with DHS regulations under which such an occurrence could last up to 3 years. We received a number of comments on this proposal.

The majority of commenters opposed the apparent expansion of this requirement. One commenter indicated that while the reduction in the duration of seasonal/peakload need to 9 months was a notable improvement, the 3-year one-time occurrence provided employers with a loophole. This commenter referred to the H–2B definition under section 101 of the INA to indicate an inconsistency. Other commenters suggested that we institute an across the board 9-month limitation to the duration of temporary need. Many of the commenters opposing this proposal referred to average durations U.S. workers stay in their jobs, noting that the duration was typically less than 3 years and thus that our proposal was inconsistent with labor market information.

Other commenters addressing the needs of the construction industry indicated that the standard for proving a temporary need based on a one-time occurrence would be difficult to meet under the definition, in that the employer must establish that [1] it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or [2] it has an employment situation that is

otherwise permanent, but a temporary event of short duration has created the need for a temporary worker. These commenters expressed concern that construction contractors will not able to pass the first test unless the project for which the H–2B worker is hired is the only project they ever work on, because they invariably use the same types of workers. As to the second alternative, they argued that the construction industry consists primarily of short-term and intermittent work and therefore does not qualify under this test. Another commenter opposing the change in the definition for consistency with DHS regulations indicated that in crafting its definition DHS relied on an example from the construction industry which was not an accurate portrayal of the way in which that industry operates. Another commenter opposing the 3-year standard for one-time occurrences indicated that circumstances where an employer will be able to comply with the requirements for meeting the standard may be rare.

We proposed to define temporary need consistent with DHS regulations, so that both agencies make consistent decisions on applications/petitions. The majority of commenters asserted that our reliance on DHS regulations, in this instance, is misplaced. These commenters focused on the examples relied upon by DHS in the preamble to its 2008 regulations at 73 FR 78104, Dec. 19, 2008 to explain the operation of the 3-year, one-time occurrence. Although we adopt the DHS regulatory standard, we acknowledge, as DHS did, that it did not intend for the 3-year accommodation of special projects to provide a specific exemption for the construction industry in which many of an employer's projects or contracts may prove a permanent rather than a temporary need. Therefore, we will closely scrutinize all assertions of temporary need on the basis of a one-time occurrence to ensure that the use of this category is limited to those special and rare circumstances where the employer has a non-recurring need which exceeds the 9 month limitation. For example, an employer who has a construction contract which exceeds 9 months may not use the program under a one-time occurrence if it has previously filed an *Application for Temporary Employment Certification* identifying a one-time occurrence and the prior *Application for Temporary Employment Certification* requested H–2B workers to perform the same services or labor in the same occupation.

For all of the reasons articulated above, we are retaining the standard for a one-time occurrence as proposed.

7. § 655.7 Persons and Entities Authorized To File

In the NPRM, we proposed to designate the persons authorized to file an *H–2B Registration* or an *Application for Temporary Employment Certification* as the employer, or its attorney or agent. The proposed provisions also stressed the requirement that the employer must sign the *H–2B Registration* or *Application for Temporary Employment Certification* and any other required documents, whether or not it is represented by an attorney or agent. We did not receive comments on this proposal. Therefore, the provision is retained as proposed.

8. § 655.8 Requirements for Agents

In the NPRM, we noted that we have long accepted applications from agents acting on behalf of employers in the H–2B program, but that in administering the H–2B program, we have become concerned about the role of agents in the program and whether their presence and participation have contributed to program compliance problems. We proposed that if we were to continue to accept applications from agents, that the agents be required, at a minimum, to provide copies of current agreements defining the scope of their relationships with employers and that where an agent is required under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) to have a Certificate of Registration, the agent must also provide a current copy of the certificate which identifies the specific farm labor contracting activities that the agent is authorized to perform. The Final Rule adopts this provision as proposed. We also invited the public to provide ideas and suggestions on the appropriate role of agents in the H–2B program. We specifically sought comments on whether we should continue to permit the representation of employers by agents in the H–2B program, and if so, whether any additional requirements should be applied to agents to strengthen program integrity.

Based on the comments we received, we have concluded that agents should be permitted to continue to represent employers in the H–2B process before the Department and file *Applications for Temporary Employment Certification* on their behalf. To assist in verifying the scope of the agent's relationship with the employer, we will also require agents to provide copies of their agreement with the employer as well as the MSPA Certificate of Registration, where applicable. We are collecting the agreements and will be reviewing them as evidence that a bona fide relationship exists between the agent and the employer and, where the agent is also engaged in international recruitment, to ensure that the agreements include the language required at § 655.20(p) prohibiting the payment of fees by the worker. We do, however, also reserve the right to further review the agreements in the course of an investigation or other integrity measure. We therefore remind the public that a certification of an employer's application that includes such a submitted agreement in no way indicates a general approval of the agreement or the terms therein.

A few commenters suggested that agents be barred from filing applications on behalf of H–2B employers. At least two commenters, both trade organizations, suggested that agents create a problematic level of separation between employers and their obligations under the H–2B program.

An overwhelming number of commenters, however, stated that while disreputable agents may exist, bona fide agents are critical to the employers' ability to maneuver through the H–2B application process and requirements. Many of these commenters reiterated our own statistics for FY 2010, showing that that only 14 percent of employers filed applications without an agent and that 38 percent of these cases were denied. These commenters argued that we should continue to allow agents to file applications on behalf of H–2B employers. These same commenters, however, expressed an interest in program integrity and therefore agreed with the proposal to require agents to provide copies of their agreements with employers, to verify the existence of a relationship. Some commenters suggested that the agent(s) should be permitted to redact confidential proprietary business information before providing such agreements. Again, we are requiring agents to supply copies of the agreements defining the scope of their relationship with employers to ensure that there is a bona fide agency relationship and maintain program integrity. The requirement, however, in no way obligates either the agent or the employer to disclose any trade secrets or other proprietary business information. The Final Rule only requires the agent to provide sufficient documentation to clearly demonstrate the scope of the agency relationship. In addition, under this Final Rule, we do not presently plan to post these agreements for public viewing. If, however, we do so in the future, we will continue to follow all applicable legal and internal procedures for complying with Freedom of Information Act (FOIA) requests to

ensure the protection of private data in such circumstances.

One commenter, a trade organization, suggested that the proposed requirement that agents provide a copy of their MSPA Certificate of Registration, if required under MSPA, may be confusing since H–2B is viewed as non-agricultural, in contrast with the H–2A program, which is for agricultural labor and services. This commenter recommended that we provide a list of those businesses to which this additional requirement applies.

Several commenters also suggested that, in addition to receiving agent-employer agreements we should: limit the tasks in which agents can engage to those not involving the unauthorized practice of law or for which no payment is received, in accordance with DHS' regulations; make such agreements publicly available; maintain a public list of the identity of agents who represent employers in the labor certification process; require mandatory registration for agents; hold employers strictly liable for the actions and representations of their agents; and lastly, enhance enforcement mechanisms to combat fraud.

After evaluating all the comments, we have decided to continue to permit agents to participate in the Department's H–2B labor certification program. Their importance to employers, as reflected in numerous comments, outweighs any value gained by their exclusion. We remain interested in furthering program integrity; while we are not prepared to accept any of the specific requirements on agents suggested by commenters at this time, we have clarified in § 655.73(b) that an agent signing ETA Form 9142 may be debarred for its own violation as well as for participating in a violation committed by the employer. Some of the commenters' ideas, such as requiring agents to be registered with the Department to participate in the program would require additional government resources which are currently limited, while other ideas are not deemed necessary at this time, such as making the agreements publicly available. We believe that the Department will be able to preserve program integrity by collecting such agreements to ascertain the validity of and scope of the agency relationship and, where the agent is also engaged in international recruitment, to ensure they include the contractual prohibition against charging fees language required at § 655.20(p) prohibiting the payment of fees by the worker. Such action, in combination with the enforcement mechanisms and compliance-based model adopted by this Final Rule, will resolve many of the expressed concerns without requiring the expenditure of additional resources. However, as stated under § 655.63, we reserve the right to post any documents received in connection with the *Application For Temporary Employment Certification* and will redact information accordingly.

Lastly, in response to commenters that urged us to hold employers strictly liable for the actions of the agents, we remind both agents and employers that each is responsible for the accuracy and veracity of the information and documentation submitted, as indicated in the ETA Form 9142 and Appendix B.1, both of which must be signed by the employer and its agent. As discussed under § 655.73(b), agents who are signatories to ETA Form 9142 may now be held liable for their own independent violations of the H–2B program. As to the commenter's suggestion that we provide additional examples of H–2B occupations subject to MSPA guidelines, we believe that employers or individuals working in affected industries are already aware of their obligations under MSPA, including the requirement to register.

9. § 655.9 Disclosure of Foreign Worker Recruitment

We proposed to require an employer and its attorney and/or agent to provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H–2B workers. We also proposed to disclose to the public the names of the agents and recruiters used by employers and their attorneys and/or agents participating in the H–2B program. We received several comments, all of which agreed with the proposal to provide information about the recruiter's identity. We have expanded this section in the Final Rule to better reflect the obligation therein. For example, we revised the Final Rule to specify that the requirement to provide a copy of the written contract applies to agreements between the employer or the employer's attorney or agent and that the written contract must contain the contractual prohibition on charging fees, as set forth in § 655.20(p). Where the contract is not in English and the required contractual prohibition is not readily discernible, we reserve the right to request further information to ensure that the contractual prohibition is included in the agreement.

Several commenters requested that we strengthen the section by requiring the employer to also provide the identity and location of the foreign labor recruiter's sub-recruiters or sub-agents and to expand the provision to include verbal agreements, as such informal arrangements with foreign recruiters are not uncommon. We agree that in addition to bolstering program integrity by aiding in the enforcement of certain regulatory provisions, collecting the identity and location of persons hired by or working for the recruiter or its agent to recruit or solicit prospective H–2B workers—effectively acting as sub-recruiters, sub-agents, or sub-contractors—will bring a greater level of transparency to the foreign recruitment process that will assist the Department, other agencies, workers, and community and worker advocates in understanding the roles of each participant and the recruitment chain altogether. This requirement advances the Department's mission of ensuring that employers comply with overall H–2B program requirements, and do not engage in practices that adversely affect the wages and working conditions of U.S. workers. See 8 U.S.C. 1184(c)(14).

We have therefore added paragraph (b) of this section in the Final Rule, requiring that employers and their attorneys or agents provide the identity (name) of the persons and entities hired by or working for the recruiter or recruiting agent and any of the agents or employees of those persons and entities, as well as the geographic location in which they are operating. We interpret the term ''working for'' to encompass any persons or entities engaged in recruiting prospective foreign workers for the H–2B job opportunities offered by the employer, whether they are hired directly by the primary recruiter or are working indirectly for that recruiter as a downstream recruiter in the recruitment chain. We expect employers, and their attorneys or agents, as applicable, to provide these names and geographic locations to the best of their knowledge at the time the application is filed. We expect that, as a normal business practice, when completing the written agreement with the primary recruiting agent or recruiter, the employer/attorney/agent will ask who the recruiter plans to use to recruit workers in foreign countries, and whether those persons or entities plan to hire other persons or entities to conduct such recruitment, throughout the recruitment chain.

As mentioned above, the public disclosure of the names of the foreign labor recruiters used by employers, as well as the identities and locations of persons or entities hired by or working for the primary recruiter in the recruitment of H–2B workers, and the agents or employees of these entities, will provide greater transparency to the H–2B worker recruitment process. By

providing us with this list, which we will make public, the Department will be in a better position to enforce recruitment violations, and workers will be better protected against fraudulent recruiting schemes because they will be able to verify whether a recruiter is in fact recruiting for legitimate H–2B job opportunities in the U.S. We intend to use this list of foreign labor recruiters to facilitate information sharing between the Department and the public, so that where we believe it is appropriate, we can more closely examine applications or certifications involving a particular recruiter or its agent identified by members of the public as having engaged in improper behavior. Additionally, information about the identity of the international recruiters will assist us in more appropriately directing our audits and investigations.

To reiterate the overall requirements of § 655.9 in the Final Rule, § 655.9(a) requires employers or their agents or attorneys, as applicable, to provide us with a copy of all agreements with any foreign labor recruiter, and those written agreements must contain the required contractual prohibition on the collection of fees, as set forth in § 655.20(p). The requirement in § 655.9(b) to disclose to the Department the identities and locations of persons and entities hired by or working for the foreign labor recruiter and any of the agents or employees of those persons and entities who will recruit or solicit H–2B workers for the job opportunities offered by the employer encompasses all agreements, whether written or verbal, involving the whole recruitment chain that brings an H–2B worker to the employer's certified H–2B job opportunity in the U.S.

Several commenters erroneously assumed the agreements between the employer and the foreign recruiter would be made public. The NPRM provided for obtaining the agreements and sharing with the public the identity of the recruiters, not the full agreements.

As stated above, we intend to collect the submitted agreements for the purpose of maintaining a public list of recruiters involved with H–2B workers. At the time of collection, we will review the agreements to obtain the names of the foreign recruiters and to verify that these agreements include the contractual prohibition against charging fees language required at § 655.20(p) prohibiting the payment of fees by the worker. We may also further review the agreements in the course of an investigation or other integrity measure. We therefore remind the public that a certification of an employer's application that includes such a submitted agreement in no way indicates a general approval of the agreement or the terms therein.

Several commenters agreed that the disclosure of the identity of the foreign recruiters is helpful and badly needed, but suggested that it is not enough. One commenter, an individual, suggested that if an employer is paying a recruiter to locate foreign workers, that employer should also pay for a U.S. recruiter to locate U.S. workers. We did not impose such a requirement. This Final Rule, as discussed below in further detail, contains several recruitment steps the employer must conduct, aimed at providing U.S. workers ample opportunity to learn about and apply for these jobs.

Other commenters suggested that we should institute a mandatory registration or licensing system, that we should require recruiters to make themselves subject to U.S. jurisdiction, or that employers should be held strictly liable for recruitment violations. While we appreciate these suggestions, we will not implement them because we neither have the resources nor the authority to do so. However, we will continue to implement enforcement and integrity measures to decrease potential fraud in the H–2B program.

B. Prefiling Procedures

1. § 655.10 Prevailing Wage

We proposed a modified process for obtaining a prevailing wage designed to simplify how an employer requests a PWD. The proposed rule required employers to request PWDs from the National Prevailing Wage Center (NPWC) before posting their job orders with the SWA and stated that the PWD must be valid on the day the job orders are posted. We encourage employers to continue to request a PWD in the H–2B program at least 60 days before the date the determination is needed. After reviewing comments on the proposed prevailing wage process, we are adopting the provisions as proposed, with one amendment.

Several labor and worker advocacy groups supported the proposed process for obtaining a PWD. One, while agreeing that we should require employers to test the U.S. labor market using a currently valid PWD, suggested that we should also require employers to pay any increased prevailing wage that is in effect for any time during the certified period of employment. The commenter cited the Court's ruling in *CATA* and the requirement in the H–2A program requirement that an employer pay a higher adverse effect wage rate (AEWR) when a new, higher AEWR becomes effective during the period of employment as its basis for the suggestion.

Since this concept of paying any increased prevailing wage that is in effect for any time during the certified period of employment was not contained in the NPRM and the public did not have notice and an opportunity to comment, we cannot adopt the commenter's suggestion in this Final Rule.

Some labor and worker advocacy groups suggested that removing the last sentence of proposed paragraph (d), which exempts employers operating under special procedures, would clarify the proposed regulatory language on prevailing wages for multiple worksites. We agree and have removed the sentence in the Final Rule. We issue special procedures through TEGLs which detail the variances permitted for occupations covered by the special procedures.

Some commenters noted that existing special procedures will require updating, given this rule and the Prevailing Wage Final Rule. We agree that we will need to update existing special procedure guidance to reflect organizational and regulatory changes; however, those updates will be issued through new Training and Employment Guidance Letters (TEGLs) rather than within this rule, where appropriate. Until such time as new TEGLs are issued, we will continue to honor the special procedures that were in place before the effective date of the new regulations.

A number of commenters expressed concern about the application of the new prevailing wage methodology to workers in corresponding employment. We address these comments in the larger discussion of corresponding employment at § 655.5.

As discussed in the NPRM, this rulemaking does not address or seek to amend the prevailing wage methodology established under the H–2B Wage Final Rule. Comments related to the new prevailing wage methodology fall outside the scope of this rulemaking.

2. § 655.11 Registration of H–2B Employers

We proposed to bifurcate the current application process into a registration phase, which addresses the employer's temporary need, and an application phase, which addresses the labor market test. We proposed to require employers to submit an *H–2B Registration* and receive an approval before submitting an *Application for Temporary Employment Certification* and conducting the U.S. labor market test. The proposed registration required

employers to document the number of positions the employer desires to fill in the first year of registration; the period of time for which the employer needs the workers; and that the employer's need for the services or labor is non-agricultural, temporary and is justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by DHS in 8 CFR 214.2(h)(6)(ii)(B) and interpreted in § 655.6. If approved, we proposed that the registration would be valid for a period of up to 3 years, absent a significant change in conditions, enabling an employer to begin the application process at the second phase without having to re-establish temporary need for the second and third years of registration. We have retained the proposed registration process in the Final Rule, with one minor change related to Requests for Information (RFIs) and other clarifying language that if and when the *H–2B Registration* is permitted to be filed electronically, the employer must print and sign it to satisfy the original signature requirement.

a. Method of registration. Many commenters voiced support for the proposal to bifurcate the application process and shift the temporary need and bona fide job opportunity review to the registration process described in the NPRM. Some commenters supported bifurcation believing that the registration process will provide more time for OFLC to thoroughly review an employer's intended use of the program and temporary need. Others supported the registration process, asserting that the 3-year registration validity and removal of employers without legitimate temporary need will result in a more efficient process, better program oversight, better protection for workers, and greater visa availability for employers with legitimate temporary needs. Still other commenters believed that the registration would help prevent visa fraud. These comments were consistent with our reasoning, as articulated in the NPRM.

Other commenters opposed the registration process. Some industry organizations and employers feared that the addition of a registration step will make the application process more cumbersome and time-consuming and some urged us to use increased enforcement activities rather than program restructuring to accomplish our stated goals. We view the proposed separation of the temporary need evaluation process from the labor market test process as an opportunity to fully evaluate an employer's intended use of the H–2B program without sacrificing overall program efficiency. We have found that evaluating temporary need is a fact-intensive process which, in many cases, can take a considerable amount of time to resolve. Separating the two processes will give OFLC the time to make a considered decision about temporary need without negatively impacting an employer's ability to have the workers it needs in place when needed. In addition, we anticipate that many employers, with 3 years of registration validity, will enjoy a one-step process involving only the labor market test in their second and third years after registration, which will allow the Department to process these applications more efficiently. We disagree that enforcement alone can ensure program integrity; we believe the move from an attestation-based model to a compliance-based model, the bifurcation of application processing into registration and labor market test phases, and enforcement activities all contribute to program integrity. We appreciate and understand stakeholder concerns about transition to a new registration process and will make every effort to ensure that the transition does not adversely impact processing by announcing the procedures by which we will implement the registration process. We have accordingly added a regulatory provision to allow for the transition of the registration process through a future announcement in the **Federal Register**, until which time the CO will adjudicate temporary need through the application process.

One commenter expressed concern that DHS and the Department of State (DOS) each also review temporary need and that the three agencies differ in approach, resulting in inconsistent findings related to temporary need. We understand that, throughout the H–2B process, an employer must interact with multiple government agencies, each with different responsibilities related to the H–2B program. However, while each may perform different functions, the definition of temporary need is consistent across all relevant agencies, and we seek to minimize differences by participating in inter-agency communication designed to align the agencies' H–2B processing efforts.

One specialty bar association asserted that the new registration process is a departure from previous practice and that we are exceeding our authority by adjudicating temporary need in the registration process, effectively removing USCIS from the process and assuming an adjudicatory role that Congress did not intend. We disagree. We have a longstanding practice of evaluating temporary need as an integral part of the adjudication of the *Application for Temporary Labor Certification;* the bifurcation of the application process into a registration phase and a labor market test phase shifts the timing of, but does not change the nature of, our review. See Matter of Golden Dragon Chinese Restaurant, 19 I. & N. Dec. 238, 239 (Comm'r 1984). Moreover, following lengthy discussions, DHS and the Department both issued companion H–2B final rules in 2008. 73 FR 78020, Dec. 19, 2008; 73 FR 78104, Dec. 19, 2008. These final rules left our evaluation of temporary need in place and shifted administrative review of the *Application for Temporary Labor Certification* from DHS to the Department. The bifurcation of the application process simply represents a timing shift, not a change, in our longstanding review of temporary need and bona fide job opportunity issues.

b. Timing of registration. We proposed to require employers to file an *H–2B Registration* no fewer than 120 and no more than 150 calendar days before the date of initial need for H–2B workers. The Final Rule retains this provision with minor clarification.

Several commenters supported bifurcation of the application process as a means of enabling employers to conduct recruitment in the U.S. labor market closer to the date of need. We agree and anticipate, as these commenters do, that recruitment closer to the date of need should provide a more accurate reflection of actual labor market conditions.

Other commenters feared that the addition of a registration step will make the application process more time-consuming. Commenters expressed concern that, without timelines or deadlines on registration processing, an employer cannot be sure it will have time to complete Department, DHS, and DOS processing and receive the requested workers before its date of need. One commenter alleged that we sought to hide registration processing time outside the application processing time counted against our 60-day processing guideline.

Our timeline for processing applications in the new two-step process is sensitive to these concerns. The proposed registration window (*i.e.,* 120 to 150 days before the employer's anticipated date of need) provides enough time for processing the registration before an employer may submit an *Application for Temporary Employment Certification* (*i.e.,* 75 to 90 days before the employer's anticipated date of need) to assure that the adjudication of the *Application for*

Temporary Employment Certification will not be delayed. In addition, many employers will not have to repeat the registration process for the next 2 years. The registration timeframe also reflects our understanding that some employers may have difficulty accurately predicting their need more than 5 months in advance. The registration window seeks to balance both processing time and accuracy concerns. We anticipate an employer's overall processing time to decrease significantly when the bifurcated process goes into effect.

For consistency with other provisions under the Final Rule and clarification of the process therein, this provision has been slightly revised to add reference to the exception to the filing time requirement of the *H–2B Registration* where it is filed in support of an emergency filing under § 655.17.

c. Registration process. The proposed rule authorized the CO to issue one or more RFIs before issuing a Notice of Decision on the *H–2B Registration* if the CO determined that he or she could not approve the *H–2B Registration* for various reasons, including, but not limited to: An incomplete or inaccurate ETA Form 9155; a job classification and duties that do not qualify as non-agricultural; the failure to demonstrate temporary need; and/or positions that do not constitute bona fide job opportunities. We retained the proposed provisions in the Final Rule, with one amendment.

One employer suggested we remove the word ''normally'' from paragraph (g) of this section to establish a definitive timeframe for RFI issuance. We agree and have removed ''normally'' from paragraph (g) of this section in the Final Rule.

Another employer suggested that we should not permit the CO to issue an unlimited number of RFIs. In order to provide the CO with flexibility to work with employers seeking to resolve deficiencies and secure registration approval, we will retain the provision as proposed.

One commenter suggested limiting 3-year registration validity to employers with recurring predictable seasonal and peakload needs, while requiring one-time or intermittent need employers to re-register every year. We find that this concern is sufficiently accommodated in the regulation as written, which provides the CO with discretion over the validity period of registrations approved. The CO may approve a registration for a period up to 3 consecutive years, taking into consideration the standard of need and any other factors in the registration.

d. Registration content. Under the proposed rule, supporting documentation was to accompany the *H–2B Registration,* including documentation showing the number of positions the employer desires to fill in the first year of registration; the period of time for which the employer needs the workers; and that the employer's need for the services or labor is non-agricultural, temporary and justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined by DHS in 8 CFR 214.2(h)(6)(ii)(B) and interpreted in § 655.6. We are adopting the proposed provision of the NPRM without change.

One commenter suggested that we include a basic recruitment effort requirement at the time of registration to show need for the program. We do not believe requiring recruitment prior to registration filing is consistent with our purpose in separating the application process into a registration step and a labor market test. Recruitment efforts close to an employer's period of need are most likely to result in an accurate labor market test, while recruitment far in advance of the employer's period of need is unlikely to yield valid recruitment results. The Final Rule retains recruitment requirements during the application process, which is closer to the employer's date of need.

One commenter encouraged us to include a bona fide employer check, in order to eliminate fraud by fictitious employers. The commenter suggested requiring Federal Employer Identification Number (FEIN) documentation and a certificate of good standing from the company's State of formation (in the case of a corporation or a limited liability company) or comparable document for a sole proprietorship (*e.g.,* certified payrolls and confirmation of a bank account form a financial institution) as well as disclosure of beneficial owners. We agree with the importance of allowing only bona fide employers access to the H–2B program and will verify business existence at the time of registration to protect program integrity. We will perform the initial business existence verification and, if questions arise, will request additional documentation of bona fide existence through the RFI process already contained in the Final Rule.

Some labor and advocacy groups suggested making registration information available to the public, for both transparency and information purposes, as well as to permit public input on registrations before adjudication. Comments related to transparency and community interest in publicly available information have been addressed in the larger discussion of public disclosure. While we anticipate continuing to receive information and concerns from the public informally, which OFLC takes under consideration during its review, we cannot permit the public to formally participate in the adjudication process. It would present serious operational burdens, and as a result it would become difficult to complete the registration process in a timely fashion. Finally, we anticipate that the various provisions of this Final Rule will result in improved employer compliance, resolving some of the underlying concerns.

e. Registration documentation retention. We proposed requiring all employers that file an *H–2B Registration* to retain any documents and records not otherwise submitted proving compliance with this subpart for a period of 3 years from the final date of applicability of the *H–2B Registration,* if approved, or the date of denial or withdrawal. We have retained this requirement in the Final Rule.

We received few comments on this provision. One worker advocacy organization expressed support for the registration documentation retention requirement, believing the requirement will improve protections for U.S. workers, while another commenter suggested that a 5-year retention requirement would be better than 3 years in preserving evidence for criminal prosecution. We believe the 3-year retention requirement is sufficient to address our interests in upholding program integrity and, as with any document retention requirement, if an employer is involved in a proceeding in which documents are relevant, the time for retaining the documents is tolled.

One State bar association expressed concern about our discussion in the NPRM about requiring retention of documentation related to an *H–2B Registration* so that we could, potentially, use a prior year's registration, even if withdrawn, as a factor in evaluating current temporary need. The commenter argued that there are many legitimate business reasons why an employer's situation could change following denial or withdrawal of a registration. We understand that, in some situations, circumstances may change and legitimately affect the nature of an employer's need for workers. We also expect that employers who accurately document their need when submitting a registration will be able to articulate the change, if requested. We will not deny an employer's *H–2B*

Registration where the employer documents a change in circumstances and the *H–2B Registration* otherwise complies with program requirements.

f. Registration of job contractors. As discussed in the preamble to § 655.6, we are continuing to permit job contractors to participate in the H–2B program where they can demonstrate their own temporary need and not that of their employer-clients, and that this temporary need is seasonal or a one-time occurrence. Accordingly, we have made several edits to reflect the requirement that job contractors provide documentation that establishes their temporary seasonal need or one-time occurrence during the registration process and to make this requirement a factor in the National Processing Center's (NPC's) review of the *H–2B Registration.* While a job contractor must file an *Application for Temporary Employment Certification* jointly with its employer-client, in accordance with § 655.19, a job contractor and its employer-client must each file a separate *H–2B Registration.*

g. Document retention. We proposed that the documents for registration would be retained for a period of 3 years from the date of applicability of the *H–2B Registration.* This meant that all documents retained in connection with an *H–2B Registration* would be retained for 3 years after the last date of validity—for up to 6 years. We have clarified in this Final Rule that the documents to be retained must be retained for 3 years from the date of certification of the last *Application for Temporary Employment Certification* supported by the *H–2B Registration.* We have also added clarifying language in the document retention provision at § 655.56 with respect to the document retention of an *H–2B Registration.*

3. § 655.12 Use of Registration by H–2B Employers

We proposed to permit an employer to file an *Application for Temporary Employment Certification* upon approval of its *H–2B Registration,* and for the duration of the registration's validity period, which may be up to 3 consecutive years from the date of issuance, provided that the employer's need for workers (*i.e.,* dates of need or number of workers) had not changed more than the specified levels. In the NPRM, we proposed that if the employer's need for workers increased by more than 20 percent (or 50 percent for employers requesting fewer than 10 workers); if the beginning or ending date of need for the job opportunity changed by more than 14 calendar days; if the nature of the job classification and/or duties materially changed; and/or if the temporary nature of the employer's need for services or labor materially changed, the employer would be required to file a new *H–2B Registration.* We also proposed that the *H–2B Registration* would be non-transferable. In the Final Rule, for the reasons stated below, we have retained this provision as proposed, except for a modification to the variance in the period of need permitted without an employer needing to re-register.

a. Limitation on variances in temporary need. Some commenters contend that, given that business is not static, the limitations on *H–2B Registration* validity make it likely that an employer will have to register each year or at least more than once every 3 years due to fluctuations in the number of workers needed, the dates of need, or the nature of the duties. We recognize that there may be fluctuations from year to year and accordingly have designed the *H–2B Registration* to accommodate minor variations. However, we also have an interest in preserving program integrity, and thus do not believe that it would be appropriate to allow for the same *H–2B Registration* to apply to a substantially different job opportunity.

Commenters suggested other thresholds for variances in the period of need or in the number of workers requested that could trigger re-registration requirements. One commenter supported the requirement that employers be required to re-register when there are significant variances in temporary need as an important fraud reduction mechanism, but suggested we alter the formula from a percentage system to a whole number ratio system (*e.g.,* employer can request an extra 2 workers for every 10 that were sought in the initial registration). As the basis for the suggestion, the commenter identified a scenario in which an employer that initially requested 9 workers could increase its request by 4 workers without having to re-register, while an employer that initially requested 16 could only request 3 workers without having to re-register.

We believe that material changes in the job classification or job duties, material changes in the nature of the employer's temporary need, or changes in the number of workers needed greater than the specified levels, from one year to the next, merit a fresh review through re-registration. We note that the tolerance level for the number of workers requested proposed for the registration process (*i.e.,* 20 percent (or 50 percent for employers requesting fewer than 10 workers)) is the same as the tolerance level in the 2008 H–2B Final Rule, the current H–2A regulation, and § 655.35 of this Final Rule for amendments to an *Application for Temporary Employment Certification* before certification. We do not find the difference of one worker, in the scenario provided, sufficient to justify changing our method of calculating minor changes in the number of workers requested.

Another commenter suggested focusing the number of workers limitation on the number of H–2B workers actually employed rather than the number requested. We find this suggestion unworkable both for OFLC and employers. Our focus is on an employer's need for workers and openings to be filled during recruitment, not actual visa usage. While we plan to begin collecting data on the number of workers an employer ultimately employs under H–2B visas for other purposes, such as gaining a better understanding of program usage, we will base our evaluation of *H–2B Registration* use on the number of workers requested.

We agree, however, that a wider variation in the employer's stated period of need would accommodate reasonable fluctuations in temporary need, without sacrificing program integrity, and would better effectuate our goal of streamlining the process by enabling more employers to use an *H–2B Registration* for more than 1 year. Accordingly, we have changed the limitation on a valid *H–2B Registration* to permit an employer's beginning and/or ending date of need to change by no more than a total of 30 calendar days from the initial year without requiring re-registration.

b. Prohibition on transfer. We proposed to prohibit the transfer of an approved *H–2B Registration.* One commenter agreed with the proposal, finding the approach critical to preventing program abuse. Under the Final Rule, an *H–2B Registration* is non-transferrable.

c. Validity of registration. We proposed to issue *H–2B Registration* approvals, valid for up to a period of 3 years. Apart from the concerns discussed earlier, such as business fluctuations requiring an employer to re-register more often than its registration validity required, commenters generally supported the 3-year validity of a registration as a mechanism for potentially streamlining the process for repeat users.

4. § 655.13 Review of Prevailing Wage Determinations

We proposed changing the process for the review of PWDs for purposes of clarity and consistency. Specifically, we

proposed reducing the number of days within which the employer must request review of a PWD by the NPWC Director from 10 calendar days to 7 business days from the date of the PWD. We also proposed revising the language of the 2008 Final Rule to reflect that the NPWC Director will review determinations, and specifying that the employer has 10 business days from the date of the NPWC Director's final determination within which to request review by the BALCA. We adopt this provision of the NPRM without change in the Final Rule.

A labor and worker advocacy organization suggested that U.S. and foreign workers should not be excluded from the PWD appeal process. We cannot permit public participation in the prevailing wage appeal process. The prevailing wage process is an employer-based application process, which often occurs before specific workers are identified. Operationally, doing so would present serious questions as to who could or could not become parties to the process and would make timely resolution of issues difficult. We will continue however, to accept information from the public regarding wage issues, including information concerning appeals.

C. Application for Temporary Employment Certification Filing Procedures

1. § 655.15 Application Filing Requirements

Under the proposed rule, we returned to a post-filing recruitment model in order to develop more robust recruitment and to ensure better and more complete compliance by H–2B employers with program requirements. As explained in the proposed rule, our experience in administering the H–2B program since the implementation of the 2008 Final Rule suggests that the lack of oversight by the Department and the SWAs during the pre-filing recruitment process has resulted in failures to comply with program requirements. We believe the recruitment model described in the proposed rule and now adopted in this Final Rule will enhance coordination between OFLC and the SWAs, better serve the public by providing U.S. workers more access to available job opportunities, and assist employers in obtaining the qualified personnel that they require in a timelier manner.

The proposed rule required the employer to file the *Application for Temporary Employment Certification,* with original signature(s), copies of all contracts and agreements with any agent and/or recruiter executed in connection with the job opportunities, and a copy of the job order with the Chicago NPC at the same time it files the job order with the SWA. The employer must submit this filing no more than 90 days and no fewer than 75 days before its date of need. The proposed process continues to employ the SWAs' significant knowledge of the local labor market and job requirements. In the Final Rule, this provision is slightly revised to clarify that the employer is required to also submit to the NPC any information required under §§ 655.8 and 655.9 (including the identity and location of persons and entities hired by or working with the recruiter or agent or employee of the recruiter to recruit prospective foreign workers for the H–2B job opportunities). The signature portion of this section is also slightly revised to clarify that if and when the *Application for Temporary Employment* is permitted to be filed electronically, the employer must print and sign it after receiving a determination to satisfy the original signature requirement.

For purposes of simultaneous filing, we use the term ''job order'' when in fact the job order has yet to be created and posted by the SWA. We recognize that this may be confusing to the employer, as what will actually be submitted simultaneously to both agencies is a document which outlines the details of the employer's job opportunity, not the official job order. We expect the employer to provide the Chicago NPC with an exact copy of the draft the employer provides to the SWA for the creation of the SWA job order.

We also proposed to continue to require employers to file separate applications when there are different dates of need for the same job opportunity within an area of intended employment. Lastly, we proposed to continue to require filing of an *Application for Temporary Employment Certification* in a paper format until such time as an electronic system can be fully implemented. We are retaining the provisions as proposed.

A few commenters disagreed with the proposal to allow for the simultaneous filing of the job order with the Department and the SWA, contending that the process would be unwieldy and result in duplicative efforts. In contrast, other commenters supported a return to a post-filing recruitment model. As discussed in the NPRM, by involving the SWA in the job order review, the proposed process directly employs the SWAs' significant knowledge of the local labor market and job requirements. We agree with the commenters who asserted that the resulting job order will provide accurate, program compliant notification of the job opportunity to U.S. workers. In addition, requiring the employer to simultaneously file the job order with the Chicago NPC and the SWA will enhance coordination between the agencies, resulting in increased U.S. worker access to job opportunities as well as helping employers locate qualified and available U.S. workers.

Some commenters supported the proposed timeframe for submitting the *Application for Temporary Employment Certification.* These commenters thought the requirement that employers file an *Application for Temporary Employment Certification* no more than 90 days and no fewer than 75 days before their date of need, combined with the proposed post-filing recruitment, would allow employers to conduct a more accurate test of the U.S. labor market and the CO to make a more accurate determination about availability of U.S. workers. OIG, in its October 17, 2011 report, found that permitting employers to recruit for job openings up to 120 days prior to the job start makes the recruitment less likely to result in U.S. worker hires than recruitment closer to the start date. OIG identified our proposal to shorten the timeframe between recruitment and job start date as strengthening U.S. worker recruitment. We agree and have retained the proposed timeframe for filing the *Application for Temporary Employment Certification* in the Final Rule.

One worker advocacy group expressed support for requiring separate applications for work occurring at separate worksites, with separate employers, or for different positions that have different job duties or terms and conditions of employment. We also received comments opposing the proposal to continue to require employers to file separate applications when there are different dates of need for the same job opportunity within an area of intended employment. Commenters argued that their business ramps up during the period of need, resulting in a need for some, but not all, of the workers requested on the date of need provided in the *Application for Temporary Employment Certification.* These commenters asserted that they also need flexibility to respond to changes in the market. We acknowledge that business is not static and an employer's need for workers during its period of greatest and least need may not be consistent. However, employers should accurately identify their personnel needs and, for each period within its season, file a separate application containing a different date

of need. An application with an accurate date of need will be more likely to attract qualified U.S. workers to fill those open positions, especially when the employer conducts recruitment closer to the actual date of need. This prohibition against staggered entries based on a single date of need is intended to ensure that employers provide U.S. workers the maximum opportunity to consider the job opportunity and is consistent with USCIS policies. It ensures that U.S. workers are not treated less favorably than H–2B workers who, for example, may be permitted to report for duty 6 weeks after the stated date of need. We recognize that there may be industries whose participation in the H–2B program may be constrained as a result of this revised 90- to 75-day timeframe filing in years in which the statutory cap of for the six-month intervals beginning October 1 and April 1 is at issue. However, this is largely a function of the statutory cap on the available visas over which we have no control. We are, therefore, retaining the provision as proposed and only slightly revising the language to further clarify that an employer must file only one *Application for Temporary Employment Certification* for worksite(s) within one area of intended employment for each job opportunity for each date of need.

We received comments suggesting that we post the *Application for Temporary Employment Certification* to increase transparency. These comments have been addressed in the larger discussion of public disclosure at § 655.63.

We did not receive comments on our proposal to continue to use ETA Form 9142 to collect the necessary information, with slightly modified appendices reflecting changes from the 2008 Final Rule (such as a change of tense to note pre-recruitment filing). As discussed in the NPRM, while we have begun efforts to establish an online format for the submission of an *Application for Temporary Employment Certification,* deployment of the system depends upon the resolution of issues in this rulemaking; we cannot implement it until after this Final Rule is effective. After the rule is effective, there will have to be a period during which entities may only file applications by paper submissions. However, in anticipation of the deployment of an online filing system, we have added language in the regulatory text that clarifies that when an employer submits an *Application for Temporary Employment Certification* electronically, the CO will inform the employer how to fulfill the signature requirement.

2. § 655.16 Filing of the Job Order at the SWA

We proposed to require the employer to submit its job order directly to the SWA at the same time as it files the *Application for Temporary Employment Certification* and a copy of the job order with the Chicago NPC, no more than 90 calendar days and no fewer than 75 calendar days before the employer's date of need. As discussed above, we sought to continue to use the SWAs' experience with the local labor market, job requirements, and prevailing practices by requiring the SWA to review the contents of the job order for compliance with § 655.18 and to notify the CO of any deficiencies within 4 business days of its receipt of the job order. The proposed rule differed from the 2008 Final Rule in that it prohibited the SWA from posting the job order before receiving a Notice of Acceptance from the CO directing it to do so. We have retained the provision in the Final Rule as proposed except for a modification to the SWA's job order review timeframe and minor clarifications.

Many commenters supported the return to more direct SWA participation in the U.S. labor market test, including the SWA's simultaneous review of job order content with the Chicago NPC. These commenters agreed that the SWA's local knowledge would be helpful in ensuring that an accurate job order is posted presenting the job opportunity to available workers. In contrast, some commenters opposed the simultaneous job order review process as burdensome for SWAs at current funding levels and duplicative of the Chicago NPC's review. By requiring such concurrent filing and review, the CO can use the knowledge of the SWA, in addition to its own review, in a single Notice of Deficiency before the employer conducts its recruitment. While we are sensitive to SWA budget concerns, SWAs can continue to rely on foreign labor certification grant funding to support those functions. We believe that this continued cooperative relationship between the CO and the SWA will ensure greater program integrity and efficiency.

Despite supporting re-introduction of SWA job order review, some commenters contended that 4 calendar days was insufficient time for the SWA to conduct an adequate compliance review and notify the Chicago NPC of its findings. After reviewing these comments, we have decided to modify the SWA's timeframe for job order review in the Final Rule, from 4 calendar days to 6 business days.

One commenter suggested requiring the employer to submit the job order to all SWAs having jurisdiction over the anticipated worksite(s). We will not accept this suggestion, finding the result potentially burdensome and confusing to SWAs and employers, as well as the Chicago NPC. Limiting the job order submission and review to one SWA and the Chicago NPC and, after acceptance, circulating the job order to other appropriate SWAs, best accomplishes the cooperative relationship and thorough review we seek to implement without increasing confusion or sacrificing efficiency.

A labor organization suggested that we clarify the meaning of intrastate and interstate clearance to ensure that the SWA circulates the job order to all appropriate States. Intrastate clearance refers to placement of the job order within the SWA labor exchange services system of the State to which the employer submitted the job order and to which the NPC sent the Notice of Acceptance, while interstate clearance refers to circulation of the job order to SWAs in other States, including those with jurisdiction over listed worksites and those the CO designates, for placement in their labor exchange services systems. We note that, under § 655.33(b)(4), the CO directs the SWA in the Notice of Acceptance to the States to which the SWA must circulate the job order, ensuring that the employer is also aware of the job order's exposure in the SWAs' labor exchange services systems. However, to further this distinction in the Final Rule, this section has been slightly revised to clarify that the SWA must place the job order in intrastate clearance and must also provide it to other States as directed by the CO.

The same labor organization suggested we require the SWA to post the job at State motor vehicle offices and Web sites. Another commenter suggested we require the job order to be open until the end of the certification period, not only the recruitment period. Still another commenter suggested the SWA be required to keep the job order posted for 30 days. We note that job order posting in the SWA labor exchange system is but one of the SWA and employer recruitment activities contained in the Final Rule, which together are designed to ensure maximum job opportunity exposure for U.S. workers during the recruitment period. Also, in most cases, the job order will be posted for more than 30 days, since the Final Rule requires the employer to file its application no more than 90 calendar days and no less than 75 calendar days before its date of need and the SWA to post the job order upon

receipt of the Notice of Acceptance and to keep the job order posted until 21 days before the date of need, as discussed in the preamble to § 655.20(t). We do not consider it feasible to add further SWA requirements; as stated above, we have to be sensitive to SWA resource concerns. Additionally, the H–2B electronic job registry, for instance, already provides nationwide exposure of the job opportunities, which renders the additional postings suggested by the commenter unnecessary. We have decided to retain the requirement that SWAs post the job order for the duration of the recruitment period, which was revised as discussed in the preamble to § 655.40. This ensures the job order is afforded maximum visibility for the most relevant period of time—the time during which workers are most likely to apply for an imminent job opening, and when employers are most in need of workers.

One commenter suggested we require employers to simultaneously file the *Application for Temporary Employment Certification* rather than the job order with the SWA and Chicago NPC. In addition to citing the lack of a uniform job order form, the commenter contended that the *Application for Temporary Employment Certification* form contains the information necessary to place a job order and provides additional information, thereby enhancing the SWA's review ability. While we acknowledge that there is no uniform job order form available, we note that the SWA labor exchange system is a State, not Federal, system. The existing cooperative Federal-State model under the Wagner-Peyser system is much too decentralized to accommodate the requirement that SWAs use a specific form. Moreover, in deference to concerns about SWA administrative burden, we do not wish to add forms, such as the *Application for Temporary Employment Certification,* outside of a SWA's normal job order placement function. Additionally, the job order contains different reference points than the ETA Form 9141 and collects different information. Therefore, we will retain the provision without change. In an effort to acknowledge the fact that SWAs have different forms and emphasize the employer's need to comply with each State's form and requirements, we have revised this provision to provide that the employer's job order must conform to the State-specific requirements governing job orders as well as the requirements set forth in § 655.18.

3. § 655.17 Emergency Situations

We proposed to permit an employer to file an *H–2B Registration* fewer than 120 days before the date of need and/or an *Application for Temporary Employment Certification* along with the job order fewer than 75 days before the date of need where an employer has good and substantial cause and there is enough time for the employer to undertake an adequate test of the labor market. This was a change from the 2008 regulations, which do not allow for emergency filings, and sought to afford employers flexibility while maintaining the integrity of the application and recruitment processes. To meet the good and substantial cause test, we proposed that the employer must provide to the CO detailed information describing the reason(s) which led to the emergency request. Such cause may, in the Final Rule, include the substantial loss of U.S. workers due to Acts of God or similar unforeseeable man-made catastrophic event that is wholly outside the employer's control, unforeseen changes in market conditions, or pandemic health issues. These edits have been made for consistency and clarity so that employers will easily understand those areas in which emergency situations will be permitted. However, the CO's denial of an *H–2B Registration* in accordance with the procedures under § 655.11 does not constitute good and substantial cause for a waiver request.

In the NPRM, apart from permitting an employer to file fewer than 75 days before the start date of need and requiring the employer to show good and substantial cause, we proposed to process an *H–2B Registration* and/or an *Application for Temporary Employment Certification* and job orders in a manner consistent with non-emergency processing. In the Final Rule, we have adopted the proposed provision with a few clarifying edits.

For purposes of simultaneous filing we use the term job order in the NPRM, when in fact the job order has yet to be created and posted by the SWA. We recognize that this may be confusing to the employer, as what will actually be submitted simultaneously with the *Application for Temporary Employment Certification* in such instances is a draft document which outlines the details of the employer's job opportunity, not the official job order. Therefore, we have made such clarification in the Final Rule, indicating that the job order is proposed and not final.

We also received several comments from employers, employer advocacy groups, and trade organizations, requesting that we include man-made disasters in this provision. While we indicated in the NPRM that the examples listed as good and substantial cause are not exclusive, suggesting that the expansion of the list is in line with the intent of the provision, for clarification we have revised this provision in the Final Rule to specifically include man-made disasters as being circumstances beyond the control of the employer that can result in the need to file an *H–2B Registration* and/or an *Application for Temporary Employment Certification* along with the job order fewer than 75 days before the date of need.

Several commenters expressed concern about the potential for employers to use natural disasters to abuse the program and workers. These commenters urged us to be vigilant when processing emergency applications. We are sensitive to these concerns. We intend to subject emergency applications to a higher level of scrutiny than non-emergency applications. As proposed and as adopted in the Final Rule, an *H–2B Registration* and/or *Application for Temporary Employment Certification* processed under the emergency situation provision is subject to the same recruitment activities, potential to be selected for audit, and enforcement mechanisms as a non-emergency *H–2B Registration* and/or *Application for Temporary Employment Certification.*

A labor organization asserted that in times of disaster, U.S. workers may be interested in assuming these temporary positions after an initial period of securing basic provisions and safety because they have been displaced from their normal jobs. This commenter suggested expanding the recruitment period for emergency situation filings to require the employer to replace H–2B workers with U.S. workers up to 50 percent of the period of need requested. We have decided not to incorporate this suggestion. We believe each emergency situation is unique and must be evaluated on its specific characteristics, both as to whether a qualifying situation exists and whether there is sufficient time to thoroughly test the U.S. labor market. The regulation gives the CO the discretion not to accept the emergency filing if the CO believes there is insufficient time to thoroughly test the U.S. labor market and make a final determination. Moreover, under § 655.46, the CO has the discretion to instruct an employer to conduct additional recruitment. We believe the Final Rule accommodates both the urgency of these situations and the importance of conducting an appropriate test of the U.S. labor market.

A worker advocacy group supported the inclusion of an emergency situation provision, but urged us to permit only late applications, not early applications. As discussed above, it is our intention that the emergency situation provision permit an employer to file fewer than 75 days before the start date of need. This provision in no way expands the earliest date an employer is eligible to submit an *H–2B Registration* or *Application for Temporary Employment Certification.*

A private citizen suggested limiting an employer to one emergency application per year. We have decided not to accept this suggestion. Given that some employers file multiple applications, each for a different occupation and/or area of intended employment, we believe such an approach is too strict and contrary to the purpose of the provision.

Two labor organizations suggested limiting the subjectivity of the provision. One specifically recommended adding the word reasonably to unforeseen changes in market conditions, while the other recommended limiting emergencies to objectively verifiable events such as those confirmed in Federal, State or local government statements formally certifying a natural or manmade disaster, necessitating extraordinary measures by Federal, State or local government. The CO will adjudicate foreseeability based on the precise circumstances of each situation presented. The burden of proof is on the employer to demonstrate the unforeseeability leading to a request for a filing on an emergency basis. Therefore, we believe the language as proposed strikes an appropriate balance between providing flexibility to employers experiencing emergencies that create a need to submit applications closer to their need than normal processing permits, and limiting the scope of such emergencies so that emergency processing is truly an exception rather than the norm.

4. § 655.18 Job Order Requirements and Contents

The job order is essential for U.S. workers to make informed employment decisions. The Department proposed to require employers to inform applicants in the job order not only of the standard information provided in advertisements, but also several key assurances and obligations to which the employer is committing by filing an *Application for Temporary Employment Certification* for H–2B workers and to which U.S. workers are also entitled. The job order must also be provided to H–2B workers with its pertinent terms in a language the worker understands.

Several commenters found the organization of this section to be confusing when read in concert with the advertising requirements at § 655.41. The proposed rule at § 655.18 reads: ''An employer must ensure that the job order contains the information about the job opportunity as required for the advertisements required in § 655.41 and the following assurances * * *'' many of which overlapped with those requirements found in § 655.41. 76 FR 15182, Mar. 18, 2011. In order to dispel confusion and reconcile the sections, the Department has reorganized § 655.18 and imported some requirements from § 655.41 that were implied, but not explicitly required, in the NPRM. Those specific changes are discussed below and in the preamble to § 655.41, and as a result of those changes, this section no longer cross-references § 655.41.

In addition, the Department has reorganized this section in order to ensure that employers include all pertinent information in each job order, regardless of the State in which the job order is being placed. As there is not a single H–2B job order form that is applicable to all States and job opportunities, this change is necessary for the uniform administration of the program requirements. This approach will ensure that workers have a full understanding of the terms and conditions of employment, improve employer compliance, and support program enforcement.

Furthermore, the Department clarifies that the assurances pertaining to the prohibition against preferential treatment and bona fide job requirements in paragraph (a) of this section need not be included in the job order verbatim; rather they are applicable to each job order insofar as they apply to each listed term and condition of employment.

One commenter suggested that the lengthy job orders have the effect of discouraging U.S. workers from pursuing a job opportunity and suggested that the Department adopt an abbreviated form which might be provided to each job applicant by the SWA which summarizes the job order. The Department is not able to accept this suggestion as it is our primary concern in this context that U.S. applicants be provided with all of the terms and conditions of employment and fully apprised of the job opportunity.

a. Prohibition against preferential treatment (proposed rule § 655.18(a); Final Rule § 655.18(a)(1)). The proposed rule required the employer to provide to U.S. workers at least the same level of benefits, wages, and working conditions that are being or will be offered or paid to H–2B workers, similar to the requirements under § 655.22(a) of the 2008 Final Rule, with the additional requirement that this guarantee must be set forth in the job order to ensure that all workers are aware of their rights to similar benefits, wages, and working conditions. These protections were also reflected in the proposed rule as an employer assurance and obligation under § 655.20(q).

Some commenters may have misunderstood the protections guaranteed to U.S. workers under the proposed section because the last sentence of the proposed section stated that an employer is not relieved from providing H–2B workers the minimum benefits, wages, and working conditions that must be offered to U.S. workers under this section. One commenter expressed support for the proposed changes and elaborated on the importance of preventing disparate treatment of H–2B and U.S. workers that could lead to the creation of substandard jobs and lead to the abuse of vulnerable H–2B workers. To clarify, the purpose of § 655.18(a)(1) is to protect U.S. workers by ensuring that the employers do not understate wages and/or benefits in an attempt to discourage U.S. applicants or to provide preferential treatment to temporary foreign workers. Employers are required to offer and provide H–2B workers at least the minimum wages and benefits outlined in these regulations. So long as the employer offers U.S. workers at least the same level of benefits as will be provided to the H–2B workers, the employer will be in compliance with this provision. Section 655.18(a)(1) does not preclude an employer from offering a higher wage rate or more generous benefits or working conditions to U.S. workers, as long as the employer offers to U.S. workers all the wages, benefits, and working conditions offered to and required for H–2B workers pursuant to the certified *Application for Temporary Employment Certification.*

In addition to commenters who generally supported the expanded protections of H–2B workers, several commenters—a legal network a human rights organization, a labor organization and an alliance of human rights organizations—specifically requested that the Department add an additional provision into the job order which would require the employer to offer to H–2B workers the same fringe benefits as those the employer is offering to U.S. workers in corresponding employment. As discussed above, the Department's

mandate requires that an employer be permitted to hire H–2B workers only in circumstances where there are no qualified and available U.S. workers, and where the employment of H–2B workers will not have an adverse effect on the wages and working conditions of U.S. workers. To that end, the regulation under § 655.18(a)(1) requires that the job order ''must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2B workers.'' Any fringe benefits offered or provided by an employer would fall under the category of benefits, and the employer would therefore be required to list them on the job order. However, nothing in this regulation precludes an employer from offering more generous benefits than those required by the regulations to either U.S. workers or H–2B workers, as long as the employer offers to U.S. workers at least the same wages, benefits, and working conditions offered to and required for H–2B workers pursuant to the approved *Application for Temporary Employment Certification.* However, for further clarification, the Department has amended § 655.18(b)(9) to require that the job order specifically list any fringe benefits that will be offered.

The Department received no more comments on this section; the Department is therefore adopting the proposed language in the Final Rule without change.

b. Bona fide job requirements (proposed rule § 655.18(b); Final Rule § 655.18(a)(2)). The Department proposed to require that the job qualifications and requirements listed in the job order be bona fide and consistent with the normal and accepted job qualifications and requirements of employers that do not use H–2B workers for the same or comparable occupations in the same area of intended employment. Several commenters expressed concern about how the Department and the SWAs will determine what qualifications and requirements are bona fide and normal to the job opportunity. The determination of whether job requirements and qualifications are consistent with the normal and accepted job requirements and qualifications of non-H–2B employers is fact-specific. The SWAs have decades of experience reviewing job orders according to these standards. However, the Department recognizes that some confusion exists concerning the distinction between job requirements and qualifications and the application of each. Therefore, this provision of the Final Rule includes a definition of job requirements and qualifications. As stated in § 655.18(b), a qualification means a characteristic that is necessary for the individual to perform the job in question. A requirement means a term or condition of employment which a worker is required to accept in order to obtain the job opportunity. Additionally, the Department added language requiring that any on-the-job training that will be provided to the worker must be disclosed in the job order. This change was made to align with the advertising requirements in § 655.41.

c. Benefits, wages, and working conditions (proposed rule § 655.18(c)–(g); Final Rule § 655.18(b)(1)–(8), (11)). The Department proposed to require that the employer list the following benefits, wages, and working conditions in the job order: The rate of pay, frequency of pay, deductions that will be made, and that the job opportunity is full-time. These requirements are generally consistent with those required in § 655.17 and § 655.22 of the 2008 Final Rule. These disclosures are critical to any applicant's decision to accept the job opportunity.

Many advocacy groups commented on the importance of including information related to benefits, wages, and working conditions in the job order. These commenters noted that when this information is specifically listed on the job order, workers are better able to make an informed decision regarding the job opportunity prior to accepting a position. As no specific comments were received on proposed §§ 655.18(d), (e), or (g), the Department is adopting those provisions without change in the Final Rule. A full discussion of comments received on § 655.18(f) is below.

In response to the aforementioned confusion caused by discrepancies between proposed § 655.18 (Contents of the job order) and § 655.41 (Advertising requirements), the following sections were reorganized: Proposed § 655.18(d) (Rate of pay) is § 655.18(b)(5) in the Final Rule, proposed § 655.18(e) (Frequency of pay) is § 655.18(b)(9) in the Final Rule, proposed § 655.18(f) (Deductions that will be made) is § 655.18(b)(11) in the Final Rule, proposed § 655.18(g) (Statement that the job opportunity is full-time) is § 655.18(b)(2) in the Final Rule, proposed § 655.18(h) (Three-fourths guarantee) is § 655.18(b)(17) in the Final Rule, proposed § 655.18(i) (Transportation and visa fees) is § 655.18(b)(12) through (15) in the Final Rule, proposed § 655.18(j) (Employer-provided items) is § 655.18(b)(16) in the Final Rule, and proposed § 655.18(k) (Board, lodging, or facilities) is § 655.18(b)(10) and (11).

d. Deductions (proposed rule § 655.18(f); Final Rule § 655.18(b)(10)). In § 655.18(f), the Department proposed to require that the job order specify that the employer will make all deductions from the worker's paycheck required by law and specifically list all deductions not required by law that the employer will make from the worker's paycheck. Numerous commenters—including advocacy organizations, legal networks, and labor organizations—offered unqualified support for this provision. One foreign worker advocacy group noted that workers have expressed concern that the various deductions are unlawful and affect their ability to support family members in their countries of origin.

In addition, a coalition representing agents and employers requested that the Department amend this section in three ways. First, the commenter suggested that the Department define deductions for the purpose of this section as an actual subtraction from earned wages. This commenter contended that such an amendment would prevent an employer from finding itself in violation of this obligation because an employee expended sums without its knowledge, which some treat as deductions. Second, the commenter requested that the Department amend this section to deal with the circumstance where deductions may, but not necessarily will, be made. The commenter asserted that an employer should be able to avoid discouraging a potential applicant by suggesting that a deduction will be made when it might never be, for example, a deduction for damages to employer-owned items, where State law permits such a deduction. Finally, this commenter requested that the Department clarify that required by law includes judicial process, such as child support orders.

The Department reminds the commenter that under the Fair Labor Standards Act (FLSA) there is no legal difference between deducting a cost from a worker's wages and shifting a cost to an employee to bear directly. As the court stated in *Arriaga* v. *Florida Pacific Farms, L.L.C.,* 305 F.3d 1228, 1236 (11th Cir. 2002):

> An employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deduction drive wages below the minimum wage. See 29 C.F.R. § 531.36(b). This rule cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during employment. See id. *§ 531.35; Ayres* v. *127*

Rest. Corp., 12 F.Supp.2d 305, 310 (S.D.N.Y.1998).

Consistent with the FLSA and the Department's obligation to prevent adverse effects on U.S. workers by protecting the integrity of the H–2B offered wage, the Department views the offered wage as the effective minimum wage for H–2B and corresponding U.S. workers.

In response to the second instance mentioned by the commenter, the Department reminds the commenter that deductions for damage to employer-provided items are prohibited under the Final Rule, regardless of State laws permitting such deductions. This prohibition is explained in detail in the preamble to § 655.20(k). However, as a general rule, if an employer reserves the right to make a deduction, the potential that such a deduction could be made must be disclosed in the job order to ensure that employees are fully informed of the terms and conditions of employment. Finally, the Department includes garnishments in deductions required by law; this is made explicit in the Final Rule at § 655.20(c).

No other comments were received on this provision. However, for clarification, the Department has moved this section to § 655.18(b)(10) in the Final Rule and added language, previously contained in proposed § 655.18(k), specifying that the job order must include, ''if applicable, any deduction for the reasonable cost of board, lodging, or other facilities.'' The Department has made another clarifying edit, modifying the provision to require the disclosure of any deductions the employer intends to make rather than those an employer will make. This change is consistent with the intent of the proposed rule. No other changes were made to this provision.

e. Three-fourths guarantee (proposed rule § 655.18(h); Final Rule § 655.18(b)(17)). The NPRM proposed to require that H–2B employers list in the job order the new obligation that the employer would guarantee to offer employment for a total number of work hours equal to at least three-fourths of the workdays of each 4-week period and, if the guarantee was not met, to pay the worker what the worker would have earned if the employer had offered the guaranteed number of days, as required by proposed § 655.20(f). For the reasons discussed in the preamble under § 655.20(f), the Final Rule modifies this provision to lengthen the increment to a 12-week period instead of a 4-week period if the period of employment covered by the job order is 120 days or more, and lengthens the increment to a 6-week period if the employment covered by the job order is less than 120 days. As there were no comments specific to inclusion of this requirement in the job order, the Department adopts this provision without further change in the Final Rule.

f. Transportation and visa fees (proposed rule § 655.18(i); Final Rule § 655.18(b)(12)–(15)). The NPRM proposed to require the job order to disclose that the employer will provide, pay for, or fully reimburse the worker for inbound and outbound transportation and daily subsistence costs for U.S. workers who are not reasonably able to return to their residence within the same workday and H–2B workers when traveling to and from the employer's place of employment. Additionally, the NPRM proposed to require employers to disclose if they will provide daily transportation to the worksite and that the employer will reimburse H–2B workers for visa and related fees. For the reasons discussed in the preamble under § 655.20(j), the Final Rule adopts these obligations with the modification that employers must arrange and pay for the inbound transportation and subsistence directly, advance the reasonable cost, or reimburse the worker's reasonable costs if the worker completes 50 percent of the period of employment covered by the job order, and must provide, pay for, or reimburse outbound transportation and subsistence if the worker completes the job order period or is dismissed early. However, under § 655.18(y), if separation is due to the voluntary abandonment of employment by the H–2B worker or the worker in corresponding employment and the employer provides proper notice to DHS and DOL, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker and that worker is not entitled to the three-fourths guarantee described in § 655.20(f). As there were no comments specific to the disclosure requirements under this section, the Department adopts this provision without further change in the Final Rule.

g. Employer-provided items (proposed § 655.18(j); Final Rule § 655.18 (b)(16)). The proposed rule required the job order to disclose that the employer will provide workers with all tools, supplies, and equipment needed to perform the job at no cost to the employee. This provision, which is consistent with the FLSA regulations at 29 CFR part 531 and current § 655.22(g) requiring all deductions to be reasonable, gives the workers additional protection against improper deductions from wages for items that primarily benefit the employer, and assures workers that they will not be required to pay for items necessary to perform the job.

Several commenters expressed unqualified support for this provision. However, some commenters noted that this provision could be impractical in industries in which employees customarily prefer to use specialized, custom-made equipment, such as the skis used by some ski instructors. One commenter, a ski industry representative, suggested that the Department amend § 655.18(j) to require that employers offer standard equipment instead of provide * * * all tools, supplies, and equipment required to perform the duties assigned to clarify that employers are not responsible for providing employees with custom-fitted equipment. The Department wishes to clarify that this provision is intended to protect workers against improper deductions by ensuring that they are fully capable of performing their jobs without any personal investment in tools or equipment. Thus, employers must provide standard equipment that allows employees to perform their job fully, but they are not required to provide, for example, equipment such as custom-made skis that may be preferred, but not needed by, ski instructors. It does not prohibit employees from electing to use their own equipment, nor does it penalize employers whose employees voluntarily do so, so long as a bona fide offer of adequate, appropriate equipment has been made.

Another commenter, a worker advocate, suggested further protections, requesting that the provision be revised to include language explicitly prohibiting employers from charging workers for broken, stolen, or lost equipment. Section 3(m) of the FLSA prohibits deductions that are primarily for the benefit of the employer that bring a worker's wage below the applicable minimum wage, including deductions for tools, supplies, or equipment that are incidental to carrying out the employer's business. Consistent with the FLSA, current § 655.22(g) (which requires all deductions to be reasonable), and the Department's obligation to prevent adverse effects on U.S. workers, the Department believes this Final Rule similarly should protect the integrity of the H–2B offered wage by treating it as the effective minimum wage. This gives U.S. and H–2B workers additional protection against improper deductions from the offered wage for items that primarily benefit the employer. Therefore, because

deductions for damaged and lost equipment are encompassed within deductions for equipment needed to perform a job, such deductions that bring a worker's wage below the offered wage are not permissible. The Department believes these principles are sufficiently clear as set forth in the FLSA regulations, 29 CFR part 531, and declines to adopt this commenter's suggestion. No other comments were received on this section. Therefore, the Final Rule retains the requirement as proposed.

h. Board, lodging, or facilities (proposed rule § 655.18(k)); Final Rule § 655.18(b)(9). In § 655.18(k) the Department proposed to require that, if an employer provides the worker with the option of board, lodging, or other facilities or intends to assist workers to secure such lodging, this must be listed in the job order. In addition, if the employer intends to make any wage deductions related to such provision of board, lodging or other facilities, such deductions must be disclosed in the job order. Several commenters offered unqualified support for this provision. However, a coalition representing agents and employers was concerned that the phrase or intends to assist workers to secure such lodging was overly vague and asked the Department to clarify what would qualify as assistance. This commenter also noted that the proposed section did not require that the intention to assist be listed in the job order. The Department does not include as assistance an employer's simple provision of information, such as providing workers coming from remote locations with a list of facilities providing short-term leases, or a list of extended-stay motels. However, in some cases, employers may reserve a block of rooms for employees, negotiate a discounted rate on the workers' behalf, or arrange to have housing provided at cost for its employees and such activities would qualify as assistance. Any such assistance may make it more feasible for a U.S. worker from outside the area of intended employment to accept the job, and therefore it should be included in the job order. In addition, while the requirement to disclose the provision of such assistance was implicit in § 655.18(k) of the NPRM, in response to this commenter's suggestion the Final Rule has been clarified to explicitly require the employer to disclose such offer of assistance. The Final Rule regulatory text now requires the disclosure of: the provision of board, lodging, or other facilities or of assistance in securing such lodging. Finally, this commenter requested that the Department add a definition of other facilities to the definition section or to this section. The Department declines to make such an addition and refers the commenter to 29 CFR 531.32, which defines the term at length and has been construed and enforced by the Department for several decades. The Department has concluded that it is beneficial for workers, employers, agents, and the Wage and Hour Division to ground its enforcement of H–2B program obligations in its decades of experience enforcing the FLSA, and the decades of court decisions interpreting the regulatory language we are adopting in these regulations. Therefore, the Department notes throughout this preamble where it is relying on FLSA principles to explain the meaning of the requirements of the H–2B program that use similar language. Nevertheless, the Department has clarified the meaning of the term facilities by adding the parenthetical (including fringe benefits) to the Final Rule. This clarification makes this section more parallel with the requirement in § 655.18(a)(1), which requires the job order to offer U.S. workers no less than the same benefits, wages, and working conditions as offered to H–2B workers. Because the term fringe benefits is commonly used and understood, the Department believes this will provide employers with greater clarification about their obligation to disclose on the job order the benefits they will offer or provide to workers.

An advocacy organization requested that the Department impose additional requirements on employers who intend to provide rental housing. This commenter suggested that in such cases, the job order should specifically disclose the following: whether the worker will be sharing the accommodations with other workers or tenants, and if so, how many; the rent and security deposit, if any; a description of the type of accommodations; information about utilities; and any other pertinent information related to room and board. This commenter also requested that the regulations specifically require that all rental housing comply with State and local housing codes. The Department acknowledges this commenter's concern, but declines to implement the suggestion. There is no guarantee that an employer would have secured housing for potential employees at the point of filing the job order, which cannot be done less than 75 days before the date of need. Requiring such disclosures would either result in speculation that would undermine their purpose, or would force employers to secure housing more than 2 months before workers arrived, potentially resulting in unnecessary and burdensome costs. Furthermore, two of the suggested disclosures—the cost of rent or security deposit and the cost of utilities—are already covered under the Final Rule at § 655.18(b)(10) if the employer will make deductions for them.

Responding to the Department's discussion of the application of this section to employers operating under special procedures, a trade association argues that no DOL regulation has ever suggested that mobile housing is unworthy of deductions. The Department's long-standing position is that facilities that are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages. See 29 CFR 531.3(d)(1). The Department maintains that housing provided by employers with a need for a mobile workforce, such as those in the carnival or forestry industries where workers are in an area for a short period of time, need to be available to work immediately, and may not be able to procure temporary housing easily, is primarily for the employer's benefit and convenience.

One commenter from the reforestation industry wrote that the court cases the Department cites in the proposal have nothing whatsoever to do with the H–2B program or workers on an itinerary being paid wages substantially in excess of the federal minimum wage. As discussed in the preamble to § 655.15(f), the Department has made an exception for the carnival and reforestation industries, which use H–2B workers in itinerant employment over large interstate areas. Without this exception, these industries would be unable to readily comply with the program's established processes. Having made this exception for these industries, the Department asserts that the requirement that the employer provide housing and transportation free of charge to the employees is both reasonable and reflective of the true cost of doing business for this type of work. It should also be noted that without the ability and flexibility to move quickly and use mobile workforces, these industries could not function.

An employer from the reforestation industry suggested that the Final Rule require that housing for itinerant employees be selected by the workers, and that workers be reimbursed at a standard daily housing rate for the area of intended employment. The

Department declines to mandate such a practice. For the reasons stated in this section, the Department's position is that housing for workers in itinerant industries must be provided or paid for by the employer.

The Department has amended this section to require the disclosure of any fringe benefits that will be provided. This change is consistent with proposed § 655.18(a), which required that the job order offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2B workers. No other comments were received on this section.

i. Other changes. In addition to commenting on the contents of the job order as proposed, several commenters suggested additional content requirements.

An alliance of human rights organizations suggested that the job order contain multiple explicit provisions. Many of the disclosures suggested by the commenter were included in the proposed rule, such as a list of costs charged to the worker (§ 655.18(f)) and educational or experience requirements (§ 655.41(b)(3)). The commenter also suggested that the job order contain information on the visa, a statement prohibiting a foreign labor contractor from assessing fees, a notice that the worker be provided 48 hours to review and consider any changes in terms, a statement that changes to the terms may not be made without specific consent of the worker, and a statement describing worker protections under the Trafficking Victims Protection Act of 2000. The Department maintains that the information which employers are required to include in the job order under § 655.18 of the Final Rule is necessary and sufficient to provide the worker with adequate information to determine whether to accept the job opportunity, and notes that the Department of State provides all H–2B workers with a detailed worker rights card at the visa application stage.[7] The Department believes that these disclosures will ensure that adequate information is available to H–2B workers and therefore does not accept the commenters' suggestions.

With respect to a proposal that workers be provided notice of the changes to the job order, the Department notes that both the NPRM and the Final Rule require an employer who wishes to change any of the terms and conditions of employment listed in the job order, to submit such a proposed change to the CO for approval. The employer may not implement changes to the approved terms and conditions listed in the job order without the approval by CO. Additionally, such changes must be disclosed to all U.S. workers hired under the original job order, as required by § 655.35.

Finally, a coalition of worker advocacy organizations and several other worker advocacy organizations suggested that the Department add a provision to the regulations stating that, in the absence of a written contract, the terms and conditions listed in the job order shall be the work contract. The Department does not believe it is necessary to add such a provision, as the courts will determine private parties' contractual rights under state contract law. These commenters were concerned, however, that the Department's reference to *Garcia* v. *Frog Island Seafood, Inc. (Frog Island),* 644 F. Supp. 2d 696, 716–18 (E.D.N.C. 2009), in its rationale for the three-fourths hours guarantee, 76 FR 15143, Mar. 18, 2011, implied that the Department endorsed that court's view that the terms and conditions of H–2B job orders are not enforceable under state contract law. The Department wishes to clarify that it does not endorse this view, and was simply referencing this decision as an example of one of several ways that courts have viewed the enforceability of an hours guarantee in the H–2B job order absent an explicit regulatory requirement. The Department believes that the *Frog Island* court's holding regarding the enforceability of the H–2B job order is limited to the 2008 Final Rule, as the court's reasoning was based on the explicit lack of an hours guarantee under that rule. See 644 F. Supp. 2d at 718; 73 FR 78024, Dec. 18, 2008 (2008 Final Rule preamble explaining that the definition of full-time did not constitute an actual obligation of the number of hours that must be guaranteed each week). The reference to *Frog Island* in the NPRM should not have been interpreted as the Department's view of the enforceability of the three-fourths guarantee in this Final Rule because this Final Rule explicitly mandates an hours guarantee. Moreover, to the extent the court in *Frog Island* also based its decision on the premise that finding the employer responsible for providing the 40 hours listed in the H–2B job order would effectively negate at-will employment, see 644 F. Supp. 2d at 719, the Department notes that it views the terms and conditions of the job order as binding, regardless of workers' at-will employment status.

In addition to making the organizational changes discussed above, the Final Rule will require employers to list in the job order the following information that is essential for providing U.S. workers sufficient information about the job opportunity (this information was previously required to be included in the job order by a cross reference to § 655.41): the employer's name and contact information (§ 655.18(b)(1)); a full description of the job opportunity (§ 655.18(b)(3)); the specific geographic area of intended employment (§ 655.18(b)(4)); if applicable, a statement that overtime will be available to the worker and the overtime wage offer(s) (§ 655.18(b)(6)); if applicable, a statement that on-the-job training will be provided to the worker (§ 655.18(b)(7)); a statement that the employer will use a single workweek as its standard for computing wages due (§ 655.18(b)(8)); and instructions for inquiring about the job opportunity or submitting applications, indications of availability, and/or resumes to the appropriate SWA (§ 655.18 (b)(18)). This last addition was included to ensure that applicants who learn of the job opening through the electronic job registry are provided with the opportunity to contact the SWA for more information or referral.

5. § 655.19 Job Contractor Filing Requirements

This Final Rule amends § 655.6 to provide for the limited circumstances under which job contractors may continue to participate in the H–2B program. However, their participation is still be subject to the limitations provided in the *CATA* decision, in which the Court invalidated and vacated 20 CFR 655.22(k) under the 2008 Final Rule insofar as that provision permits the clients of job contractors to hire H–2B workers without submitting an application to the Department. In particular, the Court relied, as a basis for its determination, on the DHS regulation at 8 CFR 214.2(h)(2)(i)(C), which provides that ''[i]f the beneficiary [*i.e.,* the temporary, non-immigrant worker] will perform nonagricultural services for, or receive training from, more than one employer, each employer must file a separate petition with USCIS as provided in the form instructions.'' The Court found that this provision, when coupled with the DHS regulation at 8 CFR 214.2(h)(6)(iii)(A), which requires the petitioner to apply for a temporary labor certification with the Department of Labor, prohibited the Department's

[7] The workers rights card is available at *http://travel.state.gov/pdf/Pamphlet-Order.pdf.*

existing practice of allowing only job contractors to file for labor certifications. See *CATA* 2010 WL 3431761, at *16 (E.D. Pa. Aug. 30, 2010). Rather, the Court found that such provisions

> mandate that (1) every employer must file a petition with DHS, and (2) before doing so, the employer must also file a certification application with DOL. By allowing certain employers *not* to file certification applications, DOL's regulations unambiguously contradict this mandate. *Id.* (emphasis added).

As a result of this order, we determined that we could no longer accept H–2B labor certification applications from job contractors if the job contractor's employer-clients did not also submit labor certification applications. However, both the 2008 Final Rule and this Final Rule only permit one H–2B labor certification application to be filed for worksite(s) within one area of intended employment for each job opportunity with an employer. Accordingly, both a job contractor and employer-client each would not be able to file their own application for a single job opportunity.

However, we recognized that it may be possible for a job contractor and its employer-client to file a single application as a joint employer. Joint employment is defined as where two or more employers each have sufficient definitional indicia of employment to be considered the employer of an employee, those employers may be considered to jointly employ that employee. An employer in a joint employment relationship with an employee may be considered a 'joint employer' of that employee. See § 655.4. That approach would be consistent with both the *CATA* decision (which prohibits allowing only the job contractor to file the application) and § 655.20 under the 2008 Final Rule and § 655.15 under this Final Rule (which prohibit the filing of multiple applications for a single job opportunity). Earlier this year, we issued guidance on our Web site which addresses the requirement and procedures for filing and processing applications for joint employers (which could include job contractors and their employer-client(s)) under the H–2B program. See *http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h2b.* While such guidance continues to remain valid, we are incorporating in this section the key procedures and requirements relating to the submission of the *Application for Prevailing Wage Determination,* the filing of the *Application for Temporary Employment Certification,* placement of the job order and conduct of recruitment, issuance of certification, and submission of certification to USCIS.

In deciding whether to file as joint employers, the job contractor and its employer-client should understand that employers are considered to jointly employ an employee when they each, individually, have sufficient definitional indicia of employment with respect to that employee. As described in the definition of employee in 20 CFR 655.4, some factors relevant to the determination of employment status include, but are not limited to, the following: The right to control the manner and means by which work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; discretion over when and how long to work; and whether the work is part of the regular business of the employer or employers. Whenever a job contractor and its employer client file applications, each employer is responsible for compliance with H–2B program assurances and obligations. In the event a violation is determined to have occurred, either or both employers can be found to be responsible for remedying the violation and attendant penalties.

D. Assurances and Obligations

1. § 655.20 Assurances and Obligations of H–2B Employers

Proposed § 655.20 replaced existing § 655.22 and contained the employer obligations that WHD will enforce. The Department proposed to modify, expand, and clarify current requirements to ensure that the employment of H–2B workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. Requiring compliance with the following conditions of employment is the most effective way to meet this goal. As discussed in the preamble to § 655.5, workers engaged in corresponding employment are entitled to the same protections and benefits, set forth below, that are provided to H–2B workers.

a. Rate of pay (§ 655.20(a)). In proposed § 655.20(a) the Department expanded the current § 655.22(e). In addition to the existing requirements that employers pay the offered wage during the entire certification period and that the offered wage equal or exceed the highest of the prevailing wage, the applicable Federal minimum wage, the State minimum wage, and any local minimum wage, the Department added the requirement that such wages be paid free and clear. The proposed section also added requirements related to productivity standards and payments made on a piece-rate basis, and eliminated the current § 655.22(g)(1) option of paying such wages on a monthly basis. The Department received numerous comments on this section that were deemed out of scope, as they concerned the calculation of the prevailing wage.

The Department's proposed regulation required that the wages offered in the job order must be at least equal to the prevailing wage rate for the occupation in the area of employment, as set forth in § 655.10(b), or the appropriate Federal, State, or local minimum wage, whichever is highest. If, during the course of the period certified in the *Application for Temporary Employment Certification,* the Federal, State or local minimum wage increases to a level higher than the prevailing wage certified in the Application, then the employer is obligated to pay that higher rate for the work performed in that jurisdiction where the higher minimum wage applies.

A State Attorney General's office supported the obligation to pay the State or local minimum wage where one is higher than the prevailing wage or the Federal minimum wage, stating that this provision is particularly important in industries in which employees are often exempt from Federal wage and hour law. We concur with this assessment.

Upon consideration, we have amended the provision with respect to productivity standards (§ 655.20(a)(3)) to reflect that it is incumbent upon the employer to demonstrate that such productivity standards are normal and usual for non-H–2B employers for the occupation and area of intended employment. Unlike in the H–2A program, the Department does not conduct prevailing practice surveys through the SWAs, which would provide such information to enable a CO to make this decision. If an employer wishes to provide productivity standards as a condition of job retention, the burden of proof rests with that employer to show that such productivity standards are normal and usual for employers not employing H–2B workers. We have adopted the rest of the proposed rule with minor clarifying edits for consistency.

b. Wages free and clear (§ 655.20(b)). In § 655.20(b), the Department proposed to require that wages be paid either in cash or negotiable instrument payable at par, and that payment be made finally and unconditionally and free and clear in accordance with WHD regulations at

29 CFR part 531. Numerous commenters, including several advocacy organizations and a state agency, wrote in support of this provision. A foreign worker advocacy organization writing in favor of the provision stated that in its experience employers too often try to impermissibly shift costs of tools, recruiting, travel, and other costs which impermissibly bring employees' wages below the minimum and prevailing wage. This assurance clarifies the pre-existing obligation for both employers and employees.

Only one commenter, a trade organization wrote in opposition to the provision. However, this commenter misunderstood the proposal, writing that the requirement to pay prevailing wages free and clear will expose employers to the costs of local convenience travel (trips to Wal-Mart, Western Union, laundry, *etc.*), uniforms, tools, meals, *etc.* While the employer's obligation to pay for uniforms and tools is covered in the Final Rule at § 655.20(k), reasonable deductions for employer-provided local travel that is for the employees' primary benefit and meals, if disclosed on the job order, would generally be viewed as permissible under § 655.20(c).

c. Deductions (§ 655.20(c)). In proposed § 655.20(c) the Department sought to ensure payment of the offered wage by limiting deductions which reduce wages to below the required rate. The proposed section limited authorized deductions to those required by law, made under a court order, that are for the reasonable cost or fair value of board, lodging, or facilities furnished that primarily benefit the employee, or that are amounts paid to third parties authorized by the employee or a collective bargaining agreement. The proposed section specifically provided that deductions not disclosed in the job order are prohibited. The Department also specified deductions that would never be permissible, including: Those for costs that are primarily for the benefit of the employer; those not specified on the job order; kick backs paid to the employer or an employer representative; and amounts paid to third parties which are unauthorized, unlawful, or from which the employer or its foreign labor contractor, recruiter, agent, or affiliated person benefits to the extent such deductions reduce the actual wage to below the required wage. The proposed section referred to the FLSA and 29 CFR part 531 for further guidance.

Numerous advocacy groups, labor organizations, and individuals commented in favor of the provision. One foreign worker advocacy organization applauded the Department's proposal, writing the provision's level of specificity is valuable and necessary to prevent employers from taking advantage of vulnerable workers with little understanding of what employers may lawfully deduct from their wages. A labor organization wrote that it regularly finds that immigrant workers are exploited by employers who confuse them as to their rate of pay, overtime, taxes, and other deductions, and therefore enthusiastically supported the provision. Two individuals misunderstood the provision as allowing deductions that are primarily for the benefit of the employer and requested that the Department explicitly prohibit such deductions. The Department clarifies that a deduction for any cost that is primarily for the benefit of the employer is never reasonable and therefore never permitted under the Final Rule. Some examples of costs that Department has long held to be primarily for the benefit of the employer are: Tools of the trade and other materials and services incidental to carrying on the employer's business; the cost of any construction by and for the employer; the cost of uniforms (whether purchased or rented) and of their laundering, where the nature of the business requires the employee to wear a uniform; and transportation charges where such transportation is an incident of and necessary to the employment. This list is not an all-inclusive list of employer business expenses.

A comment from a State Department of Labor expressed concern that the permissibility of a deduction was still subjective and requested that ETA provide SWAs with training and detailed written instructions with criteria to use when evaluating deductions listed on a job order. The Department believes that the guidance provided in this section is sufficient, but will provide additional training and guidance to SWAs as needed.

In addition, concerns were raised by a coalition representing agents and employers and an industry group that the prohibition of deductions constituted an overstepping of the Department's bounds by importing the de facto deduction concept from the FLSA. One of these commenters also cited the decision by the Fifth Circuit Court of Appeals in *Castellanos-Contreras* v. *Decatur Hotels, LLC,* 622 F.3d 393 (5th Cir. 2010), contending that this decision definitively resolved whether the FLSA requires H–2B employers to reimburse certain employee pre-employment business expenses, and that the Department is bound by this decision. However, that decision concerned alleged FLSA violations relating to employees' payment of transportation and visa fees during a time period in which the court found that the Department did not have a clear position as to whether employers were required to reimburse for these fees. *Decatur,* 622 F.3d at 401–02, and n.9. It specifically stated that the Department's subsequent clarification that these expenses primarily benefited the employer and therefore could not bring workers' wages below the FLSA minimum wage, as set forth in Field Assistance Bulletin No. 2009–2 (August 2009, available at *http://www.dol.gov/ebsa/regs/fab2009–2.html*), might be afforded due deference in the future but would not apply retroactively to the allegations at issue in that case. Id. at 402. The Department acknowledges that it is bound by the Fifth Circuit's decision with respect to the time period considered in that case, in the jurisdictions covered by the Fifth Circuit, with regard to how such expenses are treated under the FLSA. However, the Department does not interpret this decision to be the ultimate determination on these issues, as suggested by this commenter, and notes that the decision did not address what the proper deduction analysis would be under newly promulgated regulations adopted under the H–2B program. The Department believes that the concept of de facto deductions initially developed under the FLSA is equally applicable to deductions that bring H–2B workers' wages below the required wage, as the payment of the prevailing wage is necessary to ensure that the employment of foreign workers does not adversely affect the wages and working conditions of similarly employed U.S. workers. To allow deductions for business expenses, such as tools of the trade, would undercut the prevailing wage concept and, as a result, harm U.S. workers.

d. Job opportunity is full-time (§ 655.20(d)). In proposed § 655.20(d), the Department required that all job opportunities be full-time temporary positions, consistent with existing language in § 655.22(h), and established full-time employment as at least 35 hours per week, an increase from the current level of 30 hours. Additionally, consistent with the FLSA, the NPRM added the requirement that the workweek be a fixed and regularly recurring period of 168 hours or seven consecutive 24-hour periods which may start on any day or hour of the day. The Department received no comments regarding the added language

addressing the workweek requirement; however, there were many comments submitted by a variety of commenters expressing opinions about the definition of full-time employment. The Department carefully considered and responded to those comments in its discussion of § 655.5, Definition of Terms.

e. Job qualifications and requirements (§ 655.20(e)). Proposed § 655.20(e) clarified existing § 655.22(h) by stating that each job qualification and requirement listed in the job order must be consistent with normal and accepted qualifications required by non-H–2B employers for similar occupations in the area of intended employment. Under the proposed compliance model, OFLC in collaboration with the SWA would determine what is normal and accepted during the pre-certification process. In addition, we proposed to provide the CO with the authority to require the employer to substantiate any job qualifications specified in the job order. The Department is retaining this provision with amendments, as discussed below.

The Department received one comment on this additional language, in which a coalition representing agents and employers requested that the Department limit the CO's discretion to demand substantiation to those cases in which he or she has objective and reliable documentation showing that a requirement or qualification is unusual or rare. This commenter asserted that this limitation would not place a further burden on the CO and would limit the burden placed on employers. The Department concludes that such a requirement would in fact place a significant burden on the CO, who would have to do substantial research to produce such documentation, while an employer would presumably have documentation of the appropriateness of its own requirement or qualification readily available. The Department therefore declines to make this change.

In addition, the Department received comments raising concerns regarding the Department's standard for what is normal and accepted with respect to the employer's qualifications and requirements. Some commenters expressed confusion between the use of the terms qualification and requirement. These and other comments related to this and related provisions are discussed in the preamble to paragraph (r) of this section as well as § 655.18(a)(2). However, in response to these comments, the Department has amended this section to clarify, consistent with a parallel requirement in 655.18(a)(2), that the employer's job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on H–2B workers. In addition, and in response to the confusion articulated by some commenters, we have clarified that a qualification means a characteristic that is necessary to the individual's ability to perform the job in question. In contrast, a requirement means a term or condition of employment which a worker is required to accept in order to obtain the job opportunity.

This provision, as amended, enables us to continue our current standard of review of the job qualifications and special requirements by looking at what non-H–2B employers determine is normal and accepted to be required to perform the duties of the job opportunity. The purpose of this review is to avoid the consideration (and the subsequent imposition) of requirements on the performance of the job duties that would serve to limit the U.S. worker access to the opportunity. OFLC has significant experience in conducting this review and in making determinations based on a wide range of sources assessing what is normal for a particular job, and employers will continue to be held to an objective standard beyond their mere assertion that a requirement is necessary. We will continue to look at a wide range of available objective sources of such information, including but not limited to O*NET and other job classification materials and the experience of local treatment of requirements at the SWA level. Ultimately, however, it is incumbent upon the employer to provide sufficient justification for any requirement outside the standards for the particular job opportunity.

Therefore, we are retaining this provision with the amendments discussed above.

f. Three-fourths guarantee (§ 655.20(f)). In § 655.20(f), the NPRM proposed to require employers to guarantee to offer employment for a total number of work hours equal to at least three-fourths of the workdays of each 4-week period and, if the guarantee was not met, to pay the worker what the worker would have earned if the employer had offered the guaranteed number of days. The NPRM stated these 4-week periods would begin the first workday after the worker's arrival at the place of employment or the advertised contractual first date of need, whichever is later, and would end on the expiration date specified in the job order or in any extensions. The NPRM provided that a workday would be based on the workday hours stated in the employer's job order, and the 4-week period would be based on the employer's workweek, with increases for the initial period and decreases for the last period on a pro rata basis, depending on which day of the workweek the worker starts or ceases work.

The NPRM proposed that if a worker failed or refused to work hours offered by the employer, the employer could count any hours offered consistent with the job order that a worker freely and without coercion chose not to work, up to the maximum number of daily hours on the job order, in the calculation of guaranteed hours. The NPRM also allowed the employer to offer the worker more than the specified daily work hours, but stated the employer may not require the employee to work such hours or count them as offered if the employee chose not to work the extra hours. However, the NPRM allowed the employer to include all hours actually worked when determining whether the guarantee had been met. Finally, the NPRM proposed, as detailed in 29 CFR 503.16(g), that the CO can terminate the employer's obligations under the guarantee in the event of fire, weather, or other Act of God that makes the fulfillment of the job order impossible.

The NPRM specifically invited the public to suggest alternative guarantee systems that may better serve the goals of the guarantee. In particular, the Department sought comments on whether a 4-week increment is the best period of time for measuring the three-fourths guarantee or whether a shorter or longer time period would be more appropriate.

Based upon all the comments received, the Department has decided to retain the three-fourths guarantee, but to lengthen the increment over which the guarantee is measured to 12 weeks, rather than just 4 weeks, if the period of employment covered by the job order is 120 days or more, and increase the increment of the guarantee to 6 weeks, if the period of employment covered by the job order is less than 120 days.

The Department received numerous comments, from both employers and employees, addressing whether to include a guarantee and whether a 4-week increment is the appropriate period of time. Many employers expressed concern about the guarantee. They were particularly concerned about the impact of the weather on their ability to meet the guarantee. For example, crab processing companies emphasized that unseasonably cool weather, weather events such as

hurricanes, or unforeseen events like oil spills or health department or conservation closures can make the harvesting and processing of crabs impossible. Other employers—such as those in the forestry industry—similarly emphasized that the 4-week period does not adequately account for the impact of weather because many days can be unworkable (because it is too hot, too dry, too wet, or too cold to plant seedlings) and the hours cannot be made up within 4 weeks. Ski resorts emphasized that they are dependent upon the amount and timing of snowfall as well as temperatures, and golf clubs expressed similar concerns about the impact of the weather. Employers also stated that work hours may be unavailable for many other reasons beyond their control, such as federal money for forestry work is unavailable, landowners change their minds about planting, or the nursery does not make seedlings available; the economy affects consumers' willingness to travel for leisure; or a large group or event sponsor changes the schedule or cancels a booking. Employers also emphasized that it is difficult to predict with precision several months ahead of time exactly what an employer's workforce needs will be throughout the season, and requiring employers to pay wages when no work is performed would cause financial ruin. Some employers focused, in particular, on their difficulty in meeting the guarantee during slow months at the beginning and end of the season.

One commenter presented a survey of 501 employers in which 34 percent of employers responded that the guarantee would severely affect their bottom line, 26 percent were moderately concerned, and 40 percent stated that it would not affect them. The survey showed that, for a plurality of employers, workers consistently work more than 40 hours per week; even those employers that expressed concern stated that the guarantee would not present a problem during the busiest months of the season, but would be a burden during the first and last months of the season when they are ramping up or winding down. Many survey respondents were prepared to guarantee a minimum workload over the season, but not month to month.

Numerous other employer commenters similarly stated that if a guarantee remains in the Final Rule, it should be spread over the entire certification period, as it is in the H–2A regulations. They noted that this would provide flexibility and enhance their ability to meet the guarantee without cost, because often the loss of demand for work in one period is shifted to another point in the season, but such a guarantee would still deter egregious cases of employers misstating their need for H–2B employees. Employers also suggested, in addition to a clear Act of God exception, that there should be an exception for man-made disasters such as an oil spill or controlled flooding. Some also suggested that the rule should allow the Department to give employers a short period of interim relief from the guarantee, when weather or some other catastrophic event makes work temporarily unavailable, rather than simply authorizing the termination of the job order.

A number of employer commenters suggested that the guarantee should be based upon pay for three-fourths of the hours, rather than three-fourths of the hours, so that employers could take credit for any overtime paid at time-and-a-half. They noted that, because agriculture is exempt from overtime, H–2A employers do not have to pay an overtime premium when employees work extra hours in some weeks. Other commenters stated that the three-fourths guarantee is beyond the Department's statutory authority, noting the differences between the H–2A and H–2B statutory frameworks. Finally, some employers expressed concern about how they could afford to pay the guarantee when the employee does not or cannot work, seeming to suggest that employers are required to pay the guarantee even if an employee voluntarily chooses not to work, or that they were unaware of the alternative of seeking termination of the job order.

Employees, in contrast, uniformly supported the requirement for a guarantee, and many suggested strengthening the proposed guarantee. For example, employee advocates stressed that the three-fourths guarantee is important to prevent foreign workers from being lured into the program with promises of far more hours of work than they will actually receive. When workers do not receive the promised hours, they are forced to resort to work that does not comply with the program in order to survive, and this then impacts the job opportunities available to U.S. workers. Further, where there are excess H–2B workers, employers are able to exploit them out of their desperation for work, resulting in an ability to undercut the wages of U.S. workers. Commenters emphasized that the proposed guarantee would protect workers who traveled in reliance on promises of work, who now may have to wait weeks or months for the work to begin, because it would serve as a barrier preventing employers from artificially increasing their stated need for H–2B workers. One commenter with experience working with H–2B workers in New Orleans described a situation in which the workers were provided little or no work after traveling from India, and when they complained they were threatened and many were fired. Employee commenters noted that when they get very limited hours because the jobs either do not start on the promised date or finish early, or have fewer hours per week, they would have been better off staying in their home country because they have to spend everything they earn to live on and have nothing left to send home.

Employee advocates stated that applying the guarantee on a 4-week basis (as opposed to over the length of the job order) prevents employers from claiming artificially long seasons, in the hopes that workers will quit prematurely at the end of the season and lose their rights to the guarantee and transportation home, even if the reason was that the employer had very little work available. The shorter increment also protects U.S. workers because it prevents employers from using an unrealistic early start date as a method of encouraging them to abandon the job to seek alternative employment with more hours. The commenters noted that employers could simply apply for fewer H–2B workers and offer all workers more hours to minimize the impact of the requirement.

Although employee advocates uniformly supported the concept of a guarantee, some advocates stressed that the three-fourths guarantee overcompensates for the effects of weather. Employees were particularly concerned about the guarantee being only three-fourths if the definition of full-time remained at 35 hours, which they viewed as double-counting for the effects of weather and which would result in workers only being guaranteed 26 hours per week (105 hours per month). Thus, while some employee commenters believed the three-fourths guarantee to be a reasonable and narrowly-tailored means to prevent abuses, other employee advocates suggested adopting a more protective guarantee—100 percent, or 90 percent, or providing the guarantee on a weekly basis. They emphasized that employees are required to pay 100 percent of their expenses, such as rent and medical fees. They also noted that many H–2B industries are not affected by the weather to the same degree as agricultural work; therefore, some advocates suggested the guarantee should be higher than the three-fourths rule in the H–2A program. At a minimum, they emphasized the

importance of having the guarantee at least every 4 weeks to prevent employees from going through long periods without work or income.

Finally, employee advocates expressed concern about a broad Act of God or impossibility exception to the rule and suggested that the Department play a direct role in assisting in the transfer of temporary foreign workers affected by such a job order termination to other employers, and suggested adopting an additional recordkeeping requirement, similar to the H–2A three-fourths guarantee recordkeeping provision at § 655.122(j)(3)), requiring employers to record the reason a worker declined offered hours of work in order to prevent employers from overstating the number of hours offered.

After carefully considering all the comments received, the Department has decided to retain the three-fourths guarantee, but to lengthen the increment over which the guarantee is measured to 12 weeks, rather than just 4 weeks, if the period of employment covered by the job order is 120 days or more, and increase the increment over which the guarantee is measured to 6 weeks rather than 4 weeks, if the period of employment is less than 120 days. The Department believes that this approach will retain the benefits of having the guarantee, while offering employers the flexibility to spread the required hours over a sufficiently long period of time such that the vagaries of the weather or other events out of their control that affect their need for labor do not prevent employers from fulfilling their guarantee. Moreover, as discussed in detail later with regard to § 655.20(g), the CO may relieve an employer from the three-fourths guarantee requirement for time periods after an unforeseeable event outside the employer's control occurs, such as fire, weather, or other Act of God.

When employers file applications for H–2B labor certifications, they represent that they have a need for full-time workers during the entire certification period. Therefore, it is important to the integrity of the program, which is a capped visa program, to have a methodology for ensuring that employers have fairly and accurately estimated their temporary need. As explained in the NPRM, the guarantee deters employers from misusing the program by overstating their need for full-time, temporary workers, such as by carelessly calculating the starting and ending dates of their temporary need, the hours of work needed per week, or the total number of workers required to do the work available. To the extent that employers more accurately describe the amount of work available and the periods during which work is available, it gives both U.S. and foreign workers a better chance to realistically evaluate the desirability of the offered job. U.S. workers will not be induced to abandon employment, to seek full-time work elsewhere at the beginning of the season or near the end of the season because the employer overstated the number of employees it actually needed to ramp up or to wind down operations. Nor will U.S. workers be induced to leave employment at the beginning of the season or near the end of the season due to limited hours of work because the employer misstated the months during which it reasonably could expect to perform the particular type of work involved in that geographic area. Not only will the guarantee result in U.S. and H–2B workers actually working most of the hours promised in the job order, but it also will make the capped H–2B visas more available to other employers whose businesses need to use H–2B workers. Therefore, the Department disagrees with those commenters who suggested the Department lacks the authority to impose a guarantee. The guarantee is a necessary element to ensure the integrity of the labor certification process, to ensure that the availability of U.S. workers for full-time employment is appropriately tested, to ensure that there is no adverse effect on U.S. workers from the presence of H–2B workers who are desperate for work because the work that was promised does not exist, and to ensure that H–2B visas are available to employers who truly have a need for temporary labor for the dates and for the numbers of employees stated.

The Department's recent experience in enforcing the H–2B regulations demonstrates that its concerns about employers overstating their need for workers are not unfounded, as do the numerous comments from employees and their advocates who described countless private cases and testimony demonstrating the existence of this problem. The Department's investigations have revealed employers that stated on their H–2B applications that they would provide 40 hours of work per week when, in fact, their workers averaged far fewer hours of work, especially at the beginning and/or end of the season. Indeed, in some weeks the workers have not worked at all. In addition, there has been testimony before Congress involving similar cases in which employers have overstated the period of need and/or the number of hours for which the workers are needed. For example, as the Department described in the NPRM, H–2B workers testified at a hearing before the Domestic Policy Subcommittee, House Committee on Oversight and Government Reform, on April 23, 2009, that there were several weeks in which they were offered no work; others testified that their actual weekly hours—and hence their weekly earnings—were less than half of the amount they had been promised in the job order. Daniel Angel Castellanos Contreras, a Peruvian engineer, was promised 60 hours per week at $10–$15 per hour. According to Mr. Contreras, ''[t]he guarantee of 60 hours per week became an average of only 20 to 30 hours per week—sometimes less. With so little work at such low pay [$6.02 to $7.79 per hour] it was impossible to even cover our expenses in New Orleans, let alone pay off the debt we incurred to come to work and save money to send home.'' [8] Miguel Angel Jovel Lopez, a plumber and farmer from El Salvador, was recruited to do demolition work in Louisiana with a guaranteed minimum of 40 hours of work per week. Mr. Lopez testified, ''[i]nstead of starting work, however, I was dropped off at an apartment and left for two weeks. Then I was told to attend a two week training course. I waited three more weeks before working for one day on a private home and then sitting for three more weeks.'' [9] Testimony at the same hearing by three attorneys who represent H–2B workers stated that these witnesses' experiences were not aberrations but were typical. Hearing on The H–2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers, 111th Cong. (Apr. 23, 2009).

Furthermore, a 2010 report by the American University Washington College of Law International Human Rights Law Clinic and the Centro de los Derechos del Migrante, Inc. documented the prevalence of work shortages for women working on H–2B visas in the Maryland crab industry. The researchers found that several women interviewed spent days and weeks without work when crabs were scarce. During this time most continued to make rent

[8] Testimony of Daniel Angel Castellanos Contreras before the House Committee on Oversight and Government Reform Domestic Policy Subcommittee, 2, (2009, Apr. 23) *http://oversight.house.gov/images/stories/documents/20090423085101.pdf.*

[9] Testimony of Miguel Angel Jovel Lopez before the House Committee on Oversight and Government Reform Domestic Policy Subcommittee, 2. (2009, Apr. 23) *http://oversight.house.gov/images/stories/documents/20090423085606.pdf.*

payments, and struggled to send money to family back in Mexico.[10]

The Department has not adopted the suggestion of employers to spread the three-fourths guarantee over the entire period covered by the job order. Using the entire period of the job order would not adequately protect the integrity of the program because it would not measure whether an employer has appropriately estimated its need for temporary workers. It would not prevent an employer from overstating the beginning date of need and/or the ending date of need and then making up for the lack of work in those two periods by offering employees 100 percent of the advertised hours in the middle of the certification period. Indeed the employer could offer employees more than 100 percent of the advertised hours in the peak season and, although they would not be required to work the excess hours, most employees could reasonably be expected to do so in an effort to maximize their earnings.

However, in order to meet the legitimate needs of employers for adequate flexibility to respond to changes in climatic conditions (such as too much or too little snow or rain, temperatures too high or too low) as well as the impact of other events beyond the employer's control (such as a major customer who cancels a large contract), the Department has modified the increment of time for measuring the guarantee by tripling it from 4 weeks to 12 weeks (if the period of employment covered by the job order is at least 120 days) and increasing the period by 2 weeks to 6 weeks (if the employment is less than 120 days). The Department believes this provides sufficient flexibility to employers, while continuing to deter employers from requesting workers for 9 months, for example, when they really only have a need for their services for 7 months. If an employer needs fewer workers during the shoulder months than the peak months, it should not attest to an inaccurate statement of need by requesting the full number of workers for all the months. Rather, the proper approach it should follow is to submit two applications with separate dates of need, so that it engages in the required recruitment of U.S. workers at the appropriate time when it actually needs the workers.

Finally, the Department has not adopted the suggestion of some employers for a guarantee tied to pay rather than hours. The employers' attestation relates to their need for a particular number of full-time workers during a set period; thus, the attestation relates to the amount of full-time work, not the amount of pay received. The Department reminds employers that they may count toward the guarantee hours that are offered but that the employee fails to work, up to the maximum number of hours specified in the job order for a workday; thus, they do not have to pay an employee who voluntarily chooses not to work. Similarly, they may count all hours the employee actually works, even if they are in excess of the daily hours specified in the job order. Employers' comments addressing the Act of God exception are addressed in § 655.20(g).

The Department has not adopted the suggestion of many employee advocates to impose a more protective guarantee. The Department does not believe it would be appropriate to impose a 100 percent, 90 percent, or weekly guarantee. The three-fourths guarantee is a reasonable deterrent to potential carelessness and a necessary protection for workers, while still providing employers with flexibility relating to the required hours, given that many common H–2B occupations involve work that can be significantly affected by weather conditions. Moreover, it is not just outdoor jobs such as landscaping that are affected by weather. For example, indoor jobs such as housekeeping and waiting on tables can be affected when a hurricane, flood, unseasonably cool temperatures, or the lack of snow deters customers from traveling to a resort location. The impact on business of such weather effects may last for several weeks, although (as employers recognized) they are likely to be able to make up for them in other weeks of the season. Moreover, the Department understands that it is difficult to predict with precision months in advance exactly how many hours of work will be available, especially as the period of time involved is shortened. Finally, the comment suggesting adding a recordkeeping requirement related to the reason an employee declines offered work is addressed in § 655.20(i).

g. Impossibility of fulfillment (§ 655.20(g)). In proposed § 655.20(g), the Department added language to allow employers to terminate a job order in certain narrowly-prescribed circumstances when approved by the CO. In such an event, the employer would be required to meet the three-fourths guarantee discussed in paragraph (f) of this section based on the starting date listed in the job offer or first workday after the arrival of the worker, whichever is later, and ending on the job order termination date. The employer would also be required to attempt to transfer the H–2B worker (to the extent permitted by DHS) or worker in corresponding employment to another comparable job. Actions employers could take include reviewing the electronic job registry to locate other H–2B-certified employers in the area and contacting any known H–2B employers, the SWA, or ETA for assistance in placing workers. Absent such placement, the employer would have to comply with the proposed transportation requirements in paragraph (j) of this section.

The Department received numerous comments on this section, from the Small Business Administration (SBA) Office of Advocacy, employers, employer advocacy groups, and trade organizations, requesting that the provision be expanded to cover manmade disasters. Many of these commenters cited the recent Deepwater Horizon oil spill, which forced many businesses to close unexpectedly. The Department views this suggested expansion as wholly in line with the intent of the provision, which acknowledged that circumstances beyond the control of the employer or the worker can result in the need to terminate a worker's employment before the expiration date of a job order. Therefore, the Department has amended this provision in the Final Rule. The first sentence of the paragraph now reads, ''If, before the expiration date specified in the job order, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, other Acts of God, or a similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside the employer's control, that makes the fulfillment of the job order impossible, the employer may terminate the job order with the approval of the CO.'' No other changes were made to this section.

h. Frequency of pay (§ 655.20(h)). Proposed § 655.20(h) required that the employer indicate the frequency of pay in the job order and that workers be paid at least every two weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent. Further, it required that wages be paid when due.

Numerous worker advocacy organizations submitted comments supporting this provision. One comment

[10] American University Washington College of Law International Human Rights Law Clinic and Centro de los Derechos del Migrante, Inc. *Picked Apart: The Hidden Struggles of Migrant Worker Women In the Maryland Crab Industry.*2, July 2010. *http://www.wcl.american.edu/clinical/documents/20100714_auwcl_ihrlc_picked_apart.pdf?rd=1.*

stated that frequent pay is important for H–2B workers who often arrive in the United States with little money and need prompt payment after beginning work to be able to pay for their expenses without going into debt. Requiring frequent pay also negates the ability of unscrupulous lenders to take advantage of desperate workers who run out of money before payday by extending high interest loans. Another comment stated that this provision would allow regular access to funds and assist workers to avoid being trapped in a work situation because of lack of resources to leave an exploitative working situation.

One employer expressed general opposition to this requirement but gave no reason explaining the opposition. Other employer comments expressed a range of concerns.

One individual commented that the specific language in § 655.20(h), or according to the prevailing practice in the area of intended employment, is ambiguous. The commenter expressed concern that the regulation provides no process for determining what prevailing practice is and that area of intended employment has no rigid tangible boundaries. This commenter did not provide any alternative suggestions. The Department does not consider the regulation text ambiguous. The concept of an area of intended employment is defined in the regulations at § 655.5 and has been used in the program since its inception. While we do not conduct prevailing practice surveys in the H–2B program at this time, we assume employers are aware of prevailing practices for frequency of pay in their area.

One employer suggested that the Department permit employers to use a monthly pay period provided that they give employees the option to draw a percentage of wages earned in the middle of the month, as this would effectively give twice-monthly pay periods to any employee who exercised the option. The Department rejects this suggestion. The requirement that workers be paid at least every 2 weeks was designed to protect financially vulnerable workers. Allowing an employer to pay less frequently than every two weeks would impose an undue burden on workers who traditionally are paid low wages and may lack the means to make their income stretch through a month until they get paid, and it would force these workers to pursue the needless step of requesting their earnings every month in the middle of the pay period.

One commenter suggested that the Department require employers to pay wages in cash or require that wages be deposited directly into the employee's bank account. The Department notes that the requirement that payments be made either in cash or negotiable instrument payable at par at § 655.20(b) of the Final Rule will ensure that wages are paid free and clear and in an accessible medium.

No other comments were received on this section. As such, the Department adopts the provision as proposed.

i. Earnings statements (§ 655.20(i)). Proposed § 655.20(i) added requirements for the employer to maintain accurate records of worker earnings and provide the worker an appropriate earnings statement on or before each payday. The proposed paragraph also listed the information that the employer must include in such a statement.

The Department received numerous comments in support of § 655.20(i) from community-based organizations and worker advocacy organizations. One comment from a worker advocacy organization stated that earning statements will help workers promptly identify any improper deductions or wage violations. This commenter noted that, armed with such wage information, employees are better able to hold employers accountable to wage requirements.

Some commenters expressed opposition to this provision, arguing that requiring employers to provide earnings statements will create an administrative burden and additional costs resulting from more paperwork and additional recordkeeping. The Department believes that any additional administrative burden resulting from this provision will be outweighed by the importance of providing workers with this crucial information, especially because an earnings statement provides workers with an opportunity to quickly identify and resolve any anomalies with the employer and hold employers accountable for proper payment.

One employer association expressed concern that before in the phrase on or before each payday is vague. The comment proposed no alternative language. The Department finds the language to clearly indicate that so long as the earnings statement is provided no later than the time payment is received there is no violation of this provision.

One comment submitted by a worker advocacy group suggested the Department also require that where a worker declines any offered hours of work, employers record the reason why the hours were declined. Similar to § 655.122(j)(3) in the H–2A program, requiring an employer to record the reasons why a worker declined work will support the Department's enforcement activities related to the three-fourths guarantee proposed in § 655.20(f). The Department accepts this suggestion and adds the following language to § 655.20(i)(1) and 29 CFR 503.16(i)(1): ''* * * if the number of hours worked by the worker is less than the number of hours offered, the reason(s) the worker did not work;''.

Additionally, the Department has amended §§ 655.16(i)(2)(iv), 655.20(i)(l) and 655.20(i)(2)(v) and 29 CFR 503.16(i)(l) to require employers to maintain records of any additions made to a worker's wages and to include such information in the earnings statements furnished to the worker. Such additions could include performance bonuses, cash advances, or reimbursement for costs incurred by the worker. This requirement is consistent with the recordkeeping requirements under the FLSA in 29 CFR part 516. No other changes were made to this section in the Final Rule.

j. Transportation and visa fees (§ 655.20(j)). The Department proposed changes relating to transportation and visa costs in § 655.20(j). In § 655.20(j)(1)(i), the NPRM proposed to require an employer to provide, pay for, or reimburse the worker in the first workweek the cost of transportation and subsistence from the place from which the worker has come to the place of employment. If the employer advanced or provided transportation and subsistence costs to H–2B workers, or it was the prevailing practice of non-H–2B employers to do so, the NPRM proposed to require the employer to advance such costs or provide the services to workers in corresponding employment traveling to the worksite. The amount of the transportation payment was required to be at least the most economical and reasonable common carrier charge for the trip. Section 655.20(j)(1)(ii) of the NPRM proposed to require the employer, at the end of the employment, to provide or pay for the U.S. or foreign worker's return transportation and daily subsistence from the place of employment to the place from which the worker departed to work for the employer, if the worker has no immediate subsequent approved H–2B employment. If the worker has been contracted to work for a subsequent and certified employer, the last H–2B employer to employ the worker would be required to provide or pay the U.S. or foreign worker's return transportation. Therefore, prior employers would not be obligated to pay for such return transportation costs. The NPRM also proposed that all employer-provided transportation—

including transportation to and from the worksite, if provided—must meet applicable safety, licensure, and insurance standards (§ 655.20(j)(1)(iii)). Furthermore, all transportation and subsistence costs covered by the employer had to be disclosed in the job order (§ 655.20(j)(1)(iv)). Finally, § 655.20(j)(2) of the NPRM proposed that employers would be required to pay or reimburse the worker in the first workweek for the H–2B worker's visa, visa processing, border crossing, and other related fees including those fees mandated by the government (but not for passport expenses or other charges primarily for the benefit of the workers). As discussed below, a significant number of commenters addressed these proposed changes, and the Department has made two changes to the Final Rule as a result.

Employers and their representatives generally opposed at least some aspects of the proposal. For example, some employers asserted that paying such fees would be too costly and that transportation costs should be the responsibility of the employee or paid at the discretion of the employer. In particular, some ski resorts emphasized the costs they face because many of their ski instructors travel a significant distance by air to remote resorts. Many employers were particularly concerned with the requirement to pay transportation and subsistence costs for U.S. workers recruited from outside the local commuting distance, based upon their experience that U.S. workers have high rates of turnover and rarely stay for the entire season. A number of employers recounted their experience with the short periods worked by U.S. applicants. For example, one commenter gave examples from various employers who stated that, *e.g.,* of 25 U.S. workers hired, only four reported for work and only two stayed more than one week; the longest a U.S. worker remained employed was one month; no U.S. worker has stayed more than 2 days in ten to 15 years; in 13 seasons, no worker stayed more than a few weeks; in 5 years, only one U.S. worker reported to work and he lasted less than 2 weeks; and of the U.S. workers who report for work, fewer than 10 percent stay through the season.

Employers expressed particular opposition to reimbursing what a number of them labeled as disingenuous U.S. applicants who could exploit the employer by applying for a job they had no intention of performing simply to get the transportation and subsistence to a new area. Having received a free trip, such employees would quit the job and be able to look for full-time, year-round work with another employer, because U.S. workers are not bound to work only for the H–2B employer. Such applicants would result in large costs to the employer with no return on their investment, and the employer could do nothing to mitigate its risk. Many such employers and their representatives suggested that it would be more appropriate to tie the reimbursement to either full completion of, or partial completion of, the term of employment. A number of them suggested adoption of the H–2A program provision requiring that workers must complete at least 50 percent of the work contract to be reimbursed for inbound transportation and subsistence expenses; they stated that this would help to minimize the risk that an employee could manipulate the system for free travel and would ensure that the employer benefited from the employment before disbursing the cost.

One commenter stated that the Department lacks the authority to require reimbursement of travel expenses, especially with regard to U.S. workers in corresponding employment, because the Internal Revenue Service does not allow employees to deduct such travel to the job as a business expense. Another commenter asserted that visa fees should be the responsibility of the employee because State Department regulations assign the cost to the foreigner. Finally, an employer suggested requiring employers to reimburse only the amount necessary to protect the FLSA minimum wage, but not the H–2B prevailing wage.

Employee advocates strongly supported the proposal and commended the Department for it. Numerous advocates described why it is essential for the employer to provide, pay for or reimburse transportation, subsistence and visa-related expenses in the first workweek, in order to ensure that workers are not forced to go into debt and borrow money at exorbitant rates. They emphasized that, without timely reimbursement, employees are more likely to tolerate abusive work environments in order to be able to repay their loans, rather than risk retaliatory termination. One commenter's survey of temporary foreign workers indicated that debts from such pre-employment costs are the main reason temporary foreign workers do not come forward to report violations of the law. Another commenter emphasized that employers are the primary beneficiaries of such expenditures, because they directly profit from the mobility of a low-wage workforce. Commenters stated that, if the costs of transportation and visa-related expenses are not reimbursed, it effectively lowers the employees' wage rates below the required wage, which causes adverse effects because it puts downward pressure on the wages of similarly situated U.S. workers. And they noted that it is important that U.S. workers are provided the same benefit, both because the concept that there should be no preferential treatment for foreign workers is fundamental to the INA, and because it will make it possible for available U.S. workers to take jobs where the transportation costs otherwise would be an insurmountable hurdle. They stated that requiring transportation and subsistence reimbursement also encourages employers to consider more carefully the number of workers actually needed, making it less likely that employers will request more workers than they need and making it more likely that they will make more efforts to recruit U.S. workers.

Thus, these commenters believed that the proposed rule requirements, and even stronger measures, were necessary in order to make progress toward eliminating the history of abuses in the H–2B program. Some employee advocates suggested expanding the proposed regulation to clarify that inbound transportation includes travel between the home community and the consular city as well as between the consular city and the place of employment in the U.S., or to require reimbursement for additional expenses, such as hotels while traveling to the worksite or while waiting in the consular city for visa processing. They suggested requiring employers to bear these expenses up front, rather than reimbursing them, so that workers do not have to borrow money to pay the fees. They also suggested clarifying that the employer must pay for outbound transportation if the employer terminates the employee without cause or the employee is constructively discharged, such as where the employee leaves due to lack of work. A union suggested incorporating an H–2A provision requiring employers to provide free daily transportation to the worksite, noting that H–2B workers often have no means to commute and are forced into dangerous transportation arrangements, such as being packed into the open beds of pick-up trucks or squeezed into vans in excessive numbers. The union also recommended a requirement that such transportation comply with applicable laws. As an alternative, the union suggested that employers be required to state in the job order whether they will voluntarily

choose to provide such daily transportation to the jobsite, noting that such transportation would be applicable to both H–2B workers and domestic workers in corresponding employment. Another commenter specifically supported the requirement to disclose all transportation and subsistence costs in the job order.

After carefully considering the voluminous comments on this issue, the Department has made two changes in the Final Rule. Section 655.120(j)(1)(i) of the Final Rule continues to require employers to provide inbound transportation and subsistence to H–2B employees and to U.S. employees who have traveled to take the position from such a distance that they are not reasonably able to return to their residence each day. However, the Final Rule provides that employers must arrange and pay for the transportation and subsistence directly, advance at a minimum, the most economical and reasonable common carrier cost, or reimburse the worker's reasonable costs if the worker completes 50 percent of the period of employment covered by the job order if the employer has not previously reimbursed such costs. The Final Rule reminds employers that the FLSA imposes independent wage payment obligations, where it applies. Section 655.20(j)(1)(ii) of the Final Rule continues to require employers to provide return transportation and subsistence from the place of employment; however, the obligation attaches only if the worker completes the period of employment covered by the job order or if the worker is dismissed from employment for any reason before the end of the period. An employer is not required to provide return transportation if separation is due to a worker's voluntary abandonment. The Final Rule, like the NPRM, requires employers to reimburse all visa, visa processing, border crossing and other related fees in the first workweek.

The Department continues to believe that under the FLSA the transportation, subsistence, and visa and related expenses for H–2B workers are for the primary benefit of employers, as the Department explained in Wage and Hour's Field Assistance Bulletin No. 2009–2 (Aug 21, 2009). The employer benefits because it obtains foreign workers where the employer has demonstrated that there are not sufficient qualified U.S. workers available to perform the work; the employer has demonstrated that unavailability by engaging in prescribed recruiting activities that do not yield sufficient U.S. workers. The H–2B workers, on the other hand, only receive the right to work for a particular employer, in a particular location, and for a temporary period of time; if they leave that specific job, they generally must leave the country. Transporting these H–2B workers from remote locations to the workplace thus primarily benefits the employer who has sought authority to fill its workforce needs by bringing in workers from foreign countries. Similarly, because an H–2B worker's visa (including all the related expenses, which vary by country, including the visa processing interview fee and border crossing fee) is an incident of and necessary to employment under the program, the employer is the primary beneficiary of such expenses. The visa does not allow the employee to find work in the U.S. generally, but rather restricts the worker to the employer with an approved labor certification and to the particular approved work described in the employer's application.

Therefore, the Final Rule adds a reminder to employers that the FLSA applies independently of the H–2B requirements. As discussed above, employers covered by the FLSA must pay such expenses to nonexempt employees in the first workweek, to the level necessary to meet the FLSA minimum wage (outside the Fifth Circuit). See, *e.g., Arriaga* v. *Florida Pacific Farms, LLC,* 305 F.3d 1228 (11th Cir. 2002); *Morante-Navarro* v. *T&Y Pine Straw, Inc.,* 350 F.3d 1163 (11th Cir. 2003); *Gaxiola* v. *Williams Seafood of Arapahoe, Inc.,* 2011 WL 806792 (E.D.N.C. 2011); *Teoba* v. *Trugreen Landcare LLC,* 2011 WL 573572 (W.D.N.Y. 2011); *DeLeon-Granados* v. *Eller & Sons Trees, Inc.,* 581 F. Supp. 2d 1295 (N.D. Ga. 2008); *Rosales* v. *Hispanic Employee Leasing Program,* 2008 WL 363479 (W.D. Mich. 2008); *Rivera* v. *Brickman Group,* 2008 WL 81570 (E.D. Pa. 2008); contra *Castellanos-Contreras* v. *Decatur Hotels, LLC,* 622 F.3d 393 (5th Cir. 2010). Payment sufficient to satisfy the FLSA in the first workweek is also required because § 655.20(z) of the Final Rule, like the current H–2B regulation, specifically requires employers to comply with all applicable Federal, State, and local employment-related laws. Furthermore, because U.S. workers are entitled to receive at least the same terms and conditions of employment as H–2B workers, in order to prevent adverse effects on U.S. workers from the presence of foreign workers, the Final Rule requires the same reimbursement for U.S. workers in corresponding employment who are unable to return to their residence each workday, such as those from another state who saw the position advertised in a SWA posting or on the Department's electronic job registry. The Department does not believe that the treatment of such expenses by the State Department or the Internal Revenue Service controls how they are categorized for these purposes. Rather, employers must simultaneously comply with all the laws that are applicable, and must do so by complying with the most protective standard. See *Powell* v. *United States Cartridge Co.,* 339 U.S. 497 (1950).

The Final Rule separately requires employers to reimburse these inbound transportation and subsistence expenses, up to the offered wage rate, if the employee completes 50 percent of the period of employment covered by the job order. The Department believes this approach is appropriate and adequately protects the interests of both U.S. and H–2B workers. It takes account of the concerns expressed by numerous employers that they would have to pay the inbound transportation and subsistence costs of U.S. workers recruited pursuant to H–2B job orders who do not remain on the job for more than a very brief period of time.

Additionally, the Final Rule requires reimbursement of outbound transportation and subsistence if the worker completes the job order period or if the employer dismisses the worker before the end of the period of employment in the job order, even if the employee has completed less than 50 percent of the period of employment covered by the job order. This requirement uses language contained in the DHS regulation at 8 CFR. 214.2(h)(6)(vi)(E), which states that employers will be liable for return transportation costs if the employer discharges the worker for any reason. See 8 U.S.C. 1184(c)(5)(A). For example, if there is a constructive discharge, such as the employer's failure to offer any work or sexual harassment that created an untenable working situation, the requirement to pay outbound transportation would apply. However, if separation from employment is due to voluntary abandonment by an H–2B worker or a corresponding worker, and the employer provides appropriate notification specified under § 655.20(y), the employer will not be responsible for providing or paying for return transportation and subsistence expenses of that worker.

This requirement to pay inbound transportation at the 50 percent point and outbound transportation at the completion of the work period is consistent with the rule under the H–2A visa program. Moreover, the Final Rule

fulfills the Department's obligation to protect U.S. workers from adverse effect due to the presence of temporary foreign workers. As discussed above, under the FLSA, numerous courts have held in the context of both H–2B and H–2A workers that the inbound and outbound transportation costs associated with using such workers are an inevitable and inescapable consequence of employers choosing to participate in these visa programs. Moreover, the courts have held that such transportation expenses are not ordinary living expenses, because they have no substantial value to the employee independent of the job and do not ordinarily arise in an employment relationship, unlike normal daily home-to-work commuting costs. Therefore, the courts view employers as the primary beneficiaries of such expenses under the FLSA; in essence the courts have held that inbound and outbound transportation are employer business expenses just like any other tool of the trade. A similar analysis applies to the H–2B required wage. If employers were permitted to shift their business expenses onto H–2B workers, they would effectively be making a de facto deduction and bringing the worker below the H–2B required wage, thereby risking depression of the wages of U.S. workers in corresponding employment. This regulatory requirement, therefore, ensures the integrity of the full H–2B required wage, rather than just the FLSA minimum wage, over the full term of employment; both H–2B workers and U.S. workers in corresponding employment will receive the H–2B required wage they were promised, as well as reimbursement for the reasonable transportation and subsistence expenses that primarily benefit the employer, over the full period of employment. To enhance this protection, the Final Rule contains the additional requirement that, where a worker pays out of pocket for inbound transportation and subsistence, the employer must maintain records of the cost of transportation and subsistence incurred by the worker, the amount reimbursed, and the date(s) of reimbursement.

The Department made two clarifying edits to this section in the Final Rule. Paragraph (1)(ii) of this section has been amended to clarify that the employer is required to provide or pay for the return transportation and daily subsistence of a worker who has completed the period of employment listed on the certified *Application for Temporary Employment Certification,* regardless of any subsequent extensions. The Final Rule continues to provide that if a worker has contracted with a subsequent employer that has agreed to provide or pay for the worker's transportation to the subsequent employer's worksite, the subsequent employer must provide or pay for such expenses; otherwise, the employer must provide or pay for that transportation and subsistence. Paragraph (2) of this section has been amended to clarify that the employer need not, but may, reimburse workers for expenses that are primarily for the benefit of the employee.

The Department does not believe that any other change to § 655.20(j) is necessary. The regulatory text already clarifies that transportation must be reimbursed from the place from which the worker has come to work for the employer to the place of employment; therefore, the employer must pay for transportation from the employee's home community to the consular city and then on to the worksite. Similarly, the regulatory text already requires the employer to pay for subsistence during that period, so if an overnight stay at a hotel in the consular city is required while the employee is interviewing for and obtaining a visa, that subsistence must be reimbursed. See *Morales-Arcadio* v. *Shannon Produce Farms, Inc.,* 2007 WL 2106188 (S.D. Ga. 2007). Finally, if an employer provides daily transportation to the worksite, the regulation already requires both that the transportation must comply with all applicable safety laws and that the employer must disclose the fact that free transportation will be provided in the job order.

k. Employer-provided items (§ 655.20(k)). The Department proposed to add a new requirement under § 655.20(k), consistent with the requirement under the FLSA regulations at 29 CFR part 531, that the employer provide to the worker without charge all tools, supplies, and equipment necessary to perform the assigned duties. The employer may not shift to the employee the burden to pay for damage to, loss of, or normal wear and tear of, such items. This proposed provision gives workers additional protections against improper deductions for the employer's business expenses from required wages.

The Department received numerous comments on this provision, the majority of which were supportive. Discussing the importance of the requirement, one employee advocacy organization cited a worker testimonial in which a former H–2B crab picker said the boss doesn't give tools to use on the job. Instead, he sells the workers knives to pick the crabmeat. He sold a worker a knife for $30, but they don't have an option to not use it. They deduct this amount from the paychecks.

Another organization referred to a study of H–2B crab pickers working on Maryland's Eastern Shore which found that 54 percent of workers interviewed had had deductions for tools taken from their weekly paychecks. Numerous employers and employer organizations signed on to a report, jointly published by two large industry groups, that characterized the requirement as seeming unlikely to cause major problems for employers enrolled in the program.

However, some commenters had objections to the proposed requirement. One trade organization expressed unqualified opposition to the proposal. Several employers and industry representatives expressed concern that the provision was incompatible with those industries in which employees customarily supply their own tools. Several of these commenters noted that in certain industries employees have personal preferences for their equipment and as a matter of course bring it with them to the job site. One employer requested that the Department simply state that any tools or equipment provided to domestic workers should be provided to similarly-employed H–2B workers, and argued that the requirement would unfairly favor H–2B workers by offering them a benefit that was not legally extended to U.S. workers. This commenter overlooked the fact that, like all of the provisions in § 655.20, this requirement applies to both H–2B workers and U.S. workers in corresponding employment, and would therefore not disadvantage domestic workers. As discussed above with respect to the disclosure requirement in § 655.18(g), section 3(m) of the FLSA prohibits employers from making deductions for items that are primarily for the benefit of the employer if such deductions reduce the employee's wage below the Federal minimum wage. Therefore an employer that does not provide tools but requires its employees to bring their own would already be required under the FLSA to reimburse its employees for the difference between the weekly wage minus the cost of equipment and the weekly minimum wage. The proposed provision simply extends this protection to cover the required H–2B offered wage, in order to protect the integrity of the required H–2B wage rate and thereby avoid adverse effects on the wages of U.S. workers. However, as discussed above with regard to proposed § 655.18(j), this requirement does not prohibit employees from voluntarily choosing to

use their own specialized equipment; it simply requires employers to make available to employees adequate and appropriate equipment.

No other substantive comments were received on this provision; the Final Rule therefore retains the requirement as proposed.

l. Disclosure of the job order (§ 655.20(l)). Proposed § 655.20(l) required that the employer provide a copy of the job order to H–2B workers no later than the time of application for a visa and to workers in corresponding employment no later than the first day of work. The job order would contain information about the terms and conditions of employment and employer obligations as provided in proposed § 655.18 and would have to be in a language understandable to the workers. The Department received numerous comments in support of this provision, and none in opposition to it.

One advocacy organization used the experience of an H–2B worker, Yolanda, to illustrate the importance of proposed § 655.20(l):

> When Yolanda went to the Eastern Shore for what would be her final year, she found that her wages were much different than what the recruiter promised. Yolanda was promised $7 per hour, but earned $5 instead. She was promised overtime, but never received it.

This commenter concluded:

> Had Yolanda, or someone in a similar position, known about the actual terms and conditions of employment, she could make an informed decision as to whether employment in the U.S. was worthwhile.

Yet many employee advocates urged the Department to go further in the Final Rule. Several advocacy groups suggested that the Department require written disclosure of the job order at the time of recruitment, as required under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), rather than when the worker applies for a visa or, in the case of U.S. workers in corresponding employment, on the first day of work. These commenters asserted that earlier disclosure would allow potential H–2B workers to more fully consider their options before committing to a U.S. employer. The Department notes that H–2B employers that are subject to MSPA are bound by the requirements of that Act, including disclosure of the appropriate job order at the time of recruitment. The H–2B and MSPA programs are not analogous, however. MSPA workers are often recruited domestically shortly before the start date of the job order, making the provision of the job order at the time of recruitment both logical and practical. In the H–2B program, as in the H–2A program, recruitment is often less directly related to the work start date, making immediate disclosure of the job order less necessary. It thus is more practical to require disclosure of the job order at the time the worker applies for a visa, to be sure that workers fully understand the terms and condition of their job offer before they make a commitment to come to the United States. To clarify, the time at which the worker applies for the visa means before the worker has made any payment, whether to a recruiter or directly to the consulate, to initiate the visa application process. The Department maintains that worker notification is a vital component of worker protection and program compliance, and believes that the proposed requirement provides workers with sufficient notice of the terms and conditions of the job so that they can make an informed decision.

Some of the same commenters requested that the Department amend § 655.20(l) to require that the job order be provided to workers in their primary language, removing the qualifying phrase as necessary or reasonable. The Department agrees that providing the terms and conditions of employment to each worker in a language that she understands is a key element of much-needed worker protection. However, as the Department intends to broadly interpret the necessary or reasonable qualification and apply the exemption only in those situations where having the job order translated into a particular language would place an undue burden on an employer without significantly disadvantaging an H–2B or corresponding worker, it declines to remove the qualifying language.

An industry group argued that this section was designed to transform the job order into an employment contract. The purpose of the disclosure is to provide workers with the terms and conditions of employment and of employer obligations to strengthen worker protection and promote program compliance. Furthermore, as discussed in the preamble to § 655.18, the Department views the terms and conditions of the job order as binding, and requires employers to attest that they will abide by the terms and conditions of the H–2B program. However, the Department leaves it to the courts to determine private parties' contractual rights under state contract law.

No other substantive comments were received on this provision; the Final Rule therefore retains § 655.20(l) as proposed.

m. Notice of worker rights (§ 655.20(m)). Proposed § 655.20(m) required that the employer post a notice in English of worker rights and protections in a conspicuous location and post the notice in other appropriate languages if such translations are provided by the Department. While the Department received numerous comments in support of this provision, several commenters suggested amendments that they felt would strengthen worker protections. Several advocacy groups requested that the Department specify that the notice of worker rights must instruct workers how to file a complaint with WHD. The poster, which will be printed and provided by the Department, will state that workers who believe their rights under the program have been violated may file confidential complaints and will display the number for WHD's toll-free help line.

Another advocacy organization suggested that the provision be amended to require the employer to post the poster in the language of any worker who is not fluent in English. The Department acknowledges that the purpose of this section would be undermined if workers cannot read the notice. However, the Department cannot guarantee that it will have available translations of the notice in any given language, and cannot require employers to display a translation that may not exist. Translations will be made in response to demand; employers and organizations that work with H–2B workers are encouraged to inform the Department about the language needs of the H–2B worker population.

n. No unfair treatment (§ 655.20(n)). Proposed § 655.20(n) added new language on nondiscrimination and nonretaliation protections that are fundamental to statutes that the Department enforces. Worker rights cannot be secured unless there is protection from all forms of intimidation or discrimination resulting from any person's attempt to report or correct perceived violations of the H–2B provisions. As provided in proposed 29 CFR 503.20, make-whole relief would be available to victims of discrimination and retaliation under this paragraph.

The Department received numerous comments in support of § 655.20(n); among them were comments from worker advocacy organizations, labor organizations, and a State Attorney General's office. One comment, submitted by a coalition of human rights organizations, stated support for § 655.20(n) and noted that the provision will contribute to the nation's battle against human rights abuses, abroad and

at home. Another comment, submitted by a worker advocacy organization, reinforced the importance of anti-retaliatory protections, stating that over 100 workers surveyed in April 2009 reported across the board that they would not come forward to report abuse—even when facing severe labor exploitation. Ignacio Zaragoza, an H–2B temporary foreign worker from Mexico, explained the following, ''Guestworkers are afraid to report abuse. I've known people in Mississippi that have even been assaulted and didn't report it because they were so afraid of losing everything—their job, their visa, everything. Guestworkers are really afraid of retaliation.''

Multiple comments suggested adding language to § 655.20(n)(4), which proposed providing protection from retaliation based on contact or consultation with an employee of a legal assistance organization or an attorney, to include contact with labor unions, worker centers, and worker advocacy organizations. These commenters maintain that labor unions, worker centers, and community organizations are often the first point of contact for H–2B workers who have experienced violations and who may be isolated or lack familiarity with the local community and how to obtain redress or legal assistance. In support of the above argument, one commenter cited to the NPRM where the Department stated that because H–2B workers are not eligible for services from federally-funded legal aid programs, most H–2B workers have no access to lawyers or information about their legal rights. 76 FR 15143, Mar. 18, 2011. In addition, a temporary foreign worker advocacy organization noted that employers frequently retaliated against H–2B workers upon learning that the H–2B workers had spoken with that organization regarding their rights under the H–2B program. The Department agrees with these commenters that proposed § 655.20(n) fails to cover the majority of first contacts between temporary foreign workers and those who are regularly communicating directly with foreign workers helping them to correct and/or report perceived violations of the H–2B provisions. The commenters' suggested additions to § 655.20(n) are fully consistent with the intent of this anti-retaliation provision. The Department recognizes that workers should be just as protected from retaliation if they contact or consult with worker centers, community organizations, or labor unions as they are if they contact or consult with attorneys or legal assistance organizations. Changes to § 655.20(n)(4) will be reflected in the Final Rule as follows: ''Consulted with a workers' center, community organization, labor union, legal assistance program, or an attorney on matters related to 8 U.S.C. 1184(c), 29 CFR part 503, or this Subpart or any other Department regulation promulgated thereunder;''.

One comment submitted by a coalition of human rights organizations suggested that the right to federally-funded legal services be explicitly provided for H–2B workers. However, providing the right to federally-funded legal services is beyond the Department's jurisdiction. In addition, some comments referred to § 655.20(n) as protecting against retaliation from engaging in acts of worker organizing. To clarify, the provision protects against discrimination and retaliation for asserting rights specific to the H–2B program. Workers' rights to join together, with or without a union, to improve their wages and working conditions are protected under the National Labor Relations Act and other similar State laws.

A labor union suggested that the Department provide an avenue for H–2B workers to file oral complaints with the Department by telephone or electronically regarding H–2B violations and all other federal labor rights granted temporary workers. The Department already accepts complaints through these means. Section 655.20(m) requires all H–2B employers to display a notice of worker rights, which sets out the rights and protections for H–2B workers and workers in corresponding employment and informs workers how to file a complaint with WHD.

A similar comment suggested the Department create a mechanism for H–2B workers who have returned to their home country or family members who are currently in the home country and hearing about ongoing worker abuse to file a complaint with DOL from their country of origin. To clarify, any person may contact the WHD by phone at 1–866–4–USWAGE or online at *www.wagehour.dol.gov* to request information about the H–2B program or to file a complaint.

One comment, submitted by a State Attorney General's office, suggested the Department clarify that § 655.20(n) provides protection to U.S. workers and H–2B workers alike. This commenter and a temporary foreign worker advocacy group stressed the importance of providing workers, especially H–2B workers who are particularly vulnerable to retaliation, protection against employer retaliatory acts, as well as the importance of encouraging workers to come forward when there is a potential workplace violation. The Department recognizes that H–2B workers can be particularly vulnerable to retaliation and acknowledges the importance of assuring that H–2B workers are protected against any unfair treatment and retaliation. The Department therefore clarifies that § 655.20(n) will apply equally to H–2B workers and workers in corresponding employment.

The State Attorney General's office also sought clarification of the phrase ''related to 8 U.S.C. 1184(c)'' found in § 655.20(n)(1). The commenter suggested the Department state that related complaints need not specify any specific provision of law, and would also include complaints of violations of related state and local laws. The Department rejects this suggestion, as the anti-retaliation provision applies only to the H–2B program. However, the Department notes that § 655.20(z) requires employers to abide by all other Federal, State, and local employment-related laws, including any anti-retaliation provisions therein.

Another comment submitted by a worker advocacy group encouraged the Department to clarify that legal assistance sought in relation to the terms and conditions of employment includes legal assistance relating to employer-provided housing. If a worker sought legal assistance after an employer charged for housing that was listed as free of charge in the job order, this would be a protected act; however, a routine landlord-tenant dispute may not fall under the protections of this section.

o. Comply with the prohibitions against employees paying fees (§ 655.20(o)). Proposed § 655.20(o) prohibited employers and their attorneys, agents, or employees from seeking or receiving payment of any kind from workers for any activity related to obtaining H–2B labor certification or employment. The Department received numerous comments in support of this section from advocacy groups, labor organizations, and an independent policy institute. However, a number of these commenters took issue with the provision allowing employers and their agents to receive reimbursement for passport fees. These commenters argued that passport fees are not always for the primary benefit of the employee, particularly where H–2B workers receive passports that expire within 1 year of their issue date, and urged the Department to qualify the exception to take such circumstances into account. The Department is unaware of passports with such extremely short validity

periods and with restrictions which would not allow the worker to use the passport in ways unrelated to the H–2B employment. As such, the Department declines to make the suggested change.

The Department also received comments from a legal network and an independent policy institute expressing concern that the proposed section did not protect workers from coercion by recruiters tenuously affiliated with an employer or an employer's designated agent. These commenters requested that the Department go beyond the requirement at § 655.20(p), which obligates employers to execute a written contract with any third-party agents or recruiters prohibiting them from seeking or receiving payment from prospective employees, and amend § 655.20(o) to make H–2B employers strictly liable for any recruitment or placement fees charged by third parties. The Department recognizes these commenters' concerns but must reject this request for the reasons stated in the preamble under 29 CFR 503.20, Sanctions and remedies, Liability for prohibited fees collected by foreign labor recruiters and sub-contractors.

No other comments were received on this section, which is adopted as proposed in the Final Rule.

p. Contracts with third parties to comply with prohibitions (§ 655.20(p)). In § 655.20(p), the Department proposed to amend existing § 655.22(g)(2) to require that an employer that engages any agent or recruiter must prohibit in a written contract the agent or recruiter from seeking or receiving payments from prospective employees.

The Department received numerous comments in support of this proposal. However, some commenters requested that the Department go further: One commenter requested that the contract include the full contact information for the agent or recruiter. The Department declines to require such information in the contract, but notes that the new requirements at § 655.9 of this Final Rule require disclosure of the employer's agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H–2B workers, as well as the identity and geographic location of any persons or entities hired by or working for the recruiter and the agents or employees of those persons and entities. The difference between § 655.9, which requires the employer to provide copies of such agreements to the Department when an employer files its *Application for Temporary Employment Certification,* and this provision's requirements is that the requirements in this provision are of an ongoing nature. The employer must always prohibit the seeking or collection of fees from prospective employees in any contract with third parties whom the employer engages to recruit international workers, and is required to provide a copy of such existing agreements when the employer files its *Application for Temporary Employment Certification.* For employers' convenience, and to facilitate the processing of applications, the Final Rule contains the exact language of the required contractual prohibition that must appear in such agreements. Further guidance on how the Department interprets the employer obligations in § 655.20(o) and (p) regarding prohibited fees can be found in Field Assistance Bulletin No. 2011–2 (May 2011, available at *http://www.dol.gov/whd/FieldBulletins/fab2011_2.htm*.

One comment submitted by an advocacy group informed the Department that many recruiters engage local intermediaries in the recruitment process and these recruiting subcontractors in turn charge fees. The commenter suggested that in addition to stating that the recruiter will not charge a fee, the contract must insist that the recruiter will ensure that no subcontractor will charge fees and that no workers will pay fees. The Department recognizes the complexities of recruiters using subcontractor recruiters and has accounted for this in § 655.20(p) by including the following language: ''The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly * * *''.

The specific language covers subcontractors. In addition, the required contractual prohibition applies to the agents and employees of the recruiting agent, and encompasses both direct and indirect fees. As these requirements should sufficiently address the commenter's concerns, the Department declines to adopt this suggestion.

A Member of Congress urged the Department to require that employers publicly disclose all recruiters and sub-recruiters. In another comment submitted by a community-based organization, an H–2B worker described his experience with recruiters and lack of information regarding the recruiter, citing having to pay very large fees to the recruiters in his community, just for the opportunity to apply for a work visa and later work in the United States. He explained that they generally do not even know who the recruiter is working for.

Another comment provided the following example of common recruitment violations: In January 2011, a group of 25 Mexican nationals in the state of Guanajuato had been promised visas and six months of work by a recruiter. The recruiter charged each of the workers 2000 pesos to process the visa application. Unaware of the legitimacy of the job offer, who the recruiter was, or whom he was representing, the 25 Mexicans sent the money and their passports to the address the ''recruiter'' provided. After several weeks of no response, the workers inquired at the address given, but were told by the person living there that the recruiter had died. The workers lost both their money and their passports.

The Department agrees that such public disclosure is necessary and has addressed the issue under § 655.9. The Department will maintain a publicly available list of agents and recruiters who are party to such recruitment contracts, as well as a list of the identity and location of any persons or entities hired by or working for the recruiters to recruit H–2B workers for the H–2B job opportunities offered by the employer.

q. Prohibition against preferential treatment of H–2B workers (§ 655.20(q)). In § 655.20(q) the Department proposed to prohibit employers from providing better terms and conditions of employment to H–2B workers than to U.S. workers. This provision is identical to that found at § 655.18(a)(1) of this Final Rule; a discussion of comments received in response to the proposal can be found in the preamble to that section. The Final Rule adopts the proposal as written.

r. Non-discriminatory hiring practices § 655.20(r). In § 655.20(r) the Department proposed to retain the non-discriminatory hiring provision contained in § 655.22(c) of the 2008 Final Rule and to clarify that the employer's obligation to hire U.S. workers continues throughout the period described in proposed § 655.20(t). Under this provision, rejections of U.S. workers continue to be permitted only for lawful, job-related reasons. An advocacy organization representing low wage workers commented in support of the proposed provision, stating that the provision helps the Department fulfill its obligation to ensure that U.S. workers are not adversely affected by the H–2B program. This commenter also advised the Department to be aware of job order terms that may appear to be non-discriminatory but have a discriminatory impact on U.S. workers, such as requiring drug testing or

criminal background checks as a condition for employment. The Department acknowledges the potential problem and directs the commenter to § 655.20(q), which specifies that job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on H–2B workers. Thus, where an employer requires drug tests or criminal background checks for U.S. workers and does not require the same tests and background checks for H–2B workers, the employer has violated this provision. Additionally, where an employer conducts criminal background checks on prospective U.S. employees, in order to be lawful and job-related, the employer's consideration of any arrest or conviction history must be consistent with guidance from the Equal Employment Opportunity Commission on employer consideration of arrest and conviction history under Title VII of the Civil Rights Act of 1964. See *http://www.eeoc.gov/policy/docs/convict1.html; http://www.eeoc.gov/policy/docs/arrest_records.html; http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm*. Thus, employers may reject U.S. workers solely for lawful, job-related reasons, and they must also comply with all applicable employment-related laws, pursuant to § 655.20(z). The Final Rule adopts the NPRM provision as proposed.

s. Recruitment requirements (§ 655.20(s)). The NPRM proposed that the employer conduct required recruitment as described in proposed §§ 655.40–.46. No substantive comments were received concerning employers' obligation to comply with recruitment requirements, and the section is adopted in the Final Rule as proposed.

t. Continuing obligation to hire U.S. workers § 655.20(t). In proposed § 655.20(t), the Department extended the period during which the employer must hire qualified U.S. workers referred by the SWA or who respond to recruitment to 3 days before the date of need or the date the last H–2B worker departs for the workplace for the certified job opportunity, whichever is later. In order to determine the appropriate cutoff date for SWA referrals, the Department proposed that the employer notify the SWA in writing if the last H–2B worker has not departed by 3 days before the date of need and of the new departure date as soon as available. The Department characterized as inadequate the existing requirements under which an employer is under no obligation to hire U.S. workers after submitting the recruitment report, which could occur as early as 120 days before the first date of need. U.S. applicants—particularly unemployed workers—applying for the kinds of temporary positions typically offered by H–2B employers are often unable to make informed decisions about jobs several months in advance; it is far more likely that they are in need of a job beginning far sooner. In fact, many of these applicants may not even be searching for work as early as several months in advance and are therefore unlikely to see SWA job orders in the 10 days they are posted or the newspaper advertisements on the 2 days they are published in accordance with the existing minimum recruitment requirements. This segment of the labor force cannot afford to make plans around the possibility of a temporary job several months in the future. The current recruitment and hiring structure simply cannot be reconciled with the Department's obligation to protect U.S. workers and ensure that qualified U.S. applicants are unavailable for a job opportunity before H–2B workers are hired.

The Department received many comments on this proposed requirement—predominantly from the SBA Office of Advocacy, employers, their advocates, and employer associations—asserting that accepting U.S. applicants until 3 days before the date of need would be unworkable for employers. Some of these commenters described this as the most troubling provision in the NPRM. Some of these commenters suggested that the Department instead modify existing § 655.15(e) to require the SWA to keep the job order posted for 30 days, while others recommended changing the closing date from 3 days to 30 days or 60 days before the date of need.

The Department also received numerous comments in support of the proposed provision from advocacy groups, policy institutes, and labor organizations. However, some of these commenters felt that the provision did not go far enough to protect the interests of U.S. workers. Some commenters, including a labor organization, a legal network, and a legal policy institute, requested that the Department extend the obligation to hire qualified U.S. workers into the certification period, either until 50 percent of the period has elapsed, as in the H–2A program, or until only 2 weeks remain.

After extensive consideration of all comments and mindful of its responsibilities to ensure that qualified, available U.S. workers are not precluded from job opportunities, the Department has decided to change the day through which employers must accept SWA referrals of qualified U.S. applicants until 21 days before the date of need, irrespective of the date of departure of the last H–2B worker. The Department believes this reduction in the priority hiring period to 21 days before from 3 days before the date of need will allay a number of employer concerns, and it takes into consideration the USCIS requirement that H–2B workers not enter the United States until 10 days before the date of need. Whereas employers expressed concern that the proposed 3-day priority hiring cutoff opened up the possibility that a U.S. applicant could displace an H–2B workers who has been recruited, traveled to the consular's office, obtained a visa, or even begun inbound transportation to the worksite, the 21-day provision gives employers more certainty regarding the timing of and need for their efforts to recruit H–2B workers. At the same time, the Department believes that the 21-day requirement, which increases the priority hiring period by as much as 3 months compared to the current rule, is sufficient to protect the interests of U.S. workers. Further, the Department notes that the extended recruitment period is not the only provision of this Final Rule enhancing U.S. applicants' access to vacancies: The number and breadth of recruitment vehicles in place (*i.e.,* contact of previous workers, a national job registry, a 15-day job posting at worksites, among others) have also greatly expanded.

A number of employers, trade associations, and professional associations expressed concern that a continuing obligation to accept U.S. applicants could burden employers with additional expenses. They argued that if an employer is compelled to hire a U.S. worker close to the date of need, the employer might have to absorb the cost of recruitment, travel, and housing that it had already arranged for foreign workers. Employers are encouraged to delay recruitment of foreign workers until it becomes evident that it will be necessary to hire such workers. With regard to travel expenses, the Department asserts that the additional time granted to employers in the Final Rule will be sufficient to allow for the arrangement of inbound transportation without employers having to bear any risk of last-minute cancellations, pay premiums for refundable fares, or pay visa expenses that are ultimately not needed. Housing arrangements should not present an issue, as § 655.20(q) requires an employer to offer U.S. workers the same benefits that it is

offering, intends to offer, or will provide to H–2B workers. If an employer intends to offer housing to H–2B workers, such housing must also be offered to all U.S. applicants who live outside the area of intended employment. Housing secured for workers can just as easily be occupied by U.S. workers as by H–2B workers, or some combination of U.S. and H–2B workers.

Many of the same commenters also worried that foreign workers no longer needed would have wasted their time in committing to the job opportunity and traveling to the United States, and that some might sue for breach of contract. As discussed above, the new 21-day provision will prevent H–2B workers from being dismissed after beginning travel from their home to the consular office or even to the United States as the obligation to hire U.S. workers now ends 11 days before USCIS permits H–2B workers to be admitted to the country. Additionally, in order to create appropriate expectations for potential H–2B workers, when an employer recruits foreign workers, it should put them on notice that the job opportunity will be available to U.S. workers until 21 days before the date of need; therefore, the job offer is conditional upon there being no qualified and available U.S. workers to fill the positions.

A number of employers, trade associations, and professional associations commented about what they called disingenuous applicants, *e.g.,* U.S. workers who would be referred shortly before the date of need, triggering an employer's obligation to hire them, but who would then shirk their responsibilities or potentially abandon the job altogether, leaving the employer with an unmet business need. These commenters expressed concern that employers would be forced to reject recruited foreign workers in favor of SWA-referred U.S. workers who would quickly abandon employment, leaving employers understaffed and unable to find replacement workers; several commenters asserted the U.S. workers never show up for seasonal employment. The Department believes the worker protections contained in this Final Rule will encourage U.S. applicants hired to remain on the job. In addition, provisions such as that found at § 655.20(y) (Abandonment/termination of employment) offer protection to employers from workers who might accept the offer of employment but who subsequently abandon the job, as § 655.20(y) relieves the employer, under certain circumstances, of the responsibilities to provide transportation and to fulfill the three-quarter guarantee obligation.

Some employers, trade associations, and professional associations expressed concern that the proposed structure would inhibit their ability to plan for their seasons and commit to contracts. The Department notes that regardless of the obligation to hire cutoff, the H–2B employer has a high degree of certainty that it will have access to workers, whether from within or outside the United States. Further, the Final Rule's 21-day obligation to hire cutoff should provide employers with ample time to identify foreign workers if they are, in fact, needed and to initiate their travel without substantial uncertainty. The purpose of this provision is to ensure that available U.S. workers have a viable opportunity to apply for H–2B job opportunities and to facilitate the employment of these workers. The Department believes that the proposed provisions do not pose a disadvantage to employers in terms of having certainty that positions will be filled.

One employer noted that State laws requiring employers in some industries to submit requests for background checks or drug testing for their employees 30 to 45 days before the date of need would preclude the hiring of U.S. workers 21 days before the date of need. A background check or drug test required for employment in a State, if listed in the job order, would be considered a bona fide job requirement, as long as it was clearly disclosed in the job order and recruitment materials. An applicant who submitted an application for employment after a State-established deadline and was therefore unable to undergo such an evaluation would be considered not qualified for employment in that State. However, consistent with §§ 655.18(a)(2) and 655.20(e), such a requirement must be disclosed in the job order, and the employer would bear the responsibility of demonstrating that it is bona fide and consistent with the normal and accepted requirements imposed by non-H–2B employers in the same occupation and area of intended employment. Furthermore, employers cannot treat U.S. workers less favorably than foreign workers with regard to start date; employers may not conduct such screening for H–2B workers at a later date if the employer does not provide the same late screening for U.S. workers who submit an application after a State-established deadline.

Due to the modification of this provision in the Final Rule allowing for a fixed, 21-day cut-off date for the priority hiring rights of U.S. workers, and with the knowledge (as reported in the comments discussed under § 655.20(f) (three-fourths guarantee)) that many employers' workforce needs vary throughout the season and they require fewer workers in slow months at the beginning and end of the season, the Department wishes to remind employers about the requirements of the three-fourths guarantee. Specifically, the guarantee begins on the first workday after the arrival of the worker at the place of employment or the advertised first date of need, whichever is later. An employer cannot delay the three-fourths guarantee by telling workers not to come to work on or after the advertised first date of need because the employer does not have a need for them at that time. Particularly for U.S. workers who are not traveling to the place of employment, this means that when they present themselves at the place of employment on the advertised first date of need, the three-fourths guarantee is triggered, whether or not the employer has sufficient full-time work for all of them to perform.

u. No strike or lockout (§ 655.20(u)). The Department proposed in § 655.20(u) to modify the no strike or lockout language in the current rule to require employers to assure the Department that there is no strike or lockout at the worksite for which the employer is requesting H–2B certification, rather than solely in the positions being filled by H–2B workers, which is the requirement under the current regulations. If there is a strike or lockout at the worksite when the employer requests H–2B workers, the CO may deny the H–2B certification.

The Department received several comments from advocacy groups and labor organizations in support of the proposed change. These groups suggested that the change would provide a needed protection for U.S. workers whose employers seek to circumvent the current regulatory provisions by transferring workers to fill positions vacated by striking workers. One labor organization that generally supported the proposed regulation indicated that it believed the Department did not go far enough because employers could still transfer U.S. workers from one worksite to a second to fill positions vacated by striking workers, then use H–2B workers to fill the vacancies at the first worksite. This commenter suggested that if the Department would not extend the strike/layoff prohibition to all employer worksites it should at least consider expanding the prohibition to worksites operated by the employer within a particular region or geographic proximity, for example within a 500-

mile radius. The Department acknowledges the commenter's concern, and while the Department rejects the proposal to expand the provision to all employer locations and rejects the proposal to extend the prohibition to all employer facilities within a 500-mile radius, the Department has concluded that, in order to effectuate its intent in expanding the no strike or lockout provision as proposed in the NPRM, it will expand the provision to include all employer worksites within the area of intended employment. Thus, the proposed language has been modified in the Final Rule to further decrease the chances that an unscrupulous employer will circumvent the regulatory requirement by transferring U.S. workers to fill positions vacated by striking workers and employing H–2B workers in the positions those U.S. workers vacated. The Department believes that this extension will provide added protection for workers whose employers have multiple locations within a commuting distance where transferring employees among locations would be relatively easy.

Several trade associations commented that the prohibition on strikes/lockouts was too broad. One of these commenters was concerned that the Department did not specify that the provision was not intended to encompass annual layoffs that occur due to the end of the peak season. The Department did not intend for § 655.20(u) to include employer layoffs; section § 655.20(v) addresses employer layoffs. Other commenters were concerned that a work stoppage as a result of labor disputes could refer to commonly-occurring minor disagreements and would effectively mean no employer in the country could use the program. The Department maintains that the definition of strike is sufficiently clear, and contends that this provision will not inhibit the use of the program by a large number of employers.

Another commenter indicated that the ability of a CO to deny an application due to a strike or a lockout might complicate the application process and increase delays, unsuccessful applications, and last-minute refusals of H–2B workers. The Department does not anticipate that this will be a problem as long as employers do not seek approval of an *Application for Temporary Employment Certification* while there is a strike or lockout at the worksite.

v. No recent or future layoffs (§ 655.20(v)). Proposed § 655.20(v) modified the dates of impermissible layoffs of U.S. workers, extending the period during which an H–2B employer must not lay off any similarly employed U.S. workers from 120 days after the date of need to the end of the certification period. The Department also proposed adding the requirement that H–2B workers must be laid off before any U.S. worker in corresponding employment.

The Department received several comments that expressed support for this revision. The Department received two comments that suggested the period be extended to 180 days prior to the date of need, instead of the current provision of 120 days prior to the date of need. One commenter, a labor organization, suggested the 180-day period in order to be consistent with one of its other proposed regulatory changes, discussed in the preamble to § 655.20(w). The Department did not adopt the relevant portion of that suggested change, and therefore declines to change this provision. One commenter asserted that this change would correspond with a U.S. worker's eligibility for unemployment benefits. Unemployment insurance eligibility varies by State and can change due to economic conditions, while the 120-day period in the layoff provision is tied to the seasonal nature of the program. The Department maintains the 120-day period in this Final Rule.

Several employers commented that the regulations should specify that this provision is not intended to address annual layoffs that occur due to the end of the peak season. The Department notes that the provision specifically permits layoffs due to lawful, job-related reasons provided that the employer performs all required recruitment and contacts all former U.S. employees as indicated in § 655.20(w). Similarly, one commenter indicated that this provision would not allow an employer who laid off workers due to a natural or manmade disaster to request H–2B workers when cleanup work begins and the employer is unable to find U.S. workers. The Department concludes that these commenters' concerns are unfounded, as the provision specifically permits layoffs due to lawful, job-related reasons such as the end of the peak season or a natural or manmade disaster, as long as, if applicable, the employer lays off H–2B workers first.

w. Contact with former U.S. employees (§ 655.20(w)). The Department proposed to require employers to contact former U.S. employees who worked for the employer in the occupation and at the place of employment listed on the *Application for Temporary Employment Certification* within the last year, including any U.S. employees who were laid off within 120 days before the date of need. This expanded the existing requirement that employers contact only former employees who were laid off during the 120 days preceding the date of need. The employer is not required to contact those who were dismissed for cause or who abandoned the worksite. Note, however, that voluntary abandonment is different from a constructive discharge, which occurs when the ''working conditions have become so intolerable that a reasonable person in the employee's position would have felt compelled to resign.'' *Pennsylvania State Police* v. *Suders,* 542 U.S. 129, 141 (2004).

All comments addressing this issue supported the change. One advocacy organization that supported the change also expressed concern about employers determining which workers they have terminated for cause because there is no requirement that employers keep records of the reasons why a person was dismissed. Though the regulations do not specify a requirement to keep records of reasons for termination, many employers keep such records as a matter of general business practice. Moreover, such a record would be useful if there were an investigation to show that the termination was in fact for cause and not a layoff.

A labor organization proposed that the Department require employers to contact those employees who quit after having their hours reduced by 25 percent or more during the 180-day period preceding the submission of the *Application for Temporary Employment Certification.* The Department reminds employers if qualified former employees apply during the recruitment period they, like all qualified U.S. applicants, must be offered employment. However, there is no definitive way to determine the motivation behind an employee's resignation. The suggested requirement would place an unnecessary burden on both employers seeking to comply with the provision and Departmental employees seeking to verify compliance. The Department therefore declines to make the suggested change and maintains the proposed language in the Final Rule.

x. Area of intended employment and job opportunity (§ 655.20(x)). Proposed § 655.20(x) modified existing § 655.22(l) by additionally prohibiting the employer from placing a worker in a job opportunity not specified on the *Application for Temporary Employment Certification,* clarifying that an H–2B worker is only permitted to work in the job and in the location that OFLC approves unless the employer obtains a new labor certification. No comments were received on this section, and the

provision is adopted in the Final Rule without change.

y. Abandonment/termination of employment (§ 655.20(y)). Proposed § 655.20(y), which is largely consistent with the existing notification requirement in § 655.22(f), described the requirement that employers notify OFLC and DHS within 2 days of the separation of an H–2B worker or worker in corresponding employment if the separation occurs before the end date certified on the *Application for Temporary Employment Certification.* The section also deemed that an abandonment or abscondment begins after a worker fails to report for work for 5 consecutive working days, and added language relieving the employer of its outbound transportation requirements introduced in the NPRM under § 655.22(j) and 29 CFR 503.16(j) if separation is due to a worker's voluntary abandonment. Additionally, the proposed section clarified that if a worker voluntarily abandons employment or is terminated for cause, an employer will not be required to guarantee three-quarters of the work in the worker's final partial 6- or 12-week period, as described in proposed § 655.22(f) and 29 CFR 503.16(f).

A professional association asserted that an employer that fails to provide notice as required should be relieved of its three-quarter guarantee obligation if its notification was innocently or mistakenly late. Similarly, a coalition representing agents and employers and a trade association expressed concern that the Department's 2-day window implies that an employer who waits until the third day to provide notification would be in violation. It is not the Department's intention in this preamble to determine whether hypothetical situations would ultimately be charged as violations of this rule. Instead, the Department reminds the public that WHD will determine violations of this and other employer requirements after appropriate investigative actions, using the clear criteria defining what constitutes a violation found in 29 CFR 503.19.

A coalition representing agents and employers commented that the Department should define precisely which day of a separation triggers the start of the 2-day window; articulate what happens if the second day falls on a Federal holiday; articulate what happens in the event that the notification is sent within 2 days but transmission failures delay the Department's receipt; provide specific notification procedures including email addresses employers should use; and reduce its fines to conform with those of DHS. The Department asserts that its language in the proposed section provides employers clear guidance regarding their notification obligations. This assertion is backed up by the Department's enforcement experience of the almost identical provision at existing § 655.22(f); neither WHD nor employers have expressed confusion regarding the notification requirements or articulated concerns similar to the commenter's since the introduction of the requirement in the 2008 Final Rule. Furthermore, the Department notes that an identical provision in its H–2A regulations has not resulted in confusion for H–2A employers, many of whom also participate in the H–2B program. The Department advises employers to send notification, either in hard copy or via email, using the contact information they used to submit their *Application for Temporary Employment Certification,* and to retain records in accordance with documentation retention requirements outlined at 29 CFR 503.17. Finally, the commenter is correct that the Department's penalties for this violation are different from DHS fines. The notification requirement serves different purposes for DHS and the Department, and the Department believes it is fair and consistent to treat this violation in the same way it treats other violations of employers' H–2B obligations.

The same commenter also claimed that the proposed language is unclear and that the Department should clarify that an employer is relieved of its obligations under the three-quarter guarantee not only in the event of a voluntary abandonment but also of a lawful termination. The Department cites its final sentence in § 655.20(y) and 29 CFR 503.16(y) as unambiguous in relieving an employer from the guarantee for both a voluntary abandonment and a termination for cause.

Two worker advocacy groups claimed that unscrupulous employers could misuse the DHS notification as a threat to coerce workers, whose immigration status is tied inextricably to the job, to endure abusive work conditions. The Department emphasizes that the notification requirements in § 655.20(y) are not intended to be used as threats against vulnerable foreign workers to keep them in abusive work situations. Further, the Department cautions that coercing workers into performing labor by threatening potential deportation or immigration enforcement may violate anti-trafficking laws such as the William Wilberforce Trafficking Victims Protection Act of 2008 (TVPRA), 18 U.S.C. 1584, 1589, among other laws. While the worker advocates argue that the Final Rule should eliminate the DHS portion of the notification and replace it with a requirement to notify WHD, the Department reminds the public that DHS regulations already compel employers to notify DHS of early separations by assisting the agency in keeping track of foreign nationals in the United States. Both OFLC's (which may share information with WHD) and DHS's awareness of early separations are critical to program integrity, allowing the agencies to appropriately monitor and audit employer actions. If not for proper notification, employers with histories of frequent and unjustified early dismissals of workers could continue to have an *Application for Temporary Employment Certification* certified and an *H–2B Petition* approved. In addition, the same two worker advocacy groups stated that WHD should investigate and confirm the veracity of purported terminations for cause to ensure that employers do not misuse this provision to escape their outbound travel obligations and the three-quarter guarantee. One worker advocacy group argued that retaliation for workers asserting their rights should not be considered legitimate cause for termination and suggested the Department require employers to inform workers that they can quit abusive conditions and work for another employer, provided the new employment is authorized. The Department reminds the public that WHD, as part of its enforcement practices, may in fact investigate conditions behind the early termination of foreign workers to ensure that the dismissals were not effected merely to relieve an employer of its outbound transportation and three-quarter guarantee obligations. Further, § 655.20(n) already protects workers from a dismissal in retaliation for protected activities.

Several comments related to the Department's language describing abscondment. A private citizen and a coalition representing agents and employers claimed there is an inconsistency between the proposed rule, which considers abscondment to occur after 5 days, and some employer personnel rules that purportedly set the threshold at 3 days. A worker advocacy group argued that workers who fail to report for work due to legitimate injury or illness should not be considered to have abandoned employment. The Department maintains that the proposed language does not intrude upon or supersede employer attendance policies. The proposed requirement that an

employer provide appropriate notification if a worker fails to report for 5 consecutive working days does not preclude an employer from establishing a different standard for dismissing its workers. Further, the Department did not intend the H–2B regulations to provide job protection to workers in the case of illness or injury and considers such determinations beyond its authority. The proposed rule leaves it largely to employers to determine the worker behaviors that trigger a dismissal for cause, beyond the protected activities described in § 655.20(n) and the requirement in § 655.20(z) that the employer comply with all applicable employment-related laws.

z. Compliance with applicable laws (§ 655.20(z)). In proposed § 655.20(z), which requires H–2B employers to comply with all other applicable Federal, State, and local employment laws, the Department retained much of the language from the existing provision at § 655.22(d) and added an explicit reference to the TVPRA. The Department received comments from several worker advocacy organizations expressing general support for referencing the Act, which prohibits employers from holding or confiscating workers' immigration documents such as passports or visas under certain circumstances. One worker advocacy organization suggested the Department broaden the proposed section in two ways: By including employers' attorneys and agents in the prohibition and by expanding the documents employers are barred from holding to incorporate deeds to a worker's auto, land and home. The Department does not have the authority to include documents not specified in the TVPRA at 18 U.S.C. 1592(a), such as the deeds to an H–2B worker's auto, land, or home. However, the Department agrees that the prohibition must include attorneys and agents in order to achieve the intended worker protection. The Department has added appropriate language to § 655.20(z) of this Final Rule to reflect the change.

aa. Disclosure of foreign worker recruitment (§ 655.20(aa)). The NPRM proposed to require the employer and its attorney and/or agents to provide a copy of any agreements with an agent or recruiter whom it engages or plans to engage in the international recruitment of H–2B workers under this *Application for Temporary Employment Certification* (proposed § 655.9), at the time of filing the application (proposed § 655.15(a)). As explained in the preamble under § 655.9, this Final Rule adopts that provision as modified to also include disclosure of persons and entities hired by or working for the recruiter or agent, and any of their agents or employees, to recruit prospective foreign workers for the H–2B job opportunities offered by the employer. Therefore, the Department is adding this obligation to the list of Assurances and Obligations in this Final Rule, as it as a critical obligation that will significantly enhance the recruitment process.

E. Processing of an Application for Temporary Employment Certification

1. § 655.30 Processing of an Application and Job Order

In the NPRM, we proposed that, upon receipt of an *Application for Temporary Employment Certification* and copy of the job order, the CO will promptly conduct a comprehensive review. The CO's review of the *Application for Temporary Employment Certification,* in most cases,[11] will no longer entail a determination of temporary need following *H–2B Registration.* Instead, as proposed, this aspect of the CO's review is limited to verifying that the employer previously submitted a request for and was granted *H–2B Registration,* and that the terms of the *Application for Temporary Employment Certification* have not significantly changed from those approved under the *H–2B Registration.*

The proposed rule also required the use of next day delivery methods, including electronic mail, for any notice or request sent by the CO requiring a response from the employer and the employer's response to such a notice or request. This proposed section also contained a long-standing program requirement that the employer's response to the CO's notice or request must be sent by the due date or the next business day if the due date falls on a Saturday, Sunday, or a Federal holiday. The Final Rule adopts the language of the NPRM without change.

One labor organization urged us to strictly scrutinize applications requesting 10 or more workers to perform construction or construction-type work to guard against unscrupulous employers' applications. While we appreciate the commenter's concern, we do not believe that it is necessary to strictly scrutinize only certain types of applications but rather will continue to thoroughly review all applications.

Some commenters expressed concern that the H–2B program would be more efficient and predictable if we were subject to more deadlines governing our decision-making. We have set timeframes throughout these regulations for our decision-making (*e.g.,* the CO's issuance of Notices of Deficiency and Notices of Acceptance) that are designed to ensure application processing progresses efficiently without sacrificing program integrity. Different applications require different periods of time for review, depending on the quality and completeness of the application. While we cannot set more specific timeframes that would ensure appropriate adjudication of all applications, we will process each application as quickly as possible.

2. § 655.31 Notice of Deficiency

We proposed to require the CO to issue a formal Notice of Deficiency where the CO determines that the *Application for Temporary Employment Certification* and/or job order contains errors or inaccuracies, or fails to comply with applicable regulatory and program requirements. The proposed provision required the CO to issue the Notice of Deficiency within 7 business days from the date on which the Chicago NPC receives the employer's *Application for Temporary Employment Certification* and job order.

As proposed, once the CO issues a Notice of Deficiency to the employer, the CO will provide the SWA and the employer's attorney or agent, if applicable, a copy of the notice. The Notice of Deficiency would include the specific reason(s) why the *Application for Temporary Employment Certification* and/or job order is deficient, identify the type of modification necessary for the CO to issue a Notice of Acceptance, and provide the employer with an opportunity to submit a modified *Application for Temporary Employment Certification* and/or job order within 10 business days from the date of the Notice of Deficiency. The Notice of Deficiency would also inform the employer that it may, alternatively, request administrative review before an Administrative Law Judge (ALJ) within 10 business days of the date of the Notice of Deficiency and instruct the employer how to file a request for such review in accordance with the administrative review provision under this subpart. Finally, the Notice of Deficiency would inform the employer

[11] As provided in the discussion of § 655.11, each employer filing an *Application for Temporary Employment Certification* is required under the Final Rule to establish temporary need through the registration process. However, in limited circumstances where the employer has applied for a temporary labor certification on an emergency basis under emergency procedures in § 655.17 without an approved *H–2B Registration,* the CO may be required to also make a determination of temporary need.

that failing to timely submit a modified *Application for Temporary Employment Certification* and/or job order, or request administrative review, will cause the CO to deny that employer's *Application for Temporary Employment Certification.* In the Final Rule, we have adopted the proposed provisions without change.

Some commenters suggested limiting the CO to one Notice of Deficiency, covering all deficiencies, while another suggested limiting an employer to a certain number of Notices of Deficiency received before restricting it from using the program in the future. We understand that these commenters are interested in processing efficiency, as are we. However, we have decided to retain the CO's ability to issue multiple Notices of Deficiency, if necessary, to provide the CO with the needed flexibility to work with employers seeking to resolve deficiencies that are preventing acceptance of their *Application for Temporary Employment Certification.* For example, there are situations in which a response to a Notice of Deficiency raises other issues that must be resolved, requiring the CO to request more information. The CO must have the ability to address these situations. Additionally, we do not believe that it would be appropriate to restrict an employer from participating in the program in the future based on its receipt of multiple Notices of Deficiency, as this result would be unduly harsh, especially if the employer is new to the program or committed unintentional errors when submitting its *Application for Temporary Employment Certification* or job order.

3. § 655.32 Submission of a Modified Application or Job Order

In the NPRM, we proposed to permit the CO to deny any *Application for Temporary Employment Certification* where the employer neither submits a modification nor requests a timely administrative review, and that such a denial cannot be appealed. The proposed rule also required the CO to deny an *Application for Temporary Employment Certification* if the modification(s) made by the employer do not comply with the requirements for certification in § 655.50. A denial of a modified *Application for Temporary Employment Certification* may be appealed.

Under the proposed rule, if the CO deems a modified application acceptable, the CO issues a Notice of Acceptance and requires the SWA to modify the job order in accordance with the accepted modification(s), as necessary. In addition to requiring modification before the acceptance of an *Application for Temporary Employment Certification,* we proposed to permit the CO to require the employer to modify a job order at any time before the final determination to grant or deny the *Application for Temporary Employment Certification* if the CO determines that the job order does not contain all the applicable minimum benefits, wages, and working conditions. The proposed rule required the CO to update the electronic job registry to reflect the necessary modification(s) and to direct the SWA(s) in possession of the job order to replace the job order in their active files with the modified job order. The proposed rule also required the employer to disclose the modified job order to all workers who were recruited under the original job order or *Application for Temporary Employment Certification.* The Final Rule adopts these provisions.

One commenter suggested that, if we decide to retain the CO's ability to require post-acceptance modifications, we should provide employers with an opportunity for immediate de novo hearings. As discussed further in the larger discussion of administrative review process contained in the Final Rule, we decline to add de novo hearings in this post-acceptance certification model. Since the application will be denied under § 655.53, an employer will have the right of appeal. We decline, however, to provide for a de novo hearing.

Some commenters opposed the CO having the ability to require modifications post-acceptance, arguing the CO's ability to issue unlimited modifications at any point in the process is inefficient for both the CO and the employer and is contrary to the employer's interest in finality. We have determined it is contrary to the integrity of the H–2B program to limit the CO's ability to require modification(s) of a job order, even after acceptance. In some cases, information may come to the CO's attention after acceptance indicating that the job order does not contain all the applicable minimum benefits, wages, and working conditions that are required for certification. This provision enables the CO to ensure that the job order meets all regulatory requirements.

4. § 655.33 Notice of Acceptance

We proposed to require the CO to issue a formal notice accepting the employer's *Application for Temporary Employment Certification* for processing. Specifically, we proposed that the CO would send a Notice of Acceptance to the employer (and the employer's attorney or agent, if applicable), with a copy to the SWA, within 7 business days from the CO's receipt of the *Application for Temporary Employment Certification* or modification, provided that the *Application for Temporary Employment Certification* and job order meet all the program and regulatory requirements.

As proposed, the Notice of Acceptance directs the SWA: (1) To place the job order in intra- and interstate clearance, including (i) circulating the job order to the SWAs in all other States listed on the employer's *Application for Temporary Employment Certification* and job order as anticipated worksites and (ii) to any States to which the CO directs the SWA to circulate the job order; (2) to keep the job order on its active file and continue to refer U.S. workers to the employer until the end of the recruitment period defined in § 655.40(c), as well as transmit those instructions to all other SWAs to which it circulates the job order; and (3) to circulate a copy of the job order to certain labor organizations, where the job classification is traditionally or customarily unionized.

As proposed, the Notice of Acceptance also directs the employer to recruit U.S. workers in accordance with employer-conducted recruitment provisions in §§ 655.40–655.47, as well as to conduct any additional recruitment the CO directs, consistent with § 655.46, within 14 calendar days from the date of the notice. The Notice of Acceptance would inform the employer that such employer-conducted recruitment is required in addition to SWA circulation of the job order in intrastate and interstate clearance under § 655.16. In addition, the Notice of Acceptance would require the employer to submit a written report of its recruitment efforts as specified in § 655.48.

Under the proposed rule, the Notice of Acceptance would have also advised the employer of its obligation to notify the SWA with which it placed its job order if the last H–2B worker has not departed for the place of employment by the third day preceding the employer's date of need. This would have indicated to the SWA when to stop referring potential U.S. workers to the employer.

We are adopting the proposed provisions on the Notice of Acceptance content, with one modification. For consistency with an amendment made to the employer's obligation to continue hiring qualified U.S. workers in § 655.20 until 21 days before the date of need, we have deleted proposed paragraph (b)(3) of this section, which would have notified the employer that it must inform the SWA(s) handling the job

order in writing if the last H–2B worker has not departed for the place of employment by the third day preceding the employer's date of need. Further discussion of this modified position may be found in the discussion of an employer's assurances and obligations under § 655.20.

Comments about the content of the Notice of Acceptance focused on the recruitment instructions contained in the Notice. One commenter suggested that we permit SWAs to circulate job orders nationwide and put the job order on the Internet to broaden the reach of U.S. labor market recruitment. In contrast, another commenter suggested that the requirement for a SWA to place the job order in interstate clearance is both unnecessary and burdensome, given the introduction of the electronic job registry, the absence of supply States for non-agricultural work, and the difficulty of coordinating processing among multiple SWAs. We believe both the electronic job registry and the interstate clearance process serve important, but distinct, purposes in testing the U.S. labor market. The electronic job registry, available to anyone with Internet access, accomplishes the objective of disseminating job opportunity information to the widest U.S. audience possible. Adding nationwide circulation to the SWAs' responsibilities would duplicate the function of the electronic job registry, unnecessarily burdening the SWAs. The interstate clearance process, however, targets local labor markets that are most likely to have available U.S. workers, so that those SWAs can make the job opportunity information available to the interested, available, and qualified U.S. workers in that particular local labor market. While there are not traditional supply States for non-agricultural work, the CO may identify States in which circulating the job order is likely to target additional local markets with potentially available U.S. workers (*e.g.,* designated areas of substantial unemployment or areas where mass layoffs have occurred).

Some commenters discussed the community-based organization contact requirement. While the Notice of Acceptance notifies the employer when the CO has determined that such contact is appropriate to the occupation and areas of intended employment, the community-based organization contact requirement is an employer recruitment activity, when appropriate, appearing in § 655.45. Accordingly, we have addressed these comments in the discussion of § 655.45.

We received many comments on the proposals in this section that the SWA circulate the job order to the applicable labor organizations and in § 655.44 that the employer contact the local union. While some opposed the proposal that employers not party to a collective bargaining agreement would be required to contact a labor organization, others supported the return to this historic practice. Many commenters expressed concern about an employer's ability to discern when and what type of labor organization contact was required, finding the phrase, where the occupation or industry is traditionally or customarily unionized, vague. These commenters feared that using this language meant employers and the CO would disagree about when labor organization contact was required. Some suggested changing or removing this language.

After reviewing the comments, we have decided to remove this requirement from the employer's recruitment steps in § 655.44, and to retain the requirement that the SWA circulate the job order to the applicable labor organizations under this section. We believe this modification will eliminate duplicative efforts and resolve concerns about an employer's ability to determine when and what type of labor organization contact is required. The CO, in consultation with the SWA, will make a determination about whether labor organization contact is required and include specific directions to the SWA in the Notice of Acceptance, as specified in paragraph (b)(6) of this section. Under the Final Rule, an employer will neither have to determine when such contact is required nor have to contact the local union; rather, the Notice of Acceptance will notify the employer whether the CO has directed the SWA to initiate such contact.

While the standard used for labor organization contact is based on historical knowledge and practice,[12] we are mindful of the fluidity of unionized occupations and will gauge trends accordingly. As discussed in the NPRM, unions have traditionally been recognized as a reliable source of referrals of U.S. workers. Because the SWAs have greater knowledge of the local labor markets, including labor organizations, and have traditionally included labor organizations in their efforts to match workers with job opportunities, the SWAs are in the best position to identify whether there are local labor organizations which cover the occupation and which local labor organizations are most likely to refer qualified and available U.S. workers for the job opportunity.

In addition to commenting on the return to this long-standing program requirement, some commenters responded to our request for suggestions on how to best determine the circumstances which would trigger the requirement for contacting labor organizations. Some commenters suggested we specifically identify certain industries and/or occupations as customarily unionized and require contact with organizations which represent workers in those occupations/industries. Other commenters suggested that we and/or the SWAs work together with labor organizations to develop a list of organizations and/or an email listserv to be publicized for purposes of ensuring appropriate and consistent application of the contact requirement. We appreciate the suggestions for the circumstances or criteria for contacting labor organizations. Specifically, we have taken under advisement the suggestion that we develop a list of organizations for the uniform application of the contact requirement. Some commenters noted the fluidity of unionized occupations over time. We are also mindful that unionization within industries, occupations, and areas of intended employment is not uniform. Because of this lack of uniformity, we do not think it is appropriate to base the contact requirement on a specified industry or occupation. Rather than create a general rule in the regulation, we think that a list of labor organizations to be contacted must focus on specific occupations in specific areas of intended employment and must be responsive to trends in the marketplace. Therefore, we believe retaining the labor organization contact requirement as proposed in paragraph (b)(5) of this section will most appropriately include labor organizations in the U.S. labor market test. We will notify the public when such a list is devised. We will work closely with the SWAs to ensure a complete and appropriate test of the labor market, including contacting the applicable labor organizations, is made before approving an *Application for Temporary Employment Certification.*

Some commenters offered suggestions about the particular entities that should be contacted with respect to this requirement. These suggestions included requiring contact with a specific federation of labor

[12] See, Employment and Training Guidance Letter 21–06, Change 1: Procedures for H–2B Certification of Temporary Non-Agricultural Occupations. Attachment A at 7. *http://wdr.doleta.gov/directives/attach/TEGL/TEGL21-06c1a1.pdf.* See also, General Administration Letter 1–95: Procedures for Temporary Labor Certification in Non-agricultural Occupations (December 31, 1999). *http://wdr.doleta.gov/directives/attach/GAL1-95_attach.pdf.*

organizations, requiring contact with all unions within a State or with jurisdiction over the area of intended employment or within an equivalent geographic distance, or requiring contact with all unions representing workers of a specific skill and wage level. As discussed above, we think the contact requirement should be based on the situation in the local labor market, not on an absolute rule about which labor organizations to contact. We will work with the SWAs to develop a flexible list tailored to local circumstances.

Finally, some commenters proposed that we require employers to prove contact with labor organizations. As this Final Rule requires the SWA, not the employer, to initiate contact with labor organizations as a component of testing the U.S. labor market, the proof suggested by these commenters is not necessary.

One labor and worker advocacy organization expressed general support for the application process described in the proposed rule and agreed with the provisions ensuring that only the final job order is used and an employer may not commence recruitment until the CO accepts the modified job order. Like the commenter, we believe the final, approved version of the job order, containing the applicable minimum benefits, wages, and working conditions, is essential to an appropriate test of the U.S. labor market.

Some commenters expressed support for the regulations requiring employers to submit a recruitment report, asserting that the requirement makes it more difficult for unscrupulous employers to bypass U.S. workers in favor of more vulnerable foreign workers. We agree that the requirement adds accountability and supports program integrity. Further discussion of the recruitment report provision can be found in the discussion of § 655.48.

5. § 655.34 Electronic Job Registry

In the NPRM, we proposed posting employers' H–2B job orders, including modifications and/or amendments approved by the CO, on an electronic job registry to disseminate the job opportunities to the widest audience possible. The electronic job registry was initially created to accommodate the posting of H–2A job orders, but we proposed to expand the electronic job registry to include H–2B job orders. As proposed, the CO would post the job orders on the electronic job registry after accepting an *Application for Temporary Employment Certification* for the duration of the recruitment period, as provided in § 655.40(c). At the conclusion of the recruitment period, we would maintain the job order on the electronic job registry in inactive status, making the information available for a variety of purposes. In the Final Rule, we have adopted the proposed provisions without change.

Many commenters supported the introduction of the electronic job registry, viewing it as a means to increase the program's transparency and improve U.S. worker awareness of and access to nonagricultural jobs. Some also contended that the electronic job registry will facilitate earlier and more frequent detection of program abuse.

Commenters supporting the introduction of the electronic job registry suggested expanding electronic job registry postings to the *Application for Temporary Employment Certification,* other job-offer-related documents, and contracts between employers and foreign recruiters to further improve transparency. However, other commenters expressed concern about the volume and nature of information potentially exposed in the job order posted on the electronic job registry. These commenters contended that since employment contracts typically incorporate employee handbooks and other documents by reference, it would be difficult, if not impossible, to draft a document that contains all material terms and conditions and that would be appropriate to disclose, in its entirety, on the Internet. The commenters argued that while an employer could submit detailed information to the CO for review (*e.g.,* employee contracts or handbooks), making such information available for public viewing would infringe on an employer's legitimate business interest in maintaining the confidentiality of employment terms. Comments about transparency and exposure concerns have been addressed in the larger discussion of public disclosure of information under § 655.63. Also, as outlined further in the discussion of the job order content requirements, the Final Rule details specific minimum content requirement for job orders, sensitive to these concerns, which in turn affect the job order content to be posted on the electronic job registry.

One commenter suggested that the job opportunity appear in the electronic job registry until the end of the certification period, rather than just the recruitment period. As articulated in the NPRM, the purpose of posting job orders on the electronic job registry is to serve as an effective, useable tool for alerting U.S. workers to jobs for which employers are recruiting H–2B workers. These jobs are accessible to the public through the Department's resources, including its One-Stop Career Centers, and through a link to the electronic job registry on the OFLC's Web site *http://www.foreignlaborcert.doleta.gov/.* As a recruitment tool, we believe it is appropriate for the job order to appear as active during the recruitment period and to be placed in inactive status, but still accessible, on the electronic job registry after the recruitment period ends.

One commenter suggested we give H–2B workers access to the electronic job registry so that they can find other H–2B employment, if they are displaced (*e.g.,* replaced by a U.S. worker) or experiencing improper treatment. While our purpose in introducing the electronic job registry is to alert U.S. workers of job opportunities, the electronic job registry will be accessible via the Internet to anyone seeking employment.

One commenter asserted that an *Application for Temporary Employment Certification* involving two or more SWAs would result in the CO posting the job order of each of the States on the electronic job registry, potentially confusing applicants about the location of work sites and terms and conditions of employment, such as requirements to withhold or pay State income taxes. While a job order may be circulated among multiple SWAs, only the job order placed with the initial SWA, which identifies all work locations, will be posted on the electronic job registry.

We also received a suggestion that we create a simple mechanism, such as an email listserve, for notifying interested parties, such as labor organizations who may have unemployed members seeking employment in new areas, of job opportunities. While the Final Rule adopts the electronic job registry provisions as proposed, we will also work with the SWAs to devise procedures to further publicize the electronic job registry.

6. § 655.35 Amendments to an Application or Job Order

We proposed to permit an employer to request to amend its *Application for Temporary Employment Certification* and/or job order to increase the number of workers, to change the period of employment, or to make other changes to the application, before the CO makes a final determination to grant or deny the *Application for Temporary Employment Certification.* The proposed rule would permit an employer to seek such amendments only before certification, not after certification. As discussed in the NPRM,

these provisions were proposed to provide clarity to employers and workers alike of the limitations on and processes for amending an *Application for Temporary Employment Certification* and the need to inform any U.S. workers already recruited of the changed job opportunity. We recognized that business is not static and employers can face changed circumstances from varying sources—from climatic conditions to cancelled contracts; we included these provisions to provide some flexibility to enable employers to assess and respond to such changes.

At the same time, we proposed certain limitations to ensure that these job opportunities are not misrepresented or materially changed as a result of such amendments. Specifically, as proposed, the employer may request an amendment of the *Application for Temporary Employment Certification* and/or job order to increase the number of workers initially requested. However, we proposed limiting such amendments to increase the number of workers to no more than 20 percent (50 percent for employers requesting fewer than 10 workers) above the number specified in the *H–2B Registration.*

In addition, we proposed to permit minor changes to the period of employment at any time before the CO's final determination. However, the NPRM stated such amendments to the period of employment may not exceed 14 days and may not cause the total period to exceed 9 months, except in the event of a demonstrated one-time occurrence. This limitation to 14 days was designed to ensure that the employer had a legitimate need before commencing the registration process and accurately estimated its dates of need.

As proposed, the employer must request any amendment(s) to the *Application for Temporary Employment Certification* and/or job order in writing and any such amendment(s) will not be effective until approved by the CO. After reviewing an employer's request to amend its *Application for Temporary Employment Certification* and/or job order, the CO will approve these changes if the CO determines the proposed amendment(s) are justified and will not negatively affect the CO's ability to make a timely labor certification determination, including the ability to thoroughly test the labor market. Changes will not be approved which affect the underlying job registration. Once the CO approves an amendment to the *Application for Temporary Employment Certification* and/or job order, the CO will submit to the SWA any necessary change(s) to the job order and update the electronic job registry to reflect the approved amendment(s). We have decided to adopt this provision in the Final Rule, with the modifications discussed below.

We received a few comments on this proposed provision. One commenter noted that the following sentence appeared in the proposed rule at paragraph (c) of this section, but not at paragraphs (a) or (b) of this section: ''In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into account the effect of the changes on the underlying labor market test for the job opportunity.'' The commenter expressed concern that employers requesting one type of amendment would be required to justify their request to the satisfaction of the CO, while employers requesting the other types of amendments would not be required to justify their requests. We had no intention of applying different standards and have modified the language of paragraphs (a) and (b) of this section to include the sentence that appears in paragraph (c) of this section.

Some commenters were suspicious of post-acceptance modification requests, fearing that employers will use this provision as an opportunity to move from their approved *H–2B Registration* period of need or number of workers. We do not intend this provision to allow employers to amend their applications beyond the parameters contained in § 655.12; rather, part of the CO's review will involve comparing the requested amendments to the content of the approved *H–2B Registration.* However, the Final Rule provision has been slightly revised to clarify that an employer may not request a post-filing amendment that would modify the number of workers beyond that which would have been acceptable at the time of filing under § 655.12. Similarly, an employer will not be permitted to expand the period of employment beyond 9 months. We expect the stated parameters, which limit the extent of the change in number of workers or period of need permitted, and the CO review process to control the frequency with which post-acceptance and pre-certification job order amendments are requested or approved and maintain the integrity of the *H–2B Registration* process. One commenter expressed concern about the resources used to update both the SWA's labor exchange system and the electronic job registry to replace obsolete versions of the job order, if the CO approves amendments. As discussed above, we believe the job order posting on both the SWA's labor exchange system and electronic job registry serve valuable purposes and must accurately reflect the final job order contents, validating the use of resources.

We have not amended the provision to reflect the corresponding change made to the registration provision that allows an employer to adjust its date of need by up to 30 days without having to re-register. Registration covers the entire period of need for up to 3 years. This provision, by contrast, allows an employer to request a deviance of up to 14 days from the previous year, allowing for up to 2 such deviations from the initial dates provided in the registration, as long as the deviations do not result in a total period of need exceeding 9 months.

F. Recruitment Requirements

We proposed to maintain and expand some of the requirements relating to the recruitment of U.S. workers under the 2008 Final Rule. These efforts included a requirement that the employer contact its former U.S. workers; a requirement to contact labor organizations as well as community-based organizations, if appropriate to the occupation and area of intended employment; and a requirement to conduct additional recruitment at the discretion of the CO.

We received a number of comments from individuals, labor organizations, worker advocacy organizations, and coalitions expressing support for the additional recruitment efforts as imperative to ensuring the appropriate test of the labor market and providing U.S. workers with appropriate access to these job opportunities. In addition, we received comments from employers and industry organizations expressing opposition to or concerns about the specific recruitment efforts required in the NPRM. As discussed in more detail below, except for the requirement under § 655.44 that the employer contact labor organizations where the occupation or industry is customarily unionized, the Final Rule retains these recruitment requirements as proposed or with amendments where noted.

1. § 655.40 Employer-Conducted Recruitment

Unlike under the 2008 Final Rule, in the NPRM we proposed that the employer conduct recruitment of U.S. workers after its *Application for Temporary Employment Certification* is accepted for processing by the CO. We received a number of comments on this proposal, most of them in support.

Several commenters suggested that we take this requirement further by requiring employers to conduct recruitment efforts comparable to ones

that they normally use to recruit workers in corresponding employment for the job opportunity. Although the Department's Final Rule includes requirements which are aimed at approximating the recruitment efforts typically used by employers outside the H–2B program, we are not able to adopt this suggestion because we have no mechanism for ascertaining those efforts or ensuring compliance. In addition, we believe that the existing regulatory language gives the CO sufficient authority to order any appropriate recruitment which will ensure that U.S. workers get adequate access to these job opportunities.

We proposed that the employer conduct recruitment of U.S. workers within 14 calendar days from the date of the Notice of Acceptance, unless the CO provides different instructions to the employer in the Notice of Acceptance, and that the employer must accept all qualified U.S. applicants referred by the SWA until the third day before the employer's date of need or the date the last H–2B worker departs for employment, whichever is later. We are amending this requirement, as described below.

We received a number of comments and alternatives for the duration of the recruitment period. For example, several labor organizations and worker advocates proposed that we extend the recruitment period until 3 days before the date of need, while one other labor organization proposed to instead extend the duration for the posting of the job order. Employers and industry commenters generally opposed a longer recruitment period, but expressed willingness to accept a recruitment period of either 30 days or ending 30 days before the date of need.

Most of these comments demonstrate a misunderstanding of the proposal and the difference between the 14-day employer-conducted recruitment period and the SWA referral period. As indicated above, we proposed to require that employers complete specific recruitment steps outlined in §§ 655.42 through 655.46 within 14 days from the date of the Notice of Acceptance. Separate from the employer-conducted recruitment, the NPRM proposed to require the SWA, upon acceptance of the job order and *Application for Temporary Employment Certification* by the CO, to place the job order in interstate clearance and indicated that we would post the job order to the electronic job registry. Thereafter, we proposed to require employers to continue to accept all qualified U.S. applicants referred for employment by the SWA or who apply for the position directly with the employer until the third day preceding the employer's date of need or the date the last H–2B worker departs for employment, whichever is later. In order to further the effectiveness of the longer referral period and ensure that U.S. workers are notified of the job opportunities, we proposed that the job order remain posted with the SWA for the duration of the referral period or until the employer notifies the SWA that the last H–2B worker has departed. This aspect of the proposal balanced the need to ensure an adequate test of the labor market without requiring the employer to incur any additional costs in conducting independent recruitment efforts beyond the sources and the 14 days specified in the Notice of Acceptance. As discussed more fully below, the Final Rule retains the 14-day recruitment period. After considering comments on this issue, we have determined that the 14-day recruitment period provides an appropriate timeframe for the employer to conduct the recruitment described in §§ 655.42 through 655.46, especially when combined with the longer referral period discussed further below.

In addition, we proposed to require employers to report to the SWA the actual date of departure of H–2B workers, if different from the date that is 3 days before the date of need. However, for the reasons discussion at § 655.20(t), in the Final Rule employers will only be required to hire qualified and available U.S. workers until 21 days before the date of need. Employers are therefore relieved of the obligation to report this information to the SWAs.

In the context of the proposal requiring employers to report to the SWA the date of last departure of the last H–2B worker, we specifically solicited comments on whether it should also require employers to inform the Department of the actual number of H–2B workers hired under the approved *Application for Temporary Employment Certification,* as well as whether the H–2B workers were hired from a foreign country or were already present in the U.S. We have determined to adopt a modified version of this proposal. Based on comments received, we have determined that the best approach to collecting this type of information is to request the employer's information for the prior year on the *Application for Temporary Employment Certification.* However, we are not requiring that the employer engage in such reporting in the context of conducting its recruitment efforts.

We received several comments supporting this proposal. One worker advocacy organization espoused the importance of such a collection based on its value to program integrity. Another commenter supporting this proposal suggested that we implement a reporting requirement that would be triggered at three specific points beginning during the referral period and ending during the period of certified employment (the first report would be at 30 days before the date of need, the second 30 days into the period of employment and the third 30 days before the end of the period of employment). This commenter expressed a concern that we certify more H–2B positions than the employer ultimately fills. Another commenter suggested that we should collect the information about both the number of H–2B and the number of U.S. workers actually hired. Another commenter, a worker advocacy organization, suggested that we should collect the age and gender of H–2B workers who are hired.

Our role in the H–2B program is to certify that the employer has a need to fill a specific number of temporary positions for which the employer is unable to find qualified and available U.S. workers. We do not, however, have control over how many of those positions are ultimately filled with H–2B workers nor the identity of those workers; the names of alien beneficiaries are not captured on ETA Form 9142 since in most cases the identity of the workers is not known at that time. We agree, however, that requiring employers to report the number of H–2B and U.S. workers actually hired, and whether the H–2B workers are hired from within the U.S. or from abroad, is in the interest of overall H–2B program integrity and will assist the Department and other Federal agencies with ascertaining the actual use of the program. This is especially so given the limited number of visas available, because an employer who significantly overstates its need for temporary workers may preclude another employer with a bona fide temporary need from getting visas for workers it equally needs. With respect to comments that we should collect both the number of H–2B and the number of U.S. workers actually hired, our regulations under § 655.48 already require the employer to report the disposition of each U.S. worker who was referred or self-referred to the employer for employment. With respect to the other commenters' suggestion that we collect the age and gender of H–2B workers who are hired by the employer, the Paperwork Reduction Act requires the Department to collect only such

information as is reasonably related to the administration of our program; at this time we feel that requiring employers to report such information would not be reasonably related to our administration of the H–2B program. As discussed above, we have adopted the proposal to collect the number of H–2B workers actually hired during the previous year on the *Application for Temporary Employment Certification.*

The NPRM provided that employers are not required to conduct employment interviews but that where the employer wishes to conduct interviews with U.S. workers, it must do so by telephone or at a location where workers can participate at little or no cost to the workers. The Final Rule retains this requirement.

We received several comments supporting this proposal. One commenter also suggested that we prohibit employers from interviewing U.S. workers unless it also conducts interviews of H–2B workers. Another commenter proposed that we require employers to promise to be available for interviews during normal business hours throughout the referral period. As indicated in the NPRM and retained in the Final Rule, we have explicitly prohibited employers from offering preferential treatment to H–2B workers, including any requirement to interview for the job opportunity. In addition, both the NPRM and the Final Rule seek to ensure that employers conduct a fair labor market test by requiring employers that require interviews to conduct them by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. With respect to the commenters' suggestion that the employer be required to be available to conduct interviews during normal business hours, we are declining to adopt this suggestion as it may unnecessarily infringe on the employer's business operations. However, an employer who requires a U.S. worker to undergo an interview must provide such worker with a reasonable opportunity to meet such a requirement. The purpose of these requirements is to ensure that that the employer does not use the interview process to the disadvantage of U.S. workers. For all the reasons articulated above, we are retaining this provision as proposed.

2. § 655.41 Advertising Requirements

We proposed to retain the 2008 Final Rule requirement that all employer advertisements contain terms and conditions of employment no less favorable than those offered to the H–2B workers and reflect, at a minimum, the terms and conditions contained in the job order. The NPRM also required that all advertisements direct applicants to apply for the job opportunity through the SWA. We have made revisions to this provision to clarify which terms and conditions of employment contained in job orders must be included in advertisements, and to clarify that the employer must comply with but need not actually include the job order assurances in advertisements.

We received a number of comments on this proposal. The majority of commenters expressed strong support for extending job order requirements to all recruitment, including the requirement to identify when the employer is offering board, lodging or facilities. Other commenters expressed concern that including all of the job order requirements in advertisements may prove to be costly and burdensome, particularly where it would result in lengthy and expensive newspaper advertisements. Another commenter, referring to the H–2A program, although supporting full disclosure, suggested that the job order requirements often serve to discourage rather than encourage applicants from pursuing the job opportunity due to the sheer length and complexity of information required to be included. This commenter suggested that we should require that a summary form be provided to the applicants.

In considering the issues raised by commenters, we have amended this section to ensure that all advertisements include, at a minimum, the terms and conditions of employment necessary to apprise U.S. workers of the job opportunity and have clarified that those terms and conditions must conform to the job order assurances, required by the amended § 655.18(a), but need not contain those assurances.

Based on the commenter's suggestions and in order to ensure that all recruitment complies with the requirements applicable to job orders, we have amended the language of this section to clarify that advertisements need not include the text of assurances applicable to job orders, but that they must include the minimum terms and conditions of employment. These minimum terms and conditions of employment include a requirement that the employer make the appropriate disclosure when it is offering or providing board, lodging or facilities, as well as identify any deductions, if applicable, that will be applied to the employee's pay for the provision of such accommodations. These minimum content requirements will address industry concerns about the cost inherent in placing potentially lengthy advertisements, while also ensuring that entities disclose all necessary information to all potential applicants. In addition, as a continuing practice in the program, employers will be able to use abbreviations in the advertisements so long as the abbreviation clearly and accurately captures the underlying content requirement.

In order to assist employers to comply with these requirements, we provide below specific language which is minimally sufficient to apprise U.S. applicants of required items in the advertisement, and which is intended to assist the employer in complying with such requirements. In response to industry concerns over the potential length and cost of advertising, the employer may also abbreviate some of this language so long as the underlying guarantee can be clearly understood by a prospective applicant. The employer may include the following statements in its advertisements: 1. Transportation: Transportation (including meals and, to the extent necessary, lodging) to the place of employment will be provided, or its cost to workers reimbursed, if the worker completes half the employment period. Return transportation will be provided if the worker completes the employment period or is dismissed early by the employer. 2. Three-fourths guarantee: For certified periods of employment lasting fewer than 120 days: The employer guarantees to offer work for hours equal to at least three-fourths of the workdays in each 6-week period of the total employment period. For certified periods of employment lasting 120 days or more: The employer guarantees to offer work for hours equal to at least three-fourths of the workdays in each 12-week period of the total employment period. 3. Tools, equipment and supplies: The employer will provide workers at no charge all tools, supplies, and equipment required to perform the job.

Another commenter expressed concern that some employers have a legitimate need to keep the terms and conditions of employment confidential. Although we recognize that some employers may wish for more discretion in recruitment, our statutory mandate requires that the employer be permitted to hire H–2B workers only in circumstances where there are no qualified and available U.S. workers, and where the employment of those H–2B workers does not have an adverse effect on the wages and working conditions of U.S. workers. Therefore, in the context of the H–2B program, an

employer must forego some of its preferences for its usual recruitment practices in order to comply with our regulations.

As indicated above, we retained the requirement that all recruitment conducted under this section and §§ 655.42–655.46 comply with the prohibition on preferential treatment and also that each job opportunity be bona fide as required by § 655.18. Some commenters objected to the bona fide job opportunity requirement because it permits the CO to require the employer to substantiate any job qualification or requirement contained in the job order. In particular, one commenter was concerned that this requirement may preclude the employers from conducting background checks.

Our longstanding policy on job qualifications and requirements has been that they must be customary; *i.e.,* they may not be used to discourage applicants from applying for the job opportunity. Including requirements that do not meet this standard would undermine a true test of the labor market. The standard for employment of H–2B workers in the U.S. is that there are no U.S. workers capable of performing such service or labor who are available for employment. In accordance with this standard, the regulations require as a condition of certification that no qualified persons who are available to perform the job can be found. For purposes of complying with this requirement, we have clarified in § 655.20(e) the meaning of qualifications and requirements. A qualification means a characteristic that is necessary to the individual's ability to perform the job in question. Such characteristics include but are not limited to, the ability to use specific equipment or any education or experience required for performing a certain job task. A requirement on the other hand, means a term or condition of employment which a worker is required to accept to obtain or retain the job opportunity, *e.g.,* the willingness to complete the full period of employment or commute to and from the worksite.

This interpretation is consistent with program history, primarily under the General Administration Letter 1–95,[13] where the State Employment Security Agencies (now SWAs) were specifically directed to reject any restrictive job requirements. To the extent an employer has requirements that are related to the U.S. workers' qualifications or availability we will examine those in consultation with the SWAs to determine whether they are normal. We recognize that background checks are legitimately used in private industry and it is not our intent here to preclude the employer from conducting such checks to the extent that the employer applies the same criteria to both H–2B and U.S. workers. However, where such job requirements are included in the recruitment materials, we reserve the right to inquire further as to whether such requirements are normal and accepted.

Some comments addressed the proposal that employer-conducted recruitment must direct all applicants to the SWA. Most commenters supported this proposal, indicating that this requirement will enhance the likelihood that workers will be fully apprised of the job opportunities. A SWA expressed concern over the availability of funding to perform the additional referral functions. We have retained this requirement because we believe that allowing SWAs to apprise job applicants of the terms and conditions of employment is an essential aspect of ensuring an appropriate labor market test. However, notwithstanding the many benefits of being referred to the job opportunity by the SWA, U.S. workers may contact the employer directly and the Final Rule requires that employers include their contact information to enable such direct contact. With respect to the SWAs' concerns regarding the availability of sufficient funding, we anticipate that the enhanced role of the SWA and the additional duties inherent in that role will be offset through the elimination of the requirement to conduct employment verification activities.

3. § 655.42 Newspaper Advertisements

We proposed to continue to require the employer to place two advertisements in a newspaper of general circulation for the area of intended employment that is appropriate to the occupation and the workers likely to apply for the job opportunity and to permit the employer to place the advertisement(s) in a language other than English where the CO determines it appropriate. However, we proposed to eliminate an employer's option to replace one of the newspaper advertisements with an advertisement in a professional, trade, or ethnic newspaper. Instead, we proposed to allow the CO the discretion to require an employer to place such an advertisement in addition to the required newspaper advertisements where such an advertisement is appropriate for the particular occupation and area of employment. We are retaining this provision as proposed with minor clarifying edits.

Several commenters agreed that we should continue to require newspaper advertisements. Others disagreed. One commenter indicated that newspaper advertisements are outdated as a recruitment source and are increasingly unavailable due to an overall reduction in newspapers with print editions. This commenter expressed regret that we did not use this rulemaking as an opportunity to replace this requirement with recruitment efforts that are more reflective of the current labor market realities and the decline in newspaper subscriptions and readership. A worker advocacy group suggested that eliminating newspaper advertising will have a minimal impact on domestic worker recruitment because very few U.S. workers search for jobs through newspapers. This commenter recommended that the regulations instead incorporate innovations which are now widely used by employers of domestic workers to recruit new employees, such as web-based advertising on job search sites and participation in job fairs. Another commenter offered as an alternative to newspaper advertising the use of road signs as more apt to appeal to workers typically employed in the H–2B program. Industry commenters also noted the expense of placing newspaper advertisements.

While several other commenters offered suggestions for disseminating information about the job opportunity, they did not indicate whether these alternatives should be considered in addition to newspaper advertisements or instead of them. Consequently, these suggestions are further discussed under § 655.46. It is worth noting, however, in response to commenters who suggested web-based advertisements, this Final Rule requires the CO to post H–2B job orders on the electronic job registry maintained by the Department in order to widely disseminate the job opportunities.

After due consideration, we continue to believe that newspapers of general circulation remain an important source for recruiting U.S. workers because they are among the means most likely to reach the broadest audiences, particularly those interested in positions typically found in the H–2B program. Newspaper advertisements are also recognized as information sources likely to generate informal, word of mouth referrals. Although we do not dispute that available statistics on subscriptions and readership favor a view that these

[13] General Administration Letter 1–95, Procedures for H–2B Temporary Labor Certification in Nonagricultural Occupations (December 31, 1995).

publications are in decline, we are not aware of any reliable means for tracking how many persons have access to a single printed newspaper before it is discarded, particularly due to their availability through community organizations, centers, public libraries, and other venues which provide important access to information for those seeking jobs. As to one commenter's proposal to require the use of road signs, we note that such a requirement would not offer appropriate substitution for newspaper advertisements, would be costly to the employer, and would be difficult to administer and enforce.

We received no comments on the proposal to prohibit substitution of ads between newspapers and trade and ethnic publications. Therefore, after considering alternatives to newspaper advertisements proposed by commenters, we have determined that no single alternative method of advertising uniformly applies to the variety of H–2B job opportunities or is likely to reach as broad a potential audience. For that reason, the Final Rule retains the proposed section in its entirety with a clarifying edit that requires the employer that placed any advertisement in a language other than English to retain the translations of such advertisements, as required by § 655.56.

4. § 655.43 Contact With Former U.S. Employees

The NPRM proposed to require the employer to contact by mail or other effective means its former U.S. workers who were employed by the employer in the same occupation and the place of employment during the previous year before the date of need listed in the *Application for Temporary Employment Certification.* This proposal expanded the 2008 Final Rule requirement for contact with former U.S. workers who have been laid off within 120 days of the employer's date of need. Under the proposal, employers are not required to contact U.S. workers who abandoned the worksite or who were terminated for cause. We have retained the proposed requirement.

We received a number of comments from labor organizations and worker advocates supporting the expanded requirement contained in the proposal. Most of the comments focused on the importance of offering access to these job opportunities to the greatest number of U.S. workers, particularly during times of high unemployment. One commenter endorsed the expanded requirement but indicated that the INA includes a preference for U.S. workers which is unlimited. According to this commenter, U.S. workers quit their jobs for a variety of reasons and should not be disqualified in this fashion.

We agree with this commenter and for that reason the NPRM proposed to limit the exception to the contact requirement only to workers who were dismissed for cause or who abandoned the worksite. For purposes of this provision, abandonment has the same meaning as it does in § 655.20(y), *i.e.,* a worker who fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer.

The same commenter raised further concerns about an employer being released from contact requirements where an employee was terminated for cause, noting experience in the program where employers use termination for cause or threat of termination as a means for retaliating against workers who were dissatisfied with illegal treatment. Under the NPRM, as well as this Final Rule, each employer must affirmatively attest that it has not engaged in unfair treatment as defined in § 655.20(n), *i.e.,* that it has not retaliated against complaining employees. Although this commenter proposes to require the employer to contact all former workers regardless of why they left employment with the employer, we have determined that such a requirement is overbroad and not necessary to ensure an appropriate test of the labor market.

Another commenter suggested that we expand the window for contacting former U.S. workers who have been laid off within 120 days before the date of need to layoffs within 180 days before the date of need. Because the provision as proposed and retained in the Final Rule requires the employer to contact all its former U.S. workers who were employed by the employer in the occupation at the place of employment in the last year, expanding the requirement to contact those laid off within 180 days will not have any effect, as those workers are already included in the provision. Therefore, we are not accepting this proposal.

A few commenters addressed the issue of protecting workers whose hours have been reduced by the employer. One commenter suggested that we redefine layoff to include a separation following a 25 percent reduction in hours in a 180-day period preceding the employer's date of need in order to expand the exposure of U.S. workers to the job opportunity. As discussed in the preamble to § 655.20(w), there is no definitive way to determine whether a worker quit because of a reduction in hours. The suggested requirement would place an unnecessary burden both on employers seeking to comply with the provision and Departmental employees seeking to verify compliance, and we therefore do not accept this recommendation.

Finally, other commenters proposed that we require the employer to contact laid off employees in accordance with the terms governing recall for the duration of the recall period provided in the collective bargaining agreement that covers the employees in the occupation and area of intended employment. We have addressed this commenter's concerns by proposing a requirement that the employer contact former employees employed by the employer during the prior year. In addition, the employer is separately obligated to comply with the terms and conditions of the bargaining agreement, to the extent that the recall provisions cover workers employed by the employer beyond the prior year, pursuant to both the agreement and the requirement at § 655.20(z).

Therefore, the Final Rule retains this provision as proposed.

5. § 655.44 Contact With Labor Organizations

We proposed to require employers to formally contact local labor organizations to inquire about the availability of U.S. workers to fill the job opportunities for which the employer seeks to hire H–2B workers where union representation is customary in the occupation or industry. We have decided to remove this requirement.

We received a number of comments on the proposal to expand the contact requirement with labor organizations beyond those employers who are party to a collective bargaining agreement (CBA). Most labor organizations and worker advocates expressed support for the proposed requirement and offered suggestions to enhance it, *i.e.,* by clarifying when union contact is required. In addition, we received comments from industry representatives and employers objecting to this requirement as burdensome and unlikely to result in a greater number of legitimate applicants who will meet the employers' temporary need for workers. Many commenters strongly objected to overall enhanced recruitment requirements, as costly, burdensome, and unlikely to result in legitimate applicants or ultimately meet the employers' need for temporary labor. Some industry commenters indicated that the customarily unionized standard was vague or ambiguous, and requested clarification. Others objected to the application of the requirement to

employers who were not party to a CBA or who did not otherwise employ unionized workers. One commenter also requested that we eliminate this section in its entirety.

We agree that the provision should be deleted. We realize that this requirement is duplicative of the activity undertaken by the SWAs in § 655.33, where the Notice of Acceptance will direct the SWAs to circulate a copy of the job order to both the State Federation of Labor in the States(s) in which work will be performed and to the local unions representing employees in the same or substantially equivalent job classification in the area of intended employment, where the occupation or industry is traditionally or customarily unionized. For this reason, we have decided to remove this requirement, but retain in this Final Rule a mechanism by which labor organizations are still contacted, increasing the exposure of such job opportunities to U.S. workers while reducing the burden on the employer. For a more detailed discussion about contacting labor organizations and the Department's request for suggestions on how to best determine the circumstances which would trigger the requirement for contacting labor organizations, please see § 655.33 above.

6. § 655.45 Contact With Bargaining Representative and Posting Requirements and Other Contact Requirements

The NPRM proposed to require employers that are party to a CBA to provide written notice to the bargaining representative(s) of the employer's employees in the job classification in the area of intended employment. Where there is no bargaining representative of the employer's employees, we proposed to require the employer to post a notice to its employees of the job opportunities for at least 10 consecutive business days in at least two conspicuous locations at the place of intended employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which work will be performed by the H–2B workers. We requested comments on the likelihood this requirement will result in finding qualified and available applicants.

The majority of comments supported this proposal. Most of the commenters indicated that keeping the bargaining representative apprised of these job opportunities will likely result in the job opportunities being available to U.S. workers. Most commenters specifically supported the new alternative requirement that the employer post notice of the job opportunity. A few commenters offered suggestions for enhancing the requirement, one of them proposing that the notice of the job opportunity be posted at each facility owned and operated by the employer. A few commenters suggested that we extend the duration of the posting. These suggestions ranged from requiring a posting through the duration of the referral period to a recommendation to increase the posting duration from 10 days to 14 days, or 30 days in some instances.

After thorough consideration of these comments, we are unable to accept the proposal which would require the posting of the notice at each facility owned and operated by the employer, as this requirement is overbroad both with respect to the burden on the employer and with respect to the administrative feasibility of oversight and enforcement. We have, however, adopted the other commenters' suggestion to extend the duration of the posting from 10 to 15 consecutive business days. This increase in duration will provide greater opportunity for the employer's workers to learn of the job opportunity and enhance the likelihood that unemployed U.S. workers will learn of the job opportunity.

We also received comments opposing this proposal. Most of these comments generally objected to the requirement to contact the bargaining representative and indicated that the contacts will not result in meaningful candidates for the job opportunities, some indicating that most referred U.S. workers cannot be relied upon to complete the duration of the certified period of employment. Other commenters specifically objected to the posting requirement. One employer association whose members are subject to special procedures indicated infeasibility of complying with the requirement due to the itinerant nature of their work.

The requirement to contact the bargaining representative(s) is intended to ensure that each employer's existing U.S. workers receive timely notice of the job opportunities, thereby increasing the likelihood that those workers will apply for the available positions for the subsequent temporary period of need and that other U.S. workers, possibly including former workers, will be more likely to learn of the job opportunities as well. The posting of the notice at the employer's worksite, in lieu of formal contact with a representative when one does not exist, is intended to ensure that all of the employer's U.S. workers are afforded the same access to the job opportunities for which the employer intends to hire H–2B workers. In addition, the posting of the notice may result in the sharing of information between the employer's unionized and nonunionized workers and therefore result in more referrals and a greater pool of qualified U.S. workers. With respect to one commenter's concern regarding the ability of an itinerant employer to comply with the posting requirement, we included in the NPRM and have retained in the Final Rule a degree of flexibility for complying with this requirement; specifically, the regulation includes the language ''or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the H–2B workers.'' This permits the employer to devise an alternative method for disseminating this information to the employer's employees, such as posting the notice in the same manner and location as for other notices, such as safety and health occupational notices, that the employer is required by law to post. The Final Rule includes such flexibility and provides that electronic posting, such as displaying the notice prominently on any internal or external Web site that is maintained by the employer and customarily used for notices to employees about terms and conditions of employment, is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. However, under this Final Rule, employers who are subject to special procedures under the program will continue to conduct recruitment activities in accordance with those procedures unless or until such a time when these procedures are modified or withdrawn by the Administrator, OFLC in accordance with the regulatory requirements under § 655.4, except to the extent that such procedures are in direct conflict with these regulations.

For all of the reasons discussed above, we are retaining the requirement that the employer contact the bargaining representative or post a notice of the job opportunity and are extending the duration for such posting from 10 to 15 business days.

In addition to requiring the employer to contact the bargaining representative or post a notice of the job opportunity, the NPRM included a proposal to, where appropriate, require the employer to contact community-based organizations to disseminate the notice of the job opportunity. Community-based organizations are an effective means of reaching out to domestic workers interested in specific

occupations. ETA administers our nation's public exchange workforce system through a series of One-Stop Career Centers. These One-Stop Centers provide a wide range of employment and training services for workers through job training and outreach programs such as job search assistance, job referral and job placement services, and also provide recruitment services to businesses seeking workers. Community-based organizations with employment programs including workers who might be interested in H–2B job opportunities have established relationships with the One-Stop Career Center network. The One-Stop Center in or closest to the area of intended employment will be, in most cases, the designated point of contact the CO will give employers to use to provide notice of the job opportunity. This provides the employer with access not only to the community-based organization, but to a wider range of services of assistance to its goal of meeting its workforce needs. This contact is to be made when designated specifically by the CO in the Notice of Acceptance, as appropriate to the job opportunity and the area of intended employment. We have decided to retain this provision as proposed with minor revisions.

We received several comments on this proposal. The majority of commenters expressed strong support for the requirement that the employer contact community-based organizations, indicating that these organizations in many cases possess specialized knowledge of local labor market conditions and practices, and are in the position to assist with recruitment efforts, thus ensuring a complete test of the labor market as well as assist the CO with identifying potential problems with the offered terms and conditions of employment.

Commenters opposing this proposed requirement suggested that it will not result in meaningful applicants for the job opportunity. We note that, not unlike additional recruitment, contact with community-based organizations is intended to broaden the pool of potential applicants and assist the many unemployed U.S. workers with finding meaningful job opportunities. These organizations are especially valuable because they are likely to serve those workers in greatest need of assistance in finding work, particularly with respect to H–2B occupations that require little or no specialized knowledge. Although we will not require each employer to make this type of contact, we have determined that keeping this provision in the Final Rule will assist with fulfilling the intent of the H–2B program and enhancing the integrity of the labor market test. Therefore the Final Rule retains the requirement that the employer, where ordered by the CO, contact community-based organizations.

7. § 655.46 Additional Employer-Conducted Recruitment

Where the CO determines that the employer-conducted recruitment, described in §§ 655.42 through 655.45, is not sufficient to attract qualified U.S. workers, the proposed rule authorized the CO to require the employer to engage in additional recruitment activities. In addition to proposing that the CO require additional recruitment, we solicited suggestions from the public on the recruitment means most suitable for the CO to require. We also proposed that the CO would specify the documentation or evidence that the employer must maintain as proof it met the additional recruitment step(s). We are retaining this provision as proposed with minor clarifying edits.

We received many comments on this proposal. The majority of commenters expressed strong support for the proposal and indicated that the additional recruitment requirement is particularly welcome in times of high unemployment because it will ensure that U.S. workers have the broadest exposure to these job opportunities. In contrast, several other commenters objected to the proposal on the ground that it provides the CO with potentially unfettered discretion to impose additional requirements on employers; some requested clarification of when the additional recruitment will take place.

We also invited comments on the proposed additional recruitment methods, including examples of the types of recruitment typically conducted in specific industries, occupations, or job classifications. Several commenters provided suggestions for potential recruitment sources such as the use of the employer's Web site, job search Web sites (such as Craig's List or Monster.com), staffing agencies, and other outreach efforts. Some commenters also suggested recruitment efforts they use or have used in the past to recruit U.S. workers. However, none of the commenters provided information about the types of recruitment that are typically conducted in specific industries. We thank the commenters for their input. Where appropriate, the CO will draw upon these suggestions when making a determination about what types of additional recruitment are appropriate. We have made a clarifying edit in this section, adding the word additional to indicate that CO-ordered efforts to contact community-based organizations and/or One-Stop Career Centers are in addition to the requirements in §§ 655.16 and 655.45.

A few comments reflected confusion over the requirement, and encouraged us to expand it beyond areas of substantial unemployment. Others commenters requested that we revisit the requirement and proposed alternatives for redefining an area of substantial unemployment.

Our intention in requiring additional recruitment including, where appropriate, in areas of substantial unemployment, is predicated on the belief that more recruitment will result in more opportunities for U.S. workers. In addition, we recognize that the increased rate of innovation in the arena of technology, including its implications for communication of information about job opportunities, is changing the way many U.S. workers search for and find jobs. In part due to these changes, the inclusion of this requirement is intended to allow the CO flexibility to keep apace with the ever-changing labor market trends.

In response to comments about not limiting additional recruitment only to job opportunities located in areas of substantial unemployment, we agree that the recruitment sources the CO uses should go beyond just the areas of substantial unemployment, which is why we only listed areas of substantial unemployment as one example of an additional source and why we solicited information about other available sources. The requirement as proposed and retained is intended to provide the CO with discretion to order additional positive recruitment whenever the CO deems it to be appropriate. This discretion is also not an absolute requirement but permits us to ensure the appropriateness and integrity of the labor market test and determine the appropriate level of recruitment based on the specific situation. The COs, with advice from the SWAs which are familiar with local employment patterns and real-time market conditions, are well-positioned to judge where additional recruitment may or may not be required as well as the sources that should be used by the employer to conduct such additional recruitment.

For example, it may be reasonable to require additional recruitment for a job that requires little training or experience in an area of substantial unemployment, since a larger group of available workers would be qualified for the job. While the employer will be required to conduct all the recruitment efforts required under this section and §§ 655.42–655.46 in certain circumstances, in other

circumstances, the CO may determine that such additional efforts are unlikely to result in meaningful applications for the job opportunity. In each instance, the CO, often in consultation with the SWAs, will carefully weigh the projected benefits of additional recruitment to potential U.S. applicants against the benefit the employer is seeking through certification.

We also note that OIG's October 17, 2011 report recommended the Department reassess the existing recruitment provisions that require employers with itinerant positions subject to special procedures to actively recruit only in the State of initial employment. While recruitment requirements prior to this Final Rule did not necessarily limit recruitment of workers to just one State, neither did those provisions require recruitment outside the area of intended employment, in most cases. This Final Rule expands required recruitment activity, when appropriate for labor market test quality, to additional areas and sources likely to result in U.S. worker applicants.

Although we recognize that some commenters may be concerned over the discretion the CO has to order additional positive recruitment, as discussed above, such discretion is necessary to permit the CO the flexibility to ensure an adequate test of the labor market. However, any additional positive recruitment will be conducted in addition to, and occur within the same time period as the circulation of the job order and the other mandatory employer-conducted recruitment described above, and will not result in any delay in certification. While we may not endorse a specific commercially-available publication or Web site, the sources used by the CO will include, but will not be limited to: additional print advertising; advertising on the employer's Web site or another Web site; contact with additional community-based organizations that have contact with potential worker populations; additional contact with labor unions; contact with faith-based organizations; and radio advertisements. When assessing the appropriateness of a particular recruitment method, the CO will take into consideration all options at her/his disposal, including relying on the SWA experience and expertise with local labor markets, and where appropriate, will opt for the least burdensome and costly method(s).

8. § 655.47 Referrals of U.S. Workers

We proposed to require SWAs to refer for employment individuals who have been informed of the details of the job opportunity and indicate that they are qualified and will be available for employment. We also eliminated the requirement that the SWAs conduct employment (I–9) eligibility verification. We are retaining the provision as proposed in part and revising the proposed provision in other part.

We received three comments on this proposal to eliminate the requirement that the SWAs conduct employment (I–9) eligibility verification. One commenter indicated a preference that the SWAs continue to conduct employment eligibility verification, while another supported its elimination. None of these commenters provided a rationale for its opinion.

In light of limited resources, we have determined that the requirement that SWAs conduct employment eligibility verification of job applicants is duplicative of the employer's responsibility under the INA. In addition, the INA provides that SWAs may, but are not required to, conduct such verification for those job applicants they refer to employers. DHS regulations permit employers to rely on the employment eligibility verification voluntarily performed by a State employment agency in certain limited circumstances.

We also received several comments regarding the proposal to require SWAs to refer for employment individuals who have been informed of the details of the job opportunity and who indicate that they are qualified and will be available for employment. Some commenters, primarily worker advocates and labor organizations, commended the Department for ensuring that U.S. workers are provided with the opportunity to be fully apprised of the job opportunity prior to being referred to the employer. These commenters indicated that this will lead to greater opportunities for U.S. workers as well as curb program abuse.

Other commenters focused more on the proposed role of the SWAs in referring U.S. applicants to the employer. One commenter understood the provision as proposed to require SWAs to inform prospective U.S. workers of the details of the job opportunity and to screen them for qualifications and availability. Other commenters, namely employer associations and employers, expressed concern regarding this provision, particularly in the context of the referral period proposed in the NPRM, indicating that it will result in an increase of disingenuous applicants or unqualified workers replacing available and qualified H–2B workers that the employer already secured under an arduous process. Two State agencies expressed some uncertainty over the scope of their duties in the context of this proposal and their hope that we will provide them with resources to conduct additional employee screenings and referrals resulting from the new recruitment requirements.

As stated in the NPRM, it is our intention that the elimination of the employment eligibility requirement will allow the SWAs to focus their staff and resources on ensuring that U.S. workers who come to them are apprised of job opportunities for which the employer seeks to hire H–2B workers, which is one of the basic functions of the SWAs under their foreign labor certification grants, and to ensure such workers are qualified and available for the job opportunities. This does not mean that every referral must be assisted by SWA staff to be apprised of the job opportunity. To the contrary, many H–2B referrals are not staff-assisted but are instead self-referrals and we have no intention of interfering with the current processes established by most SWAs to handle these job orders. However, to the extent that staff are directly involved in a referral, we expect that the referrals made would be only of qualified workers. We do not expect this to be an additional burden on SWA staff.

Moreover, we do not presume that the judgment of the SWAs as to an applicant's qualifications is irrebuttable or a complete substitute for the employer's business judgment with respect to any candidate's suitability for employment. However, to the extent that the employer does not hire a SWA referral who was screened and assessed as qualified, the employer will have a heightened burden to demonstrate to us that the applicant was rejected only for lawful, job-related reasons.

With respect to the comments expressing concerns over the ability of the employer to rely on U.S. workers completing the duration of the certified period of employment, the SWAs will be required to, as part of the screening process, ascertain that the unemployed U.S. applicants who request referral to the job opportunity are sufficiently informed about the job opportunity, including the start and end dates of employment and that they commit to accepting the job offer if extended by the employer. However, as discussed under § 655.57, in recognition that some employers may nonetheless require relief in the form of replacing U.S. workers who fail to show up or complete the certified period of employment, we have developed a

redetermination process to accommodate these employers.

9. § 655.48 Recruitment Report

Consistent with the requirements of the 2008 Final Rule, we proposed to continue to require the employer to submit to the Chicago NPC a signed recruitment report. Unlike the 2008 Final Rule, however, we also proposed to require the employer to send the recruitment report on a date specified by the CO in the Notice of Acceptance instead of at the time of filing its *Application for Temporary Employment Certification.* This change accommodates the proposed recruitment model under which the employer does not begin its recruitment until directed by the CO in the Notice of Acceptance. The proposed rule detailed the information the employer is required to include in the recruitment report, such as the recruitment steps undertaken and their results, as well as other pertinent information. In addition, we proposed to require the employer to update the recruitment report throughout the referral period to ensure that the employer accounts for contact with each prospective U.S. worker. The proposed rule does not require the employer to submit the updated recruitment report but does require the employer to retain it and make it available in the event of a post-certification audit, a WHD or other Federal agency investigation, or upon request by the CO. We are retaining the provision as proposed with minor clarifying edits.

We received a number of comments offering strong support for the requirement that employers document that they have conducted the required recruitment efforts. One commenter suggested that we expand the recruitment report and require the employer to list all U.S. and foreign-born applicants for the job opportunity. The provision, as proposed and retained, requires the employer to provide the name and contact information of each U.S. worker who applied or was referred for the job opportunity. This reporting allows us to ensure the employer has met its obligation and to meet our responsibility to determine whether there were insufficient U.S. workers who are qualified and available to perform the job for which the employer seeks certification. In addition, when WHD conducts an investigation, WHD may contact U.S. workers listed in the report to verify the reasons given by the employer as to why they were not hired, where applicable. While we do not foreclose the possibility of expanding the content of the recruitment report in the future, requiring that employers identify all applicants, including foreign workers, would impose a heavy burden on employers and is not necessary for carrying out our responsibilities under the H–2B program.

Some commenters objected to the record-keeping requirements, generally and as included in the proposed rule. Because these objections are not specific to the recruitment report, we address them in the discussion of document retention requirements. Other commenters suggested that the recruitment report be made available to the public so they may provide input to the CO on the contents before a Final Determination is made on the *Application for Temporary Employment Certification.* For the reasons discussed under § 655.63, we are not accepting this suggestion at this time. However, we continue to reserve the right to post any documents received in connection with the *Application for Temporary Employment Certification* and will redact information accordingly. Therefore we are retaining this provision as proposed with a minor clarifying edit that is consistent with requirements under § 655.43, indicating that, where applicable, the employer's recruitment report must contain confirmation the employer posted the job availability to all employees in the job classification and area in which the work will be performed by the H–2B workers.

G. Labor Certification Determinations

1. § 655.50 Determinations

We proposed to retain the same requirements under this provision as proposed in the 2008 Final Rule. We are retaining this provision as proposed with minor clarifying edits.

We received no comments on the substance of this provision. However, we received a number of comments critical of our failure to provide processing timeliness or a deadline for issuing a final determination. One commenter referred to our past performance before the attestation-based model in the 2008 Final Rule and argued that the processing of applications under the pre-2008 Final Rule system involved delays and that we have fallen short of our processing targets even under the 2008 Final Rule. This commenter, along with others, proposed that we commit to a deadline such as a return to the 60 days discussed in the preamble of the 2008 Final Rule or 30 days.

Unlike the other programs we administer, the INA does not provide a statutory deadline for processing H–2B applications. In order to maximize integrity in the H–2B program it is imperative that we take the time necessary to carefully review each application and to make certain that each application we review represents a legitimate need for temporary workers. We will be implementing a completely reengineered program with a new registration process, new recruitment requirements, and new obligations that must be reviewed. OFLC has no baseline for these processes and therefore cannot predict at this time the likely processing time parameters. While we anticipate that registration, with its emphasis on the determination of temporary need, will decrease application adjudication times, we cannot know to what extent that additional process will streamline processing times. However, as is our practice, we will make every effort to timely process each application and to keep employers and other program users apprised of current processing times.

In addition, we received a few comments requesting that third parties be allowed to participate in the adjudication of a particular *Application for Temporary Employment Certification* or the job order. Some of these comments are related to the public availability of the *Application for Temporary Employment Certification* and are discussed elsewhere in this Final Rule.

Responsibility for the adjudication of each *Application of Temporary Employment Certification* rests with the Secretary, who has delegated that responsibility to OFLC. Historically, we have never permitted third parties to participate in the adjudication of labor certification decisions. Such involvement would create operational difficulties that would make it impossible to process these applications in a timely fashion. For that reason, we do not adopt the commenters' suggestion. However, we would certainly accept, as we do now, any information bearing on the application from any interested party.

For the reasons discussed above, we are retaining this provision as proposed with a minor clarifying edit to paragraph (b) of the regulation that replaces ''grant, partially grant or deny'' with ''certify or deny.'' This clarification was based on our determination that the word certify encompasses both determinations to certify or partially certify an *Application for Temporary Employment Certification.*

2. § 655.51 Criteria for Certification

In the majority of cases, the certification determination will rest on

a finding that the employer has a valid *H–2B Registration* and has demonstrated full compliance with the requirements of this subpart. As under the 2008 Final Rule, in ensuring that the employer meets its recruitment obligations with respect to U.S. workers, the CO will treat as available all those individuals who were rejected by the employer for any reason other than a lawful, job-related reason. We are retaining this provision as proposed with a minor clarifying edit.

We received only one comment specific to the proposed regulatory provision. This commenter encouraged us to add a clause to the certification criteria indicating that lawful job-related reasons for rejecting U.S. workers do not include requirements which are applied to U.S. workers but not to H–2B workers.

As discussed elsewhere in this Final Rule, these regulations expressly prohibit an employer from offering preferential treatment to H–2B workers. That obligation extends to all aspects of the H–2B program, including recruitment and consideration of U.S. workers. Although an employer may not reject U.S. workers based on requirements that would not otherwise disqualify an H–2B worker, we do not believe that a change in this particular provision is needed to clarify this requirement.

Additionally, we proposed to clarify that we will not grant certifications to employers that have failed to comply with one or more sanctions or remedies imposed by final agency actions under the H–2B program. We did not receive any comments on this proposal. Accordingly, we are retaining this section as proposed except that we have clarified that the employer must comply with criteria necessary to grant the certification, rather than all program criteria. This clarification was necessary, as the criteria for certification cannot reasonably encompass the employer's future compliance, as contemplated by some of the program requirements. Such compliance is addressed through post-certification audits, integrity measures and enforcement activities.

3. § 655.52 Approved Certification

We proposed that the CO use next day delivery methods, and preferably, electronic mail, to send the Final Determination letter to the employer. We are doing so in an effort to expedite the transmittal of information and introduce efficiency and cost savings into the application determination process. The proposed rule also provided that the CO will send the approved certification to the employer, with a copy to the employer's attorney or agent, if applicable. This is a departure from the 2008 Final Rule. This change in procedure has resulted from years of OFLC program experience evidencing complications in the relationship between employers and their agents or attorneys. Because the employer must attest to the assurances and obligations contained in the *Application for Temporary Employment Certification* and be ultimately responsible for upholding those assurances and obligations, the employer should receive and maintain the original approved certification. We are retaining this regulatory provision, as proposed with one minor clarification.

We received only one comment of general approval about the proposal to use next day delivery and no comments addressing the proposal to send the approved certification to the employer.

For the reasons above, we are retaining the provisions as proposed with one minor edit clarifying that when and if the *Application for Temporary Employment Certification* is permitted to be filed electronically, the employer must print, sign and retain the approved temporary labor certification.

4. § 655.53 Denied Certification

The NPRM proposed to retain the general provisions on denying certifications from the 2008 Final Rule, except that we proposed that the CO will send the Final Determination letter by means guaranteeing next day delivery to the employer, with a copy to the employer's attorney or agent. Under the proposal, the Final Determination letter will continue to state the reason(s) that the certification was denied, cite the relevant regulatory provisions and/or special procedures that govern, and provide the applicant with information sufficient to appeal the determination. We received no comments on this proposal and retain the provision as proposed with a minor clarifying edit that electronic mail is encompassed in means normally assuring next day delivery.

5. § 655.54 Partial Certification

The NPRM proposed to retain the 2008 Final Rule provision explicitly providing that the CO may issue a partial certification, reducing either the period of need or the number of H–2B workers requested, or both. The proposed rule clarified that the CO may reduce the number of workers certified by subtracting the number of qualified and available U.S. workers who have not been rejected for lawful job-related reasons from the total number of workers requested. The Final Rule retains this provision as proposed.

We received few comments on this proposal. The majority of commenters supported the requirement that the employer not be permitted to hire H–2B workers unless it has demonstrated that no qualified U.S. workers are available. In addition, most commenters supported the proposal that an employer must consider for employment and hire all qualified and available U.S. workers who are referred to the employer within the referral period.

Many industry commenters expressed concern over the need to have a stable workforce throughout their certified period of need. One commenter requested that we provide a re-certification process to allow employers to hire H–2B workers when U.S. workers become unavailable. These commenters expressed significant concerns over the viability of their businesses if, after expending significant resources to hire H–2B workers, those workers are displaced or not hired due to the requirement that the employer hire each U.S. worker who is qualified and available for employment and the U.S. workers hired do not report for work or fail to complete the work contract period. We agree with these commenters and have added a new § 655.57 to address this issue.

6. § 655.55 Validity of Temporary Employment Certification

We proposed to retain the provision in the 2008 Final Rule that an approved temporary labor certification is only valid for the period, the number of H–2B positions, the area of intended employment, the job classification and specific services or labor to be performed as provided on the *Application for Temporary Employment Certification.* While the proposed rule continued to prohibit the employer from transferring the labor certification to another employer, we proposed to allow the employer to transfer the approved labor certification to a successor in interest in case of a merger or acquisition where the new employer is willing to continue to employ the workers certified and take on all of the legal obligations associated with the labor certification. We are retaining this provision as proposed, with minor clarifying edits.

Most commenters supported the proposal to limit the validity of the labor certification as proposed. We received one comment suggesting that the transfer to a successor in interest be limited to legally documented mergers

or acquisitions. Another commenter indicated that the prohibition on transfers will promote appropriate recruitment of U.S. workers and prohibit employers from skirting program requirements.

Similar to the prohibition on transfers of an *H–2B Registration,* we believe that limiting the validity of each certification to the employer to which it was issued is essential to ensuring program integrity. As we have stated elsewhere, we consider it our obligation to protect a labor certification against being treated as a commodity; limiting its use to the employer who applied for it achieves that protection. Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity; Final Rule, 72 FR 27904, 27918, May 17, 2007. As discussed in the preamble to the proposed rule, we intend to limit transfers to the successor in interest solely to legally documented business transactions such as mergers or acquisitions, whereby the new owner assumes all obligations and liabilities of the employer who originally obtained the certification.

Therefore, we are retaining this provision as proposed except that we have clarified that each temporary labor certification is valid for the period approved on the *Application for Temporary Employment Certification,* including any approved modifications.

7. § 655.56 Document Retention Requirements of H–2B Employers

We proposed to add a section that delineates all of the document retention requirements, including the period of time during which documents must be retained. These retention requirements were included solely under their individual sections under the 2008 Final Rule. The document retention requirements apply to all employers who file an *Application for Temporary Employment Certification,* regardless of whether such applications have been certified, denied, or withdrawn. The proposed provision outlines the documents that an employer must retain. We are keeping this portion of the provision as proposed, with a minor expansion to include any documents that must be retained by the employer resulting from revisions in the Final Rule, as well as other minor clarifying edits, including expressing what the NPRM already implied, *i.e.,* that the documents and records retained under this section must be made available to the Department as well as other Federal agencies in the event of an audit or investigation.

In addition, we proposed to require employers to make these documents and records available to the Administrator, OFLC within 72 hours following a request. In response to comments, we have made certain clarifying edits to this provision, but are retaining most of the substantive aspects as proposed.

The majority of commenters supported this proposal because it requires employers to document, rather than merely attest to, compliance. One commenter expressed strong support for this requirement and suggested that we expand it to include records on the amounts spent by the employer for transportation, subsistence, visa fees, and other costs which the employer is prohibited from shifting to its workers. Another commenter requested the record keeping requirement be expanded to include records about recruiting fees, including amounts and recipients.

Some commenters objected to the requirement, as generally unnecessary or burdensome in terms of cost and effort required by the employer, while other commenters offered suggestions for enhancing or curbing the requirements related to specific records such as payroll/earning records. Where the substance of those comments is specific to a particular provision in the proposed rule, we will address it there.

We agree with commenters supporting this proposal. The records that the employer is required to retain are invaluable to ensuring program integrity. We use them both in making current determinations, where needed, and in evaluating any future *Application for Temporary Employment Certification.* These records permit us to ensure that the employer complied with the assurances and obligations of the H–2B labor certification program. We believe that the proposed recordkeeping requirement already encompasses the commenters' request to expand that requirement to information about costs for subsistence, transportation, visa fees, or recruiting fees. For example, under § 655.20(i), an employer is required to keep accurate and adequate records with respect to the workers' earnings. This obligation encompasses records of the amount of any and all deductions taken from the workers' wages and additional payments to the worker. For clarity, as described below, we added a new paragraph (c)(6) specifically addressing transportation and subsistence. Furthermore, this section in paragraph (c)(9) requires the employer to retain copies of all contracts with agents or recruiters, which will provide additional information regarding payments involved in these contracts. These records, which may be maintained electronically, together with the requirement to keep accurate earning statements, will assist us in determining whether the employer has paid or provided for all other costs required in the H–2B employment. Requiring additional documentation is unnecessary.

We disagree with the commenters who opposed the document retention requirement. Document retention has been an integral part of the H–2B program, and the proposed regulation is substantively similar to the existing requirement under the 2008 Final Rule. Moreover, it is essential to the performance of program integrity activities.

One commenter objected to the requirement that the employer make such records available within a 72-hour period, indicating that the requirement is burdensome, or impossible to comply with based on the nature of the employer's business. This commenter further requested clarification of when the timeframe starts and asked us to indicate whether electronic records may be maintained. Other commenters offered suggestions for the timeframe for document retention, one suggesting that all records should be retained for a year after any *H–2B Registration* expires and others proposing a period of time based on the end of the job opportunity.

We revised paragraph (d) of this section to clarify that the requirement to produce records within a 72-hour period is to produce such records to the Administrator, WHD for enforcement purposes, rather than Administrator, OFLC. When the Administrator, OFLC makes a request to make records available, an employer must comply with the timeframes in the provision governing the request, *e.g.,* Request for Information, Notice of Deficiency, Revocation or Debarment. Additionally, OFLC will continue to include in the correspondence requesting records the deadline by which they must be produced. This timeframe will correspond to the regulatory requirement for the type of request. For example, in an audit letter under § 655.70, the CO will specify a date, not to exceed 30 calendar days from the date of the audit letter, to provide a response, including any documents which are requested in the audit letter.

Finally, we received several comments addressing the 3-year requirement for document retention. One commenter expressed support for the 3-year retention requirement noting that the familiar requirement will make compliance easy for employers. Another commenter opposed the 3-year retention

requirement for applications that have been withdrawn or denied. One commenter indicated that the retention period should be 1 year after the expiration of the H–2B registration, while another expressed concerns that the 3-year retention requirement may permit an employer with a 3-year certification to destroy records before the completion of the job; this commenter suggested that employers be required to maintain records and documents for at least 1 year after the completion of the job. Finally a commenter suggested a longer retention requirement of 5 years.

In response to these comments, we wish to clarify that employers must maintain all records required in this section for the period of 3 years after the *Application for Temporary Employment Certification* is adjudicated or from the date the CO receives a letter of withdrawal. The Final Rule also includes a separate requirement in § 655.11(i) that the employer retain documents pertaining to the *H–2B Registration* for a 3-year period after the end of the validity of the *H–2B Registration.* We have concluded that the two document retention requirements taken together adequately address the need to document compliance with program requirements. In addition, the regulatory scheme does not allow that records be destroyed until the certified period of employment has concluded. Although we recognize that the employer may have a temporary need based on a one-time occurrence which lasts up to 3 years, the Department will not grant a 3-year certification but will require the employer to file additional *Applications for Temporary Employment Certification* and conduct a labor market test where the period of employment exceeds 9 months. Each application filed by the employer will trigger a new document retention requirement and therefore ensure that records are available to assist the Department in ascertaining compliance with all program requirements. The Department believes, however, that a longer requirement such as the suggested 5 years is not necessary to ensure program integrity and would be inconsistent with document retention requirements in other labor certification programs. Finally, the Department disagrees with a commenter who opposed the 3-year retention requirement for withdrawn or denied applications. Based on our program experience, we have concluded that requiring all employers to retain this information will bolster program integrity and aid in the enforcement of program obligations, particularly since many employers are repeat filers in the H–2B program. For these reasons we are retaining the 3-year retention period, as proposed.

To reflect changes made to § 655.20, we have added a new subparagraph (c)(6) to this section to require employers to retain records of reimbursement of transportation and subsistence costs incurred by the worker. Additionally, in response to comments and changes made to § 655.9, we have made edits to subparagraph (c)(9) of this section to indicate that the retention of written contracts with agents or recruiters must also include the list of the identities and locations of persons hired by or working for the recruiter and their agents or employees.

Finally, the provision in the Final Rule also reminds the employer that if and when the *Application for Temporary Employment Certification* and the *H–2B Registration* are permitted to be filed electronically, the employer must print, sign, and retain each adjudicated *Application for Temporary Employment Certification* and the *H–2B Registration* including any approved modifications, amendments, or extensions.

8. § 655.57 Determinations Based on the Unavailability of U.S. Workers

As discussed earlier in this preamble, several commenters expressed significant concerns over the viability of their businesses if, after expending significant resources to hire H–2B workers, those workers are displaced or not hired due to the requirement that the employer hire each U.S. worker who is qualified and available for employment and the U.S. workers hired do not report for work or fail to complete the work contract period. Specifically, one commenter requested that we provide a re-certification process to allow employers to hire H–2B workers when U.S. workers become unavailable. We agree with these commenters and have added this provision to provide an option to employers to address their workforce needs in the continuing absence of U.S. workers.

Under the Final Rule, as under the NPRM, an employer is required to hire all qualified and available U.S. workers who are referred to it by the SWA during the referral period specified in § 655.40(c). Where the employer's request for H–2B workers is reduced by the number of qualified and available U.S. workers or denied because the employer has hired U.S. workers for all of the positions it seeks to fill and the U.S. worker(s) subsequently become unavailable, the employer has the option to voluntarily contact the SWA for additional referrals of U.S. workers. While this is not a requirement, the SWA may be able to provide the employer with replacement workers without an additional request to the CO. However, we recognize that there are circumstances where an employer's U.S. workers fail to report to work or quit before the end of the certified period of employment, and it is at times not viable for an employer to seek additional workers from the SWA. We have determined that it is prudent to provide an avenue for relief for those employers. In the event that some or all of the employer's U.S. workers become unavailable, we are adopting a regulation similar to that in the H–2A program which provides the CO with the authority to issue a redetermination based on the unavailability of U.S. workers, upon a timely and proper request by the employer. Under this added section, the employer must make a written request directly to the CO for a new determination by electronic mail or other appropriate means, such as a private courier. The request must be accompanied by a signed statement confirming the employer's assertion and providing reasons for the nonavailability (*e.g.,* information regarding the departure of the workers after one day, the fact they never showed up for work on the first day.). If the employer has not previously provided notification of abandonment or termination of a U.S. worker under 655.20(y), the employer will be required to include in the signed statement the name and contact information for each U.S. worker who has become unavailable. Before granting the employer's request, the CO will contact the SWA in an attempt to locate qualified replacement workers who are available or are likely to become available for the job opportunity. If no such workers are found, the CO will grant the employer's request for a new determination. The employer may appeal a denial of its request under the administrative appeal process in § 655.61. For these reasons, we are adding this new section, Request for determination based on unavailability of U.S. workers, to address the concerns raised by commenters.

H. Post Certification Activities

1. § 655.60 Extensions

In the proposed rule, we identified instances when an employer will have a reasonable need for an extension of the time period that was not foreseen at the time the employer originally filed

the *Application for Temporary Employment Certification.* This provision provides flexibility to the employer in the event of such circumstances while maintaining the integrity of the certification and the determination of temporary need.

We proposed that the employer make its request to the CO in writing and submit documentation showing that the extension is needed and that the employer could not have reasonably foreseen the need. Extensions would be available only to employers whose original certified period of employment is less than the maximum period allowable in this subpart and under DHS H–2B regulations. Extensions differ from amendments to the period of need because extensions are requested after certification, while amendments are requested before certification. Extensions will only be granted if the employer demonstrates that the need for the extension arose from unforeseeable circumstances, such as weather conditions or other factors beyond the control of the employer (including unforeseen changes in market conditions). We have decided to keep this provision as proposed, with a few edits to remove redundancy related to the maximum period allowable through extension and employer obligations and otherwise clarify the provision.

A comment received from a labor organization suggested that the words reasonably unforeseeable, when referring to changes in market conditions, should replace unforeseeable. We have determined that adding the term reasonably would not confer any additional clarity as it is the CO who determines whether the employer has provided a sufficient reason for the extension based on the facts of the specific case and evidence presented.

2. § 655.61 Administrative Review

The Administrative Review provision in the NPRM was substantially the same as the 2008 Final Rule, with a proposed adjustment in the timeframe from 5 to 7 business days each for the submission of the appeal file by the CO, the submission of a brief by the CO's counsel, and the issuance of a decision by BALCA. We are adopting the provision of the NPRM without change in this Final Rule.

Two commenters recommended that we provide de novo review in the administrative review process. As proposed in the NPRM, a request for administrative review may contain only legal arguments and such evidence as was actually submitted to the CO before the date the determination was issued. By contrast, de novo review would permit the parties to add additional information for the BALCA to consider beyond what was actually submitted to the CO. After considering this issue, we decline to change the administrative process to provide de novo review. Given that an employer is provided with multiple opportunities to submit information and respond to the CO at each step of the labor certification adjudication process, record review provides employers with a fair and efficient process to appeal the CO's determinations. De novo review, if anything, provides employers with less of an incentive to submit the required information or documentation when requested. Additionally, establishing de novo proceedings would further lengthen the adjudication process and require additional resources that may produce a backlog in H–2B appeals. Furthermore, the regulations have limited BALCA review to the record considered by the CO for the past 18 months without any problems, and we believe continuing with this process is unlikely to cause problems in the future, for the reasons mentioned previously.

One of these commenters also recommended that the rule require us to include all information relating to a particular matter in the administrative file. The commenter stated that placing all material relating to a particular matter in the administrative file as a matter of course would enhance public perception of the fairness of the process and would likely produce better outcomes on the merits. The CO already includes in the administrative file any documents that it receives from the employer and third parties that pertain to the adjudication of the certification. Therefore, we do not believe that it is necessary to add to the regulatory language a requirement that the CO include in the administrative file all information that any party states is related to particular matter in the administrative file.

This commenter also requested modification of the rule to establish that appellate proceedings are adversary proceedings for the purposes of the Equal Access of Justice Act (EAJA). However, Federal courts have recognized the EAJA is a waiver of the sovereign's traditional immunity from claims for attorneys' fees and therefore must be construed strictly in favor of the U.S. *Ruckelshaus* v. *Sierra Club,* 463 U.S. 680, 103 S.Ct. 3274 (1983); *Fidelity Construction Co.* v. *United States,* 700 F.2d 1378, 1385 (Fed. Cir. 1983). In *Smedberg Mach. & Tool, Inc.* v. *Donovan,* 730 F.2d 1089 (7th Cir. 1984), the court specifically found that labor certification review proceedings are not adversary adjudication for the purposes of the EAJA. While the *Smedberg* decision dealt with the administrative review process for the permanent labor certification program, it is just as applicable to the H–2B program. The court found that unless an agency hearing is statutorily mandated, the EAJA does not provide for the award of attorney fees to the prevailing party. See *Smedberg,* 730 F.2d at 1092. Because the INA does not mandate an agency hearing for the granting or denial of H–2B labor certifications, EAJA does not provide for attorneys fee awards to plaintiffs who prevail in those proceedings. Therefore, we decline to establish an H–2B appeal is an adversary proceeding.

We received a comment about the provision which increased the time for the CO to assemble and submit the appeal file in § 655.61(b) from 5 business days to 7 business days. The commenter recommended that the rule require the submission within 3 business days. However, 3 business days is not, in many cases, enough time to assemble, review and submit an appeal file, particularly when coupled with the CO's continuing responsibility to adjudicate other pending applications within a short timeframe and to prepare appeal files for other cases on appeal. Furthermore, 7 business days is an administratively efficient timeframe, consistent with similar deadlines for the Chicago NPC in our other labor certification programs. Therefore, we decline to change the deadline to assemble and submit the appeal file to 3 days and instead maintain the 7 business day deadline proposed.

One commenter recommended that we establish procedures which would allow for intervention by workers and/or organizations of workers to participate in ALJ hearings. For the reasons provided in the general discussion of integrity measures later in this preamble, we decline to accept this suggestion.

3. § 655.62 Withdrawal of an Application for Temporary Employment Certification

Under the proposed rule, an employer may withdraw an *Application for Temporary Employment Certification* before it is adjudicated. We are retaining this provision as proposed with one clarifying edit. We received one comment on the withdrawal provision. This commenter encouraged us to adopt additional language providing that if an employer withdraws a pending H–2B *Application for Temporary Employment Certification,* any U.S. workers hired or

in corresponding employment must still receive the benefits and protections provided under that *Application for Temporary Employment Certification.* We decline to accept this suggestion, as we do not have the authority to enforce the benefits and protections provided under an *Application for Temporary Employment Certification* if there is no final determination. Presumably, an employer can withdraw its application the day after submission, at which point no recruitment has begun. Hence, we distinguish between a request to withdraw an *Application for Temporary Employment Certification* before adjudication, where the employer makes a decision not to participate in the program and is likely to have not completed the recruitment process, and a request to withdraw an adjudicated, *i.e.* certified (full or partial) or denied, *Application for Temporary Employment Certification* where the employer has already initiated the recruitment process on which the CO based the determination. Where the CO has already made a final decision on an employer's *Application for Temporary Employment Certification,* regardless of whether it is denied or certified, and where the employer requests withdrawal after such adjudication, we have maintained as proposed, within the integrity measures of both 29 part 503 and this subpart, that the employer is bound by the assurances and obligations of the *Application for Temporary Employment Certification* to any U.S. worker hired or any corresponding workers under the positions listed in the *Application for Temporary Employment Certification.* Therefore, we are retaining this provision with one clarifying change. Although implied in the NPRM, we have included language in the regulations to clarify that a withdrawal of an *Application for Temporary Employment Certification* must be requested in writing.

4. § 655.63 Public Disclosure

This proposed section codifies our practice of maintaining, apart from the electronic job registry, an electronic database accessible to the public containing information on all employers that apply for H–2B labor certifications. The database will continue to include information such as the number of workers the employer requests on an application, the date an application is filed, and the final disposition of an application. The continued accessibility of such information will increase the transparency of the H–2B program and process and provide information to those currently seeking such information from the Department through FOIA requests.

The comments that were received in regard to public disclosure were requests that we include additional information or documentation. These comments are addressed below.

We received several suggestions as to the types of documents that should be posted on the OFLC Web site or electronic job registry. One labor organization requested that all information received from an employer seeking registration in the H–2B program be placed on an online database, in order to facilitate private enforcement of the regulations. An advocacy group also stated that program integrity would be better served by expanding the database to include all of the materials that the NPC receives from employers. While we are committed to transparency, we have determined that there are several reasons why it may not be appropriate or feasible to disclose every document to the public. Again, many of the documents now required to be submitted under the Final Rule may contain privileged information, which for legitimate reasons cannot be disclosed to a third party. In addition, the amount of time it would take OFLC staff to appropriately redact and upload all documentation is beyond OFLC's capabilities at this time. That being said, we reserve the right to post, as appropriate, any documents pertaining to an *Application for Temporary Employment Certification* in order to align with the government's goal to be as open and transparent as possible.

Another advocacy group specified different types of information and documentation that should be included within the public disclosure such as: the type of work, the prevailing wage, the beginning and the ending dates of employment, and if housing is provided, then location of the housing. An additional concern was the timeliness of disclosure, so as to allow workers and advocates to participate in the administrative review processes. Much of the information listed by the commenter is contained within the *Application for Temporary Employment Certification* and/or the job order, which is already disclosed through the electronic job registry. We decline to accept the suggestion that documents related to pre-certification review such as agreements with agents and/or recruitment reports, or administrative actions such as audits should be posted before a determination is made by the CO and/or an ALJ to give the public time to review the documents and provide information. In addition to causing delays in processing, such information if disseminated during the administrative process could undermine the integrity of the certification and appeal processes. There are mechanisms for relaying information regarding an H–2B job opportunity or an employer application; such information may be relayed in a complaint lodged through the Job Service Complaint System, or may be provided to the Administrator, OFLC and/or CO at any time. Employers filing applications are also reminded that where the employer or its agent/attorney is found to have provided false information on the *Application for Temporary Employment Certification,* the application may be subject to revocation, and that person or entity may be subject to debarment or additional penalties, as appropriate.

Several commenters also recommended that we create a searchable database with all enforcement actions. OFLC already maintains a publically available list of debarred entities on its Web site, and WHD also maintains a list of enforcement actions in closed cases, which include the violations, on its Web. As stated above, we continue to be open to transparency and potentially developing a process to make additional information, such as final determinations, publically available. However, we do not believe that it would be appropriate to disclose information on pending enforcement actions, as doing so may undermine the integrity of the audit, investigation, or adjudication process. Therefore, we decline to adopt the commenter's proposal.

Another commenter recommended that ETA and WHD file an annual public report about their enforcement actions. The commenter is concerned that without such public reporting the public will have little idea whether the changes to the rule are making a difference. We decline to adopt this requirement in this Final Rule, as such information is already available to the public. As stated above, OFLC already maintains a publically available list of debarred entities on its Web site, and WHD also maintains a list of enforcement actions in closed cases, which include the violations, on its Web site.

Several commenters recommended that additional information and documentation should be included on the electronic job registry, in order to provide potential workers with a better sense of the job opportunity and employer. Some wanted us to include ETA Forms and other job-offer-related documents, while others wanted us to go as far as including contracts between

employers and foreign recruiters. Other commenters expressed concern about the type and amount of information that could become public via the electronic job registry. These commenters asserted that employers have a legitimate business interest in maintaining the confidentiality of employment terms. At this time we have decided not to include any additional information to the electronic job registry other than what was proposed under § 655.34.

Many commenters requested that the *H–2B Registration* be included as part of the public disclosure process. These commenters contend that such transparency would permit public monitoring compliance with regulatory requirements. For example, members of the general public could bring to light evidence that an employer misrepresented its actual need or the employer's need materially changed after the employer received a multi-year *H–2B Registration.* The types of information that these commenters wanted incorporated under our public disclosure are: employer names, worksite addresses, number of H–2B workers each employer is seeking to employ, the industries in which each employer operates, indication of the employer's application stage (*e.g.* registration or application), while others wanted on-going public disclosure of an employer's certified payrolls demonstrating compliance with the minimum wage requirements of the H–2B program. Though we understand why the public may want to see the *H–2B Registration* and the specific information listed above, at this time because the registration process is one by which employers may demonstrate their ability to participate in the H–2B program and does not provide an explicit right to access H–2B workers, we decline to make it part of our public disclosure.

I. Integrity Measures

Proposed §§ 655.70 through 655.73 have been grouped together under the heading Integrity Measures, describing those actions we propose to take to ensure that an *Application for Temporary Employment Certification* filed with the Department in fact complies with the requirements of this subpart.

Several commenters suggested that we establish procedures to allow for workers and organizations of workers to intervene and participate in the audit, revocation, and debarment processes. We find that such procedures would be administratively infeasible and inefficient and would cause numerous delays in the adjudication process. For example, under this proposal, we would have to identify which workers and/or organizations of workers should receive notice and should be allowed to intervene. Processing delays would be exacerbated by the fact that once identified, we would have to provide additional time and resources to notify the parties and provide them with the opportunity to prepare and present their information, regardless of whether they have any specific interest or information about the particular proceedings at hand. Workers and worker advocates continue to have the opportunity to contact the OFLC or WHD with any findings or concerns that they have about a particular employer or certification, even without a formal notice and intervention process in place. For these reasons, we are not adding procedures to allow workers and organizations of workers to participate in the audit, revocation, and debarment processes.

1. § 655.70 Audits

This proposed section outlined the process under which OFLC would conduct audits of adjudicated applications. The proposed provisions were similar to the 2008 Final Rule. The Final Rule retains this provision as proposed with one clarifying edit.

Our regulatory mandate to ensure that qualified workers in the U.S. are not available and that the foreign workers' employment will not adversely affect wages and working conditions of similarly employed U.S. workers serves as the basis for our authority to audit adjudicated applications, even if the employer's application is ultimately withdrawn after adjudication or denied. Adjudicated applications include those that have been certified, denied, or withdrawn after certification. There is real value in auditing denied applications because they could be used to establish a record of employer non-compliance with program requirements and because the information they contain assists us in determining whether we need to further investigate or debar an employer or its agent or attorney.

Under the proposed rule, OFLC had the discretion to choose which *Applications for Temporary Employment Certification* will be audited, including selecting applications using a random assignment method. When an *Application for Temporary Employment Certification* is selected for audit, the CO will send a letter to the employer and, if appropriate, its attorney or agent, listing the documentation the employer must submit and the date by which the documentation must be sent to the CO.

The NPRM also provided that an employer's failure to comply with the audit process may result in the revocation of its certification or in debarment, under proposed §§ 655.72 and 655.73, or require assisted recruitment in future filings of an *Application for Temporary Employment Certification,* under § 655.71. The CO may provide any findings made or documents received in the course of the audit to DHS or other enforcement agencies, as well as WHD. The CO may also refer any findings that an employer discriminated against a qualified U.S. worker to the Department of Justice, Civil Rights Division, and Office of Special Counsel for Unfair Immigration Related Employment Practices.

We received many comments on this provision. The comments were equally divided between those that opposed post-adjudication audits and those that believed that audits are an effective tool to enhance integrity and successfully root out bad actors.

Most comments supported OFLC's ability to audit, though one individual had concerns about the discretion that OFLC has under the NPRM to choose which employer that is audited. OFLC audits both employers about which it has information suggesting that the employer may have violated one or more provisions of the application and employers selected either randomly or by industry or other area of concern for quality assurance purposes. We do not believe that it is appropriate to limit our discretion as to which applications may be audited, as such a limitation could reduce the effectiveness of the integrity measures in the H–2B program.

Several commenters brought up the issue of allowing others to intervene in the OFLC audit process. As stated above in the general discussion of the integrity measures, we have decided that such procedures would be administratively infeasible and inefficient and would cause numerous delays in the adjudication process.

A comment submitted by several employer advocacy groups recommended that the post-adjudication audit procedure be eliminated as unnecessary and duplicative. They argued that post-adjudication audits are appropriate in the attestation-based certification model; however, there is no justification for them under the compliance model. These groups also stated that the incorporation of ETA's audit procedure coupled with WHD enforcement cannot be justified at a time when Federal funding resources are extremely limited. We disagree with

these commenters. We have a duty to use the tools and resources in our power to protect all workers in the U.S. By creating multiple checks and balances within the H–2B program, and allowing both ETA and WHD the ability to ensure compliance, we are meeting our goal of ensuring the protection of workers as well as keeping employers accountable.

One commenter wanted to be sure that all findings made by OFLC and all documents provided during an audit would be provided to DHS or other enforcement agencies. We work very closely with our sister agencies in all aspects of the H–2B program and will continue to do so. But we have come to recognize that providing documentation before the determination of an audit may result in unnecessary confusion and cause unwarranted delays, costs, or penalties to an employer. In addition, this commenter requested that we share information submitted in response to an audit or action for revocation or debarment with the SWA, so that the SWA can provide any relevant information to promote informed DOL decisions. As previously discussed, we have decided that incorporating such procedures could cause numerous delays in the adjudication process. A worker advocacy group suggested that any person should be able to request that the CO audit a particular employer. We reiterate that workers and worker advocates always have had the opportunity to contact us with any information or concerns that they have about a particular employer or certification, and they will continue to have that opportunity, even without a formal notice and intervention process in place. We cannot, however, commit to auditing every employer about which we receive a complaint or information. We will evaluate all information and complaints we receive to determine whether an audit is appropriate.

This same commenter requested that the provisions of 29 CFR 503.6 and 503.7 be incorporated into the audit section under this subpart. However, though this subpart and 29 CFR part 503 in many instances parallel each other, there are many provisions in one part that, based on the different roles of OFLC and WHD, may not be deemed appropriate for the other. For example, one of the provisions in 29 CFR 503.6 (Waiver of rights prohibited) provides that a person may not seek to have an H–2B worker, a worker in corresponding employment, or any other person's rights waived. This provision is not necessarily applicable to the audits requirements under the post-adjudication audit section, where OFLC is auditing the employer's application. It is highly unlikely that the documentation provided or requested in an audit would provide evidence of any waiver of a worker's rights. Under 29 CFR 503.7 (Investigation authority of the Secretary) WHD has assumed the authority delegated to the Secretary under 8 U.S.C. 1184(c)(14)(B). WHD is the primary agency within the Department for investigating employer compliance with the requirements of the H–2A and H–2B programs. WHD has the necessary expertise and knowledge to enforce and investigate the various regulatory provisions. Requiring OFLC to have duplicative investigative authority under the audit provision would not be the best use of the Department's resources. For the reasons stated above, we are retaining the substance of this provision as proposed, except for several clarifying edits. We clarified that the Audit Letter will advise the employer of its obligation to fully comply with the audit process and included a consistency change in the last sentence of paragraph (c) by replacing the word additional with the word supplemental.

2. § 655.71 CO-Ordered Assisted Recruitment

The proposed rule permitted OFLC to determine that a violation that does not warrant debarment has occurred and, as a result, to require an employer to participate in assisted recruitment. This provision also applied to those employers that due to either program inexperience or confusion, have made mistakes in their *Application for Temporary Employment Certification* that indicate a need for further assistance from OFLC.

Under this provision the CO will notify the employer (and its attorney or agent, if applicable) in writing of the requirement to participate in assisted recruitment for any future filed *Application for Temporary Employment Certification* for a period of up to 2 years. The assisted recruitment will be at the discretion of the CO, and determined on the unique circumstances of the employer.

The assisted recruitment may consist of, but is not limited to, requiring the employer to conduct additional recruitment, reviewing the employer's advertisements before posting and directing the employer where such advertisements are to be placed and for how long, requesting and reviewing copies of all advertisements after they have been posted, and requiring the employer to submit proof of contact with past U.S. workers, and proof of SWA referrals of U.S. workers. If an employer fails to comply with the requirements of this section, the employer's application will be denied and the employer may be debarred from future program participation under § 655.73.

We also invited comments and suggestions of industry-specific recruitment and advertising sources to be used by the CO in administering assisted recruitment in the H–2B program under this section. We are retaining the proposed provision with one change. While we received no suggestions about industry-specific recruitment sources, the comments did indicate general support for allowing the CO to order assisted recruitment as a means of helping an employer rectify recruitment problems before more severe administrative actions are pursued. One individual stated that the COs should refrain from inserting themselves into the employer-attorney/agent relationship and should only notify the employer of the need to participate in assisted recruitment. We disagree with this commenter. An employer has the right under the regulations to seek the advice and assistance of an attorney or agent. We know of no reason why we should limit the areas in which the employer can seek that advice and assistance.

Having considered comments on this proposal, we are retaining this provision in its entirety with one edit in paragraph (d), where we clarify that the employer's failure to comply must be material in nature.

3. § 655.72 Revocation

Under this section, OFLC can revoke an approved temporary labor certification under certain conditions, including where there is fraud or willful misrepresentation of a material fact in the application process or a substantial failure to comply with the terms and conditions of the certification. The 2008 Final Rule did not include a similar revocation provision. We are adopting the provisions of the NPRM without change in this Final Rule.

Many commenters expressed general approval of the new revocation provision as an important enforcement technique. Commenters also submitted comments on specific provisions of this section.

Several of these commenters discussed the bases for revocation in paragraph (a) of this section. The basis generating the most comments is paragraph (a)(2), which lists a substantial failure to comply with the terms and conditions of the certification as a basis for revocation and defines a substantial failure as a willful failure to comply. Several worker advocacy

organizations stated the willful standard is too high. Many of these organizations suggested an intentional standard, instead. Several stated an intentional standard would be consistent with the Job Service Complaint System and with the MSPA. One organization noted that the courts have provided considerable interpretation of the intentional standard under MSPA, so use of the intentional standard would enhance the standard's clarity. Another worker advocacy organization proposed a new eight-part definition for substantial failure that included failure to provide wages, benefits or acceptable working conditions; violations of H–2B regulations; and violations of other laws.

We elect to maintain the willful standard. The reason for maintaining this standard is discussed in more depth at 29 CFR 503.19 (Violations) of the WHD preamble.

A labor organization suggested that all of an employer's existing labor certifications be revoked if one is revoked, because the employer has been found to be untrustworthy. While we recognize that an employer would be undermining the integrity of the labor certification program if it meets any of the bases for revocation set forth in this section, we are retaining the language as proposed in the NPRM, because we do not believe that violations relating to a particular certification should not necessarily be imputed to an employer's other certifications. We recognize the serious impact that a revocation would have on employers and H–2B workers alike and do not believe that it should be applied to certifications for which there has been no finding of employer culpability.

However, we acknowledge that in some situations, the Administrator, OFLC, may revoke all of an employer's existing labor certifications where the underlying violation applies to all of the employer's certifications. For instance, if the Administrator, OFLC finds that the employer meets either the basis for revocation in paragraph (a)(3) of this section (failure to cooperate with a Department investigation or with a Department official performing an investigation, inspection, audit, or law enforcement function) or in paragraph (a)(4) of this section (failure to comply with sanctions or remedies imposed by WHD or with decisions or orders of the Secretary with respect to the H–2B program), this finding could provide a basis for revoking any and all of the employer's existing labor certifications. Additionally, where we find violations of paragraphs (a)(1) or (a)(2) of this section affect all of the employer's certifications, such as where an employer misrepresents its legal status, we also may revoke all of that employer's certifications. Lastly, where an employer's certification has been revoked, we certainly would take a more careful look at the employer's other certifications to determine if similar violations exist that would warrant their revocation.

Representing the opposite perspective, one coalition of employers expressed concern about the effect of revocation on businesses and concern that revocation may be too frequent under the bases proposed in the NPRM. The coalition wants us to clarify that revocation is an extreme penalty for egregious violations. This commenter also suggested that we consider the totality of the circumstances, not just the potential bases listed in paragraph (a) of this section, when considering whether or not to revoke a temporary labor certification.

We cannot say how often revocation will occur under the Final Rule, because a similar provision did not exist in the 2008 Final Rule or before. We recognize the seriousness of revocation as a remedy; accordingly, the bases for revocation in paragraph (a) reflect violations that significantly undermine the integrity of the H–2B program. We intend to use the authority to revoke only when an employer's actions warrant such a severe consequence. We do not intend to revoke certifications if an employer commits minor mistakes.

Several worker advocacy organizations also submitted comments on paragraph (b) of this section, which details the procedures for revocation. Three organizations suggested that the rules should provide for notice to employees of revocation proceedings and for intervention by employees in revocation proceedings. One organization suggested giving notice of revocation to entities listed as potential recruitment sources, such as former employees. We have decided not to add procedures for employee or third party notification and intervention to the revocation section for the reasons set forth in the Integrity Measures preamble at §§ 655.70–655.73.

4. § 655.73 Debarment

The NPRM proposed to revise the existing debarment provision to strengthen the enforcement of H–2B labor certification requirements and to clarify the bases for a debarment. It also proposed that WHD have debarment authority independent of OFLC. The Final Rule adopts these provisions with minor changes.

A number of commenters had concerns about the willfulness standard that would apply not only to debarment, but also to the assessment of violations and other remedies. However, many of the comments were based on a misunderstanding of what a willful violation entailed. The violations discussion at 29 CFR 503.19 of the WHD preamble discusses the willfulness standard. As explained in that section, we will judge all violations by the willfulness standard and will not debar for minor, unintentional violations.

a. Debarment of an employer. A labor union encouraged us to extend debarment to the individual principals of a company or legal entity to foreclose the ability of these individuals to reconstitute under another business entity. Although we do not have the authority to routinely seek debarment of entities that are not listed on the ETA Form 9142, in appropriate circumstances, we may pierce the corporate veil in order to more effectively remedy the violations found.

b. Debarment of an agent or attorney. As discussed under § 655.8, the NPRM raised explicit concerns about the role of agents in the program, and whether their presence and participation have contributed to problems with program compliance, such as the passing on of prohibited costs to employees. These concerns were so significant that we solicited comments on whether to continue to permit the representation of employers by agents in the H–2B program. As discussed in the preamble discussion of § 655.8, we have decided to continue to allow agents to represent employers. However, as the NPRM also explained, if we were to continue to accept applications from agents, additional requirements might need to be applied to strengthen program integrity and we solicited comments on this issue as well.

Several employers and employer organizations responded by acknowledging that bad actors exist in the H–2B program, and urging us to use our enforcement authority to pursue fraud involving agents rather than prohibiting the legitimate work of agents in preparing and filing H–2B applications on behalf of employers. In addition, several worker advocacy organizations' comments expressed concern about violations committed by agents and attorneys, and encouraged us to take stronger actions to prevent such abuses, primarily by holding employers strictly liable for the actions of their agents. We are unable to do that for the reasons discussed in the preamble discussion at 29 CFR 503.20.

As a number of both employer and worker advocacy organizations noted, the Department's statistics show that in FY 2010, 86 percent of employers filed H–2B applications using an agent. These agents are intimately familiar with the H–2B program requirements. As commenters affirmed, agents have a high level of program knowledge and help guide employers through the process. The agents and attorneys who file applications on behalf of employers certify under penalty of perjury on the ETA Form 9142 *Application for Temporary Employment Certification* that everything on the application is true and correct. However, where, for example, a bad actor agent passes on prohibited fees to workers in violation of the prohibition on collecting such fees in § 655.20(o) and 29 CFR 503.16(o) while affirming that everything on the application is true and correct, including the employer's declaration that its agents and/or attorneys have not sought or received prohibited fees, the agent is not currently held accountable for such a violation absent a link to an employer violation.

In addition, § 655.20(p) and 29 CFR 503.16(p) require an employer to contractually prohibit an agent or recruiter from seeking or receiving payments from prospective employees. This creates a loophole, under which an employer may contractually prohibit the attorney or agent (and agents and employees) from collecting prohibited fees, yet the attorney or agent independently charges the workers for prohibited fees. In this situation, the employer will not be debarred for the independent violation of the agent or attorney because the employer has not committed any violation. A coalition of worker advocacy organizations pointed out that the proposed regulations ''continue the Department's efforts to eliminate the pernicious practice of foreign workers paying substantial fees to recruiters to obtain H–2B jobs. While the proposed changes are praiseworthy, they are not sufficient to curb these abuses and may actually help relieve employers of responsibility for such charges.''

In light of the concerns expressed in the NPRM and the comments received, we have decided to strengthen program integrity in the Final Rule by applying debarment to independent violations by attorneys and agents, recognizing that agents and attorneys should be held accountable for their own independent willful violations of the H–2B program, separate from an employer's violation. Language to this effect has been added to the OFLC and WHD debarment provisions at § 655.73(b) and 29 CFR 503.24(b), as well as the WHD sanctions and remedies section, as discussed further in the preamble at 29 CFR 503.20. These enhanced compliance measures apply only to the agents and attorneys who are signatories on the ETA Form 9142, as these agents and attorneys have become directly involved with the H–2B program and have made attestations to the Department.

A coalition of agents and employers suggested that we provide guidance on how we would apply the reckless disregard standard to agents and attorneys and the extent to which agents and attorneys must intrude into the details of the employer's business to avoid showing reckless disregard for the truthfulness of the agent's or attorney's representations or for whether their conduct satisfies the required conditions. We do not intend to make attorneys or agents strictly liable for debarrable offenses committed by their employer clients, nor do we intend to debar attorneys who obtain privileged information during the course of representation about their client's violations or whose clients disregard their legal advice and commit willful violations. We will be sensitive to the facts and circumstances in each particular instance, and when considering whether an attorney or agent has participated in an employer's violation; we will seek to debar only those attorneys or agents who work in collusion with their employer-clients to either willfully misrepresent material facts or willfully and substantially fail to comply with the regulations. Similarly, where employers have colluded with their agents or attorneys to commit willful violations, we will consider debarment of the employer as well.

We did not propose in the NPRM to debar recruiters who are not agent or attorney signatories to the ETA Form 9142. However, several commenters specifically recommended that we maintain a public list of debarred recruiters. Since recruiters are not subject to debarment unless they are signatories to the ETA Form 9142, we will not maintain a list of debarred recruiters. However, both OFLC and WHD already publicly post a list of employers, agents, or attorneys that have been debarred under all of the labor certification programs and to the extent that a recruiter might also be debarred, the recruiter would also appear on the list.

Another commenter requested that we report debarred attorneys to State bar associations. We note that there is nothing in the regulations that restricts us from making such a report. Where circumstances warrant, we may decide to report debarred attorneys to State bar associations using the information provided in the ETA Form 9142 which provides a field for the attorney's State bar association number and State of the highest court where the attorney is in good standing. However, we note that these fields are limited to only one State bar association. Therefore, while we may be able to notify the State bar association listed on the ETA Form 9142, there may be other State bar associations unknown to us, of which the attorney is a member that we are unable to notify. However, as stated in 20 CFR 655.73(h) and 29 CFR 503.24(e), copies of all final debarment decisions will be forwarded to DHS and DOS promptly.

c. Period of debarment. The NPRM proposed that the Administrator, OFLC may not debar an employer, attorney, or agent for less than 1 year nor more than 5 years from the date of the final debarment decision. The Final Rule adopts this provision as proposed. One commenter stated that increasing the maximum debarment period to 5 years based on what could be a single innocent act could result in a disproportionate and overly harsh penalty. In addition, a trade association questioned why a debarment period of up to 5 years was included in the NPRM, recommending that we adopt the-up- to-3-year debarment maximum rule from the current H–2A regulations or at least articulate why a more extreme penalty is justified under the H–2B program. On the other hand, several commenters suggested that the Department remove the 5-year cap and impose debarment for up to 10 years, or in some cases permanent debarment, on repeat violators.

The 1- to 5-year range for the period of debarment is consistent with the H–2B enforcement provisions in the INA, and we believe that it is appropriate to apply the same standard in our regulations. 8 U.S.C. 1184(c)(14)(A)(ii). We do not intend to debar employers, attorneys, or agents who make minor, unintentional mistakes in complying with the program, but rather those who commit a willful misrepresentation of a material fact, or a substantial failure to meet the terms and conditions, in the *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition.* Additionally, just because the Administrator, OFLC has the authority to debar a party for up to 5 years does not mean that would be the result for all debarment determinations, as the Administrator, OFLC retains the discretion to determine the appropriate

period of debarment based on the severity of the violation.

d. Violations. The NPRM proposed that a single act, as opposed to a pattern or practice of such actions, would be sufficient to merit debarment. A labor union noted that the proposed regulation text, stating at § 655.73(f)(12) and 29 CFR 503.24(a)(10) that a single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot be reasonably expected implies that a single violation in one of the eleven categories listed before the single act language is insufficient for debarment. The commenter noted that this implication was at odds with our stated intent to make any of the listed acts sufficient for debarment. The commenter suggested that the regulation establish that failure to comply with any representation, requirement, or offer in the registration, application, or job order would warrant per se debarment. By contrast, a professional organization took issue with debarment for a single act, rather than a pattern or practice of repeat violations, where there was no evidence of fraud or misrepresentation.

We agree that the single heinous act language is potentially confusing. We did not intend to suggest that a single violation falling into one of the other 13 listed categories of violations may not be sufficient for debarment. Thus, we have added language in the Final Rule text at § 655.73 and 29 CFR 503.24 making one or more acts of commission or omission debarrable for all of the listed violations, and have revised § 655.73(f)(12) and 29 CFR 503.24(a)(10) to encompass any other act as opposed to a single heinous act. As discussed in the preamble discussion of 29 CFR 503.19, which explains the standard that applies to all H–2B debarment actions, any act or omission would have to be willful to warrant debarment.

A State attorney general recommended that we add failure to cooperate in State and local investigations to the grounds for debarment. It is beyond our jurisdiction and the scope of our responsibilities under the H–2B program to evaluate whether an entity cooperated with a State or local investigation and to penalize the entity for failing to so.

A coalition of worker advocacy organizations and several additional worker advocacy organizations encouraged us to add to the non-exhaustive list of debarrable offenses the failure to disclose a recruiter's identity under the requirement proposed in § 655.9, the use of a debarred recruiter, and the failure of an employer to report recruiter violations to OFLC and WHD. The NPRM did not propose violations for employer use of a debarred recruiter, nor did it propose a reporting requirement for recruiter violations known to the employer but not to us. Further, as the list of debarrable offenses is explicitly non-exhaustive, we decline to add non-compliance with § 655.9 to the list. However, we are adding obligations under § 655.9 to the list of employer assurances and obligations in § 655.20 and 29 CFR 503.16 to clarify that we view employer (and its agent or attorney, as applicable) disclosure of foreign worker recruitment by an agent or recruiter as a critical obligation. We will pursue enforcement where employers (and their agents or attorneys, as applicable) commit willful violations of this provision.

A labor union expressed concern about employer misclassification of immigrant workers as independent contractors, and suggested that we add to the list of debarrable offenses the misclassification of H–2B workers or corresponding U.S. employees as independent contractors. Although the misclassification of workers as independent contractors is a matter WHD might pursue as it relates to its enforcement authority under statutes such as the Fair Labor Standards Act, this type of misclassification has not been characterized as a violation of the H–2B regulations, where an employer is explicitly seeking permission to hire foreign workers as employees. Therefore, it would not be appropriate to add to the list of debarrable offenses.

e. Debarment procedure. A worker advocacy organization commented that the debarment timeline should allow debarment to take place before employers are able to recruit and hire workers for the next season, to ensure that employers who violate worker protection laws are removed before the next recruitment cycle. However, the debarment timeline varies greatly depending on the timing of when violations are discovered through OFLC audits, WHD targeted investigations, or WHD investigations initiated by complaints. In other words, there is no one time within a season when a debarment proceeding might be initiated. Additionally, various factors affect the timing of an investigation that may lead to debarment, including the complexity of the case and the number of violations involved. Parties subject to debarment also have the right to appeal the debarment decision. Thus, we cannot ensure any particular timing for the debarment process.

f. Concurrent debarment jurisdiction. Several commenters objected to WHD's concurrent debarment authority. These comments are fully discussed in the concurrent actions section at 29 CFR 503.21 of the WHD preamble.

g. Interagency communication. A commenter recommended amending the proposed rule to require us to share information about problem entities with other departments and agencies that administer U.S. visa programs to prevent the offender from refocusing its efforts on possible alternative visa programs outside of our jurisdiction. Also, the commenter recommended that in more serious cases we should permanently debar the entity and refer the entity to the Department of Justice for prosecution. Similarly, another commenter recommended that the regulations require the provision of regular notices to other agencies about investigations and enforcement actions that we have taken against employers for possible or adjudicated violations of Department-administered visa programs and that we should ask other departments and agencies, *i.e.,* DOS, USCIS, and ICE, to provide similar notices to us. We decline to make these recommended changes to the regulation text. Paragraph (h) of this section already provides that copies of final debarment decisions will be forwarded to DHS and DOS promptly. Clearly, where it is warranted, we will notify additional agencies, such as DOJ, of the violations, but we do not believe that it is necessary for the regulation to provide that as an additional requirement. Also, we do not believe that it is appropriate to provide regular notices to other agencies, or require such agencies to notify us, of pending enforcement actions and investigations of possible violations because that information is of little practical use until these actions have been concluded and a final determination has been issued. Finally, for the reasons discussed above, we do not believe that permanent debarment is appropriate but rather have determined that the 5-year maximum period is consistent with the H–2B enforcement provisions under the INA.

h. Additional penalties for debarred employers. Two commenters requested that the regulations add discontinuation of job services to the list of sanctions of debarred employers. Because discontinuation of services under the employment service system, along with other sanctions for non-compliant H–2B employers, is already governed at § 658.500 subpart F of this part, we do not believe that it is necessary to make any change to the regulations in this subpart to reflect that provision. Additional remedies offered by commenters that would apply to all

non-compliant employers, including those that are debarred, are discussed in the preamble discussion of the sanctions and remedies at 29 CFR 503.20.

III. Addition of 29 CFR Part 503

Effective January 18, 2009, pursuant to INA section 214(c)(14)(B), DHS transferred to the Secretary enforcement authority for the provisions in section 214(c)(14)(A)(i) of the INA which govern petitions to admit H–2B workers. The 2008 Final Rule contains the regulatory provisions governing ETA's processing of the employer's *Application for Temporary Employment Certification* and the WHD's enforcement responsibilities in ensuring that the employer has not willfully misrepresented a material fact or substantially failed to meet a condition of such application.

The Department carefully reviewed the 2008 Final Rule and proposed substantive changes to both the certification and enforcement processes to enhance protection of U.S. and H–2B workers.

The proposed rule added a new part, 29 CFR part 503, to further define and clarify the protections for workers. This proposal and the proposed changes in 20 CFR part 655, Subpart A added workers in corresponding employment to the protected worker group, imposed additional recruitment obligations and employer obligations for laid off U.S. workers, and increased wage protections for H–2B workers and workers in corresponding employment. Additionally, the Department proposed to enhance the WHD's enforcement role in administrative proceedings following a WHD investigation, such as by allowing WHD to pursue debarment rather than simply recommending to ETA that it debar an employer as occurs under current § 655.65(h).

To ensure consistency and clear delineation of responsibilities between Departmental agencies implementing and enforcing H–2B provisions, this new Part 503 was written in close collaboration with ETA and is being published concurrently with ETA's Final Rule in 20 CFR part 655, Subpart A to amend the employer certification process. Some editorial changes have been made to the text of the proposed regulations, for clarity and to improve readability. Those changes are not intended to alter the meaning or intent of the regulations and are not further discussed in this preamble. A discussion of the comments received on the proposal and substantive changes made by the Department are discussed at length below.

A. General Provisions and Definitions

Proposed §§ 503.0 through 503.8 provided general background information about the H–2B program and its operation. Proposed § 503.1 and § 503.2 are similar to the existing regulations at 20 CFR 655.1 and 655.2. Proposed § 503.3 described how the Department will coordinate both internally and with other agencies. One commenter expressed concerns that the provision at § 503.3 did not provide specific information on where to file a complaint. The Department considers the guidance provided in § 503.7 to be sufficient notice to potential complainants.

Sections 503.0, 503.1, 503.2, and 503.3 are adopted in the Final Rule as proposed.

1. § 503.4 Definition of Terms

Under this section of the NPRM, the proposed definitions were identical to those contained in proposed 20 CFR part 655, Subpart A, except that this section contained only those definitions applicable to this part. The preamble to 20 CFR part 655, Subpart A contains the relevant discussion of comments received on and changes made to those definitions. For the reasons discussed there, the Final Rule makes identical conforming changes in this section.

2. § 503.5 Temporary Need

Under this proposed section, the provision regarding temporary need was identical to the requirements set forth in proposed 20 CFR 655.6; the preamble to that section includes a full discussion of the comments received in response to the proposed provisions. The Final Rule adopts the provision as proposed.

3. § 503.6 Waiver of Rights Prohibited

The Department proposed in § 503.6 to add new language that would prohibit any employer from seeking to have workers waive or modify any rights granted them under these regulations. The proposed paragraph would have, with limited exceptions, voided any agreement purporting to waive or modify such rights. The proposed language was consistent with similar prohibitions against waiver of rights under other laws, such as the Family and Medical Leave Act, see 29 CFR 825.220(d), and the H–2A program, see 29 CFR 501.5. The Department received several comments concerning this proposed addition, all of which supported the change. One advocacy group cited the vulnerability of the H–2B workers as a reason for needing this provision. One union mentioned concerns that without the provision unscrupulous employers might attempt to use waivers to gut the program. The Department has retained the section as proposed in the Final Rule.

4. § 503.7 Investigation Authority of Secretary

In § 503.7 of the NPRM, the Department proposed to retain the current authority established under 20 CFR 655.50, affirming WHD's authority to investigate employer compliance with these regulations and WHD's obligation to protect the confidentiality of complainants. This proposed section also discussed the reporting of violations. No comments were received on this section; the proposed language has been maintained in the Final Rule.

5. § 503.8 Accuracy of Information, Statements, Data

Under this proposed section, making false representations to the government would make an entity subject to penalties, including a fine of up to $250,000 and/or up to 5 years in prison. A few commenters expressly supported this provision, stating that the inclusion of this provision makes it clear to employer that there are serious consequences for criminal acts. The proposed language has been maintained in the Final Rule.

B. Enforcement Provisions

1. § 503.15 Enforcement

In order to ensure that U.S. workers are not adversely affected by the employment of H–2B workers, the NPRM proposed expanding the type of workers entitled to protection by WHD enforcement to workers in corresponding employment, as defined under 20 CFR 655.5. Comments regarding corresponding employment are discussed fully in that section. The NPRM proposed to continue WHD enforcement for H–2B workers and U.S. workers improperly rejected, laid off, or displaced. Labor unions supported WHD's proposed enforcement, with one commenting that giving U.S. workers this means of redress is critical to effectuating the Secretary of Labor's mandate to ensure that the certification and employment of H–2B aliens does not harm similarly-situated U.S. workers, and asserting that it also prevents U.S. workers being employed alongside H–2B aliens who might otherwise receive greater pay, benefits, and protection from abuse through the H–2B program than their domestic counterparts enjoy. Similarly, a State Attorney General's office strongly supported the Department's strengthened efforts to protect

workers—U.S. workers as well as H–2B workers laboring along side them.

A trade association expressed its concern that the proposed investigation and enforcement regulations in this Part would only be complaint-driven, *i.e.,* that WHD would only investigate where there were complaints from foreign workers, which would potentially overlook violations because foreign workers may be reluctant to file complaints. However, WHD investigates complaints filed by both foreign and U.S. workers affected by the H–2B program, as well as concerns raised by other federal agencies, such as USCIS, regarding particular employers and agents. WHD also conducts targeted or directed investigations of H–2B employers to evaluate program compliance.

An individual stakeholder questioned the avenue for filing a complaint alleging non-compliance with the H–2B program. Complaints may be filed by calling WHD at 866–4US–WAGE or by contacting a local WHD office. Contact information for local offices is available online at *http://www.dol.gov/whd/america2.htm.*

Several agents and employer organizations contended that the Department's proposed enforcement authority over H–2B program compliance exceeded its statutory authority, as delegated by DHS. Based on the enforcement authority outlined in the preamble under 20 CFR 655.2 and the addition of 29 CFR part 503, and the detailed discussion of the Department's enforcement authority in the 2008 Final Rule in response to similar comments, 73 FR78020, 78043–44 (debarment) 78046–47 (civil monetary penalties and remedies), Dec. 19, 2008, the Department has concluded that it is authorized to conduct the enforcement activities described in this Final Rule.

2. § 503.16 Assurances and Obligations of H–2B Employers

The provisions proposed in this section were identical to those proposed in 20 CFR 655.20, with the exception of the additional obligation in proposed paragraph (aa) (Cooperation with investigators) requiring employers to cooperate in any administrative or enforcement proceeding. No comments were received on that paragraph and the provision is adopted in the Final Rule as paragraph (bb). Proposed paragraph § 503.16(aa) is redesignated as § 503.16(bb) in the final rule. Proposed paragraph (aa), paragraph (bb) in the Final Rule matches the language of a new provision at 20 CFR 655.20(aa), which is consistent with 20 CFR 655.9 of the proposed rule and this Final Rule, requiring an employer to provide with its *Application for Temporary Employment Certification* copies of agreements with foreign labor contractors and recruiters (see discussion of 20 CFR 655.9 in this preamble). The Department carefully reviewed all comments concerning employer assurances and obligations (a) through (z), a full discussion of which is included in the preamble to 20 CFR 655.20. Identical conforming changes are made in this Final Rule section as are made there, for the reasons discussed in that preamble.

3. § 503.17 Documentation Retention Requirements of H–2B Employers

In § 503.17 the Department proposed to consolidate the document retention requirements previously found throughout 20 CFR 655, subpart A. These requirements are similar to those in 20 CFR 655.56, with minor differences related to OFLC's and WHD's separate interests. A coalition representing agents and employers commented in support of this proposal, noting that most employers are already familiar with their obligation to keep documents for three years to comply with the FLSA. However one employer stated that the documentation provision was complex and demanding for the employer. As stated in the preamble to the proposed rule, this section does not require employers to create any new documents but simply to preserve those documents that are already required for applying for participation in the H–2B program, and therefore should not place any further burden on employers. A commenter representing the outdoor entertainment industry indicated that it would be difficult to comply with the 72-hour availability requirement and urged the Department to allow retention and provision of required documents in electronic format. This request was repeated by an employer advocacy group. The Department recognizes these commenters' concern and reminds them that under the FLSA employers who maintain records at a central recordkeeping office, other than in the place(s) of employment, are required to make records available within 72 hours following notice from WHD. See 29 CFR 516.7. This provision, which has been in place for decades, has not created undue burden for employers; as many H–2B employers are likely covered by the FLSA, this provision results in no additional burden. A full discussion of the use of electronic records can be found in the preamble to 20 CFR 655.56.

A commenter stated that a retention period of 3 years was insufficient and expressed concern that in the case of a 3-year certification, the employer could destroy records before completion of the job. Another comment included a recommendation that records be retained for 5 years in case of an investigation for criminal fraud. The Department has decided that a 3-year record retention requirement is adequate for its civil enforcement purposes.

Finally, a number of comments included recommendations that employers be required to retain records of the visa, subsistence, transportation, and recruitment costs, including the amount, by whom and to whom they were paid and the time of payment. The Department considers the general requirement that employers retain documents and records to prove compliance with the regulations to be sufficient for its enforcement purposes. Further discussion of recordkeeping provisions is included in the preamble of 20 CFR 655, subpart A. The proposed provision is adopted without change.

4. § 503.18 Validity of Temporary Labor Certification

In § 503.18 the Department proposed to include clarifying edits to this section (which corresponds to existing 20 CFR 655.34 (a) and (b)), providing the time frame and scope for which an *Application for Temporary Employment Certification* is valid. A discussion of comments received on this section can be found in the preamble to 20 CFR 655.55. The proposed provision is adopted without change.

5. § 503.19 Violations

The NPRM proposed retention of the willfulness standard for the assessment of violations, monetary remedies, and civil money penalties, as well as determinations concerning revocation and debarment. As discussed below, comments from employers, agents, industry organizations, labor unions, and worker advocacy organizations reflected a significant amount of confusion about the standards by which violations are determined under the H–2B program, as well as whether the standards apply equally to revocation, debarment, monetary or other remedies, and civil money penalties. After briefly summarizing the comments received, the Department will attempt to clarify for the benefit of all affected parties the basis for the continued use of a willfulness standard for determining whether a violation has occurred, regardless of whether the violation results in revocation imposed by OFLC pursuant to 20 CFR 655.72, debarment imposed by OFLC pursuant to 20 CFR 655.73 or WHD pursuant to § 503.24,

monetary or other remedies assessed by WHD pursuant to § 503.20, and/or civil money penalties assessed by WHD pursuant to § 503.23.

Several worker advocacy organizations stated the willful standard is too high. Many of these organizations suggested an intentional standard, instead. Several stated an intentional standard would be consistent with the Job Service Complaint System and with the Migrant and Seasonal Agricultural Worker Protection Act. One organization noted that the courts have provided considerable interpretation of the intentional standard under MSPA, so use of the intentional standard would enhance the standard's clarity. Another worker advocacy organization proposed a new eight-part definition for substantial failure.

Conversely, several employers, employer coalitions, and trade associations commented that the substantial failure standard was too low, believing this standard would lead the Department to debar for unintentional, negligent failures or technical violations, as opposed to knowing failures. In addition, several agents and employer organizations wanted the Department to clarify that it views the punishments of revocation and debarment as extreme penalties for egregious violations rather than routine remedies, indistinguishable from back pay and civil money penalties.

In light of the numerous comments suggesting what commenters believed to be the adoption of essentially a higher or lower standard than the standard currently in place, the Department wishes to clarify that violations under these regulations, both in the 2008 Final Rule and in the 2011 NPRM, have been defined to be consistent with the INA's provisions regarding violations for H–2B workers. Specifically, INA section 214(c)(14)(A), 8 U.S.C. 1184(c)(14)(A), sets forth two potential violations under the H–2B program: (1) ''a substantial failure to meet any of the conditions of the petition'' and (2) ''a willful misrepresentation of a material fact in such petition.'' The INA further defines a substantial failure to be a ''willful failure to comply * * * that constitutes a significant deviation from the terms and conditions of a petition.'' 8 U.S.C. 1184(c)(14)(D). The *H–2B Petition* includes the approved *Application for Temporary Employment Certification.* See § 503.4; 20 CFR § 655.5. Therefore, it is the Department's view that non-willful violations are not cognizable under the H–2B program, and that it is not appropriate for the Department to select a lower standard for determining H–2B violations.

Thus, in this Final Rule, the basis for determining violations has not changed since the 2008 Final Rule, and continues to be either a misrepresentation of material fact or a substantial failure to comply with terms and conditions, both of which continue to be willful. See 20 CFR 655.72(a)(1) & (2) (revocation), 20 CFR 655.73(a)(1)-(3) (OFLC debarment), § 503.19(a)(1) & (2) (WHD violations, which lead to remedies, civil monetary penalties, and/or debarment). To determine whether a violation is willful, the Department will consider whether the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions. See 20 CFR 655.73(d), § 503.19(b). This is consistent with the longstanding definition of willfulness. See *McLaughlin* v. *Richland Shoe Co.,* 486 U.S. 128 (1988); see also *Trans World Airlines, Inc.* v. *Thurston,* 469 U.S. 111 (1985). Further, tracking the INA language, a substantial failure continues to be defined as willful as well as a significant deviation from the terms or conditions of a petition. 20 CFR 655.72(a)(2), 20 CFR 655.73(a)(2), § 503.19(a)(2). OFLC revocation and debarment are tied to the definitions in 20 CFR 655.73(d) and (e), which explain how to determine willfulness and how to determine whether a substantial violation is a significant deviation; these provisions mirror the definitions for WHD violations in § 503.19(b) and (c).

A labor union that approved of the willfulness standard and recognized that it encompasses reckless disregard suggested that the Department impute willfulness where there are multiple, non-willful violations because such repeated violations evidence reckless disregard. Rather than imputing willfulness, when the Department encounters violations that do not rise to the level of willfulness, it puts the party on notice regarding future compliance and will consider subsequent violations committed with the knowledge that such acts or omissions violate H–2B program requirements to be willful.

The NPRM also proposed an additional change in the description of violations in § 503.19. Unlike the definition of violations in the 2008 Final Rule, which only mentioned employer violations specifically, the proposed definition of violations does not specify a violator, thus encompassing violations committed by an employer, attorney and/or agent. After receiving no comments, the Department is adopting this provision of the NPRM without change in the Final Rule.

6. § 503.20 Sanctions and Remedies—General

The NPRM proposed that the Department continue to pursue essentially the same remedies upon a WHD determination that a violation has occurred, including but not limited to payment of back wages, recovery of prohibited fees paid or impermissible deductions, enforcement of the provisions of the job order, assessment of CMPs, make-whole relief for victims of discrimination, and reinstatement and make-whole relief for U.S. workers who were improperly denied employment. The NPRM also proposed to give WHD independent debarment authority, concurrent with ETA's debarment authority. Comments regarding WHD's debarment authority are discussed under § 503.21.

Sanctions and remedies in general. In general, worker advocacy organizations favored the enforcement measures proposed in the NPRM, noting that the H–2B program has been plagued by wage and hour violations, fraudulent applications for non-existent jobs, race and gender discrimination and human trafficking. Worker advocacy organizations commented that debarment, revocation, civil money penalties, and traditional remedies such as payment of back wages and impermissible fees and deductions, as well as reinstatement for workers improperly rejected for employment, were important tools to encourage compliance. One worker advocacy organization proposed that the Department should allow workers who have been subjected to H–2B violations and who live outside the United States to participate in related investigations or proceedings, recover any damages, and be recommended for visas for this purpose. The Department does not prohibit such participation by workers who may have returned to their home country, and it often distributes back wages to workers who have experienced violations and have returned to their home countries. Where appropriate given the circumstances in any given investigation or proceeding, the Department might seek a means for the worker to travel to the U.S. to participate in such proceedings.

Liability for prohibited fees collected by foreign labor recruiters and sub-contractors. A coalition of worker advocacy organizations, several additional worker advocacy organizations, and a federation of national and international labor unions explained that although the NPRM took important steps toward reducing exploitative foreign labor recruiting

practices by prohibiting the collection of transportation, visa, recruiting, and other fees from workers, these prohibitions would be unenforceable as a practical matter unless the Department held employers strictly liable for such charges levied on workers by the employer's recruiters, agents, or sub-contracted recruiters and agents. These commenters cited instances where employers were insulated from liability for unlawful fee-charging because the employers obtained assurances from their agents that fees were not being charged, noting that the NPRM would similarly shield employers from liability for prohibited fees charged by recruiters where an employer complied with the provision requiring it to contractually prohibit agents from seeking or receiving payments from workers. In addition, these commenters noted that exploitative practices, which leave H–2B workers in significant pre-employment debt, are often left unchecked because most of the local *recruiters* who charge these fees are beyond the direct regulatory reach of the Department and it is difficult for workers to bring actions against recruiters operating overseas due to issues of personal jurisdiction, solvency, cost and collectability.

As the preamble to the 2008 Final Rule emphasized, 73 FR 78037, the Department is adamant that recruitment of foreign workers is an expense to be borne by the employer and not by the foreign worker. Examples of exploitation of foreign workers, who in some instances have been required to give recruiters thousands of dollars to secure a job, have been widely reported in the comments received by the Department and elsewhere. The Department is concerned about the exploitation of workers who have heavily indebted themselves to secure a place in the H–2B program, and believes that such exploitation may adversely affect the wages and working conditions of U.S. workers by creating conditions akin to indentured servitude, driving down wages and working conditions for all workers, foreign and domestic.

The Department believes that requiring employers to incur the costs of recruitment is reasonable, even when taking place in a foreign country. However, the Department recognizes that an employer's ability to control the actions of agents and sub-contractors across international borders is constrained, just as the Department's ability to enforce regulations across international borders is constrained. As discussed in the preamble to 20 CFR 655.20 (p), the Department is requiring that the employer, as a condition of applying for temporary labor certification for H–2B workers, contractually forbid any foreign labor contractor or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages in international recruitment of H–2B workers to seek or receive payments from prospective employees. The Department will attempt to ensure the bona fides of such contracts and will work together with DHS, whose regulations also generally preclude the approval of an *H–2B Petition* and provide for denial or revocation if the employer knows or has reason to know that the worker has paid, or has agreed to pay, fees to a recruiter, facilitator, agent, and similar employment service as a condition of an offer or maintaining condition of H–2B employment. See 8 CFR 214.2(h)(6)(i)(B). As explained in WHD Field Assistance Bulletin No. 2011–2, any fee that facilitates an employee obtaining the visa in order to be able to work for that employer will be considered a recruitment fee, which must be borne by the H–2B employer. In addition, although employees may voluntarily pay some fees to independent third-party facilitators for services such as assisting the employee to access the Internet or in dealing with DOS, such fees may be paid by employees only if they are not made a condition of access to the job opportunity. When employers use recruiters, and in particular when they impose the contractual prohibition on collecting prohibited fees, they must make it abundantly clear that the recruiter and its agents or employees are not to receive remuneration from the foreign worker recruited in exchange for access to a job opportunity or in exchange for having that worker maintain that job opportunity. For example, evidence showing that the employer paid the recruiter no fee or an extraordinarily low fee, or continued to use a recruiter about whom the employer had received credible complaints, could be an indication that the contractual prohibition was not bona fide. In addition, where the Department determines that workers have paid these fees and the employer cannot demonstrate the requisite bona fide contractual prohibitions, the Department will require the employer to reimburse the workers in the amount of these prohibited fees. However, where an employer has complied in good faith with this provision and has contractually prohibited the collection of prohibited fees from workers, there is no willful violation. Thus, the Final Rule does not impose strict liability on employers for the collection of prohibited fees from workers by others.

Agent and attorney liability. For the reasons stated in the discussion under Debarment of Agents and Attorneys in 20 CFR 655.73, this Final Rule holds agent and attorney signatories to the Form 9142 liable for their independent willful violations of the H–2B program, separate from an employer's violation. As noted earlier, the Final Rule adopts the language proposed in § 503.19 that: ''A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions.'' The Final Rule also adopts the language proposed in § 503.20(a) that WHD can seek appropriate relief for any violation defined in § 503.19, including recovery of prohibited recruitment fees. Clarifying language has been added to § 503.20(b) to reflect that remedies will be sought directly from the employer or its successor, or from the employer's agent or attorney, where appropriate. For example, it would be appropriate to seek reimbursement of prohibited fees to affected workers from an attorney or agent, as opposed to an employer, where the employer has contractually prohibited the attorney or agent from collecting such fees yet the agent or attorney does so, despite the employer having affirmed on the *Application for Temporary Employment Certification* that everything in the application is true and correct, including the employer's attestation that ''[t]he employer and its attorney, agents and/or employees have not sought or received payment of any kind from the H–2B worker for any activity related to obtaining temporary labor certification, including but not limited to payment of the employer's attorney or agent fees, application fees, or recruitment costs.'' On the other hand, it would not be appropriate to hold the attorney or agent liable for unpaid wages when an employer fails to pay the required wage during the period of the application where the attorney or agent was uninvolved in such a violation.

Make-whole relief. A coalition representing agents and employers requested that the Department clarify the meaning of make-whole relief in this provision. Specifically, these commenters were concerned that make-whole relief would include compensatory damages for injuries beyond those that occur because of acts

or omissions related to violations of the terms and conditions of the H–2B program, as these damages would typically be available in a civil court action but employers would be disadvantaged if the Department imposed them in informal administrative proceedings. These commenters suggested that make-whole relief be deleted if the Department did not provide a clearer definition.

These commenters' concerns are unfounded. The Department intended make-whole relief to be limited to its traditional meaning, which is that the party subjected to the violation is restored to the position, both economically and in terms of employment status, that he or she would have occupied had the violation never taken place. Make-whole relief includes equitable and monetary relief such as reinstatement, hiring, front pay, reimbursement of monies illegally demanded or withheld, or the provision of specific relief such as the cash value of transportation or subsistence payments which the employer was required to, but failed to provide, in addition to the recovery of back wages, where appropriate. Nothing in the regulations allows recovery for injuries or losses in addition to actual damages and equitable relief. Therefore, the Department has decided to retain make-whole relief as one of the types of remedies available when a violation has been found, without further specification.

A federation of national and international labor unions suggested that the Department include a new subsection under this provision clarifying that ''[i]n any proceeding concerning unpaid wages or make whole relief, any monetary remedy will be determined based on the actual number of hours worked by similarly situated employees or the three-fourths guarantee described in 20 CFR 655.20(f), whichever is greater.'' The Department agrees that this statement accurately summarizes how such monetary remedies are calculated under this section. However, just as the Department believed it unnecessary to further define make-whole relief with respect to compensatory damages, it has determined that it is not necessary to add the suggested language to this section because these concepts and comparators are already encompassed under make-whole relief and are reflected in § 503.23(b) and (c), which explain that the civil money penalty for such violations is the difference between what should have been paid or earned and the amount that was actually paid.

Finally, a State Attorney General commented specifically regarding the importance of providing remedies for unlawful retaliation, particularly so that H–2B workers who are vulnerable to retaliation will have adequate protection when making meritorious complaints about workplace violations. This Attorney General's Office noted that, because reinstatement is a critical component of make-whole relief and may not be possible if the employer is debarred or chooses not to use the H–2B program in the future, the Department might wish to adopt a provision similar to a recent amendment to the New York labor law that provides up to $10,000 in liquidated damages for each instance of unlawful retaliation. While the Department appreciates the utility of this suggestion, liquidated damages are not consistent with make-whole relief for actual damages. However, as this Attorney General's Office further suggested, the Department wishes to clarify that make-whole relief for unlawful retaliation and discrimination may include front pay (such as for the duration of the work remaining in the job order) where reinstatement is not possible.

Additional comments regarding sanctions and remedies. A legal organization suggested that the Department should encourage the reporting of non-compliant employers by offering a reward to employee whistleblowers equal to a portion of the fines collected from the non-compliant employers. The Department does not believe authority exists to offer rewards to whistleblowers under the enforcement authority that has been delegated by DHS. This commenter also suggested that non-compliant employers be required to register for and use E-Verify. It is unclear how E-Verify is relevant to violations of these H–2B regulations, and mandating the use of E-Verify by employers is beyond the Department's jurisdiction.

7. § 503.21 Concurrent Actions

The NPRM proposed that OFLC and WHD would have concurrent jurisdiction to impose a debarment remedy under 20 CFR 655.73 and under § 503.24, while recognizing the differing roles and responsibilities of each agency under the program, as set forth in § 503.1. The cross-reference in § 503.3(c) proposed the safeguard that a specific violation for which debarment is sought will be cited in a single debarment proceeding, and that OFLC and WHD would coordinate their activities to achieve this result. This will ensure streamlined adjudications and that an employer will not face two debarment proceedings for a specific violation. The Department is adopting the provisions as proposed without change.

Numerous labor unions, worker advocacy organizations, and a congressman welcomed WHD's independent debarment authority. On the other hand, a coalition representing agents and employers, employer associations, and a legal association opposed the Department's proposal to grant debarment authority to WHD. They primarily contended that allowing both agencies to exercise debarment authority would likely result in inefficient and duplicative actions. However, as noted earlier, the NPRM proposed a safeguard that requires coordination rather than duplicative debarment proceedings.

The coalition representing agents and employers felt that OFLC should continue to have exclusive debarment authority because OFLC has greater familiarity with the nature and extent of employer violations in the application and recruitment process, and would therefore be better equipped to determine whether a violation warranted this type of punishment. This comment ignores the fact that employers and the Department have important roles and obligations during both the H–2B application and recruitment process and during the validity of the job order, when employers must comply with critical assurances and program obligations. While OFLC has more expertise in the application and recruitment process, and will retain specific authority to debar for failure to comply with the Notice of Deficiency and assisted recruitment processes, WHD has extensive expertise in conducting workplace investigations under numerous statutes, and has been enforcing H–2B program violations since the 2008 Final Rule became effective on January 18, 2009.

Providing WHD with the ability to order debarment, along with or in lieu of other remedies, will streamline and simplify the administrative process, and eliminate unnecessary bureaucracy by removing extra steps. Under the 2008 Final Rule, WHD conducts investigations of H–2B employers, and may assess back wages, civil money penalties, and other remedies, which the employer has the right to challenge administratively. However, under the 2008 Final Rule, WHD cannot order debarment, no matter how egregious the violations, and instead must take the extra step of recommending that OFLC issue a Notice of Debarment based on the exact same facts, which then have to be litigated again. Contrary to the commenters' assertions, allowing WHD

to impose debarment along with the other remedies it can already impose in a single proceeding will simplify and speed up this duplicative enforcement process, and result in less bureaucracy for employers who have received a debarment determination. Instead, administrative hearings and appeals of back wage and civil money penalties, which the WHD already handles, will now be consolidated with challenges to debarment actions based on the same facts, so that an employer need only litigate one case and file one appeal rather than two. This means that both matters can be resolved more expeditiously. Moreover, WHD has extensive debarment experience under regulations implementing other programs, such as H–1B, the Davis-Bacon Act, and the Service Contract Act. See, *e.g.,* 29 CFR 5.12.

The commenters opposing WHD's debarment authority also argued that WHD's debarment process was not as fair as OFLC's because WHD's process does not include a 30-day rebuttal period. These commenters were concerned that WHD might make a determination about a violation and initiate debarment proceedings before employers had an opportunity to provide critical information relating to the alleged violation. This concern is misplaced, however, and may reflect a lack of familiarity with how WHD conducts investigations and reaches a determination about whether violations have occurred and which remedies are appropriate. During the course of an investigation, WHD contacts and interviews both the employer and workers. WHD investigators discuss potential violations with the employer and, when requested, with his or her legal representative, providing the employer ample notice and an opportunity to provide any information relevant to WHD's final determination. Rather than a formal, 30-day rebuttal period, employers have numerous opportunities during the course of a WHD investigation and during a final conference to provide critical information regarding violations that may lead to debarment.

Finally, an employer association opposed the Department's proposal to grant WHD debarment authority because it believed it would make it easier for the Department to remove employers from the program without impartial review by an independent review panel or judge. However, the NPRM specifically included procedural protections for parties subject to WHD debarment proceedings, including notice of debarment, the right to a hearing before an Administrative Law Judge (ALJ), the right to seek judicial review of an ALJ's decision by the Administrative Review Board (ARB). See Subpart C, Administrative Proceedings.

8. § 503.22 Representation of the Secretary

The NPRM proposed to continue to have the Solicitor of Labor represent the Administrator, WHD and the Secretary in all administrative hearings under 8 U.S.C. 1184(c)(14) and these regulations. After receiving no comments, the Department is adopting this provision of the NPRM without change in the Final Rule.

9. § 503.23 Civil Money Penalty Assessment

The NPRM proposed a civil money penalty (CMP) assessment scheme similar to the CMP assessment contained in the 2008 Final Rule, with additional and clarifying language specifying that WHD may find a separate violation for each failure to pay an individual worker properly or to honor the terms or conditions of the worker's employment, as long as the violation meets the willfulness standard and/or substantial failure standard in § 503.19. Similar to the CMPs in the 2008 Final Rule, the proposed CMP assessments set CMPs at the amount of back wages owed for violations related to wages and impermissible deductions or prohibited fees, and at the amount that would have been earned but for an illegal layoff or failure to hire, up to $10,000 per violation. The NPRM also proposed to retain the catch-all CMP provision for any other violation that meets the standards in § 503.19, and set forth the factors WHD will consider in determining the level of penalties to assess for all violations but wage violations.

A coalition representing agents and employers was concerned that the NPRM blurred the lines between back pay remedies and civil money penalties. Specifically, these commenters questioned whether the CMPs that are set at the amount of unpaid wages (§ 503.23(b) and (c)) were treated as back wages or as a penalty payable to the U.S. Treasury rather than to the employee or applicant. As indicated in the NPRM, unpaid wages, including the recovery of wages owed for work performed, prohibited fees paid or impermissible deductions from pay, or recovery of wages due for improperly placing workers in areas of employment or in occupations other than those identified on the *Application for Temporary Employment Certification,* are recoverable as monetary remedies under § 503.20. These monetary remedies serve to make workers whole based on the violations to which they have been subjected. By contrast, the CMP provision, § 503.23, represents a penalty for non-compliance, and is payable to WHD for deposit with the Treasury.

These commenters also noted that the CMP assessment provision is confusing because § 503.23(b) and (c) suggest a formulaic means to determine a CMP (*i.e.,* the CMP is equal to the wages owed, up to a maximum of $10,000 per violation), whereas § 503.23(e) sets forth the factors WHD will consider in determining the level of CMPs to assess, yet the NPRM states that these factors apply to both § 503.23(c) and (d). The Department agrees that this is confusing, and is an unintentional holdover from the 2008 Final Rule, which contained the same language. Therefore, in this Final Rule, the reference to § 503.23(c) is deleted, in order to clarify that, as the commenters pointed out, § 503.23(b) and (c) use a fixed CMP amount and the factors set forth in § 503.23(e) apply only to the catch-all provision in § 503.23(d).

An individual U.S. worker felt that the Department should not limit CMPs to a $10,000 maximum, and should instead impose treble damages payable to the worker and a fine covering the costs of the Department's investigation and enforcement. The maximum CMP amount is set at $10,000 in order to be consistent with the statutory limit under 8 U.S.C. 1184(c)(14)(A), the statutory enforcement authority delegated to WHD by DHS. As stated earlier, the Department does not believe this enforcement authority permits liquidated damages.

10. § 503.24 Debarment

The NPRM's proposal to provide WHD with independent debarment authority is discussed under § 503.21. For the reasons stated under Debarment of Agents and Attorneys in 20 CFR 655.73, the Final Rule allows WHD to seek debarment of agents and attorneys for their own independent violations, and § 503.24(b) has been amended to that effect. Comments received regarding debarment that apply equally to OFLC and WHD are also discussed in the OFLC preamble discussion of debarment (20 CFR 655.73). With respect to the comments received from several worker advocacy organizations suggesting that the Department establish procedures to allow for workers and organizations of workers to intervene in and participate in WHD's debarment process, the Department has concluded that the Final Rule will not adopt additional procedures mandating that it

provide workers a right to intervene and participate in every case, for the reasons stated in OFLC's preamble under Integrity Measures (20 CFR 655.70–655.73). In addition to that discussion, which applies to both OFLC and WHD proceedings, WHD further notes that workers already participate in WHD investigations, which involve interviews with workers regarding program compliance. It is WHD's practice to provide notice to the individual complainants and their designated representatives and/or any third-party complainants when WHD completes an investigation by providing them a copy of the WHD Determination Letter. To further protect their interests, workers can seek, and have sought, intervention upon appeal to an Administrative Law Judge. See 20 CFR 18.10(c) and (d).

11. § 503.25 Failure To Cooperate With Investigators

The NPRM defined and expanded the penalties for failure to cooperate with a WHD investigation, noting the federal criminal laws prohibiting interference with federal officers in the course of official duties and permitting WHD to recommend revocation to OFLC and/or initiate debarment proceedings. Several worker advocacy organizations commended the Department for making it clear to employers that they may face serious consequences for certain violations of the regulations. The Department is adopting this provision of the NPRM without change in the Final Rule.

12. § 503.26 Civil Money Penalties—Payment and Collection

The NPRM proposed revised language instructing employers how to submit payment to WHD. After receiving no comments, the Department is adopting this provision of the NPRM without change in the Final Rule.

C. Administrative Proceedings

The NPRM proposed few changes to the administrative proceedings from the 2008 Final Rule. These minor changes were intended to bring clarity to the administrative proceedings that govern H–2B hearings, and to achieve general consistency with the procedural requirements applicable to H–2A proceedings. The Department received no comments on the particular provisions proposed in subpart C of the NPRM. However, upon further internal review, the Department concluded that additional minor changes were necessary to make clear that the procedures contained in this subpart apply to any party or entity subject to the Administrator, WHD's determination to assess a civil money penalty, to debar, or to impose other appropriate administrative remedies, including for the recovery of monetary relief—not just the employer. Therefore, in the Final Rule, in §§ 503.41, 503.42, 503.43, and 503.50, the term employer is replaced with the term party or recipient(s) of the notice. The Department intends the terms party or recipient(s) of the notice to include the employer, agent, or attorney, as appropriate. These changes correct internal inconsistencies in the provisions proposed in this subpart of the NPRM, and will make these provisions consistent with the language used in 20 CFR 655.73(g) (OFLC debarment procedure).

The Department received numerous comments from worker advocacy organizations suggesting that workers should be provided notice of administrative actions and a right to intervene, as workers possess valuable information relevant to these proceedings such as the appropriateness of job qualifications and the assessment of unlawful recruitment fees. Similarly, an individual stakeholder, commented that employers are afforded procedures for seeking review of the Department's determinations, yet such procedures are not provided for workers.

The importance of worker communication with WHD by filing complaints, participating in investigations, and serving as witnesses in administrative or judicial proceedings cannot be understated; it is essential in carrying out WHD's enforcement obligations. However, the Department has concluded that the Final Rule will not adopt additional procedures mandating that it provide workers notice of administrative actions and a right to intervene in every case, for the reasons stated in OFLC's preamble under Integrity Measures (20 CFR 655.70–655.73), which also apply to WHD's administrative actions. Further, as noted under § 503.24, workers already participate in WHD investigations, which involve interviews with workers regarding program compliance. It is WHD's practice to provide notice to the individual complainants and their designated representatives and/or any third-party complainants when WHD completes an investigation by providing them a copy of the WHD Determination Letter. To further protect their interests, workers can seek, and have sought, intervention upon appeal to an Administrative Law Judge. See 20 CFR 18.10(c) and (d). Thus, the Department is adopting the provisions of this Subpart of the NPRM without further change in the Final Rule.

IV. Administrative Information

A. Executive Orders 12866 and 13563

Under Executive Order (E.O.) 12866 and E.O. 13563, the Department must determine whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and to review by the OMB. Section 3(f) of the E.O. defines an economically significant regulatory action as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely and materially affects a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

The Department has determined that this rule is an economically significant regulatory action under section 3(f)(1) of E.O. 12866. This regulation would have an annual effect on the economy of $100 million or more; however, it would not adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, or public health or safety in a material way. The Department also has determined that this rule is a significant regulatory action under sec. 3(f)(4) of E.O. 12866. Accordingly, OMB has reviewed this rule.

1. Need for Regulation

The Department has determined for a variety of reasons that a new rulemaking effort is necessary for the H–2B program. The Department believes that the practical ramifications of the 2008 Final Rule (*e.g.,* streamlining the H–2B process to defer many determinations of program compliance until after an application has been adjudicated, inadequately protecting U.S. workers who may be paid less than H–2B workers performing the same jobs, failing to ensure the integrity of the program by not requiring employers to guarantee U.S. and H–2B employees work for any number of weeks during the period of the job order) have undermined the program's intended

protection of both U.S. and foreign workers.

For these reasons the Department is promulgating the changes contained in the Final Rule.

2. Alternatives

The Department has considered a number of alternatives: (1) To promulgate the policy changes contained in this rule; (2) to take no action, that is, to leave the 2008 Final Rule intact; and (3) to consider a number of other options discussed in more detail below. We believe that this rule retains the best features of the 2008 Final Rule and adopts additional provisions to best achieve the Department's policy objectives, consistent with its mandate under the H–2B program.

The Department considered alternatives to a number of program provisions. First, the Department considered another alternative to the definition of full-time work: a 40-hour threshold instead of the 35-hour level proposed and actually implemented in this Final Rule. As discussed in detail in the preamble to proposed 20 CFR 655.5, the Department established a 35-hour minimum as the definition of full-time employment because it more accurately reflects full-time employment expectations when coupled with the obligation for the employer to accurately disclose the hours of work that will be offered each week, and is consistent with other existing Department standards and practices in the industries that currently use the H–2B program to obtain workers.

Second, this rule included a three-fourths guarantee requirement, with the Final Rule requiring that the guarantee be measured based on 12-week periods (if the period of the job order is 120 or more days) and 6 weeks (if the period of the job order is less than 120 days). The Department considered using 4-week periods, as proposed, and also considered retaining the language of the H–2A requirement, under which employers must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total length of the contract. The Department rejected this alternative because, while this would provide workers with significant protection, it would not be sufficient to discourage the submission of imprecise dates of need and/or imprecise numbers of employees needed and would therefore fail to protect U.S. and H–2B workers from periods of unforeseen underemployment.

The Department believes that the rule, which calculates the hours of employment offered in 12-week and 6-week periods, better ensures that workers' commitment to a particular employer will result in real jobs that meet their reasonable expectations. We do not believe this Final Rule will create any additional financial burden on employers who have accurately represented their period of need and number of employees needed, and will provide an additional incentive for applicants to correctly state all of their needs on the *H–2B Registration* and the *Application for Temporary Employment Certification.*

Third, the Department considered omitting the registration of H–2B employers and instead retaining the current practice for the adjudication of the employer's temporary need and the labor market analysis to occur simultaneously. While this might be more advantageous for employers new to the program, it delays the vast majority of employers that are recurring users with relatively stable dates of need and that would benefit from separate adjudication of need and adequacy of recruitment. Moreover, employers and potential workers benefit from a recruitment process close in time to the actual date of need which a registration process, by pre-determining temporary need, expressly permits. Therefore, the Department rejected the alternative of simultaneous adjudication because it undercuts the Secretary's fulfillment of her obligations under the program.

Fourth, the Final Rule provides that employers may arrange and pay for workers' transportation and subsistence from the place from which the worker has come to the place of employment directly, advance at a minimum, the most economical and reasonable common carrier cost, or reimburse the worker's reasonable costs if the worker completes 50 percent of the period of employment covered by the job order if the employer has not previously reimbursed such costs. The Final Rule continues to require employers to provide return transportation and subsistence from the place of employment; however, the obligation attaches only if the worker completes the period of employment covered by the job order or if the worker is dismissed from employment for any reason before the end of the period. In addition, the Final Rule continues to provide that if a worker has contracted with a subsequent employer that has agreed to provide or pay for the worker's transportation to the subsequent employer's worksite, the subsequent employer must provide or pay for such expenses; otherwise, if this agreement is not made, the employer must provide or pay for that transportation and subsistence. The Final Rule reminds employers that the FLSA imposes independent wage payment obligations, where it applies. The Department considered requiring employers to reimburse the worker in the first workweek any cost of transportation and subsistence, as proposed, but rejected this alternative in response to commenter concerns.

Finally, the proposed rule required the employers to extend offers of employment to qualified U.S. workers referred by the SWAs until 3 days before the date of need or the date of departure of the last H–2B worker, whichever is later. In consideration of commenter concerns, and to taking into consideration USCIS regulations governing the arrival of H–2B workers, the Department has modified this requirement. In the Final Rule, employers are required to accept SWA referrals of qualified U.S. applicants until 21 days before the date of need, irrespective of the date of departure of the last H–2B worker.

3. Economic Analysis

The Department derives its estimates by comparing the baseline, that is, the program benefits and costs under the 2008 Final Rule, against the benefits and costs associated with the implementation of the provisions in this Final Rule. The benefits and costs of the provisions of this Final Rule are estimated as incremental impacts relative to the baseline. Thus, benefits and costs attributable to the 2008 Final Rule are not considered as benefits and costs of this Final Rule. We explain how the actions of workers, employers, and government agencies resulting from the Final Rule are linked to the expected benefits and costs.

The Department sought to quantify and monetize the benefits and costs of this Final Rule where feasible. Where we were unable to quantify benefits and costs—for example, due to data limitations—we describe them qualitatively. The analysis covers 10 years (2012 through 2021) to ensure it captures major benefits and costs that accrue over time.[14] We have sought to present benefits and costs both undiscounted and discounted at 7 percent and 3 percent.

In addition, the Department provides an assessment of transfer payments associated with certain provisions of the

[14] For the purposes of the cost-benefit analysis, the 10-year period starts on July 1, 2012.

rule.[15] Transfer payments, as defined by OMB Circular A–4, are payments from one group to another that do not affect total resources available to society. Transfer payments are associated with a distributional effect, but do not result in additional benefits or costs to society. The rule would alter the transfer patterns and increase the transfers from employers to workers. The primary recipients of transfer payments reflected in this analysis are U.S. workers and H–2B workers. The primary payors of transfer payments reflected in this analysis are H–2B employers, and under the rule, those employers who choose to participate are likely to be those that have the greatest need to access the H–2B program. When summarizing the benefits or costs of specific provisions of this rule, we present the 10-year averages to reflect the typical annual effect.

The inputs used to calculate the costs of this rule are described below.

a. Number of H–2B Workers

The Department estimates that from FY 2000–2007, there were an average of 185,879[16] H–2B workers requested per year and 154,281 H–2B positions certified. Because the number of H–2B visas is statutorily limited, only some portion of these certified positions were ultimately filled by foreign workers.

The number of visas available in any given year in the H–2B program is 66,000, assuming no statutory changes in the number of visas available. Some costs, such as travel, subsistence, visa and border crossing, and reproducing the job order apply to these 66,000 workers. Employment in the H–2B program represents a very small fraction of the total employment in the U.S. economy, both overall and in the industries represented in this program. The H–2B program's annual cap of 66,000 visas issued per year (33,000 allocated semi-annually) represents approximately 0.05 percent of total nonfarm employment in the U.S. economy (129.8 million).[17] The number of visas per year does not fully capture the number of H–2B workers in the U.S. at any given time as there are exceptions to the H–2B cap; additionally, a nonimmigrant's H–2B classification may be extended for qualifying employment for a total stay of up to 3 years without being counted against the cap. The Department assumes that half of all H–2B workers entering the United States (33,000) in any year stay at least 1 additional year, and half of those workers (16,500) will stay a third year, for a total of 115,500 H–2B workers employed at any given time. This suggests that 57 percent of H–2B workers (66,000/115,500) are new entrants in a given year. Extending the analysis to the 115,500 H–2B workers we estimate are in the country at any given time, the number of H–2B workers represents approximately 0.09 percent of total nonfarm employment.

According to H–2B program data for FY 2007–2009, the average annual numbers of H–2B positions certified in the top five industries were as follows:

Landscaping Services—78,027
Janitorial Services—30,902
Construction—30,242
Food Services and Drinking Places—22,948
Amusement, Gambling, and Recreation—14,041

These numbers overestimate the number of actual H–2B workers, as the number of positions certified exceeds the number of H–2B workers in the country at a given time.

The Department estimates the number of H–2B workers in these industries based on the number of positions certified by dividing 115,500 H–2B workers (66,000 plus 33,000 staying one additional year plus 16,500 staying a third year) by the 236,706 positions certified per year on average during FY 2007–2009. This produces a scalar of 48.8 percent. Applying this scalar to the number of positions certified suggests that the number of H–2B workers in the top five industries is:

Landscaping Services—38,073
Janitorial Services—15,079
Construction—14,756
Food Services and Drinking Places—11,197
Amusement, Gambling, and Recreation—6,851

These employment numbers represent the following percentages of the total employment in each of these industries:[18]

Landscaping Services—6.5 percent (38,073/589,698)
Janitorial Services—1.6 percent (15,079/933,245)
Construction—0.2 percent (14,756/7,265,648)
Food Services and Drinking Places—0.1 percent (11,197/9,617,597)
Amusement, Gambling, and Recreation—0.5 percent (6,851/1,506,120)

As these data illustrate, the H–2B program represents a small fraction of the total employment even in each of the top five industries in which H–2B workers are found.

b. Number of Affected Employers

The Department estimates that from FY 2000–2007, an average of 6,425 unique employers applied for H–2B workers, and of these, an average of 5,298 were granted certifications. Several of the Final Rule's provisions (the requirement for employers to translate the job order from English to a language understood by the foreign workers, and payment of visa and visa-related fees) will predominantly or only apply to employers that ultimately employ H–2B workers. As there is no available source of data on the number of H–2B employer applicants who ultimately employ H–2B workers, the Department uses the ratio of estimated H–2B workers in the country at a given time (115,500) to the number of positions certified in an average year (154,281) to derive a scale factor of 74.9 percent. Multiplying the average number of unique certified H–2B employer applicants from FY2000–2007 (5,298) by the scale factor (74.9) suggests that there are 3,966 unique certified H–2B employer applicants who ultimately employ H–2B workers.

c. Number of Corresponding Workers

Several provisions of the Final Rule extend to workers in corresponding employment, defined as those non-H–2B workers who perform work for an H–2B employer, where such work is substantially the same as the work included in the job order, or is substantially the same as other work performed by H–2B workers. Corresponding workers are U.S. workers employed by the same employer performing the substantially the same tasks at the same location as the H–2B workers, and they are entitled to at least the same terms and conditions of employment as the H–2B workers. Corresponding workers might be temporary or permanent; that is, they could be employed under the same job order as the H–2B workers for the same period of employment, or they could have been employed prior to the H–2B workers, and might remain after the H–2B workers leave. However, the Final Rule excludes two categories of workers from the definition of corresponding employment. Corresponding workers are entitled to the same wages and benefits that the employer provides to H–2B workers, including the three-fourths guarantee, during the period covered by the job order. The

[15] The specific provisions associated with transfer payments are: wages paid to corresponding U.S. workers, payments for transportation, subsistence, and lodging for travel to and from the place of employment, and visa-related fees.

[16] Office of Foreign Labor Certification, Public Disclosure Data.

[17] U.S. Bureau of Labor Statistics (BLS). 2011. Employees on nonfarm payrolls by major industry sector, 1961 to date. Available at *ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb1.txt.*

[18] U.S. Census Bureau. 2007. 2007 Economic Census. Available at *http://www.census.gov/econ/census07/.*

corresponding workers would also be eligible for the same transportation and subsistence payments as the H–2B workers if they travel a long distance to reach the job site and cannot reasonably return to their residence each workday. In addition, as a result of the enhanced recruiting in this rule, including the new electronic job registry, certain costs may be avoided as employers are able to find U.S. workers in lieu of some H–2B workers. The Department believes that the costs associated with hiring a new U.S. worker would be lower than the costs associated with hiring an H–2B worker brought to the U.S. from abroad, as the costs of visa and border crossing fees to be paid for by the employer will be avoided and travel costs may likely be less (or zero for workers who are able to return to their residence each day).

There are no reliable data sources on the number of corresponding workers at work sites for which H–2B workers are requested or the hourly wages of those workers. The Department does not collect data regarding what we have defined as corresponding employees, and therefore cannot identify the numbers of workers to whom the obligations would apply.[19] The Department extensively examined alternative data sources that might be used to accurately estimate the number of corresponding workers. First, in the proposed rule, the Department asked the public to propose possible sources of data or information on the number of corresponding workers at work sites for which H–2B workers were requested and the current hourly wage of those corresponding workers. The Department reviewed comments received in response to this request, but unfortunately, no data were provided by commenters. Perhaps the most interesting qualitative feedback from comments was the apparent dichotomy in perceptions of the issue of corresponding workers. Some commenters indicated there would be no corresponding workers whose wages were affected by this rule: they hired H–2B workers because they could not find corresponding U.S. workers willing to do the job. At the opposite end of the spectrum were commenters who asserted that many, if not most, of their permanent employees might require wage increases as a result of this rule. However, at least some of the latter comments reflected a potential misunderstanding of the rule; most commenters who made such assertions were misguided in their assumption that any activity performed by any worker that is also performed by H–2B workers would make those workers corresponding.[20]

Second, the Department asked its WHD field staff to provide information they might have on the number of corresponding workers employed by H–2B employers based on the data gathered during investigations. The number of U.S. workers similarly employed varies widely among the companies investigated, ranging from 0 to 310. No data on the number of H–2B workers was collected, though, so it is impossible to compare the pattern of employment of U.S. and H–2B workers. Because such data gathering was not the principal goal of the investigation, the data provided are the result of chance and what the investigator happened to record, rather than a systematic collection of worker counts relevant to the estimation of corresponding employment. Furthermore, the results of only 36 investigations were available. Finally, they did not represent a random sample of H–2B employers, but just that subset of employers that the Department had some reason to investigate.

Third, the Department reviewed a random sample of 225 certified and partially certified applications from FY2010 submitted by employers in response to Request for Information (RFIs) during the application process. While the 2011 version of ETA Form 9142 includes an optional item on the number of non-family full-time equivalent employees, that number includes all employees and not only the employees in corresponding employment. (See also the instructions to the Form 9142, which inform the employer to ''[e]nter the number of full-time equivalent (FTE) workers the employer employs.'') Moreover, even if this number accounted for the number of corresponding employees, none of the applications in the random sample used the 2011 version of the form. Of the 225 applications reviewed, two applications gave the current number of employees as part of the other information submitted. Additionally, DOL examined data in 34 payroll tables that were provided to supplement the application. The payroll tables reported data by month for at least 1 year from 2007 to 2010 and included information such as the total number of workers, hours worked, and earnings for all workers performing work covered by the job order. These workers were broken down into categories for permanent workers (those already employed and performing the certified job) and for temporary workers (both H–2B workers and corresponding workers who responded to the job order). The Department divided the total payroll by the total hours worked across the two categories of workers to estimate an average hourly wage per permanent and temporary worker. The Department compared the total number of workers in months where permanent workers were paid more than and less than temporary employees for those months in which both were employed.

The Department found 7,548 temporary and 10,310 permanent worker-months (defined as one worker, whether full- or part-time, employed one month) in the 34 payroll tables examined. Of these, permanent employees were paid more than temporary employees in 9,007 worker-months, and were paid less than temporary employees in 1,303 worker months. This suggests the rule would have no impact on wages for 87 percent of permanent workers (9,007/10,310). Conversely, 13 percent of permanent workers (1,303/10,310), were paid less than temporary employees and would receive an increase in wages as a result of the rule. Calculating the ratio of 1,303 permanent worker-months to 7,548 temporary worker-months when permanent workers are paid less than temporary workers suggests that for every temporary worker-month, there are 0.17 worker-months where the permanent worker wage is less than the temporary worker wage. Extrapolating this ratio based on the Department's estimate that there are a total of 115,500 H–2B employees at any given time, this suggests that 19,939 permanent workers ($115{,}500 \times 0.17$) would be eligible for pay raises due to the rule.

The Department also calculated the percentage difference in the corresponding and temporary worker wages in months where temporary workers were paid more. On average, corresponding workers earning less than temporary employees would need their wages to be increased 4.5 percent to match temporary worker wages.

[19] The Department only recently began asking employers (in a non-required field) to state on an H–2B *Application for Temporary Employment Certification* the number of full-time equivalent employees that they employ. Further, the Department does not have this information from concluded investigations.

[20] Comments by the SBA, for example, (ETA–2011–0001–0438) stated that in some industries (*e.g.,* landscaping, restaurants), supervisors and H–2B workers might sometimes perform the same task (*e.g.,* a landscaping supervisor might mow lawns if someone calls in sick; a supervisor at a small restaurant might help clear tables during busy times). Therefore, as explained in the preamble, the commenters mistakenly believed that because the H–2B worker and the supervisor ''perform the same work,'' they are corresponding employees, and the firm must pay the H–2B worker the same wage rate as the supervisor, which then means all other workers must be paid the same as the H–2B worker.

For several reasons, however, the Department did not believe it was appropriate to use the data in the payroll tables to extrapolate to the entire universe of H–2B employers. First, because of the selective way in which these payroll records were collected by the Department, the distribution of occupations represented in the payroll tables is not representative of the distribution of occupations in H–2B applications. The 34 payroll tables examined by the Department included the following occupations:

Nonfarm Animal Caretakers (12 payroll tables)
Landscaping and Groundskeeping Workers (four payroll tables)
Maids and Housekeeping Cleaners (four payroll tables)
Cooks (two payroll tables)
Waiters and Waitresses (two payroll tables)
Forest and Conservation Workers (two payroll tables)
Dishwashers (one payroll table)
Dining Room and Cafeteria Attendants and Bartender Helpers (one payroll table)
Separating, Filtering, Clarifying, Precipitating, and Still Machine Setters, Operators, and Tenders (one payroll table)
Food Cooking Machine Operators and Tenders (one payroll table)
Floor Sanders and Finishers (one payroll table)
Production Workers, All Other (one payroll table)
Receptionists and Information Clerks (one payroll table)
Grounds Maintenance Workers, All Other (one payroll table)

The four payroll tables for landscaping and groundskeeping workers made up only 12 percent of the payroll tables, while applications for these workers comprised 35 percent of FY 2010 applications. Conversely, the 12 payroll tables from nonfarm animal caretakers made up 35 percent of the payroll tables in our sample, while applications for such workers made up only 6 percent of the FY 2010 applications.

Second, the total number of payroll tables or payroll records provided to the Department was very small. We found only 34 payroll tables in 225 randomly selected applications. Furthermore, payroll records in H–2B applications are provided in specific response to an RFI or in the course of a post-adjudication audit. In both instances the primary purpose of these records is to demonstrate compliance with program requirements, usually either to demonstrate proactively that the need for workers is a temporary need, or to demonstrate retroactively compliance with the wage obligation. Because payroll tables were submitted in response to an RFI rather than as a matter of routine in the application process, it is not clear that the data in the limited number of payroll tables for a given occupation are representative of all workers within that occupation in the H–2B program. Something triggered the RFI, presumably some indication that the need for temporary workers was not apparent, and therefore these applications are not representative of the 85 percent of applications that did not require a payroll table.

Third, the payroll wage information in these tables is provided at the group level, and the Department is unable to estimate how many individual corresponding workers are paid less than temporary workers in any given month. The payroll tables only allow a gross estimate of whether corresponding or temporary workers were paid more, on average, in a given month. Because wages would only increase for those U.S. workers currently making less than the prevailing wage, this information is necessary to determine the effect the rule would have on workers in corresponding employment. Finally, the Department has no data regarding the number of employees who would fall under the two exclusions in the definition of corresponding employment.

The Department, therefore, cannot confidently rely upon the payroll tables alone and has no other statistically valid data to quantify the total number of corresponding workers or the number that would be eligible for a wage increase to match the H–2B workers. Nevertheless, the Department believes that the payroll tables show that the impact of the corresponding employment provision would be relatively limited, both as to the number of corresponding workers who would be paid more and as to the amount their wages would increase.

Based upon all the information available to us, including the payroll tables, the anecdotal evidence in the comments, and the Department's enforcement experience, the Department has attempted to quantify the impact of the corresponding employment provision. We note that the 2008 Final Rule already protects U.S. workers hired in response to the required recruitment, including those U.S. workers who were laid off within 120 days of the date of need and offered reemployment. Therefore, this rule will have no impact on their wages. This Final Rule simply extends the same protection to other employees performing substantially the same work included in the job order or substantially the same work that is actually performed by the H–2B workers. Based in particular upon the numerous employer commenters who asserted that they were unable to find U.S. workers to perform the types of jobs typically encompassed within their job orders, the Department believes that a reasonable estimate is that H–2B workers make up 75% to 90% of the workers in the particular job and location covered by a job order; we assume, therefore, that 10% to 25% of the workers will be U.S. workers newly covered by the rule's wage requirement. This assumption does not discount at all for the fact, as noted above, that some of these U.S. workers already are covered by the prevailing wage requirement or could be covered by one of the two exclusions from the definition of corresponding employment. Carrying forward with our estimate that there are a total of 115,500 H–2B workers employed at any given time, we thus estimate that there will be between 12,833 (if 90% are H–2B workers) and 38,500 (if 75% are H–2B workers) U.S. workers newly covered by the corresponding employment provision.

d. Wages Used in the Analysis

The Department updated the wage and benefit costs under the proposed rule by incorporating the most recent OES wage data available from BLS, and its most recent estimate of the ratio of fringe benefit costs to wages, 30.4 percent.[21]

To represent the hourly compensation rate for an administrative assistant/executive secretary, the Department used the median hourly wage ($22.06) for SOC 43–6011 (Executive Secretaries and Executive Administrative Assistants).[22] The hourly compensation rate for a human resources manager is the median hourly wage of $47.68 for SOC 11–3121 (Human Resources Managers).[23] Both wage rates were multiplied by 1.304 to account for private-sector employee benefits.

For registry development and maintenance activities, the proposed rule used fully loaded rates based on an Independent Government Cost Estimate

[21] U.S. Bureau of Labor Statistics (BLS). 2011a. Employer Costs for Employee Compensation news release text. June 8, 2011. Available at *http://www.bls.gov/news.release/ecec.nr0.htm* (Accessed July 12, 2011).

[22] U.S. Bureau of Labor Statistics (BLS). 2011b. Occupational Employment and Wages, May 2010—43–6011 Executive Secretaries and Executive Administrative Assistants. Available at *http://www.bls.gov/oes/current/oes436011.htm* (Accessed June 3, 2011).

[23] U.S. Bureau of Labor Statistics (BLS). 2011c. Occupational Employment and Wages, May 2010—11–3121 Human Resources Managers. Available at *http://www.bls.gov/oes/current/oes113121.htm* (Accessed July 12, 2011).

(IGCE) produced by OFLC,[24] which are inclusive of direct labor and overhead costs for each labor category.[25] Because the BLS data used to update other wages does not include overhead costs, the Department updated these wage estimates using the Producer Price Index (PPI) for software publishers producing application software to inflate the loaded wage rates for each labor category from 2010 (average annual PPI, 96.8) to 2011 (average of first five months' PPIs, 97.0).

The 2011 wages used in the analysis are summarized in Table 3.

TABLE 3—WAGES USED IN THE ANALYSIS

Occupation	Hourly wage	Loaded wage [a]	PPI adjusted wage [b]
Administrative Assistant	$22	$29	.....
HR Manager	48	62	N/A
Program Manager	N/A	138	$139
Computer Systems Analyst II	N/A	92	92
Computer Systems Analyst III	N/A	110	110
Computer Programmer III	N/A	90	90
Computer Programmer IV	N/A	108	108
Computer Programmer Manager	N/A	124	124
Data Architect	N/A	105	105
Web Designer	N/A	125	125
Database Analyst	N/A	78	78
Technical Writer II	N/A	85	85
Help Desk Support Analyst	N/A	55	55
Production Support Manager	N/A	126	126

[a] Accounts for 30.4 percent fringe.
[b] Multiplied by ratio of 2011 PPI to 2010 PPI (97.0/96.8).
N/A: Not Applicable.
Sources: BLS, 2011a; BLS, 2011b; BLS, 2011c; BLS, 2011d; BLS, 2011e.

e. H–2B Employment in the Territory of Guam

This Final Rule applies to H–2B employers in the Territory of Guam only in that it requires them to obtain prevailing wage determinations in accordance with the process defined at 20 CFR 655.10. To the extent that this process incorporates the new methodology defined in the January 2011 prevailing wage rule, it is possible that some H–2B employers in Guam will experience an increase in their H–2B prevailing wages. The Department expects that the H–2B employers in Guam working on Federally-funded construction projects subject to the Davis-Bacon and Related Acts (DBRA) are already paying the Davis-Bacon Act prevailing wage for the classification of work performed and that such employers may not experience an increase in the wage levels they are required to pay. Employers performing work ancillary or unrelated to DBRA projects, and therefore paying a wage potentially lower than the Davis-Bacon Act prevailing wage, may receive increased prevailing wage determinations under this Final Rule. However, because the H–2B program in Guam is administered and enforced by the Governor of Guam, or the Governor's designated representative, the Department is unable to quantify the effect of this provision on H–2B employers in Guam due to a lack of data.

4. Subject-by-Subject Analysis

The Department's analysis below considers the expected impacts of the Final Rule provisions against the baseline (*i.e.,* the 2008 Final Rule). The sections detail the costs of provisions that provide additional benefits for H–2B and/or workers in corresponding employment, expand efforts to recruit U.S. workers, enhance transparency and worker protections, and reduce the administrative burden on SWAs.

a. Three-Fourths Guarantee

Under the Proposed Rule, the Department specified that employers guarantee to offer hours of employment equal to at least three-fourths of the certified work days during the job order period, and that they use successive 4-week periods to measure the three-fourths guarantee. The use of 4-week periods was proposed (as opposed to measuring the three-fourths guarantee over the course of the entire period of need as in the H–2A program) in order to ensure that work is offered during the entire certified period of employment. The Department received comments from employers expressing concern that they are unable to predict the exact timing and flow of tasks by H–2B workers, particularly at the beginning and end of the period of certification, and that they need more scheduling flexibility due to unexpected events such as extreme weather or catastrophic man-made events. Acknowledging these commenters' concerns, the Department lengthened the calculation period from 4 weeks to 12 weeks for job orders lasting at least 120 days and 6 weeks for job orders lasting less than 120 days. In order to ensure that the capped H–2B visas are appropriately made available to employers based upon their actual need for workers, and to ensure that U.S. workers can realistically evaluate the job opportunity, the Department maintains that employers should accurately state their beginning and end dates of need and the number of H–2B workers needed. To the extent that employers submit *Applications for Temporary Employment Certification* accurately reflecting their needs, the three-fourths guarantee provision should not represent a cost to employers, particularly given the extended 12-week and 6-week periods over which to calculate the guarantee.

b. Application of H–2B Wages to Corresponding Workers

There are two cohorts of corresponding workers: (1) The U.S. workers hired in the recruitment process and (2) other U.S. workers who work for the employer and who perform

[24] OFLC. 2010. Independent Government Cost Estimates.

[25] The Department would not typically use a wage that included overhead costs, but here the Department uses the services of a contractor to develop the registry, and therefore the fully loaded wage is more reflective of costs.

the substantially the same work as the H–2B workers, other than those that fall under one of the two exclusions in the definition. The former are part of the baseline for purposes of the wage obligation, as employers have always been required to pay U.S. workers recruited under the H–2B program the same prevailing wage that H–2B workers get. Of the latter group of corresponding workers, some will already be paid a wage equal to or exceeding the H–2B prevailing wage so their wages represent no additional cost to the employer. Those who are currently paid less than the H–2B prevailing wage will have to be paid at a higher rate, with the additional cost to the employer equal to the difference between the former wage and the H–2B wage.

As discussed above, the Department was unable to identify a reliable source of data providing the number of corresponding workers at work sites for which H–2B workers are requested or the hourly wages of those workers. Nevertheless, the Department has attempted to quantify the impacts associated with this provision. All increases in wages paid to corresponding workers under this provision represent a transfer from participating employers to U.S. workers.

In the absence of reliable data, the Department believes it is reasonable to assume that H–2B workers make up 75 to 90 percent of the workers in a particular job and location covered by the job-order, with the remaining 10 to 25 percent of workers being corresponding workers newly covered by the rule's wage requirement. When these rates are applied to our estimate of the total number of H–2B workers (115,500) employed at any given time, we estimate that the number of corresponding workers newly covered by the corresponding employment provision will be between 12,833 and 38,500. This is an overestimate of the rule's impact, since some of the employees included in the 10–25 percent proportion of corresponding workers are those hired in response to required recruitment and are therefore already covered by the existing regulation, and some employees will fall within one of the two exclusions under the definition.

The prevailing wage calculation represents a typical worker's wage for a given type of work. Since the prevailing wage calculation is based on the current wages received by all workers in the occupation and area of intended employment, it is reasonable to assume that 50 percent of the corresponding workforce earns a wage that is equal to or greater than the calculated prevailing wage. Conversely, it would be reasonable to assume that 50 percent of the workers in corresponding employment earn less than the prevailing wage and would have their wages increased as a result of the Final Rule. Applying this rate to our estimate of the number of workers covered by the corresponding employment provision would mean that the number of newly-covered workers is between 6,417 and 19,250.

We also believe it is reasonable to assume that the typical hourly wage increase for the newly-covered U.S. workers will be less than the average increase for H–2B workers resulting from the Wage Rule. This reflects our expectation that a majority of the newly-covered corresponding workers are currently earning close to the new H–2B prevailing wage (which represents the mathematical mean wage for the occupation in the area of intended employment). These corresponding workers, who would already be part of an employer's staff in occupations for which a certification is being sought, have likely experienced some wage growth during their tenure with the employer; therefore, their wage increase should be significantly less than the hourly wage increase for the H–2B workers in that occupations.

We also expect that few corresponding workers are likely to receive a wage increase that is close to or greater than the weighted average hourly increase for H–2B workers. This small number of incumbent employees would likely be limited to those hired shortly before an employer applied for an H–2B Temporary Employment Certification. Because they would not have had sufficient tenure to experience any wage growth, their hourly wage increase may be equivalent to the average wage increases provided to H–2B workers under the Wage Rule.

Therefore, we believe that U.S. workers' wage increases will be largely distributed between the previous H–2B prevailing wage and the new prevailing wage. Using the weighted average hourly wage increase for H–2B workers to approximate an upper bound for the increase in corresponding workers' wages, we assume that the wage increases for newly-covered workers will be distributed between three hourly-wage intervals: 30 percent of the newly-covered corresponding workers will receive an average hourly wage increase of $1.00; 15 percent will receive a wage increase of $3.00 per hour; and, 5 percent will receive an average hourly increase of $5.00, which encompasses the weighted average hourly wage increase for H–2B workers from the Wage Rule.

Finally, we estimate that these workers in corresponding employment will have their wages increased for 1,365 hours of work. This assumes that every H–2B employer is certified for the maximum period of employment of nine months (39 weeks), and that every corresponding worker averages 35 hours of work per week for each of the 39 weeks. This is an upper-bound estimate since it is based upon every employer voluntarily providing in excess of the number of hours of work required by the three-fourths guarantee for the maximum number of weeks that can be certified.

Therefore, based on all the assumptions noted above, we estimate the total annual transfer incurred due to the increase in wages for newly-covered workers in corresponding employment ranges from $17.5 million to $52.6 million. See Table 4.

Also, based on our review of available information on the characteristics of industries employing H–2B workers, there will be natural limit on the number of corresponding workers whose wages might be affected by the revised rule. The Department found that the two industries that most commonly employ H–2B workers are landscaping services and janitorial services.

Establishments in these industries tend to be small: Approximately 7 percent of janitorial service and 3 percent of landscaping establishments have more than 50 year-round employees; and, 86 percent of janitorial services and 91 percent of landscaping establishments have fewer than 20 year-round employees. Therefore, we believe that a majority of H–2B employers are small-sized firms whose workforces are comprised predominately of H–2B workers.

This assertion is consistent with employer comments on the proposed rule that firms hire H–2B workers primarily because they find it difficult to fill those positions with U.S. workers. This is also consistent with the fact that 20 percent in janitorial services and 30 percent in landscaping do not even operate year-round. Taken in total, the small size of a typical H–2B employer would place limits on the number of potential corresponding workers.

Finally, to the extent that firms in landscaping and janitorial services incur increased payroll costs, those increased costs are unlikely to have a significant aggregate impact. U.S. Bureau of Economic Analysis (BEA) input-output analysis of the economy demonstrates that the demand for ''Services to Buildings and Dwellings'' (the sector in

which janitorial and landscaping services are classified) is highly diffused throughout the economy.

BEA calculates Direct Requirements tables that indicate the dollar amount of input from each industry necessary to produce one dollar of a specified industry's output. These results show that building services account for a relatively negligible proportion of production costs: Of 428 sectors, building services account of less than $0.01 for each dollar of output in 414 sectors, and less than $0.005 for each dollar of output in 343 sectors. The largest users of these services tend to be retail trade, government and educational facilities, hotels, entertainment and similar sectors. In other words, these services do not impact industrial productivity or the production of commodities that will result in large impacts that ripple throughout the economy. To further place this in perspective, Services to Buildings and Dwellings, upon which this characterization is based includes more than just the janitorial and landscaping service industries. The estimated 53,173 H–2B workers hired by these industries account for only 3.1 percent of employment in the Services to Buildings and Dwellings sector, even including impacts through corresponding employee provisions (described above as limited), and are only a small fraction of the already small direct requirements figures for this sector.

Therefore, based on the characteristics of industries that use H–2B workers, only a relatively small fraction of employees and firms in those industries likely will be affected by corresponding worker provisions.

However, because the Department does not have data on the number of corresponding workers or their wages relative to prevailing wages, it cannot project firm-level impacts to those firms that do have permanent corresponding workers. Standard labor economic models suggest that an increase in the cost of employing U.S. workers in corresponding employment would reduce the demand for their labor. Because employers cannot replace U.S. workers laid off 120 days before the date of need or through the period of certification with H–2B workers, the Department concludes that there would be no short-term reduction in the employment of corresponding workers among participating employers. In the long-run, however, these firms might be reluctant to hire additional permanent staff. The extent to which such unemployment effects might result from the prevailing wage provision will be a function of: The number of permanent staff requiring wage increases; the underlying demand for the product or service provided by the firm during off-peak periods; and the firm's ability to substitute for labor to meet that off-peak demand for its products or services. First, the fewer the number of permanent staff receiving wage increases, then the smaller the increase in the cost of producing the good or service. Second, the demand for labor services is a ''derived demand.'' That is, if the product or service provided has few substitutes, purchasers would prefer to pay a higher price rather than do without the product. Third, some goods and services are more difficult to produce than others by substituting equipment or other inputs for labor services. In summary, if increased wages result in a small overall cost increase, demand for the product is inelastic, and there are few suitable substitutes for labor in production, then unemployment effects are likely to be relatively small.

TABLE 4—COST OF CORRESPONDING WORKER WAGES

Hourly wage increase	Percent corresponding employees	Corresponding employees	Total cost
H2B Workers 90% of Occupation at Firm			
$0.00	50	6,417	$0
1.00	30	3,850	5,255,250
3.00	15	1,925	7,882,875
5.00	5	642	4,379,375
Total	100	12,833	17,517,500
H2B Workers 75% of Occupation at Firm			
$0.00	50	19,250	$0
$1.00	30	11,550	15,765,750
$3.00	15	5,775	23,648,625
$5.00	5	1,925	13,138,125
Total	100	38,500	52,552,500

Source: DOL assumptions.

c. Transportation to and From the Place of Employment for H–2B Workers

The Final Rule requires H–2B employers to provide workers—both H–2B workers and those in corresponding employment who are unable to return to their permanent residences—with transportation and daily subsistence to the place of employment from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, if the worker completes 50 percent of the period of the job order. The employer must also pay for or provide the worker with return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer if the worker completes the period of the job order or is dismissed early. The impacts of requiring H–2B employers to pay for employees' transportation and subsistence represent transfers from H–2B employers to workers because they represent distributional effects, not a change in society's resources.[26]

To estimate the transfer related to transportation, the Department first

[26] For the purpose of this analysis, H–2B workers are considered temporary residents of the United States.

calculated the average number of certified H–2B positions per year during FY 2007–2009 from the ten most common countries of origin, along with each country's proportion of this total.[27] These figures, presented in Table 5, are used to create weighted averages of travel costs in the analysis below.

TABLE 5—NUMBER OF CERTIFIED H–2B WORKERS BY COUNTRY OF ORIGIN, FY 2007–2009

Country	Positions certified	Percent of total
Mexico	134,226	75.6
Jamaica	17,068	9.6
Guatemala	6,530	3.7
Philippines	4,963	2.8
Romania	3,251	1.8
South Africa	3,239	1.8
UK	2,511	1.4
Canada	2,371	1.3
Israel	1,784	1.0
Australia	1,577	0.9
Total	177,520	100.0

Source: H–2B Program Data and DHS, 2009.

The Department received a comment from a worker advocacy organization requesting clarification that inbound and outbound transportation costs include the expenses incurred between their home community and the consular city, and between the consular city and the place of employment in the United States. In response, the Department confirms that this is the intent of the rule. Therefore, in this section the Department accounts for a cost not clearly accounted for in the proposed rule: The cost of travel from the worker's home to the consular city to obtain a visa. As in the proposed rule, the Department also accounts for travel from the consular city to the place of employment (assumed to be St. Louis, MO for the purpose of cost estimation). Where these costs were given in foreign currency, the Department converted them to U.S. dollars using exchange rates effective July 11, 2011.[28]

Transportation costs were calculated by adding two components: the estimated cost of a bus or ferry trip from a regional city[29] to the consular city to obtain a visa, and the estimated cost of a trip from the consular city to St. Louis. Workers from Mexico and Canada (77 percent of the total) are assumed to travel by bus; workers from all other countries, by air. In response to the proposed rule, an employer representative submitted a comment expressing concern that the travel expenses underestimated the cost of airfare.[30] The Department reviewed air transport costs, found that some have risen significantly since the NPRM was published, and revised them accordingly. The increases are likely attributable to a combination of increased fuel costs and decreases in passenger capacity. The same commenter expressed concern that the proposed rule's requirement that employers continue hiring U.S. workers up to 3 days before the listed job start date means that employers will need to pay a premium for refundable tickets. Because this Final Rule changed the last day an employer must hire U.S. applicants to 21 days before the date of need, employers will not have to pay a premium for refundable fares. This analysis, therefore, includes only the cost for non-refundable tickets.

The revised travel cost estimates are presented in Table 6. The Department estimated the roundtrip transportation costs by doubling the weighted average one-way cost (for a roundtrip travel cost of $929), then multiplying by the annual number of H–2B workers entering the U.S. (66,000). The Department estimates average annual transfer payments associated with transportation expenditures to be approximately $61.3 million. This estimate is an increase of approximately $23.5 million over the Proposed Rule estimate of $37.8 million. The addition of travel costs from the worker's hometown to the consular city accounts for approximately $2.9 million (12 percent) of this increase and the overall increase in average airfares accounts for $20.6 million (88 percent). It is not possible for the Department to determine how much of the cost of transportation the employer is already paying, however, in order to secure the workers or because of the employer's obligations under the FLSA. (Under the FLSA, the majority of H–2B employers are required to pay for the proportion of inbound and outbound transportation costs that would otherwise bring a worker's earnings below the minimum wage in the first and last workweeks of employment.) To the extent that this does already occur, this transportation transfer is an upper-bound estimate. The Department also believes we have overestimated this transfer for the additional reason that inbound transportation is only due for workers who complete 50 percent of the job order and outbound transportation is due only for those who complete the full job order or are dismissed early.

TABLE 6—COST OF TRAVEL FOR H–2B WORKERS

Item	Value
New entrants per Year	66,000
Mexico:	
One way travel (bus)—Hometown to Monterrey[31]	$50
One way travel (bus)—Monterrey to Juarez[32]	$83
One way travel (bus)—El Paso to St. Louis[33]	$214
Total one way travel	$347
Jamaica:	
One way travel (bus)—Hometown to Kingston[34]	$3
One way travel (air)—Kingston to St. Louis[35]	$499
Total one way travel	$502
Guatemala:	
One way travel (bus)—Hometown to Guatemala City[36]	$4
One way travel (air)—Guatemala City to St. Louis[37]	$490
Total one way travel	$594

[27] U.S. Department of Homeland Security (DHS). 2009. Yearbook of Immigration Statistics. Available at *http://www.dhs.gov/files/statistics/publications/yearbook.shtm* (Accessed June 12, 2011).

[28] Exchange rates sourced from Google's currency converter. If no exchange rate is mentioned, then costs were provided in U.S. dollars.

[29] Where possible, we used a selection of cities to represent travel from different regions of the country.

[30] ETA–2011–0001–0456.

TABLE 6—COST OF TRAVEL FOR H–2B WORKERS—Continued

Item	Value
Philippines:	
One way travel (ferry)—Hometown to Manila [37]	$41
One way travel (air)—Manila to St. Louis [37]	$1,083
Total one way travel	$1,124
Romania:	
One way travel (bus)—Hometown to Bucharest [38]	$21
One way travel (air)—Bucharest to St. Louis [37]	$1,388
Total one way travel	$1,409
South Africa:	
One way travel (bus)—Hometown to Pretoria [39]	$41
One way travel (bus)—Pretoria to O.R. Tambo International Airport (ORTIA) [39]	$17
One way travel (air)—ORTIA to St. Louis [37]	$1,391
Total one way travel	$1,449
United Kingdom:	
One way travel (bus or rail)—Hometown to London [40]	$32
One way travel (air)—London to St. Louis [37]	$1,111
Total one way travel	$1,143
Canada:	
One way travel (air)—Hometown to Ottawa [41]	$175
One way travel (bus)—Ottawa to St. Louis [35]	$178
Total one way travel	$353
Israel:	
One way travel (bus)—Hometown to Tel Aviv [42]	$11
One way travel (air)—Tel Aviv to St. Louis [37]	$1,176
Total one way travel	$1,187
Australia:	
One way travel (bus)—Hometown to Canberra [43]	$92
One way travel (air)—Canberra to St. Louis [37]	$2,064
Total one way travel	$2,156
All:	
One way travel—Weighted average	$465
Roundtrip travel—Weighted average	$929
Total Travel Costs—H2B Workers	$61,328,243

d. Transportation to and From the Place of Employment for Corresponding Workers

The proposed rule did not address inbound and outbound transportation to and from the place of employment for corresponding workers who are unable to return daily to their permanent residences. The Department estimates an approximate unit cost for each traveling corresponding worker by taking the average of the cost of a bus ticket to St. Louis from Fort Wayne, IN ($91), Pittsburgh, PA ($138), Omaha, NE ($93), Nashville, TN ($86), and Palmdale, CA ($233).[44] Averaging the cost of travel from these five cities results in an average one way cost of $128.20, and a round trip cost of $256.40 (see Table 7).

[31] Omnibus de México. 2011. Venta en Línea. Available at *http://www.odm.com.mx/* (Accessed July 22, 2011). Averages cost of a bus ticket to Monterrey from: Tampico (473 pesos), Actopan (680 pesos); and Acámbaro (585 pesos). Converted from pesos to US dollars at the rate of 0.0861 pesos per dollar for an average cost of $50.

[32] Omnibus de México. 2011. Venta en Línea. Available at *http://www.odm.com.mx/* (Accessed July 22, 2011). The cost of a bus ticket from Monterrey to Ciudad Juarez is 970 pesos, converted from pesos to US dollars at the rate of 0.0861 pesos per dollar for a cost of $83.

[33] Greyhound. 2011. Tickets. Available at *https://www.greyhound.com/farefinder/step1.aspx* (Accessed July 8, 2011).

[34] Jamaica Guide. 2011. Getting around. Available at *http://jamaica-guide.info/getting.around/buses/* (Accessed July 11, 2011).

[35] Orbitz. 2011. Home Page. Available at *http://www.orbitz.com/* (Accessed July 22, 2011).

[36] Virtual Tourist. 2011. Guatemala City Transportation. Available at *http://www.virtualtourist.com/travel/Caribbean_and_Central_America/Guatemala/Departamento_de_Guatemala/Guatemala_City-1671108/Transportation-Guatemala_City-TG–C–1.html* (Accessed July 10, 2011).

[37] Lonely Planet. 2011a. Ferry travel in the Philippines. Available at *http://www.lonelyplanet.com/philippines/transport/getting-around* (Accessed July 10, 2011).

[38] Mersul Trenulior. 2011. Mersul Trenulior. Available at *http://www.mersultrenurilor.ro* (Accessed July 8, 2011).

[39] Computicket. 2011. Computicket Home Page. Available at *http://www.computicket.com/web/bus_tickets/* (Accessed July 22, 2011).

[40] Megabus. 2011. Megabus UK Home Page. Available at *http://uk.megabus.com/default.aspxhttp\:uk.megabus.com* (Accessed July 10, 2011) and Raileasy. 2011. Raileasy Home Page. Available at *https://www.raileasy.co.uk/* (Accessed July 10, 2011); average of the cost of a bus ticket from three cities in England to London (GBP 15) and a train from Northern Ireland to London (GBP 50); Converted at the rate of 1.36 GBP per USD for an average of $32.

[41] Air Canada. 2011. Air Canada Home Page. Available at *http://www.aircanada.com* (Accessed July 10, 2011).

[42] Wikitravel. 2011. Bus travel in Israel. Available at *http://wikitravel.org/en/Bus_travel_in_Israel* (Accessed July 10, 2011).

[43] Greyhound Australia. 2011. Greyhound Australia Home Page. Available at *htttp://www.greyhound.com.au* (Accessed July 11, 2011).

[44] Greyhound. 2011. Tickets. Available at *https://www.greyhound.com/farefinder/step1.aspx* (Accessed July 8, 2011).

TABLE 7—UNIT COSTS OF CORRESPONDING WORKER TRAVEL

One way travel to St. Louis	Cost
Fort Wayne, IN	$91
Pittsburgh, PA	138
Omaha, NE	93
Nashville, TN	86
Palmdale, CA	233
One way travel—Average	128
Roundtrip travel	256

Source: Greyhound, 2011.

Some employers have expressed concern that the rule's provision that employers reimburse workers for transportation costs will lead to workers quitting soon after the start date and thus in effect receiving a free trip to the city of their employment. The Department has addressed this concern with a provision that workers are not reimbursed for inbound travel until they work for half of the job order work period, and they do not receive outbound travel unless they complete the work period or are dismissed early. Therefore, this estimate also is an upper-bound estimate for these reasons as well. Because the Department has no basis for estimating the number of workers in corresponding employment who will travel to the job from such a distance that they are unable to return daily to their permanent residence, or to estimate what percentage of them will remain on the job through at least half or all of the job order period, we are unable to further estimate the total transfer involved.

e. Subsistence Payments

We estimated the transfer related to subsistence payments by multiplying the annual cap set for the number of H–2B workers generally entering the U.S. (66,000) by the subsistence per diem ($10.64), and the roundtrip travel time for the top ten H–2B countries (4 days). In the Proposed Rule the Department estimated a weighted average roundtrip travel time of 1.055 days, but in response to a comment from a workers' advocacy organization the Department has increased this estimate to account for workers' travel to the consular city to obtain a visa. The roundtrip travel time now includes 3 days to account for travel from the worker's home town to the consular city and from the consular city to the place of employment, and 1 day to account for the workers' transportation back to their home country. Multiplying by 66,000 new entrants per year and the subsistence per diem of $10.64 results in average annual transfers associated with the subsistence per diem of approximately $2.8 million (see Table 8). Again, this is an upper-bound estimate because the inbound subsistence reimbursement only is due for workers who complete 50 percent of the period of the job order and outbound subsistence is due only for those who complete the full job order period or are dismissed early.

TABLE 8—COST OF SUBSISTENCE PAYMENTS

Cost component	Value
New entrants per year	66,000
Subsistence Per Diem	$11
One way travel days—Inbound	3
One way travel days—Outbound	1
Roundtrip travel days	4
Total annual subsistence costs—H2B workers	$2,808,960

This provision applies not only to H–2B workers, but also to workers in corresponding employment on H–2B worksites who are recruited from a distance at which the workers cannot reasonably return to their residence within the same workday. Assuming that each worker can reach the place of employment within 1 day and thus would be reimbursed for a total of 2 roundtrip travel days at a rate of $10.64 per day, each corresponding worker would receive $21.28 in subsistence payments. The Department was unable to identify adequate data to estimate the number of corresponding workers who are unable to return to their residence daily or, as a consequence, the percent of corresponding workers requiring payment of subsistence costs; thus the total cost of this transfer could not be estimated.

f. Lodging for H–2B Workers

The Department received a comment from a workers' advocacy organization requesting clarification that inbound and outbound transportation costs include the expenses incurred between their home community and the consular city and between the consular city and the place of employment in the U.S. The Department clarifies that the proposed rule considered any expenses incurred between a worker's hometown and the consular city to be within the scope of inbound transportation and subsistence costs, and therefore includes an additional cost not accounted for in the proposed rule: lodging costs while H–2B workers travel from their hometown to the consular city to wait to obtain a visa and from there to the place of employment. The Department estimates that H–2B workers will spend an average of two nights in an inexpensive hostel-style accommodation and that the costs of those stays in consular cities of the ten most common countries of origin are as follows: Monterrey, $11; Kingston, $13; Guatemala City, $14; Manila, $7; Bucharest, $11; Pretoria, $19; London, $22; Ottawa, $30; Tel Aviv, $22; and Canberra, $26.[45] Using the number of certified H–2B workers from the top ten countries of origin, we calculate a weighted average of $11.99 for one night's stay, and $23.98 for two nights' stay. Multiplying by the 66,000 new entrants per year suggests total transfers associated with travel lodging of $1.6 million per year (see Table 9). This cost would not apply to U.S. workers.

TABLE 9—COST OF LODGING FOR H–2B WORKERS

Cost component	Value
New entrants per year	66,000
Nights in Hostel	2
City	**Lodging cost**
Monterrey	$11
Kingston	13
Guatemala City	14
Manila	7
Bucharest	11
Pretoria	19
London	22
Ottawa	30
Tel Aviv	22
Canberra	26
Weighted Average—One Night	12
Weighted Average—Two Nights	24
Total Cost of Lodging	1,582,673

Source: Lonely Planet, 2011b.

g. Visa and Consular Fees

Under the 2008 Final Rule, visa-related fees—including fees required by the Department of State for scheduling and/or conducting an interview at the consular post—may be paid by the temporary worker. This Final Rule, however, requires employers to pay visa fees and associated consular expenses. Requiring employers to bear the full cost of their decision to hire foreign workers is a necessary step toward preventing the exploitation of foreign workers with its concomitant adverse effect on U.S. workers. As explained in the Preamble, government-mandated fees such as these are integral to the employer's choice to use the H–2B program to bring temporary foreign workers into the United States.

The reimbursement by employers of visa application fees and fees for scheduling and/or conducting an

[45] Lonely Planet. 2011b. Hotels & Hostels Search. Available at *http://hotels.lonelyplanet.com/* (Accessed July 12, 2011).

interview at the consular post is a transfer from employers to H–2B workers. The Department estimates the total cost of these expenses by adding the cost of an H–2B visa and any applicable appointment and reciprocity fees. The H–2B visa fee is $150 in all of the ten most common countries of origin except Canada, where citizens traveling to the U.S. for temporary employment do not need a visa,[46] resulting in a weighted average visa fee of $148. The same countries charge the following appointment fees: Mexico ($0),[47] Jamaica ($10),[48] Guatemala ($12),[49] Philippines ($10),[50] Romania ($11),[51] South Africa ($0),[52] the U.K. ($0),[53] Canada ($0),[54] Israel ($22),[55] and Australia ($105),[56] for a weighted average appointment fee of $3.05. Additionally, South Africa and Australia charge reciprocity fees of $85 and $105, respectively, resulting in a weighted average of $2.48.[57] Multiplying the weighted average visa cost, appointment fee, and reciprocity fee by the 66,000 H–2B workers entering the U.S. annually results in an annual average transfer of visa-related fees from H–2B employers to H–2B workers of $10.1 million (see Table 10). Again, this is an upper-bound estimate because many H–2B employers already are paying these fees in order to ensure compliance with the FLSA's minimum wage requirements.

TABLE 10—COST OF VISA AND CONSULAR FEES

Cost component	Value
New Entrants per Year	66,000
Visa Application Fee:	
Mexico	$150
Jamaica	150
Guatemala	150
Philippines	150
Romania	150
South Africa	150
UK	150
Canada	0
Israel	150
Australia	150
Weighted Average Visa Fee	148
H2B Visa—Total Costs	9,767,773
Appointment Fee:	
Mexico	0
Jamaica	10
Guatemala	12
Philippines	10
Romania	11
South Africa	0
UK	0
Canada	0
Israel	22
Australia	105
Weighted Average Appointment Fee	3
Appointment Fee—Total Costs	201,439
Reciprocity Fee:	
Mexico	0
Jamaica	0
Guatemala	0
Philippines	0
Romania	0
South Africa	85
UK	0
Canada	0
Israel	0
Australia	105
Weighted Average Reciprocity Fee	2
Reciprocity Fee—Total Costs	163,922
Total Costs:	
Total Visa and Consular Fees	10,133,134

Sources: Given in text.

h. Enhanced U.S. Worker Referral Period

The Final Rule ensures that U.S. workers are provided with better access to H–2B job opportunities by requiring employers to continue to hire any qualified and available U.S. worker referred to them from the SWA until 21 days before the date of need, representing an increase in the recruitment period compared to the baseline. The rule also introduces expanded recruitment provisions, including requiring employers to notify their current workforce of the job opportunity and contact their former U.S. employees from the previous year. The enhanced recruitment period and activities improve the information exchange between employers, SWAs, the public and workers about job availability, increasing the likelihood that U.S. workers will be hired for those jobs.

The benefits to U.S. workers also apply to sections ''i'' through ''k'' below, which discuss additional provisions aimed at further improving the recruitment of U.S. workers.

The extension of the referral period in this Final Rule will likely result in more U.S. workers applying for these jobs, requiring more SWA staff time to process additional referrals. The Department does not have estimates of the additional number of U.S. applicants, and thus is unable to estimate the costs to SWAs associated with this provision.

The Department believes that hiring a U.S. worker will cost employers less than hiring an H–2B worker, as transportation and subsistence expenses will likely be reduced, if not avoided entirely. The cost of visa fees will be entirely avoided if U.S. workers are hired. Because the Department has not identified appropriate data to estimate any increase in the number of U.S. workers that might be hired as a result of the Final Rule's enhanced recruitment, it is unable to estimate total cost savings. Likewise, the enhanced recruitment period along with more extensive recruitment activities and a number of program changes that should make these job opportunities more desirable should generate an increased number of local referrals for whom no transportation or subsistence costs will be incurred. Since the number of such workers cannot be estimated with precision, these cost saving are not factored into this analysis however we are confident the actual overall costs to employers for transportation and subsistence will be lower than the estimates provided here.

i. Additional Recruitment Directed by the CO

Under the Final Rule, an employer may be directed by the CO to conduct additional recruitment if the CO has determined that there may be qualified

[46] U.S. Department of State. 2011a. Citizens of Canada, Bermuda and Mexico—When is a Visa Required? Available at *http://travel.state.gov/visa/temp/without/without_1260.html* (Accessed July 22, 2011).

[47] Consulate General of the United States—Monterrey—Mexico. 2011. Temporary worker. Available at *http://monterrey.usconsulate.gov/work_visa.html* (Accessed July 22, 2011).

[48] The U.S. Visa Information Service in Jamaica. 2011. How the Online System Works. Available at *http://www.usvisa-jamaica.com/jam/* (Accessed July 22, 2011).

[49] Embassy of the United States—Guatemala. 2011. Application Process. Available at *http://guatemala.usembassy.gov/niv_how_to_apply.html#appointment* (Accessed July 22, 2011).

[50] Embassy of the United States—Manila—Philippines. 2011. Visa Point™—The Online Visa Information and Appointment System. Available at *http://manila.usembassy.gov/wwwhvpnt.html* (Accessed July 22, 2011).

[51] Embassy of the United States—Bucharest—Romania. 2011. Non Immigrant Visas. Available at *http://romania.usembassy.gov/visas/visa_application_process.html* (Accessed July 22, 2011).

[52] The U.S. Visa Information Service in South Africa. 2011. Fee Payment Options. Available at *http://usvisa-info.com/en-ZA/selfservice/us_fee_payment_options* (Accessed July 22, 2011).

[53] Embassy of the United States—London—U.K. 2011. MRV Application Fee. Available at *http://london.usembassy.gov/fee.html* (Accessed July 22, 2011).

[54] U.S. Department of State. 2011a. Citizens of Canada, Bermuda and Mexico—When is a Visa Required? Available at *http://travel.state.gov/visa/temp/without/without_1260.html* (Accessed July 22, 2011).

[55] VisaPoint—Tel Aviv—Jerusalem. 2011. Create New Login. Available at *https://visainfo.us-visaservices.com/Forms/CreateGroupUser.aspx* (Accessed July 22, 2011).

[56] Embassy of the United States—Canberra—Australia. 2011. Nonimmigrant Visas. Available at *http://canberra.usembassy.gov/niv_fees.html* (Accessed July 22, 2011).

[57] U.S. Department of State. 2011b. Reciprocity by Country. Available at *http://travel.state.gov/visa/fees/fees_3272.html* (Accessed July 22, 2011).

U.S. workers available, particularly when the job opportunity is located in an area of substantial unemployment. This provision applies to all employer applicants regardless of whether they ultimately employ H–2B workers. Therefore, the Department estimates costs using the average number of unique employer applicants for FY 2000–2007 (6,425), rather than the average number of employer applicants that ultimately hire H–2B workers (4,810). The Department conservatively estimates that 50 percent of these employer applicants (3,213) will be directed by the CO to conduct additional recruitment.

In response to the NPRM, the Department received a comment from an employer expressing concern that the NPRM understated the cost of placing a newspaper advertisement that would capture all the requirements of proposed 20 CFR 655.41. The Department reexamined its original estimate ($25.09), agrees that it was too low, and has updated the original calculation. While the cost estimate has increased, it does not reflect any additional advertising requirements beyond those proposed. The higher estimate is rather a more accurate reflection of the cost of an advertisement of sufficient length to include the required information and assurances contained in 20 CFR 655.41. The Department also updated the mix of newspapers used in the analysis to better represent different sized communities in areas in which a significant number of H–2B positions were certified in FY 2009.[58]

To estimate the cost of a newspaper advertisement, we calculated the cost of placing a classified advertisement in the following newspapers: Virginia-Pilot ($725),[59] Austin Chronicle ($120),[60] Gainesville Sun ($337),[61] Plaquemines (LA) Gazette ($50),[62] Aspen Times ($513),[63] and Branson Tri-Lakes News ($144),[64] for an average cost of $315. Employers may use other means of recruiting, such as listings on Monster.com ($375) [65] and Career Builder ($419).[66] Because so many newspapers include posting of the advertisement on their Web sites and/or Career Builder in the cost of the print advertisement, we based the estimate on the cost of newspaper recruiting. Multiplying the number of unique employer applicants who will be directed to conduct additional recruitment by the average cost of a newspaper advertisement ($315) results in a total cost for newspaper ads of $1.01 million.

The Department estimates that no more than 10 percent of employer applicants (*i.e.,* 20 percent of those directed to conduct additional recruiting) will need to translate the advertisement in order to recruit workers whose primary language is not English. The Department calculated translation costs by creating a weighted average based on U.S. Census data on the top five non-English languages spoken in the home [67] and the cost of translating a one-page document from English to Spanish ($25.50), Chinese ($28.50), Tagalog ($28.50), French ($25.50), and Vietnamese ($28.50), for a weighted average cost of $25.88.[68] Multiplying the number of employers performing translation (643) by the weighted average translation cost results in total translation costs of $16,627.

To account for labor costs in posting additional ads, the Department multiplied the estimated number of unique employer applicants required to conduct additional recruiting (3,213) by the estimated time required to post the advertisement (0.08 hours, or 5 minutes) and the loaded hourly compensation rate of an administrative assistant/executive secretary ($28.77). The result, $0.01 million, was added to the average annual cost of CO-directed recruiting activities for a total of approximately $1.1 million (see Table 11).

TABLE 11—COST OF ADDITIONAL RECRUITING

Cost component	Value
Number of unique H–2B employer applicants	6,425
Percent directed to conduct additional recruiting	50%
Employer applicants conducting additional recruiting	3,213
Newspaper Advertisement:	
Newspaper advertisement—Unit cost	$315
Total Cost of Newspaper Ad	$1,011,274
Translating Newspaper Advertisement:	
Percent workers needing translation	10%
Employers performing translation	643
English to Spanish Translation	$26
English to Chinese Translation	$29
English to Tagalog Translation	$29
English to French Translation	$26
English to Vietnamese Translation	$29
Weighted Average Translation Cost	$26
Total Cost of Translation	$16,627
Labor to Post Newspaper Ad:	
Time to post advertisement	0.08
Administrative Assistant hourly wage w/fringe	$29
Administrative Assistant labor per ad	$2
Total Cost of Labor to Post Newspaper Ad	$7,701

[58] The calculation in the NPRM included classified advertising rates from five newspapers (Augusta Chronicle, Huntsville Times, Los Alamos Monitor, San Diego Union-Tribune, and Advertiser Times in Detroit) not included in this final analysis and one newspaper that is included (Austin Chronicle).

[59] *http://selfserve.pilotezads.com/vp-adportal/classified/index.html.*

[60] Austin Chronicle. 2011. Place an Ad. Available at *https://ssl.austinchronicle.com/gyrobase/PlaceAd* (Accessed August 1, 2011).

[61] *http://gainesvillesun.adperfect.com/.*

[62] *http://plaqueminesgazette.com/?page_id=118*).

[63] *https://classifieds.swiftcom.com/webentry/url/consumer/c_category.html.*

[64] Data collected by phone interview with a member of classified staff, August 12, 2011.

[65] Monster.com. 2011. Job Postings Inventory. Available at *http://hiring.monster.com/index Prospect.Redux.aspx* (Accessed August 8, 2011).

[66] CareerBuilder. 2011. Job Posting. Available at *https://www.careerbuilder.com/JobPoster/ECommerce/CartOrderSummary.aspx?cblid=epjobbtn&sc_cmp2=JP_HP_PostJobButton&ssl RedirectCnt=1* (Accessed August 9, 2011).

[67] U.S. Census Bureau. 2008. Population: Ancestry, Language Spoken At Home—Table 53: Languages Spoken at Home by Language. Available at *http://www.census.gov/compendia/statab/cats/population/ancestry_language_spoken_at_home.html* (Accessed August 3, 2011).

[68] LanguageScape. 2011. How it Works—Cost Calculator. Available at *http://www.languagescape.com/how_works_1.asp* (Accessed June 7, 2011).

TABLE 11—COST OF ADDITIONAL RECRUITING—Continued

Cost component	Value
Total Cost:	
Total Cost of Additional Recruiting	$1,035,601

Sources: BLS, 2011a; BLS, 2011b; U.S. Census, 2008; LanguageScape, 2011; Branson Tri-Lake News; Aspen Times; Austin Chronicle; Gainesville Sun; Plaquemines Gazette; Virginia-Pilot.

It is possible that employers will incur costs from interviewing applicants who are referred to H–2B employers by the additional recruiting activities. However, the Department is unable to quantify the impact.

j. Cost of Contacting Labor Organizations

The analysis performed for the Proposed Rule included a cost for employers to contact the local union to locate qualified U.S. workers when seeking to fill positions in occupations and industries that are traditionally unionized. Under this Final Rule, union notification is the responsibility of the SWA, and no costs to employers are included.

k. Electronic Job Registry

Under the Final Rule, the Department will post and maintain employers' H–2B job orders, including modifications approved by the CO, in a national and publicly accessible electronic job registry. The electronic job registry will serve as a public repository of H–2B job orders for the duration of the referral period. The job orders will be posted in the registry by the CO upon the acceptance of each submitted *Application for Temporary Employment Certification.* The posting of the job orders will not require any additional effort on the part of H–2B employers or SWAs.

i. Benefits

The electronic job registry will improve the visibility of H–2B jobs to U.S. workers. In conjunction with the longer referral period under the Final Rule, the electronic job registry will expand the availability of information about these jobs to U.S. workers, and therefore improve their employment opportunities. In addition, the establishment of an electronic job registry will provide greater transparency of the Department's administration of the H–2B program to the public, members of Congress, and other stakeholders. Transferring these job orders into electronic records for the electronic job registry will result in a more complete, real-time record of job opportunities for which H–2B workers are sought. Employers seeking temporary workers, in turn, will likely experience an increase in job applications from U.S. workers, and thus may not incur the additional expenses of hiring H–2B workers. The Department, however, is not able to estimate the increase in job applications resulting from the electronic job registry, and thus is unable to quantify this benefit.

ii. Costs

The establishment of an electronic job registry in this Final Rule represents increased maintenance costs to the Department. The Department has reduced its cost estimates from the proposed rule as it can rely on design and development resources already used in implementing the H–2A job registry. The Department estimates that first year costs will be 25 percent of the first year costs under the H–2A program (25 percent of $561,365, or $140,341) and that subsequent year costs will be 10 percent of the costs under the H–2A program (10 percent of $464,341, or $46,434). Using the loaded hourly rate for all relevant labor categories ($1,238) suggests that 113 labor hours will be required in the first year, and 38 labor hours will be required in subsequent years (see Table 12).

TABLE 12—COST OF ELECTRONIC JOB REGISTRY

Cost component	Value
Sum of All Labor Category Loaded Wages	$1,238
Registry development and maintenance hours—Year 1	113
Registry maintenance hours—Year 2–10	38
Cost to DOL to Maintain Job Registry—Year 1	$140,341
Cost to DOL to Maintain Job Registry—Year 2–10	$46,434

l. Disclosure of Job Order

The Final Rule requires an employer to provide a copy of the job order to H–2B workers outside of the United States no later than the time at which the worker applies for the visa, and to a worker in corresponding employment no later than the day that work starts. For H–2B workers changing employment from one certified H–2B employer to another, the copy must be provided no later than the time the subsequent H–2B employer makes an offer of employment. The job order must be translated to a language understood by the worker.

We estimate two cost components for the disclosure of job orders: The cost of reproducing the document containing the terms and conditions of employment, and the cost of translation.

The cost of reproducing job orders does not apply to employers of reforestation workers because the Migrant and Seasonal Agricultural Worker Protection Act already requires these employers to make this disclosure in a language common to the worker. According to H–2B program data for FY 2000–2007, 88.3 percent of H–2B workers work in an industry other than reforestation, suggesting that the job order will need to be reproduced for 102,012 (88.3 percent of 115,500) H–2B workers. We estimate the cost of reproducing the terms and conditions document by multiplying the number of affected H–2B workers (102,012) by the number of pages to be photocopied (three) and by the cost per photocopy ($0.12). The Department estimates average annual costs of reproducing the document containing the terms and conditions of employment to be approximately $0.04 million (see Table 13).

For the cost of translation, we assume the provision will impact only employers who are hiring H–2B workers. Therefore, the Department uses its estimate of the number of certified employer applicants who ultimately hire H–2B workers in this calculation. This suggests that translation costs potentially apply to 3,966 H–2B employers. The Department estimates that 83.9 percent of H–2B workers from the top ten countries of origin do not speak English,[69] so approximately 3,328 H–2B employers will need to translate their job orders. The Department assumes that an employer hires all of its H–2B workers from a country or set of countries that speak the same foreign language; thus, only one translation is

[69] U.S. Department of Homeland Security (DHS). 2009. Yearbook of Immigration Statistics. Available at *http://www.dhs.gov/files/statistics/publications/yearbook.shtm* (Accessed June 12, 2011).

necessary per employer needing translation. The Department has updated its estimates of the cost of translating a three-page document into English from languages spoken in the top ten countries of origin as follows: English to Tagalog, $76.50; English to Hebrew/Arabic, $76.50; English to Romanian, $72.00; and English to Spanish, $67.50.[70] Using the percentage of entrants from the top ten countries of origin produces a weighted average translation cost of $68.00 per job order. Multiplying the number of H–2B employers who will need to translate the job order (3,328) by the weighted average cost of translation ($68) suggests translation costs will total $0.2 million (see Table 13).

Summing the costs of reproducing and translating the job order results in total costs related to disclosure of the job order of $0.3 million (see Table 13).

TABLE 13—COST OF DISCLOSURE OF JOB ORDER

Cost component	Value
Reproducing Job Order:	
H2B workers	115,500
Percent workers not in reforestation	88.3%
Affected workers	102,012
Pages to be photocopied	3
Cost per page	$0.12
Cost per job order	$0.36
Total Cost of Reproducing Document	$36,724
Translating Job Order:	
Scaled number of unique certified H–2B employers	3,966
Percent workers needing translation	83.9%
Employers performing translation	3,328
English to Tagalog—3 page document, 3 day delivery	$77
English to Hebrew/Arabic—3 page document, 3 day delivery	$77
English to Romanian—3 page document, 3 day delivery	$72
English to Spanish—3 page document, 3 day delivery	$68
Weighted average translation cost	$68
Total Translation Cost	$226,337
Total Cost:	
Total Cost of Disclosure of Job Order	$263,061

Sources: DHS, 2009; LanguageScape, 2011.

m. Elimination of Attestation-Based Model

The 2008 Final Rule used an attestation-based model: employers conducted the required recruitment before submitting an *Application for Temporary Employment Certification* and, based on the results of that effort, applied for certification from the Department for a number of foreign workers to fill the remaining openings. Employers simply attested that they had undertaken the necessary activities and made the required assurances to workers. The Department has determined that this attestation-based model does not provide sufficient protection to workers. In eliminating the attestation-based model, the recruitment process under this rule now occurs after the *Application for Temporary Certification* is filed so that employers have to demonstrate—and not merely attest—that they have performed an adequate test of the labor market. Therefore, the primary effect of eliminating the attestation based-model is to change the timing of recruitment rather than a change in substantive requirements.

The return to a certification model in which employers demonstrate compliance with program obligations before certification will improve worker protections and reduce various costs for several different stakeholders. Greater compliance will provide improved administration of the program, conserving government resources at both the State and Federal level. In addition, employers will be subject to fewer requests for additional information and denials of Applications, decreasing the time and expense of responding to these Department actions. Finally, it will result in the intangible benefit of increased H–2B visa availability to those employers who have conducted bona fide recruitment around an actual date of need. The Department, however, is not able to estimate the economic impacts of these several effects and is therefore unable to quantify the related benefits.

The elimination of the attestation-based model will impose minimal costs on employers because they will not be required to produce new documents, but only to supplement their recruitment report with additional information (including the additional recruitment conducted, means of posting the job opportunity, contact with former U.S. workers, and contact with labor organizations where the occupation is customarily unionized).

We estimated two costs for the elimination of the attestation-based model: The material cost of reproducing and mailing the documents, and the associated labor cost. The Department estimated material cost equal to $2,023, calculated by multiplying the scaled number of H–2B employers (3,966) by the estimated additional number of pages that must be submitted (three) and the additional postage required to ship those pages ($0.17). Estimated labor cost of $9,087 was calculated by multiplying the scaled number of H–2B employers (3,966) by the time needed to reproduce and mail the documents (0.08 hours, or 5 minutes) and the hourly labor compensation of an administrative assistant/executive secretary ($28.77). Summing these two components results in incremental costs of $11,531 per year associated with the elimination of the attestation-based model (see Table 14).

[70] LanguageScape. 2011. How it Works—Cost Calculator. Available at *http://www.languagescape.com/how_works_1.asp* (Accessed June 7, 2011).

TABLE 14—COST OF ELIMINATION OF ATTESTATION-BASED MODEL

Cost component	Value
Postage Costs:	
Scaled number of unique certified H–2B employers	3,966
Additional pages to submit	3
Additional postage	$0.17
Total Postage Costs	$2,023
Labor Costs to Photocopy and Mail Documents:	
Scaled number of unique certified H–2B employers	3,966
Labor time to photocopy and mail documents (hours)	0.08
Administrative Assistant hourly wage with fringe	$29
Total Labor Costs to Photocopy and Mail Documents	$9,508
Total Cost:	
Total Costs of Elimination of Attestation-Based Model	$11,531

Sources: BLS, 2011a; BLS, 2011b.

n. Document Retention

Under the Final Rule, H–2B employers must retain documentation in addition to that required by the 2008 Final Rule. The Department assumes that each H–2B employer will purchase a filing cabinet at a cost of $49.99 [71] (an increase of the proposed rule estimate of $21.99) in which to store the additional documents starting in the first year of the rule. To obtain the cost of storing documents, we multiply the scaled number of H–2B employers (6,425) by the cost per file cabinet for a total one-time cost of $0.3 million (see Table 15). This cost is likely an overestimate, since the 2008 Final Rule also required document retention and many employers who already use the H–2B program will already have bought a file cabinet to store the documents they must retain under that rule.

TABLE 15—COST OF DOCUMENT RETENTION

Cost component	Value
Scaled number of unique certified H–2B employers	6,425
Filing cabinet	$50

[71] Prices at Stapes, the source cited in the proposed rule, have risen to $69.99. The current price is for a similar item at a lower price. OfficeMax. 2011. Vertical File Cabinets. Available at *http://www.officemax.com/office-furniture/file-cabinets-accessories/vertical-file-cabinets?history=utozftma%7CcategoryId%7E10001%5EcategoryName%7EOffice%2BFurniture%5EparentCategoryID%7Ecategory_root%5EprodPage%7E25%5Eregion%7E1%40porkedzu%7CcategoryId%7E40%5EcategoryName%7EFile%2BCabinets%2B%2526%2BAccessories%5EparentCategoryID%7Ecat_10001%5EprodPage%7E25%5Eregion%7E1%5Erefine%7E1%40wih8mfsy%7CprodPage%7E15%5Erefine%7E1%5Eregion%7E1%5EcategoryName%7Evertical-file-cabinets%5EcategoryId%7E91%5EparentCategoryID%7Ecat_40&view=list&position=1&prodPage=15&sort=Price+%28Low-High%29* (Accessed July 11, 2011).

TABLE 15—COST OF DOCUMENT RETENTION—Continued

Cost component	Value
Total Document Retention Costs	$321,186

Source: OfficeMax, 2011.

o. Departure Time Determination

The Proposed Rule would have required employers to notify the local SWA of the time at which the last H–2B worker departs for the place of employment, if the last worker has not departed for the work site at least 3 days before the date of need. Under the Final Rule, the obligation to hire U.S. workers will end 21 days before the date of need and the employer is not required to provide any notice to the local SWA, thus eliminating the costs associated with this proposed provision.

p. SWA Administrative Burden

Under this Final Rule, SWAs will see both additions to and reductions from its current, baseline workload. Additional responsibilities that the SWAs will take on include contacting labor organizations to inform them about a job opportunity when the occupation or industry is customarily unionized, and accepting and processing a likely higher number of U.S. applicants during the newly extended recruitment period. The Department, however, does not have reliable data to measure these increased activities and is therefore unable to provide an estimate of any increased workload.

In contrast, SWAs will no longer be responsible for conducting employment eligibility verification activities. These activities include completion of Form I–9 and vetting of application documents by SWA personnel.

Under the 2008 Final Rule, SWAs are required to complete Form I–9 for applicants who are referred through the SWA to non-agricultural job orders, and inspect and verify the employment eligibility documents furnished by the applicants. Under this Final Rule SWAs will no longer be required to complete this process, resulting in cost savings. Due to a lack of data on the number of SWA referrals, we are not able to quantify this benefit.

q. Read and Understand the Rule

During the first year that the Final Rule will be in effect, H–2B employer applicants will need to learn about the new processes and requirements. We estimate the cost to read and understand the rule by multiplying the average number of unique H–2B employer applicants in FY 2000–2007 (6,425) by the time required to read the new rule and associated educational and outreach materials (3 hours), and the loaded hourly wage of a human resources manager ($62.17). In the first year of the rule, this amounts to approximately $1.2 million in labor costs (see Table 16).

TABLE 16—COST TO READ AND UNDERSTAND RULE

Cost component	Value
Number of unique H–2B employer applicants	6,425
Time to read rule and materials	3
HR Manager hourly wage	$62
Total Cost to Read and Understand Rule	$1,198,418

Sources: BLS, 2011a; BLS, 2011c.

r. Job Posting Requirement

The Final Rule requires employers applying for H–2B certification to post a notice of the job opportunity in two conspicuous locations at the place of anticipated employment (when there is no union representative) for at least 15 consecutive days. This provision entails additional reproduction costs. To obtain the total cost incurred due to the job posting requirement, we multiplied the

average number of unique H–2B employer applicants FY 2000–2007 (6,425) by the cost per photocopy ($0.12) and the number of postings per place of employment (2), which amounts to $1,542 per year (see Table 17).

TABLE 17—COST OF JOB POSTING REQUIREMENT

Cost component	Value
Number of unique H–2B employer applicants	6,425
Job Postings per Website	2
Cost per photocopy	$0.12
Total Cost to Post Job Opportunity	$1,542

s. Workers' Rights Poster

In addition, the Final Rule requires employers to post and maintain in a conspicuous location at the place of employment a poster provided by the Secretary which sets out the rights and protections for workers. The poster must be in English and, to the extent necessary and as provided by the Secretary, foreign language(s) common to a significant portion of the workers if they are not fluent in English. To estimate the cost of producing workers' rights posters, we multiply the estimated number of H–2B employers (6,425) by the cost of downloading and printing the poster ($0.12). In total, the cost of producing workers' rights posters is $771 per year (see Table 18). If an employer needs to download and print additional versions of the poster in languages other than English, this would result in increased costs.

TABLE 18—COST OF WORKERS' RIGHTS POSTER

Cost component	Value
Number of unique certified H–2B employers	6,425
Cost per Poster	$0.12
Total Cost of Workers' Rights Poster	$771

5. Summary of Cost-Benefit Analysis

Table 19 presents a summary of the costs associated with this Final Rule. Because of data limitations on the number of corresponding workers and U.S. workers expected to fill positions currently held by H–2B workers, the Department was not able to monetize any costs of the rule that would arise as a result of deadweight losses associated with higher employment costs under the Final Rule. However, because the size of the H–2B program is limited, the Department expects that any deadweight loss would be small.

The monetized costs displayed are the yearly summations of the calculations described above. The total undiscounted costs of the rule in Years 1–10 are expected to total approximately $15.2 million.

TABLE 19—TOTAL COSTS—UNDISCOUNTED

Cost component	Year 1 costs	Year 2–10 costs	Year 1–10 costs
Transfers:			
Corresponding Workers' Wages—90 Percent	$17,517,500	$17,517,500	$17,517,500
Corresponding Workers' Wages—75 percent	52,552,500	52,552,500	525,525,000
Transportation	61,328,243	61,328,243	613,282,432
Subsistence	2,808,960	2,808,960	28,089,600
Lodging	1,582,673	1,582,673	15,826,727
Visa and Border Crossing Fees	10,133,134	10,133,134	101,331,343
Total Transfers—Low	93,370,510	93,370,510	933,705,103
Total Transfers—High	128,405,510	128,405,510	1,284,055,103
Annual Costs to Employers:			
Additional Recruiting	1,035,601	1,035,601	10,356,014
Disclosure of Job Order	263,061	263,061	2,630,608
Elimination of Attestation-Based Model	11,531	11,531	115,307
Post Job Opportunity	1,542	1,542	15,420
Workers Rights Poster	771	771	7,710
Total Annual Costs to Employers	1,312,506	1,312,506	13,125,058
First Year Costs to Employers:			
Read and Understand Rule	1,198,418	0	1,198,418
Document Retention	321,186	0	321,186
Total First Year Costs to Employers	1,519,603	0	1,519,603
First Year Costs to Government:			
Electronic Job Registry	140,341	46,434	558,248
Enhanced U.S. Worker Referral Period	Not Estimated	Not Estimated	Not Estimated
Total First Year Costs to Government	140,341	46,434	558,248
Total Costs:			
Total Costs & Transfers—Low	96,342,961	94,729,450	948,908,012
Total Costs & Transfers—High	131,377,961	129,764,450	1,299,258,012
Total Transfers—Low	93,370,510	93,370,510	933,705,103
Total Transfers—High	128,405,510	128,405,510	1,284,055,103
Total Costs	2,972,451	1,358,940	15,202,910

Note: Totals may not sum due to rounding.

Summing the present value of the costs in Years 1–10 results in total discounted costs over 10 years of $10.3 million to $12.8 million (with 7 percent and 3 percent discounting, respectively) (see Table 20).

TABLE 20—TOTAL COSTS—SUM OF PRESENT VALUES

Cost component	Year 1–10 costs
Present Value—7%:	
Total Costs & Transfers—Low	623,222,403
Total Costs & Transfers—High	853,195,468
Total Transfers—Low	612,892,890
Total Transfers—High	842,865,955
Total Costs	10,329,513
Present Value—3%:	
Total Costs & Transfers—Low	786,046,544
Total Costs and Transfers—High	1,076,197,666
Total Transfers—Low	773,271,254
Total Transfers—High	1,063,422,377
Total Costs	12,775,290

Note: Totals may not sum due to rounding.

Because the Department was not able to monetize any benefits for this Final Rule due to the lack of adequate data, the monetized costs exceed the monetized benefits both at a 7 percent and a 3 percent discount rate.

The Department was unable to identify data to provide monetary estimates of several important benefits to society, including increased employment opportunities for U.S. workers and enhancement of worker protections for U.S. and H–2B workers. These important benefits result from the following provisions of this Final Rule: transportation to and from the place of employment, payment of visa and consular fees, the enhanced U.S. worker referral period, additional recruiting directed by the CO, the electronic job registry, the job posting requirement, and enhanced integrity and enforcement provisions. Because the enhanced referral period extends the time during which jobs are available to U.S. workers, it increases the likelihood that U.S. workers are hired for those jobs. In addition, the electronic job registry will improve the visibility of H–2B jobs to U.S. workers and enhance their employment opportunities. In addition, the establishment of a electronic job registry will provide greater transparency with respect to the Department's administration of the H–2B program to the public, members of Congress, and other stakeholders. These benefits, however, are difficult to quantify due to data limitations.

Several unquantifiable benefits result in the form of cost savings. As more U.S. workers are hired as a result of this Final Rule, employers will avoid visa and consular fees for positions that might have otherwise been filled with H–2B workers; it is also likely that transportation costs will be lower. Under the 2008 Final Rule, SWAs are required to complete Form I–9 for non-agricultural job orders, and inspect and verify the employment eligibility documents furnished by the applicants. Under this Final Rule, SWAs will no longer be required to complete this process, resulting in cost savings to SWAs. We were not able to quantify these cost savings due to a lack of data regarding the number of I–9 verifications SWAs have been performing for H–2B referrals.

After considering both the quantitative and qualitative impacts of this Final Rule, the Department has concluded that the societal benefits of the rule justify the societal costs.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, as amended (RFA), requires agencies to prepare regulatory flexibility analyses and make them available for public comment when proposing regulations that will have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603. If the rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA allows an agency to certify such, in lieu of preparing an analysis. See 5 U.S.C. 605. For the reasons explained in this section, the Department believes this rule is not likely to have a significant impact on a substantial number of small entities and, therefore, a Final Regulatory Flexibility Analysis (FRFA) is not required by the RFA. However, in the interest of transparency we have prepared the following FRFA to assess the impact of this regulation on small entities, as defined by the applicable Small Business Administration (SBA) size standards. The Chief Counsel for Advocacy of the Small Business Administration was notified of a draft of this rule upon submission of the rule to OMB under E.O. 12866, as amended, ''Regulatory Planning and Review'' (58 FR 51735, Oct. 4, 1993; 67 FR 9385, Feb. 28, 2002; 72 FR 2763, Jan. 23, 2007).

1. Statement of the Need for, and Objectives of, the Rule

The Department seeks to help employers meet their legitimate short-term temporary labor needs where and when there are no available U.S. workers and to increase worker protections and strengthen program integrity under the H–2B labor certification program. The legal basis for the rule is the Department's authority, as delegated from DHS under 8 U.S.C. 1184(c) and its regulations at 8 CFR 214.2(h)(6), to grant temporary labor certifications under the H–2B program.

The Department has determined for a variety of reasons that a new rulemaking effort is necessary for the H–2B program. The Department believes that the practical ramifications of the 2008 Final Rule (*e.g.,* streamlining the H–2B process to defer many determinations of program compliance until after an application has been adjudicated, inadequately protecting U.S. workers who may be paid less than H–2B workers performing the same jobs, failing to ensure the integrity of the program by not requiring employers to guarantee U.S. and H–2B employees work for any number of weeks during the period of the job order) have undermined the program's intended protection of both U.S. and foreign workers.

The protections in this rule are essential to meet the regulatory mandate to prevent adverse effect on wages and working conditions for U.S. workers, including measures to ensure greater access to jobs for U.S. workers through enhanced recruitment in order to satisfy the statutory requirement that certifications be granted only if no U.S. workers are available.

Additionally, the rule seeks to help employers meet legitimate short-term temporary labor needs where and when there are no available U.S. workers. As the program has evolved, stakeholders in diverse industries throughout the country repeatedly have expressed concerns that some employers were inappropriately using H–2B workers for job opportunities that were permanent, thereby denying U.S. workers the opportunity for long-term employment. These employers' actions are to the detriment of other employers with a legitimate temporary need that are ultimately denied access to the program due to the annual cap on available visas. By preventing employers with a long-term permanent need from participating in the H–2B program, the Department would provide employers with genuine unmet temporary needs with a greater opportunity to participate in the program.

For these reasons the Department is promulgating the changes contained in the Final Rule.

2. Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration and Significant Issues Raised by the Public to the Proposed Rule, the Department's Response, and Changes Made as a Result of the Comments

The Department received and carefully considered written comments

to the proposed rule submitted by the Chief Counsel for Advocacy of the SBA (Advocacy), along with written comments and significant regulatory alternatives from small businesses and their representatives. We also considered feedback gathered during an April 26, 2011 roundtable discussion conducted by the SBA which included Department representatives, small businesses, and the SBA itself. A brief summary of significant comments and Department responses follows, but because the concerns of Advocacy and small businesses were largely similar to those expressed by the wider universe of all employers, the preceding preamble sections contain far more extensive responses and explanations.

Advocacy stated that the economic impact calculated in the IRFA was underestimated because it failed to account for higher wages that employers may have to pay resulting from a separate rule published by the Department on January 13, 2011 changing the way H–2B prevailing wages are determined. Further, Advocacy believed that the IRFA also underestimated the proportion of small businesses that would be impacted. An employer association commented that in order to accurately assess the proposed rule's impact to small businesses, the Department could have conducted a survey to identify the number of small businesses affected and the number in each of the industry sectors that commonly uses the H–2B program.

In response to Advocacy's assertions, the Department notes that it accounted for the full cost impact of the January 2011 prevailing wage Final Rule in that rule's FRFA. Regarding this rule's IRFA calculation of the proportion of small businesses affected, the Department evaluated the economic impact across 1.1 million employers, which represents all small businesses (according to the SBA's definition of a small entity) within the five most common industries using the H–2B program. In calculating the impact of this rule, the Department used this universe of small businesses to be consistent with SBA guidance (see A Guide for Government Agencies: How to Comply with the RFA, Small Business Administration, at 20: ''the substantiality of the number of businesses affected should be determined on an industry-specific basis and/or the number of small businesses overall.'') and because any of those small employers could request certification for H–2B workers. In the *Application for Temporary Employment Certification,* the Department only recently added a non-mandatory field asking for annual dollar revenue and therefore cannot determine how many H–2B employers typically are small businesses. The Department did not conduct its own small business surveys as an employer association suggested because doing so would have required an extended clearance process under the Paperwork Reduction Act, a process that would have been impossible to fulfill given the time constraints. Instead, we relied on other, more expeditious methods to estimate data. However, even if all 6,980 employers that receive H–2B certifications in an average year were, in fact, small businesses, this Final Rule would not impact a substantial number of small entities because it would only affect less than 1 percent of all small businesses.

An employer association also commented that proposed provisions would remove most temporary labor supply services from H–2B program eligibility, and that the IRFA failed to account for the lost revenue to these U.S. businesses. While the NPRM proposed to eliminate all job contractors from participating in the H–2B program, the Final Rule allows job contractors to continue to participate in the program only if they are able to demonstrate through documentation their own one-time occurrence or seasonal need, and not that of their employer-clients. The Department recognizes that while providing necessary protections to U.S. workers, this rulemaking may also result in some small businesses receiving fewer, or no, temporary labor certifications. However, in typical years, demand for H–2B visas exceeds the program's annual statutory cap of 66,000, meaning that other small businesses will benefit from the opportunity to have their H–2B petitions approved. The Department was unable to accurately project the monetary losses and benefits of scarce visas transitioning from some employers, and even industries, to others.

Though this rulemaking will not impose a significant economic burden on a substantial number of small businesses, the Department did make a number of changes to the proposed rule that should alleviate many of the concerns Advocacy expressed and that were expressed in the comments received from other small business employers. For instance, Advocacy, other employers, and their representatives articulated the difficulty of fulfilling the three-fourths guarantee in 4-week increments given unpredictability of the weather, acts of God, and acts of man. As explained further in the preamble to 20 CFR 655.20(f) and (g), the Department responded by extending the length of the three-fourths guarantee calculation period to 12 weeks (for job orders that last 120 days or longer, which is the vast majority of job orders) and to 6 weeks (for job orders lasting less than 120 days). We also added catastrophic man-made events such as oil spills or controlled flooding to the proposed list of triggers that employers could use to request cancellation of job orders, send workers home, and relief from obligations such as the three-fourths guarantee. Though Advocacy describes as a burden the small business employer's requirement to inform the CO in a timely manner after a catastrophic event, the Department maintains that it is a relatively low threshold to meet in order to seek termination of the job order.

Small business owners who participated in Advocacy's roundtable discussion were most concerned about the proposed requirement that employers continue to accept SWA referrals of U.S. applicants until 3 days before the date of need or the time of the last H–2B worker's departure, whichever is later. The provision also required employers to inform the SWA if the last H–2B worker had not departed by 3 days before the start of the job order, and to notify the SWA of the new departure date when available so the SWA would know when to stop referring qualified U.S. workers. The concerns of the roundtable participants were consistent with comments submitted by many other businesses in response to these proposed changes. Some small businesses called the provision unworkable and claimed it would disrupt their hiring and training plans. As explained more in depth in the preamble to 20 CFR 655.20(t), the Department believes the current recruitment period—a 10-day window that occurs up to 4 months before the date of need—is far too short and takes place too far in advance of the job order's start date for U.S. applicants to realistically be able to apply. As such, the existing 10-day recruitment period compromises the Department's regulatory mandate to grant H–2B certifications only after ensuring that no qualified U.S. workers are available. However, based upon the comments from small businesses and Advocacy about the potential burdens of this provision, this Final Rule has been changed. The referral period has been reduced so that it ends 21 days before the date of need. Additionally, employers are no longer obligated to continue accepting U.S. applicants after

that point, a change that eliminates the related SWA notification requirements.

Advocacy expressed its belief that the IRFA underestimated its members' exposure to inbound travel expenses, asserting that the price premium on tickets purchased close to the date of need and the cost of transporting U.S. workers represent significant burdens to employers and were not accounted for in the original cost estimates. Because this Final Rule changed the last day an employer must hire U.S. applicants to 21 days before the date of need, the Department does not calculate the extra cost of refundable fares. The FRFA responds to Advocacy's request to account for the transportation of corresponding workers and estimates a per ticket cost to and from the workplace. Moreover, as discussed in the preamble to 20 CFR 655.20(j), this Final Rule also responds to small business concerns about U.S. worker travel by providing that employers may require workers to complete 50 percent of the period of employment before reimbursing the reasonable costs of inbound travel and subsistence if the employer has not already paid for or reimbursed such costs. Further, employers will be required to pay the costs of outbound transportation only for workers who complete the job order period of employment or are dismissed early. And to the extent that employers do hire qualified U.S. applicants responding to national job registry postings and requiring inbound travel, this FRFA estimates that the costs of their travel expenses would be a fraction of those for foreign workers. In addition, hiring these U.S. workers would not require employers to pay the visa or consular expenses related to bringing in workers from foreign countries.

Advocacy cited comments from small businesses that use the H–2B program expressing concern that the new, potentially higher wage rates under the recently changed prevailing wage determination process will interact with the proposed rule's corresponding employment provision, forcing employers to raise payroll across their entire workforce. For example, small landscape companies worried that temporarily assigning to a landscaping supervisor the duties of a landscape laborer who has called in sick would require all laborers to be paid the supervisor's higher wage rate. As discussed in more depth in the preamble to 20 CFR 655.5, this landscape example and other similar examples in the employer comments represent a misunderstanding of what the definition of corresponding employment requires: Corresponding workers who perform substantially the same work specified in the job order or substantially the same work that H–2B workers actually perform are entitled to at least the same wage rate as the H–2B workers. Employers are not required to apply corresponding employment in the other direction and, in this example, pay laborers the same wage paid to the supervisors. Advocacy also articulated small businesses' recommendation that the Department reconsider the corresponding worker provision because it may impose too great a cost on small H–2B employers. After carefully considering Advocacy's comments and other comments submitted separately from small businesses, the definition of corresponding employment was retained with modifications (also fully discussed in the preamble to 20 CFR 655.5) because it is a critical component in the Department's mandate to protect similarly employed U.S. workers from adverse impacts of the H–2B program; however, the Department did modify the definition to clarify that occasional, insignificant instances of overlapping job duties would not transform a U.S. worker employed in one job into someone in corresponding employment with an H–2B worker employed in another job.

Advocacy also challenged the IRFA's lack of data which prevented the Department from calculating the effects of corresponding employment. Similarly, an employer association commented that the Department could have conducted its own corresponding employment survey to solve any gaps in data. Both organizations stated that the Department could have used an assumed value of 50 percent to estimate the ratio of corresponding workers to H–2B workers, purportedly similar to an estimate used elsewhere in the IRFA. The Department appreciates the proffered solutions and notes that the proposed rule requested that the public suggest data sources we could use to estimate corresponding employment. No such sources were ultimately provided. However, pursuing a statistically valid survey would not only have been prohibitively time-consuming given the Department's time constraints, but also would have required a lengthy clearance process under the Paperwork Reduction Act. The 50 percent estimate found in the IRFA was used in a different context and would have been an inappropriate and misguided way to estimate the ratio of corresponding workers to H–2B workers. In reality, the prevalence of corresponding workers spans a very wide range among businesses: Most comments from employers indicated that employers use H–2B workers to fill most if not all of their needs; other businesses commented that they hire very few H–2B workers as a way to supplement a wider staff only during a seasonal peak. The Department attempted to use its own data from a random sample of 225 applications to estimate the number of corresponding employees, but as explained in the Executive Order 12866 section, there were too few files that contained employee data to be statistically reliable, and those few files that did contain a breakdown of the numbers of H–2B and U.S. workers were not from a representative pool of the industries that participate in the H–2B program. Further, the 34 of the 225 files that contained payroll data were not a random subset, because the data was provided in response to an RFI or an audit rather than as a routine part of the application process. Nevertheless, the Department attempted to quantify the impact associated with this provision by estimating that 50 percent of incumbent corresponding workers in a given industry earn less than the prevailing wage and would have their wages increased as a result of the Final Rule. Department believes the cost of providing H–2B prevailing wages to corresponding workers will likely not be the undue burden that small businesses fear, because the prevailing wage calculation is representative of a typical worker's wage for a given type of work in a particular area. Since this calculation uses the current wages received by corresponding U.S. workers, many, if not most, of the non-H–2B workers will already be making at least the required prevailing wage rate, and therefore, small business employers will not be obligated to increase the wages of such workers. The Department's estimate assumed that workers in corresponding employment would receive a range of wage increases. The Department's estimate further assumed that all U.S. workers in corresponding employment would work 35 hours per week for 39 weeks (the maximum allowable certification period) in order to determine an upper-bound estimate. Therefore, the Department believes it has been responsive to commenter concerns with the cost of the corresponding employment provision.

Finally, small business participants who attended the SBA roundtable discussion expressed concerns regarding the proposed bifurcation of the certification process into registration and application processes. As Advocacy summarized in its written comments to the proposed rule, small businesses

were concerned that the bifurcated process creates many complicated layers of review by federal and state officials, which may add delays, requests for information and overall administrative paperwork. A complete discussion of the new process can be found at the preamble to 20 CFR 655.11. In summary, the Department believes that OFLC and employers will recognize administrative efficiencies once registration is introduced and the assessment of temporary need is adjudicated separately from and in advance of the determination of U.S. worker availability. In many cases, the determination of temporary need will be required only once every 3 years, which will reduce RFIs that may happen annually under the existing application process, reducing the burden on employers and clearing the way for a more efficient adjudication of *Applications for Temporary Employment Certification* and more effective recruitment of U.S. workers closer to the date of need. On behalf of SBA's small business members, Advocacy recommended that the Department reconsider the bifurcated registration and application processes and retain the current attestation-based system. As explained in both the NPRM and in RFA Section 1, above, the current application process does not provide adequate worker protections that are essential for the Department to meet its regulatory mandates of ensuring that foreign workers may be employed only if qualified U.S. workers are not available and that the hiring of H–2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.

3. Description and Estimate of the Number of Small Entities to Which the Rule Will Apply Definition of a Small Business

A small entity is one that is independently owned and operated and that is not dominant in its field of operation. The definition of small business varies from industry to industry to properly reflect industry size differences. An agency must either use the SBA definition for a small entity or establish an alternative definition for the industry. The Department has conducted a small entity impact analysis on small businesses in the five industries with the largest number of H–2B workers and for which data were available, as mentioned in the Executive Order 12866 analysis: Landscaping Services; Janitorial Services (includes housekeeping services); Food Services and Drinking Places; Amusement, Gambling, and Recreation; and Construction. These top five industries accounted for almost 75 percent of the total number of H–2B job opportunities certified during FY 2007–2009.[72] [73] One industry, Forest Services, made the initial top five list but is not included in this analysis because the only data available for forestry also include various agriculture, fishing, and hunting activities. Relevant data for Forestry only were not available.

We have adopted the Small Business Administration (SBA) small business size standard for each of the five industries, which is a firm with annual revenues equal to or less than the following:

Landscaping Services, $7 million;
Janitorial Services, $16.5 million;
Construction, $20.7 million;[74] [75]
Food Services and Drinking Places, $7 million; and
Amusement, Gambling, and Recreation, $7 million.

In order to convert the SBA's revenue-based definitions to employment size-class based definitions that can be used in conjunction with U.S. Census's Statistics of U.S. Businesses data,[76] the Department calculated average revenue per firm by employment size class for the top five industries, and found the largest employment size class for which average revenue per firm was below the SBA's size standard. This method obtained the following employment size-class based definitions (see Table 18):

Landscaping Services, 499 employees;
Janitorial Services, 499 employees;
Construction, 99 employees;
Food Services and Drinking Places, 99 employees; and
Amusement, Gambling, and Recreation, 499 employees.

Employers seeking to participate in the H–2B program come from virtually all segments of the economy; those participating businesses make up a small portion of the industries they represent as well as of the national economy overall. A Guide for Government Agencies: How to Comply with the RFA, Small Business Administration, at 20 (''the substantiality of the number of businesses affected should be determined on an industry-specific basis and/or the number of small businesses overall''). Accordingly, the Department believes that the rule will not impact a substantial number of small entities in a particular industry or segment of the economy.

Employment in the H–2B program represents a very small fraction of the total employment in the U.S. economy, both overall and in the industries represented in the H–2B program. The H–2B program is capped at 66,000 visas issued per year, and the Department estimates that at any given time there are 115,500 H–2B workers in the country (66,000 plus 33,000 who return in the second year and 16,500 who return in the third year). This represents approximately 0.09 percent of total nonfarm employment in the U.S. economy (129.8 million).[77] As described in the Executive Order 12866 analysis, the average annual number of H–2B workers in the top five industries is small in absolute terms and relative to total employment in that occupation.

Landscaping Services: 38,073 H–2B workers; 6.5 percent of occupation
Janitorial Services: 15,079 H–2B workers; 1.6 percent of occupation
Construction: 14,756 H–2B workers; 0.2 percent of occupation
Food Services and Drinking Places: 11,197 H–2B workers; 0.1 percent of occupation
Amusement, Gambling, and Recreation: 6,851 H–2B workers; 0.5 percent of occupation

The Department receives an average of 8,717 applications from 6,425 unique employer applicants annually. An average of 6,980 of those applications results in petitions for H–2B workers that are approved by DHS, of which 5,298 are from unique employer applicants. Even if all 6,980 applications were filed by unique small entities, all of which were in the top five

[72] According to H–2B program data, the average annual number of firms (of all sizes) and H–2B workers certified for these industries during FY2007–2009 were as follows: Landscaping Services, Firms—2,754, Workers—78,027; Janitorial Services, Firms—788, Workers—30,902; Food Services and Drinking Places, Firms—851, Workers—22,948; Amusement, Gambling, and Recreation, Firms—227, Workers—14,041; and Construction, Firms—860, Workers—30,242.

[73] As explained above, the distribution of certified job opportunities might not perfectly reflect the distribution of H–2B workers; however, it serves as a valuable proxy for the purposes of this analysis.

[74] U.S. Small Business Administration (SBA). 2010. Table of Small Business Size Standards Matched to North American Industry Classification System Codes (effective November 5, 2010). Available at *http://www.sba.gov/content/table-small-business-size-standards.*

[75] The SBA small business size standards for construction range from $7 million (land subdivision) to $33.5 million (general building and heavy construction). However, because employers representing all types of construction businesses may apply for certification to employ H–2B workers, the Department used an average of $20.7 million as the size standard for construction.

[76] U.S. Census Bureau. 2007. Statistics of U.S. Businesses. Available at *http://www.census.gov/econ/susb/data/susb2007.html.* While 2008 data were available at the time of this analysis, 2007 is the most recent year with revenue data included.

[77] U.S. Bureau of Labor Statistics (BLS). 2011. Employees on nonfarm payrolls by major industry sector, 1961 to date. Available at *ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb1.txt.*

industries, the percentage of small entities authorized to employ temporary non-agricultural workers will be less than 1 percent of the total number of small entities in these industries.[78] Based on this analysis, the Department estimates that the rule will impact less than 1 percent of the total number of small businesses. A detailed industry-by-industry analysis is provided below.

Regarding the Territory of Guam, this Final Rule applies to H–2B employers there only in that it requires them to obtain prevailing wage determinations in accordance with the process defined at 20 CFR 655.10. To the extent that this process incorporates the new methodology defined in the January 2011 prevailing wage rule, it is possible that some H–2B employers in Guam will experience an increase in their H–2B prevailing wages. The Department expects that the H–2B employers in Guam working on Federally funded construction projects subject to the Davis-Bacon and Related Acts (DBRA) are already paying the Davis-Bacon Act prevailing wage for the classification of work performed and that such employers may not experience an increase in the wage levels they are required to pay. Employers performing work ancillary or unrelated to DBRA projects, and therefore paying a wage potentially lower than the Davis-Bacon Act prevailing wage, may receive increased prevailing wage determinations under this Final Rule. However, because the H–2B program in Guam is administered and enforced by the Governor of Guam, or the Governor's designated representative, the Department is unable to quantify the effect of this provision on H–2B employers in Guam due to a lack of data.

4. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule

The Department estimated the incremental costs for small businesses from the baseline. For this rule, the baseline is the 2008 Final Rule.[79] This analysis reflects the incremental cost of this rule as it adds to the requirements in the 2008 Final Rule. Using available data, we have estimated the costs of the payment of transportation and subsistence to workers, visa and consular fees, corresponding employment, the disclosure of job orders, additional recruiting directed by the CO, the time required to read and review the Final Rule, and other impacts.

To examine the impact of this rule on small entities, the Department evaluates the impact of the incremental costs on a hypothetical small entity of average size, in terms of the total number of both U.S. and foreign workers, in each industry if it were to fill 50 percent of its workforce with H–2B workers. There are no available data to estimate the breakdown of the workforce into U.S. and foreign workers. Based on the U.S. Census' Statistics of U.S. Businesses data, the total number of workers (including both U.S. and foreign workers) for this hypothetical small business is as follows[80]: Landscaping Services, 5.3 employees; Janitorial Services, 10.9 employees; Construction, 6.2 employees; Food Services and Drinking Places, 11.5 employees; and Amusement, Gambling, and Recreation, 13.9 employees.

These data do not distinguish between U.S. workers and foreign workers. For the purposes of producing a cost estimate, the Department assumes that 50 percent of these employees are H–2B workers, suggesting the total number of H–2B workers for the hypothetical small business is as follows: Landscaping Services, 2.7 H–2B employees; Janitorial Services, 5.5 H–2B employees; Construction, 3.1 H–2B employees; Food Services and Drinking Places, 5.7 H–2B employees; and Amusement, Gambling, and Recreation, 7.0 H–2B employees.

Also using U.S. Census[81] data, we derived the annual revenues per small firm for each of the top five industries by dividing total revenue by total employment. The Department estimates that small businesses in the top five industries have the following annual revenues:

Landscaping Services, $0.5 million;
Janitorial Services, $0.4 million;
Construction, $1.3 million;
Food Services and Drinking Places, $0.5 million; and
Amusement, Gambling, and Recreation, $0.8 million.

These key small business data are summarized in Table 21.

TABLE 21—PROFILE OF SMALL FIRMS IN THE TOP FIVE H–2B INDUSTRIES

Industry	Size standards in millions of dollars	Size standards in number of employees	Small firms	Average employees per small firm	Average H–2B employees per small firm	Average revenue per small firm
Landscaping Services	$7.0	499	91,483	5.3	2.7	$517,105
Janitorial Services	16.5	499	50,061	10.9	5.5	425,693
Food Services and Drinking Places	7.0	99	415,225	11.5	5.7	516,055
Amusement, Gambling, and Recreation	7.0	499	65,979	13.9	7.0	846,948
Construction [a]	20.7	99	791,396	6.2	3.1	1,292,201

[a] Average of Construction Size Standards.
Sources: SBA, 2011; U.S. Census, 2007.

[78] The total number of firms classified as small entities in these industries is as follows: Landscaping Services, 63,210; Janitorial Services, 45,495; Food Services and Drinking Places, 293,373; Amusement, Gambling, and Recreation, 43,726; and Construction, 689,040.

[79] The Department published a revised final rule modifying the methodology by which prevailing wage rates are calculated for the H–2B program. 76 FR 3452, Jan. 10, 2011, 76 FR 45667, August 1, 2011. However, because that final rule is limited to the prevailing wage rate issue, the baseline for this rule remains the non-prevailing wage rate provisions of the 2008 Final Rule.

[80] U.S. Census Bureau. 2007. Statistics of U.S. Businesses. Available at *http://www.census.gov/econ/susb/data/susb2007.html.* Compare to data obtained from H–2B program data for FY 2007–2009, which indicated that the average annual number of firms (of all sizes) and H–2B workers certified for these industries during FY 2007–2009 were as follows: Landscaping Services, Firms—2,754, Workers—78,027, an average of 28 workers per firm; Janitorial Services, Firms—788, Workers—30,902, an average of 39 workers per firm; Food Services and Drinking Places, Firms—851, Workers—22,948, and average of 27 workers per firm; Amusement, Gambling, and Recreation, Firms—227, Workers—14,041, an average of 62 workers per firm; and Construction, Firms—860, Workers—30,242, an average of 35 workers per firm.

[81] U.S. Census Bureau. 2007. Statistics of U.S. Businesses. Available at *http://www.census.gov/econ/susb/data/susb2007.html.*

work performed by H–2B workers, with two exceptions for employees that meet certain criteria. These provisions include the application of H–2B wages to workers in corresponding employment, the three-fourths guarantee, transportation and subsistence payments for workers who cannot reasonably return to their residence each workday and who complete the required portion of the job order period, and the disclosure of the job order. As discussed in the Executive Order 12866 analysis, although there is no statistically valid data available, the Department has estimated the number of corresponding employees for purposes of estimating the cost of the increased wages due based upon this provision.

The following sections present the impacts that this rule is estimated to have on a small business that chooses to hire H–2B workers, including impacts on the application of H–2B wages to workers in corresponding employment, transportation and subsistence costs, visa-related and consular fees, disclosure of job orders, additional recruiting that may be directed by the CO, reading and reviewing the new processes and requirements, and other impacts. Note that the costs estimated below are not costs to all small businesses or to the average small business in an industry, but rather are the expected value of the cost to any given H–2B employer that is a small business. Most small businesses in the relevant industry do not hire H–2B workers and, therefore, incur no cost burden from the rule. The costs estimated apply only to the relatively small number of firms that are expected to hire H–2B workers. In the estimates below, the hypothetical firm that chooses to hire H–2B workers is assumed to be of the average total employment and revenue size for small businesses in its industry.

a. Three-fourths Guarantee

Under the proposed rule, the Department specified that employers guarantee to offer hours of employment equal to at least three-fourths of the work days during the job order period, and that they use successive 4-week periods to measure the three-fourths guarantee. The use of 4-week periods was proposed (instead of measuring the three-fourths guarantee over the course of the entire time period of need as in the H–2A program) in order to ensure that work is offered during the entire certified period of employment. The Department received comments from Advocacy, an employer association, and small businesses expressing concern that they are unable to predict the exact timing and flows of tasks by H–2B workers, particularly at the beginning and end of the period of employment, and that they need more scheduling flexibility due to unexpected events such as extreme weather or catastrophic man-made events. Acknowledging these commenters' concerns, the Department lengthened the calculation period from 4 weeks to 12 weeks for job orders lasting at least 120 days and to 6 weeks for job orders lasting less than 120 days. In order to ensure that the capped H–2B visas are appropriately made available to employers based upon their actual need for workers, and to ensure that U.S. workers can realistically evaluate the job opportunity, the Department maintains that employers should accurately state their beginning and end dates of need and the number of H–2B workers needed. To the extent that employers, including small businesses, submit *Applications for Temporary Employment Certification* accurately reflecting their needs, the three-fourths guarantee should not represent a cost to employers, particularly given the extended 12-week and 6-week periods over which to calculate the guarantee.

b. Application of H–2B Wages to Corresponding Workers

The rule requires that workers in corresponding employment be paid at least the same wages paid to foreign workers under the H–2B program. However, while the Department has not identified a reliable source of data to estimate the number of workers in corresponding employment at work sites on which H–2B workers are requested or the hourly wages of those workers, the Department has attempted to quantify the impacts associated with this provision. The Department believes that H–2B workers will make up 75 to 90 percent of the workers in a particular job and location covered by the job order, with the remaining 10 to 25 percent of the workers being corresponding employees newly covered by the wage requirements. This 10 to 25 percent figure is an overestimate of the Final Rule's impact since some of the employees included in this proportion of corresponding workers are those hired in response to the required recruitment and are therefore already covered by the existing regulation, and some workers will be excluded by the two new exceptions. Since the required H–2B wage is an average wage that generally prevails among existing workers in the occupation in the area of employment, we also estimate that half of the corresponding workers will already be earning a wage at least equal to the H–2B wage, and thus will not require wage increases. Finally, we estimate that the 50 percent of remaining corresponding workers who are eligible for wage increases will be normally distributed at wage levels between the mean wage level and the previous H–2B prevailing wage.

Table 22 shows the average estimated costs of increased wages for corresponding workers at a typical small business in each of the five most common H–2B industries. For each H–2B worker, the corresponding employment requirement will result in an estimated increase in corresponding worker wages of between $152 (assuming H–2B workers comprise 90 percent of a firm's employees in the job order occupation) and $455 (assuming H–2B workers comprise 75 percent of those employees) per firm.

TABLE 22—COSTS FOR CORRESPONDING WORKER WAGES AT SMALL FIRMS

Hourly wage increase	Percent	Firm with one H–2B worker	Land-scaping services	Janitorial services	Food services and drinking places	Amusement, gambling, and recreation	Construction
H–2B Workers per Small Firm							
N/A	N/A	1.0	2.7	5.5	5.7	7.0	3.1
H–2B Workers 90 Percent of Occupation at Firm							
Number of Corresponding Workers per Small Firm in Each Category:							
$0.00	50	0.06	0.15	0.30	0.32	0.39	0.17

TABLE 22—COSTS FOR CORRESPONDING WORKER WAGES AT SMALL FIRMS—Continued

Hourly wage increase	Percent	Firm with one H–2B worker	Land-scaping services	Janitorial services	Food services and drinking places	Amusement, gambling, and recreation	Construction
$1.00	30	0.03	0.09	0.18	0.19	0.23	0.10
$3.00	15	0.02	0.04	0.09	0.10	0.12	0.05
$5.00	5	0.01	0.01	0.03	0.03	0.04	0.02
Total	100	0.11	0.30	0.61	0.64	0.77	0.35
Cost per Firm:							
$0.00	50	$0	$0	$0	$0	$0	$0
$1.00	30	46	121	249	261	317	142
$3.00	15	68	182	373	391	475	213
$5.00	5	38	101	207	217	264	118
Total	100	152	404	830	869	1,056	473
H–2B Workers 75 Percent of Occupation at Firm							
Number of Corresponding Workers per Small Firm in Each Category:							
$0.00	50	0.17	0.44	0.91	0.96	1.16	0.52
$1.00	30	0.10	0.27	0.55	0.57	0.70	0.31
$3.00	15	0.05	0.13	0.27	0.29	0.35	0.16
$5.00	5	0.02	0.04	0.09	0.10	0.12	0.05
Total	100	0.33	0.89	1.82	1.91	2.32	1.04
Cost per Firm:							
$0.00	50	$0	$0	$0	$0	$0	$0
$1.00	30	137	364	747	782	951	426
$3.00	15	205	546	1,120	1,173	1,426	639
$5.00	5	114	303	622	652	792	355
Total	100	455	1,212	1,489	2,607	3,169	1,419

Source: DOL Estimate.

c. Transportation To and From the Place of Employment for H–2B Workers

The rule requires H–2B employers to provide H–2B workers with transportation to and from the place of employment. In general, transportation costs are calculated by first estimating the cost of a bus trip from a regional city to the consular city to obtain a visa. Then we estimate the cost of the trip from the consular city to St. Louis. In the case of the 77 percent of H–2B workers who come to the U.S. from Mexico and Canada, we assume this is a bus trip. For employees from other countries, we assume this trip is by air.

We estimate the weighted average roundtrip travel cost per employee to be approximately $929 per H–2B worker, as detailed in the Executive Order 12866 analysis section titled ''Transportation to and from the Place of Employment for H–2B Workers.'' This increase from the estimate included in the IRFA is due to two factors. First, a bus or ferry fare was added to account for an H–2B worker's trip from their home to a consular city to obtain a visa. Second, since publication of the NPRM, air fares have increased substantially, attributable to a combination of market condition such as increased fuel costs, anticipated increases in demand for workers from improving economic conditions, and reduced passenger capacity. (Because this Final Rule changed the last day an employer must hire U.S. applicants to 21 days before the date of need, the Department does not account for the extra cost of refundable fares.) We then multiplied the weighted average roundtrip travel cost per employee by the number of H–2B workers per average small entity and the probability that the worker is a new entrant to the country (57 percent).[82] For a hypothetical small firm with one employee, the annual average roundtrip transportation cost is $531. The total annual average roundtrip transportation costs incurred by the average small employer in the top five industries are listed in Table 23.

[82] The H–2B program is capped at 66,000 new visas per year. We estimate the probability that the worker is a new entrant by dividing 66,000 by the total number of H–2B workers (115,500), which includes both new entrants and H–2B workers who entered in the previous 2 years. We assume that 33,000 of the 66,000 workers stay one additional year and 16,500 workers stay two additional years, for a total of 115,500 H–2B workers in any given year.

TABLE 23—TRAVEL COSTS FOR H–2B WORKERS AT SMALL FIRMS

Industry	Transportation cost
Firm with One H–2B Employee	$531
Landscaping Services	1,415
Janitorial Services	2,905
Food Services and Drinking Places	3,043
Amusement, Gambling, and Recreation	3,698
Construction	1,656

Sources: Given in text.

We do not know the extent to which employers are currently paying for this cost in order to secure these workers or to comply with their obligations under the FLSA. To the extent that some employers are already paying for inbound and outbound transportation, these calculations represent upper-

bound estimates. These are also upper-bound estimates because workers are entitled to reimbursement of inbound transportation expenses only if they complete 50 percent of the job order period; moreover, they are entitled to outbound transportation expenses only if they complete the entire job order or are dismissed early.

d. Transportation To and From the Place of Employment for Corresponding Workers

The rule requires H–2B employers to provide workers in corresponding employment unable to return each day to their permanent residence with transportation to the place of employment if they complete at least half the period of the job order and from the place of employment if they complete the full period of the job order. However, there is no basis for estimating what percentage of the workers in corresponding employment will be new employees coming from outside the commuting area who will continue to work for at least half or all of the job order period. Therefore, while the Department is unable to estimate the number of corresponding workers at a given small firm who would receive reimbursement, the Department estimates an approximate unit cost for each traveling corresponding worker by taking the average of the cost of a bus ticket to St. Louis from Fort Wayne, IN ($91); Pittsburgh, PA ($138); Omaha, NE ($93); Nashville, TN ($86); and Palmdale, CA ($233). Averaging the cost of travel from these five cities results in an average one way cost of $128.20, and a round trip cost of $256.40 (see Table 24) representing a transfer from employers to H–2B workers. The inbound transportation costs would be incurred only for those workers who fulfill the required portion of the certified period of employment; the outbound transportation costs would only be incurred for those who work until the end of the certified period of employment or who are dismissed early by the employer.

TABLE 24—COST OF CORRESPONDING WORKER TRAVEL FOR SMALL FIRMS

One way travel to St. Louis	Cost
Fort Wayne, IN	$91
Pittsburgh, PA	138
Omaha, NE	93
Nashville, TN	86
Palmdale, CA	233
One way travel—Average	128
Roundtrip travel	256

Source: Greyhound, 2011.

e. Subsistence Payments

As discussed in the E.O. 12866 analysis, we estimated the per-worker cost of subsistence by multiplying the subsistence per diem ($10.64) by the number of roundtrip travel days (4 days) by the probability that the worker is a new entrant to the country (57 percent). The length of time for an H–2B worker to complete round-trip travel reflects an increase from the proposed rule and was made in response to a comment from a worker advocacy organization. The estimate was increased to account for 2 days to obtain the visa (travel time from the home town and time spent in the consular city), 1 day to travel from the consular city to the place of employment, and 1 day of outbound transportation back to the worker's home country. We estimate the average annual cost of subsistence to be $24.32 ($10.64 × 4 × 0.57) per H–2B worker. The total annual average subsistence costs incurred by the average small employer in the top five industries are presented in Table 23.

This provision applies not only to H–2B workers, but also to workers in corresponding employment on H–2B worksites who are recruited from a distance at which the workers cannot reasonably return to their residence within the same workday. While we were unable to identify adequate data to estimate the number of corresponding workers who would travel to the job from outside the reasonable commuting area and be eligible to receive compensation for subsistence, the Department assumes that it would take 1 travel day to travel from one city in the U.S. to another, and 1 day to return. Thus each corresponding worker would receive $21.28 in subsistence payments (see Table 25). Both of these estimates are upper-bound estimates, as the inbound subsistence would be incurred only for workers who fulfill the required portion of the certification period, and outbound subsistence would only be incurred for those who work until the end of the job order or who are dismissed by the employer.

TABLE 25—COST OF SUBSISTENCE PAYMENTS FOR WORKERS AT SMALL FIRMS

Cost component	Value
Subsistence Per Diem	$11
Weighted Average Roundtrip Travel Days—H–2B Workers	$4
Firm with One H–2B Employee	$24
Landscaping Services	$65
Janitorial Services	$133
Food Services and Drinking Places	$139

TABLE 25—COST OF SUBSISTENCE PAYMENTS FOR WORKERS AT SMALL FIRMS—Continued

Cost component	Value
Amusement, Gambling, and Recreation	$169
Construction	$76
Roundtrip Travel Days—Corresponding Workers	2
Roundtrip Subsistence per Corresponding Worker	$21

f. Lodging for H–2B Workers En Route to the Place of Employment

In response to a comment from a worker advocacy organization, the Department includes a cost in the FRFA not accounted for in the proposed rule: lodging costs while H–2B workers travel from their hometown to the consular city to obtain a visa and from there to the place of employment. This change does not reflect any additional obligation since the publication of the NPRM, but clarifies the Final Rule's intent that lodging expenses incurred between a worker's hometown and consular city are part of inbound transportation and subsistence costs. The Department estimates that H–2B workers will spend an average of two nights in an inexpensive hostel-style accommodation. The Department estimates the nightly cost of this stay in common consular cities of the top ten countries of origin as follows: Monterrey, $11; Kingston, $13; Guatemala City, $14; Manila, $7; Bucharest, $11; Pretoria, $19; London, $22; Ottawa, $30; Tel Aviv, $22; and Canberra, $26.[83] Using the number of certified H–2B workers from the top ten countries of origin, we calculated a weighted average of $11.99 for one night's stay, and $23.98 for two nights' stay. We then multiplied the weighted average lodging cost per employee by the number of H–2B workers per average small entity and the probability that the worker is a new entrant to the country (57 percent). For a hypothetical small firm with one employee, the annual average lodging cost is $13.70 (.57 × $23.98). The total annual average lodging costs incurred by the average small employer in the top five industries are presented in Table 26.

[83] Lonely Planet. 2011b. Hotels & Hostels Search. Available at *http://hotels.lonelyplanet.com/* (Accessed July 12, 2011).

TABLE 26—COST OF LODGING FOR H–2B WORKERS AT SMALL FIRMS

Cost component	Value
Firm with One H–2B Employee	$14
Landscaping Services	37
Janitorial Services	75
Food Services and Drinking Places	79
Amusement, Gambling, and Recreation	95
Construction	43

Source: Lonely Planet, 2011b.

g. Visa-Related and Consular Fees

Under the 2008 Final Rule, visa fees are permitted to be paid by the temporary worker. This Final Rule, however, requires visa fees and related fees to be paid by the employer. Requiring employers to bear the full cost of hiring foreign workers is a necessary step toward preventing the exploitation of foreign workers with its concomitant adverse effect on domestic workers.

The Department estimated the cost of visa fees by adding the weighted average visa cost per H–2B worker ($148),[84] weighted average appointment fee ($3.05), and the weighted average reciprocity fee ($2.48), then multiplying by the average number of H–2B employees in small entities in each of the top five industries and the probability that the worker is a new entrant to the country (57 percent, or 66,000/115,500). The total annual average visa fee and related costs incurred by the average small employer in the top five industries are listed in Table 27. Again, to the extent that some employers may already be paying these fees in order to ensure their compliance with the FLSA, this represents an upper-bound estimate. Similarly, to the extent that our estimate that 57 percent of H–2B workers are new is conservative, our estimate of visa and consular fees is an upper-bound estimate.[85]

TABLE 27—COST OF VISA AND CONSULAR FEES FOR H–2B WORKERS AT SMALL FIRMS

Cost component	Value
Firm with One H–2B Employee	$88
Landscaping Services	234
Janitorial Services	480
Food Services and Drinking Places	503
Amusement, Gambling, and Recreation	611
Construction	274

Source: U.S. Department of State, 2010.

h. Additional Recruiting Directed by the Certifying Officer

Under the Final Rule, the CO may direct an employer to conduct additional recruitment if the CO has determined that there may be qualified U.S. workers available, particularly where the job opportunity is located in an area of substantial unemployment. There is no such provision in the 2008 Final Rule.

In response to an employer comment expressing concern that the NPRM understated the cost of running a newspaper advertisement that would capture all the requirements contained in 20 CFR 655.41, the Department updated the original calculation in the NPRM. The higher estimated cost does not reflect any additional advertising requirement beyond those in 20 CFR 655.41, but is rather is a more accurate reflection of the cost of an advertisement that includes the required information.

We estimate the cost of this requirement by multiplying the average cost of a newspaper advertisement ($315) by 0.5 based on our estimate that 50 percent of H–2B employer applicants can be expected to be directed by the CO to conduct additional recruitment for a total cost of $157 ($315 × 0.50) per employer.[86] We also added the cost for 10 percent of employer applicants to translate the advertisement into a language other than English at an average cost of $2.59 ($25.88 × 0.1), and labor cost to post the advertisement. The latter cost was calculated by multiplying the estimated time required to post the advertisement (0.08 hours, or 5 minutes) by the scaled hourly compensation rate of an administrative assistant/executive secretary ($28.77) and our estimate that 50 percent of H–2B employers can be expected to be directed by the CO to conduct additional recruiting for a total labor cost of $1.20 (0.08 × $28.77 × 0.50) per employer applicant. Thus, the total annual cost of CO-directed recruiting is estimated to be $161.18 ($157 + $2.59 + $1.20) per employer (see Table 28).

TABLE 28—COST OF ADDITIONAL RECRUITING FOR SMALL FIRMS

Cost component	Value
Percent directed to conduct additional recruiting	50%
Newspaper Advertisement:	
Percent translating advertisement	10%
Newspaper advertisement—Unit cost	$315
Average cost of newspaper advertisement	$157
Translating Newspaper Advertisement:	
Translation—Weighted Average Cost	$26
Average cost of newspaper advertisement	$3
Labor to Post Newspaper Ad:	
Time to post advertisement	0.05
Administrative Assistant hourly wage w/fringe	$29
Administrative Assistant labor per ad	$2
Average cost of labor to post ad	$1
Total Cost:	

[84] U.S. Department of State. 2010. Nonimmigrant Visa Application Fees to Increase June 4. Available at *http://www.state.gov/r/pa/prs/ps/2010/05/142155.htm*. The visa fee of $150 went into effect on June 4, 2010.

[85] The Department is confident that 66,000 new workers enter the country under H–2B visas each year; it has less information concerning the number of H–2B workers that remain in the U.S. for more than one year. To the extent that more than 67 percent of each year's cohort remains in the U.S. for a second and third year, then the Department has overestimated the percent of H–2B workers that are new, and we have overestimated visa and consular fees.

[86] To obtain the average cost of a newspaper advertisement, we averaged the rates for a model H–2B advertisement in the following newspapers: Branson Tri-Lakes News, Aspen Times, Austin Chronicle, Gainesville Sun, the Plaquemines Gazette, and Virginia Pilot. These newspapers were chosen because they are located in areas in which a significant number of H–2B positions were certified in FY 2009. Other means of recruiting are possible under this rule (such as listings on Monster.com and Career Builder), but they may be more costly, while other recruiting means (such as contacting community-based organizations) may be less costly.

TABLE 28—COST OF ADDITIONAL RECRUITING FOR SMALL FIRMS—Continued

Cost component	Value
Total Cost of Additional Recruiting per Firm	$161

Sources: BLS, 2011a; BLS, 2011b.

It is possible that there will be additional costs incurred by small employers due to interviewing additional applicants who are referred to H–2B employers by job advertisements. The Department does not have valid data on referrals resulting from job advertisements and therefore is unable to quantify this impact.

i. Contacting Labor Organizations

The analysis performed for the proposed rule included a cost for employers to contact the local union to locate qualified U.S. workers where the occupation is customarily unionized. Under this Final Rule, union notification is the responsibility of the SWA and employers incur no costs.

j. Disclosure of Job Order

The rule requires an employer to provide a copy of the job order to an H–2B worker no later than the time at which the worker outside of the U.S. applies for the H–2B visa or to a worker in corresponding employment no later than on the day that work starts. The job order must be translated to a language understood by the worker. For an H–2B worker changing employment from an H–2B employer to a subsequent H–2B employer, the copy must be provided no later than the time the subsequent H–2B employer makes an offer of employment.

We estimate two cost components of the disclosure of job orders: The cost of reproducing the document containing the terms and conditions of employment, and the cost of translation. We obtained the cost of reproducing the terms and conditions by multiplying the number of pages to be photocopied (three) by the cost per photocopy ($0.12) and the percent of certified H–2B workers that are not involved in reforestation (88.3 percent).[87] We estimate average annual reproduction costs for an employer with one H–2B employee of $0.32 per year (3 × $0.12 × 0.883). We then multiplied this product by the average number of H–2B workers in the top five industries to obtain the average annual costs per small employer; these costs are summarized in Table B–9.

For the cost of translation, the Department assumes that an employer hires all of its H–2B workers from a country or set of countries that speak the same foreign language; thus, only one translation is necessary per employer needing translation. Using DHS data, we determined that approximately 83.92 percent of H–2B workers from the top ten countries of origin do not speak English.[88] We used this as a proxy for the probability that an H–2B employer will need to translate the job order. We obtained the cost of translation by multiplying the percent of H–2B workers who do not speak English (83.92) by the weighted average cost of translation ($68).[89] We estimate average annual translation costs of $57.07 per employer (0.8392 × $68).

Summing reproduction and translation costs results in the average annual job order disclosure costs per small employer (listed in Table 29).

TABLE 29—COST OF DISCLOSURE OF JOB ORDER FOR SMALL FIRMS

Cost component	Value
Percent workers not in reforestation	88.3%
Reproducing Job Order:	
Pages to be photocopied	3
Cost per page	$0.12
Cost per job order	$0.36
Firm with One H–2B Employee	$0.32
Landscaping Services—Cost to Reproduce	$0.85
Janitorial Services—Cost to Reproduce	$2
Food Services and Drinking Places—Cost to Reproduce	$2
Amusement, Gambling, and Recreation—Cost to Reproduce	$2
Construction—Cost to Reproduce	$1
Translating Job Order:	
Weighted average translation cost	$68
Translation Cost per H–2B Employer	$57
Total Cost of Disclosure of Job Order:	
Firm with One H–2B Employee	$57
Landscaping Services	$58
Janitorial Services	$59
Food Services and Drinking Places	$59
Amusement, Gambling, and Recreation	$59
Construction	$58

Sources: DHS, 2009; LanguageScape, 2011.

[87] The requirement to disclose the job order does not result in a new cost to reforestation employers because the Migrant and Seasonal Agricultural Worker Protection Act presently requires reforestation employers to make this disclosure. According to H–2B program data for FY2000–FY2009, 88.3 percent of H–2B workers work in an industry other than reforestation.

[88] U.S. Department of Homeland Security (DHS). 2009. Yearbook of Immigration Statistics. Available at *http://www.dhs.gov/files/statistics/publications/yearbook.shtm* (Accessed June 12, 2011).

[89] LanguageScape. 2011. How it Works—Cost Calculator. Available at *http://www.languagescape.com/how_works_1.asp* (Accessed June 7, 2011).

k. Elimination of Attestation-Based Model

The 2008 Final Rule implemented an attestation-based model: employers conduct the required recruitment in advance of application filing and, based on the results of that effort, apply for certification from the Department for the remaining openings. The Department has determined that there are insufficient worker protections in the current attestation-based model. In eliminating the attestation-based model, the rule shifts the recruitment process to after the filing of the *Application for Temporary Employment Certification* so that employers have to demonstrate—and not merely attest—that they have performed an adequate test of the labor market. Therefore, the primary effect of eliminating the attestation-based model is a change in the timing of recruitment rather than a substantive change in required activities.

The elimination of the attestation-based model will impose minimal costs on employers because they will only need to include additional information in the recruitment report they are already required to submit, including information on additional recruitment conducted, means of posting, and contact with former U.S. workers. We estimated two costs for the elimination of the attestation-based model: the material cost to reproduce and mail the additional pages of the documents, and the labor cost to reproduce and mail the additional pages. To estimate the cost of reproducing and mailing the documents, we multiplied the additional number of pages that must be submitted (three) by the additional postage required to ship those pages ($0.17). We estimate this cost to be approximately $0.51 per employer. To estimate the labor cost of reproducing and mailing the documents, we multiplied the time needed to reproduce and mail the documents (0.08 hours, or 5 minutes) by the scaled hourly labor compensation of an administrative assistant/executive secretary ($28.77). We estimate this cost to be approximately $2.40 per employer. Summing material and labor costs results in total costs per small firm of $2.91 (see Table 30).

TABLE 30—COST OF ELIMINATION OF ATTESTATION-BASED MODEL FOR SMALL FIRMS

Cost component	Value
Postage Costs:	
Additional pages to submit	3
Additional postage	$0.17
Postage Cost per Small Firm	$0.51
Labor Costs to Photocopy and Mail Documents:	
Labor time to photocopy and mail documents	0.08
Administrative Assistant hourly wage w/fringe	$29
Photocopying Cost per Small Firm	$2
Total Cost of Elimination of Attestation-Based Model:	
Total Cost per Small Firm	$3

Sources: BLS, 2011a; BLS, 2011b.

l. Document Retention

Under the rule, H–2B employers must retain documentation beyond that required by the 2008 Final Rule. The Department assumes that each H–2B employer will purchase a filing cabinet ($49.99) in which to store the additional documents starting in the first year of the rule.[90] The cost for each employer is likely an overestimate, since the 2008 Final Rule already contains document retention requirements, and many employers who already use the H–2B program will already have bought a file cabinet to store the documents they must retain under that rule.

m. Departure Time Determination

The Proposed Rule would have required employers to provide notice to the local SWA of the time at which the last H–2B worker departs for the place of employment, if the last worker has not departed at least 3 days before the date of need. Under the Final Rule, the obligation to hire U.S. workers will end 21 days before the date of need and the employer is not required to provide any notice to the local SWA, thus eliminating the costs associated with this provision of the Proposed Rule.

n. Read and Understand the Rule

During the first year that this rule would be in effect, employers would need to learn about the new processes and requirements. We estimated this cost for a hypothetical small entity that is interested in applying for H–2B workers by multiplying the time required to read the new rule and any educational and outreach materials that explain the H–2B application process under the rule by the average compensation of a human resources manager. In the first year that the Final Rule is effective, the Department estimates that the average small business participating in the program will spend approximately three hours of staff time to read and review the new processes and requirements, which amounts to approximately $186.52 ($62.17 × 3) in labor costs in the first year.

o. Job Posting Requirement

The rule requires employer applicants to post the availability of the job opportunity in at least two conspicuous locations at the place of intended employment for at least 15 consecutive days. This provision entails additional reproduction costs. For the job posting requirement, the total cost to photocopy the additional job postings (two) is $0.24 per employer applicant. Those employer applicants who need to print the posting in languages other than English may face a small additional cost.

p. Workers Rights Poster

The Final Rule requires employers to post and maintain in a conspicuous location at the place of employment, a poster provided by the Secretary that sets out the rights and protections for workers. The poster must be in English and, to the extent necessary and as

[90] OfficeMax. 2011. Vertical File Cabinets. Available at *http://www.officemax.com/office-furniture/file-cabinets-accessories/vertical-file-cabinets?history=utozftma%7CcategoryId%7E10001%5EcategoryName%7EOffice%2BFurniture%5EparentCategoryID%7Ecategory_root%5EprodPage%7E25%5Eregion%7E1%40porkedzu%7CcategoryId%7E40%5EcategoryName%7EFile%2BCabinets%2B%2526%2BAccessories%5EparentCategoryID%7Ecat_10001%5EprodPage%7E25%5Eregion%7E1%5Erefine%7E1%40wih8mfsy%7CprodPage%7E15%5Erefine%7E1%5Eregion%7E1%5EcategoryName%7Evertical-file-cabinets%5EcategoryId%7E91%5EparentCategoryID%7Ecat_40&view=list&position=1&prodPage=15&sort=Price+%28Low-High%29* (Accessed July 11, 2011).

provided by the Secretary, foreign language(s) common to a significant portion of the workers if they are not fluent in English. We estimate the cost of producing the workers' rights poster to be $0.12.

q. Total Cost Burden for Small Entities

The Department's calculations indicate that for a hypothetical small entity in the top five industries that applies for one worker (representing the smallest of the small entities that hire H–2B workers), the total annualized first-year costs and annual costs are between $1,058 (using the low estimate of corresponding worker wages and annualizing at 3 percent over 10 years) and $1,367 (using the high estimate and annualizing at 7 percent over 10 years). Using the low estimate of corresponding worker wages and annualizing at 3 percent and using the high estimate of corresponding worker wages and annualizing at 7 percent, respectively, the total annualized first-year and annual costs for employers in the top five industries that hire the average number of employees for their respective industries are as follows:

Landscaping Services, $2,404 to $3,218;
Janitorial Services, $4,673 to $6,339;
Food Services and Drinking Places, $4,884 to $6,628;
Amusement, Gambling, and Recreation, $5,881 to $8,000;
Construction, $2,772 to $3,724.

A rule is considered to have a significant economic impact when the total annual cost associated with the rule is equal to or exceeds 1 percent of annual revenue. To evaluate this impact, the Department calculates the total cost burden as a percent of revenue for each of the top five industries. The estimated revenues for small entities in the top five industries are as follows:

Landscaping Services, $517,105;
Janitorial Services, $425,693;
Food Services and Drinking Places, $516,055;
Amusement, Gambling, and Recreation, $846,948;
Construction, $1,292,201.[91]

The Department then divides the total cost burden for small entities by the total estimated revenue for small entities in each of the top five industries. The total costs as a percent of revenues for the top five industries are summarized in Table 31:

Landscaping Services, 0.46 to 0.62 percent;
Janitorial Services, 1.10 to 1.549 percent;
Food Services and Drinking Places, 0.95 to 1.28 percent;
Amusement, Gambling, and Recreation, 0.69 to 0.94 percent;
Construction, 0.21 to 0.29 percent.

TABLE 31—TOTAL COSTS FOR SMALL FIRMS

	Industry					
	Cost per firm with one H–2B worker	Land-scaping services	Janitorial services	Food services and drinking places	Amusement, gambling, and recreation	Construction
H–2B Workers	1.0	2.7	5.5	5.7	7.0	3.1
Annual Costs to Employers:						
Corresponding Workers' Wages—Low	$152	$404	$830	$869	$1056	$473
Corresponding Workers' Wages—High	$455	$1,212	$2,489	$2,607	$3,169	$1,419
Transportation	$531	$1,415	$2,905	$3,043	$3,698	$1,656
Subsistence	$24	$65	$133	$139	$169	$76
Lodging	$14	$37	$75	$79	$95	$43
Visa and Consular Fees	$88	$234	$480	$503	$611	$274
Additional Recruiting	$161	$161	$161	$161	$161	$161
Disclosure of Job Order	$57	$58	$59	$59	$59	$58
Elimination of Attestation	$3	$3	$3	$3	$3	$3
Post Job Opportunity	$0.24	$0.24	$0.24	$0.24	$0.24	$0.24
Workers Rights Poster	$0.12	$0.12	$0.12	$0.12	$0.12	$0.12
Total Annual Costs—Low	$1,030	$2,376	$4,646	$4,856	$5,854	$2,744
Total Annual Costs—High	$1,334	$3,185	$6,305	$6,594	$7,966	$3,690
First Year Costs to Employers:						
Read and Understand Rule	$187	$187	$187	$187	$187	$187
Document Retention	$50	$50	$50	$50	$50	$50
Total First Year Costs	$237	$237	$237	$237	$237	$237
Annualized First Year Costs (7%)	$34	$34	$34	$34	$34	$34
Annualized First Year Costs (3%)	$28	$28	$28	$28	$28	$28
Total Costs per Small Firm (Annualized First Year and Annual Costs, 7%)						
Total Costs—Low	$1,064	$2,410	$4,679	$4,890	$5,877	$2,778
Total Costs—High	$1,367	$3,218	$6,339	$6,628	$8,000	$3,724
Total Revenue	N/A	$517,105	$425,693	$516,055	$846,948	$1,292,201
Costs as a Percent of Revenue—Low	N/A	0.47%	1.10%	0.95%	0.70%	0.21%
Cost as a Percent of Revenue—High	N/A	0.63%	1.50%	1.29%	0.95%	0.29%
Total Costs per Small Firm (Annualized First Year and Annual Costs, 3%):						
Total Costs—Low	$1,058	$2,404	$4,673	$4,884	$5,881	$2,772
Total Costs—High	$1,361	$3,212	$6,333	$6,622	$7,994	$3,718
Total Revenue	N/A	$517,105	$425,693	$516,055	$846,948	$1,292,201

[91] U.S. Census Bureau. 2007. Statistics of U.S. Businesses. Available at *http://www.census.gov/econ/susb/data/susb2007.html. c.*

TABLE 31—TOTAL COSTS FOR SMALL FIRMS—Continued

	Industry					
	Cost per firm with one H–2B worker	Land-scaping services	Janitorial services	Food services and drinking places	Amusement, gambling, and recreation	Construction
Costs as a Percent of Revenue—Low	N/A	0.46%	1.10%	0.95%	0.69%	0.21%
Cost as a Percent of Revenue—High	N/A	0.62%	1.549%	1.28%	0.94%	0.29%

N/A: Not Applicable.
Note: Totals may not sum due to rounding.

This rule is expected to have a significant economic impact (at least 1 percent of annual revenue) on the average participating small entity in two of the five most common industries: Janitorial Services, and Food Services and Drinking Places. Although applying to hire H–2B workers is voluntary, and any employer (small or otherwise) may choose not to apply, an employer, whether it continues to participate in the H–2B program or fills its workforce with U.S. workers, could face costs equal to or slightly greater than 1 percent of annual revenue. However, in the Department's view, increased employment opportunities for U.S. workers and higher wages for both U.S. and H–2B workers provide a broad societal benefit that outweighs these costs.

The Department considers that a rule has an impact on a ''substantial number of small entities'' when the total number of small entities impacted by the rule is equal to or exceeds 10 percent of the relevant universe of small entities in a given industry. *See, e.g.,* 76 FR 3476, Jan. 19, 2011. The Department has used the 10 percent threshold in previous regulations. As discussed earlier in the analysis, the percentage of small entities authorized to employ temporary non-agricultural workers would be less than 1 percent of the total number of small entities in the top five industries with the greatest number of H–2B workers. Therefore, this rule is not expected to impact a substantial number of small entities.

5. Alternatives Considered as Options for Small Businesses

We have concluded that this Final Rule will not have a significant economic impact on a substantial number of small entities. This Final Rule sets minimum standards to ensure that foreign workers may be employed only if qualified domestic workers are not available and that the hiring of H–2B workers will not adversely affect the wages and working conditions of similarly employed domestic workers. While we recognize the concerns expressed by small businesses and have made every effort to minimize the burden on the relatively small number of businesses that use the program, creating different and likely lower standards for one class of employers (*e.g.,* small businesses) would essentially sanction the very adverse effects that we are compelled to prevent.

Under the existing H–2B program, an employer must first apply for a temporary labor certification from the Secretary of Labor. That certification informs USCIS that U.S. workers qualified to perform the services or labor are not available, and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers. Our obligation to ensure that U.S. workers capable of performing the services or labor are not available, and that the employment of the foreign worker(s) will not adversely affect the wages and working conditions of similarly employed U.S. workers was reaffirmed in a recent court decision, *CATA* v. *Solis,* Civil No. 2:09–cv–240, 2011 WL 2414555 (E.D. Pa. 20100), which made clear that our consideration of hardship to employers when setting the January 1, 2012 effective data was contrary to our responsibilities under the INA.

While our responsibilities in the H–2B labor certification program first and foremost are to ensure that U.S. workers are given priority for temporary non-agricultural job opportunities and to protect U.S. workers' wages and working conditions, we solicited and considered public comments on a number of alternatives that would balance the needs of small businesses while providing adequate protection to U.S. and H–2B workers. A discussion on each alternative considered and our final determination is below.

First, we proposed to change the definition of full-time from 30 or more hours of work per workweek to 35 or more hours of work per week in response to the District Court's decision in *CATA* v. *Solis,* 2010 WL 3431761, which invalidated the 2008 H–2B Final Rule's 30-hour definition because our decision was not supported by empirical data. We stated in the NPRM that a 35-hour work week was supported by empirical data and was more representative of the actual needs of employers and expectations of workers. However in the NPRM, we requested comments on whether extending the definition of full-time to at least 40 hours is more protective of U.S workers and better conforms to employer standards and needs.

As discussed in this preamble, several trade associations and private businesses supported retaining the 2008 Final Rule's standard of 30 hours per workweek, citing the difficulties of scheduling work around unpredictable and uncontrollable events, particularly the weather. Other employers suggested that full-time employment should be determined not in each individual workweek, but by averaging workweeks over the length of the certified employment period. In addition, several businesses stated that a 35-hour workweek would be burdensome in combination with other aspects of the proposed rule, particularly the three-quarter guarantee. We concluded, after a thorough review of the comments, to retain the definition of full-time as 35 or more hours of work per week. This standard more accurately reflects full-time employment expectations than the current 30-hour definition, would not compromise worker protections, and is consistent with other existing Department standards and practices in the industries that currently use the H–2B program to obtain workers.

The NPRM also proposed to eliminate job contractors from participating in the H–2B program based on our view that a job contractor's ongoing need is by its very nature permanent rather than temporary and therefore the job contractor does not qualify to participate in the program. We received a comment that questioned our underlying assumption that all job contractors have a permanent need and asserted that the bar on job contractors should not be complete because to the

extent that any one job contractor does not have a year-round need and routinely does not employ workers in a particular occupation for a specific segment of the year, its needs are seasonal. The commenter asserted that job contractors should be afforded the same opportunity as all other employers to prove they have a temporary need for services or labor. Upon further consideration, we recognize that there very well may be job contractors who only operate several months out of the year and thus have a genuine temporary need and that these job contractors should not be excluded from the program. Additionally, we recognize that job contractors with a one-time need may also have a genuine temporary need and should not be excluded from the program. Therefore, we revised § 655.6 to permit only those job contractors that demonstrate through documentation their own temporary need, not that of their employer-clients, to continue to participate in the H–2B program. Job contractors will only be permitted to file applications based on seasonal need and one-time occurrences.

We also introduced in the NPRM a three-fourths guarantee provision that would require that H–2B employers guarantee to offer the worker employment for a total number of hours equal to at least three-fourths of the workdays in each 4-week period of the certified period of employment. We believed that this guarantee would motivate employers to carefully consider the extent of their workforce needs before applying for certification and discourage employers from applying for unnecessary workers or from promising work which may not exist. While we stated in the NPRM that an hours' guarantee is necessary to protect the integrity of the H–2B program and to protect the interests of both workers and employers in the program, we invited the public to suggest alternative guarantee systems that may better serve the goals of the guarantee. In particular, the Department sought comments on whether a 4-week increment is the best period of time for measuring the three-fourths guarantee or whether a shorter or longer time period would be more appropriate.

Many small businesses expressed concerns about the guarantee. They were particularly concerned about the impact of the weather on their ability to meet the guarantee and their ability to meet the guarantee in the event of unforeseen events like oil spills or health department or conservation closures that, for example, can make the harvesting and processing of crabs impossible. Numerous other employers similarly stated that if a guarantee remains in the Final Rule, it should be spread over the entire certification period, as it is in the H–2A regulations. They noted that this would provide flexibility and enhance their ability to meet the guarantee without cost, because often the loss of demand for work in one period is shifted to another point in the season, but such a guarantee would still deter egregious cases of employers misstating their need for H–2B employees. A number of commenters also suggested that the guarantee should be based upon pay for three-fourths of the hours, rather than three-fourths of the hours, so that employers could take credit for any overtime paid at time-and-a-half. After careful consideration of all comments received, we decided to retain the three-fourths guarantee of the hours, but lengthen the increment over which the guarantee is measured from 4 weeks to 12 weeks, if the period of employment covered by the job order is 120 days or more and to 6 weeks, if the period of employment covered by the job order is less than 120 days.

The NPRM continued to reflect our commitment to ensuring that U.S. workers have priority for H–2B job opportunities by proposing that employers hire qualified U.S. workers referred by the SWA or who respond to recruitment until 3 days before the date of need or the last H–2B worker departs for the workplace for the certified job opportunity, whichever is later. We believed that this proposal would increase the opportunity for U.S. workers to fill the available positions without unnecessarily burdening the employer. The proposal would have required the employer to inform the appropriate SWA(s) in writing of the later departure so that the SWA would know when to stop referring potential U.S. workers to the employer.

We received many comments from employers and their advocates arguing that accepting U.S. applicants until 3 days before the date of need would be unworkable for employers. Some of these commenters suggested that we require the SWA to keep the job order posted for 30 days (instead of the current 10), while others recommended changing the closing date from 3 days to 30 days or 60 days before the date of need. We carefully reviewed all comments and weighed these concerns against our mandate to ensure that U.S. workers rather than foreign workers be employed whenever possible. As a result, we changed the day through which employers must accept SWA referrals of qualified U.S. applicants from 3 days to 21 days before the date of need. The Department believes that increasing the number of days before the date of need that referrals are cut off as well as removing the clause or the date that the last H–2B worker departs for the job opportunity will alleviate a number of employer concerns without compromising our obligation to U.S. workers. In addition, this change takes into consideration the USCIS requirement that H–2B workers not enter the United States until 10 days before the date of need, providing employers the certainty that their H–2B workers will have sufficient time to obtain their visas and eliminating the employer concern that an H–2B worker could be displaced by a U.S. worker after beginning inbound travel.

Employers and small businesses generally opposed our proposed provisions that would require an employer to provide, pay, or reimburse the worker in the first workweek the cost of transportation and subsistence from the place from which the worker has come to the place of employment, and for H–2B workers' visa, visa processing, and other related consular fees including those fees mandated by the government (but not for passport expenses or other charges primarily for the benefit of the workers). Employers and small businesses asserted that paying such fees would be too costly and that transportation costs should be the responsibility of the employee or paid at the discretion of the employer. A number of commenters suggested that the Department adopt the H–2A provision requiring that workers must complete at least 50 percent of the work contract to be reimbursed for inbound transportation and subsistence expenses. After careful consideration of all comments, we have made two changes. While we will continue to require employers to provide inbound transportation and subsistence to H–2B workers and to U.S. workers who are not reasonably able to return to their residence within the same workday, the Final Rule now provides that employers may arrange and pay for the transportation and subsistence directly, advance at a minimum, the most economical and reasonable common carrier cost, or reimburse a worker's reasonable costs, after the worker completes 50 percent of the period of employment covered by the job order if the employer has not previously reimbursed such costs. We also continue in the Final Rule to require employers to provide return transportation and subsistence from the place of employment; however, these

obligations have been revised to stipulate that an employer is only required to provide return transportation and subsistence if the worker completes the period of employment covered by the job order or if the worker is dismissed from employment for any reason by the employer before the end of the period. In addition, the Final Rule continues to provide that if a worker has contracted with a subsequent employer that has agreed to provide or pay for the worker's transportation to the subsequent employer's worksite, the subsequent employer must provide or pay for such expenses; otherwise, if this agreement has not been made, the employer must provide or pay for that transportation and subsistence. The Final Rule also continues to require employers to reimburse all visa, visa processing, and other related consular fees in the first workweek.

We received several comments from employers noting the need to have a stable workforce throughout their certified period of need. Employers were concerned that after expending significant resources to hire H–2B workers, these workers could be displaced to hire U.S. workers referred by the SWA who may not report for work, or might fail to complete the contract period. One employer requested that we consider new provisions that would allow an employer to hire H–2B workers if the hired U.S. workers become unavailable. We considered these comments and agreed to address the circumstances where an employer's U.S. workers fail to report to work or quit before the end of the certified period of employment by providing the CO the authority to issue a redetermination based on the unavailability of U.S. workers. While we have provided a means by which employers may request a new determination, we strongly encourage employers to make an additional effort to voluntarily contact the SWA for additional referrals for qualified U.S. workers.

Finally, the Small Business Administration's Office of Advocacy and several industry groups requested an exemption from the job order obligations for man-made catastrophic events such as an oil-spill or controlled flooding that is wholly outside of the employer's control. The Department proposed that a CO could only terminate the employer's obligations under the guarantee in the event of fire, weather, or another Act of God. The Department agreed with commenters that this provision should be expanded to allow a CO to terminate an employer's job order based upon these man-made catastrophes.

C. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector. The rule has no Federal mandate, which is defined in 2 U.S.C. 658(6) to include either a Federal intergovernmental mandate or a Federal private sector mandate. A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or imposes a duty upon the private sector that is not voluntary. A decision by a private entity to obtain an H–2B worker is purely voluntary and is, therefore, excluded from any reporting requirement under the Act.

SWAs are mandated to perform certain activities for the Federal Government under the H–2B program, and receive grants to support the performance of these activities. Under the 2008 Final Rule the SWA role was changed to accommodate the attestation-based process. The current regulation requires SWAs to accept and place job orders into intra- and interstate clearance, review referrals, and verify employment eligibility of the applicants who apply to the SWA to be referred to the job opportunity. Under the Final Rule the SWA will continue to play a significant and active role. The Department continues to require that employers submit their job orders to the SWA having jurisdiction over the area of intended employment as is the case in the current regulation, with the added requirement that the SWA review the job order prior to posting it. The Final Rule further requires that the employer provide a copy of the *Application for Temporary Employment Certification* to the SWA; however, this is simply a copy for disclosure purposes and would require no additional information collection or review activities by the SWA. The Department will also continue to require SWAs to place job orders into clearance, as well as provide employers with referrals received in connection with the job opportunity. Additionally, the Final Rule requires SWAs to contact labor organizations where union representation is customary in the occupation and area of intended employment. The Department recognizes that SWAs may experience a slight increase in their workload in terms of review, referrals, and employer guidance. However, the Department is eliminating the employment verification responsibilities the SWA has under the current regulations. The elimination of workload created by the employment verification requirement will allow the SWAs to apply those resources to the additional recruitment requirements under this rule.

SWA activities under the H–2B program are currently funded by the Department through grants provided under the Wagner-Peyser Act. 29 U.S.C. 49 *et seq,* and directly through appropriated funds for administration of the Department's foreign labor certification program.

D. Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)

We have determined that this rulemaking does not impose a significant impact on a substantial number of small entities under the RFA. We have similarly concluded that this Final Rule is a major rule requiring review by the Congress under the SBREFA because it will likely result in an annual effect on the economy of $100 million.

E. Executive Order 13132—Federalism

We have reviewed this Final Rule in accordance with E.O. 13132 on federalism and have determined that it does not have federalism implications. The Final Rule does not have substantial direct effects on States, on the relationship between the States, or on the distribution of power and responsibilities among the various levels of government as described by E.O. 13132. Therefore, we have determined that this Final Rule will not have a sufficient federalism implication to warrant the preparation of a summary impact statement.

F. Executive Order 13175—Indian Tribal Governments

We reviewed this Final Rule under the terms of E.O. 13175 and determined it not to have tribal implications. The Final Rule does not have substantial direct effects 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. As a result, no tribal summary impact statement has been prepared.

G. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency

Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681) requires us to assess the impact of this Final Rule on family well-being. A rule that is determined to have a negative effect on families must be supported with an adequate rationale. We have assessed this Final Rule and determined that it will not have a negative effect on families.

H. Executive Order 12630—Government Actions and Interference With Constitutionally Protected Property Rights

The Final Rule is not subject to E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

I. Executive Order 12988—Civil Justice

The Final Rule has been drafted and reviewed in accordance with E.O. 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The Department has developed the Final Rule to minimize litigation and provide a clear legal standard for affected conduct, and has reviewed the Final Rule carefully to eliminate drafting errors and ambiguities.

J. Plain Language

We drafted this Final Rule in plain language.

K. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the U.S. Department of Labor (the Department) conducts a preclearance consultation process to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)).

This helps to ensure that the public understands the Department's collection instructions; respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents. Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number as required in 5 CFR 1320.11(l).

The information collected is mandated in this Final Rule at Title 20 CFR 655.8, 655.9, 655.11, 655.12, 655.13, 655.15, 655.16, 655.17, 655.20, 655.32, 655.33, 655.35, 655.40, 655.42, 655.43, 655.45, 655.46, 655.47, 655.48, 655.56, 655.57, 655.60, 655, 61, 655.62, 655.70, 655.71, 655.72, 655.73, and Title 29 CFR 503.16, 503.17, 503.43, and 503.51. In accordance with the PRA (44 U.S.C. 3501) information collection requirements, which must be implemented as a result of this regulation, a clearance package containing proposed changes to the already approved collection was submitted to OMB on March 18, 2011, as part of the proposed rule to reform the H–2B program for hiring temporary non-agricultural aliens. The public was given 60 days to comment on this information collection.

The Department did not receive any comments specifically related to this section. The Department did receive several comments suggesting that it collect information about how many U.S. workers and H–2B workers an employer hires as a result of its participation in this program and how many of the H–2B workers were hired from abroad as opposed to from within the United States. The Department agrees that this would be valuable information and has decided to amend ETA Form 9142 to collect from the employer the number of H–2B and U.S. workers it actually hired from within the U.S. or from abroad based on its last H–2B labor certification application, if applicable.

The forms used to comply with this Final Rule include those that were required under the 2008 Final Rule, except that ETA Form 9142, Appendix B was modified to reflect the assurances and obligations of the H–2B employer as required under the compliance-based system proposed in the NPRM and retained in this Final Rule. Also, a new form was created for registering as an H–2B employer—the ETA Form 9155, *H–2B Registration*—was developed at the time of the NPRM in compliance with the new provisions first proposed in the NPRM and retained in the Final Rule, and was available for public comment.

The Department has made changes to this Final Rule after receiving comments to the NPRM. In addition to the change discussed above, the Department has also made changes to the forms for consistency with other changes to the Final Rule and for clarity. However, these changes do not impact the overall annual burden hours for the H–2B program information collection. The total costs associated with the form, as defined by the PRA, are zero dollars per employer for ETA Forms 9141, 9142, and 9155.

This Final Rule utilizes the information collection, which OMB first approved on November 21, 2008 under OMB control number 1205–0466. The Department has simultaneously submitted with this Final Rule an information collection containing the revised ETA Forms 9141 and ETA 9142, and the new ETA Form 9155. The ETA Form 9141 has a public reporting burden estimated to average 1 hour per response or application filed. The ETA Form 9142 with Appendix B.1 has a public reporting burden estimated to average 1 hour per response or application filed. Additionally, the ETA Form 9155 has a public reporting burden estimated to average 1 hour per response or application filed.

For an additional explanation of how the Department calculated the burden hours and related costs, the PRA packages for these information collections may be obtained from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAMain* or by contacting the Department at: Office of Policy Development and Research, U.S. Department of Labor, 200 Constitution Ave. NW., Washington, DC 20210 or by phone request to 202–693–3700 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

List of Subjects

20 CFR Part 655

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant workers, Nonimmigrant workers, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

29 CFR Part 503

Administrative practice and procedure, Employment, Foreign Workers, Housing, Housing standards, Immigration, Labor, Nonimmigrant workers, Penalties, Transportation, Wages.

Accordingly, the Department of Labor amends 20 CFR part 655 and adds 29 CFR part 503 as follows:

Title 20—Employees' Benefits

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 1. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 1182(m), (n) and (t), 1184(c), (g), and

(j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts A and C issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts D and E authority repealed.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); and sec. 323(c), Pub. L. 103–206, 107 Stat. 2428.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; and 8 CFR 214.2(h).

Subparts J and K authority repealed.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 2. In subpart A, revise §§ 655.1 through 655.6 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

Sec.
655.1 Scope and purpose of subpart A.
655.2 Authority of the agencies, offices, and divisions in the Department of Labor.
655.3 Territory of Guam.
655.4 Special procedures.
655.5 Definition of terms.
655.6 Temporary need.

* * * * *

§ 655.1 Scope and purpose of subpart A.

The Immigration and Nationality Act (INA) at 8 U.S.C. 1184(c)(1) requires the Secretary of the Department of Homeland Security (DHS) to consult with appropriate agencies before authorizing the entry of H–2B workers. DHS regulations at 8 CFR 214.2(h)(6)(iv) provide that an employer's petition to employ nonimmigrant workers on H–2B visas for temporary non-agricultural employment in the United States (U.S.), except for Guam, must be accompanied by an approved temporary labor certification from the Secretary of Labor (Secretary).

(a) *Purpose.* The temporary labor certification reflects a determination by the Secretary that:

(1) There are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to hire foreign workers, and that

(2) The employment of the H–2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(b) *Scope.* This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant foreign workers in the H–2B visa category, as defined in 8 U.S.C. 1101(a)(15)(H)(ii)(b). It also establishes obligations with respect to the terms and conditions of the temporary labor certification with which H–2B employers must comply, as well as their obligations to H–2B workers and workers in corresponding employment. Additionally, this subpart sets forth integrity measures for ensuring employers' continued compliance with the terms and conditions of the temporary labor certification.

§ 655.2 Authority of the agencies, offices, and divisions in the Department of Labor.

(a) *Authority and role of the Office of Foreign Labor Certification (OFLC).* The Secretary has delegated her authority to make determinations under this subpart, pursuant to 8 CFR 214.2(h)(6)(iv), to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to OFLC. Determinations on an *Application for Temporary Employment Certification* in the H–2B program are made by the Administrator, OFLC who, in turn, may delegate this responsibility to designated staff members, *e.g.,* a Certifying Officer (CO).

(b) *Authority of the Wage and Hour Division (WHD).* Pursuant to its authority under the INA, 8 U.S.C. 1184(c)(14)(B), DHS has delegated to the Secretary certain investigatory and law enforcement functions with respect to terms and conditions of employment in the H–2B program. The Secretary has, in turn, delegated that authority to WHD. The regulations governing WHD investigation and enforcement functions, including those related to the enforcement of temporary labor certifications, issued under this subpart, may be found in 29 CFR part 503.

(c) *Concurrent authority.* OFLC and WHD have concurrent authority to impose a debarment remedy under § 655.73 or under 29 CFR 503.24.

§ 655.3 Territory of Guam.

Subpart A of this part does not apply to temporary employment in the Territory of Guam, except that an employer seeking certification for a job opportunity on Guam must obtain a prevailing wage from the Department in accordance with § 655.10 of this subpart. The U.S. Department of Labor (Department or DOL) does not certify to the United States Citizenship and Immigration Services (USCIS) of DHS the temporary employment of nonimmigrant foreign workers under H–2B visas, or enforce compliance with the provisions of the H–2B visa program, in the Territory of Guam. Under DHS regulations, administration of the H–2B temporary labor certification program is undertaken by the Governor of Guam, or the Governor's designated representative.

§ 655.4 Special procedures.

To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities, the Administrator, OFLC has the authority to establish, continue, revise, or revoke special procedures in the form of variances for processing certain H–2B applications. Employers must request and demonstrate in writing to the Administrator, OFLC that special procedures are necessary. Before making determinations under this section, the Administrator, OFLC may consult with affected employers and worker representatives. Special procedures in place on the effective date of this regulation, including special procedures currently in effect for handling applications for tree planters and related reforestation workers, professional athletes, boilermakers coming to the U.S. on an emergency basis, and professional entertainers, will remain in force until modified or withdrawn by the Administrator, OFLC.

§ 655.5 Definition of terms.

For purposes of this subpart:

Act means the Immigration and Nationality Act or INA, as amended, 8 U.S.C. 1101 *et seq.*

Administrative Law Judge (ALJ) means a person within the Department's Office of Administrative Law Judges appointed under 5 U.S.C. 3105.

Administrator, Office of Foreign Labor Certification (OFLC) means the primary official of the Office of Foreign Labor Certification, ETA, or the Administrator's designee.

Administrator, Wage and Hour Division (WHD) means the primary official of the WHD, or the Administrator's designee.

Agent. (1) *Agent* means a legal entity or person who:

(i) Is authorized to act on behalf of an employer for temporary nonagricultural labor certification purposes;

(ii) Is not itself an employer, or a joint employer, as defined in this part with respect to a specific application; and

(iii) Is not an association or other organization of employers.

(2) No agent who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this part.

Agricultural labor or services means those duties and occupations defined in subpart B of this part.

Applicant means a U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* (ETA Form 9142 and the appropriate appendices).

Application for Temporary Employment Certification means the Office of Management and Budget (OMB)-approved ETA Form 9142 and the appropriate appendices, a valid wage determination, as required by § 655.10, and a subsequently-filed U.S. worker recruitment report, submitted by an employer to secure a temporary labor certification determination from DOL.

Area of intended employment means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.,* average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (*e.g.,* near the border of) the MSA.

Area of substantial unemployment means a contiguous area with a population of at least 10,000 in which there is an average unemployment rate equal to or exceeding 6.5 percent for the 12 months preceding the determination of such areas made by the ETA.

Attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the U.S., or the District of Columbia. No attorney who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this subpart.

Board of Alien Labor Certification Appeals (BALCA or Board) means the permanent Board established by part 656 of this chapter, chaired by the Chief Administrative Law Judge (Chief ALJ), and consisting of ALJs assigned to the Department and designated by the Chief ALJ to be members of BALCA.

Certifying Officer (CO) means an OFLC official designated by the Administrator, OFLC to make determinations on applications under the H–2B program. The Administrator, OFLC is the National CO. Other COs may also be designated by the Administrator, OFLC to make the determinations required under this subpart.

Chief Administrative Law Judge (Chief ALJ) means the chief official of the Department's Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

Corresponding employment. (1) *Corresponding employment* means the employment of workers who are not H–2B workers by an employer that has a certified H–2B *Application for Temporary Employment Certification* when those workers are performing either substantially the same work included in the job order or substantially the same work performed by the H–2B workers, except that workers in the following two categories are not included in corresponding employment:

(i) Incumbent employees continuously employed by the H–2B employer to perform substantially the same work included in the job order or substantially the same work performed by the H–2B workers during the 52 weeks prior to the period of employment certified on the *Application for Temporary Employment Certification* and who have worked or been paid for at least 35 hours in at least 48 of the prior 52 workweeks, and who have worked or been paid for an average of at least 35 hours per week over the prior 52 weeks, as demonstrated on the employer's payroll records, provided that the terms and working conditions of their employment are not substantially reduced during the period of employment covered by the job order. In determining whether this standard was met, the employer may take credit for any hours that were reduced by the employee voluntarily choosing not to work due to personal reasons such as illness or vacation; or

(ii) Incumbent employees covered by a collective bargaining agreement or an individual employment contract that guarantees both an offer of at least 35 hours of work each workweek and continued employment with the H–2B employer at least through the period of employment covered by the job order, except that the employee may be dismissed for cause.

(2) To qualify as corresponding employment, the work must be performed during the period of the job order, including any approved extension thereof.

Date of need means the first date the employer requires services of the H–2B workers as listed on the *Application for Temporary Employment Certification.*

Department of Homeland Security (DHS) means the Federal Department having jurisdiction over certain immigration-related functions, acting through its agencies, including USCIS.

Employee means a person who is engaged to perform work for an employer, as defined under the general common law. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive. The terms employee and worker are used interchangeably in this subpart.

Employer means a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;

(2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H–2B worker or a worker in corresponding employment; and

(3) Possesses, for purposes of filing an *Application for Temporary Employment Certification,* a valid Federal Employer Identification Number (FEIN).

Employer-client means an employer that has entered into an agreement with

a job contractor and that is not an affiliate, branch or subsidiary of the job contractor, under which the job contractor provides services or labor to the employer on a temporary basis and will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.

Employment and Training Administration (ETA) means the agency within the Department which includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the DHS regulations for the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

Federal holiday means a legal public holiday as defined at 5 U.S.C. 6103.

Full-time means 35 or more hours of work per week.

H–2B Petition means the DHS *Petition for a Nonimmigrant Worker* form, or successor form, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H–2B nonimmigrant workers. The *H–2B Petition* includes the approved *Application for Temporary Employment Certification* and the Final Determination letter.

H–2B Registration means the OMB-approved ETA Form 9155, submitted by an employer to register its intent to hire H–2B workers and to file an *Application for Temporary Employment Certification.*

H–2B worker means any temporary foreign worker who is lawfully present in the U.S. and authorized by DHS to perform nonagricultural labor or services of a temporary or seasonal nature under 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.

Job offer means the offer made by an employer or potential employer of H–2B workers to both U.S. and H–2B workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity means one or more openings for full-time employment with the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers.

Job order means the document containing the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other benefits, including obligations and assurances under 29 CFR part 503 and this subpart that is posted between and among the State Workforce Agencies (SWAs) on their job clearance systems.

Joint employment means that where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker.

Layoff means any involuntary separation of one or more U.S. employees without cause.

Metropolitan Statistical Area (MSA) means a geographic entity defined by OMB for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

National Prevailing Wage Center (NPWC) means that office within OFLC from which employers, agents, or attorneys who wish to file an *Application for Temporary Employment Certification* receive a prevailing wage determination (PWD).

NPWC Director means the OFLC official to whom the Administrator, OFLC has delegated authority to carry out certain NPWC operations and functions.

National Processing Center (NPC) means the office within OFLC which is charged with the adjudication of an *Application for Temporary Employment Certification* or other applications. For purposes of this subpart, the NPC receiving a request for an *H–2B Registration* and an *Application for Temporary Employment Certification* is the Chicago NPC whose address is published in the **Federal Register**.

NPC Director means the OFLC official to whom the Administrator, OFLC has delegated authority for purposes of certain Chicago NPC operations and functions.

Non-agricultural labor and services means any labor or services not considered to be agricultural labor or services as defined in subpart B of this part. It does not include the provision of services as members of the medical profession by graduates of medical schools.

Occupational employment statistics (OES) survey means the program under the jurisdiction of the Bureau of Labor Statistics (BLS) that provides annual wage estimates for occupations at the State and MSA levels.

Offered wage means the wage offered by an employer in an H–2B job order. The offered wage must equal or exceed the highest of the prevailing wage or Federal, State or local minimum wage.

Office of Foreign Labor Certification (OFLC) means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations to carry out the Secretary's responsibilities for the admission of foreign workers to the U.S. to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Prevailing wage determination (PWD) means the prevailing wage for the position, as described in § 655.10, that is the subject of the *Application for Temporary Employment Certification.* The PWD is made on ETA Form 9141, *Application for Prevailing Wage Determination.*

Professional athlete is defined in 8 U.S.C. 1182(a)(5)(A)(iii)(II), and means an individual who is employed as an athlete by:

(1) A team that is a member of an association of six or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or

(2) Any minor league team that is affiliated with such an association.

Secretary means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary's designee.

Secretary of the Department of Homeland Security means the chief official of the U.S. Department of Homeland Security (DHS) or the Secretary of DHS's designee.

Secretary of State means the chief official of the U.S. Department of State or the Secretary of State's designee.

State Workforce Agency (SWA) means a State government agency that receives funds under the Wagner-Peyser Act (29

U.S.C. 49 *et seq.*) to administer the State's public labor exchange activities.

Strike means a concerted stoppage of work by employees as a result of a labor dispute, or any concerted slowdown or other concerted interruption of operation (including stoppage by reason of the expiration of a collective bargaining agreement).

Successor in interest means:

(1) Where an employer has violated 29 CFR part 503, or this subpart, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(i) Substantial continuity of the same business operations;

(ii) Use of the same facilities;

(iii) Continuity of the work force;

(iv) Similarity of jobs and working conditions;

(v) Similarity of supervisory personnel;

(vi) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(vii) Similarity in machinery, equipment, and production methods;

(viii) Similarity of products and services; and

(ix) The ability of the predecessor to provide relief.

(2) For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

United States (U.S.) means the continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI).

United States Citizenship and Immigration Services (USCIS) means the Federal agency within DHS that makes the determination under the INA whether to grant petitions filed by employers seeking H–2B workers to perform temporary non-agricultural work in the U.S.

United States worker (U.S. worker) means a worker who is:

(1) A citizen or national of the U.S.;

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.; or

(3) An individual who is not an unauthorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

Wage and Hour Division (WHD) means the agency within the Department with investigatory and law enforcement authority, as delegated from DHS, to carry out the provisions under 8 U.S.C. 1184(c).

Wages mean all forms of cash remuneration to a worker by an employer in payment for personal services.

§ 655.6 Temporary need.

(a) An employer seeking certification under this subpart must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii)(A).

(b) The employer's need is considered temporary if justified to the CO as one of the following: A one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS. 8 CFR 214.2(h)(6)(ii)(B). Except where the employer's need is based on a one-time occurrence, the CO will deny a request for an *H–2B Registration* or an *Application for Temporary Employment Certification* where the employer has a need lasting more than 9 months.

(c) A job contractor will only be permitted to seek certification if it can demonstrate through documentation its own temporary need, not that of its employer-client(s). A job contractor will only be permitted to file applications based on a seasonal need or a one-time occurrence.

■ 3. In subpart A, add §§ 655.7 through 655.9 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

* * * * *

Sec.

655.7 Persons and entities authorized to file.

655.8 Requirements for agents.

655.9 Disclosure of foreign worker recruitment.

* * * * *

§ 655.7 Persons and entities authorized to file.

(a) *Persons authorized to file.* In addition to the employer applicant, a request for an *H–2B Registration* or an *Application for Temporary Employment Certification* may be filed by an attorney or agent, as defined in § 655.5.

(b) *Employer's signature required.* Regardless of whether the employer is represented by an attorney or agent, the employer is required to sign the *H–2B Registration* and *Application for Temporary Employment Certification* and all documentation submitted to the Department.

§ 655.8 Requirements for agents.

An agent filing an *Application for Temporary Employment Certification* on behalf of an employer must provide:

(a) A copy of the agent agreement or other document demonstrating the agent's authority to represent the employer; and

(b) A copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor Certificate of Registration, if the agent is required under MSPA, at 29 U.S.C. 1801 *et seq.,* to have such a certificate, identifying the specific farm labor contracting activities the agent is authorized to perform.

§ 655.9 Disclosure of foreign worker recruitment.

(a) The employer, and its attorney or agent, as applicable, must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H–2B workers under this *Application for Temporary Employment Certification.* These agreements must contain the contractual prohibition against charging fees as set forth in § 655.20(p).

(b) The employer, and its attorney or agent, as applicable, must also provide the identity and location of all persons and entities hired by or working for the recruiter or agent referenced in paragraph (a) of this section, and any of the agents or employees of those persons and entities, to recruit prospective foreign workers for the H–2B job opportunities offered by the employer.

(c) The Department will maintain a publicly available list of agents and recruiters who are party to the agreements referenced in paragraph (a) of this section, as well as the persons and entities referenced in paragraph (b) of this section and the locations in which they are operating.

■ 4a. In subpart A add an undesignated center heading before § 655.10 to read as follows:

Prefiling Procedures

■ 4b. In § 655.10, revise paragraphs (a), (c) through (e), (h), and (i), and add paragraphs (j) and (k), to read as follows:

§ 655.10 Prevailing wage.

(a) *Offered wage.* The employer must advertise the position to all potential workers at a wage at least equal to the prevailing wage obtained from the NPWC, or the Federal, State or local minimum wage, whichever is highest. The employer must offer and pay this wage (or higher) to both its H–2B workers and its workers in corresponding employment. The issuance of a PWD under this section does not permit an employer to pay a wage lower than the highest wage required by any applicable Federal, State or local law.

* * * * *

(c) *Request for PWD.* (1) An employer must request and receive a PWD from the NPWC before filing the job order with the SWA.

(2) The PWD must be valid on the date the job order is posted.

(d) *Multiple worksites.* If the job opportunity involves multiple worksites within an area of intended employment and different prevailing wage rates exist for the opportunity within the area of intended employment, the prevailing wage is the highest applicable wage among all the worksites.

(e) *NPWC action.* The NPWC will provide the PWD, indicate the source, and return the Application for Prevailing Wage Determination (ETA Form 9141) with its endorsement to the employer.

* * * * *

(h) *Validity period.* The NPWC must specify the validity period of the prevailing wage, which in no event may be more than 365 days and no less than 90 days from the date that the determination is issued.

(i) *Professional athletes.* In computing the prevailing wage for a professional athlete when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered the prevailing wage. 8 U.S.C. 1182(p)(2).

(j) *Retention of documentation.* The employer must retain the PWD for 3 years from the date of issuance or the date of a final determination on the *Application for Temporary Employment Certification,* whichever is later, and submit it to a CO if requested by a Notice of Deficiency, described in § 655.31, or audit, as described in § 655.70, or to a WHD representative during a WHD investigation.

(k) *Guam.* The requirements of this paragraph apply to any request filed for an H–2B job opportunity on Guam.

■ 5. Revise § 655.11 to read as follows:

§ 655.11 Registration of H–2B employers.

All employers that desire to hire H–2B workers must establish their need for services or labor is temporary by filing an *H–2B Registration* with the Chicago NPC.

(a) *Registration filing.* An employer must file an *H–2B Registration.* The *H–2B Registration* must be accompanied by documentation evidencing:

(1) The number of positions that will be sought in the first year of registration;

(2) The time period of need for the workers requested;

(3) That the nature of the employer's need for the services or labor to be performed is non-agricultural and temporary, and is justified as either a one-time occurrence, a seasonal need, a peakload need, or an intermittent need, as defined at 8 CFR 214.2(h)(6)(ii)(B) and § 655.6 (or in the case of job contractors, a seasonal need or one-time occurrence); and

(4) For job contractors, the job contractor's own seasonal need or one-time occurrence, such as through the provision of payroll records.

(b) *Original signature.* The *H–2B Registration* must bear the original signature of the employer (and that of the employer's attorney or agent if applicable). If and when the *H–2B Registration* is permitted to be filed electronically, the employer will satisfy this requirement by signing the *H–2B Registration* as directed by the CO.

(c) *Timeliness of registration filing.* A completed request for an *H–2B Registration* must be received by no less than 120 calendar days and no more than 150 calendar days before the employer's date of need, except where the employer submits the *H–2B Registration* in support of an emergency filing under § 655.17.

(d) *Temporary need.* (1) The employer must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii)(A). A job contractor must also demonstrate through documentation its own seasonal need or one-time occurrence.

(2) The employer's need will be assessed in accordance with the definitions provided by the Secretary of DHS and as further defined in § 655.6.

(e) *NPC review.* The CO will review the *H–2B Registration* and its accompanying documentation for completeness and make a determination based on the following factors:

(1) The job classification and duties qualify as non-agricultural;

(2) The employer's need for the services or labor to be performed is temporary in nature, and for job contractors, demonstration of the job contractor's own seasonal need or one-time occurrence;

(3) The number of worker positions and period of need are justified; and

(4) The request represents a bona fide job opportunity.

(f) *Mailing and postmark requirements.* Any notice or request pertaining to an *H–2B Registration* sent by the CO to an employer requiring a response will be mailed to the address provided on the *H–2B Registration* using methods to assure next day delivery, including electronic mail. The employer's response to the notice or request must be mailed using methods to assure next day delivery, including electronic mail, and be sent by the due date specified by the CO or by the next business day if the due date falls on a Saturday, Sunday or Federal holiday.

(g) *Request for information (RFI).* If the CO determines the *H–2B Registration* cannot be approved, the CO will issue an RFI. The RFI will be issued within 7 business days of the CO's receipt of the *H–2B Registration.* The RFI will:

(1) State the reason(s) why the *H–2B Registration* cannot be approved and what supplemental information or documentation is needed to correct the deficiencies;

(2) Specify a date, no later than 7 business days from the date the RFI is issued, by which the supplemental information or documentation must be sent by the employer;

(3) State that, upon receipt of a response to the RFI, the CO will review the *H–2B Registration* as well as any supplemental information and documentation and issue a Notice of Decision on the *H–2B Registration.* The CO may, at his or her discretion, issue one or more additional RFIs before issuing a Notice of Decision on the *H–2B Registration;* and

(4) State that failure to comply with an RFI, including not responding in a timely manner or not providing all required documentation within the specified timeframe, will result in a denial of the *H–2B Registration.*

(h) *Notice of Decision.* The CO will notify the employer in writing of the final decision on the *H–2B Registration.*

(1) Approved *H–2B Registration.* If the *H–2B Registration* is approved, the CO will send a Notice of Decision to the employer, and a copy to the employer's attorney or agent, if applicable. The Notice of Decision will notify the employer that it is eligible to seek H–2B workers in the occupational classification for the anticipated number of positions and period of need stated

on the approved *H–2B Registration.* The CO may approve the *H–2B Registration* for a period of up to 3 consecutive years.

(2) Denied *H–2B Registration.* If the *H–2B Registration* is denied, the CO will send a Notice of Decision to the employer, and a copy to the employer's attorney or agent, if applicable. The Notice of Decision will:

(i) State the reason(s) why the *H–2B Registration* is denied;

(ii) Offer the employer an opportunity to request administrative review under § 655.61 within 10 business days from the date the Notice of Decision is issued and state that if the employer does not request administrative review within that period the denial is final.

(i) *Retention of documents.* All employers filing an *H–2B Registration* are required to retain any documents and records not otherwise submitted proving compliance with this subpart. Such records and documents must be retained for a period of 3 years from the date of certification of the last *Application for Temporary Employment Certification* supported by the *H–2B Registration,* if approved, or 3 years from the date the decision is issued if the *H–2B Registration* is denied or 3 years from the day the Department receives written notification from the employer withdrawing its pending *H–2B Registration.*

(j) Transition period. In order to allow OFLC to make the necessary changes to its program operations to accommodate the new registration process, OFLC will announce in the **Federal Register** a separate transition period for the registration process, and until that time, will continue to adjudicate temporary need during the processing of applications.

■ 6. In subpart A, add §§ 655.12 and 655.13 to read as follows:

§ 655.12 Use of registration of H–2B employers.

(a) Upon approval of the *H–2B Registration,* the employer is authorized for the specified period of up to 3 consecutive years from the date the *H–2B Registration* is approved to file an *Application for Temporary Employment Certification,* unless:

(1) The number of workers to be employed has increased by more than 20 percent (or 50 percent for employers requesting fewer than 10 workers) from the initial year;

(2) The dates of need for the job opportunity have changed by more than a total of 30 calendar days from the initial year for the entire period of need;

(3) The nature of the job classification and/or duties has materially changed; or

(4) The temporary nature of the employer's need for services or labor to be performed has materially changed.

(b) If any of the changes in paragraphs (a)(1) through (4) of this section apply, the employer must file a new *H–2B Registration* in accordance with § 655.11.

§ 655.13 Review of PWDs.

(a) *Request for review of PWDs.* Any employer desiring review of a PWD must make a written request for such review to the NPWC Director within 7 business days from the date the PWD is issued. The request for review must clearly identify the PWD for which review is sought; set forth the particular grounds for the request; and include any materials submitted to the NPWC for purposes of securing the PWD.

(b) *NPWC review.* Upon the receipt of the written request for review, the NPWC Director will review the employer's request and accompanying documentation, including any supplementary material submitted by the employer, and after review shall issue a Final Determination letter; that letter may:

(1) Affirm the PWD issued by the NPWC; or

(2) Modify the PWD.

(c) *Request for review by BALCA.* Any employer desiring review of the NPWC Director's decision on a PWD must make a written request for review of the determination by BALCA within 10 business days from the date the Final Determination letter is issued.

(1) The request for BALCA review must be in writing and addressed to the NPWC Director who made the final determinations. Upon receipt of a request for BALCA review, the NPWC will prepare an appeal file and submit it to BALCA.

(2) The request for review, statements, briefs, and other submissions of the parties must contain only legal arguments and may refer to only the evidence that was within the record upon which the decision on the PWD was based.

(3) BALCA will handle appeals in accordance with § 655.61.

■ 7. In subpart A, add an undesignated center heading above § 655.15 to read as follows:

Application for Temporary Employment Certification Filing Procedures

■ 8. Revise § 655.15 to read as follows:

§ 655.15 Application filing requirements.

All registered employers that desire to hire H–2B workers must file an *Application for Temporary Employment Certification* with the NPC designated by the Administrator, OFLC. Except for employers that qualify for emergency procedures at § 655.17, employers that fail to register under the procedures in § 655.11 and/or that fail to submit a PWD obtained under § 655.10 will not be eligible to file an *Application for Temporary Employment Certification* and their applications will be returned without review.

(a) *What to file.* A registered employer seeking H–2B workers must file a completed *Application for Temporary Employment Certification* (ETA Form 9142 and the appropriate appendices and valid PWD), a copy of the job order being submitted concurrently to the SWA serving the area of intended employment, as set forth in § 655.16, and copies of all contracts and agreements with any agent and/or recruiter, executed in connection with the job opportunities and all information required, as specified in §§ 655.8 and 655.9.

(b) *Timeliness.* A completed *Application for Temporary Employment Certification* must be filed no more than 90 calendar days and no less than 75 calendar days before the employer's date of need.

(c) *Location and method of filing.* The employer must submit the *Application for Temporary Employment Certification* and all required supporting documentation to the NPC. At a future date the Department may also permit an *Application for Temporary Employment Certification* to be filed electronically in addition to or instead of by mail. Notice of such procedure will be published in the **Federal Register.**

(d) *Original signature.* The *Application for Temporary Employment Certification* must bear the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is so represented). If and when an *Application for Temporary Employment Certification* is permitted to be filed electronically, the employer will satisfy this requirement by signing the *Application for Temporary Employment Certification* as directed by the CO.

(e) *Requests for multiple positions.* Certification of more than one position may be requested on the *Application for Temporary Employment Certification* as long as all H–2B workers will perform the same services or labor under the same terms and conditions, in the same occupation, in the same area of intended employment, and during the same period of employment.

(f) *Separate applications.* Only one *Application for Temporary Employment Certification* may be filed for worksite(s)

within one area of intended employment for each job opportunity with an employer for each period of employment. Except where otherwise permitted under § 655.4, an association or other organization of employers is not permitted to file master applications on behalf of its employer-members under the H–2B program.

(g) *One-time occurrence.* Where a one-time occurrence lasts longer than 1 year, the CO will instruct the employer on any additional recruitment requirements with respect to the continuing validity of the labor market test or offered wage obligation.

(h) *Information dissemination.* Information received in the course of processing a request for an *H–2B Registration,* an *Application for Temporary Employment Certification* or program integrity measures such as audits may be forwarded from OFLC to WHD, or any other Federal agency as appropriate, for investigative and/or enforcement purposes.

■ 9. Add § 655.16 to read as follows:

§ 655.16 Filing of the job order at the SWA.

(a) *Submission of the job order.* (1) The employer must submit the job order to the SWA serving the area of intended employment at the same time it submits the *Application for Temporary Employment Certification* and a copy of the job order to the NPC in accordance with § 655.15. If the job opportunity is located in more than one State within the same area of intended employment, the employer may submit the job order to any one of the SWAs having jurisdiction over the anticipated worksites, but must identify the receiving SWA on the copy of the job order submitted to the NPC with its *Application for Temporary Employment Certification.* The employer must inform the SWA that the job order is being placed in connection with a concurrently submitted *Application for Temporary Employment Certification* for H–2B workers.

(2) In addition to complying with State-specific requirements governing job orders, the job order submitted to the SWA must satisfy the requirements set forth in § 655.18.

(b) *SWA review of the job order.* The SWA must review the job order and ensure that it complies with criteria set forth in § 655.18. If the SWA determines that the job order does not comply with the applicable criteria, the SWA must inform the CO at the NPC of the noted deficiencies within 6 business days of receipt of the job order.

(c) *Intrastate and interstate clearance.* Upon receipt of the Notice of Acceptance, as described in § 655.33, the SWA must promptly place the job order in intrastate clearance and provide to other states as directed by the CO.

(d) *Duration of job order posting and SWA referral of U.S. workers.* Upon receipt of the Notice of Acceptance, any SWA in receipt of the employer's job order must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.40(c), and must refer to the employer in a manner consistent with § 655.47 all qualified U.S. workers who apply for the job opportunity or on whose behalf a job application is made.

(e) *Amendments to a job order.* The employer may amend the job order at any time before the CO makes a final determination, in accordance with procedures set forth in § 655.35.

■ 10. Revise § 655.17 to read as follows:

§ 655.17 Emergency situations.

(a) *Waiver of time period.* The CO may waive the time period(s) for filing an *H–2B Registration* and/or an *Application for Temporary Employment Certification* for employers that have good and substantial cause, provided that the CO has sufficient time to thoroughly test the domestic labor market on an expedited basis and to make a final determination as required by § 655.50.

(b) *Employer requirements.* The employer requesting a waiver of the required time period(s) must submit to the NPC a request for a waiver of the time period requirement, a completed *Application for Temporary Employment Certification* and the proposed job order identifying the SWA serving the area of intended employment, and must otherwise meet the requirements of § 655.15. If the employer did not previously apply for an *H–2B Registration,* the employer must also submit a completed *H–2B Registration* with all supporting documentation, as required by § 655.11. If the employer did not previously apply for a PWD, the employer must also submit a completed PWD request. The employer's waiver request must include detailed information describing the good and substantial cause that has necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside of the employer's control, unforeseeable changes in market conditions, or pandemic health issues. A denial of a previously submitted *H–2B Registration* in accordance with the procedures set forth in § 655.11 does not constitute good and substantial cause necessitating a waiver under this section.

(c) *Processing of emergency applications.* The CO will process the emergency *H–2B Registration* and/or *Application for Temporary Employment Certification* and job order in a manner consistent with the provisions of this subpart and make a determination on the *Application for Temporary Employment Certification* in accordance with § 655.50. If the CO grants the waiver request, the CO will forward a Notice of Acceptance and the approved job order to the SWA serving the area of intended employment identified by the employer in the job order. If the CO determines that the certification cannot be granted because, under paragraph (a) of this section, the request for emergency filing is not justified and/or there is not sufficient time to make a determination of temporary need or ensure compliance with the criteria for certification contained in § 655.51, the CO will send a Final Determination letter to the employer in accordance with § 655.53.

■ 11. Add §§ 655.18 and 655.19 to read as follows:

§ 655.18 Job order assurances and contents.

(a) *General.* Each job order placed in connection with an *Application for Temporary Employment Certification* must at a minimum include the information contained in paragraph (b) of this section. In addition, by submitting the *Application for Temporary Employment Certification,* an employer agrees to comply with the following assurances with respect to each job order:

(1) Prohibition against preferential treatment. The employer's job order must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2B workers. This does not relieve the employer from providing to H–2B workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(2) Bona fide job requirements. Each job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H–2B employers in the same occupation and area of intended employment.

(b) *Contents.* In addition to complying with the assurances in paragraph (a) of this section, the employer's job order must meet the following requirements:

(1) State the employer's name and contact information;

(2) Indicate that the job opportunity is a temporary, full-time position, including the total number of job openings the employer intends to fill;

(3) Describe the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity;

(4) Indicate the geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;

(5) Specify the wage that the employer is offering, intends to offer, or will provide to H–2B workers, or, in the event that there are multiple wage offers (such as where an itinerary is authorized through special procedures for an employer), the range of wage offers, and ensure that the wage offer equals or exceeds the highest of the prevailing wage or the Federal, State, or local minimum wage;

(6) If applicable, specify that overtime will be available to the worker and the wage offer(s) for working any overtime hours;

(7) If applicable, state that on-the-job training will be provided to the worker;

(8) State that the employer will use a single workweek as its standard for computing wages due;

(9) Specify the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent;

(10) If the employer provides the worker with the option of board, lodging, or other facilities, including fringe benefits, or intends to assist workers to secure such lodging, disclose the provision and cost of the board, lodging, or other facilities, including fringe benefits or assistance to be provided;

(11) State that the employer will make all deductions from the worker's paycheck required by law. Specify any deductions the employer intends to make from the worker's paycheck which are not required by law, including, if applicable, any deductions for the reasonable cost of board, lodging, or other facilities;

(12) Detail how the worker will be provided with or reimbursed for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment, if the worker completes 50 percent of the period of employment covered by the job order, consistent with § 655.20(j)(1)(i);

(13) State that the employer will provide or pay for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer, if the worker completes the certified period of employment or is dismissed from employment for any reason by the employer before the end of the period, consistent with § 655.20(j)(1)(ii);

(14) If applicable, state that the employer will provide daily transportation to and from the worksite;

(15) State that the employer will reimburse the H–2B worker in the first workweek for all visa, visa processing, border crossing, and other related fees, including those mandated by the government, incurred by the H–2B worker (but need not include passport expenses or other charges primarily for the benefit of the worker);

(16) State that the employer will provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned, in accordance with § 655.20(k);

(17) State the applicability of the three-fourths guarantee, offering the worker employment for a total number of work hours equal to at least three-fourths of the workdays of each 12-week period, if the period of employment covered by the job order is 120 or more days, or each 6-week period, if the period of employment covered by the job order is less than 120 days, in accordance with § 655.20(f); and

(18) Instruct applicants to inquire about the job opportunity or send applications, indications of availability, and/or resumes directly to the nearest office of the SWA in the State in which the advertisement appeared and include the SWA contact information.

§ 655.19 Job contractor filing requirements.

(a) Provided that a job contractor and any employer-client are joint employers, a job contractor may submit an *Application for Temporary Employment Certification* on behalf of itself and that employer-client.

(b) A job contractor must have separate contracts with each different employer-client. Each contract or agreement may support only one *Application for Temporary Employment Certification* for each employer-client job opportunity within a single area of intended employment.

(c) Either the job contractor or its employer-client may submit an ETA Form 9141, Application for Prevailing Wage Determination, describing the job opportunity to the NPWC. However, each of the joint employers is separately responsible for ensuring that the wage offer listed on the *Application for Temporary Employment Certification,* ETA Form 9142, and related recruitment at least equals the prevailing wage rate determined by the NPWC and that all other wage obligations are met.

(d)(1) A job contractor that is filing as a joint employer with its employer-client must submit to the NPC a completed *Application for Temporary Employment Certification,* ETA Form 9142, that clearly identifies the joint employers (the job contractor and its employer-client) and the employment relationship (including the actual worksite), in accordance with the instructions provided by the Department. The *Application for Temporary Employment Certification* must bear the original signature of the job contractor and the employer-client and be accompanied by a recruitment report bearing both joint employers' signatures and the contract or agreement establishing the employers' relationship related to the workers sought.

(2) By signing the *Application for Temporary Employment Certification,* each employer independently attests to the conditions of employment required of an employer participating in the H–2B program and assumes full responsibility for the accuracy of the representations made in the application and for all of the responsibilities of an employer in the H–2B program.

(e)(1) Either the job contractor or its employer-client may place the required job order and conduct recruitment as described in § 655.16 and §§ 655.42–46. Also, either one of the joint employers may assume responsibility for interviewing applicants. However, both of the joint employers must sign the recruitment report that is submitted to the NPC with the *Application for Temporary Employment Certification,* ETA Form 9142.

(2) The job order and all recruitment conducted by joint employers must satisfy the content requirements identified in § 655.18 and § 655.41. Additionally, in order to fully apprise applicants of the job opportunity and

avoid potential confusion inherent in a job opportunity involving two employers, joint employer recruitment must clearly identify both employers (the job contractor and its employer-client) by name and must clearly identify the worksite location(s) where workers will perform labor or services.

(3)(i) Provided that all of the employer-clients' job opportunities are in the same occupation and area of intended employment and have the same requirements and terms and conditions of employment, including dates of employment, a job contractor may combine more than one of its joint employer employer-clients' job opportunities in a single advertisement. Each advertisement must fully apprise potential workers of the job opportunity available with each employer-client and otherwise satisfy the advertising content requirements required for all H–2B-related advertisements, as identified in § 655.41. Such a shared advertisement must clearly identify the job contractor by name, the joint employment relationship, and the number of workers sought for each job opportunity, identified by employer-client name and location (*e.g.* 5 openings with Employer-Client 1 (worksite location), 3 openings with Employer-Client 2 (worksite location)).

(ii) In addition, the advertisement must contain the following statement: ''Applicants may apply for any or all of the jobs listed. When applying, please identify the job(s) (by company and work location) you are applying to for the entire period of employment specified.'' If an applicant fails to identify one or more specific work location(s), that applicant is presumed to have applied to all work locations listed in the advertisement.

(f) If an application for joint employers is approved, the NPC will issue one certification and send it to the job contractor. In order to ensure notice to both employers, a courtesy copy of the certification cover letter will be sent to the employer-client.

(g) When submitting a certified *Application for Temporary Employment Certification* to USCIS, the job contractor should submit the complete ETA Form 9142 containing the original signatures of both the job contractor and employer-client.

■ 12. In subpart A, add an undesignated center heading before § 655.20 to read as follows:

Assurances and Obligations

■ 13. Revise § 655.20 to read as follows:

§ 655.20 Assurances and obligations of H–2B employers.

An employer employing H–2B workers and/or workers in corresponding employment under an *Application for Temporary Employment Certification* has agreed as part of the *Application for Temporary Employment Certification* that it will abide by the following conditions with respect to its H–2B workers and any workers in corresponding employment:

(a) *Rate of pay.* (1) The offered wage in the job order equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the *Application for Temporary Employment Certification* granted by OFLC.

(2) The offered wage is not based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage.

(3) If the employer requires one or more minimum productivity standards of workers as a condition of job retention, the standards must be specified in the job order and the employer must demonstrate that they are normal and usual for non-H–2B employers for the same occupation in the area of intended employment.

(4) An employer that pays on a piece-rate basis must demonstrate that the piece rate is no less than the normal rate paid by non-H–2B employers to workers performing the same activity in the area of intended employment. The average hourly piece rate earnings must result in an amount at least equal to the offered wage. If the worker is paid on a piece rate basis and at the end of the workweek the piece rate does not result in average hourly piece rate earnings during the workweek at least equal to the amount the worker would have earned had the worker been paid at the offered hourly wage, then the employer must supplement the worker's pay at that time so that the worker's earnings are at least as much as the worker would have earned during the workweek if the worker had instead been paid at the offered hourly wage for each hour worked.

(b) *Wages free and clear.* The payment requirements for wages in this section will be satisfied by the timely payment of such wages to the worker either in cash or negotiable instrument payable at par. The payment must be made finally and unconditionally and ''free and clear.'' The principles applied in determining whether deductions are reasonable and payments are received free and clear and the permissibility of deductions for payments to third persons are explained in more detail in 29 CFR part 531.

(c) *Deductions.* The employer must make all deductions from the worker's paycheck required by law. The job order must specify all deductions not required by law which the employer will make from the worker's pay; any such deductions not disclosed in the job order are prohibited. The wage payment requirements of paragraph (b) of this section are not met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the minimum amounts required by the offered wage or where the worker fails to receive such amounts free and clear because the worker ''kicks back'' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wages delivered to the worker. Authorized deductions are limited to: Those required by law, such as taxes payable by workers that are required to be withheld by the employer and amounts due workers which the employer is required by court order to pay to another; deductions for the reasonable cost or fair value of board, lodging, and facilities furnished; and deductions of amounts which are authorized to be paid to third persons for the worker's account and benefit through his or her voluntary assignment or order or which are authorized by a collective bargaining agreement with bona fide representatives of workers which covers the employer. Deductions for amounts paid to third persons for the worker's account and benefit which are not so authorized or are contrary to law or from which the employer, agent or recruiter including any agents or employees of these entities, or any affiliated person derives any payment, rebate, commission, profit, or benefit directly or indirectly, may not be made if they reduce the actual wage paid to the worker below the offered wage indicated on the *Application for Temporary Employment Certification.*

(d) *Job opportunity is full-time.* The job opportunity is a full-time temporary position, consistent with § 655.5, and the employer must use a single workweek as its standard for computing wages due. An employee's workweek must be a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day.

(e) *Job qualifications and requirements.* Each job qualification and

requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H–2B employers in the same occupation and area of intended employment. The employer's job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on H–2B workers. A qualification means a characteristic that is necessary to the individual's ability to perform the job in question. A requirement means a term or condition of employment which a worker is required to accept in order to obtain the job opportunity. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification and/or requirement specified in the job order.

(f) *Three-fourths guarantee.* (1) The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays in each 12-week period (each 6-week period if the period of employment covered by the job order is less than 120 days) beginning with the first workday after the arrival of the worker at the place of employment or the advertised first date of need, whichever is later, and ending on the expiration date specified in the job order or in its extensions, if any. See the exception in paragraph (y) of this section.

(2) For purposes of this paragraph a workday means the number of hours in a workday as stated in the job order. The employer must offer a total number of hours of work to ensure the provision of sufficient work to reach the three-fourths guarantee in each 12-week period (each 6-week period if the period of employment covered by the job order is less than 120 days) during the work period specified in the job order, or during any modified job order period to which the worker and employer have mutually agreed and that has been approved by the CO.

(3) In the event the worker begins working later than the specified beginning date the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the job order and all extensions thereof are in effect.

(4) The 12-week periods (6-week periods if the period of employment covered by the job order is less than 120 days) to which the guarantee applies are based upon the workweek used by the employer for pay purposes. The first 12-week period (or 6-week period, as appropriate) also includes any partial workweek, if the first workday after the worker's arrival at the place of employment is not the beginning of the employer's workweek, with the guaranteed number of hours increased on a pro rata basis (thus, the first period may include up to 12 weeks and 6 days (or 6 weeks and 6 days, as appropriate)). The final 12-week period (or 6-week period, as appropriate) includes any time remaining after the last full 12-week period (or 6-week period) ends, and thus may be as short as 1 day, with the guaranteed number of hours decreased on a pro rata basis.

(5) Therefore, if, for example, a job order is for a 32-week period (a period greater than 120 days), during which the normal workdays and work hours for the workweek are specified as 5 days a week, 7 hours per day, the worker would have to be guaranteed employment for at least 315 hours (12 weeks × 35 hours/week = 420 hours × 75 percent = 315) in the first 12-week period, at least 315 hours in the second 12-week period, and at least 210 hours (8 weeks × 35 hours/week = 280 hours × 75 percent = 210) in the final partial period. If the job order is for a 16-week period (less than 120 days), during which the normal workdays and work hours for the workweek are specified as 5 days a week, 7 hours per day, the worker would have to be guaranteed employment for at least 157.5 hours (6 weeks × 35 hours/week = 210 hours × 75 percent = 157.5) in the first 6-week period, at least 157.5 hours in the second 6-week period, and at least 105 hours (4 weeks × 35 hours/week = 140 hours × 75 percent = 105) in the final partial period.

(6) If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the offered wage, whichever is higher, to calculate the amount due under the guarantee.

(7) A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday. The employer, however, may count all hours actually worked in calculating whether the guarantee has been met. If during any 12-week period (6-week period if the period of employment covered by the job order is less than 120 days) during the period of the job order the employer affords the U.S. or H–2B worker less employment than that required under paragraph (f)(1) of this section, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer has not met the work guarantee if the employer has merely offered work on three-fourths of the workdays in an 12-week period (or 6-week period, as appropriate) if each workday did not consist of a full number of hours of work time as specified in the job order.

(8) Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (f)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday), may be counted by the employer in calculating whether each 12-week period (or 6-week period, as appropriate) of guaranteed employment has been met. An employer seeking to calculate whether the guaranteed number of hours has been met must maintain the payroll records in accordance with this part.

(g) *Impossibility of fulfillment.* If, before the expiration date specified in the job order, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God, or similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside the employer's control that makes the fulfillment of the job order impossible, the employer may terminate the job order with the approval of the CO. In the event of such termination of a job order, the employer must fulfill a three-fourths guarantee, as described in paragraph (f) of this section, for the time that has elapsed from the start date listed in the job order or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination. The employer must make efforts to transfer the H–2B worker or worker in corresponding employment to other comparable employment acceptable to the worker and consistent with the INA, as applicable. If a transfer is not effected, the employer must return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H–2B employer, whichever the worker prefers.

(h) *Frequency of pay.* The employer must state in the job order the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in

the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(i) *Earnings statements.* (1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to: Records showing the nature, amount and location(s) of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee in paragraph (f) of this section); the hours actually worked each day by the worker; if the number of hours worked by the worker is less than the number of hours offered, the reason(s) the worker did not work; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from or additions made to the worker's wages.

(2) The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(i) The worker's total earnings for each workweek in the pay period;

(ii) The worker's hourly rate and/or piece rate of pay;

(iii) For each workweek in the pay period the hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (f) of this section, separate from any hours offered over and above the guarantee);

(iv) For each workweek in the pay period the hours actually worked by the worker;

(v) An itemization of all deductions made from or additions made to the worker's wages;

(vi) If piece rates are used, the units produced daily;

(vii) The beginning and ending dates of the pay period; and

(viii) The employer's name, address and FEIN.

(j) *Transportation and visa fees.* (1)(i) Transportation to the place of employment. The employer must provide or reimburse the worker for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment if the worker completes 50 percent of the period of employment covered by the job order (not counting any extensions). The employer may arrange and pay for the transportation and subsistence directly, advance at a minimum the most economical and reasonable common carrier cost of the transportation and subsistence to the worker before the worker's departure, or pay the worker for the reasonable costs incurred by the worker. When it is the prevailing practice of non-H–2B employers in the occupation in the area to do so or when the employer extends such benefits to similarly situated H–2B workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence must be at least the amount permitted in § 655.173 of subpart B of this part. Where the employer will reimburse the reasonable costs incurred by the worker, it must keep accurate and adequate records of: The cost of transportation and subsistence incurred by the worker; the amount reimbursed; and the dates of reimbursement. Note that the FLSA applies independently of the H–2B requirements and imposes obligations on employers regarding payment of wages.

(ii) Transportation from the place of employment. If the worker completes the period of employment covered by the job order (not counting any extensions), or if the worker is dismissed from employment for any reason by the employer before the end of the period, and the worker has no immediate subsequent H–2B employment, the employer must provide or pay at the time of departure for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer that has not agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the employer must provide or pay for that transportation and subsistence. If the worker has contracted with a subsequent employer that has agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses.

(iii) Employer-provided transportation. All employer-provided transportation must comply with all applicable Federal, State, and local laws and regulations and must provide, at a minimum, the same vehicle safety standards, driver licensure requirements, and vehicle insurance as required under 49 CFR parts 390, 393, and 396.

(iv) Disclosure. All transportation and subsistence costs that the employer will pay must be disclosed in the job order.

(2) The employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the H–2B worker, but not for passport expenses or other charges primarily for the benefit of the worker.

(k) *Employer-provided items.* The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.

(l) *Disclosure of job order.* The employer must provide to an H–2B worker if outside of the U.S. no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the job order including any subsequent approved modifications. For an H–2B worker changing employment from an H–2B employer to a subsequent H–2B employer, the copy must be provided no later than the time an offer of employment is made by the subsequent H–2B employer. The disclosure of all documents required by this paragraph must be provided in a language understood by the worker, as necessary or reasonable.

(m) *Notice of worker rights.* The employer must post and maintain in a conspicuous location at the place of employment a poster provided by the Department which sets out the rights and protections for H–2B workers and workers in corresponding employment. The employer must post the poster in English. To the extent necessary, the employer must request and post additional posters, as made available by the Department, in any language common to a significant portion of the workers if they are not fluent in English.

(n) *No unfair treatment.* The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1184(c), 29 CFR part 503, or

this subpart, or any other Department regulation promulgated thereunder;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1184(c), 29 CFR part 503, or this subpart or any other Department regulation promulgated thereunder;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1184(c), 29 CFR part 503, or this subpart or any other Department regulation promulgated thereunder;

(4) Consulted with a workers' center, community organization, labor union, legal assistance program, or an attorney on matters related to 8 U.S.C. 1184(c), 29 CFR part 503, or this subpart or any other Department regulation promulgated thereunder; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by 8 U.S.C. 1184(c), 29 CFR part 503, or this subpart or any other Department regulation promulgated thereunder.

(o) *Comply with the prohibitions against employees paying fees.* The employer and its attorney, agents, or employees have not sought or received payment of any kind from the worker for any activity related to obtaining H–2B labor certification or employment, including payment of the employer's attorney or agent fees, application and *H–2B Petition* fees, recruitment costs, or any fees attributed to obtaining the approved *Application for Temporary Employment Certification.* For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor. All wages must be paid free and clear. This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(p) *Contracts with third parties to comply with prohibitions.* The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H–2B workers to seek or receive payments or other compensation from prospective workers. The contract must include the following statement: ''Under this agreement, [name of agent, recruiter] and any agent of or employee of [name of agent or recruiter] are prohibited from seeking or receiving payments from any prospective employee of [employer name] at any time, including before or after the worker obtains employment. Payments include but are not limited to, any direct or indirect fees paid by such employees for recruitment, job placement, processing, maintenance, attorneys' fees, agent fees, application fees, or petition fees.''

(q) *Prohibition against preferential treatment of foreign workers.* The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2B workers. This does not relieve the employer from providing to H–2B workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(r) *Non-discriminatory hiring practices.* The job opportunity is, and through the period set forth in paragraph (t) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship. Rejections of any U.S. workers who applied or apply for the job must only be for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hired workers and rejected applicants as required by § 655.56.

(s) *Recruitment requirements.* The employer must conduct all required recruitment activities, including any additional employer-conducted recruitment activities as directed by the CO, and as specified in §§ 655.40–655.46.

(t) *Continuing requirement to hire U.S. workers.* The employer has and will continue to cooperate with the SWA by accepting referrals of all qualified U.S. workers who apply (or on whose behalf a job application is made) for the job opportunity, and must provide employment to any qualified U.S. worker who applies to the employer for the job opportunity, until 21 days before the date of need.

(u) *No strike or lockout.* There is no strike or lockout at any of the employer's worksites within the area of intended employment for which the employer is requesting H–2B certification at the time the *Application for Temporary Employment Certification* is filed.

(v) *No recent or future layoffs.* The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within the period beginning 120 calendar days before the date of need through the end of the period of certification. A layoff for lawful, job-related reasons such as lack of work or the end of a season is permissible if all H–2B workers are laid off before any U.S. worker in corresponding employment.

(w) *Contact with former U.S. employees.* The employer will contact (by mail or other effective means) its former U.S. workers, including those who have been laid off within 120 calendar days before the date of need (except those who were dismissed for cause or who abandoned the worksite), employed by the employer in the occupation at the place of employment during the previous year, disclose the terms of the job order, and solicit their return to the job.

(x) *Area of intended employment and job opportunity.* The employer must not place any H–2B workers employed under the approved *Application for Temporary Employment Certification* outside the area of intended employment or in a job opportunity not listed on the approved *Application for Temporary Employment Certification* unless the employer has obtained a new approved *Application for Temporary Employment Certification.*

(y) *Abandonment/termination of employment.* Upon the separation from employment of worker(s) employed under the *Application for Temporary Employment Certification* or workers in corresponding employment, if such separation occurs before the end date of the employment specified in the *Application for Temporary Employment Certification,* the employer must notify OFLC in writing of the separation from employment not later than 2 work days after such separation is discovered by the employer. In addition, the employer must notify DHS in writing (or any other method specified by the Department or DHS in the **Federal Register** or the Code of Federal Regulations) of such separation of an H–2B worker. An abandonment or abscondment is deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. If the separation is due to the voluntary abandonment of employment by the H–2B worker or worker in corresponding employment, and the employer provides appropriate notification specified under this paragraph, the employer will not be responsible for providing or paying for

the subsequent transportation and subsistence expenses of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (f) of this section. The employer's obligation to guarantee three-fourths of the work described in paragraph (f) ends with the last full 12-week period (or 6-week period, as appropriate) preceding the worker's voluntary abandonment or termination for cause.

(z) *Compliance with applicable laws.* During the period of employment specified on the *Application for Temporary Employment Certification,* the employer must comply with all applicable Federal, State and local employment-related laws and regulations, including health and safety laws. In compliance with such laws, including the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 18 U.S.C. 1592(a), neither the employer nor the employer's agents or attorneys may hold or confiscate workers' passports, visas, or other immigration documents.

(aa) *Disclosure of foreign worker recruitment.* The employer, and its attorney or agent, as applicable, must comply with § 655.9 by providing a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H–2B workers, and the identity and location of the persons or entities hired by or working for the agent or recruiter and any of the agents or employees of those persons and entities, to recruit foreign workers. Pursuant to § 655.15(a), the agreements and information must be filed with the *Application for Temporary Employment Certification.*

§§ 655.21–655.24 [Removed and Reserved]

■ 13. Remove and reserve §§ 655.21 through 655.24.

■ 14. In subpart A, add an undesignated center heading before § 655.30 to read as follows:

Processing of an Application for Temporary Employment Certification

■ 15. In subpart A, revise §§ 655.30 through 655.35 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

* * * * *

Sec.

655.30 Processing of an application and job order.
655.31 Notice of deficiency.
655.32 Submission of a modified application or job order.
655.33 Notice of acceptance.
655.34 Electronic job registry.
655.35 Amendments to an application or job order.

* * * * *

§ 655.30 Processing of an application and job order.

(a) *NPC review.* The CO will review the *Application for Temporary Employment Certification* and job order for compliance with all applicable program requirements.

(b) *Mailing and postmark requirements.* Any notice or request sent by the CO to an employer requiring a response will be mailed to the address provided in the *Application for Temporary Employment Certification* using methods to assure next day delivery, including electronic mail. The employer's response to such a notice or request must be mailed using methods to assure next day delivery, including electronic mail, and be sent by the due date or the next business day if the due date falls on a Saturday, Sunday or Federal holiday.

(c) *Information dissemination.* OFLC may forward information received in the course of processing an *Application for Temporary Employment Certification* and program integrity measures to WHD, or any other Federal agency, as appropriate, for investigation and/or enforcement purposes.

§ 655.31 Notice of deficiency.

(a) *Notification timeline.* If the CO determines the *Application for Temporary Employment Certification* and/or job order is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in this subpart, the CO will notify the employer within 7 business days from the CO's receipt of the *Application for Temporary Employment Certification.* If applicable, the Notice of Deficiency will include job order deficiencies identified by the SWA under § 655.16. The CO will send a copy of the Notice of Deficiency to the SWA serving the area of intended employment identified by the employer on its job order, and if applicable, to the employer's attorney or agent.

(b) *Notice content.* The Notice of Deficiency will:

(1) State the reason(s) why the *Application for Temporary Employment Certification* or job order fails to meet the criteria for acceptance and state the modification needed for the CO to issue a Notice of Acceptance;

(2) Offer the employer an opportunity to submit a modified *Application for Temporary Employment Certification* or job order within 10 business days from the date of the Notice of Deficiency. The Notice will state the modification needed for the CO to issue a Notice of Acceptance;

(3) Offer the employer an opportunity to request administrative review of the Notice of Deficiency before an ALJ under provisions set forth in § 655.61. The notice will inform the employer that it must submit a written request for review to the Chief ALJ of DOL within 10 business days from the date the Notice of Deficiency is issued by facsimile or other means normally assuring next day delivery, and that the employer must simultaneously serve a copy on the CO. The notice will also state that the employer may submit any legal arguments that the employer believes will rebut the basis of the CO's action; and

(4) State that if the employer does not comply with the requirements of this section by either submitting a modified application within 10 business days or requesting administrative review before an ALJ under § 655.61, the CO will deny the *Application for Temporary Employment Certification.* The notice will inform the employer that the denial of the *Application for Temporary Employment Certification* is final, and cannot be appealed. The Department will not further consider that *Application for Temporary Employment Certification.*

§ 655.32 Submission of a modified application or job order.

(a) *Review of a modified Application for Temporary Employment Certification or job order.* Upon receipt of a response to a Notice of Deficiency, including any modifications, the CO will review the response. The CO may issue one or more additional Notices of Deficiency before issuing a Notice of Decision. The employer's failure to comply with a Notice of Deficiency, including not responding in a timely manner or not providing all required documentation, will result in a denial of the *Application for Temporary Employment Certification.*

(b) *Acceptance of a modified Application for Temporary Employment Certification or job order.* If the CO accepts the modification(s) to the *Application for Temporary Employment Certification* and/or job order, the CO will issue a Notice of Acceptance to the employer. The CO will send a copy of the Notice of Acceptance to the SWA instructing it to make any necessary modifications to the not yet posted job order and, if applicable, to the employer's attorney or agent, and follow the procedure set forth in § 655.33.

(c) *Denial of a modified Application for Temporary Employment Certification or job order.* If the CO finds

the response to Notice of Deficiency unacceptable, the CO will deny the *Application for Temporary Employment Certification* in accordance with the labor certification determination provisions in § 655.51.

(d) *Appeal from denial of a modified Application for Temporary Employment Certification or job order.* The procedures for appealing a denial of a modified *Application for Temporary Employment Certification* and/or job order are the same as for appealing the denial of a non-modified *Application for Temporary Employment Certification* outlined in § 655.61.

(e) *Post acceptance modifications.* Irrespective of the decision to accept the *Application for Temporary Employment Certification,* the CO may require modifications to the job order at any time before the final determination to grant or deny the *Application for Temporary Employment Certification* if the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions as set forth in § 655.18. The employer must make such modification, or certification will be denied under § 655.53. The employer must provide all workers recruited in connection with the job opportunity in the *Application for Temporary Employment Certification* with a copy of the modified job order no later than the date work commences, as approved by the CO.

§ 655.33 Notice of acceptance.

(a) *Notification timeline.* If the CO determines the *Application for Temporary Employment Certification* and job order are complete and meet the requirements of this subpart, the CO will notify the employer in writing within 7 business days from the date the CO received the *Application for Temporary Employment Certification* and job order or modification thereof. A copy of the Notice of Acceptance will be sent to the SWA serving the area of intended employment identified by the employer on its job order and, if applicable, to the employer's attorney or agent.

(b) *Notice content.* The notice will:

(1) Direct the employer to engage in recruitment of U.S. workers as provided in §§ 655.40–655.46, including any additional recruitment ordered by the CO under § 655.46;

(2) State that such employer-conducted recruitment is in addition to the job order being circulated by the SWA(s) and that the employer must conduct recruitment within 14 calendar days from the date the Notice of Acceptance is issued, consistent with § 655.40;

(3) Direct the SWA to place the job order into intra- and interstate clearance as set forth in § 655.16 and to commence such clearance by:

(i) Sending a copy of the job order to other States listed as anticipated worksites in the *Application for Temporary Employment Certification* and job order, if applicable; and

(ii) Sending a copy of the job order to the SWAs for all States designated by the CO for interstate clearance;

(4) Instruct the SWA to keep the approved job order on its active file until the end of the recruitment period as defined in § 655.40(c), and to transmit the same instruction to other SWAs to which it circulates the job order in the course of interstate clearance;

(5) Where the occupation or industry is traditionally or customarily unionized, direct the SWA to circulate a copy of the job order to the following labor organizations:

(i) The central office of the State Federation of Labor in the State(s) in which work will be performed; and

(ii) The office(s) of local union(s) representing employees in the same or substantially equivalent job classification in the area(s) in which work will be performed;

(6) Advise the employer, as appropriate, that it must contact the appropriate designated community-based organization(s) with notice of the job opportunity; and

(7) Require the employer to submit a report of its recruitment efforts as specified in § 655.48.

§ 655.34 Electronic job registry.

(a) *Location of and placement in the electronic job registry.* Upon acceptance of the *Application for Temporary Employment Certification* under § 655.33, the CO will place for public examination a copy of the job order posted by the SWA on the Department's electronic job registry, including any amendments or required modifications approved by the CO.

(b) *Length of posting on electronic job registry.* The Department will keep the job order posted on the electronic job registry until the end of the recruitment period, as set forth in § 655.40(c).

(c) *Conclusion of active posting.* Once the recruitment period has concluded the job order will be placed in inactive status on the electronic job registry.

§ 655.35 Amendments to an application or job order.

(a) *Increases in number of workers.* The employer may request to increase the number of workers noted in the *H–2B Registration* by no more than 20 percent (50 percent for employers requesting fewer than 10 workers). All requests for increasing the number of workers must be made in writing and will not be effective until approved by the CO. In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into account the effect of the changes on the underlying labor market test for the job opportunity. Upon acceptance of an amendment, the CO will submit to the SWA any necessary changes to the job order and update the electronic job registry. The employer must promptly provide copies of any approved amendments to all U.S. workers hired under the original job order.

(b) *Minor changes to the period of employment.* The employer may request minor changes to the total period of employment listed on its *Application for Temporary Employment Certification* and job order, for a period of up to 14 days, but the period of employment may not exceed a total of 9 months, except in the event of a one-time occurrence. All requests for minor changes to the total period of employment must be made in writing and will not be effective until approved by the CO. In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into account the effect of the changes on the underlying labor market test for the job opportunity. Upon acceptance of an amendment, the CO will submit to the SWA any necessary changes to the job order and update the electronic job registry. The employer must promptly provide copies of any approved amendments to all U.S. workers hired under the original job order.

(c) *Other amendments to the Application for Temporary Employment Certification and job order.* The employer may request other amendments to the *Application for Temporary Employment Certification* and job order. All such requests must be made in writing and will not be effective until approved by the CO. In considering whether to approve the request, the CO will determine whether the proposed amendment(s) are sufficiently justified and must take into account the effect of the changes on the underlying labor market test for the job opportunity. Upon acceptance of an amendment, the CO will submit to the SWA any necessary changes to the job

order and update the electronic job registry.

(d) Amendments after certification are not permitted. The employer must promptly provide copies of any approved amendments to all U.S. workers hired under the original job order.

§§ 655.36–655.39 [Added and Reserved]

■ 16. Add and reserve §§ 655.36 through 655.39.

■ 17–18. Add an undesignated center heading and §§ 655.40 through 655.48 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

* * * * *

Post-Acceptance Requirements

Sec.
655.40 Employer-conducted recruitment.
655.41 Advertising requirements.
655.42 Newspaper advertisements.
655.43 Contact with former U.S. employees.
655.44 [Reserved]
655.45 Contact with bargaining representative, posting and other contact requirements.
655.46 Additional employer-conducted recruitment.
655.47 Referrals of U.S. workers.
655.48 Recruitment report.

* * * * *

Post-Acceptance Requirements

§ 655.40 Employer-conducted recruitment.

(a) *Employer obligations.* Employers must conduct recruitment of U.S. workers to ensure that there are not qualified U.S. workers who will be available for the positions listed in the *Application for Temporary Employment Certification.* U.S. Applicants can be rejected only for lawful job-related reasons.

(b) *Employer-conducted recruitment period.* Unless otherwise instructed by the CO, the employer must conduct the recruitment described in §§ 655.42–655.46 within 14 calendar days from the date the Notice of Acceptance is issued. All employer-conducted recruitment must be completed before the employer submits the recruitment report as required in § 655.48.

(c) *U.S. worker referrals.* Employers must continue to accept referrals of all U.S. applicants interested in the position until 21 days before the date of need.

(d) *Interviewing U.S. workers.* Employers that wish to require interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. Employers cannot provide potential H–2B workers with more favorable treatment with respect to the requirement for, and conduct of, interviews.

(e) *Qualified and available U.S. workers.* The employer must consider all U.S. applicants for the job opportunity. The employer must accept and hire any applicants who are qualified and who will be available.

(f) *Recruitment report.* The employer must prepare a recruitment report meeting the requirements of § 655.48.

§ 655.41 Advertising requirements.

(a) All recruitment conducted under §§ 655.42–655.46 must contain terms and conditions of employment that are not less favorable than those offered to the H–2B workers and, at a minimum, must comply with the assurances applicable to job orders as set forth in § 655.18(a).

(b) All advertising must contain the following information:

(1) The employer's name and contact information;

(2) The geographic area of intended employment with enough specificity to apprise applicants of any travel requirements and where applicants will likely have to reside to perform the services or labor;

(3) A description of the job opportunity for which certification is sought with sufficient information to apprise U.S. workers of the services or labor to be performed, including the duties, the minimum education and experience requirements, the work hours and days, and the anticipated start and end dates of the job opportunity;

(4) A statement that the job opportunity is a temporary, full-time position including the total number of job openings the employer intends to fill;

(5) If applicable, a statement that overtime will be available to the worker and the wage offer(s) for working any overtime hours;

(6) If applicable, a statement indicating that on-the-job training will be provided to the worker;

(7) The wage that the employer is offering, intends to offer or will provide to the H–2B workers, or in the event that there are multiple wage offers (such as where an itinerary is authorized through special procedures for an employer), the range of applicable wage offers, each of which must equal or exceed the highest of the prevailing wage or the Federal, State, or local minimum wage;

(8) If applicable, any board, lodging, or other facilities the employer will offer to workers or intends to assist workers in securing;

(9) All deductions not required by law that the employer will make from the worker's paycheck, including, if applicable, reasonable deduction for board, lodging, and other facilities offered to the workers;

(10) A statement that transportation and subsistence from the place where the worker has come to work for the employer to the place of employment and return transportation and subsistence will be provided, as required by § 655.20(j)(1);

(11) If applicable, a statement that work tools, supplies, and equipment will be provided to the worker without charge;

(12) If applicable, a statement that daily transportation to and from the worksite will be provided by the employer;

(13) A statement summarizing the three-fourths guarantee as required by § 655.20(f); and

(14) A statement directing applicants to apply for the job opportunity at the nearest office of the SWA in the State in which the advertisement appeared, the SWA contact information, and, if applicable, the job order number.

§ 655.42 Newspaper advertisements.

(a) The employer must place an advertisement (which may be in a language other than English, where the CO determines appropriate) on 2 separate days, which may be consecutive, one of which must be a Sunday (except as provided in paragraph (b) of this section), in a newspaper of general circulation serving the area of intended employment and appropriate to the occupation and the workers likely to apply for the job opportunity.

(b) If the job opportunity is located in a rural area that does not have a newspaper with a Sunday edition, the CO may direct the employer, in place of a Sunday edition, to advertise in the regularly published daily edition with the widest circulation in the area of intended employment.

(c) The newspaper advertisements must satisfy the requirements in § 655.41.

(d) The employer must maintain copies of newspaper pages (with date of publication and full copy of the advertisement), or tear sheets of the pages of the publication in which the advertisements appeared, or other proof of publication furnished by the newspaper containing the text of the printed advertisements and the dates of publication, consistent with the document retention requirements in

§ 655.56. If the advertisement was required to be placed in a language other than English, the employer must maintain a translation and retain it in accordance with § 655.56.

§ 655.43 Contact with former U.S. employees.

The employer must contact (by mail or other effective means) its former U.S. workers, including those who have been laid off within 120 calendar days before the date of need (except those who were dismissed for cause or who abandoned the worksite), employed by the employer in the occupation at the place of employment during the previous year, disclose the terms of the job order, and solicit their return to the job. The employer must maintain documentation sufficient to prove such contact in accordance with § 655.56.

§ 655.44 [Reserved]

§ 655.45 Contact with bargaining representative, posting and other contact requirements.

(a) If there is a bargaining representative for any of the employer's employees in the occupation and area of intended employment, the employer must provide written notice of the job opportunity, by providing a copy of the *Application for Temporary Employment Certification* and the job order, and maintain documentation that it was sent to the bargaining representative(s). An employer governed by this paragraph must include information in its recruitment report that confirms that the bargaining representative(s) was contacted and notified of the position openings and whether the organization referred qualified U.S. worker(s), including the number of referrals, or was non-responsive to the employer's requests.

(b) If there is no bargaining representative, the employer must post the availability of the job opportunity in at least 2 conspicuous locations at the place(s) of anticipated employment or in some other manner that provides reasonable notification to all employees in the job classification and area in which the work will be performed by the H–2B workers. Electronic posting, such as displaying the notice prominently on any internal or external Web site that is maintained by the employer and customarily used for notices to employees about terms and conditions of employment, is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. The notice must meet the requirements under § 655.41 and be posted for at least 15 consecutive business days. The employer must maintain a copy of the posted notice and identify where and when it was posted in accordance with § 655.56.

(c) If appropriate to the occupation and area of intended employment, as indicated by the CO in the Notice of Acceptance, the employer must provide written notice of the job opportunity to a community-based organization, and maintain documentation that it was sent to any designated community-based organization. An employer governed by this paragraph must include information in its recruitment report that confirms that the community-based organization was contacted and notified of the position openings and whether the organization referred qualified U.S. worker(s), including the number of referrals, or was non-responsive to the employer's requests.

§ 655.46 Additional employer-conducted recruitment.

(a) *Requirement to conduct additional recruitment.* The employer may be instructed by the CO to conduct additional recruitment. Such recruitment may be required at the discretion of the CO where the CO has determined that there may be U.S. workers who are qualified and who will be available for the work, including but not limited to where the job opportunity is located in an Area of Substantial Unemployment.

(b) *Nature of the additional employer-conducted recruitment.* The CO will describe the precise number and nature of the additional recruitment efforts. Additional recruitment may include, but is not limited to, posting on the employer's Web site or another Web site, contact with additional community-based organizations, additional contact with State One-Stop Career Centers, and other print advertising, such as using a professional, trade or ethnic publication where such a publication is appropriate for the occupation and the workers likely to apply for the job opportunity.

(c) *Proof of the additional employer-conducted recruitment.* The CO will specify the documentation or other supporting evidence that must be maintained by the employer as proof that the additional recruitment requirements were met. Documentation must be maintained as required in § 655.56.

§ 655.47 Referrals of U.S. workers.

SWAs may only refer for employment individuals who have been apprised of all the material terms and conditions of employment and who are qualified and will be available for employment.

§ 655.48 Recruitment report.

(a) *Requirements of the recruitment report.* The employer must prepare, sign, and date a recruitment report. The recruitment report must be submitted by a date specified by the CO in the Notice of Acceptance and contain the following information:

(1) The name of each recruitment activity or source (*e.g.,* job order and the name of the newspaper);

(2) The name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker's application. The employer must clearly indicate whether the job opportunity was offered to the U.S. worker and whether the U.S. worker accepted or declined;

(3) Confirmation that former U.S. employees were contacted, if applicable, and by what means;

(4) Confirmation that the bargaining representative was contacted, if applicable, and by what means, or that the employer posted the availability of the job opportunity to all employees in the job classification and area in which the work will be performed by the H–2B workers;

(5) Confirmation that the community-based organization designated by the CO was contacted, if applicable;

(6) If applicable, confirmation that additional recruitment was conducted as directed by the CO; and

(7) If applicable, for each U.S. worker who applied for the position but was not hired, the lawful job-related reason(s) for not hiring the U.S. worker.

(b) *Duty to update recruitment report.* The employer must continue to update the recruitment report throughout the recruitment period. The updated report need not be submitted to the Department, but must be made available in the event of a post-certification audit or upon request by DOL.

§ 655.49 [Added and Reserved]

■ 19. Add and reserve § 655.49.

■ 20. Add an undesignated center heading before § 655.50 to read as follows:

Labor Certification Determinations

■ 21. Revise § 655.50 to read as follows:

§ 655.50 Determinations.

(a) *Certifying Officers (COs).* The Administrator, OFLC is the Department's National CO. The Administrator, OFLC and the CO(s), by virtue of delegation from the Administrator, OFLC, have the authority to certify or deny *Applications for*

Temporary Employment Certification under the H–2B nonimmigrant classification. If the Administrator, OFLC directs that certain types of temporary labor certification applications or a specific *Application for Temporary Employment Certification* under the H–2B nonimmigrant classification be handled by the OFLC's National Office, the Director of the NPC will refer such applications to the Administrator, OFLC.

(b) *Determination.* Except as otherwise provided in this paragraph, the CO will make a determination either to certify or deny the *Application for Temporary Employment Certification.* The CO will certify the application only if the employer has met all the requirements of this subpart, including the criteria for certification in § 655.51, thus demonstrating that there is an insufficient number of U.S. workers who are qualified and who will be available for the job opportunity for which certification is sought and that the employment of the H–2B workers will not adversely affect the benefits, wages, and working conditions of similarly employed U.S. workers.

■ 22–23. In subpart A, add §§ 655.51 through 655.57 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

* * * * *

Sec.

655.51 Criteria for certification.
655.52 Approved certification.
655.53 Denied certification.
655.54 Partial certification.
655.55 Validity of temporary labor certification.
655.56 Document retention requirements of H–2B employers.
655.57 Request for determination based on nonavailability of U.S. workers.

* * * * *

§ 655.51 Criteria for certification.

(a) The criteria for certification include whether the employer has a valid *H–2B Registration* to participate in the H–2B program and has complied with all of the requirements necessary to grant the labor certification.

(b) In making a determination whether there are insufficient U.S. workers to fill the employer's job opportunity, the CO will count as available any U.S. worker referred by the SWA or any U.S. worker who applied (or on whose behalf an application is made) directly to the employer, but who was rejected by the employer for other than a lawful job-related reason.

(c) A certification will not be granted to an employer that has failed to comply with one or more sanctions or remedies imposed by final agency actions under the H–2B program.

§ 655.52 Approved certification.

If a temporary labor certification is granted, the CO will send the approved *Application for Temporary Employment Certification* and a Final Determination letter to the employer by means normally assuring next day delivery, including electronic mail, and a copy, if applicable, to the employer's attorney or agent. If and when the *Application for Temporary Employment Certification* will be permitted to be electronically filed, the employer must sign the certified *Application for Temporary Employment Certification* as directed by the CO. The employer must retain a signed copy of the *Application for Temporary Employment Certification,* as required by § 655.56.

§ 655.53 Denied certification.

If a temporary labor certification is denied, the CO will send the Final Determination letter to the employer by means normally assuring next day delivery, including electronic mail, and a copy, if applicable, to the employer's attorney or agent. The Final Determination letter will:

(a) State the reason(s) certification is denied, citing the relevant regulatory standards and/or special procedures;

(b) Offer the employer an opportunity to request administrative review of the denial under § 655.61; and

(c) State that if the employer does not request administrative review in accordance with § 655.61, the denial is final and the Department will not accept any appeal on that *Application for Temporary Employment Certification.*

§ 655.54 Partial certification.

The CO may issue a partial certification, reducing either the period of need or the number of H–2B workers or both for certification, based upon information the CO receives during the course of processing the *Application for Temporary Employment Certification.* The number of workers certified will be reduced by one for each referred U.S. worker who is qualified and who will be available at the time and place needed to perform the services or labor and who has not been rejected for lawful job-related reasons. If a partial labor certification is issued, the CO will amend the *Application for Temporary Employment Certification* and then return it to the employer with a Final Determination letter, with a copy to the employer's attorney or agent, if applicable. The Final Determination letter will:

(a) State the reason(s) why either the period of need and/or the number of H–2B workers requested has been reduced, citing the relevant regulatory standards and/or special procedures;

(b) If applicable, address the availability of U.S. workers in the occupation;

(c) Offer the employer an opportunity to request administrative review of the partial certification under § 655.61; and

(d) State that if the employer does not request administrative review in accordance with § 655.61, the partial certification is final and the Department will not accept any appeal on that *Application for Temporary Employment Certification.*

§ 655.55 Validity of temporary labor certification.

(a) *Validity period.* A temporary labor certification is valid only for the period as approved on the *Application for Temporary Employment Certification.* The certification expires on the last day of authorized employment.

(b) *Scope of validity.* A temporary labor certification is valid only for the number of H–2B positions, the area of intended employment, the job classification and specific services or labor to be performed, and the employer specified on the approved *Application for Temporary Employment Certification,* including any approved modifications. The temporary labor certification may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

§ 655.56 Document retention requirements of H–2B employers.

(a) *Entities required to retain documents.* All employers filing an *Application for Temporary Employment Certification* requesting H–2B workers are required to retain the documents and records proving compliance with 29 CFR part 503 and this subpart, including but not limited to those specified in paragraph (c) of this section.

(b) *Period of required retention.* The employer must retain records and documents for 3 years from the date of certification of the *Application for Temporary Employment Certification,* or from the date of adjudication if the *Application for Temporary Employment Certification* is denied, or 3 years from the day the Department receives the letter of withdrawal provided in accordance with § 655.62. For the purposes of this section, records and

documents required to be retained in connection with an *H–2B Registration* must be retained in connection with all of the *Applications for Temporary Employment Certification* that are supported by it.

(c) *Documents and records to be retained by all employer applicants.* All employers filing an *H–2B Registration* and an *Application for Temporary Employment Certification* must retain the following documents and records and must provide the documents and records to the Department and other Federal agencies in the event of an audit or investigation:

(1) Documents and records not previously submitted during the registration process that substantiate temporary need;

(2) Proof of recruitment efforts, as applicable, including:

(i) Job order placement as specified in § 655.16;

(ii) Advertising as specified in §§ 655.41 and 655.42;

(iii) Contact with former U.S. workers as specified in § 655.43;

(iv) Contact with bargaining representative(s), or a copy of the posting of the job opportunity, if applicable, as specified in § 655.45(a) or (b); and

(v) Additional employer-conducted recruitment efforts as specified in § 655.46;

(3) Substantiation of the information submitted in the recruitment report prepared in accordance with § 655.48, such as evidence of nonapplicability of contact with former workers as specified in § 655.43;

(4) The final recruitment report and any supporting resumes and contact information as specified in § 655.48;

(5) Records of each worker's earnings, hours offered and worked, location(s) of work performed, and other information as specified in § 655.20(i);

(6) If appropriate, records of reimbursement of transportation and subsistence costs incurred by the workers, as specified in § 655.20(j).

(7) Evidence of contact with U.S. workers who applied for the job opportunity in the *Application for Temporary Employment Certification,* including documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in § 655.20(r);

(8) Evidence of contact with any former U.S. worker in the occupation at the place of employment in the *Application for Temporary Employment Certification,* including documents demonstrating that the U.S. worker had been offered the job opportunity in the *Application for Temporary Employment Certification,* as specified in § 655.20(w), and that the U.S. worker either refused the job opportunity or was rejected only for lawful, job-related reasons, as specified in § 655.20(r);

(9) The written contracts with agents or recruiters as specified in §§ 655.8 and 655.9, and the list of the identities and locations of persons hired by or working for the agent or recruiter and these entities' agents or employees, as specified in § 655.9;

(10) Written notice provided to and informing OFLC that an H–2B worker or worker in corresponding employment has separated from employment before the end date of employment specified in the *Application for Temporary Employment Certification,* as specified in § 655.20(y);

(11) The *H–2B Registration,* job order and a copy of the *Application for Temporary Employment Certification.* If and when the *Application for Temporary Employment Certification* and *H–2B Registration* is permitted to be electronically filed, a printed copy of each adjudicated *Application for Temporary Employment Certification,* including any modifications, amendments or extensions will be signed by the employer as directed by the CO and retained;

(12) The *H–2B Petition,* including all accompanying documents; and

(13) Any collective bargaining agreement(s), individual employment contract(s), or payroll records from the previous year necessary to substantiate any claim that certain incumbent workers are not included in corresponding employment, as specified in § 655.5.

(d) *Availability of documents for enforcement purposes.* An employer must make available to the Administrator, WHD within 72 hours following a request by the WHD the documents and records required under 29 CFR part 503 and this section so that the Administrator, WHD may copy, transcribe, or inspect them.

§ 655.57 Request for determination based on nonavailability of U.S. workers.

(a) *Standards for requests.* If a temporary labor certification has been partially granted or denied, based on the CO's determination that qualified U.S. workers are available, and, on or after 21 calendar days before the date of need, some or all of those qualified U.S. workers are, in fact no longer available, the employer may request a new temporary labor certification determination from the CO. Prior to making a new determination the CO will promptly ascertain (which may be through the SWA or other sources of information on U.S. worker availability) whether specific qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment with 72 hours from the date the employer's request was received. The CO will expeditiously, but in no case later than 72 hours after the time a complete request (including the signed statement included in paragraph (b) of this section) is received, make a determination on the request. An employer may appeal a denial of such a determination in accordance with procedures contained in § 655.61.

(b) *Unavailability of U.S. workers.* The employer's request for a new determination must be made directly to the CO by electronic mail or other appropriate means and must be accompanied by a signed statement confirming the employer's assertion. In addition, unless the employer has provided to the CO notification of abandonment or termination of employment as required by § 655.20(y), the employer's signed statement must include the name and contact information of each U.S. worker who became unavailable and must supply the reason why the worker has become unavailable.

(c) *Notification of determination.* If the CO determines that U.S. workers have become unavailable and cannot identify sufficient available U.S. workers who are qualified or who are likely to become available, the CO will grant the employer's request for a new determination. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not being qualified because of lawful job-related reasons.

§§ 655.58–655.59 [Added and Reserved]

■ 24. Add and reserve §§ 655.58 through 655.59.

■ 25. Add an undesignated center heading before § 655.60 to read as follows:

Post Certification Activities

■ 26. Revise § 655.60 to read as follows:

§ 655.60 Extensions.

An employer may apply for extensions of the period of employment in the following circumstances. A request for extension must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseeable changes in market conditions), and must be supported in writing, with

documentation showing why the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will notify the employer of the decision in writing. The CO will not grant an extension where the total work period under that *Application for Temporary Employment Certification* and the authorized extension would exceed 9 months for employers whose temporary need is seasonal, peakload, or intermittent, or 3 years for employers that have a one-time occurrence of temporary need, except in extraordinary circumstances. The employer may appeal a denial of a request for an extension by following the procedures in § 655.61. The H–2B employer's assurances and obligations under the temporary labor certification will continue to apply during the extended period of employment. The employer must immediately provide to its workers a copy of any approved extension.

■ 27. In subpart A, add §§ 655.61 through 655.63 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

* * * * *

Sec.
655.61 Administrative review.
655.62 Withdrawal of an Application for Temporary Employment Certification.
655.63 Public disclosure.

* * * * *

§ 655.61 Administrative review.

(a) *Request for review.* Where authorized in this subpart, employers may request an administrative review before the BALCA of a determination by the CO. In such cases, the request for review:

(1) Must be sent to the BALCA, with a copy simultaneously sent to the CO who denied the application, within 10 business days from the date of determination;

(2) Must clearly identify the particular determination for which review is sought;

(3) Must set forth the particular grounds for the request;

(4) Must include a copy of the CO's determination; and

(5) May contain only legal argument and such evidence as was actually submitted to the CO before the date the CO's determination was issued.

(b) *Appeal file.* Upon the receipt of a request for review, the CO will, within 7 business days, assemble and submit the Appeal File using means to ensure same day or next day delivery, to the BALCA, the employer, and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor.

(c) *Briefing schedule.* Within 7 business days of receipt of the Appeal File, the counsel for the CO may submit, using means to ensure same day or next day delivery, a brief in support of the CO's decision.

(d) *Assignment.* The Chief ALJ may designate a single member or a three member panel of the BALCA to consider a particular case.

(e) *Review.* The BALCA must review the CO's determination only on the basis of the Appeal File, the request for review, and any legal briefs submitted and must:

(1) Affirm the CO's determination; or

(2) Reverse or modify the CO's determination; or

(3) Remand to the CO for further action.

(f) *Decision.* The BALCA should notify the employer, the CO, and counsel for the CO of its decision within 7 business days of the submission of the CO's brief or 10 business days after receipt of the Appeal File, whichever is later, using means to ensure same day or next day delivery.

§ 655.62 Withdrawal of an Application for Temporary Employment Certification.

Employers may withdraw an *Application for Temporary Employment Certification* after it has been accepted and before it is adjudicated. The employer must request such withdrawal in writing.

§ 655.63 Public disclosure.

The Department will maintain an electronic file accessible to the public with information on all employers applying for temporary nonagricultural labor certifications. The database will include such information as the number of workers requested, the date filed, the date decided, and the final disposition.

§ 655.64 [Added and Reserved]

■ 28. Add and reserve § 655.64.

§ 655.65 [Removed and Reserved]

■ 29. Remove and reserve § 655.65.

§§ 655.66–655.69 [Added and Reserved]

■ 30. Add and reserve §§ 655.66 through 655.69.

■ 31. Add an undesignated center heading before § 655.70 to read as follows:

Integrity Measures

■ 32. In subpart A, revise §§ 655.70 through 655.73 to read as follows:

Subpart A—Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H–2B Workers)

* * * * *

Sec.
655.70 Audits.
655.71 CO-ordered assisted recruitment.
655.72 Revocation.
655.73 Debarment.

* * * * *

§ 655.70 Audits.

The CO may conduct audits of adjudicated temporary labor certification applications.

(a) *Discretion.* The CO has the sole discretion to choose the applications selected for audit.

(b) *Audit letter.* Where an application is selected for audit, the CO will send an audit letter to the employer and a copy, if appropriate, to the employer's attorney or agent. The audit letter will:

(1) Specify the documentation that must be submitted by the employer;

(2) Specify a date, no more than 30 calendar days from the date the audit letter is issued, by which the required documentation must be sent to the CO; and

(3) Advise that failure to fully comply with the audit process may result:

(i) In the requirement that the employer undergo the assisted recruitment procedures in § 655.71 in future filings of H–2B temporary labor certification applications for a period of up to 2 years, or

(ii) In a revocation of the certification and/or debarment from the H–2B program and any other foreign labor certification program administered by the Department.

(c) *Supplemental information request.* During the course of the audit examination, the CO may request supplemental information and/or documentation from the employer in order to complete the audit. If circumstances warrant, the CO can issue one or more requests for supplemental information.

(d) *Potential referrals.* In addition to measures in this subpart, the CO may decide to provide the audit findings and underlying documentation to DHS, WHD, or other appropriate enforcement agencies. The CO may refer any findings that an employer discouraged a qualified U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against a qualified U.S. worker, to the Department of Justice, Civil Rights Division, Office of Special Counsel for Unfair Immigration Related Employment Practices.

§ 655.71 CO-ordered assisted recruitment.

(a) *Requirement of assisted recruitment.* If, as a result of audit or

otherwise, the CO determines that a violation has occurred that does not warrant debarment, the CO may require the employer to engage in assisted recruitment for a defined period of time for any future *Application for Temporary Employment Certification.*

(b) *Notification of assisted recruitment.* The CO will notify the employer (and its attorney or agent, if applicable) in writing of the assisted recruitment that will be required of the employer for a period of up to 2 years from the date the notice is issued. The notification will state the reasons for the imposition of the additional requirements, state that the employer's agreement to accept the conditions will constitute their inclusion as bona fide conditions and terms of a temporary labor certification, and offer the employer an opportunity to request an administrative review. If administrative review is requested, the procedures in § 655.61 apply.

(c) *Assisted recruitment.* The assisted recruitment process will be in addition to any recruitment required of the employer by §§ 655.41 through 655.47 and may consist of, but is not limited to, one or more of the following:

(1) Requiring the employer to submit a draft advertisement to the CO for review and approval at the time of filing the *Application for Temporary Employment Certification;*

(2) Designating the sources where the employer must recruit for U.S. workers, including newspapers and other publications, and directing the employer to place the advertisement(s) in such sources;

(3) Extending the length of the placement of the advertisement and/or job order;

(4) Requiring the employer to notify the CO and the SWA in writing when the advertisement(s) are placed;

(5) Requiring an employer to perform any additional assisted recruitment directed by the CO;

(6) Requiring the employer to provide proof of the publication of all advertisements as directed by the CO, in addition to providing a copy of the job order;

(7) Requiring the employer to provide proof of all SWA referrals made in response to the job order;

(8) Requiring the employer to submit any proof of contact with all referrals and past U.S. workers; and/or

(9) Requiring the employer to provide any additional documentation verifying it conducted the assisted recruitment as directed by the CO.

(d) *Failure to comply.* If an employer materially fails to comply with requirements ordered by the CO under this section, the certification will be denied and the employer and/or its attorney or agent may be debarred under § 655.73.

§ 655.72 Revocation.

(a) *Basis for DOL revocation.* The Administrator, OFLC may revoke a temporary labor certification approved under this subpart, if the Administrator, OFLC finds:

(1) The issuance of the temporary labor certification was not justified due to fraud or willful misrepresentation of a material fact in the application process, as defined in § 655.73(d);

(2) The employer substantially failed to comply with any of the terms or conditions of the approved temporary labor certification. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of the approved certification and is further defined in § 655.73(d) and (e);

(3) The employer failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit (under § 655.73), or law enforcement function under 29 CFR part 503 or this subpart; or

(4) The employer failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary with the respect to the H–2B program.

(b) *DOL procedures for revocation.* (1) Notice of Revocation. If the Administrator, OFLC makes a determination to revoke an employer's temporary labor certification, the Administrator, OFLC will send to the employer (and its attorney or agent, if applicable) a Notice of Revocation. The notice will contain a detailed statement of the grounds for the revocation and inform the employer of its right to submit rebuttal evidence or to appeal. If the employer does not file rebuttal evidence or an appeal within 10 business days from the date the Notice of Revocation is issued, the notice is the final agency action and will take effect immediately at the end of the 10-day period.

(2) Rebuttal. If the employer timely submits rebuttal evidence, the Administrator, OFLC will inform the employer of the final determination on the revocation within 10 business days of receiving the rebuttal evidence. If the Administrator, OFLC determines that the certification should be revoked, the Administrator, OFLC will inform the employer of its right to appeal according to the procedures of § 655.61. If the employer does not appeal the final determination, it will become the final agency action.

(3) Appeal. An employer may appeal a Notice of Revocation, or a final determination of the Administrator, OFLC after the review of rebuttal evidence, according to the appeal procedures of § 655.61. The ALJ's decision is the final agency action.

(4) Stay. The timely filing of rebuttal evidence or an administrative appeal will stay the revocation pending the outcome of those proceedings.

(5) Decision. If the temporary labor certification is revoked, the Administrator, OFLC will send a copy of the final agency action to DHS and the Department of State.

(c) *Employer's obligations in the event of revocation.* If an employer's temporary labor certification is revoked, the employer is responsible for:

(1) Reimbursement of actual inbound transportation and other expenses;

(2) The workers' outbound transportation expenses;

(3) Payment to the workers of the amount due under the three-fourths guarantee; and

(4) Any other wages, benefits, and working conditions due or owing to the workers under this subpart.

§ 655.73 Debarment.

(a) *Debarment of an employer.* The Administrator, OFLC may not issue future labor certifications under this subpart to an employer or any successor in interest to that employer, subject to the time limits set forth in paragraph (c) of this section, if the Administrator, OFLC finds that the employer committed the following violations:

(1) Willful misrepresentation of a material fact in its *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition;*

(2) Substantial failure to meet any of the terms and conditions of its *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition.* A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents; or

(3) Willful misrepresentation of a material fact to the DOS during the visa application process.

(b) *Debarment of an agent or attorney.* If the Administrator, OFLC finds, under this section, that an attorney or agent committed a violation as described in paragraphs (a)(1) through (3) of this section or participated in an employer's violation, the Administrator, OFLC may not issue future labor certifications to an employer represented by such agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Period of debarment.* Debarment under this subpart may not be for less

than 1 year or more than 5 years from the date of the final agency decision.

(d) *Determining whether a violation is willful.* A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent knows a statement is false or that the conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions.

(e) *Determining whether a violation is significant.* In determining whether a violation is a significant deviation from the terms and conditions of the *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition,* the factors that the Administrator, OFLC may consider include, but are not limited to, the following:

(1) Previous history of violation(s) under the H–2B program;

(2) The number of H–2B workers, workers in corresponding employment, or improperly rejected U.S. applicants who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s); and

(5) Whether U.S. workers have been harmed by the violation.

(f) *Violations.* Where the standards set forth in paragraphs (d) and (e) in this section are met, debarrable violations would include but would not be limited to one or more acts of commission or omission which involve:

(1) Failure to pay or provide the required wages, benefits or working conditions to the employer's H–2B workers and/or workers in corresponding employment;

(2) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(3) Failure to comply with the employer's obligations to recruit U.S. workers;

(4) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(5) Failure to comply with one or more sanctions or remedies imposed by the Administrator, WHD for violation(s) of obligations under the job order or other H–2B obligations, or with one or more decisions or orders of the Secretary or a court under this subpart or 29 CFR part 503;

(6) Failure to comply with the Notice of Deficiency process under this subpart;

(7) Failure to comply with the assisted recruitment process under this subpart;

(8) Impeding an investigation of an employer under 29 CFR part 503 or an audit under this subpart;

(9) Employing an H–2B worker outside the area of intended employment, in an activity/activities not listed in the job order, or outside the validity period of employment of the job order, including any approved extension thereof;

(10) A violation of the requirements of § 655.20(o) or (p);

(11) A violation of any of the provisions listed in § 655.20(r);

(12) Any other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(13) Fraud involving the *H–2B Registration, Application for Temporary Employment Certification* or the *H–2B Petition;* or

(14) A material misrepresentation of fact during the registration or application process.

(g) *Debarment procedure.* (1) Notice of Debarment. If the Administrator, OFLC makes a determination to debar an employer, attorney, or agent, the Administrator, OFLC will send the party a Notice of Debarment. The Notice will state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment and inform the party subject to the notice of its right to submit rebuttal evidence or to request a debarment hearing. If the party does not file rebuttal evidence or request a hearing within 30 calendar days of the date of the Notice of Debarment, the notice is the final agency action and the debarment will take effect at the end of the 30-day period. The timely filing of an rebuttal evidence or a request for a hearing stays the debarment pending the outcome of the appeal as provided in paragraphs (g)(2)–(6) of this section.

(2) Rebuttal. The party who received the Notice of Debarment may choose to submit evidence to rebut the grounds stated in the notice within 30 calendar days of the date the notice is issued. If rebuttal evidence is timely filed, the Administrator, OFLC will issue a final determination on the debarment within 30 calendar days of receiving the rebuttal evidence. If the Administrator, OFLC determines that the party should be debarred, the Administrator, OFLC will inform the party of its right to request a debarment hearing according to the procedures in this section. The party must request a hearing within 30 calendar days after the date of the Administrator, OFLC's final determination, or the Administrator OFLC's determination will be the final agency order and the debarment will take effect at the end of the 30-day period.

(3) Hearing. The recipient of a Notice of Debarment seeking to challenge the debarment must request a debarment hearing within 30 calendar days of the date of a Notice of Debarment or the date of a final determination of the Administrator, OFLC after review of rebuttal evidence submitted under paragraph (g)(2) of this section. To obtain a debarment hearing, the recipient must, within 30 days of the date of the Notice or the final determination, file a written request with the Chief ALJ, United States Department of Labor, 800 K Street, NW., Suite 400–N, Washington, DC 20001–8002, and simultaneously serve a copy on the Administrator, OFLC. The debarment will take effect 30 calendar days from the date the Notice of Debarment or final determination is issued, unless a request for review is timely filed. Within 10 business days of receipt of the request for a hearing, the Administrator, OFLC will send a certified copy of the ETA case file to the Chief ALJ by means normally assuring next day delivery. The Chief ALJ will immediately assign an ALJ to conduct the hearing. The procedures in 29 CFR part 18 apply to such hearings, except that the request for a hearing will not be considered to be a complaint to which an answer is required.

(4) Decision. After the hearing, the ALJ must affirm, reverse, or modify the Administrator, OFLC's determination. The ALJ will prepare the decision within 60 calendar days after completion of the hearing and closing of the record. The ALJ's decision will be provided to the parties to the debarment hearing by means normally assuring next day delivery. The ALJ's decision is the final agency action, unless either party, within 30 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

(5) Review by the ARB. (i) Any party wishing review of the decision of an ALJ must, within 30 calendar days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. The ARB will decide whether to accept the petition within 30 calendar days of receipt. If the ARB declines to accept the petition, or if the ARB does not issue a notice accepting a petition within 30 calendar days after the receipt of a timely filing of the

petition, the decision of the ALJ is the final agency action. If a petition for review is accepted, the decision of the ALJ will be stayed unless and until the ARB issues an order affirming the decision. The ARB must serve notice of its decision to accept or not to accept the petition upon the ALJ and upon all parties to the proceeding.

(ii) Upon receipt of the ARB's notice to accept the petition, the Office of Administrative Law Judges will promptly forward a copy of the complete hearing record to the ARB.

(iii) Where the ARB has determined to review the decision and order, the ARB will notify each party of the issue(s) raised, the form in which submissions must be made (*e.g.,* briefs or oral argument), and the time within which the presentation must be submitted.

(6) ARB Decision. The ARB's final decision must be issued within 90 calendar days from the notice granting the petition and served upon all parties and the ALJ.

(h) *Concurrent debarment jurisdiction.* OFLC and the WHD have concurrent jurisdiction to debar under this section or under 29 CFR 503.24. When considering debarment, OFLC and the WHD will coordinate their activities. A specific violation for which debarment is imposed will be cited in a single debarment proceeding. Copies of final debarment decisions will be forwarded to DHS and DOS promptly.

(i) *Debarment from other foreign labor programs.* Upon debarment under this subpart or 29 CFR 503.24, the debarred party will be disqualified from filing any labor certification applications or labor condition applications with the Department by, or on behalf of, the debarred party for the same period of time set forth in the final debarment decision.

§§ 655.74–655.76, 655.80, and 655.81 [Removed and Reserved]

■ 33. In subpart A, remove and reserve §§ 655.74 through 655.76, 655.80, and 655.81.

§§ 655.82–655.99 [Added and Reserved]

■ 34. In subpart A, add and reserve §§ 655.82 through 655.99.

Title 29—Labor

■ 35. Add part 503 to read as follows:

PART 503—ENFORCEMENT OF OBLIGATIONS FOR TEMPORARY NONIMMIGRANT NON-AGRICULTURAL WORKERS ADMITTED UNDER SECTION 214(c)(1) OF THE IMMIGRATION AND NATIONALITY ACT

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503.56 Retention of official record.

Authority: 8 U.S.C. 1101(a)(15(H)(ii(b) and 1184(c) and 8 CFR 214.2(h).

Subpart A—General Provisions

§ 503.0 Introduction.

The regulations in this part cover the enforcement of all statutory and regulatory obligations, including requirements under 8 U.S.C. 1184(c) and 20 CFR part 655, Subpart A, applicable to the employment of H–2B workers admitted under the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(H)(ii)(b), and workers in corresponding employment, including obligations to offer employment to eligible United States (U.S.) workers and to not lay off or displace U.S. workers in a manner prohibited by the regulations in this part or 20 CFR part 655, Subpart A.

§ 503.1 Scope and purpose.

(a) *Statutory standard.* 8 U.S.C. 1184(c)(1) requires the Secretary of the Department of Homeland Security (DHS) to consult with appropriate agencies before authorizing the entry of H–2B workers. DHS regulations 8 CFR 214.2(h)(6)(iv) provide that a petition to bring nonimmigrant workers on H–2B visas into the U.S. for temporary nonagricultural employment may not be approved by the Secretary of DHS unless the petitioner has applied for and received a temporary labor certification from the U.S. Secretary of Labor (Secretary). The temporary labor certification reflects a determination by the Secretary that:

(1) There are not sufficient U.S. workers who are qualified and will be available at the time and place needed to perform the labor or services involved in the petition; and

(2) The employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(b) *Role of the Employment and Training Administration (ETA).* The issuance and denial of labor certifications under 8 U.S.C. 1184(c) has been delegated by the Secretary to ETA, an agency within the U.S. Department of Labor (the Department or DOL), which in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC). In general, matters concerning the obligations of an H–2B employer related to the temporary labor certification process are administered by OFLC, including obligations and assurances made by employers, overseeing employer recruitment, and assuring program integrity. The

regulations pertaining to the issuance, denial, and revocation of labor certification for temporary foreign workers by the OFLC are found in 20 CFR part 655, Subpart A.

(c) *Role of the Wage and Hour Division (WHD).* DHS, effective January 18, 2009, under section 214(c)(14)(B) of the INA, 8 U.S.C. 1184(c)(14)(B), has delegated to the Secretary certain investigatory and law enforcement functions to carry out the provisions under 8 U.S.C. 1184(c). The Secretary has delegated these functions to the WHD. In general, matters concerning the rights of H–2B workers and workers in corresponding employment under this part and the employer's obligations are enforced by the WHD, including whether employment was offered to U.S. workers as required under 20 CFR part 655, Subpart A, or whether U.S. workers were laid off or displaced in violation of program requirements. The WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances to impose penalties, to debar from future certifications, to recommend revocation of existing certifications, and to seek remedies for violations, including recovery of unpaid wages and reinstatement of improperly laid off or displaced U.S. workers.

(d) *Effect of regulations.* The enforcement functions carried out by the WHD under 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, and the regulations in this part apply to the employment of any H–2B worker and any worker in corresponding employment as the result of an *Application for Temporary Employment Certification* filed with the Department on or after April 23, 2012.

§ 503.2 Territory of Guam.

This part does not apply to temporary employment in the Territory of Guam. The Department does not certify to the United States Citizenship and Immigration Services (USCIS) of DHS the temporary employment of nonimmigrant foreign workers under H–2B visas, or enforce compliance with the provisions of the H–2B visa program in the Territory of Guam. Under DHS regulations, 8 CFR 214.2(h)(6)(v), administration of the H–2B temporary labor certification program is undertaken by the Governor of Guam, or the Governor's designated representative.

§ 503.3 Coordination among Governmental agencies.

(a) Complaints received by ETA or any State Workforce Agency (SWA) regarding noncompliance with H–2B statutory or regulatory labor standards will be immediately forwarded to the appropriate WHD office for suitable action under the regulations in this part.

(b) Information received in the course of processing registrations and applications, program integrity measures, or enforcement actions may be shared between OFLC and WHD or, where applicable to employer enforcement under the H–2B program, may be forwarded to other agencies as appropriate, including the Department of State (DOS) and DHS.

(c) A specific violation for which debarment is sought will be cited in a single debarment proceeding. OFLC and the WHD will coordinate their activities to achieve this result. Copies of final debarment decisions will be forwarded to DHS promptly.

§ 503.4 Definition of terms.

For purposes of this part:

Act means the Immigration and Nationality Act or INA, as amended, 8 U.S.C. 1101 *et seq.*

Administrative Law Judge (ALJ) means a person within the Department's Office of Administrative Law Judges appointed under 5 U.S.C. 3105.

Administrator, Office of Foreign Labor Certification (OFLC) means the primary official of the Office of Foreign Labor Certification, ETA, or the Administrator's designee.

Administrator, Wage and Hour Division (WHD) means the primary official of the WHD, or the Administrator's designee.

Agent. (1) *Agent* means a legal entity or person who:

(i) Is authorized to act on behalf of an employer for temporary nonagricultural labor certification purposes;

(ii) Is not itself an employer, or a joint employer, as defined in this part with respect to a specific application; and

(iii) Is not an association or other organization of employers.

(2) No agent who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this part.

Agricultural labor or services means those duties and occupations defined in 20 CFR 655.100.

Applicant means a U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* (ETA Form 9142 and the appropriate appendices).

Application for Temporary Employment Certification means the Office of Management and Budget (OMB)-approved ETA Form 9142 and the appropriate appendices, a valid wage determination, as required by 20 CFR 655.10, and a subsequently-filed U.S. worker recruitment report, submitted by an employer to secure a temporary labor certification determination from DOL.

Area of intended employment means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.,* average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (*e.g.,* near the border of) the MSA.

Attorney means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the U.S., or the District of Columbia. No attorney who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this part.

Certifying Officer (CO) means an OFLC official designated by the Administrator, OFLC to make determinations on applications under the H–2B program. The Administrator, OFLC is the National CO. Other COs may also be designated by the Administrator, OFLC to make the determinations required under 20 CFR part 655, Subpart A.

Chief Administrative Law Judge (Chief ALJ) means the chief official of the Department's Office of Administrative Law Judges or the Chief Administrative Law Judge's designee.

Corresponding employment. (1) *Corresponding employment* means the employment of workers who are not H–2B workers by an employer that has a certified H–2B *Application for Temporary Employment Certification*

when those workers are performing either substantially the same work included in the job order or substantially the same work performed by the H–2B workers, except that workers in the following two categories are not included in corresponding employment:

(i) Incumbent employees continuously employed by the H–2B employer to perform substantially the same work included in the job order or substantially the same work performed by the H–2B workers during the 52 weeks prior to the period of employment certified on the *Application for Temporary Employment Certification* and who have worked or been paid for at least 35 hours in at least 48 of the prior 52 workweeks, and who have worked or been paid for an average of at least 35 hours per week over the prior 52 weeks, as demonstrated on the employer's payroll records, provided that the terms and working conditions of their employment are not substantially reduced during the period of employment covered by the job order. In determining whether this standard was met, the employer may take credit for any hours that were reduced by the employee voluntarily choosing not to work due to personal reasons such as illness or vacation; or

(ii) Incumbent employees covered by a collective bargaining agreement or an individual employment contract that guarantees both an offer of at least 35 hours of work each workweek and continued employment with the H–2B employer at least through the period of employment covered by the job order, except that the employee may be dismissed for cause.

(2) To qualify as corresponding employment, the work must be performed during the period of the job order, including any approved extension thereof.

Date of need means the first date the employer requires services of the H–2B workers as listed on the application.

Department of Homeland Security (DHS) means the Federal Department having jurisdiction over certain immigration-related functions, acting through its agencies, including USCIS.

Employee means a person who is engaged to perform work for an employer, as defined under the general common law. Some of the factors relevant to the determination of employee status include: The hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive. The terms ''employee'' and ''worker'' are used interchangeably in this part.

Employer means a person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(1) Has a place of business (physical location) in the U.S. and a means by which it may be contacted for employment;

(2) Has an employer relationship (such as the ability to hire, pay, fire, supervise or otherwise control the work of employees) with respect to an H–2B worker or a worker in corresponding employment; and

(3) Possesses, for purposes of filing an *Application for Temporary Employment Certification,* a valid Federal Employer Identification Number (FEIN).

Employment and Training Administration (ETA) means the agency within the Department which includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the DHS regulations for the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

Federal holiday means a legal public holiday as defined at 5 U.S.C. 6103.

Full-time means 35 or more hours of work per week.

H–2B Petition means the DHS *Petition for a Nonimmigrant Worker* form, or successor form, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H–2B nonimmigrant workers. The *H–2B Petition* includes the approved *Application for Temporary Employment Certification* and the Final Determination letter.

H–2B Registration means the OMB-approved ETA Form 9155, submitted by an employer to register its intent to hire H–2B workers and to file an *Application for Temporary Employment Certification.*

H–2B worker means any temporary foreign worker who is lawfully present in the U.S. and authorized by DHS to perform nonagricultural labor or services of a temporary or seasonal nature under 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Job contractor means a person, association, firm, or a corporation that meets the definition of an employer and that contracts services or labor on a temporary basis to one or more employers, which is not an affiliate, branch or subsidiary of the job contractor and where the job contractor will not exercise substantial, direct day-to-day supervision and control in the performance of the services or labor to be performed other than hiring, paying and firing the workers.

Job offer means the offer made by an employer or potential employer of H–2B workers to both U.S. and H–2B workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity means one or more openings for full-time employment with the petitioning employer within a specified area(s) of intended employment for which the petitioning employer is seeking workers.

Job order means the document containing the material terms and conditions of employment relating to wages, hours, working conditions, worksite and other benefits, including obligations and assurances under 29 CFR part 655, Subpart A and this subpart that is posted between and among the SWAs on their job clearance systems.

Joint employment means that where two or more employers each have sufficient definitional indicia of being an employer to be considered the employer of a worker, those employers will be considered to jointly employ that worker. Each employer in a joint employment relationship to a worker is considered a joint employer of that worker.

Layoff means any involuntary separation of one or more U.S. employees without cause.

Metropolitan Statistical Area (MSA) means a geographic entity defined by OMB for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

National Processing Center (NPC) means the office within OFLC which is charged with the adjudication of an *Application for Temporary Employment Certification* or other applications.

Non-agricultural labor and services means any labor or services not

considered to be agricultural labor or services as defined in 20 CFR part 655, Subpart B. It does not include the provision of services as members of the medical profession by graduates of medical schools.

Offered wage means the wage offered by an employer in an H–2B job order. The offered wage must equal or exceed the highest of the prevailing wage or Federal, State or local minimum wage.

Office of Foreign Labor Certification (OFLC) means the organizational component of the ETA that provides national leadership and policy guidance and develops regulations to carry out the Secretary's responsibilities for the admission of foreign workers to the U.S. to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(b).

Prevailing wage determination (PWD) means the prevailing wage for the position, as described in 20 CFR 655.12, which is the subject of the *Application for Temporary Employment Certification.*

Secretary means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary's designee.

Secretary of Homeland Security means the chief official of the U.S. DHS or the Secretary of DHS's designee.

State Workforce Agency (SWA) means a State government agency that receives funds under the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*) to administer the State's public labor exchange activities.

Strike means a concerted stoppage of work by employees as a result of a labor dispute, or any concerted slowdown or other concerted interruption of operation (including stoppage by reason of the expiration of a collective bargaining agreement).

Successor in interest. (1) *Successor in interest* means where an employer has violated 20 CFR part 655, Subpart A or this part, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer may be held liable for the duties and obligations of the violating employer in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(i) Substantial continuity of the same business operations;

(ii) Use of the same facilities;

(iii) Continuity of the work force;

(iv) Similarity of jobs and working conditions;

(v) Similarity of supervisory personnel;

(vi) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(vii) Similarity in machinery, equipment, and production methods;

(viii) Similarity of products and services; and

(ix) The ability of the predecessor to provide relief.

(2) For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

United States (U.S.) means the continental U.S., Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI).

United States Citizenship and Immigration Services (USCIS) means the Federal agency within DHS that makes the determination under the INA whether to grant petitions filed by employers seeking H–2B workers to perform temporary nonagricultural work in the U.S.

United States worker (U.S. worker) means a worker who is:

(1) A citizen or national of the U.S.;

(2) An alien who is lawfully admitted for permanent residence in the U.S., is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized (by the INA or by DHS) to be employed in the U.S.; or

(3) An individual who is not an unauthorized alien (as defined in 8 U.S.C. 1324a(h)(3)) with respect to the employment in which the worker is engaging.

Wage and Hour Division (WHD) means the agency within the Department with investigatory and law enforcement authority, as delegated from DHS, to carry out the provisions under 8 U.S.C. 1184(c).

Wages mean all forms of cash remuneration to a worker by an employer in payment for personal services.

§ 503.5 Temporary need.

(a) An employer seeking certification under 20 CFR part 655, Subpart A must establish that its need for non-agricultural services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii)(A).

(b) The employer's need is considered temporary if justified to the CO as one of the following: a one-time occurrence; a seasonal need; a peakload need; or an intermittent need, as defined by DHS. 8 CFR 214.2(h)(6)(ii)(B).

§ 503.6 Waiver of rights prohibited.

A person may not seek to have an H–2B worker, a worker in corresponding employment, or any other person, including but not limited to a U.S. worker improperly rejected for employment or improperly laid off or displaced, waive or modify any rights conferred under 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part. Any agreement by an employee purporting to waive or modify any rights given to said person under these provisions will be void as contrary to public policy except as follows:

(a) Waivers or modifications of rights or obligations hereunder in favor of the Secretary will be valid for purposes of enforcement; and

(b) Agreements in settlement of private litigation are permitted.

§ 503.7 Investigation authority of Secretary.

(a) *Authority of the Administrator, WHD.* The Secretary of Homeland Security has delegated to the Secretary, under 8 U.S.C. 1184(c)(14)(B), authority to perform investigative and enforcement functions. The Administrator, WHD will perform all such functions.

(b) *Conduct of investigations.* The Secretary, through the WHD, may investigate to determine compliance with obligations under 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part, either under a complaint or otherwise, as may be appropriate. In connection with such an investigation, WHD may enter and inspect any premises, land, property, worksite, vehicles, structure, facility, place and records (and make transcriptions, photographs, scans, videos, photocopies, or use any other means to record the content of the records or preserve images of places or objects), question any person, or gather any information, in whatever form, as may be appropriate.

(c) *Confidential investigation.* The WHD will conduct investigations in a manner that protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(d) *Report of violations.* Any person may report a violation of the obligations imposed by 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part to the Secretary by advising any local office of the SWA, ETA, WHD or any other authorized representative of the Secretary. The office or person

receiving such a report will refer it to the appropriate office of WHD for the geographic area in which the reported violation is alleged to have occurred.

§ 503.8 Accuracy of information, statements, data.

Information, statements, and data submitted in compliance with 8 U.S.C. 1184(c) or the regulations in this part are subject to 18 U.S.C. 1001, which provides, with regard to statements or entries generally, that whoever, in any matter within the jurisdiction of any department or agency of the U.S., knowingly and willfully falsifies, conceals, or covers up a material fact by any trick, scheme, or device, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, will be fined not more than $250,000 or imprisoned not more than 5 years, or both.

Subpart B—Enforcement

§ 503.15 Enforcement.

The investigation, inspection, and law enforcement functions that carry out the provisions of 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part pertain to the employment of any H–2B worker, any worker in corresponding employment, or any U.S. worker improperly rejected for employment or improperly laid off or displaced.

§ 503.16 Assurances and obligations of H–2B employers.

An employer employing H–2B workers and/or workers in corresponding employment under an *Application for Temporary Employment Certification* has agreed as part of the *Application for Temporary Employment Certification* that it will abide by the following conditions with respect to its H–2B workers and any workers in corresponding employment:

(a) *Rate of pay.* (1) The offered wage in the job order equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage. The employer must pay at least the offered wage, free and clear, during the entire period of the *Application for Temporary Employment Certification* granted by OFLC.

(2) The offered wage is not based on commissions, bonuses, or other incentives, including paying on a piece-rate basis, unless the employer guarantees a wage earned every workweek that equals or exceeds the offered wage.

(3) If the employer requires one or more minimum productivity standards of workers as a condition of job retention, the standards must be specified in the job order and the employer must demonstrate that they are normal and usual for non-H–2B employers for the same occupation in the area of intended employment.

(4) An employer that pays on a piece-rate basis must demonstrate that the piece rate is no less than the normal rate paid by non-H–2B employers to workers performing the same activity in the area of intended employment. The average hourly piece rate earnings must result in an amount at least equal to the offered wage. If the worker is paid on a piece rate basis and at the end of the workweek the piece rate does not result in average hourly piece rate earnings during the workweek at least equal to the amount the worker would have earned had the worker been paid at the offered hourly wage, then the employer must supplement the worker's pay at that time so that the worker's earnings are at least as much as the worker would have earned during the workweek if the worker had instead been paid at the offered hourly wage for each hour worked.

(b) *Wages free and clear.* The payment requirements for wages in this section will be satisfied by the timely payment of such wages to the worker either in cash or negotiable instrument payable at par. The payment must be made finally and unconditionally and ''free and clear.'' The principles applied in determining whether deductions are reasonable and payments are received free and clear and the permissibility of deductions for payments to third persons are explained in more detail in 29 CFR part 531.

(c) *Deductions.* The employer must make all deductions from the worker's paycheck required by law. The job order must specify all deductions not required by law which the employer will make from the worker's pay; any such deductions not disclosed in the job order are prohibited. The wage payment requirements of paragraph (b) of this section are not met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the worker below the minimum amounts required by the offered wage or where the worker fails to receive such amounts free and clear because the worker ''kicks back'' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wages delivered to the worker. Authorized deductions are limited to: Those required by law, such as taxes payable by workers that are required to be withheld by the employer and amounts due workers which the employer is required by court order to pay to another; deductions for the reasonable cost or fair value of board, lodging, and facilities furnished; and deductions of amounts which are authorized to be paid to third persons for the worker's account and benefit through his or her voluntary assignment or order or which are authorized by a collective bargaining agreement with bona fide representatives of workers which covers the employer. Deductions for amounts paid to third persons for the worker's account and benefit which are not so authorized or are contrary to law or from which the employer, agent or recruiter, including any agents or workers, or any affiliated person derives any payment, rebate, commission, profit, or benefit directly or indirectly, may not be made if they reduce the actual wage paid to the worker below the offered wage indicated on the *Application for Temporary Employment Certification.*

(d) *Job opportunity is full-time.* The job opportunity is a full-time temporary position, consistent with § 503.4, and the employer must use a single workweek as its standard for computing wages due. An employee's workweek must be a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day.

(e) *Job qualifications and requirements.* Each job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H–2B employers in the same occupation and area of intended employment. The employer's job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on H–2B workers. A qualification means a characteristic that is necessary to the individual's ability to perform the job in question. A requirement means a term or condition of employment which a worker is required to accept in order to obtain the job opportunity. The CO may require the employer to submit documentation to substantiate the appropriateness of any job qualification and/or requirement specified in the job order.

(f) *Three-fourths guarantee.* (1) The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays in each 12-week

period (each 6-week period if the period of employment covered by the job order is less than 120 days) beginning with the first workday after the arrival of the worker at the place of employment or the advertised first date of need, whichever is later, and ending on the expiration date specified in the job order or in its extensions, if any. See the exception in paragraph (y) of this section.

(2) For purposes of this paragraph (f) a workday means the number of hours in a workday as stated in the job order. The employer must offer a total number of hours of work to ensure the provision of sufficient work to reach the three-fourths guarantee in each 12-week period (each 6-week period if the period of employment covered by the job order is less than 120 days) during the work period specified in the job order, or during any modified job order period to which the worker and employer have mutually agreed and that has been approved by the CO.

(3) In the event the worker begins working later than the specified beginning date the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the job order and all extensions thereof are in effect.

(4) The 12-week periods to which the guarantee applies (6-week periods if the period of employment covered by the job order is less than 120 days) to which the guarantee applies are based upon the workweek used by the employer for pay purposes. The first 12-week period (or 6-week period, as appropriate) also includes any partial workweek, if the first workday after the worker's arrival at the place of employment is not the beginning of the employer's workweek, with the guaranteed number of hours increased on a pro rata basis (thus, the first period may include up to 12 weeks and 6 days (or 6 weeks and 6 days, as appropriate)). The final 12-week period (or 6-week period, as appropriate) includes any time remaining after the last full 12-week period (or 6-week period) ends, and thus may be as short as 1 day, with the guaranteed number of hours decreased on a pro rata basis.

(5) Therefore, if, for example, a job order is for a 32-week period (a period greater than 120 days), during which the normal workdays and work hours for the workweek are specified as 5 days a week, 7 hours per day, the worker would have to be guaranteed employment for at least 315 hours (12 weeks × 35 hours/week = 420 hours × 75 percent = 315) in the first 12-week period, at least 315 hours in the second 12-week period, and at least 210 hours (8 weeks × 35 hours/week = 280 hours × 75 percent = 210) in the final partial period. If the job order is for a 16-week period (less than 120 days), during which the normal workdays and work hours for the workweek are specified as 5 days a week, 7 hours per day, the worker would have to be guaranteed employment for at least 157.5 hours (6 weeks × 35 hours/week = 210 hours × 75 percent = 157.5) in the first 6-week period, at least 157.5 hours in the second 6-week period, and at least 105 hours (4 weeks × 35 hours/week = 140 hours × 75 percent = 105) in the final partial period.

(6) If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the offered wage, whichever is higher, to calculate the amount due under the guarantee.

(7) A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday. The employer, however, may count all hours actually worked in calculating whether the guarantee has been met. If during any 12-week period (6-week period if the period of employment covered by the job order is less than 120 days) during the period of the job order the employer affords the U.S. or H–2B worker less employment than that required under paragraph (f)(1) of this section, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer has not met the work guarantee if the employer has merely offered work on three-fourths of the workdays in an 12-week period (or 6-week period, as appropriate) if each workday did not consist of a full number of hours of work time as specified in the job order.

(8) Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (f)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday), may be counted by the employer in calculating whether each 12-week period (or 6-week period, as appropriate) of guaranteed employment has been met. An employer seeking to calculate whether the guaranteed number of hours has been met must maintain the payroll records in accordance with this part.

(g) *Impossibility of fulfillment.* If, before the expiration date specified in the job order, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God or similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside the employer's control that makes the fulfillment of the job order impossible, the employer may terminate the job order with the approval of the CO. In the event of such termination of a job order, the employer must fulfill a three-fourths guarantee, as described in paragraph (f) of this section, for the time that has elapsed from the start date listed in the job order or the first workday after the arrival of the worker at the place of employment, whichever is later, to the time of its termination. The employer must make efforts to transfer the H–2B worker or worker in corresponding employment to other comparable employment acceptable to the worker and consistent with the INA, as applicable. If a transfer is not effected, the employer must return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H–2B employer, whichever the worker prefers.

(h) *Frequency of pay.* The employer must state in the job order the frequency with which the worker will be paid, which must be at least every 2 weeks or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(i) *Earnings statements.* (1) The employer must keep accurate and adequate records with respect to the workers' earnings, including but not limited to: records showing the nature, amount, and location(s) of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee in paragraph (f) of this section); the hours actually worked each day by the worker; if the number of hours worked by the worker is less than the number of hours offered, the reason(s) the worker did not work; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's home address; and the amount of and reasons for any and all deductions taken from or additions made to the worker's wages.

(2) The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(i) The worker's total earnings for each workweek in the pay period;

(ii) The worker's hourly rate and/or piece rate of pay;

(iii) For each workweek in the pay period the hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (f) of this section, separate from any hours offered over and above the guarantee);

(iv) For each workweek in the pay period the hours actually worked by the worker;

(v) An itemization of all deductions made from or additions made to the worker's wages;

(vi) If piece rates are used, the units produced daily;

(vii) The beginning and ending dates of the pay period; and

(viii) The employer's name, address and FEIN.

(j) *Transportation and visa fees.* (1)(i) Transportation to the place of employment. The employer must provide or reimburse the worker for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment if the worker completes 50 percent of the period of employment covered by the job order (not counting any extensions). The employer may arrange and pay for the transportation and subsistence directly, advance at a minimum the most economical and reasonable common carrier cost of the transportation and subsistence to the worker before the worker's departure, or pay the worker for the reasonable costs incurred by the worker. When it is the prevailing practice of non-H–2B employers in the occupation in the area to do so or when the employer extends such benefits to similarly situated H–2B workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence must be at least the amount permitted in 20 CFR 655.173. Where the employer will reimburse the reasonable costs incurred by the worker, it must keep accurate and adequate records of: the costs of transportation and subsistence incurred by the worker; the amount reimbursed; and the date(s) of reimbursement. Note that the Fair Labor Standards Act (FLSA) applies independently of the H–2B requirements and imposes obligations on employers regarding payment of wages.

(ii) Transportation from the place of employment. If the worker completes the period of employment covered by the job order (not counting any extensions), or if the worker is dismissed from employment for any reason by the employer before the end of the period, and the worker has no immediate subsequent H–2B employment, the employer must provide or pay at the time of departure for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer that has not agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the employer must provide or pay for that transportation and subsistence. If the worker has contracted with a subsequent employer that has agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses.

(iii) Employer-provided transportation. All employer-provided transportation must comply with all applicable Federal, State, and local laws and regulations and must provide, at a minimum, the same vehicle safety standards, driver licensure requirements, and vehicle insurance as required under 49 CFR parts 390, 393, and 396.

(iv) Disclosure. All transportation and subsistence costs that the employer will pay must be disclosed in the job order.

(2) The employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the H–2B worker, but not for passport expenses or other charges primarily for the benefit of the worker.

(k) *Employer-provided items.* The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.

(l) *Disclosure of job order.* The employer must provide to an H–2B worker outside of the U.S. no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences, a copy of the job order including any subsequent approved modifications. For an H–2B worker changing employment from an H–2B employer to a subsequent H–2B employer, the copy must be provided no later than the time an offer of employment is made by the subsequent H–2B employer. The disclosure of all documents required by this paragraph must be provided in a language understood by the worker, as necessary or reasonable.

(m) *Notice of worker rights.* The employer must post and maintain in a conspicuous location at the place of employment a poster provided by the Department which sets out the rights and protections for H–2B workers and workers in corresponding employment. The employer must post the poster in English. To the extent necessary, the employer must request and post additional posters, as made available by the Department, in any language common to a significant portion of the workers if they are not fluent in English.

(n) *No unfair treatment.* The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or this part or any other Department regulation promulgated thereunder;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or this part or any other Department regulation promulgated thereunder;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or this part or any other Department regulation promulgated thereunder;

(4) Consulted with a workers' center, community organization, labor union, legal assistance program, or an attorney on matters related to 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or this part or any other Department regulation promulgated thereunder; or

(5) Exercised or asserted on behalf of himself/herself or others any right or protection afforded by 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or this part or any other Department regulation promulgated thereunder.

(o) *Comply with the prohibitions against employees paying fees.* The employer and its attorney, agents, or employees have not sought or received payment of any kind from the worker for any activity related to obtaining H–2B labor certification or employment, including payment of the employer's attorney or agent fees, application and *H–2B Petition* fees, recruitment costs, or any fees attributed to obtaining the approved *Application for Temporary Employment Certification.* For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in-kind payments, and free labor. All wages must be paid free and clear. This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(p) *Contracts with third parties to comply with prohibitions.* The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H–2B workers to seek or receive payments or other compensation from prospective workers. The contract must include the following statement: ''Under this agreement, [name of agent, recruiter] and any agent of or employee of [name of agent or recruiter] are prohibited from seeking or receiving payments from any prospective employee of [employer name] at any time, including before or after the worker obtains employment. Payments include but are not limited to, any direct or indirect fees paid by such employees for recruitment, job placement, processing, maintenance, attorneys' fees, agent fees, application fees, or petition fees.''

(q) *Prohibition against preferential treatment of foreign workers.* The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2B workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2B workers. This does not relieve the employer from providing to H–2B workers at least the minimum benefits, wages, and working conditions which must be offered to U.S. workers consistent with this section.

(r) *Non-discriminatory hiring practices.* The job opportunity is, and through the period set forth in paragraph (t) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship. Rejections of any U.S. workers who applied or apply for the job must only be for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hired workers and rejected applicants as required by § 503.17.

(s) *Recruitment requirements.* The employer must conduct all required recruitment activities, including any additional employer-conducted recruitment activities as directed by the CO, and as specified in 20 CFR 655.40 through 655.46.

(t) *Continuing requirement to hire U.S. workers.* The employer has and will continue to cooperate with the SWA by accepting referrals of all qualified U.S. workers who apply (or on whose behalf a job application is made) for the job opportunity, and must provide employment to any qualified U.S. worker who applies to the employer for the job opportunity, until 21 days before the date of need.

(u) *No strike or lockout.* There is no strike or lockout at any of the employer's worksites within the area of intended employment for which the employer is requesting H–2B certification at the time the *Application for Temporary Employment Certification* is filed.

(v) *No recent or future layoffs.* The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment within the period beginning 120 calendar days before the date of need through the end of the period of certification. A layoff for lawful, job-related reasons such as lack of work or the end of a season is permissible if all H–2B workers are laid off before any U.S. worker in corresponding employment.

(w) *Contact with former U.S. employees.* The employer will contact (by mail or other effective means) its former U.S. workers, including those who have been laid off within 120 calendar days before the date of need (except those who were dismissed for cause or who abandoned the worksite), employed by the employer in the occupation at the place of employment during the previous year, disclose the terms of the job order, and solicit their return to the job.

(x) *Area of intended employment and job opportunity.* The employer must not place any H–2B workers employed under the approved *Application for Temporary Employment Certification* outside the area of intended employment or in a job opportunity not listed on the approved *Application for Temporary Employment Certification* unless the employer has obtained a new approved *Application for Temporary Employment Certification.*

(y) *Abandonment/termination of employment.* Upon the separation from employment of worker(s) employed under the *Application for Temporary Employment Certification* or workers in corresponding employment, if such separation occurs before the end date of the employment specified in the *Application for Temporary Employment Certification,* the employer must notify OFLC in writing of the separation from employment not later than 2 work days after such separation is discovered by the employer. In addition, the employer must notify DHS in writing (or any other method specified by the Department or DHS in the **Federal Register** or the Code of Federal Regulations) of such separation of an H–2B worker. An abandonment or abscondment is deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. If the separation is due to the voluntary abandonment of employment by the H–2B worker or worker in corresponding employment, and the employer provides appropriate notification specified under this paragraph, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (f) of this section. The employer's obligation to guarantee three-fourths of the work described in paragraph (f) ends with the last full 12-week period (or 6-week period, as appropriate) preceding the worker's voluntary abandonment or termination for cause.

(z) *Compliance with applicable laws.* During the period of employment specified on the *Application for Temporary Employment Certification,* the employer must comply with all applicable Federal, State and local employment-related laws and regulations, including health and safety laws. In compliance with such laws, including the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 18 U.S.C. 1592(a), neither the employer nor the

employer's agents or attorneys may hold or confiscate workers' passports, visas, or other immigration documents.

(aa) *Disclosure of foreign worker recruitment.* The employer, and its attorney or agent, as applicable, must comply with 20 CFR 655.9 by providing a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the international recruitment of H–2B workers, and the identity and location of the persons or entities hired by or working for the agent or recruiter, and any of the agents or employees of those persons and entities, to recruit foreign workers. Pursuant to 20 CFR 655.15(a), the agreements and information must be filed with the *Application for Temporary Employment Certification.*

(bb) *Cooperation with investigators.* The employer must cooperate with any employee of the Secretary who is exercising or attempting to exercise the Department's authority pursuant to 8 U.S.C. 1184(c).

§ 503.17 Document retention requirements of H–2B employers.

(a) *Entities required to retain documents.* All employers filing an *Application for Temporary Employment Certification* requesting H–2B workers are required to retain the documents and records proving compliance with 20 CFR part 655, Subpart A and this part, including but not limited to those specified in paragraph (c) of this section.

(b) *Period of required retention.* The employer must retain records and documents for 3 years from the date of certification of the *Application for Temporary Employment Certification* or from the date of adjudication if the *Application for Temporary Employment Certification* is denied or 3 years from the day the Department receives the letter of withdrawal provided in accordance with 20 CFR 655.62.

(c) *Documents and records to be retained by all employer applicants.* All employers filing an *H–2B Registration* and an *Application for Temporary Employment Certification* must retain the following documents and records and must provide the documents and records in the event of an audit or investigation:

(1) Documents and records not previously submitted during the registration process that substantiate temporary need;

(2) Proof of recruitment efforts, as applicable, including:

(i) Job order placement as specified in 20 CFR 655.16;

(ii) Advertising as specified in 20 CFR 655.41 and 655.42;

(iii) Contact with former U.S. workers as specified in 20 CFR 655.43;

(iv) Contact with bargaining representative(s), copy of the posting of the job opportunity, and contact with community-based organizations, if applicable, as specified in 20 CFR 655.45(a), (b) and (c); and

(v) Additional employer-conducted recruitment efforts as specified in 20 CFR 655.46;

(3) Substantiation of the information submitted in the recruitment report prepared in accordance with 20 CFR 655.48, such as evidence of nonapplicability of contact with former workers as specified in 20 CFR 655.43;

(4) The final recruitment report and any supporting resumes and contact information as specified in 20 CFR 655.48;

(5) Records of each worker's earnings, hours offered and worked, and other information as specified in § 503.16(i);

(6) If appropriate, records of reimbursement of transportation and subsistence costs incurred by the workers, as specified in § 503.16(j).

(7) Evidence of contact with U.S. workers who applied for the job opportunity in the *Application for Temporary Employment Certification,* including documents demonstrating that any rejections of U.S. workers were for lawful, job-related reasons, as specified in § 503.16(r);

(8) Evidence of contact with any former U.S. worker in the occupation and the area of intended employment in the *Application for Temporary Employment Certification,* including documents demonstrating that the U.S. worker had been offered the job opportunity in the *Application for Temporary Employment Certification,* as specified in § 503.16(w), and that the U.S. worker either refused the job opportunity or was rejected only for lawful, job-related reasons, as specified in § 503.16(r);

(9) The written contracts with agents or recruiters, as specified in 20 CFR 655.8 and 655.9, and the list of the identities and locations of persons hired by or working for the agent or recruiter and these entities' agents or employees, as specified in 20 CFR 655.9;

(10) Written notice provided to and informing OFLC that an H–2B worker or worker in corresponding employment has separated from employment before the end date of employment specified in the *Application for Temporary Employment Certification,* as specified in § 503.16(y);

(11) The *H–2B Registration,* job order, and the *Application for Temporary Employment Certification;*

(12) The approved *H–2B Petition,* including all accompanying documents; and

(13) Any collective bargaining agreement(s), individual employment contract(s), or payroll records from the previous year necessary to substantiate any claim that certain incumbent workers are not included in corresponding employment, as specified in § 503.4.

(d) *Availability of documents for enforcement purposes.* An employer must make available to the Administrator, WHD within 72 hours following a request by the WHD the documents and records required under 20 CFR part 655, Subpart A and this section so that the Administrator, WHD may copy, transcribe, or inspect them.

§ 503.18 Validity of temporary labor certification.

(a) *Validity period.* A temporary labor certification is valid only for the period of time between the beginning and ending dates of employment, as approved on the *Application for Temporary Employment Certification.* The certification expires on the last day of authorized employment.

(b) *Scope of validity.* A temporary labor certification is valid only for the number of H–2B positions, the area of intended employment, the job classification and specific services or labor to be performed, and the employer specified on the approved *Application for Temporary Employment Certification.* The temporary labor certification may not be transferred from one employer to another unless the employer to which it is transferred is a successor in interest to the employer to which it was issued.

§ 503.19 Violations.

(a) *Types of violations.* Pursuant to the statutory provisions governing enforcement of the H–2B program, 8 U.S.C. 1184(c)(14)(A), a violation exists under this part where the Administrator, WHD, through investigation, determines that there has been a:

(1) Willful misrepresentation of a material fact on the *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition;*

(2) Substantial failure to meet any of the terms and conditions of the *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition.* A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions of such documents; or

(3) Willful misrepresentation of a material fact to the Department of State during the visa application process.

(b) *Determining whether a violation is willful.* A willful misrepresentation of a material fact or a willful failure to meet the required terms and conditions occurs when the employer, attorney, or agent knows its statement is false or that its conduct is in violation, or shows reckless disregard for the truthfulness of its representation or for whether its conduct satisfies the required conditions.

(c) *Determining whether a violation is significant.* In determining whether a violation is a significant deviation from the terms and conditions of the *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition,* the factors that the Administrator, WHD may consider include, but are not limited to, the following:

(1) Previous history of violation(s) under the H–2B program;

(2) The number of H–2B workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s); and

(5) Whether U.S. workers have been harmed by the violation.

(d) *Employer acceptance of obligations.* The provisions of this part become applicable upon the date that the employer's *Application for Temporary Employment Certification* is accepted. The employer's submission of and signature on the approved *H–2B Registration,* Appendix B of the *Application for Temporary Employment Certification,* and *H–2B Petition* constitute the employer's representation that the statements on the forms are accurate and that it knows and accepts the obligations of the program.

§ 503.20 Sanctions and remedies—general.

Whenever the Administrator, WHD determines that there has been a violation(s), as described in § 503.19, such action will be taken and such proceedings instituted as deemed appropriate, including (but not limited to) the following:

(a) Institute administrative proceedings, including for: The recovery of unpaid wages (including recovery of prohibited recruitment fees paid or impermissible deductions from pay, and recovery of wages due for improperly placing workers in areas of employment or in occupations other than those identified on the *Application for Temporary Employment Certification* and for which a prevailing wage was not obtained); the enforcement of provisions of the job order, 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part; the assessment of a civil money penalty; make whole relief for any person who has been discriminated against; reinstatement and make whole relief for any U.S. worker who has been improperly rejected for employment, laid off or displaced; or debarment for no less than 1 or no more than 5 years.

(b) The remedies referenced in paragraph (a) of this section will be sought either directly from the employer, or from its successor in interest, or from the employer's agent or attorney, as appropriate.

§ 503.21 Concurrent actions.

OFLC has primary responsibility to make all determinations regarding the issuance, denial, or revocation of a labor certification as described in § 503.1(b) and in 20 CFR part 655, Subpart A. The WHD has primary responsibility to make all determinations regarding the enforcement functions as described in § 503.1(c). The taking of any one of the actions referred to above will not be a bar to the concurrent taking of any other action authorized by 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part. OFLC and the WHD have concurrent jurisdiction to impose a debarment remedy under 20 CFR 655.73 or under § 503.24.

§ 503.22 Representation of the Secretary.

The Solicitor of Labor, through authorized representatives, will represent the Administrator, WHD and the Secretary in all administrative hearings under 8 U.S.C. 1184(c)(14) and the regulations in this part.

§ 503.23 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the Administrator, WHD for each violation that meets the standards described in § 503.19. Each such violation involving the failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by the *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition,* constitutes a separate violation. Civil money penalty amounts for such violations are determined as set forth in paragraphs (b) to (e) of this section.

(b) Upon determining that an employer has violated any provisions of § 503.16 related to wages, impermissible deductions or prohibited fees and expenses, the Administrator, WHD may assess civil money penalties that are equal to the difference between the amount that should have been paid and the amount that actually was paid to such worker(s), not to exceed $10,000 per violation.

(c) Upon determining that an employer has terminated by layoff or otherwise or has refused to employ any worker in violation of § 503.16(r), (t), or (v), within the periods described in those sections, the Administrator, WHD may assess civil money penalties that are equal to the wages that would have been earned but for the layoff or failure to hire, not to exceed $10,000 per violation. No civil money penalty will be assessed, however, if the employee refused the job opportunity, or was terminated for lawful, job-related reasons.

(d) The Administrator, WHD may assess civil money penalties in an amount not to exceed $10,000 per violation for any other violation that meets the standards described in § 503.19.

(e) In determining the amount of the civil money penalty to be assessed under paragraph (d) of this section, the Administrator, WHD will consider the type of violation committed and other relevant factors. In determining the level of penalties to be assessed, the highest penalties will be reserved for willful failures to meet any of the conditions of the *Application for Temporary Employment Certification* and *H–2B Petition* that involve harm to U.S. workers. Other factors which may be considered include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part;

(2) The number of H–2B workers, workers in corresponding employment, or improperly rejected U.S. applicants who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) Efforts made in good faith to comply with 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, and the regulations in this part;

(5) Explanation from the person charged with the violation(s);

(6) Commitment to future compliance, taking into account the public health, interest or safety; and

(7) The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

§ 503.24 Debarment.

(a) *Debarment of an employer.* The Administrator, OFLC may not issue future labor certifications under 20 CFR part 655, Subpart A to an employer or any successor in interest to that employer, subject to the time limits set forth in paragraph (c) of this section, if the Administrator, WHD finds that the employer committed a violation that meets the standards of § 503.19. Where these standards are met, debarrable violations would include but not be limited to one or more acts of commission or omission which involve:

(1) Failure to pay or provide the required wages, benefits, or working conditions to the employer's H–2B workers and/or workers in corresponding employment;

(2) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(3) Failure to comply with the employer's obligations to recruit U.S. workers;

(4) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(5) Failure to comply with one or more sanctions or remedies imposed by the Administrator, WHD for violation(s) of obligations under the job order or other H–2B obligations, or with one or more decisions or orders of the Secretary or a court under 20 CFR part 655, Subpart A or this part;

(6) Impeding an investigation of an employer under this part;

(7) Employing an H–2B worker outside the area of intended employment, in an activity/activities not listed in the job order, or outside the validity period of employment of the job order, including any approved extension thereof;

(8) A violation of the requirements of § 503.16(o) or (p);

(9) A violation of any of the provisions listed in § 503.16(r);

(10) Any other act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(11) Fraud involving the *H–2B Registration, Application for Temporary Employment Certification,* or *H–2B Petition;* or

(12) A material misrepresentation of fact during the registration or application process.

(b) *Debarment of an agent or attorney.* If the Administrator, WHD finds, under this section, that an agent or attorney committed a violation as described in paragraph (a) of this section or participated in an employer's violation, the Administrator, OFLC may not issue future labor certifications to an employer represented by such agent or attorney, subject to the time limits set forth in paragraph (c) of this section.

(c) *Period of debarment.* Debarment under this subpart may not be for less than 1 year or more than 5 years from the date of the final agency decision.

(d) *Debarment procedure.* If the Administrator, WHD makes a determination to debar an employer, attorney, or agent, the Administrator, WHD will send the party a Notice of Debarment. The notice will state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment and inform the party subject to the notice of its right to request a debarment hearing and the timeframe under which such rights must be exercised under § 503.43. If the party does not request a hearing within 30 calendar days of the date of the Notice of Debarment, the notice is the final agency action and the debarment will take effect at the end of the 30-day period. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal as provided in § 503.43(e).

(e) *Concurrent debarment jurisdiction.* OFLC and the WHD have concurrent jurisdiction debar under 20 CFR 655.73 or under this part. When considering debarment, OFLC and the WHD will coordinate their activities. A specific violation for which debarment is imposed will be cited in a single debarment proceeding. Copies of final debarment decisions will be forwarded to DHS and DOS promptly.

(f) *Debarment from other labor certification programs.* Upon debarment under this part or 20 CFR 655.73, the debarred party will be disqualified from filing any labor certification applications or labor condition applications with the Department by, or on behalf of, the debarred party for the same period of time set forth in the final debarment decision.

§ 503.25 Failure to cooperate with investigators.

(a) No person will interfere or refuse to cooperate with any employee of the Secretary who is exercising or attempting to exercise the Department's investigative or enforcement authority under 8 U.S.C. 1184(c). Federal statutes prohibiting persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 18 U.S.C. 114.

(b) Where an employer (or employer's agent or attorney) interferes or does not cooperate with an investigation concerning the employment of an H–2B worker or a worker in corresponding employment, or a U.S. worker who has been improperly rejected for employment or improperly laid off or displaced, WHD may make such information available to OFLC and may recommend that OFLC revoke the existing certification that is the basis for the employment of the H–2B workers giving rise to the investigation. In addition, WHD may take such action as appropriate where the failure to cooperate meets the standards in § 503.19, including initiating proceedings for the debarment of the employer from future certification for up to 5 years, and/or assessing civil money penalties against any person who has failed to cooperate with a WHD investigation. The taking of any one action will not bar the taking of any additional action.

§ 503.26 Civil money penalties—payment and collection.

Where a civil money penalty is assessed in a final order by the Administrator, WHD, by an ALJ, or by the ARB, the amount of the penalty must be received by the Administrator, WHD within 30 calendar days of the date of the final order. The person assessed the penalty will remit the amount ordered to the Administrator, WHD by certified check or by money order, made payable to the Wage and Hour Division, United States Department of Labor. The remittance will be delivered or mailed to the WHD Regional Office for the area in which the violations occurred.

Subpart C—Administrative Proceedings

§ 503.40 Applicability of procedures and rules.

The procedures and rules contained in this subpart prescribe the administrative appeal process that will be applied with respect to a determination to assess civil money penalties, to debar, to enforce provisions of the job order or obligations under 8 U.S.C. 1184(c), 20 CFR part 655, Subpart A, or the regulations in this part, or to the collection of monetary relief due as a result of any violation.

Procedures Related to Hearing

§ 503.41 Administrator, WHD's determination.

(a) Whenever the Administrator, WHD decides to assess a civil money penalty, to debar, or to impose other appropriate administrative remedies, including for the recovery of monetary relief, the party against which such action is taken

will be notified in writing of such determination.

(b) The Administrator, WHD's determination will be served on the party by personal service or by certified mail at the party's last known address. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail.

§ 503.42 Contents of notice of determination.

The notice of determination required by § 503.41 will:

(a) Set forth the determination of the Administrator, WHD, including:

(1) The amount of any monetary relief due; or

(2) Other appropriate administrative remedies; or

(3) The amount of any civil money penalty assessment; or

(4) Whether debarment is sought and the term; and

(5) The reason or reasons for such determination.

(b) Set forth the right to request a hearing on such determination;

(c) Inform the recipient(s) of the notice that in the absence of a timely request for a hearing, received by the Chief ALJ within 30 calendar days of the date of the determination, the determination of the Administrator, WHD will become final and not appealable;

(d) Set forth the time and method for requesting a hearing, and the related procedures for doing so, as set forth in § 503.43, and give the addresses of the Chief ALJ (with whom the request must be filed) and the representative(s) of the Solicitor of Labor (upon whom copies of the request must be served); and

(e) Where appropriate, inform the recipient(s) of the notice that the Administrator, WHD will notify OFLC and DHS of the occurrence of a violation by the employer.

§ 503.43 Request for hearing.

(a) Any party desiring review of a determination issued under § 503.41, including judicial review, must make a request for such an administrative hearing in writing to the Chief ALJ at the address stated in the notice of determination. In such a proceeding, the Administrator will be the plaintiff, and the party will be the respondent. If such a request for an administrative hearing is timely filed, the Administrator, WHD's determination will be inoperative unless and until the case is dismissed or the ALJ issues an order affirming the decision.

(b) No particular form is prescribed for any request for hearing permitted by this section. However, any such request will:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the notice of determination giving rise to such request;

(4) State the specific reason or reasons why the party believes such determination is in error;

(5) Be signed by the party making the request or by the agent or attorney of such party; and

(6) Include the address at which such party or agent or attorney desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the Chief ALJ, at the address stated in the Administrator, WHD's notice of determination, no later than 30 calendar days after the date of the determination. A party which fails to meet this 30-day deadline for requesting a hearing may thereafter participate in the proceedings only by consent of the ALJ.

(d) The request may be filed in person, by facsimile transmission, by certified or regular mail, or by courier service within the time set forth in paragraph (c) of this section. For the requesting party's protection, if the request is by mail, it should be by certified mail. If the request is by facsimile transmission, the original of the request, signed by the party or its attorney or agent, must be filed within 25 days.

(e) The determination will take effect on the start date identified in the written notice of determination, unless an administrative appeal is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings.

(f) Copies of the request for a hearing will be sent by the party or attorney or agent to the WHD official who issued the notice of determination on behalf of the Administrator, WHD, and to the representative(s) of the Solicitor of Labor identified in the notice of determination.

Rules of Practice

§ 503.44 General.

(a) Except as specifically provided in the regulations in this part and to the extent they do not conflict with the provisions of this part, the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges established by the Secretary at 29 CFR part 18 will apply to administrative proceedings described in this part.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and subpart B of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 CFR part 18, Subpart B) will not apply, but principles designed to ensure production of relevant and probative evidence will guide the admission of evidence. The ALJ may exclude evidence which is immaterial, irrelevant, or unduly repetitive.

§ 503.45 Service of pleadings.

(a) Under this part, a party may serve any pleading or document by regular mail. Service on a party is complete upon mailing to the last known address. No additional time for filing or response is authorized where service is by mail. In the interest of expeditious proceedings, the ALJ may direct the parties to serve pleadings or documents by a method other than regular mail.

(b) Two copies of all pleadings and other documents in any ALJ proceeding must be served on the attorneys for the Administrator, WHD. One copy must be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–2716, Washington, DC 20210, and one copy must be served on the attorney representing the Administrator in the proceeding.

(c) Time will be computed beginning with the day following service and includes the last day of the period unless it is a Saturday, Sunday, or Federally-observed holiday, in which case the time period includes the next business day.

§ 503.46 Commencement of proceeding.

Each administrative proceeding permitted under 8 U.S.C. 1184(c)(14) and the regulations in this part will be commenced upon receipt of a timely request for hearing filed in accordance with § 503.43.

§ 503.47 Caption of proceeding.

(a) Each administrative proceeding instituted under 8 U.S.C. 1184(c)(14) and the regulations in this part will be captioned in the name of the person requesting such hearing, and will be styled as follows:

In the Matter of ____, Respondent.

(b) For the purposes of such administrative proceedings the Administrator, WHD will be identified as plaintiff and the person requesting such hearing will be named as respondent.

§ 503.48 Conduct of proceeding.

(a) Upon receipt of a timely request for a hearing filed under and in accordance with § 503.43, the Chief ALJ will promptly appoint an ALJ to hear the case.

(b) The ALJ will notify all parties of the date, time and place of the hearing. Parties will be given at least 30 calendar days notice of such hearing.

(c) The ALJ may prescribe a schedule by which the parties are permitted to file a prehearing brief or other written statement of fact or law. Any such brief or statement must be served upon each other party. Post-hearing briefs will not be permitted except at the request of the ALJ. When permitted, any such brief must be limited to the issue or issues specified by the ALJ, will be due within the time prescribed by the ALJ, and must be served on each other party.

Procedures Before Administrative Law Judge

§ 503.49 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but before the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof will be at the discretion of the ALJ, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof will also provide:

(1) That the order will have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based will consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the ALJ; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their attorney or agent may:

(1) Submit the proposed agreement for consideration by the ALJ; or

(2) Inform the ALJ that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefore, the ALJ, within 30 days thereafter, will, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

Post-Hearing Procedures

§ 503.50 Decision and order of Administrative Law Judge.

(a) The ALJ will prepare, within 60 days after completion of the hearing and closing of the record, a decision on the issues referred by the Administrator, WHD.

(b) The decision of the ALJ will include a statement of the findings and conclusions, with reasons and basis therefore, upon each material issue presented on the record. The decision will also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the Administrator, WHD. The reason or reasons for such order will be stated in the decision.

(c) In the event that the Administrator, WHD assesses back wages for wage violation(s) of § 503.16 based upon a PWD obtained by the Administrator from OFLC during the investigation and the ALJ determines that the Administrator's request was not warranted, the ALJ will remand the matter to the Administrator for further proceedings on the Administrator's determination. If there is no such determination and remand by the ALJ, the ALJ will accept as final and accurate the wage determination obtained from OFLC or, in the event the party filed a timely appeal under 20 CFR 655.13 the final wage determination resulting from that process. Under no circumstances will the ALJ determine the validity of the wage determination or require submission into evidence or disclosure of source data or the names of establishments contacted in developing the survey which is the basis for the PWD.

(d) The decision will be served on all parties.

(e) The decision concerning civil money penalties, debarment, monetary relief, and/or other administrative remedies, when served by the ALJ will constitute the final agency order unless the ARB, as provided for in § 503.51, determines to review the decision.

Review of Administrative Law Judge's Decision

§ 503.51 Procedures for initiating and undertaking review.

(a) A respondent, the WHD, or any other party wishing review, including judicial review, of the decision of an ALJ will, within 30 days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition will be served on all parties and on the ALJ.

(b) No particular form is prescribed for any petition for the ARB's review permitted by this part. However, any such petition will:

(1) Be dated;

(2) Be typewritten or legibly written;

(3) Specify the issue or issues stated in the ALJ decision and order giving rise to such petition;

(4) State the specific reason or reasons why the party petitioning for review believes such decision and order are in error;

(5) Be signed by the party filing the petition or by an authorized representative of such party;

(6) Include the address at which such party or authorized representative desires to receive further communications relating thereto; and

(7) Include as an attachment the ALJ's decision and order, and any other record documents which would assist the ARB in determining whether review is warranted.

(c) If the ARB does not issue a notice accepting a petition for review of the decision within 30 days after receipt of a timely filing of the petition, or within 30 days of the date of the decision if no petition has been received, the decision of the ALJ will be deemed the final agency action.

(d) Whenever the ARB, either on the ARB's own motion or by acceptance of a party's petition, determines to review the decision of an ALJ, a notice of the same will be served upon the ALJ and upon all parties to the proceeding.

§ 503.52 Responsibility of the Office of Administrative Law Judges (OALJ).

Upon receipt of the ARB's notice under § 503.51, the OALJ will promptly forward a copy of the complete hearing record to the ARB.

§ 503.53 Additional information, if required.

Where the ARB has determined to review such decision and order, the ARB will notify the parties of:

(a) The issue or issues raised;

(b) The form in which submissions will be made (*i.e.,* briefs, oral argument); and

(c) The time within which such presentation will be submitted.

§ 503.54 Submission of documents to the Administrative Review Board.

All documents submitted to the ARB will be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue NW., Room S–5220, Washington, DC 20210. An original and two copies of all documents must be filed. Documents are not deemed filed with the ARB until actually received by the ARB. All documents, including documents filed by mail, must be received by the ARB either on or before the due date. Copies of all documents filed with the ARB must be served upon all other parties involved in the proceeding.

§ 503.55 Final decision of the Administrative Review Board.

The ARB's final decision will be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ.

Record

§ 503.56 Retention of official record.

The official record of every completed administrative hearing provided by the regulations in this part will be maintained and filed under the custody and control of the Chief ALJ, or, where the case has been the subject of administrative review, the ARB.

Signed in Washington, this 6th day of February 2012.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

Nancy Leppink,

Deputy Administrator, Wage and Hour Division.

[FR Doc. 2012–3058 Filed 2–10–12; 8:45 am]

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Part III

Department of Defense

Department of the Army, Corps of Engineers

Reissuance of Nationwide Permits; Notice

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

RIN 0710–AA71

Reissuance of Nationwide Permits

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final notice.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is reissuing 48 of the 49 existing nationwide permits (NWPs), general conditions, and definitions, with some modifications. The Corps is also issuing two new NWPs, three new general conditions, and three new definitions. The effective date for the new and reissued NWPs will be March 19, 2012. These NWPs will expire on March 18, 2017. The NWPs will protect the aquatic environment and the public interest while effectively authorizing activities that have minimal individual and cumulative adverse effects on the aquatic environment.

DATES: The NWPs and general conditions will become effective on March 19, 2012.

ADDRESSES: U.S. Army Corps of Engineers, Attn: CECW–CO–R, 441 G Street NW., Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson at 202–761–4922 or by email at *david.b.olson@usace.army.mil* or access the U.S. Army Corps of Engineers Regulatory Home Page at *http://www.usace.army.mil/CECW/Pages/cecwo_reg.aspx*.

SUPPLEMENTARY INFORMATION:

Executive Summary

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize certain activities that require Department of the Army permits under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. The purpose of this regulatory action is to reissue 48 existing NWPs and issue two new NWPs. In addition, three new general conditions and three new definitions will be issued. The NWPs may be issued for a period of no more than five years. Therefore, the Corps must reissue the NWPs every five years to continue to authorize these activities. These 50 NWPs will go into effect on March 19, 2012.

The NWPs authorize activities that have minimal individual and cumulative adverse effects on the aquatic environment. The NWPs authorize a variety of activities, such as aids to navigation, utility lines, bank stabilization activities, road crossings, stream and wetland restoration activities, residential developments, mining activities, commercial shellfish aquaculture activities, and agricultural activities. Some NWP activities may proceed without notifying the Corps, as long as those activities satisfy the terms and conditions of the NWPs. Other NWP activities cannot proceed until the project proponent has submitted a pre-construction notification to the Corps, and for most NWPs the Corps has 45 days to notify the project proponent whether the activity is authorized by NWP.

Background

In the February 16, 2011, issue of the **Federal Register** (76 FR 9174), the U.S. Army Corps of Engineers (Corps) published its proposal to reissue 48 existing nationwide permits (NWPs), issue two new NWPs, and not reissue one NWP. The Corps also proposed to reissue its general conditions and add two new general conditions.

After evaluating the comments received in response to the February 16, 2011, proposal, we have made a number of changes to the NWPs, general conditions, and definitions to further clarify the permits, general conditions, and definitions, facilitate their administration, and strengthen environmental protection. Examples of improved environmental protection include: imposing limits on surface coal mining activities authorized by NWP 21; modifying NWP 27 to authorize additional aquatic resource restoration and enhancement activities such as the rehabilitation and enhancement of tidal streams, wetlands, and open waters; and providing flexibility in designing crossings of streams and other waterbodies so that movements of aquatic species can be maintained after taking into account the characteristics of the stream or waterbody and the surrounding landscape (see general condition 2, aquatic life movements). These changes are discussed in the preamble.

The Corps is reissuing 48 existing NWPs, issuing two new NWPs, reissuing 28 existing general conditions, and issuing three new general conditions. The Corps is also reissuing all of the NWP definitions, and adding three new definitions. The Corps is also splitting one existing definition into two definitions as they relate to single and complete projects. The effective date for these NWPs, general conditions, and definitions is March 19, 2012. These NWPs, general conditions, and definitions expire on March 18, 2017.

Grandfather Provision for Expiring NWPs

In accordance with 33 CFR part 330.6(b), activities authorized by the current NWPs issued on March 12, 2007, that have commenced or are under contract to commence by March 18, 2012, will have until March 18, 2013, to complete the activity under the terms and conditions of the current NWPs. Nationwide permit 21 activities that were authorized by the 2007 NWP 21 may be reauthorized without applying the new limits imposed on NWP 21, provided the permittee submits a written request for reauthorization to the district engineer by February 1, 2013, and the district engineer determines that the on-going surface coal mining activity will result in minimal adverse effects on the aquatic environment and notifies the permittee in writing that the activity is authorized under the 2012 NWP 21.

Clean Water Act Section 401 Water Quality Certifications (WQC) and Coastal Zone Management Act (CZMA) Consistency Determinations

The NWPs issued today will become effective on March 19, 2012. This **Federal Register** notice begins the 60-day Clean Water Act Section 401 water quality certification (WQC) and the 90-day Coastal Zone Management Act (CZMA) consistency determination processes.

After the 60-day period, the latest version of any written position taken by a state, Indian tribe, or EPA on its WQC for any of the NWPs will be accepted as the state's, Indian tribe's, or EPA's final position on those NWPs. If the state, Indian tribe, or EPA takes no action by April 23, 2012, WQC will be considered waived for those NWPs.

After the 90-day period, the latest version of any written position taken by a state on its CZMA consistency determination for any of the NWPs will be accepted as the state's final position on those NWPs. If the state takes no action by May 21, 2012, CZMA concurrence will be presumed for those NWPs.

While the states, Indian Tribes, and EPA complete their WQC processes and the states complete their CZMA consistency determination processes, the use of an NWP to authorize a discharge into waters of the United States is contingent upon obtaining individual water quality certification or a case-specific WQC waiver. Likewise, the use of an NWP to authorize an activity within a state's coastal zone, or outside a state's coastal zone that will affect land or water uses or natural

resources of that state's coastal zone, is contingent upon obtaining an individual CZMA consistency determination, or a case-specific presumption of CZMA concurrence. We are taking this approach to reduce the hardships on the regulated public that would be caused by a substantial gap in NWP coverage if we were to wait until the WQC 60-day period and the CZMA 90-day period ended before these NWPs would become effective.

Discussion of Public Comments

I. Overview

In response to the February 16, 2011, **Federal Register** notice, we received more than 26,600 comment letters, of which approximately 26,300 were form letters pertaining to NWP 21. The non-form letters we received contained a few thousand comments on various components of the NWPs and NWP Program implementation. We reviewed and fully considered all comments received in response to the proposed rule.

General Comments

Many commenters expressed support for the proposed permits. Some commenters stated that the changes are a step forward in improving consistency in the NWP program. Many commenters endorsed the fundamentals of the NWP program, stating that the permits could have a beneficial impact to conducting infrastructure and mining projects important to the country. Some stated that permitting delays and an increase in individual permits would result without the NWP program, creating a backlog for the Corps and resource agencies, while placing a burden on regulated industries. Another commenter urged the Corps to increase flexibility to allow for project modifications when needed due to unanticipated challenges encountered during construction. Some commenters stated that further streamlining is needed for increased efficiency and reducing administrative burden while maintaining a high level of environmental protection. One commenter said the Corps should maximize rather than limit use of the NWP program in light of the current economic situation, Federal budget cuts, and presidential efforts to streamline regulations. Another commenter was pleased to see the Corps hold the line against further restrictions on the NWP program. Many commenters emphasized that a timely, efficient, and consistent permitting system is critical to the nation's economy.

The NWP Program provides flexibility to readily authorize project modifications if the NWP activity cannot be constructed in accordance with the approved plans, as long as any modifications would still meet the terms and conditions of applicable NWP(s) and qualify for NWP authorization. In cases where the district engineer has issued an NWP verification letter, the permittee should contact the district as soon as he or she finds that the activity cannot be constructed in accordance with the approved plans. The district engineer will then determine if authorization by NWP is still appropriate. If it is not, then the permittee will be instructed on the most appropriate mechanism for permitting the modified activity.

We believe the final permits issued today maintain a proper balance between efficiently authorizing activities with minimal individual and cumulative adverse environmental effects and protecting the aquatic environment. The NWPs provide a streamlined authorization process that is consistent with the principles of Executive Order 13563, Improving Regulation and Regulatory Review.

In contrast, many other commenters expressed general opposition to the proposal, and said that the proposed rule weakens protection for waters and should be withdrawn. Some commenters said that the proposal threatens to undermine the important and statutorily mandated function of the NWPs and the Clean Water Act, and is contrary to Congressional intent. One commenter expressed opposition to the issuance of the NWPs, stating that they will result in an increase in the number of activities that can be permitted and a reduction in the opportunity for public review and comment. Many of these commenters objected to the goals of ''streamlining'' or ''improving regulatory efficiency,'' and they said that the focus of the NWPs should be on compliance with the Clean Water Act. Another commenter was concerned that the proposed NWPs do not support the ''no overall net loss'' goal for wetlands, and that the Corps analysis predicts that the NWPs will result in a decrease of waters of the United States, including wetlands.

As discussed below, those NWPs that authorize discharges of dredged or fill material into waters of the United States comply with the Clean Water Act and the environmental criteria provided in its implementing regulations, the 404(b)(1) Guidelines at 40 CFR part 230. The NWPs authorize minor activities that result in minimal adverse effects on the aquatic environment that would likely generate little, if any, public comment if they were evaluated through the standard permit process with a full public notice. Through the adoption of Section 404(e) of the Clean Water Act in 1977, Congress approved the use of general permits as an important tool to keep the Corps Regulatory Program manageable from a resources and manpower perspective, while protecting the aquatic environment. The Corps first adopted the concept of general permits in its final rule published on July 25, 1975 (see 40 FR 31321). The NWP program also continues to support the national goal of ''no overall net loss'' for wetlands, and wetlands compensatory mitigation will be required when appropriate and practicable to offset losses of wetland area and functions. The ''no overall net loss'' goal applies only to wetlands, and for other waters of the United States the goal is to avoid and minimize losses of those waters and to provide compensatory mitigation to offset those losses if it is appropriate and practicable to do so. Stream mitigation is becoming more commonplace as the science and practical applications become further developed.

Some commenters stated that the NWPs should require consideration of less damaging alternatives or demonstrate that NWP activities result in minimal adverse environmental effects. One commenter said that there is not sufficient emphasis on avoidance of impacts to waters of the United States. Another commenter objected to using NWPs to expand existing projects, stating that it discourages avoidance and minimization.

Those NWPs that authorize discharges of dredged or fill material into waters of the United States comply with the provisions of the 404(b)(1) Guidelines that address the issuance of general permits (see 40 CFR 230.7). A decision document is prepared for each NWP to provide information to show that the NWP will authorize only those activities that result in minimal adverse effects on the aquatic environment and other public interest review factors. Supplemental decision documents are prepared at a regional level to support the decision on whether to add regional conditions to an NWP or suspend or revoke the use of that NWP in a specific waterbody, category of waters, or geographic area to ensure that only activities that result in minimal adverse effects on the aquatic environment and other public interest review factors are authorized by the NWP. In response to a pre-construction notification or a request to verify that an activity is authorized by NWP, a district engineer

may add activity-specific conditions to the NWP authorization or suspend or revoke the NWP authorization if he or she determines that the proposed activity would result in more than minimal adverse effects.

Paragraph (a) of general condition 23, mitigation, requires permittees to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site. The use of NWPs to authorize the expansion of existing projects does not discourage avoidance and minimization because this general condition applies equally to all NWP authorizations, including those that authorize expansion of existing projects. The consideration of practicable alternatives in accordance with 40 CFR 230.10(a) does not apply directly to discharges of dredged or fill material into waters of the United States authorized by general permits (see 40 CFR 230.7(b)(1)).

Compliance With Section 404(e) of the Clean Water Act

Several commenters said that the proposed NWPs are contrary to the Clean Water Act and violate Section 404(e) of that Act. Many commenters asserted that the NWPs result in more than minimal adverse effects on the aquatic environment, individually and cumulatively. These commenters stated that the NWPs do not protect vitally important functions of wetlands and streams, and that the proposal does not satisfy the Corps legal obligation to limit general permits to activities that cause minimal adverse impacts, individually and cumulatively. They also said the Corps lacks the data to show that the effects of the authorized activities are in fact minimal. Some commenters expressed concern regarding the potential overuse of these permits without the inclusion of acreage, linear feet, watershed or regional limitations. Another commenter said that the NWPs fail to describe similarly covered activities in precise terms.

The Corps disagrees with these comments. The NWPs comply with the Clean Water Act and the environmental criteria provided in its implementing regulations, the 404(b)(1) Guidelines at 40 CFR part 230. Section 404(e) of the Clean Water Act states that the Chief of Engineers may issue, after publishing a notice and providing an opportunity a public hearing, general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States, if it is determined that the activities in each category are similar in nature and result in minimal individual and cumulative adverse environmental effects. The issuance of the NWPs is consistent with these requirements and therefore complies with the intent of the Clean Water Act. As discussed above, national decision documents and supplemental decision documents are prepared to demonstrate that an NWP will authorize only those activities that have minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors. The decision documents use available data and other information to support their conclusions.

Where appropriate and necessary, certain NWPs have acreage, linear foot, or cubic yard limits, or combinations of those limits, to ensure that authorized activities result in minimal individual and cumulative adverse effects on the aquatic environment. Specifically, NWPs have acreage limitations, NWPs have linear foot limitations, and NWPs have cubic yard limitations. Many other NWPs have qualitative limitations in the form of specific activities or situations that are not authorized, or for which a PCN is required to allow the Corps to ensure on a case-by-case basis that the adverse effects on the aquatic environment of the project are truly minimal. A few NWPs have no explicit limits, but this is limited to those that authorize activities that provide benefits to the aquatic environment (e.g., NWP 27, which authorizes aquatic habitat restoration, establishment, and enhancement activities, and NWP 41, which authorizes activities for reshaping drainage ditches to improve water quality), or those for which the nature of the authorized activity inherently ensures that effects will be minimal (e.g., NWP 10, which authorizes non-commercial, single boat, mooring buoys). Division engineers may impose regional conditions on the NWPs to add acreage, linear foot, or cubic yard limits, or reduce those limits when the NWPs have specified limits in their terms and conditions, to ensure those NWPs authorize only those activities that result in minimal adverse effects on the aquatic environment.

The NWPs comply with the requirement in Section 404(e) of the Clean Water Act to authorize categories of activities that are similar in nature. Each NWP authorizes a specific category of activities, which may be broadly defined for some NWPs to keep the NWP program manageable. The Act does not require that activities authorized by an NWP be identical, only that they be similar in nature. The permits meet this requirement and are consistent with the Corps' longstanding practice regarding the appropriate level of detail with which to specify what constitutes activities that are similar in nature.

Compliance With the Section 404(b)(1) Guidelines

Several commenters said that the NWPs do not comply with the 404(b)(1) Guidelines. One commenter said that the Corps has no factual basis to conclude that significant degradation of waters of the United States has not occurred, which is required to be in compliance with the Guidelines. This commenter recommended withdrawing the NWPs or replacing them with state program general permits. One commenter stated that the NWPs do not comply with the 404(b)(1) Guidelines because they authorize discharges into special aquatic sites.

When we issue the NWPs, we fully comply with the requirements of the 404(b)(1) Guidelines at 40 CFR 230.7, which govern the issuance of general permits under Section 404 of the Clean Water Act. For each NWP that authorizes discharges of dredged or fill material into waters of the United States, the decision document contains a 404(b)(1) Guidelines analysis. Section 230.7(b) of the 404(b)(1) Guidelines requires a ''written evaluation of the potential individual and cumulative impacts of the categories of activities to be regulated under the general permit.'' Since the required evaluation must be completed before the NWP is issued, the analysis is predictive in nature. The estimates of potential individual and cumulative impacts, as well as the projected compensatory mitigation that will be required, are based on the best available data from the Corps district offices, including the past use of NWPs. In our decision documents, we also used readily available national data on the status of wetlands and other aquatic habitats in the United States, and the foreseeable impacts of the NWPs on those waters.

The process for issuing state programmatic general permits is similar to the process for issuing NWPs, including the use of information to support decisions. The 404(b)(1) Guidelines analysis for state programmatic general permits is also predictive. Given those similarities, compliance with the 404(b)(1) Guidelines is not different for state programmatic general permits versus NWPs.

Despite the fact that many NWPs authorize discharges of dredged or fill material into special aquatic sites, they are still in compliance with the 404(b)(1) Guidelines. Section 230.7 of the 404(b)(1) Guidelines does not

prohibit the use of NWPs to authorize discharges of dredged or fill material into special aquatic sites. Many NWPs contain additional provisions to protect special aquatic sites. For example, several NWPs specifically require pre-construction notification for proposed discharges of dredged or fill material into special aquatic sites (e.g., NWP 13 for bank stabilization activities, NWP 14 for linear transportation projects, NWP 18 for minor discharges). As another example, NWP 19 for minor dredging activities, does not authorize dredging in coral reefs or dredging activities that cause siltation that degrades coral reefs. General condition 22, designated critical resource waters, applies the prohibitions in paragraph (a) and the notification requirement in paragraph (b) to wetlands (a special aquatic site) adjacent to critical resource waters.

Compliance With the National Environmental Policy Act

Three commenters stated that the NWPs do not satisfy the requirements of the National Environmental Policy Act (NEPA), as they do not adequately consider indirect and cumulative effects on global warming. One commenter said that degradation in air quality from burning coal from mining projects must be addressed in an environmental impact statement, and that the Corps has to address the implications of climate change on aquatic ecosystems. Another commenter stated that the scientific consensus on the impacts of climate change has to be considered in the renewal of the NWPs. One commenter said the NWPs should take into account ongoing federal efforts to address the effects of climate change through federal programs. These federal programs address mitigation of climate change (e.g., through reduction of greenhouse gas emissions) and adaptation to climate change (e.g., by adjustments made to reduce vulnerability resulting from changing climate).

Although the Council on Environmental Quality has made available draft guidance on the consideration of the effects of climate change and greenhouse gas emissions, and sought public comment on that draft guidance, they have not issued any final guidance specifically on how to consider, in NEPA documents, the indirect and cumulative effects Federal agency actions have on climate change. In the Council on Environmental Quality's October 2011 Progress Report of the Interagency Climate Change Adaptation Task Force entitled ''Federal Actions for a Climate Resilient Nation'' adaptation is defined as ''adjustment in natural or human systems to a new or changing environment that exploits beneficial opportunities or moderates negative effects.''

A major cause of climate change is emissions of greenhouse gases. Activities authorized by NWPs have little direct, indirect, or cumulative effects on climate change and the emission of greenhouse gases. There may be brief emissions of greenhouse gases during the construction of activities authorized by NWP, specifically discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Any greenhouse gas emissions that occur other than as a result of the discharge of dredged or fill materials are outside of the Corps NEPA scope of analysis because the Corps does not have the legal authority to control those emissions. The degradation of air quality caused by burning coal is not the result of a discharge of dredged or fill material and therefore is outside the Corps legal authority. The issuance of a Corps permit is designed to ensure that any discharges of dredged or fill material into waters of the United States associated with such mining comply with the Clean Water Act. A Corps permit does not authorize coal mining per se, and therefore the effects of coal mining that do not result from a discharge of dredge or fill material to waters of the United States generally are beyond the Corps NEPA scope of analysis.

The effects of climate change on aquatic ecosystems are a much broader issue than the effects on the aquatic environment caused by activities authorized by NWPs. The effects of climate change on hydrology and extreme events are difficult to project. The effects will vary by location and the sensitivity of resources to changes in hydrology and extreme events. The timeframe used to project hydrologic changes will also affect the evaluation. For activities with minimal adverse effects on the aquatic environment that are eligible for authorization by the NWPs, the Corps believes that any necessary adaptation to climate change is appropriately addressed through land use planning and zoning, which is the primary responsibility of state, tribal, and local governments. Activities authorized by NWPs may be part of state, tribal, or local adaptation efforts to mitigate the effects of climate change.

On October 1, 2011, the Corps issued updated guidance on sea level change considerations for Civil Works Program (Engineer Circular 1165–2–211). The current Engineer Circular applies to Corps Civil Works activities, but not to the Regulatory Program. As stated on page 25 of its ''Climate Change Adaptation Plan and Report 2011'' (available at: *http://www.corpsclimate.us/adaptationpolicy.cfm*), the Corps expects to make larger changes in the next update of the Engineer Circular, ''and the regulatory program will be added following appropriate consultation.''

Compliance With the Endangered Species Act

One commenter acknowledged the Corps 2007 efforts to pursue programmatic consultation for the NWP program with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to ensure compliance with the Endangered Species Act (ESA), stating that failure to complete consultation violates the ESA, as well as Section 404(e) of the Clean Water Act. Two commenters stated that the Corps has a requirement to complete these consultations prior to the issuance of the NWPs.

We have reinitiated programmatic Section 7 Endangered Species Act consultation for the NWPs. If this consultation is not completed prior to the effective date of these NWPs, district engineers will consult, as necessary on a case-by-case basis with the U.S. Fish and Wildlife Service and National Marine Fisheries Service in accordance with general condition 18, endangered species. Division engineers may also impose regional conditions on any of the NWPs to facilitate compliance with the requirements of the Endangered Species Act.

Compliance With Section 304(d) of the National Marine Sanctuaries Act

One commenter stated that the proposed NWPs must comply with Section 304(d) of the National Marine Sanctuaries Act (NMSA). Section 304(d)(1))(A) of the NMSA states that ''Federal agency actions internal or external to a national marine sanctuary, including private activities authorized by licenses, leases, or permits, that are likely to destroy, cause the loss of, or injure any sanctuary resource are subject to consultation with the Secretary.'' The regulations for implementing section 304(d) are found at 15 CFR 922.187, and those regulations state that the Federal agency consultation should be conducted with the Director of the marine sanctuary. The consultation may be conducted with Endangered Species Act section 7 consultation.

District engineers that have NOAA-designated marine sanctuaries within their geographic area of responsibility should consult with the Director of the marine sanctuary to determine which NWP activities require activity-specific consultation under Section 304(d) of the NMSA. Regional conditions should be adopted where necessary to ensure compliance with the requirements of section 304(d).

New Nationwide Permits

We received several suggestions for the establishment of new NWPs for various activities. Two commenters suggested developing an NWP to authorize activities associated with linear gas facility infrastructure based on the Federal Energy Regulatory Commission's (FERC) blanket certification program that would allow the industry to undertake routine activities without the need to obtain a case-specific authorization from FERC for each project. One commenter recommended issuing an NWP to authorize activities associated with controlling nuisance and exotic plant species and another NWP to authorize activities for innovative mitigation proposals. One commenter said that an NWP should be developed to authorize the beneficial reuse of dredged material, for up to 10,000 cubic yards of material. Another commenter recommended adding an NWP to authorize discharges of dredged or fill material to raise dam elevations to increase pool elevations of public water supply reservoirs to increase potable water supplies and wetlands.

We believe that existing NWPs such as NWPs 12, 3, and 39 are sufficient to provide general permit authorization for gas utility lines and associated infrastructure. Discharges of dredged or fill material into waters of the United States or work in navigable waters of the United States associated with the removal of nuisance or exotic plant species may be authorized by NWP 27, aquatic habitat restoration, establishment, and enhancement activities. Innovative mitigation proposals may also be authorized by NWP 27, as long as those activities result in net increases in aquatic resource functions and services and satisfy the other terms and conditions of that NWP. We believe that the beneficial reuse of dredged material, especially at such large quantities, is more appropriately evaluated through the individual permit process, to more thoroughly consider effects on existing aquatic resource functions already being provided in the waters where the reused dredged material might be placed.

Waivers of Certain NWP Limits

We proposed to modify the language concerning the use of waivers in NWPs 13, 29, 36, 39, 40, 42, and 43 by clarifying that a waiver may be granted only after the district engineer makes a written determination concluding that the discharge will result in minimal adverse effects and sets forth the basis for that determination. We also proposed to apply the modified waiver language to NWPs 21, 44, and 50, as well as to the two proposed new NWPs. Some commenters supported the proposed modifications.

Many commenters said the proposed changes would allow district engineers too much discretion, and there should be no waivers of NWP limits. One commenter stated there was not a need for waivers because many of the NWPs already require pre-construction notification and the changes make the NWPs more difficult to obtain. The commenter said the waivers create an additional paperwork burden and provide no environmental benefits. Many commenters objected to the proposed waivers, stating that they imply that ephemeral and intermittent streams are considered lower in their function and value to the aquatic environment and are provided less protection than perennial streams. These commenters discussed the importance of ephemeral and intermittent streams to overall watershed integrity and to water quality and stated there is no scientific evidence to support the position that the use of waivers will result in only minimal impacts. One commenter said that before a waiver is issued, there should be analysis of cumulative effects to the watershed. Several commenters stated that the use of waivers in states with arid and semi-arid ecosystems does not properly take into account the importance of headwater streams in these ecosystems and could result in more than minimal individual and cumulative effects.

The basic requirement for general permits, including NWPs, is that they may only authorize activities that result in minimal individual and cumulative adverse effects on the aquatic environment. Section 404(e) of the Clean Water Act and the regulations relevant to the issuance of the NWPs (e.g., 33 CFR part 330 and 40 CFR 230.7) do not mandate a single approach to satisfying that basic requirement. The terms and conditions of the NWPs, including acreage, linear foot, and cubic yard limits and allowing the use of certain NWPs in specific types of waters, are intended to limit NWPs activities so that they do not result in more than minimal adverse effects on the aquatic environment. Division engineers have the authority to impose regional conditions on NWPs to restrict or prohibit their use in certain waters or other geographic areas. Another important tool is pre-construction notification, which provides for district engineers to review proposed NWP activities to ensure that they will result in minimal adverse effects. In response to a pre-construction notification, a district engineer may add activity-specific conditions to the NWP authorization to further minimize adverse effects to the aquatic environment. For those NWPs that allow district engineers review pre-construction notifications and issue written waivers of certain limits, such as the 300 linear foot limit for the loss of intermittent and ephemeral stream bed, the NWP activity must still satisfy the statutory and regulatory requirements for general permits. The waiver process does not make the NWP process more difficult. Instead, it provides an important tool for districts to efficiently authorize activities with minimal adverse effects on the aquatic environment after making a written determination that the activity satisfies the NWP requirements.

We recognize the importance of intermittent and ephemeral streams and the waiver process for certain NWPs requires district engineers to make activity-specific evaluations of the intermittent or ephemeral streams proposed to be filled or excavated before deciding whether to waive the 300 linear foot limit. To issue a waiver, the district engineer must make, and document, a minimal adverse effects determination, which as discussed above, is consistent with the statutory and regulatory requirements for general permits. As part of the analysis, the district engineer must consider the individual and cumulative adverse effects on the aquatic environment on a watershed basis, or for another appropriate geographic area, such as an ecoregion. For those activities in arid and semi-arid regions, district engineers will use local criteria as well as their knowledge of arid and semi-arid ecosystems to make decisions on pre-construction notifications for proposed activities that might be eligible for waivers. The basis for any waiver, including appropriate consideration of individual and cumulative effects, will be documented in the district engineer's written determination.

Several commenters noted concern with the 45-day pre-construction notification review period to provide a

decision whether to grant or deny the waiver. One commenter noted the applicant can proceed without authorization if the Corps fails to respond to a waiver request within the 45 day time limit. Several commenters expressed concern with the additional time and the expense that could be incurred by the applicant who must wait for the waiver decision and written determination.

We believe that the 45-day pre-construction notification review period is sufficient for district engineers to make their written determinations on whether to issue waivers of the applicable limits for certain NWPs. The text of the NWPs that allow waivers of certain limits clearly states that the waivers must be made by the district engineer in writing. In addition, paragraph (a)(2) of general condition 31, pre-construction notification, says that if a proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin that activity until the district engineer issues the waiver. The 45-day pre-construction notification review period still applies to pre-construction notifications that involve requests to waive specific limits of an NWP, but the project proponent may not proceed with the NWP activity if a written waiver is needed and the district engineer did not provide a written waiver by the time the 45-day review period ends. The Corps will make every effort to act on waiver requests within the 45-day review period. If a prospective permittee is concerned that a written waiver will not be issued within the 45-day pre-construction notification review period, then he or she has the option of modifying the proposed activity so that it does not exceed any specified limit of the applicable NWP and does not require a written waiver.

Many commenters said that specific criteria should be applied to the waiver process to ensure proposed activities result in minimal individual or cumulative adverse effects on the aquatic environment. One commenter stated that the waivers provide little incentive to minimize impacts. Another commenter said that water quality certification cannot be issued for NWPs that have limits that can be waived by district engineers because the state cannot certify that those activities meet state water quality standards. One commenter said that when waivers are issued by district engineers, the district engineer must include a fact-specific basis to support his or her finding.

The criteria that are to be applied to requested waivers of specified limits for certain NWPs are the same general criteria that are to be used to make any minimal adverse effects determination for the NWPs. Criteria that are to be used to make minimal adverse effects determinations are provided in paragraph (1) of Section D, District Engineer's Decision. The waivers still provide incentives to minimize impacts because the NWP authorization threshold (i.e., activities must result in minimal individual and cumulative adverse effects on the aquatic environment) is lower than the authorization threshold for individual permits (e.g., the proposed activity is not contrary to the public interest and, if it involves discharges of dredged or fill material into waters of the United States, it complies with the 404(b)(1) Guidelines). In other words, a waiver cannot be granted if the activity does not meet the minimal effects threshold, and applicant cannot proceed without the Corps' written determination. Applicants who submit waiver requests run the risk that the waiver will be denied, and valuable time will be lost in obtaining Department of the Army authorization. Thus, it is in the applicant's interest to modify the proposed activity if possible to avoid exceeding a threshold that requires a waiver, and especially to avoid submitting waiver requests for projects that will in fact have more than minimal adverse effects. States can issue water quality certifications for NWPs based on the specified acreage, linear foot, or cubic yard limits, and require individual water quality certifications for losses of waters of the United States that exceed the specified limits and must be waived in writing by district engineers. The written waiver determinations prepared by the district engineer have to be activity-specific, and explain the factual basis of the waiver.

Several commenters said that the additional information required for a request for a waiver and the requirement to use of a functional assessment method that is available and practicable would impose a significant documentation obligation on Corps staff.

The NWPs do not impose additional information requirements for requests for waivers of specific limits of NWPs. In addition, there is no requirement to use functional assessments to make decisions on waiver requests. The sentence in paragraph (1) of Section D, District Engineer's Decision, on the use of functional assessments to make minimal effects determinations, states that those methods ''may'' be used if they are available and practicable to use. However, the Corps does agree that there must be a factual basis for the waiver (which may entail the use of a functional assessment methodology, among other possible approaches) and documenting this does impose an additional obligation on the Corps. Applicants should provide the district engineer as much factual information as possible to support the waiver request and facilitate the district engineer's determination.

Several commenters supported the proposed changes requiring agency coordination and a written decision. Several commenters said that all appropriate state and Federal resource agencies should be provided an opportunity to comment on requests for waivers. One commenter stated there is no need for additional agency coordination unless specific resource issues are identified, such as compliance with the Endangered Species Act or the National Historic Preservation Act.

We have modified the proposed provision requiring agency coordination for pre-construction notifications involving losses of greater than 1,000 linear feet of intermittent and ephemeral stream bed, to require agency coordination for all pre-construction notifications requesting a waiver of the 300 linear foot limit for filling or excavating intermittent or ephemeral streams (see paragraph (d)(2) of general condition 31, pre-construction notification). Under this agency coordination process, district engineers will solicit comments from the agencies to assist in making the written minimal adverse effects determination necessary for a waiver of the 300 linear foot limit to take effect. Compliance with the Endangered Species Act and the National Historic Preservation Act is addressed by general conditions 18 and 20, respectively.

One commenter said that the loss of stream bed should be defined and the 300 linear foot limit should be reduced to 150 linear feet of loss of stream bed for those NWPs. Another commenter suggested reducing the linear foot limit for loss of stream bed to 50 linear feet. One commenter stated that the 300 linear foot limit should not apply to ephemeral streams. One commenter said that waivers should be allowed for losses of perennial streams if the adverse effects are determined to be minimal and the perennial stream is limited in its aquatic function.

The loss of stream bed is defined in ''loss of waters of the United States'' as the linear feet of stream bed that is filled or excavated. We believe the 300 linear foot limit is appropriate to ensure that losses of stream beds result in minimal

adverse effects on the aquatic environment. Division engineers may add regional conditions to an NWP to reduce the linear foot limit to an amount less than 300 linear feet. The 300 linear foot limit should not be waived for losses of perennial streams because they function differently than intermittent and ephemeral streams, and we believe it will generally not be the case that losses of more than 300 linear feet of a perennial stream would constitute a minimal adverse effect. We believe it would not be a good use of Corps or applicant resources to allow waiver requests for perennial streams on the remote chance that the adverse effects of such an activity would be found to be minimal. The functions provided by perennial streams, intermittent streams, and ephemeral streams differ, in terms of ecological processes and duration. Perennial streams provide aquatic habitat functions year-round, while intermittent streams provide aquatic habitat during the months when water is flowing in the stream channel, and when hyporheic flow occurs during drier months. Ephemeral streams provide aquatic habitat functions only for brief periods, because they have flowing water only during, and briefly after, precipitation events. Other important stream functions, such as sediment transport, nutrient cycling, and energy transport also depend on the presence of flowing water and, for some of those functions, the presence of aquatic organisms inhabiting those waters. The other stream functions are present year-round for perennial streams, and for much of the year for intermittent streams. In ephemeral streams, sediment transport, nutrient cycling, and energy transport functions occur during brief periods or are absent. The functional differences exhibited by perennial, intermittent, and ephemeral streams provide a scientific basis for not allowing a waiver for perennial streams. District engineers will make written case-specific determinations on whether to waive the 300-linear foot limit for losses of intermittent and ephemeral stream bed, based in part on the considerations listed in paragraph (1) of Section D, ''District Engineer's Decision.''

Clean Water Act Jurisdiction

Many commenters cited the U.S. Supreme Court decisions issued in 2001 and 2006, for *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers* and *Rapanos* v. *United States* (Rapanos), as well as other court decisions, and said that the proposed NWPs exceed the Corps jurisdictional authority under Section 404 of the Clean Water Act and reflect the Corps and EPA's flawed broad interpretation of what constitutes a water of the United States, specifically for ephemeral streams. Most commenters said the proposed NWPs would result in an expansion of Clean Water Act authority and jurisdiction that would have a negative impact on the nation's economy by creating excessive burdens on developers, farmers, and Corps staff. Another commenter said the Corps should not assert jurisdiction over isolated mining pits.

The NWPs do not assert jurisdiction over waters and wetlands. Rather, the NWPs are a form of Department of the Army authorization to comply with the permit requirements of Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. Nationwide permits issued under the authority of Section 404 of the Clean Water Act authorize discharges of dredged or fill material into waters of the United States. Nationwide permits issued under the authority of Section 10 of the Rivers and Harbors Act of 1899 authorize structures or work in navigable waters of the United States. Determining the geographic jurisdiction under the Clean Water Act (i.e., identifying waters and wetlands that are waters of the United States) is a separate process than the NWP authorization process. Likewise, identifying navigable waters of the United States for the purposes of geographic jurisdiction under Section 10 of the Rivers and Harbors Act of 1899 is a different process than the NWP authorization process. These NWPs do not expand either geographic jurisdiction or activities-based jurisdiction under the Clean Water Act. Activity-based jurisdiction under the Clean Water Act is determined by applying the appropriate regulations from 33 CFR part 323. These NWPs continue to provide a streamlined process for obtaining authorization for activities that require Department of the Army permits under either Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. Determining whether isolated mining pits are subject to Clean Water Act jurisdiction is a case-specific inquiry to be made by applying the appropriate regulations and guidance. A project proponent or landowner may contact the Corps district office that has the responsibility for that region of the country and request a jurisdictional determination for an isolated mining pit or any other area that might be considered a water or wetland. The Corps district will respond to that request and inform the project proponent or landowner of the status of that water with respect to Clean Water Act jurisdiction.

Comments on Administrative Requirements

Executive Order 13211

One commenter stated that these proposed regulations will cause coal mines to cease operations and believe the proposal is subject to Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

Although we have made substantial changes to NWP 21, some surface coal mining activities will still be authorized by this NWP. The changes to NWP 21 will not cause coal mines to cease operations, because there are other forms of Department of the Army authorization available if the coal mining activity involves discharges of dredged or fill material into waters of the United States. Project proponents may apply for individual permits to obtain Department of the Army authorization for such activities. Any activity that could have previously been authorized under earlier versions of NWP 21 would still be eligible for authorization under an individual permit. Thus, while there may be additional paperwork burden for mine operators, the Corps does not believe that the changes in these permits will have a significant impact on the supply, distribution, or use of energy (e.g., coal).

Executive Order 13563

Several commenters stated that the proposed NWPs are not consistent with EO 13563 for ''Improving Regulation and Regulatory Review'' because the modifications to the NWPs would impose numerous onerous conditions and limitations on applicants.

The NWPs continue to provide a streamlined process for authorizing activities that require Department of the Army permits under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. The average processing times for standard permit applications in Fiscal Year 2010 was 221 days, while the average processing time for NWP pre-construction notifications and voluntary requests for NWP verifications was 32 days. The terms and conditions of the NWPs are necessary to ensure that the NWPs comply with applicable statutes and regulations, including the requirement that only activities with minimal adverse effects, both

individually and cumulatively, be authorized by NWPs.

Water Quality Certification Issues

One commenter said that the Corps should provide an opportunity for state and Tribal water quality certification agencies to participate early in the NWP reissuance process, to reduce potential conflicts during the water quality certification process. Another commenter asked for clarification regarding enforcement of the NWPs, in cases where a provisional NWP verification is issued, but the permittee proceeds with work without receiving the individual water quality certification. This commenter asked whether the Corps or the state would initiate an enforcement action. One commenter objected to use of provisional NWP verifications in cases where water quality certification has not yet been issued for a particular NWP activity.

The current NWP reissuance process provides sufficient opportunity to reduce potential conflicts during the water quality certification process. States and Tribes begin their water quality certification processes when the proposal to reissue the existing NWPs and issue new NWPs is published in the **Federal Register** for public comment. Water quality certification agencies are encouraged to submit comments on the NWP proposal. But it is important to remember that each state and Tribe is likely to have different water quality standards, and the national terms and conditions for the NWPs cannot address those regional variations.

After the comments received in response to the proposal are reviewed, the final NWPs are developed. Once the final NWPs are published in the **Federal Register**, States and Tribes have another opportunity to decide whether to issue or deny water quality certification for the NWPs. States and Tribes will have 90 days to make their water quality certification decisions.

If water quality certification was denied for an NWP, then the permittee must obtain an individual water quality certification or a waiver, even if the Corps issued a provisional NWP verification. The provisional NWP verification merely informs the prospective permittee that the Corps has determined that the proposed activity qualifies for NWP authorization, as long as the permittee receives an individual water quality certification or waiver. The prospective permittee should provide a copy of the individual water quality certification to the Corps district. The Corps has full authority to pursue an enforcement action for not obtaining an individual water quality certification or waiver, which is a violation of the terms of the permit. Case-specific decisions on appropriate enforcement actions are at the Corps discretion. The provision for NWP verification is an important tool to be responsive to users of the NWPs, and to inform them of their need to work with the water quality certification agency to comply with the requirements of Section 401 of the Clean Water Act. The provisional verification serves to inform the applicant that all other requirements for NWP verification have been satisfied and allows the applicant to focus on obtaining the required state certifications.

Discussion of Comments

Nationwide Permits

NWP 1. *Aids to Navigation.* There were no changes proposed for this NWP, and no comments were received. This NWP is reissued without change.

NWP 2. *Structures in Artificial Canals.* There were no changes proposed for this NWP. One commenter recommended not reissuing this NWP because a state will deny water quality certification.

The potential for a state to deny water quality certification for an NWP is not a sufficient basis for not reissuing an NWP. The water quality certification process is independent of the decision on whether to issue or reissue an NWP. This NWP is reissued without change.

NWP 3. *Maintenance.* We proposed to modify this NWP to clarify that stream channel excavation immediately adjacent to the structure or fill being maintained is authorized under paragraph (a) and does not require a PCN. We also proposed to replace the word ''and'' with ''and/or'' in paragraph (b) to indicate that the activity does not need to include the placement of new or additional riprap to qualify for this NWP.

Several commenters supported the change to paragraph (a) to allow excavation in a stream channel immediately adjacent to a structure or fill as part of the maintenance activity, without requiring pre-construction notification. Some commenters specifically supported the ability to do minor excavation within stream channels to install a larger culvert or bridge that would improve fish passage without a pre-construction notification. Two commenters asked which types of stream channel modifications could be authorized under paragraph (a). Another commenter said that the proposed modification does not adequately clarify that a pre-construction notification is not required for stream channel modification as discussed in the proposed rule. This commenter recommended that paragraph (a) state that stream channel modification immediately adjacent to the structure or fill being maintained is authorized without pre-construction notification. One commenter suggested that paragraph (a) include the removal of material from within existing structures. One commenter indicated that the scope of activities considered as stream channel modifications should be clarified, because certain stream channel modifications such as sediment or debris removal and reestablishment of the original bridge-stream alignment are needed to maintain a safe crossing with sufficient hydraulic capacity. Another commenter indicated that while stream channel modification is restricted to the minimum necessary, there should be a 300 linear foot impact limit. One commenter did not support the proposed modification, stating that pre-construction notification should be required for stream channel excavation near a structure because excavation has the potential to uncover unknown archeological resources.

We have changed the text of paragraphs (a) and (b) to clarify which stream modifications fall under paragraph (a) and which fall under paragraph (b). The removal of material from waters within, or immediately adjacent to, the structure or fill are authorized under paragraph (a) and do not require pre-construction notification. The removal of material from waters that are not immediately adjacent to the structure or fill, but within the limits in paragraph (b), may be authorized under paragraph (b). This NWP authorizes only activities that repair or return an activity to previously existing conditions. We do not believe it is necessary to place additional limits on this NWP because the current limits are sufficient to ensure minimal effects. Paragraph (a) only authorizes minor stream channel modifications necessary to repair, replace, or rehabilitate the structure or fill, which may include minor deviations to account for changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards. Such minor deviations could be done to improve conditions to facilitate aquatic species movements. General conditions 20 and 21 address the protection of historic properties and actions to be taken if previously unknown remains or artifacts are discovered during the maintenance activity.

Several commenters recommended adding the word ''or stabilization'' after ''repair, rehabilitation, replacement'' in paragraph (a) to clarify that stabilization activities are included in paragraph (a). Two commenters requested that practicability be considered with the ''minimum necessary.'' One commenter requested that the NWP include the requirements of other regulatory agencies as a reason for allowing minor deviations in a structure's configuration or filled area.

We do not believe it would be appropriate to include stabilization activities under paragraph (a) since some stabilization activities may result in more than a minor deviation in the structure's configuration or filled area. District engineers already consider what is practicable when reviewing proposed NWP 3 activities, and we do not believe it is necessary to provide additional clarification. We agree that the requirements of other regulatory agencies is an appropriate basis for making minor changes in a structure or filled area during maintenance, especially if those regulatory requirements help protect aquatic resources.

Several commenters stated that the placement of new or additional riprap to protect small structures be included in paragraph (a). A commenter requested clarification that the placement of pipe liners and concrete repairs to flow lines of pipes are examples of maintenance activities authorized by this NWP. One commenter expressed concern that authorizing the expansion of existing projects into waters of the United States discourages avoidance and minimization of adverse impacts and violates the 404(b)(1) Guidelines. Another commenter indicated that work that is immediately adjacent to the project is not maintenance and that the work should be limited to the extent of the original project.

The placement of riprap to protect a structure or fill is more appropriately authorized by paragraph (b) of this NWP, after the district engineer reviews the pre-construction notification. If the installation of pipe liners or concrete repairs to flow lines are necessary and result only in a minor deviation to the structure's configuration or filled area, it may be authorized under paragraph (a). Paragraph (a) only authorizes minor deviations to the structure or filled area that are necessary to conduct the repair, rehabilitation, or replacement activity, and complies with the general condition requiring on-site avoidance and minimization.

One commenter said that the permit should require that the Corps be notified, within 12 months of the date of the damage, for activities involving the repair, rehabilitation, or replacement of structures or fills destroyed or damaged by storms, floods, fire or other discrete events.

The repair, rehabilitation, or replacement of structures or fills destroyed or damaged by these types of events does not require pre-construction notification. This is because restoring a structure or fill to its pre-event configuration will not result in more than minimal adverse effects relative to the pre-event status quo. If a project proponent wants a waiver of the two-year limit, the district engineer can issue a waiver if warranted, without reviewing a pre-construction notification.

Some commenters expressed opposition over the proposed change from ''and'' to ''and/or'' under paragraph (b). They recommended retaining the current language because they indicated that making the change to ''and/or'' would cause confusion as to which provision of this NWP would be used to authorize riprap placement. The commenters also said that this change would result in the regulation of excavation activities that do not result in more than incidental fallback. Another commenter was concerned that the change to ''and/or'' suggested that the addition of riprap triggered pre-construction notification.

The use of the term ''and/or'' means that paragraph (b) authorizes the removal of accumulated sediments or debris, the placement of new or additional riprap to protect the structure, or both activities. This NWP authorizes the removal of accumulated sediment and debris if that activity involves a regulated discharge of dredged or fill material. This NWP also authorizes the removal of accumulated sediments and debris in the vicinity of existing structures from section 10 waters. If a project proponent seeks authorization to place new or additional riprap near the structure, then pre-construction notification is required in accordance with paragraph (b) of this NWP.

One commenter said that the use of riprap should be discouraged and only authorized if other options are not possible. Another commenter suggested placing a limit on the amount of riprap that can be placed under paragraph (b). One commenter stated that the placement of new or additional riprap is not maintenance and should not be authorized by NWP 3. One commenter recommended requiring mitigation techniques, such as weep holes, when steel sheet piling is used for the maintenance activity.

Riprap may be necessary to protect the integrity of these structures. We have modified the next to last sentence of paragraph (b) to clarify that new or additional riprap may be placed to protect the structure or ensure the safety of the structure. In response to a pre-construction notification (which is required for all placement of new or additional riprap under paragraph (b) of this NWP), best management practices or other mitigation measures may be required by the district engineer to minimize adverse effect to the aquatic environment.

One commenter said that this NWP should not authorize maintenance dredging and that NWP 19 should be used instead. This commenter also recommended adding a cubic yard limit for the amount of dredging that is authorized. Another commenter recommended that the removal of sediment should be limited to 100 feet instead of 200 feet. One commenter suggested increasing the linear foot limit to 500 feet. One commenter also suggested that the applicant be required to provide information to ensure that sediments proposed to be removed are not contaminated.

Paragraph (b) may be used to authorize the removal of accumulated sediment and debris from section 10 waters, and the 200 linear foot limit is appropriate to ensure minimal adverse effects. District and division engineers can condition this NWP to reduce the limit to less than 200 linear feet. Maintenance dredging for the purposes of navigation may be authorized by NWP 19 and may not be authorized by this NWP. The only excavation authorized by this NWP is excavation necessary for the maintenance, repair, rehabilitation, or replacement of the structure, and then only within the limits established in the permit. It is not necessary to require contaminant testing for the sediments to be removed as a general condition of the permit, because for many cases there is reason to believe that no contaminants are present in the material. If there is reason to believe that contaminants are present, the district engineer may require contaminant testing and/or best management practices to control the release of contaminants on a case-specific basis.

One commenter objected to the proposed removal of the words ''[w]here maintenance dredging is proposed'' from the ''Notification'' paragraph. Another commenter said that pre-construction notification should only be

required when maintenance dredging is contemplated.

Pre-construction notification is required for all activities covered under paragraph (b). When a permittee submits the pre-construction notification for activities covered under paragraph (b), they also must submit information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals. The deleted phrase is meant to clarify the ''Notification'' provision.

A commenter asked if the term ''upland'' means ''above the ordinary high water mark.'' That commenter also requested clarification as to what constitutes ''temporary'' in terms of how long temporary fills can be kept in place. Another commenter asked for a definition of ''minor deviations'' and two commenters recommended that ''immediately adjacent'' be defined.

There may be wetlands landward of the ordinary high water mark of a river or other water of the United States, so it would not be appropriate to define ''uplands'' as suggested in the previous paragraph. Since some waters and wetlands are not subject to Clean Water Act jurisdiction, we have changed the text of paragraph (b) to require all dredged or excavated materials to be deposited and retained in an area that has no waters of the United States, unless otherwise specifically approved by the district engineer under separate authorization. Waters of the United States will be identified in accordance with applicable laws, regulations, and guidance, as discussed above, and is not affected by the issuance of these NWPs. What constitutes a temporary fill is at the discretion of the district engineer. Determining what is a minor deviation and immediately adjacent is also at the discretion of the district engineer. The Corps believes this is appropriate because it is difficult to identify bright line definitions for these terms that are applicable in all circumstances. If an applicant is unsure whether a specific activity qualifies, he or she should consult the appropriate Corps district office.

Several commenters said that pre-construction notification should not be required for activities authorized by paragraph (b), to reduce delays. Other commenters requested removal of the pre-construction notification requirements for sediment and debris removal, because the work is often conducted immediately after storm events when a timely response is critical to public safety. Another commenter also requested that no pre-construction notification be required for activities under paragraph (b), if the waters are ephemeral or intermittent streams. Other commenters said that pre-construction notification should be required for all activities authorized by this NWP.

We believe that the pre-construction notification requirements for this NWP are appropriate. Pre-construction notification is required for those activities that may have the potential to cause more than minimal adverse effects on the aquatic environment. Activities authorized by paragraph (b) usually involve larger impacts than those authorized by paragraph (a) and therefore warrant pre-construction notification to ensure that those activities will result in minimal adverse effects on the aquatic environment.

One commenter suggested that this NWP should require the use of best management practices to avoid sediment loading of waters. One commenter suggested that paragraph (c) should be conditioned to protect downstream water quality and prohibit sediment discharges. Two commenters said that general condition 2 should not apply to NWP 3 activities.

General condition 12 requires the use of sediment and erosion controls to minimize sediment inputs during construction. General condition 2 does apply to this NWP, to ensure that aquatic life movements can continue after the maintenance activity is conducted.

One commenter said that Tribes should be notified to avoid impacts to tribal treaty natural resources and cultural resources. Two commenters said that this NWP should be conditioned to allow fish migration to continue. One of these commenters also stated that these activities should not restrict water flows or constrict channels. One commenter said that this NWP should be conditioned to address slope stability to prevent overburden material from going into the water. Another commenter recommended that all stream crossings span the bankfull width and, in cases where the structures have a bottom, the structure bottom shall match stream slope.

District engineers have conducted government-to-government consultation with Tribes to determine which NWP activities should be subject to project-specific consultation to protect Tribal treaty natural resources and cultural resources. General Condition 18 specifies that no activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights. General condition 2 requires that NWP activities be constructed to maintain aquatic life movements, and general condition 9 requires that water flows be maintained to the maximum extent practicable. The appropriate size for stream crossings will be determined on a case-by-case basis, to comply with the applicable general conditions.

A commenter recommended an addition to the ''Note'', which references the section 404(f) exemption for maintenance. This commenter suggested that the note include clarification as to who can use the exemption for maintenance of irrigation and drainage ditches.

The section 404(f) exemption for maintenance of irrigation ditches and drainage ditches can be used by anyone that qualifies for the exemption. If a particular activity does not qualify for the exemption because of the recapture provision in section 404(f)(2) or for any other reason, NWP 3 may be used to authorize the maintenance activity, if it meets the terms and conditions of the NWP.

This NWP is reissued with the modifications discussed above.

NWP 4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* There were no changes proposed for this NWP. One commenter suggested adding fish aggregating devices to the list of devices and activities authorized by this NWP. Fish aggregating devices are man-made objects used to attract ocean-going pelagic fish. Before these devices, commercial fishing used purse seining to target surface-visible aggregations of birds and dolphins, which were used as a signal of the presence of tuna schools below. However, the by-catch of dolphins became a significant issue. The demand for dolphin-safe tuna was a driving force for fish aggregating devices. Therefore, we concur with the comment and have added that device to this NWP. This NWP is reissued with the modification discussed above.

NWP 5. *Scientific Measurement Devices.* We proposed to modify this NWP to require the removal of the device and any associated structures or fills at the conclusion of the study. We also proposed to add meteorological stations to the list of examples of the types of devices authorized by this NWP, as well as current gages and biological observation devices.

One commenter suggested that each of the listed devices be defined and have footprint and height limitations. Another commenter said that meteorological stations should not be authorized by this NWP. One commenter supported adding meteorological stations, current gages,

and biological observation devices as examples of the types of devices authorized by this NWP. Another commenter stated the Corps should define a maximum period required for a meteorological tower study.

We do not believe it is necessary to provide definitions for each of these devices and add limits. These devices are usually small in size and since most of them are structures they do not typically result in a loss of waters of the United States. This NWP already has a 25 cubic yard limit for weirs and flumes. Division engineers can regionally condition this NWP to establish additional limits, including maximum time frames for studies. In response to an NWP verification request, district engineers may also place limits on these devices and their use.

One commenter suggests the Corps clarify the requirements for the removal of a scientific measurement device, and suggested that the NWP not require excavation to remove the entire structure. This commenter also said that cutting off the structure near the substrate of the waterbody and leaving the buried foundation may result in less environmental damage during removal. Another commenter said that where meteorological towers are used for long-term data collection and preliminary testing for wind turbines, those meteorological towers would be removed during the wind energy facility decommissioning process. One commenter stated that the device should be removed ''upon completion of the use of the device to measure and record scientific data.''

We have modified the provision in the NWP to require the removal of the device when it will no longer be used to measure and record scientific data. Meteorological towers used in wind energy generation facility preliminary testing and operations could be left in place until the facility is decommissioned. We have also changed the text to state that structures or fills must be removed to the maximum extent practicable, which would allow the foundation to remain if removing the foundation would cause more adverse effects to the waters or wetlands than leaving the foundation in place. We also added the word ''foundation'' to the examples of structures or fills that may be associated with a scientific measurement device.

This NWP is reissued with the modifications discussed above.

NWP 6. *Survey Activities.* We proposed to modify this NWP to specify how exploratory trenches are backfilled by stating the work ''must not drain a water of the United States'' and to replace the 25 cubic yard limit for temporary pads with a 1/10-acre limit.

Several commenters supported changing the limit from 25 cubic yards to 1/10-acre. Two commenters expressed concern that removing the 25 cubic yard limit would result in more than minimal cumulative effects to aquatic resources. One commenter recommended adding wetland delineation sampling activities to the list of examples of activities authorized by this NWP. Several others recommended adding conditions to require removal of the temporary fills and re-establishment of pre-construction contours and reseeding of affected areas after completion of work. One commenter requested a definition of ''temporary pad.'' One commenter recommended that exploratory trenching should not be authorized below the ordinary high water mark of any waters of the United States.

We are changing the limit of this NWP from 25 cubic yards to 1/10-acre. We have added ''sample plots or transects for wetland delineations'' as an example of an activity authorized by this NWP. General condition 13, removal of temporary fills, requires temporary fills to be removed in their entirety and the area revegetated, as appropriate. We do not believe it is necessary to define ''temporary pad'' for purposes of this NWP, since it is simply a temporary fill that must be removed upon completion of the survey activity. We do not agree that exploratory trenching should be prohibited below the ordinary high water mark since these activities result in temporary impacts to the aquatic environment.

This NWP is reissued with the modification discussed above.

NWP 7. *Outfall Structures and Associated Intake Structures.* We did not propose any changes to NWP. One commenter objected to the reissuance of this NWP, stating that these activities adversely affect aquatic vegetation or areas designated as critical habitat for fish foraging and spawning, through increases in turbidity, discharges of nutrients and contaminants, alteration of near-shore areas, and scouring vegetation within the plume. Another commenter recommended that outfall structures not be placed in wetlands or constructed in such a manner that would create shoreline pockets capable of trapping debris. One commenter recommended conditioning this NWP to ensure that the outfall structure not extend into the receiving water and impair navigation. One commenter suggested that for activities proposed to occur on state-owned submerged lands, a separate authorization would be required from that state.

In waters that have been designated as Essential Fish Habitat in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, consultation with the National Marine Fisheries Service will be conducted for proposed activities that may adversely affect Essential Fish Habitat. That consultation will often result in conservation recommendations that will protect habitat for fish foraging and spawning. General condition 22, designated critical resource waters, will also reduce adverse effects to fish foraging and spawning areas caused by NWP activities in those critical resource waters. Division engineers may regionally condition this NWP to restrict or prohibit its use in specific waters, including those that provide important habitat. In response to a pre-construction notification, district engineers may also exercise discretionary authority if the proposed activity would result in more than minimal adverse effects on the aquatic environment, including vegetated shallows and fish spawning and feeding areas. These structures may be designed so that they do not trap debris. General condition 14, proper maintenance, requires authorized structures and fills to be properly maintained, which may include periodic removal of debris from outfall structures and associated intake structures, to ensure that these structures continue to function properly, do not trap debris, and do not cause more than minimal adverse effects to nearshore aquatic environments. Compliance with general condition 1, navigation, will prevent adverse impacts to navigation. Permittees are responsible for obtaining any other Federal, state or local permits that may be required.

The NWP is reissued without change.

NWP 8. *Oil and Gas Structures on the Outer Continental Shelf.* We proposed to modify this NWP to update the name of the former Minerals Management Service to the Bureau of Ocean Energy Management Regulation, and Enforcement (BOEMRE).

One commenter expressed support for the proposed modification. One commenter recommended that no oil and gas structures or activities be authorized through the nationwide permit process.

After the proposal to reissue this NWP was published, the Bureau of Ocean Energy Management (BOEM) became the agency responsible for issuing leases for oil and gas structures on the outer continental shelf. We have modified the text of NWP 8 to reflect this change. This NWP only authorizes structures

erected within areas of the outer continental shelf leased by the Bureau of Ocean Energy Management. The general environmental concerns are addressed in the required NEPA documentation prepared by BOEM prior to issuing a lease. The Corps role is limited to reviewing impacts on navigation and national security, as stated in 33 CFR part 322.5(f).

This NWP is reissued as proposed.

NWP 9. *Structures in Fleeting and Anchorage Areas.* There were no changes proposed for this NWP, and no comments were received. This NWP is reissued without change.

NWP 10. *Mooring Buoys.* There were no changes proposed for this NWP. One commenter stated a notice to Tribes needs to be provided to avoid adverse effects to Tribal treaty fishing access. One commenter recommends prohibiting the use of this NWP in ''downgraded shellfish harvest areas.'' Another commenter said that the permit should be conditioned to require permittee's to provide information on the location of the mooring buoy, including a site plan drawn to scale that shows the distance of the buoy from the shore, mark the Corps permit number on the buoy, and a statement that the buoy satisfies U.S. Coast Guard requirements. One commenter suggested adding a limit on the number of buoys installed per acre, based on the number and size of the moored vessels.

Division engineers can regionally condition this NWP to prohibit its use in areas where mooring buoys may impact access to Tribal treating fishing areas. General condition 18 states that NWP activities cannot impair reserved tribal rights. Division engineers can impose regional conditions to restrict or prohibit its use in shellfish harvesting areas. We do not agree that pre-construction notification for the activities authorized by this NWP is necessary, to require prospective permittees to submit detailed information on the location of the proposed mooring buoy, a detailed site plan, and a statement that it complies with U.S. Coast Guard requirements. All applicable Coast Guard regulations must be complied with independent of the conditions in this NWP. We believe that it is not necessary to limit this NWP, at the national level, to install a particular number of mooring buoys per acre. Division engineers may also regionally condition this NWP to impose such restrictions.

This NWP is reissued without change.

NWP 11. *Temporary Recreational Structures.* There were no changes proposed for this NWP. One commenter recommended requiring that structures authorized under this NWP be removed immediately after use ceases, instead of the 30 days specified in the NWP.

The Corps believes that the current requirements for the removal of temporary structures are sufficient. Where necessary, shorter time periods for removal can be imposed through regional conditioning or through special conditions provided in activity-specific NWP verifications.

The NWP is reissued without change.

NWP 12. *Utility Line Activities.* We proposed to modify this NWP to clarify how to calculate the loss of waters of the United States for a single and complete project that involves an access road. This proposed change was intended as a clarification of long-standing practice, not a substantive revision.

Several commenters supported the proposed change to this NWP. Another commenter stated the proposed clarification would severely restrict the use of NWP 12, because it changes the definition of single and complete project. One commenter requested further clarification of the intent and applicability of the term ''single and complete'' and suggested we replace it with ''single and complete linear projects'' wherever the former phrase is found in NWP 12 since the NWP applies to linear projects and their associated facilities and activities. Two commenters requested confirmation that the calculation of impacts for purposes of satisfying the NWP 12 threshold is done separately for each crossing. Another commenter objected to the definition of ''single and complete project'' at 33 CFR 330.2(i) and the NWP definitions section and stated mitigation should be required for utility lines that result in the loss of greater than ½-acre.

This modification of the NWP does not change the definition of single and complete project and does not affect its implementation, except to clarify that only losses of waters of the United States associated with a single and complete project would be considered when determining whether the acreage limit or pre-construction notification threshold is exceeded. However, it is correct that the Corps long-standing practice (which we are not changing) has been to generally calculate impacts for purposes of satisfying the ½-acre threshold separately for each separate and distant crossing, and we have clarified this in the definitions section by adding separate definitions that explain how single and complete projects are determined for linear and non-linear projects. We do not agree that in the text of this NWP the term ''single and complete project'' should be replaced with ''single and complete linear project.'' Although the vast majority of utility lines are linear projects where the crossings are at separate and distant locations, and thus considered separate single and complete projects, there may be circumstances where the separate crossings of a waterbody are too close together to be considered separate single and complete projects, and one NWP authorization would be evaluated for those closely-spaced crossings. Therefore, we have retained the more generic term ''single and complete project'' in the text of this NWP. Other supporting components of a utility line, such as substations, may not be considered linear projects in some circumstances. District engineers may exercise discretionary authority and require compensatory mitigation for utility line activities that require pre-construction notification and result in the loss of aquatic resources.

One commenter stated the Corps should clarify that the only relevant activity for purposes of NWP 12 is a discharge of dredged or fill material into waters of the United States. One commenter said that no discharges should be authorized in waters below the ordinary high water mark or in areas that provide fish habitat functions. This commenter also said that utility lines should be buried at least six feet below the authorized federal channel depth. One commenter stated that mechanized land clearing of forested wetlands for installation of utility lines should not be authorized by NWP 12.

The activities authorized by this NWP are not limited to discharges of dredged or fill material. This NWP also authorizes structures or work in navigable waters of the United States that require authorization under Section 10 of the Rivers and Harbors Act of 1899. We do not agree that discharges should be prohibited in open waters, below the ordinary high water mark. Such activities often result in minimal adverse effects on the aquatic environment and qualify for general permit authorization. Division engineers can restrict or prohibit use of this NWP in certain waters, through the approval of regional conditions. The appropriate depth a utility line should be buried below a federal channel should be determined on a case-by-case basis. Mechanized landclearing of a forested wetland in a utility line right-of-way may only result in a conversion of wetland type, and not result in permanent loss of waters of the United States. District engineers may require compensatory mitigation to offset permanent losses of wetland functions when such mechanized landclearing occurs in forested wetlands.

One commenter stated that authorizing the loss of ½-acre of waters of the United States for each crossing results in more than minimal adverse environmental effects. Another commenter said that the ½-acre limit should apply to the entire utility line project, because the cumulative effects of the utility line must be considered. One commenter stated that this NWP should also limit stream impacts to 300 linear feet. Several commenters asked whether the conversion of a forested wetland to a scrub-shrub wetland counts toward the ½-acre limit.

The ½-acre limit applies to each crossing that is considered to be a separate single and complete project, because they are sited at distant locations from other crossings that constitute the linear project. Each separate and distant crossing should be evaluated to determine if it meets the terms and conditions of the NWP, and cumulative effects of the overall utility line should be evaluated to determine if the adverse cumulative effects on the aquatic environment are more than minimal and therefore do not qualify for NWP authorization. Separate utility line crossings are usually on different water bodies, and may also be in widely separated watersheds. Such factors should be considered when assessing cumulative impacts. The ''Definitions'' section provides further clarification on single and complete projects. The conversion of a forested wetland to a scrub shrub wetland does not constitute a permanent loss of waters of the United States, and thus does not count towards the acreage limit, even though it may result in the permanent loss of certain functions, which may require compensatory mitigation.

One commenter said that some utility lines and associated renewable energy projects may have unintended negative impacts on the Department of Defense mission. For example, high voltage transmission lines could potentially interfere with long-range radar surveillance, homeland defense, testing, and training missions. This commenter requested that pre-construction notifications for NWP 12 activities involving the construction of overhead utility lines in waters of the United States be coordinated with the Department of Defense, by sending a copy of the pre-construction notification to the Department of Defense Siting Clearinghouse. Department of Defense Siting Clearinghouse staff will review the pre-construction notification and contact the project proponent if they identify potential negative impacts to Department of Defense operations, testing, and training missions.

We have added Note 4 to this NWP, which states that a copy of the pre-construction notification will be provided to the Department of Defense Siting Clearinghouse if the proposed activity involves an overhead utility line constructed in waters of the United States. This coordination process will not interfere or delay the district engineer's decision on the pre-construction notification, which must be made within the timeframes specified in the NWP general conditions. The coordination process will consist of districts sending the Department of Defense Siting Clearinghouse copies of pre-construction notifications and NWP verifications, and Clearinghouse staff will work with project proponents to address effects to military operations.

One commenter stated that the definition of a utility line in the NWP is too expansive and should not include liquescent or slurry substances. This commenter asked if utility lines could also be used to transport waste products. One commenter stated that terms and conditions of the NWP should require projects to use existing trenches or cables whenever possible, and require that sidecast material be put back in place within 24 hours. One commenter requested that temporary fill be defined and that compensatory mitigation should be required for temporary fills left in place for two years. One commenter said that enforcing the time periods for temporary side casting is too difficult. One commenter requested more detail regarding the circumstances under which a district engineer would extend the period of temporary side casting up to a total of 180 days. One commenter stated the side casting in areas with known or probable sediment contamination should be prohibited. One commenter stated the placement of excavated materials into any waterway should be prohibited.

Water or sewer lines are generally recognized to be utility lines, and are used to transport liquid or slurry substances. They may also be used to transport waste products, such as sewage or industrial byproducts. We do not agree that existing trenches or cable should be a requirement of this NWP, since many new utility lines constructed in waters of the United States result in minimal adverse effects on the aquatic environment. However, project sponsors should consider the use of existing trenches and cables where practicable as one way of avoiding or minimizing adverse impacts to the aquatic environment, which is required by general condition 23, mitigation. It is not practicable to require side cast material to be put back into the original trench or pit within 24 hours, and we have retained the current language concerning temporary side casting. It is the district engineer's discretion on whether to extend the period of temporary side casting. That discretion would be based on the site-specific environmental conditions, the activity, practicability considerations, and other factors. District engineers can restrict or prohibit side casting in areas where sediment contamination may be a concern. Excavated materials are generally not placed in flowing waters, and should be retained in areas outside of flowing waters with proper sediment and erosion controls.

One commenter objected to authorizing the expansion of utility line substations, stating that those activities should require individual permits and a finding of compliance with the Clean Water Act Section 404(b)(1) Guidelines and public interest review.

The expansion of utility line substations does not generally warrant a full public interest review and activity-specific Section 404(b)(1) Guidelines analysis since it is an expansion of an existing facility. In response to a pre-construction notification, the district engineer will review the proposed expansion of a substation and exercise discretionary authority if it would result in more than minimal individual and cumulative adverse effects on the aquatic environment.

Two commenters stated the construction of temporary access roads will require a submerged lands authorization and would require a submerged land lease for long-term use.

The use of NWP 12 does not obviate the need for the project proponent to obtain any other federal, state, or local permits that may be required, including permits from states that hold title to submerged lands.

One commenter said that this NWP should have fewer pre-construction notification thresholds to expedite pipeline safety repairs and infrastructure projects. One commenter supported retaining the 1/10-acre threshold pre-construction notification.

We believe all of the current pre-construction notification thresholds are necessary because of the variety of utility line activities authorized by NWP 12 (i.e., utility line construction, maintenance, repair, and removal, the construction, maintenance, or expansion of utility line substations, the construction or maintenance of foundations for overhead transmission lines, and the construction of access roads) and to allow district engineers

the opportunity to review those activities to determine whether they will result in minimal adverse effects on the aquatic environment. Pipeline maintenance may be authorized by NWP 3 or NWP 12, and use of NWP 3 would not usually trigger a pre-construction notification requirement. Many pipeline maintenance activities may also be authorized by NWP 12, without pre-construction notification. The 1/10-acre pre-construction notification threshold remains in this NWP.

One commenter recommended that this NWP require the use of specific equipment such as low ground pressure equipment and wide tires to minimize adverse effects to wetlands. Another commenter said that this NWP should be conditioned to require the use of best management practices to reduce sediment loads into waters. One commenter stated that this NWP does not require sufficient avoidance and minimization of waters of the United States. One commenter suggested requiring the installation of barriers next to utility line trenches to prevent amphibians and reptiles from falling into the trench and to reduce sediment transport into waters of the United States during precipitation events. One commenter said that pipes installed over rivers and streams should have shut-off valves to minimize the potential for discharges to occur if the pipe is breached.

The use of equipment that minimizes adverse effects to waters of the United States is addressed by general condition 11, equipment, which requires permittees to take measures to minimize soil disturbance, such as placing heavy equipment on mats when working in wetlands, mudflats, or other waters. Division or district engineers may condition this NWP, either through the regional conditioning process or through activity-specific conditions added to an NWP 12 authorization, to require the use of best management practices. General condition 23, mitigation, requires permittees to design and construct their activities to avoid and minimize adverse effects to waters of the United States. A requirement to install barriers next to utility line trenches, or the use of shut-off valves in pipes constructed over waters, is more appropriately addressed through the regional conditioning process or through activity-specific conditions added to an NWP 12 authorization during the review of a pre-construction notification or NWP verification request.

One commenter stated that this NWP could streamline the authorization of offshore wind energy generation facilities, but two of the terms and conditions may be problematic. The first is the prohibition against side casting when sediments would be dispersed by currents or other forces. The second is the 1/2-acre limit, which may prohibit use of this NWP to authorize the installation of cables that transfer the energy generated by wind turbines.

The transmission cable that runs from an offshore wind energy generation facility to a land-based facility or distribution system may be constructed so that the trench for the cable is backfilled immediately after the cable is laid into the trench. That immediate backfilling would minimize dispersion by currents or other forces in those waters. The placing of a power transmission cable on the sea bed is considered a structure under our regulations for implementing Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(b)), and not a loss of waters of the United States subject to the 1/2-acre limit in NWP 12.

One commenter recommended requiring coordination with Tribes to avoid impacts to Tribal treaty natural resources and cultural resources. Another commenter said that coordination with State Historic Preservation Officers should be required to protect historic properties.

Division engineers can regionally condition this NWP to require coordination with Tribes, to ensure that this NWP does not adversely affect Tribal treaty natural resources and cultural resources. General condition 20, historic properties, addresses compliance with the National Historic Preservation Act, which requires consultation for activities that have the potential to cause effects to historic properties, including tribal resources that meet the definition of ''historic property.'' General condition 17, tribal rights, requires that no NWP activity or its operation may impair reserved treaty rights, such as reserved water rights and treaty fishing and hunting rights.

One commenter requested clarification that individual permits are not automatically required for NWP 12 activities when a Corps district participates as a cooperating agency for an environmental impact statement.

Even though an environmental impact statement may be prepared for a particular utility line, the National Environmental Policy Act process does not prohibit the Corps from using NWP 12 to authorize the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, as long as the activity complies with all applicable terms and conditions and results in minimal individual and cumulative adverse effects on the aquatic environment. NEPA requires consideration of all environmental impacts, not only those to aquatic resources, so there may well be situations where aquatic impacts are minimal even though environmental impacts more generally are not. These other environmental impacts would be addressed by the lead agency preparing the environmental impact statement. The district engineer will exercise discretionary authority to require an individual permit for any utility line activity that he or she determines does not meet the terms and conditions of NWP 12.

One commenter suggested modifying Note 1 to limit submission of NWP 12 pre-construction notifications and verifications to the National Oceanic and Atmospheric Administration's National Ocean Service (NOS), since NOS only produces charts for waters in the coastal United States, Great Lakes, and United States territories.

We have modified Note 1 to require district engineers to send copies of NWP 12 pre-construction notifications and verifications to NOS in those regions of the country.

This NWP is reissued with the modifications discussed above.

NWP 13. *Bank Stabilization.* We proposed modifying this NWP by removing the waiver provision in paragraph (c) that allowed district engineers to authorize bank stabilization fills that exceeded one cubic yard per running foot below the ordinary high water mark or high tide line to encourage the use of bioengineered techniques for bank stabilization. To conform with the proposed change to in paragraph (c), we proposed to remove the third pre-construction notification threshold for bank stabilization fills that exceeded one cubic yard per running foot, since these fills would no longer be allowed. We also proposed changing this NWP to authorize temporary structures and fills necessary for the construction of bank stabilization activities.

Many commenters recommended that this NWP not be reissued, and stated that all bank stabilization should be evaluated under individual permit procedures. One commenter asserted that bank stabilization activities should be authorized with NWP 3 in man-made ditches and canals and NWP 13 in natural waterways. Two commenters said this NWP should not authorize new bank stabilization activities. Some commenters recommended modifying this NWP so that it would not authorize new vertical bulkheads and seawalls.

One commenter stated that this NWP does not result in minimal individual and cumulative adverse effects on the aquatic environment because these activities accelerate coastal erosion and retreat. Additional commenters said that these activities result in more than minimal individual and cumulative effects. Some of these commenters said that this NWP has more than minimal adverse effects on low-order ephemeral and intermittent streams. One commenter said that this NWP should not be applicable to both riverine and lacustrine systems and recommended that separate NWPs be developed that would address the different erosional processes in those systems. Several commenters stated that this NWP should not be reissued because of adverse effects to coastal environments, as well as sea turtles and other endangered species and their habitats. Another commenter recommended that bank stabilization only be permitted by this NWP if it is part of a habitat improvement project or has other net improvements in aquatic function.

The terms and conditions for this NWP are appropriate for limiting bank stabilization activities so that they have minimal individual and cumulative effects on the aquatic environment, while allowing landowners and other entities to protect their property and safety. NWP 3 only authorizes minor amounts of rip rap associated with maintenance activities. It is more appropriate to authorize bank stabilization activities in man-made waterways through NWP 13. In many coastal waters and rivers it is necessary to utilize hard bank protection structures, because wave energy and currents are too strong for bioengineering or other techniques to successfully prevent or reduce erosion. We do not agree that there should be separate NWPs developed to authorize bank stabilization activities in riverine and lacustrine waters. Bank stabilization that may affect endangered or threatened species require pre-construction notification and compliance with general condition 18, endangered species. We also do not agree that this NWP should be limited to habitat improvement projects, because it is often necessary to install bank stabilization structures and fills to protect property and safety.

Two commenters said that NWP 13 should not be reissued because it authorizes activities that may prevent retreat that would be necessary to adapt to sea level rise caused by climate change. These commenters also said that sea level rise needs to be considered in the decision on whether to reissue this NWP. These commenters also stated that the structures and fills authorized by NWP 13 exacerbate erosion in areas where sea level rise will occur.

Coastal and riparian areas are dynamic landscapes. They are constantly changing as a result of erosional and depositional processes. Landowners seek Department of the Army authorization for bank stabilization activities to protect their property and provide safety. The purpose of NWP 13 activities is to protect land on which residences, commercial buildings, infrastructure, and other features are located. The Corps regulations recognize that a riparian landowner has a right to protect his or her property from erosion (see 33 CFR 320.4(g)(3)). When a district engineer evaluates a permit application for bank stabilization activities, including pre-construction notifications for NWP 13 activities, he or she considers the current environmental conditions at the site of the proposed activity, as well as the reasonably foreseeable direct, indirect, and cumulative effects that might be caused by the proposed activity. At the present time, there is a considerable amount of uncertainty surrounding climate change, and any associated sea level rise that may occur as a result of climate change. To the extent there is reliable information about projected sea level rise during the reasonably foreseeable future in the vicinity of a proposed activity, the district engineer will take that information into account when determining whether a proposed NWP 13 activity will have minimal individual and cumulative adverse effects on the aquatic environment. We do not agree that the structures and fills authorized by NWP 13 will accelerate erosion in areas affected by changing sea level rise caused by climate change. The bank stabilization structures and fills authorized by this NWP must be properly designed, so that they have minimal individual and cumulative adverse effects on coastal and riparian erosion and deposition processes. As sea level rise occurs, bank stabilization activities may no longer be effective, and it may be necessary for landowners to relocate.

Two commenters suggested limiting all projects to a maximum length of 500 linear feet, except for allowing bioengineering projects to exceed that length on a case-specific basis if the district engineer waives that limit. One commenter recommended not allowing vertical bulkheads longer than 500 feet. One commenter recommended limiting replacement of vertical bulkheads and seawalls to a maximum length of 200 feet. Another commenter recommended a 300 linear foot maximum project length for shoreline protection on coastal areas or lakes. One commenter suggested a 300 linear foot maximum length for bioengineering projects and a 150 foot maximum length for all other bank stabilization projects. Two commenters requested clarification regarding project length in paragraph (b) as it relates to activities that stabilize both banks (left and right) of a stream. Many commenters supported the district engineer waiver for the 500 linear foot limit for any projects.

The limits in this NWP are sufficient to ensure that the NWP authorizes only those activities that have minimal adverse effects on the aquatic environment, although division engineers may regionally condition the NWP to reduce those limits to account for local environmental conditions and the ecological functions and services provided by waters of the United States in those areas. For streams, the linear foot limit in paragraph (b) applies to a single and complete project for the bank stabilization activity measured along the length of the stream segment, which may involve discharging dredged or fill material along either one or both stream banks. We have retained the ability for district engineers to waive the 500 linear foot limit.

One commenter requested a definition for bank stabilization. Many commenters asked for a definition of bioengineering. One commenter said that bioengineering techniques should include living plant material and soil as the primary structural components to reinforce soil and to stabilize slopes. One commenter recommended requiring native vegetation in bioengineering projects where vegetation is the primary or secondary component of a project.

We do not believe that a definition of bioengineering is necessary because there is a wide variety of bioengineering techniques and project proponents and district engineers generally understand what it means in a local context. It is not possible at the national level to envision every possible variation of technique and materials that would reasonably fit within the meaning of this term, but generally bioengineering involves the use of a combination of vegetation and hard materials instead of only hard materials such as rip-rap for bank stabilization. Also, as explained below, the final NWP does not make a distinction between bioengineering and other bank stabilization techniques. We agree that bioengineering, for the purposes of bank stabilization, includes providing protection from erosion and

providing habitat for aquatic species. We also agree that bioengineered techniques can slow erosion rates and can have beneficial effects on habitat for macroinvertebrates and fish which is why we proposed to modify this NWP to encourage greater use of this technique.

Several commenters recommended the NWP encourage the use of natural materials over riprap. One commenter said that only native plant species should be used for bioengineered bank stabilization. Another commenter recommended using natural stream design methods for erosion prevention. Several commenters objected to the placement of plant material in waters of the United States, and also objected to the planting of willows and similar species in and along waterways because these types of woody plants clog waterways and cause maintenance problems at bridge and culvert crossings.

Division engineers can regionally condition this NWP to encourage bioengineering or the use of natural materials for bank stabilization in waters subject to lower energy waves and currents. The use of plant materials as a component of a bank stabilization activity can have beneficial environmental effects, such as providing shading and habitat for near-shore organisms, or for riparian ecosystems. Proper maintenance should be done to remove plants that colonize waterways, especially at culverts or bridges. We have added a provision to this NWP stating that if bioengineering or vegetative bank stabilization is used, invasive plant species should not be used, because Executive Order 13112, Invasive Species, states that agencies should not ''authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species in the United States or elsewhere.'' The Executive Order states there are economic, ecological, and human health impacts that are caused by invasive species, and we believe that invasive species should not be used for bioengineering bank stabilization activities authorized by this NWP because of the adverse environmental effects those species can cause.

Many commenters supported the proposed modification of paragraph (c) to only allow bioengineering projects to exceed one cubic yard per running foot, and to not allow waivers from the district engineer for other types of projects. Many other commenters objected to limiting that flexibility to bioengineering techniques, stating that bank protection structures are necessary in high energy coastal and riverine environments, and said that the waiver in the 2007 NWP 13 should be reinstated. Some commenters suggested removing paragraph (c) entirely. Several of these commenters thought the proposal would encourage bioengineering methods for achieving the necessary bank stabilization. Many commenters stated that the waiver to the cubic yard limit should be removed from paragraph (c) to ensure that the NWP authorizes only those activities with minimal adverse effects on the aquatic environment. Many commenters asserted that bioengineering methods for bank stabilization are unproven and not as effective at preventing erosion as hard structures. A few commenters suggested that the preference for bioengineering would be a hardship on local governments. Another commenter suggested that bioengineering techniques are rarely successful in arid areas and in ephemeral waterways. Another commenter added that the hydraulic forces in large rivers and tidal areas require the use of large stone, the size of which exceeds the one cubic yard per running foot average size, and are not conducive to bioengineering. Several commenters said that bioengineering is not always appropriate for protecting infrastructure such as roads and bridges, and requested that the one cubic yard per foot waiver be left in place to protect these structures. One commenter suggested modifying the NWP to require alternatives analyses for each proposed project using an established hierarchy, beginning with bioengineering as the most preferable bank stabilization method and ending with the hard bank stabilization structures. One commenter observed that bank stabilization using bioengineering or any other method will still result in adverse effects, and suggested all bank stabilization activities should be located landward of the ordinary high water mark.

In response to the many commenters that objected to removing the provision allowing district engineers to waive, after reviewing a pre-construction notification, the one cubic yard per running foot limit, we have reinstated that provision in this NWP. We have also reinstated the third pre-construction notification threshold that was in the 2007 version of NWP, which requires pre-construction notification for discharges exceeding one cubic yard per running foot along the bank below the plan of the ordinary high water mark or the high tide line. We acknowledge that bioengineering may not be appropriate in all waters, because it may not result in effective bank stabilization. We have thus determined that it is not appropriate to establish a hierarchy of preferred bank stabilization options because such decisions are best left to district engineers that review project-specific pre-construction notifications, and can take into account the characteristics of the waterbody and the surrounding area, and determine which bank stabilization method would be most effective and environmentally preferable. We agree, however, that bioengineering techniques may be environmentally preferable in many situations and that project proponents should consider such techniques where practicable in order to comply with the general requirement to avoid and minimize adverse effects to the aquatic environment. It is not practicable to require all bank stabilization activities to be located landward of the ordinary high water mark.

One commenter asked if the volume of fill buried deeply below bioengineering or turf reinforcement mats could be exempted from the volume of fill that counts towards the one cubic yard per running foot limit in paragraph (b). Another commenter said that buried stone does not meet the regulatory definition of fill material, and said the volume of stone buried below the ordinary high water mark should not count towards the one cubic yard per running foot limit. One commenter suggested replacing the words ''below the plane of'' with ''within the'' when describing the ordinary high water mark in paragraph (c).

The definition of ''fill'' found in 33 CFR part 323.2 clearly states that rock is fill material, and burying rock in a waterway constitutes a discharge of fill material. The volume of the buried stone, along with all other fill material, must be determined and that volume placed below the plane of the ordinary high water mark or high tide line is considered when reviewing the proposed project. We have retained the language in NWP because the phrase ''below the plane of'' more accurately describes the Corps jurisdiction in waters of the United States. To the extent that the location and type of fill placed below the plane of the ordinary high water mark affects the potential for adverse effects to the aquatic environment, the district engineer would consider such factors in deciding whether to grant a waiver request.

Several commenters said that paragraph (d) should prohibit fills in special aquatic sites, including wetlands. One commenter opposes removing the waiver provision in

paragraph (d) for work in special aquatic sites.

We believe that the pre-construction notification process affords the district engineer an appropriate opportunity to review proposed activities in special aquatic sites. Many streams and shorelines include, or are bordered by, special aquatic sites, and precluding use of this permit in these areas severely limits its usefulness for projects that have no more than minimal adverse effects on the aquatic environment. Additionally, it may be beneficial in some watersheds to stabilize eroding banks, even though small amounts of special aquatic sites may be impacted by a bank stabilization activity. Paragraph (d) requires a written determination concluding that the activity will result in minimal adverse effects. If a written waiver is not issued by the district engineer, then this NWP does not authorize such activities and the project proponent will have to obtain another form of DA authorization.

Several commenters expressed support for inclusion of temporary fills required to accomplish work authorized under this NWP. One commenter said that temporary fills should remain in place if their removal would do more damage than allowing them to remain in place. One commenter requested a list of mandatory best management practices developed for temporary fills authorized by this NWP.

If the district engineer determines that temporary fills should remain in place those fills may be authorized by another NWP, a regional general permit, or individual permit. We do not agree that specifically requiring best management practices is appropriate, although division engineers may regionally condition this NWP to add appropriate best management practices. District engineers may also add conditions to the NWP to require specific best management practices for a particular activity.

Several commenters stated that pre-construction notification should be required for all activities authorized by this NWP. One commenter requested that no pre-construction notification be required for any bank stabilization exceeding one cubic yard per running foot in ephemeral and intermittent waters. One commenter suggested removing all pre-construction notification requirements from work done under this NWP in man-made waterways. One agency recommended lowering a pre-construction notification threshold to 100 feet for hard bank stabilization projects such as riprap, and 300 feet for bioengineering projects. One commenter claimed it would be burdensome and costly to submit a pre-construction notification for every bank stabilization project.

We do not agree that it is necessary to require pre-construction notification for all activities authorized by this NWP. A large number of small bank stabilization activities are conducted each year that result in minimal adverse effects on the aquatic environment. We believe that the existing pre-construction notification thresholds are sufficient for satisfying the minimal adverse effects requirement for general permits, and division engineers can regionally condition this NWP to impose lower pre-construction notification thresholds, including requiring pre-construction notification for all activities.

Two commenters said that bank stabilization activities must avoid impacting tribal rights, tribal natural resources, and tribal cultural resources. Many commenters said that while bank stabilization projects may reduce erosion at a site, they may transfer or accelerate erosion in other areas of a waterbody.

General condition 17, tribal rights, prohibits the impairment of all reserved tribal rights. We acknowledge that bank stabilization activities may cause indirect effects in other areas of the waterbody and those indirect effects should be evaluated during the review of a pre-construction notification, if it is required. Activities that do not require a pre-construction notification have minimal adverse effects on the aquatic environment.

Some commenters asked that compensatory mitigation be required for all activities authorized by this NWP. A few commenters remarked that compensatory mitigation should be required for adverse effects on high quality riparian areas. Another commenter said that mitigation should be required when sheet piling is used to stabilize banks.

We do not believe compensatory mitigation should be required for all bank stabilization activities. District engineers will determine when compensatory mitigation is necessary to ensure that an activity results in minimal individual and cumulative adverse effects on the aquatic environment.

This NWP is reissued with the modifications discussed above.

NWP 14. *Linear Transportation Projects.* There were no changes proposed for this NWP. One commenter suggested that this NWP should authorize only the maintenance of existing linear transportation projects because the construction of new linear transportation projects results in more than minimal adverse environmental effects. One commenter said that this NWP should not authorize parking lots. One commenter stated that activities in tidal waters should not be authorized by this NWP because any proposed linear transportation project impacting tidal wetlands require an individual permit to more thoroughly assess impacts on those aquatic habitats.

This NWP should not be limited to authorizing the maintenance of existing linear transportation projects. The terms and conditions of this NWP, including its acreage limits and pre-construction notification thresholds, provide an effective means for authorizing linear transportation projects with minimal individual and cumulative adverse effects on the aquatic environment. Parking lots may be an integral part of a single and complete linear transportation project and may be authorized under this NWP. Small linear transportation projects constructed or maintained in tidal waters may be authorized by this NWP, if they comply with appropriate thresholds and result in minimal adverse effects on the aquatic environment. Division engineers can regionally condition this NWP to restrict or prohibit the use of this NWP to authorize structures or fills in tidal waters where necessary.

Most commenters suggested adding a linear foot limit to this NWP to ensure that it only authorizes activities with minimal adverse effects on the aquatic environment, stating that the current NWP authorizes large amounts of small streams to be permanently lost or significantly altered. One commenter recommended a 100 linear foot limit for the loss of perennial, intermittent, and ephemeral streams. One commenter said that the ½-acre limit is too large when compared to other NWPs that limit impacts to 1/10-acre. One commenter suggested limiting private roads to 200 feet in length, with a maximum width of 16 feet. One commenter recommended that public road projects with multiple crossings should have a maximum cumulative limit of two acres for all crossings associated with that project.

We believe the ½-acre and ⅓-acre limits are appropriate for ensuring that the NWP authorizes only those linear transportation projects that result in minimal individual and cumulative adverse effects on the aquatic environment. Division engineers can regionally condition this NWP to decrease these acreage limits or impose linear foot limits to provide additional protection for wetlands and other waters

in a particular district or region. We do not agree that public and private crossings should have different acreage limits. The environmental effects are not dependent on the status of the entity who proposes to construct the project. A 200 linear foot limit was removed from NWP 14 in 2007 to simplify this NWP. The Corps is not aware of situations where this change resulted in projects being authorized that had more than minimal adverse effects.

One commenter asserted that using this NWP prevents the public from commenting on large transportation projects. Another commenter said that this NWP should not authorize expansion of existing projects, because it discourages avoidance and minimization and is contrary to the 404(b)(1) Guidelines. One commenter stated that use of this NWP for the expansion, modification, or improvement of previously authorized projects could result in cumulative impacts that exceed the acreage limits and said the impacts of previously authorized projects should count towards the acreage limit.

Linear transportation projects that involve small losses of waters of the United States and result in minimal adverse effects on the aquatic environment would not generally generate substantive public comments in response to a public notice and should not require public notices. It is appropriate to authorize expansions, modifications, or improvements to existing projects, as long as those activities comply with the terms and conditions of the NWP, including the applicable acreage limit. An expansion, modification, or improvement of an existing project has few practicable alternatives available because it is a change to a previously constructed project. Alternatives that would involve relocating an existing project are likely to result in more adverse effects to the aquatic environment. An expansion, modification, or improvement of a previously authorized single and complete linear transportation project should include the previously authorized losses of waters of the United States when determining whether the acreage limit would be exceeded by the expanded, modified, or improved project, if the expansion, modification, or improvement is not a separate single and complete project. Factors that may affect this determination include the length of time between the original project and the expansion, modification or improvement; the degree of independent utility of the original project and the expansion, modification or improvement; and the degree to which the expansion, modification or improvement may have been already envisioned, or planning might already have begun, at the time the original project was authorized. Under no circumstance will district engineers allow ''piecemealing'' of projects (for this or any other NWP) in order to meet thresholds.

One commenter requested that the term ''minimum necessary'' used in the first paragraph of this NWP be defined. One commenter asked if temporary fill may be put in place for up to two years without requiring any mitigation, and another commenter requested a definition for ''temporary.'' One commenter suggested that culverts or other appropriate measures should be required to maintain existing drainage patterns, all stream crossings should span the bankfull width of a stream, and in cases where bottomless culverts or bridge structures are not used, the bottom of the structure should match stream slope. Another commenter suggested that the NWP should require the use of best management practices to avoid sediment loading of waters and that best management practices should be used in upland areas and within waters to protect downstream water quality.

The decision as to whether a stream channel modification is the ''minimum necessary'' and whether a fill is ''temporary'' is to be determined on a case-by-case basis, after considering the specifics of the proposed activity and the types of aquatic resources proposed to be impacted by the linear transportation project. General condition 2, aquatic life movements, and general condition 9, management of water flows, require that linear transportation projects be designed to sustain corridors for aquatic life movements and maintain, to the maximum extent practicable, the pre-construction course, condition, capacity, and location of streams and other open waters. General condition 12, soil erosion and sediment controls, requires permittees to take appropriate measures to reduce or prevent movements of sediment into waters during construction. Water quality management measures may also be required by district engineers on a case-by-case basis after evaluating a pre-construction notification.

One commenter said that pre-construction notification should be required for stream impacts that exceed 100 linear feet. Another commenter stated that any stream channel modifications should require pre-construction notification. One commenter suggested requiring low ground pressure equipment, wide tires, rubberized racks, lightweight equipment, and the use of varied paths to avoid repeatedly crossing wetlands at the same location, to protect wetlands. One commenter suggested sending pre-construction notifications to tribes to avoid impacts to tribal treaty natural and cultural resources. One commenter recommended that the Corps consult with the Federal Highway Administration to streamline projects and align with their efforts.

The present pre-construction notification thresholds provide sufficient protection for streams, and division engineers can regionally condition this NWP to require pre-construction notification for proposed losses of stream beds that would exceed a specified amount. Streams with riffle and pool complexes are considered to be special aquatic sites under the 404(b)(1) Guidelines and would require pre-construction notification. General condition 11, equipment, establishes requirements for equipment working in wetlands or mudflats and we believe this general condition provides sufficient protection for those types of construction impacts. Division engineers can regionally condition this NWP to require pre-construction notification for activities that may affect tribal treaty resources, and consult with those tribes before making a decision on whether the activity is authorized by this NWP. This NWP, as well as other NWPs such as NWP 23, provides a means for streamlining the authorization of linear transportation projects and working cooperatively with the Federal Highway Administration and state departments of transportation.

The NWP is reissued without change.

NWP 15. *U.S. Coast Guard Approved Bridges.* We proposed to modify this NWP by removing reference to the U.S. Coast Guard authorizing the discharge of dredged or fill material into waters of the United States as part of their bridge permit. We also proposed to reference the U.S. Coast Guard's bridge permitting authority under Section 9 of the Rivers and Harbors Act of 1899 and other applicable laws. We proposed to add section 10 to the regulatory authorities so that discharges authorized under Section 404 of the Clean Water Act would be also authorized under the Rivers and Harbors Act.

One commenter agreed with adding section 10 authority to this NWP, which they believed would help clarify a sometimes confusing permitting scenario. Another commenter objected to adding section 10 authority, stating that the section 9 permits issued by the

U.S. Coast Guard for bridge and causeway construction satisfy all requirements of the Rivers and Harbors Act of 1899 and adding section 10 authorization is not necessary. One commenter requested clarification regarding the applicability of section 10 to the U.S. Coast Guard approved bridges over both navigable-in-fact and historically navigable waters of the United States. One commenter requested definitions of the terms ''causeway'' and ''approach fills.''

We agree that the U.S. Coast Guard's section 9 permit satisfies the permit requirements of the Rivers and Harbors Act and have removed the reference to section 10 from the NWP. Discharges of dredged or fill material associated with the construction of bridges across navigable waters of the United States require separate authorization under Section 404 of the Clean Water Act, since navigable waters of the United States are also considered waters of the United States under the Clean Water Act, and discharges of dredged or fill material into waters of the United States require section 404 permits, unless they are eligible for an exemption from permit requirements. Historically navigable waters of the United States may still be subject to jurisdiction under Rivers and Harbors Act of 1899, depending on the case-specific circumstances. We do not believe it is necessary to define what causeways and approach fills are, since they would be identified in the specific plans approved by the U.S. Coast Guard as part of their section 9 permit.

This NWP is reissued with the modification discussed above.

NWP 16. *Return Water From Upland Contained Disposal Areas.* We did not propose any changes to this NWP. This NWP provides section 404 authorization for the discharge of return water from a dredged material placement facility located in uplands, because that discharge of return water into waters of the United States has been administratively defined as a ''discharge of dredged material'' (see 33 CFR 323.2(d)(1)(ii)). One commenter said the NWP should address both the technical requirements and water quality of the return water due to the potential for the return water to degrade water quality for natural heritage resources. One commenter said that pre-construction notification should be required for activities authorized by this NWP to ensure that suspended contaminated sediments do not reenter waterways and impact state submerged lands.

The water quality certification issued for a specific dredging project should address any water quality concerns for natural heritage resources. We do not agree that pre-construction notification should be required for this NWP because any required sediment testing would identify contaminants. The sediment testing and potential impacts to water quality are more appropriately considered through the water quality certification process. We have modified this NWP to clarify that disposal of dredged material in an area that has no waters of the United States does not require a section 404 permit, because disposal of dredged material may occur in non-jurisdictional wetlands and waters, not just uplands.

The NWP is reissued with the modification discussed above.

NWP 17. *Hydropower Projects.* No changes were proposed for this NWP. Several commenters said that this category of activities is inappropriate for authorization under an NWP because of the scope and scale of these projects. One commenter stated that these activities result in more than minimal adverse effects on the aquatic environment, especially downstream effects such as the loss of riffle and pool complexes and degradation of water quality through increased sediment loads.

This NWP authorizes small hydropower projects that have minimal adverse effects on the aquatic environment. All activities authorized by this NWP require pre-construction notification, so that district engineers can review each proposed hydropower project and make a case-specific determination whether the minimal effects requirement has been met. Discretionary authority will be exercised, and another form of Department of the Army authorization would be required, if the district engineer determines that a particular hydropower project would result in more than minimal individual and cumulative adverse effects to the aquatic environment or any other public interest review factor. District engineers may also require compensatory mitigation to offset losses of aquatic resource functions.

This NWP is issued without change.

NWP 18. *Minor Discharges.* We did not propose modifications to this NWP. Several commenters expressed support for the reissuance of this NWP. A few commenters said that this NWP does not comply with the ''similar in nature'' requirement for general permits. Other commenters asserted that the cumulative impacts resulting from the use of this NWP would be more than minimal. Another commenter said that this NWP should not authorize discharges into waters that provide forage fish habitat or that contain aquatic vegetation. One commenter stated that the NWP should not be used to authorize discharges in rare aquatic environments such as vernal pools.

We believe that the small discharges of dredged or fill material authorized by this NWP comply with the similar in nature requirement for general permits. District engineers will review pre-construction notifications and may assert discretionary authority to add activity-specific conditions to the NWP authorization to ensure that the activity results in minimal adverse environmental effects. Division engineers may regionally condition this NWP to restrict or prohibit its use in specific waters or categories of waters, including fish foraging areas, vegetated shallows, or vernal pools.

One commenter stated that the limit for this NWP should only be expressed in terms of area filled (i.e., up to 1/10-acre) and not include the volumetric limit (i.e., 25 cubic yards). Another commenter said that all discharged material should consist of clean, uncontaminated sand, crushed rock, or stone. One commenter recommended adding language requiring that the discharge will not result in significant changes to stream geomorphology or hydrology, and that the discharge will not impede navigation.

The 25 cubic yard limit for regulated excavation activities and the 1/10-acre limit for losses of waters of the United States caused by discharges of dredged or fill material are both necessary to ensure that this NWP authorizes only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. General condition 6, suitable material, prohibits the use of unsuitable fill material. The fill material must not have toxic pollutants that are present in toxic amounts. Compliance with general condition 9, management of water flows, will ensure that the activity does not cause more than minimal adverse effects to stream geomorphology or hydrology. General condition 1, navigation, states that NWP activities cannot cause a more than minimal adverse effect to navigation.

This NWP is reissued without change.

NWP 19. *Minor Dredging.* There were no changes proposed for this NWP. One commenter recommended that the NWP include a cumulative volume limit for multiple single and complete dredging projects. One commenter recommended modifying the NWP to require that dredge material be limited to a maximum of 25 cubic yards from a 1,000 square foot area, not disturb sediments in an area known or

suspected to contain toxic pollutants, and the disposal of dredged material at an upland location. Another commenter said that pre-construction notification should be required for all activities to ensure that sediments are not contaminated and do not cause impacts to state owned land. One commenter stated that the activities authorized by this NWP are not similar in nature and do not result in cumulative minimal adverse environmental effects.

This NWP may be used only once for each single and complete project (see general condition 15, single and complete project). Therefore, each single and complete dredging project is subject to the 25 cubic yard limit. District engineers will also review pre-construction notifications and other requests for NWP verifications, and will exercise discretionary authority if they determine that the use of this NWP in a particular region is resulting in more than minimal cumulative adverse effects on the aquatic environment. We believe that the 25 cubic yard limit is sufficient to satisfy the minimal adverse environmental effects requirement for general permits, and that an areal limit, such as the 1,000 square feet recommended above, is not necessary. Division engineers may impose regional conditions on this NWP to restrict or prohibit its use in waters known to have contaminated sediments or in waters where there is sufficient reason to believe that there are contaminated sediments, that would cause more than minimal adverse effects to water quality if they were disturbed by these minor dredging activities. A separate Department of the Army authorization must be obtained if the project proponent plans to deposit the dredged material into waters of the United States, including jurisdictional wetlands. Absent such authorization, the dredged material must be deposited in an upland area or an approved dredged material disposal facility.

This NWP is reauthorized without change.

NWP 20. *Response Operations for Oil and Hazardous Substances.* We proposed to change the name of this NWP, and modify its terms and conditions to authorize a wider set of activities, such as containment and mitigation actions, to more effectively authorize efforts to manage releases of oil or hazardous substances. We also proposed to authorize training exercises for the cleanup of oil and hazardous substances, including those that involve temporary structures or fills.

Five commenters expressed support for the proposed changes to this NWP. One commenter objected to the proposed modifications, stating that the NWP could authorize large dredge and fill operations that would result in net adverse effects on the aquatic environment that would be more than minimal. One commenter stated that the NWP should be limited to interim response activities and that a separate permit should be required for final restoration response. Another commenter said that there should be a requirement to remove temporary structures and fill. This commenter also recommended that the NWP include criteria for temporary structures or fills, such as a requirement to restore wetlands to the maximum extent practicable, to ensure there are no lasting impacts from these activities. A commenter said that this NWP should require coordination with the appropriate state wetland or water resources program.

This NWP authorizes activities in waters of the United States to remediate spills of oil and hazardous substances, which normally results in environmental benefits. We do not agree that the NWP should be limited to interim responses. It should also authorize the final response activity that results in the removal of the oil or hazardous substances, as well as the authorization to remove any temporary structures or fills, to the extent that a Department of the Army permit is required to remove such temporary structures or fills. General condition 13, removal of temporary fills, requires temporary fills to be removed in their entirety, and the affected areas revegetated, if necessary. We do not agree that this NWP should require coordination with state wetland or water resource agencies, since those agencies are likely to have an independent authority to regulate such response activities, as well as their own procedures for reviewing and approving those activities. As a practical matter, such remediation efforts almost always involve coordination among multiple agencies.

This NWP is reissued as proposed.

NWP 21. *Surface Coal Mining Activities.* We proposed three options concerning this NWP. The first option was not to reissue NWP 21 and to let it expire on March 18, 2012. The other two options consisted of reissuing the NWP with modifications. Option 2 was to reissue NWP 21 with a ½-acre limit, including a 300 linear foot limit for the loss of stream bed. Under Option 2, NWP 21 would not authorize discharges of dredged or fill material into waters of the United States to construct valley fills. Option 3 was similar to Option 2, but under Option 3 NWP 21 could authorize discharges of dredged or fill material into waters of the United States to construct valley fills. In the February 16, 2011, proposal, Option 2 was identified as the Corps preferred option. Both Options 2 and 3 require a pre-construction notification for activities authorized by NWP 21, and permittees would have to receive written authorization from the district engineer prior to commencing the activity.

A large majority of commenters supported Option 1 and opposed the reissuance of NWP 21, including any modification of that NWP. Over 26,000 of those comments were form letters. Several commenters recommended adopting Option 2. Two commenters supported Option 3. Many commenters stated that NWP 21 should be reissued without change from the NWP issued in 2007.

While some commenters expressed support for Option 1, they also said that if NWP 21 is to be reissued, Option 2 should be selected and modified to remove the provision allowing district engineers to waive the 300 linear foot limit for the loss of intermittent or ephemeral stream bed. Another commenter stated that if NWP 21 is reissued, it should not authorize any losses of intermittent or perennial streams.

We believe that district engineers should have the ability to waive the 300 linear foot limit for the loss of ephemeral or intermittent stream bed if they make a case-specific determination that the proposed activity will result in minimal individual and cumulative adverse effects on the aquatic environment. For proposed activities under paragraph (b) of NWP 21 that would result in the loss of greater than 300 linear feet of intermittent or ephemeral stream bed, district engineers will coordinate the pre-construction notifications with the resource agencies, to solicit their comments (see paragraph (d) of general condition 31). Those comments will be used by the district engineer in making his or her minimal adverse effects determination. The loss of intermittent or perennial streams caused by NWP 21 activities may still result in minimal individual and cumulative adverse effects on the aquatic environment, and in such cases authorization by NWP is appropriate. Note that the 300 linear foot limit may not be waived for perennial streams. Activities authorized under paragraph (a) of NWP 21 do not require agency coordination because paragraph (a) does not authorize any expansion of surface coal mining activities in waters of the United States and the district engineer previously determined, and must again

confirm in writing, that those activities will result in minimal individual and cumulative adverse effects and qualify for NWP authorization. Many of the surface coal mining activities authorized under the 2007 NWP 21 already had agency coordination because they resulted in the loss of greater than ½-acre of waters of the United States.

Many commenters stated their preference for Option 2 because it would not allow valley fills for surface coal mining activities, which they believe substantially alter watersheds and associated headwater streams, and generally are alleged to cause more than minimal adverse effects on the aquatic environment. One commenter suggested adding a provision that would prohibit the use of NWP 21 for activities associated with mountain-top removal mining.

We have selected Option 2 for the reissuance of NWP 21, and have made some additional modifications to reduce hardships on permittees who previously obtained authorization under the NWP 21 issued on March 12, 2007, and invested substantial resources in reliance on that NWP authorization. These modifications are discussed in greater detail below. In addition, we have added a definition of ''valley fill'' to the NWP to clarify the activities to which the valley fill prohibition applies. For the purposes of this NWP, a ''hollow fill'' is considered a valley fill. This NWP authorizes discharges of dredged or fill material into waters of the United States when those discharges are associated with surface coal mining activities. The Corps review is focused on the individual and cumulative adverse effects to the aquatic environment, and determining appropriate mitigation that may be needed to ensure that the adverse effects on the aquatic environment are minimal, individually and cumulatively. It does not extend to the mining operation as a whole. The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.,* and its implementing regulations address the environmental impacts of proposed surface coal mining operations as a whole, including adverse effects to uplands and changes in land use. SMCRA is administered by the Office of Surface Mining Reclamation and Enforcement and states with approved regulatory programs under SMCRA.

Two commenters supported Option 3, and they said the production of energy from all sources, including surface-mined coal, is vitally important to the short-term economic recovery of the United States and the long-term energy independence and economic prosperity of our country. Another commenter said there is no need to limit NWP 21 to ½-acre and 300 linear feet and prohibit valley fills, because district engineers review every pre-construction notification and can require an individual permit if necessary.

We have adopted Option 2 because it provides greater assurance that NWP 21 will authorize only those discharges of dredged or fill material into waters of the United States that have minimal individual and cumulative adverse effects on the aquatic environment. Surface coal mining activities that involve discharges of dredged or fill material that require section 404 permits but do not qualify for NWP 21 may be authorized by other forms of Department of the Army authorization, such as individual permits or regional general permits. We have added the ½-acre limit, and the 300 linear foot limit for the loss of stream bed, to make this NWP consistent with many of the other NWPs (e.g., NWPs 29, 39, 40, 42, 43, 44, and 51). We have also added a prohibition against using this NWP to authorize discharges of dredged or fill material into waters of the United States to construct valley fills. Such limits are necessary to constrain the adverse effects to the aquatic environment, to ensure compliance with the statutory requirement that general permits, including NWPs, may only authorize those activities that have minimal individual and cumulative adverse effects on the aquatic environment. We do not believe it is efficient to rely on the pre-construction notification process alone to ensure minimal adverse environmental effects. Many other NWPs use a combination of acreage and/or linear foot limits and pre-construction notification requirements to ensure compliance with Section 404(e) of the Clean Water Act, as well as 33 CFR 322.2(f) and 33 CFR 323.2(h).

Previous versions of NWP 21 did not have any acreage or linear foot limits, and relied solely on the pre-construction notification review process and permit conditions to reduce adverse effects on the aquatic environment to satisfy the minimal adverse environmental effects requirement for general permits. We believe that approach is no longer appropriate because of the inconsistency with other NWPs, the possibility that larger losses of waters of the United States might be authorized, and the difficulty of documenting minimal adverse effect determinations for losses of aquatic resource area and functions that exceed those allowed in other NWPs. We note that part of the basis for the earlier approach was the environmental review that occurs in connection with obtaining a SMCRA permit, and that the SMCRA regulations related to stream protection have changed since the previous NWP 21 was issued.[1] The new acreage and linear foot limits will ensure that this NWP contributes no more than minimal individual and cumulative adverse effects to the aquatic environment, by limiting the amount of waters of the United States that can be filled by each NWP 21 activity.

Many commenters said the Corps should fulfill its June 2009 determination to prohibit the use of NWP 21 to authorize surface coal mining activities in six states in Appalachia because these activities result in more than minimal adverse effects to the aquatic environment, individually and cumulatively. Some commenters said the proposed reissuance of NWP 21 is contrary to the Corps June 18, 2010, decision to suspend NWP in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia, which stated that continued use of this NWP may result in more than minimal adverse effects to aquatic resources. Many commenters stated that surface coal mining activities in Appalachia have resulted in the loss of a couple of thousand miles of streams, substantially degraded water quality, and are harmful to the health and drinking water of Appalachian citizens. They also said the Corps should follow science and stop issuing permits, including individual permits, for surface coal mining activities in these six Appalachian states because those activities cause significant degradation of waters of the United States, and this region cannot afford to lose more of its vital natural resources.

In accordance with the June 11, 2009, memorandum of agreement implementing the interagency action plan on Appalachian Surface Coal Mining, which was signed by the Department of the Army, the Department of Interior, and the U.S. Environmental Protection Agency, the Corps issued a proposal in the **Federal Register** on July 15, 2009, to modify NWP 21 so that it would not authorize discharges of dredged or fill material into waters of the United States in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and

[1] The Office of Surface Mining has announced its intention to further revise these requirements however such revisions will not be in place at the time the NWPs are reissued. The Corps may reconsider these limits in future promulgations of the NWPs based on its experience and any changes in the broader regulatory context.

West Virginia (see 74 FR 34311). In the June 18, 2010, issue of the **Federal Register** (75 FR 34711), the Corps announced the suspension of NWP 21 in the Appalachian region of six states (i.e., Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia) and said that it would consider modifying NWP 21.

As a result of our review of the comments received in response to the February 16, 2011, proposal we have determined that it would be appropriate to adopt Option 2 and substantially modify NWP 21 by imposing acreage and linear foot limits, as well as prohibiting its use to authorize discharges of dredged or fill material into waters of the United States to construct valley fills associated with surface coal mining activities, to ensure that the NWP authorizes only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. The ½-acre and 300 linear foot limits will substantially reduce the amount of stream bed and other waters lost as a result of activities authorized by this NWP, and limit this NWP to minor fills associated with surface coal mining activities, such as the construction of sediment ponds. Issues relating to the use of individual permits to authorize discharges of dredged or fill material into waters of the United States associated with surface coal mining activities are outside the scope of the NWP reissuance process and are not addressed in this rule.

The proposed reissuance of NWP 21, as well as the selection of Option 2 to reissue the NWP with ½-acre and 300 linear foot limits and a prohibition against authorizing discharges of dredged or fill material into waters of the United States to construct valley fills, is not contrary to the suspension of NWP 21 in the Appalachian region of these six states. The NWP reissued today has been substantially modified from the 2007 version of NWP 21, with paragraph (a) authorizing Corps district engineers to re-authorize activities that were previously verified under the 2007 NWP 21 authorization where that would be appropriate, and paragraph (b) imposing the acreage and linear foot limits stated above, as well as the condition prohibiting its use for the construction of valley fills in waters of the United States, on new NWP 21 activities. The substantial changes in the terms and conditions of the reissued NWP 21 will ensure that the activities authorized by this NWP result in minimal individual and cumulative adverse effects on the aquatic environment. District engineers will review pre-construction notifications for activities authorized under paragraph (b) of this NWP and may require compensatory mitigation to offset losses of waters of the United States and ensure the adverse effects on the aquatic environment are minimal, individually and cumulatively. Compensatory mitigation required for activities verified under the 2007 NWP 21 will continue to be required, and may be augmented if the district engineer determines that they do not adequately compensate for losses of aquatic resource function and ensure minimal individual and cumulative adverse effects. Suspension of an NWP is an interim measure to be taken if there are substantive concerns that an NWP activity is potentially causing more than minimal adverse environmental effects, while the Corps collects additional information and considers modifications to that NWP to satisfy statutory or regulatory requirements for general permits, such as compliance with Section 404(e) of the Clean Water Act. We fully considered the comments received in response to the July 15, 2009, proposal to suspend NWP 21 and used those comments to develop the three options presented in the February 16, 2011, proposal to reissue NWP 21. We have now determined that adopting Option 2 addresses the concern that led to our previous suspension of NWP 21 in the six Appalachian states, but in a more effective and equitable way. It is not the geographic location of activities, but rather the nature of these activities and their associated discharges that may lead to more than minimal adverse effects. By prohibiting the use of NWP 21 for discharges associated with valley fills and activities exceeding appropriate thresholds, which are consistent with the thresholds used for many other NWPs, we can ensure that activities that may result in more than minimal individual and cumulative adverse effects obtain individual permits, and those activities that will not result in more than minimal adverse effects can be authorized by an NWP, regardless of the region of the country in which they occur.

Only those surface coal mining activities involving discharges into waters of the United States that received written authorization under the 2007 NWP 21 may be eligible for authorization under paragraph (a) of this NWP. Activities that were subject to the June 18, 2010, suspension of NWP 21 in the Appalachian region of the six states may be eligible for NWP 21 authorization under paragraph (b) if they do not result in the loss of greater than ½-acre of waters of the United States, do not result in the loss of greater than 300 linear feet of stream bed (unless that 300 linear foot limit for intermittent and ephemeral streams is waived by the district engineer after agency coordination and making a written determination that the activity will result in minimal individual and cumulative adverse effects on the aquatic environment), and do not involve discharges of dredged or fill material into waters of the United States to construct valley fills.

One commenter objected to the proposed reissuance of NWP 21, stating that it authorizes impacts for activities that are not similar in nature, such as mining operations, impoundments, processing plants, and road crossings. The commenter said that the Corps decision documents do not recognize that impoundments can cause massive spills or contaminate well water.

We do not agree that this NWP authorizes activities that are not similar in nature. This NWP authorizes surface coal mining activities, a broad category that includes a variety of features that may be constructed by discharging dredged or fill material into waters of the United States, the activities regulated by the Corps under Section 404 of the Clean Water Act. Discharges of dredged or fill material into waters of the United States may be used to construct sediment ponds, road crossings, etc. that are necessary to conduct surface coal mining activities, or they may occur while coal is being mined (e.g., mine-throughs). Impoundments constructed in waters of the United States should be properly maintained (see general condition 14, proper maintenance). District engineers may also require non-Federal permittees to demonstrate that those impoundment structures comply with applicable dam safety criteria (see general condition 24, safety of impoundment structures).

One commenter said that if NWP 21 was reissued and could be used to authorize valley fills, the Corps would violate the requirement in the 404(b)(1) Guidelines that no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of waters of the United States. This commenter also stated that the proposed 300 linear foot limit for the loss of stream bed would not prevent significant degradation of streams, and objected to the proposed waiver of that limit for intermittent and ephemeral streams, if the district engineer determined that such a loss would result in minimal adverse effects on the aquatic environment.

The NWP 21 reissued today does not authorize discharges of dredged or fill material into waters of the United States to construct valley fills, unless under paragraph (a) the activity was previously verified under the 2007 NWP 21 and the district engineer has determined that those activities still qualify for NWP 21 authorization under the 2012 NWP general conditions, applicable regional conditions, and any activity-specific conditions such as compensatory mitigation requirements. For those previously authorized surface coal mining activities, the district engineer determined that the adverse effects on the aquatic environment are minimal, individually and cumulatively. To re-verify the NWP authorization under the 2012 NWP 21, the district engineer must determine that the activity continues to result in minimal individual and cumulative adverse effects on the aquatic environment. Surface coal mining activities that involve discharges of dredged or fill material into waters of the United States for the construction of valley fills that were not previously verified under the 2007 NWP 21 are subject to paragraph (b) of the 2012 NWP 21 and cannot be authorized by NWP 21. Discharges of dredged or fill material into waters of the United States authorized by NWP 21 require water quality certification. If water quality certification is not obtained or waived, that activity is not authorized by NWP 21. The water quality certifications issued by states are to be considered by district engineers to be conclusive regarding water quality issues, unless the Regional Administrator of the U.S. Environmental Protection Agency advises the district engineer of other water quality concerns that need to be taken into consideration. The construction of impoundments authorized by NWP 21 is generally a minor cause of changes to water quality. Most of the changes to water quality are due to the overall surface coal mining activity and the change in land use (including uplands) that occurs as a result of those mining activities. The discharges of dredged or fill material into waters of the United States authorized by NWP 21 constitute a small proportion of the overall fill placed in a watershed to dispose of the rock, soil, and other materials that are produced by the surface coal mining activity. As water percolates through the larger overall fill that has been placed in uplands and streams, the water chemistry changes. The effluent discharged from impoundments constructed to trap sediments and other materials to reduce their transport to downstream waters is regulated under Section 402 of the Clean Water Act, and requires a National Pollutant Discharge Elimination System (NPDES) permit. The NPDES permit is issued by states that have approved programs or the U.S. EPA.

One commenter said the Corps has ignored cumulative impacts from discharges of dredged or fill material previously authorized by NWP 21 in proposing Option 2 as a preferred alternative. The commenter also stated that the draft decision documents fail to provide any evidence that would support a minimal effects determination and that the Corps only considers cumulative effects during the five year period the NWP is in effect and this ignores the fact that valley fills bury streams permanently, whether authorized by past nationwide or individual permits, or in the future. The commenter also said that Option 2 ignores the cumulative amount of stream loss or acreage in a watershed from multiple permits.

We have taken into account cumulative impacts from discharges of dredged or fill material previously authorized by NWP 21, and cumulative effects of discharges of dredged or fill material previously authorized by individual permits, when developing the proposal to reissue NWP 21, including Option 2. For NWP 21 activities that were not previously authorized by the 2007 NWP 21, paragraph (b) of NWP 21 imposes a ½-acre limit on NWP 21, as well as a 300 linear foot limit for losses of stream bed, and does not authorize discharges of dredged or fill material into waters of the United States to construct valley fills. These changes will reduce the number of surface coal mining activities authorized by NWP 21, when compared to previous versions of NWP 21, which had no acreage or linear foot limits, and could be used to authorize discharges of dredged or fill material into waters of the United States to construct valley fills. We determined that these limits will ensure that the adverse effects of discharges authorized by NWP 21 are minimal, both individually and cumulatively. Under the National Environmental Policy Act, an assessment of cumulative effects has to consider the past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such actions (see 40 CFR 1508.7). In addition, the 404(b)(1) Guidelines require a different approach to cumulative effects analysis for the issuance of a general permit, such as NWP 21. The 404(b)(1) Guidelines require the Corps or other permitting authority to predict cumulative effects by evaluating the number of individual discharges of dredged or fill material into waters of the United States expected to be authorized by that general permit until it expires (see 40 CFR 230.7(b)(3)).

The decision document for this NWP includes evaluations of cumulative effects under both approaches, and concludes that the reissuance of this NWP, including the imposition of the ½-acre limit, 300 linear foot limit, and prohibition against authorizing valley fills on activities that were not previously authorized under the 2007 NWP 21, as well as the pre-construction notification requirements and other procedural safeguards, will authorize only those activities with minimal individual and cumulative adverse effects on the aquatic environment. Activities authorized under the 2007 NWP 21 were already determined by district engineers to result in minimal individual and cumulative adverse effects on the aquatic environment. The other procedural safeguards include the authority for division engineers to modify, suspend, or revoke NWP 21 authorizations on a regional basis, and the authority for district engineers to modify NWP 21 authorizations by adding conditions, such as compensatory mitigation requirements, to ensure minimal individual and cumulative adverse effects on the aquatic environment. District engineers may also assert discretionary authority to require individual permits in cases where the adverse effects will be more than minimal.

Under the National Environmental Policy Act approach to assessing cumulative effects, the decision document discusses, in general terms, the various activities (Federal, non-Federal, and private actions) that may adversely affect the quantity and quality of aquatic resources in a watershed or other geographic region used for cumulative effects analysis, regardless of whether those activities occurred in the past or are expected to occur in the present or reasonably foreseeable future. Under the 404(b)(1) Guidelines approach for assessing cumulative effects of the issuance of a general permit such as NWP 21, the decision document evaluates the number of discharges of dredged or fill material into waters of the United States expected to occur during the five-year period the NWP would be in effect, as well as the estimated loss of waters of the United States and compensatory mitigation. District and division engineers are to supplement these

analyses when they prepare supplemental decision documents for this NWP, and these supplemental decision documents are to include cumulative effects analyses at a regional level. which can be highly informative regarding impacts at a local watershed level. The appropriate geographic scope of those cumulative effects analyses are at the discretion of the division or district engineers.

The Corps considers and addresses cumulative environmental effects of NWP 21 (and other NWPs) in two distinct ways. First, when Corps Headquarters evaluates and proposes to issue or re-issue a NWP (such as NWP 21), we evaluate cumulative effects at the national level, using available national information on aquatic resource status and trends and the general effects human activities have on aquatic resources. The cumulative effects analyses presented in the Headquarters decision documents reflect these national-scale evaluations and conclusions supporting the promulgation of the NWP from Corps Headquarters.

Second, division and district engineers monitor the use of the NWPs on a regional level, and will modify, suspend, or revoke applicable NWPs when necessary if the use of those NWPs is likely to result in more than minimal individual and cumulative adverse effects on the aquatic environment within a particular watershed, ecoregion, state, county, or other appropriate geographic area. To address regional and site-specific environmental considerations, we rely on the Corps district offices that receive pre-construction notifications required by the terms and conditions of the NWP to evaluate the relevant regional and site-specific environmental considerations. The Corps district may add conditions to the NWP authorization, including compensatory mitigation requirements, to ensure that the individual and cumulative adverse effects on the aquatic environment caused by the NWP activity are minimal, and therefore qualify for NWP authorization. If conditions cannot be added to the NWP authorization to ensure that minimal individual and cumulative adverse effects on the aquatic environment occur, the district engineer will exercise discretionary authority and notify the applicant that an individual permit is required.

One commenter said there is insufficient support for the Corps position that the required compensatory mitigation will attenuate cumulative impacts on the Nation's aquatic resources by providing aquatic resource functions and services, so the net effects will be minimal. Another commenter stated that the Corps relies heavily on mitigation, such as stream creation, restoration, and enhancement, but there is no evidence that stream creation works. The commenter also indicated that the 404(b)(1) Guidelines provide that no permit may rely on mitigation techniques unless they have been demonstrated to be effective in circumstances similar to those under consideration, and that the 2008 compensatory mitigation rule requires that the district engineer assess the likelihood for ecological success. The commenter said the Corps cannot issue an NWP without assessing mitigation effectiveness and success in the specific context in which the mitigation technique would be used. The commenter concluded that the Corps mitigation analysis fails to contain any discussion of stream functions that would be lost from potential NWP activities and whether compensatory mitigation can replace those functions.

Compensatory mitigation can be an effective means of offsetting losses of aquatic resource functions caused by activities authorized by Department of the Army permits, including NWP 21 activities, if it is thoughtfully planned, implemented, and monitored. Compensatory mitigation projects must be carefully sited, planned, and designed to be ecologically successful in providing stream or wetland functions. Site selection is a critical step in developing and implementing an ecologically successful compensatory mitigation project. With the promulgation of 33 CFR part 332 on April 10, 2008 (73 FR 19594), the Corps Regulatory Program adopted requirements and standards to improve compensatory mitigation practices for offsetting losses of aquatic resource functions. Under the 2008 rule, a watershed approach should be used for establishing compensatory mitigation requirements that will successfully provide aquatic resource functions to offset losses of those functions caused by permitted activities.

The 2008 rule identifies streams as ''difficult-to-replace'' resources and states that if further avoidance and minimization of stream impacts is not practicable, the required compensatory mitigation should be provided through stream rehabilitation, enhancement, or preservation since those techniques have a greater certainty of success (see 33 CFR 332.3(e)(3)). The preamble to the 2008 rule includes a detailed discussion of the scientific status of stream restoration and concludes that there has been success with stream rehabilitation, enhancement, and preservation activities (see 73 FR 19596–19598). In accordance with the 2008 rule, the Corps is not relying on stream creation as a mechanism to provide compensatory mitigation for NWP 21 activities. In cases where compensatory mitigation is required for NWP 21 activities, those compensatory mitigation requirements will be specified as activity-specific conditions of NWP 21 authorizations. The required components of a compensatory mitigation plan are specified at 33 CFR 332.4(c)(2)–(14), and the district engineer will evaluate each compensatory mitigation proposal to assess its potential for ecological success, and consider the relevant factors provided in 33 CFR 332.3. The compensatory mitigation plan must be approved by the district engineer and monitoring will be required to assess whether the compensatory mitigation project is meeting its objectives and is successfully meeting its ecological performance standards. The district engineer will review monitoring reports, and if the compensatory mitigation project is not meeting its ecological performance standards, he or she will require the responsible party to identify and implement adaptive management measures to make changes to provide a successful mitigation project. If adaptive management is not likely to result in an ecologically successful compensatory mitigation project that will be sufficient for offsetting lost aquatic resource functions that result from the permitted activity, alternative compensatory mitigation may be required. Financial assurances may also be required to help ensure the success of the required compensatory mitigation.

The 404(b)(1) Guidelines, which address habitat development and restoration as a means of minimizing adverse effects to plant and animal populations (40 CFR 230.75(d)), recommend the use of techniques that have been demonstrated to be effective. That provision is consistent with the section on difficult-to-replace resources (33 CFR 332.3(e)(3)/40 CFR 230.93(e)(3)), which states that rehabilitation, enhancement, and preservation should be used to provide the required compensatory mitigation to offset permitted impacts to such resources because there is greater certainty that such stream rehabilitation, enhancement, and preservation will be ecologically successful and offset those permitted impacts. The decision document for this NWP contains a general discussion of the functions provided by streams, as well as general

citations supporting our position that stream rehabilitation and enhancement can provide stream functions to offset functions lost as a result of permitted activities. It is not necessary for the decision document to provide a comprehensive analysis of the state of stream restoration success. The approach discussed above, and in 33 CFR part 332, is consistent with the Council on Environmental Quality's January 14, 2011, guidance on the ''Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact.'' That guidance advocates the use of adaptive management to take corrective actions if the required mitigation fails to achieve projected environmental outcomes, which is also required by the Corps compensatory mitigation regulations in 33 CFR part 332.

One commenter said that the Corps has failed to analyze whether surface coal mining activities authorized by NWP 21 will cause significant degradation to ''special aquatic sites,'' such as riffle and pool complexes. This commenter asserted that valley fills and mining through streams frequently buries riffle and pool complexes, and these special aquatic sites are protected by stringent restrictions on discharges of fill material into such sites. The commenter also stated that practicable alternatives that do not involve burying riffles and pools are presumed to be available unless clearly demonstrated otherwise and such alternatives are presumed to have less adverse impacts on the aquatic ecosystem. This commenter said the Corps should deny a permit if it lacks sufficient information to determine whether the proposed discharge complies with the Guidelines.

The activities authorized by this NWP comply with the 404(b)(1) Guidelines, even though it authorizes discharges of dredged or fill material into waters of the United States that may be classified as special aquatic sites such as riffle and pool complexes. Each activity authorized by an NWP does not require a project-specific 404(b)(1) Guidelines analysis—that analysis is done before the NWP or any other type of general permit is issued (see 40 CFR 230.7). The 404(b)(1) Guidelines do not prohibit the use of general permits to authorize discharges of dredged or fill material into special aquatic sites. A determination of significant degradation does not focus simply on the loss of a special aquatic site caused by the discharge of dredged or fill material. It requires a broader analysis. The process for determining whether significant degradation occurs consists of applying the provisions of the 404(b)(1) Guidelines holistically, and assessing the effects of the proposed discharge of pollutants on human health and welfare; aquatic life and wildlife; aquatic ecosystem diversity, productivity, and stability; and recreational, aesthetic, and economic values. For activities authorized by general permits, the evaluation of alternatives in accordance with 40 CFR 230.10(a) does not directly apply (see 40 CFR 230.7(b)(1)). Paragraph (a) of general condition 23, mitigation, requires project proponents to design and construct NWP activities to avoid and minimize adverse effects to the aquatic environment to the maximum extent practicable on the project site.

Several commenters stated that surface coal mines are already heavily regulated under SMCRA, which includes a variety of requirements to protect waters of the United States, so additional requirements are not needed to ensure that adverse effects to the aquatic environment are minimal. Two of these commenters stated NWP 21 should be reissued without change because of SMCRA requirements. One commenter said the authority to authorize stream and wetland impacts caused by mining activities should rest solely with the SMCRA regulatory authority.

There is often more than one Federal law that regulates surface coal mining activities, especially in cases where those activities involve discharges of dredged or fill material into waters of the United States. While most aspects of surface coal mining are regulated under SMCRA, surface coal mining and reclamation activities involving discharges of dredged or fill material into waters of the United States also require permits issued under Section 404 of the Clean Water Act. The statutory and regulatory standards established under SMCRA are different than those established under Section 404 of the Clean Water Act, including section 404(e) which authorizes the Corps to issue general permits. One of the objectives of SMCRA is to ensure that surface coal mining activities are conducted in an environmentally responsible manner and that the land disturbed by mining is adequately reclaimed. One of the objectives of the Clean Water Act is to ''restore and maintain the physical, chemical, and biological integrity of the Nation's waters.'' Under the regulations implementing SMCRA, surface coal mining and reclamation activities must be conducted in a manner that will ''minimize the disturbance of the hydrologic balance within the permit and adjacent areas'' and that will ''prevent material damage to the hydrologic balance outside the permit area.'' As part of the SMCRA permitting process, potential changes to the quality and quantity of surface and groundwater are evaluated to ensure that material damage to the hydrologic balance outside the permit area will not occur. Other factors considered under SMCRA include: pre- and post-mining land uses, backfilling and grading activities, disposal of excess spoil, and the protection or replacement of water supplies.

Under Section 404 of the Clean Water Act, the 404(b)(1) Guidelines provide the substantive criteria for evaluating the environmental effects of proposed discharges of dredged or fill material into waters of the United States. The 404(b)(1) Guidelines are not focused on considering effects to water quality and quantity. The 404(b)(1) Guidelines also require examination of the effects that discharges of dredged or fill material will have on physical, chemical, and biological attributes of waters of the United States. The 404(b)(1) Guidelines at 40 CFR part 230 require the Corps to evaluate the effects of discharges of dredged or fill material, including general permits that authorize such discharges, on the applicable criteria listed in subparts C through F. Examples of criteria in those subparts are: Substrate; suspended particulates/turbidity; water; current patterns and water circulation; normal water fluctuations; threatened and endangered species; fish, crustaceans, mollusks, and other aquatic organisms in the food web; other wildlife; wetlands; riffle and pool complexes; municipal and private water supplies; recreational and commercial fisheries; water-related recreation; and aesthetics. The threshold for issuance of general permits such as NWP 21 is a determination that the authorized activities would result in no more than minimal individual or cumulative adverse environmental effects.

There is no corresponding threshold under SMCRA and its implementing regulations, which do not require that permit applications be evaluated in terms of the 404(b)(1) Guidelines. Instead, section 507(b)(11) of SMCRA requires that the permit applicant prepare a determination of the probable hydrologic consequences of the proposed operation with respect to the hydrologic regime and the quantity and quality of water in surface and ground water systems. Section 510(b)(3) of SMCRA requires that the regulatory authority use this determination and other available information to prepare an assessment of the probable

cumulative impact of all anticipated mining in the area on the hydrologic balance. The SMCRA regulatory authority may not issue a permit unless it first finds that the operation has been designed to prevent material damage to the hydrologic balance outside the permit area. While there is some overlap, the thresholds for permit issuance under SMCRA are not the same as the thresholds under Section 404 of the Clean Water Act. Given the different permit issuance thresholds of SMCRA and Section 404 of the Clean Water Act, NWP 21 authorizations cannot only rely on the environmental reviews conducted under SMCRA to satisfy the minimal effects requirement.

Section 404 of the Clean Water Act applies to all discharges of dredged or fill material into waters of the United States, unless those activities qualify for an exemption under Section 404(f) of the Clean Water Act. Section 404(f) does not specifically exempt surface coal mining activities. For those activities that do not qualify for an exemption from the permit requirements of the CWA, the Corps must evaluate applications for Department of the Army permits, including general permits, and either apply the 404(b)(1) Guidelines (if an individual permit is required) or determine whether the proposed activity qualifies for NWP authorization. This NWP provides an efficient means of authorizing discharges of dredged or fill material into waters of the United States that result in minimal individual and cumulative adverse effects on the aquatic environment. Corps districts work with SMCRA regulatory authorities to reduce duplication, but each agency must still ensure that proposed activities comply with their respective statutes and implementing regulations.

Two commenters stated the primary effect of adopting any of the three options proposed for NWP 21 in the February 16, 2011, **Federal Register** notice would be to require proposed surface coal mining activities involving discharges of dredged or fill material into waters of the United States to be evaluated under the individual permit process. This would cause an unnecessary additional delay and expense to mine operators and require the Corps to get additional personnel and funding to process additional individual permit applications in a timely manner. One commenter suggested that NWP 21 should be reissued as it was in 2007, and that regional conditions should be used in Appalachia to ensure those activities result in minimal adverse effects on the aquatic environment. This commenter said this approach would allow western coal producers to continue their operations without negative consequences.

We acknowledge that reissuing NWP 21 with a ½-acre limit, a 300 linear foot limit for the loss of stream bed, and not authorizing discharges of dredged or fill material into waters of the United States to construct valley fills, will result in more surface coal mining activities requiring Clean Water Act Section 404 individual permits. To provide an equitable and less burdensome transition to the new limits to NWP 21, under paragraph (a) NWP 21 continues to authorize surface coal mining activities that were previously authorized under the 2007 NWP 21 without those new limits. Under paragraph (b), the ½-acre and 300 linear foot limits, as well as the prohibition against authorizing discharges of dredged or fill material into waters of the United States to construct valley fills, apply to surface coal mining activities that were not authorized by the 2007 NWP 21. Expansions of activities that were previously verified under the 2007 NWP 21 do not qualify for paragraph (a) of NWP 21.

Continuing to authorize surface coal mining activities that were verified under the 2007 NWP 21 will reduce burdens on the regulated public while protecting the aquatic environment in accordance with the requirements of Section 404(e) of the Clean Water Act. These project proponents who received verifications under the 2007 NWP 21 expended substantial resources to obtain their authorizations. If they cannot comply with the new limits imposed on NWP 21 it would impose a significant hardship to require those operators to cease surface coal mining activities in waters of the United States while they apply for individual permits and wait for a decision. We estimate that there are approximately 70 surface coal mining activities across the country that were authorized by the 2007 NWP 21 that may qualify for authorization under paragraph (a) of NWP 21 when it goes into effect on March 19, 2012. To obtain authorization under paragraph (a) of the 2012 NWP 21, these project proponents do not need to submit a pre-construction notification since they already did so under the 2007 NWP 21 and that notification will be on file at the district office. Instead, those project proponents only need submit a letter to the district engineer requesting verification under the 2012 NWP 21. That letter should be sent to the district engineer by February 1, 2013, although that deadline may be extended in writing by the district engineer. This date allows the district engineer approximately 45 days for review of the letter before the expiration of the one-year period that is allowed for completion of activities authorized under the 2007 NWP 21. Any changes to the previously authorized surface coal mining activity must also be described in that letter, so that the district engineer can determine whether the activity still results in minimal individual and cumulative adverse effects on the aquatic environment and is eligible for authorization under paragraph (a) of NWP 21. The district engineer will review such requests and notify the permittee whether the activity is authorized by the 2012 NWP 21. There will be no agency coordination of these previously authorized NWP 21 activities. Any currently applicable regional conditions and any activity-specific conditions, such as compensatory mitigation requirements, would apply to the NWP authorization. The district engineer may also revise such conditions and requirements if the existing ones are determined not to be adequate to ensure minimal adverse effects. If the permittee does not receive a written verification from the district engineer prior to the expiration of the one-year period provided in 33 CFR 330.6(b), the permittee must cease all activities until such verification is received because that one-year period cannot be extended. The surface coal mine activity must be authorized under the 2012 NWP 21 or another form of Department of the Army authorization to discharge dredged or fill material into waters of the United States after the one-year period ends on March 18, 2013. The district engineer may also extend the February 1, 2013, deadline by notifying the permittee in writing, if he or she needs less than 45 days to make a decision on the 2012 NWP 21 authorization. The Corps encourages operators who received a 2007 NWP 21 verification and plan to operate past March 18, 2013, to submit their letter as soon as possible to allow for uninterrupted NWP 21 permit coverage. Expansions of previously verified NWP 21 activities that result in greater losses of waters of the United States are not authorized under paragraph (a) will require a different form of Department of the Army authorization if they do not qualify for authorization under paragraph (b) of NWP 21. If the surface coal mining activity involving discharges of dredged or fill material into waters of the United States authorized under paragraph (a) cannot be completed by the time the 2012 NWP 21 expires, then the project proponent

will have to obtain an individual permit or regional general permit, if the activity does not qualify for an applicable NWP issued in 2017. The Corps recommends that any projects that will extend beyond March 18, 2017, that do not meet the new limits in NWP 21 apply for an individual permit and allow sufficient time for the Corps to process their application to allow uninterrupted coverage when the new NWP 21 expires in 2017.

The limits added to paragraph (b) of NWP 21 will ensure that this NWP authorizes only those activities that have minimal adverse effects on the aquatic environment, individually and cumulatively. These limits will also result in more new projects needing to obtain individual permits. The Corps has the resources necessary to process those individual permit applications in a timely manner. It is important for coal mine operators to consider the advantages of obtaining individual permits for surface coal mining activities. In accordance with Section 404(e) of the Clean Water Act, general permits, including NWPs, can be issued for a period of no more than five years. Individual permits can be issued for longer periods of time—the expiration date for an individual permit is at the discretion of the district engineer, who will take into account the characteristics of the proposed activity and the amount of time expected to be needed to complete the regulated activities. Therefore, it would often be advantageous for a surface coal mine operator to obtain an individual permit that would authorize discharges of dredged or fill material into waters of the United States for the expected operational timeframe for that particular coal mine. Under NWP 21, no authorization could be issued for a time period of more than five years. If the NWP 21 activity is not completed by the expiration date of the NWP authorization then the project proponent would have to notify the district engineer and obtain another NWP verification.

Nationwide permit NWP 21 pre-construction notifications require substantial resources to evaluate proposed activities and determine whether they result in minimal individual and cumulative adverse effects on the aquatic environment, and whether compensatory mitigation is needed to comply with the minimal adverse environmental effects requirement for general permits. Under the 2007 NWP 21, the project proponent could not proceed until he or she obtained an NWP 21 verification. The substantial amount of review required for both NWP 21 pre-construction notifications and individual permit applications both involve considerable amounts of resources from the Corps, so we do not expect a significant increase in workload or processing times to occur through the implementation of Option 2 and the modifications we made to that option for the final NWP.

In response to the NWP 21 proposal, one commenter said the Corps was attempting to decide on behalf of the United States government how much coal mining should take place, or what scale of mining operations is appropriate. The commenter suggested that the Corps only concern should be the scale of the regulated activity and not the scale of the mining operation. The commenter stated that the Corps evaluation of surface coal mining activities should be focused on impacts to aquatic resources. One commenter said the proposed changes to NWP 21 would have a significant effect on energy supply, since the ability to obtain permits in a timely manner is essential to the production of coal, which provides over 30 percent of America's electric power.

The three options provided in the February 16, 2011, **Federal Register** notice were intended to solicit comment to assist the Corps in identifying an option for the reissuance of NWP 21 that would comply with the statutory and regulatory requirements for general permits. Those options were developed to determine which terms and conditions (if any) should be established to ensure that NWP 21 authorizes only those activities that result in minimal adverse effects on the aquatic environment. The proposal does not affect how much coal mining may take place, nor does it have a significant effect on energy supply, because those surface coal mining activities that do not qualify for NWP 21 authorization may be authorized by individual permits or general permits, if such general permits are available. The Corps review is focused on adverse effects to aquatic resources, as well as other public interest review factors. The limits on the use of NWP 21 are expressed in terms of impacts to the aquatic environment, not the scale of the mining operation. Other aspects of surface coal mining activities are regulated by OSMRE or delegated states under SMCRA.

One commenter said that NWP 21 should not apply to ephemeral waters because they are not jurisdictional waters of the United States. Several commenters stated that NWP 21 encourages operators to design their projects within the scope of the NWP rather than seek an individual permit, thereby reducing impacts. These commenters said that there may be a net gain of wetland acreages because of reclamation practices at surface coal mines.

Ephemeral streams are waters of the United States if they meet the definition of ''waters of the United States'' at 33 CFR part 328 and applicable guidance on Clean Water Act jurisdiction, such as the guidance issued in 2008 entitled ''Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos* v. *United States* and *Carabell* v. *United States.''* The NWP 21 issued in 2007 did not have any acreage or linear foot limits, which are the primary tools used to encourage avoidance and minimization to qualify for NWP authorization. Except for those previously verified 2007 NWP 21 activities authorized under paragraph (a), the NWP 21 reissued today has a ½-acre limit and a 300-linear foot limit for losses of stream bed, which will be more effective in encouraging project proponents to avoid and minimize losses of waters of the United States to quality for NWP 21 authorization. We acknowledge that there may be net gains in wetland acreage at some surface coal mining reclamation sites, but we have imposed limits on NWP 21 because of concerns about losses of stream bed and the potential for surface coal mining activities to have more than minimal adverse effects on the aquatic environment, individually and cumulatively.

One commenter disagreed with the Corps assertion that valley fills substantially alter watersheds and result in adverse impacts on the aquatic environment. This commenter also said that Options 2 and 3 do not allow the Corps the flexibility to increase the amount of stream bed loss above the 300 linear foot limit. The commenter also objected to the proposed interagency coordination for activities resulting in a loss of greater than 1,000 linear feet of intermittent and ephemeral stream beds, and said the Corps has not suggested any reasons for this restrictive provision.

Surface coal mining activities involving the construction of valley fills result in substantial changes to the watersheds of the headwater streams that are primarily impacted by these activities. Those watersheds are changed by the large amounts of land clearing and earthmoving that occur during the mining activity. The construction of the valley fill itself causes changes to the geomorphology of the watershed, which affects water quality and watershed hydrologic

functions, such as water collection, transport, and storage. It is well documented in the scientific literature that changes in land use affect the quantity and quality of streams, wetlands, and other aquatic resources. Examples of such scientific studies are cited in the decision document for this NWP. The 300 linear foot limit for losses of stream bed is generally necessary to ensure that NWP 21 authorizes only those activities that result in minimal adverse effects on the aquatic environment. However, that 300 linear foot limit may be waived by the district engineer if the proposed activity involves filling or excavating intermittent or ephemeral stream beds and the district engineer determines, in writing, that that activity will result in minimal individual and cumulative adverse effects on the aquatic environment. Agency coordination for proposed losses of greater than 300 linear feet of intermittent or ephemeral stream bed is intended to provide information that will assist the district engineer in making his or her minimal adverse effects determination.

One commenter said all Corps divisions and districts should add regional modification alternatives to address differences in aquatic resources functions. This commenter also stated that the proposal provides that the cumulative impact analysis for an NWP 21 is not limited to assessing impacts of the use of the NWP 21 on a national basis and is not limited to activities authorized by NWPs or other Department of Army permits. The commenter acknowledged that the Corps considers activities not regulated by the Corps, including private actions and those resulting in changes in the use of uplands next to or near wetlands, streams, or other aquatic resources during the cumulative effects analysis.

It is at the division engineer's discretion whether to add regional conditions to an NWP to ensure that the NWP authorizes only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. In addition, district engineers may modify NWP authorizations by adding activity-specific conditions to minimize adverse environmental effects. The decision documents comply with the two relevant approaches for conducting cumulative effects analyses: (1) The approach provided in the Council on Environmental Quality's definition of ''cumulative impact'' provided in their National Environmental Policy Act regulations at 40 CFR 1508.7, and (2) the approach indicated in the 404(b)(1) Guidelines at 40 CFR 230.7(b).

One commenter said the proposed changes to NWP 21 will actually increase impacts because mining operators will need to increase the size of their mining sites to make the individual permit process cost effective. The commenter said operators will no longer be able to afford to mine the smaller reserve areas, so larger mine areas would need to be permitted.

The changes to NWP 21 are appropriate to help ensure that this NWP complies with the statutory requirements for general permits, in that it may only authorize activities that have minimal individual and cumulative adverse environmental effects. Surface coal mining activities involving discharges of dredged or fill material into waters of the United States that do not qualify for NWP authorization will be evaluated as individual permits if applicable regional general permits are not available. Activities authorized by individual permits must comply with the 404(b)(1) Guidelines and undergo an alternatives analysis. A public interest review will also be conducted during the individual permit review process. Mining companies will have to make their own decisions on whether it is economically viable to mine smaller reserve areas, and apply for Department of the Army authorization if proposed activities involve discharges of dredged or fill material into waters of the United States.

One commenter said that if Option 2 is adopted, it should include a definition of valley fill. A commenter stated that the utility of NWP 21 would be substantially reduced because losses of waters of the United States caused by the construction of attendant features such as ponds and roads would be counted towards the ½-acre and 300 linear foot limits. Another commenter indicated that the ½-acre limit would only authorize small sediment ponds. This commenter stated that small sediment ponds would not be able to effectively service a typical mine site. One commenter requested clarification on whether the amount of stream that is impounded for sediment ponds will be counted as a loss of waters of the United States and whether these ponds will have to be removed upon completion of the mining.

We have added a definition of the term ''valley fill'' to the text of this NWP. While fewer surface coal mining activities involving discharges of dredged or fill material into waters of the United States would be authorized by NWP 21 when compared to previous issued versions of this NWP, the new terms and conditions of this NWP, including the ½-acre and 300 linear foot limits, are necessary to ensure that this NWP authorizes only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. If the construction of larger sediment ponds does not qualify for NWP 21 authorization, activities may be authorized by individual permits or applicable regional general permits. In the definition of ''loss of waters of the United States'' the loss of stream bed is determined by the amount of linear feet of stream bed that is filled or excavated. As to whether sediment ponds would have to be removed upon completion of the mining operation, that would be a case-specific determination made by the district engineer after taking into account requirements of the SMCRA authority.

One commenter asked how many surface coal mining activities may be authorized each year with NWP 21 if Option 2 is selected. One commenter said the proposed changes to NWP 21 would be costly to small businesses and disagreed with the Corps statement that the revised NWPs will not impose substantially higher costs on small entities than those of existing permits. Another commenter indicated that the proposed changes to NWP 21 would result in more environmental impact statements being required because of the amount of wetlands in their area.

In section 6.2.2 of the decision document for this NWP, we provide estimates of the number of times we predict NWP 21 will be used each year. Under paragraph (b), we estimate that NWP 21 will be used approximately 11 times per year, although more activities may qualify for NWP 21 authorization if project proponents do additional avoidance and minimization to reduce losses of waters of the United States to satisfy the acreage and linear foot limits. As discussed above, we estimate that, across the country, approximately 70 NWP 21 activities verified under the 2007 NWP 21 might be re-verified under paragraph (a) of the 2012 NWP 21. The estimate provided in the decision document was based on an analysis of past use of NWP 21, and it is a rough estimate because NWP 21 did not have an acreage or linear foot limit and we cannot predict how many activities can be modified to comply with the new limits. Therefore, it is difficult to accurately predict how often project proponents will qualify for authorization under the NWP 21 issued today. Since fewer surface coal mining activities are likely to qualify for NWP 21 authorization, and more will require individual permits, we acknowledge

that there will be greater compliance costs for small businesses. In the preamble to the proposal, where we discuss compliance with the Regulatory Flexibility Act, we state that the proposed NWPs would not result in a significant impact on a substantial number of small entities. That statement was made in the context of considering all of the 48 NWPs proposed to be reissued and the two proposed new NWPs. Some NWPs, such as NWP 48, will require fewer pre-construction notifications and other requirements on small entities while other NWPs, such as NWP 21, will have more stringent requirements to satisfy the minimal adverse environmental effects standard and will authorize fewer activities. We do not agree that these changes to NWP 21 will result in significantly more environmental impact statements. The threshold for NWP authorization, as well as for other general permits, is minimal adverse environmental effects. The threshold for preparing an environmental impact statement is that the activity constitutes a major Federal action significantly affecting the quality of the human environment. Since the threshold that triggers the requirement to prepare an environmental impact statement is greater than the minimal adverse environmental effects threshold for NWP activities, activities that were previously authorized by NWP should generally not require an environmental impact statement if they are instead evaluated through the individual permit process. Environmental assessments should suffice to provide National Environmental Policy Act compliance for most, if not all, of those activities. If the adverse effects on the aquatic environment for a proposed NWP activity are determined by the district engineer to be more than minimal individually and cumulatively, then discretionary authority should be exercised and the proposed activity evaluated through the individual permit process.

Many commenters said that that it would be more appropriate to establish different NWP terms and conditions for different areas of the United States, because of vast differences in geological, topographical, climatologically and ecological regimes in areas where coal resources are located across the country. One of these commenters recommended focusing on the use of regional conditions to address regional differences in coal mining techniques and issues, instead of modifying NWP 21.

An NWP is developed to authorize specific categories of activities across the country that have minimal individual and cumulative adverse effects on the aquatic environment and is issued by Corps Headquarters. There must be a national decision document for each NWP, and to issue that NWP, there must be a finding that the NWP will authorize only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. Division and districts prepare supplemental decision documents to explain whether regional conditions are needed to satisfy the minimal adverse effects requirement. Regional conditions are added to an NWP at a division engineer's discretion and Corps Headquarters cannot mandate the adoption of regional conditions.

The national decision documents acknowledge that regional conditions approved by division engineers and activity-specific conditions added to NWP authorizations are procedures to be relied upon to satisfy the minimal adverse environmental effects requirement. In those areas of the country where surface coal mining activities result in minimal individual and cumulative adverse effects on the aquatic environment but exceed the limits of NWP 21, division and district engineers may issue regional general permits that have different terms and conditions than NWP 21, including larger acreage or linear foot limits. Those regional general permits are a more appropriate mechanism for considering local geologic, topographic, climatologic, and ecological characteristics.

Some commenters stated that Executive Order 13563, ''Improving Regulation and Regulatory Review'' asks federal agencies to tailor regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities. These commenters said that adding additional redundant review by Federal agencies violates this Executive Order and threatens energy supplies. One of these commenters said the proposal to reissue NWP 21 with modifications is contrary to the objectives of Executive Order 13563 because it fails to use the best, most innovative and least burdensome tools for achieving regulatory ends and that the proposed limits in NWP 21 are redundant, inconsistent, or overlapping with other regulations.

As explicitly recognized in Executive Order 13563 itself, an Executive Order does not supersede Federal laws, such as the requirements in the Clean Water Act, the Rivers and Harbors Act of 1899, the Endangered Species Act, and the National Historic Preservation Act. Section 404(e) of the Clean Water Act states that general permits (including NWPs) authorize categories of activities that are similar in nature and result only in minimal individual and cumulative adverse environmental effects. The Corps complied with Section 2 of Executive Order 13563 by seeking public comment on the proposal to reissue NWP 21 with modifications, for a 60-day comment period. The Corps has determined that the changes to NWP 21 are necessary to comply with the requirements of Section 404(e) of the Clean Water Act. We have modified Option 2 by authorizing activities verified under the 2007 NWP 21 (see paragraph (a) of NWP 21), to provide an equitable transition to the new limits in NWP 21 and reduce burdens on the regulated public. The authority for the district engineer to waive the linear foot limit for losses of intermittent and ephemeral streams if the impacts are not more than minimal is also intended to minimize regulatory burden. As discussed earlier in this section, the terms and conditions of NWP 21 are not duplicative with the requirements of other Federal agencies. While surface coal mining activities are more broadly regulated under the Surface Mining Control and Reclamation Act by the Office of Surface Mining Reclamation and Enforcement or approved states, the Corps regulates discharges of dredged or fill material into waters of the United States, and focuses its evaluation on the effects those discharges have on the aquatic environment or its other public interest review factors (see 33 CFR 330.1(d) and (e)(2)). Those activities that do not qualify for NWP authorization may be authorized by other forms of Department of the Army authorization, such as individual permits or regional general permits. The standards the Corps uses to ensure compliance with the Clean Water Act differ from the standards used by the Office of Surface Mining Reclamation and Enforcement or approved states to ensure compliance with the Surface Mining Control and Reclamation Act, and those standards are not redundant.

A commenter disagreed with the Corps statement that the proposed NWPs are not a significant energy action as defined by Executive Order 13211 because of the proposed changes to NWP 21. The commenter said the Corps must prepare a Statement of Energy Effects as required by the Executive Order, including a description of the adverse impacts expected to the production of coal, the nation's primary electrical generation fuel supply. One commenter said that the time frames for evaluating NWP 21 pre-construction notifications should be similar to those

of other NWPS, and NWP 21 should not require the project proponent to wait until he or she receives a written NWP verification even if the 45-day review period has passed.

The changes to NWP 21 are appropriate and help to ensure that the NWP authorizes only those discharges of dredged or fill materials into waters of the United States that have minimal adverse effects on the aquatic environment, individually and cumulatively. Surface coal mining activities that involve discharges of dredged or fill material into waters of the United States that do not qualify for NWP authorization may be authorized by individual permits or, if available, applicable regional general permits, which would still support the production of coal to supply the nation's energy needs. Given the adverse environmental effects associated with surface coal mining activities involving discharges of dredged or fill material into waters of the United States, which are discussed in the decision document for this NWP, we believe it is necessary to retain the existing requirement that the project proponent may not proceed with the NWP 21 activity until after he or she has obtained a written NWP 21 verification. Project proponents are already accustomed to complying with this requirement and plan accordingly.

One commenter suggested establishing a grandfathering period for surface coal mining activities authorized by the NWP 21 issued in 2007, to allow permittees to complete their currently approved mitigation plans without an added burden of updating permits. Another commenter asked how project proponents are expected to transition from the current 2007 NWP 21 to one of the selected options for reissuing NWP 21, if NWP 21 is reissued under either Option 2 or 3.

As discussed above, we have revised NWP 21 to continue the NWP authorization for surface coal mining activities that were verified under the 2007 NWP 21, to provide project proponents until March 18, 2017, to complete those activities under NWP 21. The acreage limits, linear foot limits, and prohibition against discharges of dredged or fill material into waters of the United States to construct valley fills apply to those surface coal mining activities that were not previously authorized by the 2007 NWP 21. We believe this approach for transitioning to the new NWP 21 limits provides both protection to the aquatic environment and is equitable to those members of the regulated public who made substantial investments in reliance on a previously verified NWP 21 authorization.

One commenter said that a pre-construction notification should be required for all NWP 21 activities, so plans and permit conditions could be reviewed to ensure that contaminated water being generated during these activities is not later reaching open water and impacting state-owned lands. One commenter expressed concern that historic resources impacts are not considered under SMCRA in cases where the program has been delegated to states.

To be authorized by this NWP, the project proponent must submit a pre-construction notification, so that the district engineer can evaluate the proposed activity and ensure that it qualifies for NWP authorization. Activities authorized by this NWP must comply with general condition 20, historic properties. If the proposed activity has the potential to cause effects to historic properties, consultation under Section 106 of the National Historic Preservation Act will be conducted before the district engineer determines whether the activity is authorized by NWP.

This NWP is reissued with the modifications discussed above.

NWP 22. *Removal of Vessels.* There were no changes proposed for this NWP, and no comments were received. This NWP is reissued without change.

NWP 23. *Approved Categorical Exclusions.* There were no changes proposed for this NWP. One commenter requested that this NWP be limited to federal applicants only. One commenter requested that the NWP be modified to allow any agency with categorical exclusions to use this NWP, not just those that have been approved by the Office of the Chief of Engineers. One commenter recommended adding references to requirements to comply with other applicable federal laws, such as Section 106 of the National Historic Preservation Act. One commenter stated that this NWP does not take into consideration the actions that may impact Tribal treaty cultural or natural resources and requested that notification be provided to affected tribes regardless if considered a categorical exclusion.

This NWP applies only to those activities ''undertaken, assisted, authorized, regulated, funded or financed, in whole or in part, by another Federal agency or department.'' In certain instances, another agency, such as a state department of transportation, may legally assume the responsibility for categorical exclusion determinations for a Federal entity. To ensure compliance with the requirements for general permits, it is necessary for the Office of the Chief of Engineers to review and approve agency categorical exclusions for use with this NWP. In cases where the Federal agency is responsible for compliance with the National Historic Preservation Act, the Endangered Species Act, or other Federal laws, the Corps can accept their compliance, as long as it adequately covers the activity authorized by the NWP. The same principle applies for Tribal treaty natural or cultural resources: If the agency issuing the categorical exclusion that qualifies for NWP 23 authorization has sufficiently addressed the Tribal treaty resources, then the Corps district can accept that as a basis for compliance with general condition 17, tribal rights.

One commenter stated that this NWP authorizes activities that are not similar in nature, and its use does not result in minimal adverse effects on the aquatic environment. One commenter said that the approved categorical exclusions need to be reassessed to ensure that they still meet the minimal adverse environmental effects requirement for general permit activities. One commenter said that pre-construction notification should be required for all NWP 23 activities to ensure adequate interagency coordination. Another commenter said that reporting to the Corps should be required for any activity that affects wetlands, encroaches on a regulatory floodway, affects the water level of a 100-year flood event, or affects waters designated as critical resource waters.

This NWP, along with the Regulatory Guidance Letter listing the approved categorical exclusions, authorizes activities that are similar in nature. The Corps believes that their eligibility for NEPA compliance using a categorical exclusion is an appropriate basis of ''similarity'' for their authorization under this NWP. Based on the NEPA requirements for use of categorical exclusions, the Corps has determined that these activities will result in minimal individual and cumulative adverse effects on the aquatic environment, and division engineers have the authority to regionally condition this NWP to restrict or prohibit its use if they determine that these activities are resulting in more than minimal adverse environmental effects. We do not agree that the approved categorical exclusions need to be re-evaluated because of the length of time that has passed since they were originally approved. Agencies have an on-going responsibility to review their categorical exclusions and ensure that

the activities they authorize still qualify for this type of NEPA compliance. Division engineers may also regionally condition this NWP to require agency coordination for specific categorical exclusions that have been approved for use with this NWP. We do not agree that reporting or pre-construction notification should be required for all activities that may affect wetlands. Activities that encroach upon regulatory floodways or affect 100-year flood elevations are more appropriately addressed through applicable Federal Emergency Management Agency-approved state or local floodplain management requirements (see general condition 10). General condition 22, designated critical resource waters, requires pre-construction notification for any NWP 23 activity that is proposed in designated critical resource waters and wetlands adjacent to those waters.

The proposed NWP is reissued with no changes.

NWP 24. *Indian Tribe or State Administered Section 404 Programs.* There were no changes proposed for this NWP, and no comments were received. This NWP is reissued without change.

NWP 25. *Structural Discharges.* We did not propose any changes to this NWP. One commenter stated that concrete should be cured for a full seven days before coming in contact with water. One commenter stated structures constructed by such discharges on state-owned lands may require a ''use authorization'' from the state.

Specific requirements for the curing of concrete are more appropriately addressed as regional conditions or activity-specific conditions added to an NWP 25 authorization. Project proponents are responsible for obtaining any other federal, state, or local permits that may be required for a particular activity.

The NWP is reissued without change.

NWP 27. *Aquatic Habitat Restoration, Establishment, and Enhancement Activities.* We proposed to modify this NWP by adding ''the removal of small dams'' to the list of examples of activities authorized by this NWP. We also proposed to remove the phrase ''that has not been abandoned'' that modifies the term ''prior converted cropland.'' We proposed to change ''Notification'' provisions (1) and (2) so that certain stream restoration, rehabilitation, and enhancement activities would be subject to the reporting provision instead of requiring pre-construction notification. Lastly, we proposed to modify ''Notification'' provision (1) by adding the U.S. Forest Service to the list of Federal agencies that can develop stream or wetland enhancement, restoration, or establishment agreements.

Many commenters supported the addition of removal of small dams to the list of examples of activities authorized by this NWP. One commenter said that if this NWP is modified to authorize the removal of small dams, the NWP should also authorize discharges of dredged or fill material to re-establish appropriate stream channel configurations, with a ½-acre limit for the stream channel reconfiguration. Some of these commenters requested clarification as to what constitutes a ''small dam.'' One commenter agreed with the addition of removing small dams but expressed concern regarding potential impacts to water quality when a small dam is removed. One commenter recommended requiring sediment testing before authorizing the removal of small dams.

After further consideration, we have determined that since the NWP 27 issued in 2007 authorized the installation, removal, and maintenance of small water control structures (which clearly includes small dams), it is not necessary to modify this NWP by adding the removal of small dams to the list of examples of activities authorized by NWP 27, so we have not made this proposed change. We agree that the NWP should also authorize the restoration of the stream channel that were affected by the construction of a small water control structure, if that water control structure is to be removed. We do not agree that such activities should be limited to ½-acre, since this NWP authorizes only aquatic resource restoration, establishment, and enhancement activities that result in net increases in aquatic resource functions and services. Aquatic resource habitat restoration and enhancement activities involving the removal of small water control structures should be designed and implemented to prevent or minimize the movement of pollutants, including chemical compounds adsorbed to sediments that have accumulated in the impoundment, from the impounded area once the small water control structure is removed. Sediment testing may be required on a case-by-case basis if there are substantive concerns about potential contaminants.

Several commenters suggested that NWP 27 activities be subject to strict technical guidelines and enforceable success criteria commensurate with the scope of the activity being undertaken. A number of commenters expressed concern that some of the activities authorized by NWP 27 may result in a loss of waters rather than a net gain. One commenter said that aquatic resource restoration, establishment, and enhancement activities should have management plans that include goals and objectives, baseline conditions, effective monitoring requirements, and adaptive management plans. This commenter stated that without this level of documentation, the effectiveness of any restoration, establishment, or enhancement activity cannot be effectively evaluated for success. One commenter recommended adding a requirement for performance bonds to ensure that these activities are monitored and are achieving their goals and objectives.

For those NWP 27 activities that require pre-construction notification, the prospective permittee is required to submit a complete pre-construction notification, with the information listed in paragraph (b) of general condition 31. Activities conducted in accordance with agreements with other Federal or state agencies should be adequately documented to determine whether there will be net increases in aquatic resource functions and services. When Corps districts review the reports required for activities conducted under agency agreements, they will assess whether those activities will satisfy the terms and conditions of this NWP. If a particular activity does not, then the district will notify the project proponent within 30 days of when the report was submitted to the district engineer. This NWP requires authorized activities to result in net increases in aquatic resource functions and services, which will generally add acreage to the nation's aquatic habitat base. Although there may be some NWP 27 activities that result in a decrease in aquatic resource area to increase the functional capacity of those aquatic habitats, such changes are acceptable because it is the ecosystem functions, and the benefits people derive from those functions, that are important to society. To provide better information to assess whether there will be a net increase in aquatic resource functions and services, we have added a provision to the reporting requirement that requires the prospective permittee to provide information on the baseline ecological conditions at the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. Unless the activities authorized by this NWP are to be used as compensatory mitigation for Department of the Army permits (e.g., mitigation banks or in-lieu fee projects), the project proponent is not required to submit mitigation plans that comply with 33 CFR 332.4. The aquatic resource

restoration, establishment, or enhancement activity should be sufficiently documented to help district engineers decide whether the terms and conditions of this NWP are satisfied. Performance bonds or other types of financial assurances may be required on a case-by-case basis, if such assurances are necessary to provide funding to be used for remediation or adaptive management.

One commenter requested that this NWP authorize the rehabilitation or enhancement of tidal streams, stating that such activities would result in net increases in the functions and services provided by existing tidal aquatic resources and would not be contrary to the provision that prohibits the relocation of tidal waters or the conversion of tidal waters to other aquatic uses. One commenter pointed out that NWP 27 covers a wide range of habitat restoration and enhancement activities and there should be greater flexibility to allow resource managers to plan for sea level rise. This commenter recommended adding the beneficial use of dredged material as a thin layer application to provide sediment to sediment starved marshes, which may provide substrate to maintain those marshes as local sea levels rise. One commenter suggested modifying this NWP by clarifying that it authorizes activities that involve removing or modifying existing drainage ditches and structures, to establish or re-establish wetland or stream hydrology. Another commenter suggested adding the re-establishment of submerged aquatic vegetation or emergent tidal wetlands in areas where those plant communities previously existed. One commenter supported the inclusion of mechanized land clearing to remove non-native invasive species in this NWP.

We agree that the rehabilitation or enhancement of tidal streams should be authorized by this NWP and have modified the first paragraph to include this category of activities. The enhancement of tidal wetlands may be accomplished by minor additions of sediment to facilitate changes in tidal marsh elevation that may successfully track sea level rise. We agree with providing more clarity concerning the types of ditch manipulations that can be used for restoring wetland hydrology and have removed the phrase ''and drainage ditches'' after ''the backfilling of artificial channels'' and replaced it with ''such as drainage tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology'' after ''the removal of existing drainage structures.'' We also agree that the re-establishment of submerged aquatic vegetation or emergent tidal wetlands should be authorized by this NWP, as long as those shallow water habitat and wetland types previously existed in the project area. Such re-establishment activities would not constitute a conversion of tidal waters to other aquatic uses; instead it would be a form of rehabilitation of those habitat types. We have retained the provision authorizing mechanized land clearing to remove non-native, invasive plant species.

One commenter requested that the terms ''type'' and ''natural wetland'' be defined in the paragraph that describes the activities that are not authorized by this NWP. Another commenter supported the provision that prohibits the conversion of natural wetlands to another aquatic use and recommended that this prohibition also be applied to the conversion of one type of aquatic habitat to another. One commenter said that the NWP should clearly state that wetlands with documented hydrologic alterations are not ''natural'' wetlands and that hydrologic restoration of these wetlands is not to be considered a conversion of a natural wetland to another ''type'' but instead it should be considered as wetland rehabilitation. One commenter stated that a provision should be added to this NWP to clarify that compensatory mitigation is not required for activities authorized by this NWP since they must result in net increases in aquatic resource functions and services.

As indicated by the parenthetical in the first sentence of the referenced paragraph, the term ''type'' as used for the purposes of this NWP refers to the general category of aquatic resource, such as wetland or stream. We do not believe it would be appropriate to define the term ''natural wetland'' except to contrast it with constructed wetlands, such as those that are often used to treat wastewater. District engineer have the discretion to determine what constitutes a ''natural wetland'' for the purposes of this NWP. We have added a sentence to this paragraph to clarify that changes in wetland plant communities that are caused by restoring wetland hydrology are to be considered wetland rehabilitation activities that are authorized by this NWP. Such wetland rehabilitation activities are not to be considered conversions to another aquatic habitat type. We concur that compensatory mitigation should not be required for NWP 27 activities and have added a sentence to the text of the NWP to clearly state this stipulation.

One commenter said that the NWP should prohibit the relocation of naturally occurring non-tidal aquatic resources. One commenter suggested changing the conversion provision to state that no wetlands may be converted to open water impoundments rather than limiting the prohibition to tidal wetlands. Another commenter stated that while they understand the need for language to clarify that conversion from ''streams to wetlands'' is not desirable, there are some areas that have been drained or ditched to create water flow away from agricultural land, where there was previously a wetland. This commenter asked whether reestablishing wetlands on the site could be authorized by this NWP. The commenter said that the NWP is too restrictive and has the potential to prohibit activities that may result in aquatic resources that are more appropriately integrated into the landscape.

The relocation of non-tidal waters and wetlands on a project site, including relocation activities that convert open water impoundments to non-tidal wetlands and vice versa, can result in net increases in aquatic resource functions and services when viewed in a watershed context. Therefore, we do not agree that it is appropriate to exclude such activity from coverage under this NWP if it meets all other conditions, including a net increase in resource functions and services. Ditches that were constructed in wetlands to drain those wetlands are not considered streams for the purposes of this provision of the NWP. As discussed earlier, this NWP authorizes the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology.

One commenter asked if the removal of bulkheads, derelict structures, and pilings, can be authorized by this NWP while another suggested that the NWP allow for the temporary use of spat (e.g., larval oysters) collecting devices for the purpose of shellfish restoration.

The removal of structures in navigable waters of the United States is authorized by this NWP if it is a part of an aquatic habitat restoration or enhancement activity. The temporary use of spat devices for oyster habitat restoration is more appropriately authorized by NWP 4.

One commenter said that the provisions concerning shellfish seeding are not clear and asked if the intent of the NWP is to authorize shellfish seeding activities to enhance threatened shellfish populations. This commenter also said that shellfish enhancement activities should be limited to native species. One commenter recommended authorizing shellfish restoration activities without requiring pre-

construction notification when such activities are conducted or approved by a government agency with resource management oversight. One commenter requested we not include shellfish restoration activities in this NWP, because these activities alter existing substrate and benthic habitat and should be reviewed under the individual permit evaluation process. This commenter also recommended imposing a one-acre limit for the placement of scattered shell.

This NWP authorizes shellfish seeding activities, which may help increase shellfish populations in specific waters. Division engineers may regionally condition this NWP to limit shellfish seeding activities to native species. Further, in response to a pre-construction notification or report, a district engineer may exercise discretionary authority and condition a specific NWP authorization to limit it to the seeding of native shellfish species. We do not agree that there should be no pre-construction notification requirement if there is oversight by another government entity with the responsibility for managing shellfish resources. Since these activities occur in navigable waters, the Corps needs to review them on a case-by-case basis to ensure that they result in minimal individual and cumulative adverse effects on the aquatic environment and navigation and provide net increases in aquatic resource functions and services. Shellfish restoration activities should be authorized by this NWP because shellfish provide important ecosystem services in aquatic ecosystems, including the improvement of water quality. In most cases, the changes to benthic habitat are minor when compared to the ecosystem services provided by the shellfish. We also do not agree that there should be a one-acre limit for the placement of shell to construct oyster habitat because larger oyster habitat construction activities can still result in a net increase in aquatic resource functions and services.

One commenter said that stream restoration projects should be limited to 500 linear feet. One commenter stated that the construction of small nesting islands and the alteration of rare or imperiled wetlands should be not be authorized by this NWP. This commenter also suggested acreage limits for categories of activities authorized by this NWP, such as limiting excavation of wetlands to provide shallow water habitat for wildlife to ½-acre in altered wetlands; excavating no more than 1½-acre of wetlands that have been regularly farmed within the past five years or wetlands documented to be dominated by invasive species; a 3-acre limit for excavation activities; and limiting the placement of fill for the construction of dikes, berms, or water control structures to two acres. This commenter also recommended limiting impoundments to a maximum height of six feet, with a maximum impounded area of no more than five acres during a design flood. This commenter also said that enhancement of hydrology should not be authorized unless a state agency concurs that the wetland has been farmed within the last five years or is dominated by invasive species.

Since this NWP authorizes only those aquatic habitat restoration, establishment, and enhancement activities that result in net increases in aquatic resource functions and services, we do not agree that the recommended limits should be added to this NWP. Division engineers can regionally condition this NWP to restrict or prohibit its use over specific geographic areas or categories of waters. In response to a pre-construction notification, district engineers can add conditions to the NWP authorization to ensure that the NWP authorizes only those activities that result in minimal adverse effects on the aquatic environment.

Two commenters supported the addition of the United States Forest Service as a federal agency that can develop agreements for the restoration, enhancement, or establishment of streams and wetlands. One commenter recommended removing the reversion provision of NWP 27. Another commenter said that the reversion provision should be eliminated or significantly modified because it is inconsistent with other NWPs. Two commenters stated that the reversion of wetlands should not be authorized if the wetlands were being used for compensatory mitigation. One commenter asked how many acres of wetlands could be reverted under this NWP. One commenter asked whether a ''USDA Technical Service Provider'' includes county soil and water conservation districts.

The reversion provision is necessary for those aquatic resource restoration, enhancement, or establishment activities that are done in accordance with binding agreements, voluntary actions, or permits, where those agreements, actions, or permits allow the project proponent to revert the affected lands to its prior condition. If the reversion provision is removed, it would create a disincentive to do certain aquatic restoration, enhancement, or establishment activities that could provide some aquatic resource functions and services for a substantial period of time and benefit the watershed. Nationwide permit 27 differs from the other NWPs because of the types of activities it authorizes. As stated in the Note at the end of NWP 27, reversion of an area used as a compensatory mitigation project is not authorized by this NWP. We do not track the acreage of wetland or stream restoration and enhancement activities, or of wetland establishment activities, that were authorized by NWP 27 and might be eligible for reversion. There is no limit on the amount of wetlands that can be reverted under a single authorization, provided all conditions of the NWP are met. County soil and water conservation districts can register with the U.S. Department of Agriculture to be a technical service provider.

One commenter said that pre-construction notifications should include photographs, a description of pre-project site conditions, and a discussion of general aquatic resource functions and services anticipated to be provided by the activity. Another commenter stated that pre-construction notification should be required for all activities.

Paragraph (b) of general condition 31, pre-construction notification, requires prospective permittees to submit documentation that describes the proposed activity, including the anticipated loss of waters of the United States and, if appropriate, sketches that help clarify the project. The pre-construction notification also must include a delineation of wetlands, other special aquatic sites, and other aquatic habitats. We do not agree that pre-construction notification should be required for all activities. The reporting requirements for those activities that do not require pre-construction notification provide sufficient opportunity for district engineers to notify a project proponent if the proposed work does not comply with the terms and conditions of the NWP. We have modified the ''Reporting'' provision of this NWP to require the permittee to submit information on the baseline ecological conditions at the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. We have also changed the ''Notification'' provision of this NWP by replacing the phrase ''the activity'' with ''any activity'' to clarify that any activity that does not require reporting requires a pre-construction notification. The last sentence of this NWP has been changed to clarify that appropriate documentation concerning the agreement, voluntary action, or Surface Mining Control and Reclamation Act

permit is to be provided to the district engineer to fulfill the reporting requirement.

One commenter said the NWP should require the use of best management practices to avoid sediment loading of waters especially when mechanized land clearing or work is conducted in waters of the United States. The commenter stated that best management practices, such as floating barriers, should also be used in upland areas to protect downstream water quality. One commenter stated that Tribes should be notified to ensure that NWP 27 activities avoid impacts to tribal treaty natural resources and cultural resources.

General condition 12, soil erosion and sediment controls, requires permittees to implement appropriate soil and erosion and sediment controls during the work. In response to a pre-construction notification, district engineers can add conditions to the NWP authorization to require more specific sediment and erosion controls. Division engineers can impose regional condition on this NWP to require notification of the appropriate Tribe or Tribes if a proposed activity might affect tribal treaty natural resources and cultural resources. General condition 17, Tribal rights, requires that no NWP activity or its operation impair reserved treaty rights, including treaty fishing and hunting rights. Cultural resources are protected through the requirements of general condition 20, historic properties, and general condition 21, discovery of previously unknown remains and artifacts.

This NWP is reissued with the modifications discussed above.

NWP 28. *Modifications of Existing Marinas.* There were no changes proposed for this NWP. Two commenters recommended adding a condition to ensure the modification does not encroach upon additional waters. One commenter suggested adding a condition to require a minimum maneuvering distance for an outside slip to the boundary of the marina's riparian interest area. One commenter stated that modifications for marinas on state-owned aquatic lands should require pre-construction notification.

This NWP clearly states that it does not authorize expansions of existing marinas. Since the NWP does not authorize expansions of existing marinas, it is not necessary to add a condition to provide a minimum maneuvering distance. Concerns about modifications to marinas constructed on state-owned submerged lands are more appropriately addressed through a state authorization process.

This NWP is reissued without change.

NWP 29. *Residential Developments.* We proposed to modify this NWP by changing the waiver provision for activities resulting in the loss of greater than 300 linear feet of intermittent and ephemeral stream bed, to clarify that the district engineer will only issue the waiver after making a project-specific written determination that the activity will result in minimal adverse effects.

One commenter said that this NWP should not be reissued. One commenter suggested revoking this NWP because of the large scale of these projects and associated impacts to waters and said that individual permits should be required for these activities. Two commenters stated that the use of this NWP permit to authorize ½-acre losses of waters of the United States would result in more than minimal adverse effects on an individual and cumulative basis. Two commenters said that this NWP should not authorize residential subdivisions, and should be limited to single family homes. Four commenters recommended decreasing the acreage limit for losses of waters of the United States to 1/4-acre. Two commenters suggested increasing the acreage limit to 1 acre. One commenter requested clarification on whether the acreage limits are applied cumulatively when there is any subsequent expansion of a residential development.

We do not agree that this NWP should not be reissued or limited to single family homes. The construction of residential developments, including multiple unit residential developments, may have minimal individual and cumulative adverse effects on the aquatic environment, and is appropriate for NWP authorization if it meets the conditions of this NWP. Provided the limits are met, the effects to waters of the United States are similar whether single family homes or groups of single family homes are constructed as a result of using this NWP to authorize discharges of dredged or fill material into waters of the United States. The ½-acre limit, as well as the other terms and conditions of this NWP, is consistent with longstanding limits on this and other NWPs, and is appropriate for ensuring that this NWP authorizes only those activities with minimal adverse effects on the aquatic environment. Division engineers can regionally condition this NWP to reduce the acreage limit or restrict or prohibit its use in specific regions or waters. In response to a pre-construction notification, district engineers may exercise discretionary authority to add conditions to the NWP authorization or require an individual permit. The ½-acre and 300 linear foot limits apply to single and complete projects. If a project proponent requests NWP authorization to conduct additional discharges of dredged or fill material into waters of the United States and modify a previously authorized single and complete residential development project, both the previously authorized losses and the additional losses are applied to the ½-acre and/or 300 linear foot limits. If the modification to the residential development is a separate single and complete project with independent utility from the previously authorized residential development, then a separate NWP authorization may be issued. The ''Definitions'' section includes further clarification regarding single and complete projects.

Several commenters objected to providing district engineers with the authority to waive the 300 linear foot limit for the loss of intermittent and ephemeral stream bed on a case-by-case basis after reviewing a pre-construction notification and determining that the proposed activity results in minimal adverse environmental effects. One commenter said that the waiver provision would result in more than minimal cumulative adverse effects on a watershed basis. Another commenter stated that use of the waiver would authorize the losses of large amounts of headwater streams. A few commenters suggested the waiver provision should be removed from this NWP. Three commenters recommended increasing the linear foot limit for the loss of stream bed to 500 feet. Two commenters supported the clarification that a finding of minimal adverse environmental effects would be required to issue a waiver.

Responses to comments regarding the 300 linear foot limit for losses of stream bed and the waiver provision for the loss of greater than 300 linear feet of intermittent and ephemeral stream beds are discussed in a previous section of this preamble. We are retaining the 300 linear foot limit for stream bed impacts, as well as the ability for district engineers to provide written waivers of the 300 linear foot limit for losses of intermittent and ephemeral stream beds.

One commenter recommended that compensatory mitigation be required for all unavoidable impacts to wetlands authorized under this NWP. Several commenters said that the NWP should require permittees to minimize on-and off-site impacts and avoid flooding, because the general conditions do not adequately address flooding or water quality impacts. Several commenters said that this NWP should not authorize residential subdivisions unless the

project proponents can demonstrate those subdivisions will not cause an increased flood hazard on other properties.

We do not agree that it is necessary to require compensatory mitigation for all activities authorized by this NWP to satisfy the minimal adverse environmental effects requirement for a general permit. For many small losses of waters of the United States authorized by this NWP, it is not practicable to require compensatory mitigation to offset those losses, especially in areas where there are no mitigation bank or in-lieu fee program credits available. The requirements for permittee-responsible mitigation in 33 CFR 332.1 through 332.7 impose substantial documentation and planning requirements that affect the practicability of providing ecologically successful permittee-responsible mitigation, especially for small losses of waters of the United States. Compensatory mitigation for NWP activities is only necessary in cases where the district engineer makes a project-specific determination that compensatory mitigation is needed to ensure that the activity results in minimal individual and cumulative adverse effects on the aquatic environment (see 33 CFR 330.1(e)(3)). General condition 23, mitigation, requires permittees to avoid and minimize adverse effects to waters of the United States on the project site, to the maximum extent practicable. Concerns about adverse effects on floodplains and floodways are more appropriately addressed by the state and local agencies that have the primary responsibility for floodplain management. General condition 10, fills within 100-year floodplains, requires permittees to comply with applicable Federal Emergency Management Agency-approved state or local floodplain management requirements. Most floodplains are uplands, not waters of the United States, and the Clean Water Act Section 404 permit program cannot be used to manage floodplain impacts, except for discharges of dredged or fill material or other pollutants into wetlands and other jurisdictional waters that are located in floodplains. Residential developments, whether they are single units or multiple-unit subdivisions, must comply with all terms and conditions of this NWP, including the requirement that they result in minimal adverse environmental effects.

One commenter said that this NWP should not authorize activities that result in adverse impacts to state or federally listed threatened or endangered species or their habitats, or where there are rare or imperiled habitat types. One stated that this NWP should not authorize discharges of dredged or fill material below the ordinary high water mark of any water of the United States or areas of fish habitat. One commenter said that attendant features should be limited to a garage, a driveway no more than 16 feet wide, parking or vehicle turn areas, lawns that are no more than 15 feet from the building pad, septic fields, utilities, deck foundations, and access paths. One commenter suggested modifying this NWP to require culverts and other measures to maintain pre-construction drainage patterns on the site. One commenter said this NWP should require on-site sewage treatment systems.

Compliance with the federal Endangered Species Act is addressed by general condition 18. Compliance with state or local threatened or endangered species laws or ordinances, or state or local requirements to avoid rare or imperiled habitats, is the responsibility of the permittee. Since all activities authorized by this NWP require pre-construction notification, district engineers will review proposed activities that involve discharging dredged or fill material into open waters, including fish habitat, to ensure that those activities result in minimal adverse effects on the aquatic environment. The text of the NWP provides examples of the types of attendant features that may be authorized. Further restrictions on those attendant features may be provided through regional conditions imposed by Division engineers or activity-specific conditions added to an NWP 29 authorization by a District engineer. General condition 9, management of water flows, requires permittees to maintain, to the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters, such as streams, except under certain situations identified in the text of the general condition. Sewage treatment system requirements for residential developments are the primary responsibility of state or local governments.

One commenter requested clarification on whether this NWP can be used to authorize phased development projects. Several commenters suggested limiting this NWP to a single use.

General condition 15, single and complete project, states that the same NWP can only be used once for the same single and complete project. If a particular phase of a phased development project is a single and complete project with independent utility, a separate NWP 29 authorization can be used to authorize that single and complete non-linear project.

Two commenters said that the NWP should require vegetated buffers. One commenter stated that district engineers have too much discretion regarding buffers and the general condition restricts buffers so that they are not as effective as they could be.

Compensatory mitigation for activities authorized by NWP 29 may be provided through the establishment and maintenance of riparian areas next to open waters. Paragraph (f) of general condition 23 addresses the use of riparian areas as compensatory mitigation, with recommended widths. The recommended widths are based in part on the minimum width necessary for riparian areas to help protect or improve water quality, and in part on the principle that the amount of compensatory mitigation must be roughly proportional to the permitted impacts (see 33 CFR 320.4(r)(2)). Since the NWP has an acreage limit of ½-acre, any required compensatory mitigation must be roughly proportional to the authorized loss of waters of the United States.

This NWP is reissued as proposed.

NWP 30. *Moist Soil Management for Wildlife.* No changes were proposed for this NWP and no comments were received. This NWP is reissued without change.

NWP 31. *Maintenance of Existing Flood Control Facilities.* We proposed to modify this NWP to authorize, in cases where a section 404 and/or section 10 permit would be required, the removal of vegetation from levees associated with a flood control project.

Several commenters supported the proposed modification and said that vegetation removal is a critical component of the maintenance of a flood control project to ensure continued effectiveness and integrity of levees and other flood control facilities. Two commenters objected to the proposed modification. One commenter opposed the removal of vegetation from flood control facilities, stating the vegetation has ecological importance. One commenter said that vegetation removal is not regulated by the Corps. One commenter stated that if the plant species proposed to be removed have cultural and medicinal Native American traditional uses, consultation with the Tribe or another type of permit should be required for the activity.

We have retained the proposed language in this NWP, to authorize the removal of vegetation from a levee,

when that activity involves a discharge of dredged or fill material into waters of the United States or is considered to be work in navigable waters of the United States for the purposes of Section 10 of the Rivers and Harbors Act of 1899. We agree that vegetation removal that does not involve such a discharge does not require a DA permit. Division engineers can regionally condition this NWP to identify plant species that have cultural and medicinal uses by Tribes, and to require government-to-government consultation to address impacts to such species. General condition 17, Tribal rights, protects reserved treaty rights, including reserved water rights and treaty fishing and hunting rights. Natural or cultural tribal trust resource concerns can still be addressed through the NWP decisionmaking process, and would not necessarily result in requiring an individual permit.

Several commenters said that vegetation may strengthen the integrity of levees and stated that individual permits should be required for vegetation removal. One commenter stated that vegetation on levees should be allowed or retained as part of levee management and that the vegetation should be removed only if specific levee maintenance or safety concerns are identified. One commenter stated that not allowing flood control districts to remove vegetation from levees would put them into non-compliance with their permits and with other state and local approvals. One commenter said that the removal of vegetation from a levee should only be authorized after Endangered Species Act consultation has been completed.

The decision on whether vegetation needs to be removed from a levee to maintain its functional and structural integrity is more appropriately made by those entities that are responsible for ensuring the integrity and functional effectiveness of that levee. That decision is not the responsibility of the Corps Regulatory Program or its staff. The NWP is only a means to provide Department of the Army authorization for such activities, if a section 404 and/or section 10 permit is required. If the vegetation removal may affect a listed species under the Endangered Species Act, and a Department of the Army permit is required, the Corps will conduct section 7 consultation in accordance with general condition 18, endangered species, unless another Federal agency has already fulfilled the section 7 requirements, or the project proponent has complied with the Endangered Species Act and received an Endangered Species Act Section 10 permit.

Several commenters said that there should be an acreage limit for vegetation removal. Another commenter recommended imposing a linear foot limit on vegetation removal. One commenter recommended revoking this NWP in California.

Since this NWP authorizes maintenance activities, we do not believe there should be an acreage or linear foot limit on vegetation removal. Division engineers may also add regional conditions to this NWP to impose acreage or linear foot limits on vegetation removal.

One commenter stated that many NWP authorizations are related to the maintenance baseline and the NWP should provide more details about the maintenance baseline approval process. This commenter suggested that the NWP specify: the deadline for completion, the responsible party, the regulating entity that approves the maintenance baseline, etc. One commenter requested clarification on the timeframe for approval of the maintenance baseline.

The current terms and conditions of the NWP provide sufficient details on what is needed to establish the maintenance baseline. Approval of the maintenance baseline is to be made within the 45-day review period, which begins once a complete pre-construction notification is received by the appropriate Corps district office. The pre-construction notification must include a description of the maintenance baseline.

Many commenters expressed concern about the mitigation provision of this NWP, especially the one-time limit for mitigation per facility regardless of the number of times maintenance occurs. These commenters said that limiting compensatory mitigation may result in more than minimal adverse environmental effects, including adverse impacts to floodplains and increased flood risk. These commenters recommended requiring mitigation for each maintenance activity. One commenter stated that vegetation removal should not be authorized because effective compensatory mitigation cannot be provided. One commenter said that certain riparian functions, such as shading, and losses of aesthetic values, cannot be provided through off-site mitigation.

We do not agree that compensatory mitigation should be required for each maintenance activity. On-going maintenance of flood control facilities is necessary to ensure that those projects fulfill their intended purposes. Any compensatory mitigation that was required when the maintenance baseline was established is sufficient to offset losses of aquatic resource functions. If maintenance is done in a timely manner, there is likely to be little in terms of increases in aquatic resource functions between maintenance activities. The purpose of maintaining these flood control facilities is to reduce flood risk. Riparian functions that increased between maintenance activities do not need to be replaced by imposing compensatory mitigation requirements on this NWP.

Several commenters said that the use of this NWP results in more than minimal individual and cumulative impacts, and may also inhibit comprehensive basin-wide flood risk management planning and restoration approaches.

We do not agree that these maintenance activities cause more than minimal adverse effects on the aquatic environment, on an individual or cumulative basis. This NWP is intended as a tool to support appropriate flood management activities, including comprehensive flood risk management planning and restoration processes, where maintenance of existing flood control structures is required.

One commenter recommended modifying the pre-construction notification provision to require a topographic map identifying the disposal site. One commenter said that the 1996 Water Resources Development Act allows for regional variations in vegetation management on levees.

The NWP already requires the prospective permittee to submit information concerning the location of the dredged material disposal site. There are a variety of maps that could be used to provide that information, and we do not believe it should be restricted to topographic maps. We have modified this NWP to state that all dredged material must be placed in an area that has no waters of the United States or in a separately authorized disposal site, since the disposal of dredged material into non-jurisdictional waters and wetlands, as well as uplands, does not require DA authorization. As stated above, the decision on whether to remove vegetation is the responsibility of the entity charged with managing and maintaining the flood control facility.

This NWP is reissued with the modifications discussed above.

NWP 32. *Completed Enforcement Actions.* There were no changes proposed for this NWP. One commenter recommended adding a condition to the NWP requiring that the state be a party to any lawsuit, or have an opportunity to review the consent or settlement agreement. Another commenter requested coordination with any

affected Tribes prior to administering an enforcement action to ensure that Tribal treaty resources are protected.

This NWP only provides Federal authorization under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act, and it is not appropriate to modify this NWP to require state involvement in these actions. States are often involved as co-regulators in enforcement activities, under various authorities, and this NWP in no way undercuts those authorities. General condition 17, tribal rights, states that no activity or its operation may impair reserved tribal rights.

This NWP is reissued as proposed.

NWP 33. *Temporary Construction, Access, and Dewatering.* We did not propose any changes to this NWP. Several commenters recommended that the Corps define the term ''temporary.'' One commenter said that ''temporary'' should be less than two years, another stated that one year should be the limit, and a third commenter suggested 90 days as the limit for what constitutes a temporary structure or fill. Several commenters stated that the NWP should require a specific timeframe and deadline for completion of revegetation activities. Other commenters said that any revegetation should use only native plant species associated with the general habitat type that had existed prior to construction.

The term ''temporary'' should be determined by district engineers on a case-by-case basis, after considering factors such as the type of project, the waters affected by the activity, the construction techniques and equipment used, etc. In response to a pre-construction notification, district engineers can add conditions to the NWP authorization to impose specific time frames for revegetating affected areas. Activity-specific conditions may also be added to the NWP authorization to specify the plant species to be used at the site.

One commenter asked why the NWP would state that a separate section 10 permit is required if a structure is left in place in navigable waters of the United States after completion of construction, especially if the waterbody is not a section 10 water. This commenter wondered how a ''structure'' constructed in a non-Section 10 water could be left in place and still qualify as a temporary structure.

In some cases, it may be more environmentally beneficial to leave part of a structure in place in navigable waters of the United States, when complete removal of the structure is expected to result in substantial adverse environmental effects. For example, a structure may be cut near the ocean bottom, but part of the structure and its foundation left in place, because removing the entire structure and its foundation would result in substantial disturbance of the ocean bottom. Leaving those portions of the original structure and foundation in place requires a permit under Section 10 of the Rivers and Harbors Act of 1899 because it constitutes an obstruction that may alter the course, condition, or capacity of navigable waters of the United States. A structure left in place in a waterbody subject only to section 404 jurisdiction does not require section 10 authorization. Such a structure would not require a section 404 permit unless it meets the definition of fill material (see 33 CFR 323.3(c)).

One commenter asked why NWP 33 activities require pre-construction notification for temporary structures, work, and discharges while these types of activities may be authorized under NWPs 3, 12, 13, and 14 without a pre-construction notification.

While temporary structures, work, and fills are authorized by NWPs 3, 12, 13, and 14, those NWPs have terms and conditions to help ensure that those activities result in minimal adverse effects on the aquatic environment. Since NWP 33 can be used to authorize temporary structures, work, and discharges done in association with a wide variety of other categories of activities, that uncertainty makes it necessary to require pre-construction notification for all activities authorized by NWP 33. Such a requirement allows the Corps to review the temporary and permanent impacts that are likely to occur as a result of the overall activity.

One commenter stated that the NWP should never authorize temporary fills that impact more than 1,000 square feet or discharge more than 25 cubic yards into waters of the U.S., and temporary structures or construction mats shall not impact more than 1/10-acre. One commenter stated that the NWP should require that geotextile fabric be installed prior to placement of fill material, and two commenters suggested that temporary culverts and bridges in streams should be required to match the bankfull width and stream slope. Another commenter stated that all slurry resulting from dewatering operation should be discharged through a filter bag or pumped to a sump located away from wetlands and surface waters and allowed to filter through natural upland vegetation, gravel filters, or other engineered devices for a sufficient distance and/or period of time necessary to remove sediment or suspended particles. One commenter stated that cofferdams should be required to be maintained in good working order throughout the duration of the project.

We do not agree that there should be acreage, linear foot, or cubic yard limits on this NWP since it authorizes temporary structures, work, or discharges, and all activities require pre-construction notification. In response to a pre-construction notification, district engineers can add activity-specific conditions to the NWP authorization to impose limits or require specific best management practices or specific construction techniques to minimize adverse effects to the aquatic environment where necessary.

We have modified this NWP to state that temporary fill must be entirely removed to an area that has no waters of the United States, since the placement of fill material into non-jurisdictional waters and wetlands, as well as uplands, does not require DA authorization.

The NWP is reissued with the modification discussed above.

NWP 34. *Cranberry Production Activities.* We did not propose any changes to the NWP. One commenter said that this NWP should not authorize losses of wetland functions. Two commenters expressed concern that the 10-acre limit would allow significant losses of wetland acreage and functions and values, if the 10-acre limit is applied only to the five year period the NWP is in effect. These commenters proposed making the 10-acre limit apply to future activities. One commenter suggested limiting the NWP authorization to a single cranberry production unit. One commenter said that this NWP should not be reissued.

This NWP does not authorize discharges of dredged or fill material that would result in a net loss of waters of the United States. While there would be some loss of wetland function as wetlands are converted for cranberry production, the NWP requires wetland acreage to be maintained. There would be no loss of wetland acreage over time due to future activities since the NWP does not authorize discharges of dredged or fill material that would result in permanent losses of wetland acres. This NWP applies to single and complete cranberry production activities, which would be identified by district engineers during the review of pre-construction notifications.

This NWP is reissued without change.

NWP 35. *Maintenance Dredging of Existing Basins.* There were no changes proposed for this NWP. Two commenters recommended adding limits to this NWP. Two commenters

said this NWP should not be used in areas with suspected sediment contamination, especially in areas where there might be contamination from fuel. Another commenter stated the applicant should demonstrate that the sediment is not contaminated. One commenter asked that the term ''upland'' be clarified to state that it means land located above the ordinary high water mark. One commenter stated that this NWP would have greater utility if it authorized beneficial use of dredged material, such as wetland restoration, enhancement, or establishment activities.

Since this NWP authorizes only maintenance dredging activities in existing marina basins, we do not believe it is necessary to add an acreage limit or other type of quantitative limit. Division engineers can regionally condition this NWP to require notification to the district engineer. This NWP is limited to maintenance dredging in marina basins, access channels to marinas, and boat slips, which are likely to have some degree of contaminated sediment in the substrate because of past and present boat use, especially in larger marinas. Removal of such contaminated sediments, and complying with the requirement in the NWP to deposit the dredged material in an upland site, will help ensure the activity results in minimal adverse effects on the aquatic environment. Defining the term ''upland'' to mean lands located above an ordinary high water mark would be incorrect. There may be wetlands landward of the ordinary high water mark. We have modified this NWP to state that dredged material must be placed in an area that has no waters of the United States, since the disposal of dredged material into non-jurisdictional waters and wetlands, as well as uplands, does not require DA authorization. The district engineer may issue a separate Department of the Army authorization to a project proponent who wants to use the dredged material to restore, enhance, or establish wetlands.

One commenter stated that precautions should be taken to ensure that dredging equipment does not entrain or kill any Federally-listed species and recommend that preemptive trawling around the dredge head be conducted to capture or relocate state or federally listed species.

General condition 18 addresses compliance with the Endangered Species Act, and section 7 consultation is required for any activity that may affect listed species or is located in designated critical habitat.

This NWP is reissued with the modification discussed above.

NWP 36. *Boat Ramps.* We did not propose any changes to this NWP. One commenter said that boat ramps should not be authorized by NWPs because they cause significant environmental impacts, including impacts to Tribal treaty fishing activities and access. One commenter stated that this NWP should be limited to individual riparian lot owners and not authorize commercial boat ramps. One commenter said that the NWP should require notification to the state agency responsible for managing state-owned submerged lands.

The terms and conditions of this NWP (specifically the limits on fill volume and ramp width) will ensure that the NWP authorizes only those activities that result in minimal adverse effects on the aquatic environment. Division engineers may regionally condition this NWP to restrict or prohibit its use in specific waters or geographic areas if they have concerns that more than minimal individual and cumulative adverse environmental effects may occur. In response to a pre-construction notification, district engineer may add activity-specific conditions to the NWP authorization to satisfy the minimal adverse environmental effects requirement. We do not agree that this NWP should be limited to private land owners. Commercial boat ramps that comply with the terms and conditions of this NWP will also result in minimal adverse environmental effects. The potential for adverse effects is based on the footprint of the ramp, which is limited by the conditions of this NWP, not its ownership. State agencies responsible for managing submerged lands may develop their own procedures for regulating and authorizing the construction of boat ramps on submerged lands. The Corps has neither the authority nor the resources to enforce any state requirements with respect to such lands.

Two commenters recommended reducing the pre-construction notification thresholds for this NWP. One commenter suggested limiting discharges of dredged or fill material to 25 cubic yards, with a maximum boat ramp width of 12 feet. Another commenter said that the quantitative limits for this NWP should not be waived. One commenter stated that the current 50 cubic yard limit is too small and should be increased to authorize larger boat ramps.

The pre-construction notification thresholds are sufficient for ensuring that this NWP authorizes activities with minimal individual and cumulative adverse effects on the aquatic environment. We have retained the provision authorizing district engineers to issue written waivers to the 50 cubic yard and/or 20 foot width limits, if a proposed activity is determined to result in minimal adverse environmental effects. The waiver provision may be used to authorize larger boat ramps, as long as they are determined by the district engineer to result in minimal adverse environmental effects.

One commenter asked for clarification on what is meant by placement in the upland. One commenter said that these activities may affect historic properties and the activity should not be authorized unless the state concurs that there are no documented resources within the permit area.

We have modified paragraph (d) to clarify that all excavated material must be removed to an area that has no waters of the United States, because some wetlands and waters are not subject to Clean Water Act jurisdiction and section 404 permits are not required to discharge dredged or fill material into those non-jurisdictional wetlands and waters. A separate Department of the Army authorization is required if the project proponent wants to deposit the excavated material into waters of the United States. Activities authorized by this NWP must comply with general condition 20, historic properties, as well as general condition 21, discovery of previously unknown remains and artifacts. District engineers will conduct National Historic Preservation Act Section 106 consultation if they determine the proposed activity has the potential to cause effects to any historic property.

This NWP is reissued as proposed.

NWP 37. *Emergency Watershed Protection and Rehabilitation.* No changes were proposed for this NWP. Two commenters stated that in their region, flood control activities including those authorized by this NWP, are important and suggested reducing the 45-day waiting period for pre-construction notifications to 21 days. Two commenters expressed support for allowing district engineers to waive the pre-construction notification requirements in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. One commenter said that although this NWP is intended to authorize watershed protection and rehabilitation, these activities may result in a net loss of waters and appropriate mitigation should be required.

We do not believe it would be appropriate to reduce the pre-construction notification review period

for this NWP from 45 days to 21 days. The NWP provides flexibility for the emergency watershed protection and rehabilitation activities to proceed immediately if there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The NWP does not allow the district engineer to waive the pre-construction notification requirement in cases where there would be unacceptable hazards to life or significant losses of property or economic hardships. If a project proponent wants to use NWP 37 to authorize an emergency watershed protection and rehabilitation activity, pre-construction notification is required. This is a minimally burdensome requirement that can be complied with quickly which allows the district engineer to verify that there is a genuine emergency. In addition, in response to a pre-construction notification, the district engineer may condition the NWP authorization to require compensatory mitigation to offset losses of aquatic resources and ensure that the adverse effects on the aquatic environment are minimal (see 33 CFR 330.1(e)(3) and general condition 23, mitigation).

The NWP is reissued without change.

NWP 38. *Cleanup of Hazardous and Toxic Waste.* We did not propose any changes for this NWP. One commenter stated the NWP should be revoked because hazardous waste cleanup from aquatic areas has the potential to cause significant adverse environment effects during and after the cleanup activities. This commenter said that these activities require site-specific review and should not be authorized by NWP. Another commenter recommended adding a condition to the NWP to require minimization, to the maximum extent possible, of impacts to waters and wetlands, and require restoration of the affected areas.

The cleanup of hazardous and toxic wastes, if conducted properly, will improve the aquatic environment by removing harmful chemicals and other substances that are likely to degrade the quality of wetlands, streams, and other aquatic resources, as well as the functions they provide. This NWP requires pre-construction notification, which will provide the district engineer the opportunity to review the proposed activity, including available site-specific information, to determine if that activity qualifies for NWP authorization. This NWP authorizes cleanup activities conducted, ordered, or sponsored by other government agencies, which have also reviewed those activities. In some cases these activities need to be commenced quickly and it could cause additional harm to the aquatic environment if they had to wait for an individual permit to be issued. The district engineer may also add activity-specific conditions to the NWP authorization to require compensatory mitigation, including restoration or rehabilitation of affected aquatic resources (see 33 CFR 330.1(e)(3) and general condition 23, mitigation) to satisfy the minimal adverse environmental effects requirement for general permits.

This NWP is reissued without change.

NWP 39. *Commercial and Institutional Developments.* We proposed to modify this NWP by changing the waiver provision for activities resulting in the loss of greater than 300 linear feet of intermittent and ephemeral stream bed, to clarify that the district engineer will only issue the waiver after making a project-specific written determination that the activity will result in minimal adverse effects.

Two commenters expressed support for the proposed modification. One commenter said that intermittent streams should be removed from the waiver provision so that the 300 linear foot limit could be waived only for losses of ephemeral streams. One commenter recommended removing the waiver provision.

We have retained the provision allowing the 300 linear foot limit to be waived for losses of intermittent stream bed, since such activities may, in some cases, result in minimal adverse effects on the aquatic environment. General comments concerning the 300 linear foot limit to the loss of stream bed are discussed in a separate section of the preamble.

One commenter urged the elimination of the pre-construction notification because that requirement results in delays and increases in cost. One commenter recommended conducting a natural heritage database search if a waiver determination is made that the activity will result in minimal adverse effects.

The pre-construction notification requirement is necessary so that all of these activities are reviewed by district engineers to ensure that those activities result in minimal adverse effects on the aquatic environment. District engineers may add conditions to the NWP authorization to require compensatory mitigation or other measures to comply with the minimal adverse environmental effects requirement established for general permits. District engineers may consider information from state natural heritage databases where appropriate when evaluating a pre-construction notification involving a proposed waiver of the 300 linear foot limit.

Two commenters suggested increasing the acreage limit from ½ to one acre. Another said that acreage limits should be established on a regional or watershed basis, instead of a single national acreage limit. Two commenters suggested increasing the linear foot limit to 500 feet. One commenter stated that the NWP should not authorize activities that are not water dependent.

We believe that both the ½-acre limit and the 300 linear foot limit are necessary to ensure that this NWP authorizes activities that result only in minimal individual and cumulative adverse effects on the aquatic environment. Division engineers can regionally condition this NWP to further ensure only minimal adverse effects to the aquatic environment occur in a particular area or region, based on region specific conditions. District engineers can also add specific conditions to an NWP authorization to ensure minimal individual or cumulative adverse effects. The statutory basis for authorizing activities by general permits is that they have minimal adverse effects, individually and cumulatively, not that they be water dependent.

One commenter said that commercial and institutional developments are typically phased developments, are larger in scale than other projects, and should not be authorized by NWP. One commenter said that this NWP should not be reissued because these activities result in more than minimal cumulative adverse effects to wetlands and streams. One commenter suggested requiring compensatory mitigation for all activities authorized by this NWP. Two commenters said that this NWP should include a requirement to establish buffers next to waters of the United States, clarification that the limits apply to the project site and not to multiple applicants, and a provision requiring flood protections. One commenter stated industrial facilities that may be authorized by this NWP cause indirect impacts to water quality that could be significant and suggested not reissuing this NWP.

Phased developments may be authorized by general permits, as long as they comply with all applicable terms and conditions of those general permits. In particular, an NWP may only be used once for each single and complete project. The limits in this NWP, which are consistent with those in many other NWPs, will generally ensure minimal adverse effects. In specific watersheds or other geographic areas where a

district engineer is concerned that the use of NWP 39 may result in more than minimal cumulative adverse effects to the aquatic environment, the division engineer may regionally condition this NWP to restrict or prohibit its use to ensure that the threshold for minimal individual and cumulative adverse effects on the aquatic environment is not exceeded. We do not agree that compensatory mitigation should be required for all activities authorized by this NWP. District engineers will add activity-specific conditions to the NWP authorization to require compensatory mitigation in accordance with general condition 23, mitigation (also see 33 CFR 330.1(e)(3)), where necessary to ensure minimal effects. The establishment and maintenance of riparian areas next to open waters, or buffers next to wetlands, may be required as compensatory mitigation, in accordance with general condition 23, mitigation, and the regulations at 33 CFR part 332. The acreage limits of this NWP apply to single and complete projects, even though a single and complete project may have more than one project proponent. In general, a commercial development project in which a developer prepares a large site and then markets individual lots to individual builders would be considered one single and complete project and the acreage limits would apply to the development as a whole. See the definition of ''single and complete non-linear project'' for further information. General condition 10, fills in 100-year floodplains, requires permittees to comply with applicable state or local floodplain management requirements that have been approved by the Federal Emergency Management Agency. District engineers will review pre-construction notifications requesting NWP 39 authorization for industrial facilities to ensure that adverse effects to water quality caused by the NWP activity are minimal, individually and cumulatively.

One commenter objected to authorizing the expansion of commercial and institutional developments into waters of the United States, stating that it discourages avoidance and minimization and is contrary to the 404(b)(1) Guidelines. One commenter requested clarification whether this NWP applies to new project construction or existing construction projects so the acreage limits are applied cumulatively for both the original construction and any subsequent expansion of the development. One commenter asked whether certain categories of activities that were not authorized by the 2007 version of NWP 39, specifically new golf courses, new ski areas, or oil or gas wells, could be expanded through the authorization provided by this NWP. Three commenters suggested eliminating the exclusion for the construction of oil and gas wells and attendant features.

The expansion of commercial and institutional developments into waters of the United States may qualify for NWP authorization, as long as it complies with all applicable terms and conditions of the NWP and results in minimal individual and cumulative adverse effects on the aquatic environment. This NWP complies with the 404(b)(1) Guidelines, especially 40 CFR 230.7, which addresses the issuance of general permits. The acreage limit applies to a single and complete project. The expansion of an existing commercial or institutional development may only be authorized under a separate NWP authorization if it is a separate single and complete project with independent utility. For example, one or more phased components of a commercial or institutional development may have independent utility and may be authorized as separate single and complete projects. The expansion of existing golf courses or ski areas may be authorized by this NWP. We agree that the construction of pads for oil and gas wells is a type of commercial development that would be appropriate for inclusion in this NWP. District engineers may add conditions to NWP 39 authorizations to require the removal of these pads and restoration of the site once oil or gas extraction operations have ceased and the wells will no longer be used.

One commenter said that this NWP could be used to authorize activities associated with wind energy generating structures, solar towers, or overhead utility lines, which have the potential to interfere with Department of Defense's long range surveillance, homeland defense, testing, and training missions. This commenter requested that copies of NWP 39 pre-construction notifications and NWP verification letters for these activities be provided to the Department of Defense Siting Clearinghouse, so that the Department of Defense could have an opportunity to coordinate with the project proponent to ensure that long range surveillance, homeland defense, testing, and training missions are not adversely affected by these activities.

We have added a Note at the end of this NWP to require district engineers to send pre-construction notifications and NWP verification letters to the Department of Defense Siting Clearinghouse if NWP 39 is proposed to be used, and is used, to authorize the construction of wind energy generating structures, solar towers, or overhead transmission lines. The Department of Defense Siting Clearinghouse is responsible for coordinating with the project proponent and resolving any potential effects on Department of Defense long range surveillance, homeland defense, testing, and training missions.

This permit is reissued with the modification discussed above.

NWP 40. *Agricultural Activities.* We proposed to modify this NWP so the 300 linear foot limit applies to all stream losses, not just drainage ditches constructed in streams. To waive the 300 linear foot limit for losses of intermittent or ephemeral stream bed, the district engineer would have to make a project-specific written determination that the activity will result in minimal adverse effects.

Two commenters support the changes and said the modification would ensure NWP 40 authorizes activities with minimal adverse effects on the aquatic environment. One commenter opposed expanding the 300 linear foot limit to all stream losses, stating that the NWP should not authorize the loss of natural streams. Another commenter recommended removing intermittent streams from the waiver provision to limit it to ephemeral streams. One commenter said that waivers for the loss of greater than 300 linear feet of intermittent and ephemeral streams should not be issued until a natural heritage database search was completed. Two commenters stated that the acreage limit and the ability to waive the 300 linear foot limit do not adequately address cumulative impacts and requested the waiver provision be removed.

Comments concerning the 300 linear foot limits for the loss of stream bed and the waiver process are discussed in a previous section of the preamble. We are adopting the proposed language for the waiver provision. We are retaining the provision allowing the 300 linear foot limit to be waived for losses of ephemeral and intermittent stream bed, since such activities may result in minimal adverse effects on the aquatic environment. District engineers may consider information from state natural heritage databases when evaluating a pre-construction notification involving a proposed waiver of the 300 linear foot limit. We believe that both the ½-acre limit and 300 linear foot limit for stream bed losses, along with the division engineer's authority to add regional

conditions to this NWP and the district engineer's authority to add activity-specific conditions to an NWP authorization, will ensure that the NWP authorizes activities with minimal individual and cumulative adverse effects on the aquatic environment. Division engineers may also suspend or revoke this NWP in watersheds or other geographic areas if they find that use of the NWP would result in more than minimal cumulative adverse environmental effects.

One commenter stated the ½-acre limit should be based on farm tract and asserted NWP 40 allows for the incremental fill of agricultural wetlands. One commenter stated that roadside stands should not be considered farm buildings for authorization under this permit. Another commenter recommended farm building pads be limited to areas that have been in existing, ongoing, agricultural production since at least 1980. One commenter remarked concern that this NWP allows fills in waters for non-water dependent uses. Another commenter asserted this NWP should not authorize farm ponds in wetlands.

The ½-acre limit applies to a single and complete project. The district engineer will determine, after considering the specific circumstances for a pre-construction notification, whether the single and complete project should be based on a farm tract, property boundary, or other appropriate geographic area. Road stands may be considered farm buildings for the purposes of this NWP. We do not agree that building pads for farm buildings should be limited to existing agricultural areas, or that they should be treated differently than building pads authorized by NWPs 29 or 39. General permits, including NWPs, may authorize activities that are not water-dependent, as long as the general permit is issued in accordance with the requirements in the 404(b)(1) Guidelines at 40 CFR 230.7.

This NWP is reissued as proposed.

NWP 41. *Reshaping Existing Drainage Ditches.* There were no changes proposed for this NWP. Several commenters requested adding more terms and conditions to this NWP to provide requirements concerning slope stability, conducting a natural heritage database search, limiting the NWP to reshaping no more than one mile of drainage ditch, and placing the excavated material in uplands. One commenter suggested replacing the phrase ''for the purpose of improving water quality'' with ''for the purpose of improving water quality or public safety.'' This commenter also said the NWP should authorize drainage improvements beyond the original as-built capacity. One commenter stated that this NWP should not be exempt from compensatory mitigation requirements even though the activity is designed to improve water quality.

We do not agree that the suggested additional terms and conditions are necessary to ensure that this NWP authorizes ditch reshaping activities that have minimal adverse effects on the aquatic environment. The drainage ditch slope is more appropriately determined on a case-by-case basis. District engineers have the discretion to consult state natural heritage databases while reviewing pre-construction notifications. The authorized activities are intended to improve water quality, so there is no need to impose a one mile limit or require compensatory mitigation. Reshaping a drainage ditch to improve water quality may involve discharging dredged or fill material into jurisdictional waters within the ditch. This NWP was originally issued to encourage activities that would help improve water quality within a watershed, not to provide for public safety. Discharging dredged or fill material into waters of the United States to reshape existing drainage ditches primarily for the purposes of public safety may be authorized by other NWPs, regional general permits, or individual permits.

This NWP is reissued as proposed.

NWP 42. *Recreational Facilities.* We proposed to modify this NWP by changing the waiver provision for activities resulting in the loss of greater than 300 linear feet of intermittent and ephemeral stream bed, to clarify that the district engineer will only issue the waiver after making a project-specific written determination that the activity will result in minimal adverse effects.

Two commenters said that the ½-acre limit of this NWP does not ensure minimal adverse effects, and one of these commenters stated that the 300 linear foot limit for stream bed losses does not ensure minimal adverse effects either. Several commenters supported the proposed waiver provision, since it emphasizes that the appropriate test is that the activity results in minimal adverse effects. One commenter suggested removing intermittent streams from the waiver provision because of the potential for significant impacts to intermittent streams.

The ½-acre limit is the appropriate limit to ensure that the activities authorized by this NWP result in minimal adverse effects on the aquatic environment. This limit has been in place over several permit terms and multiple NWPs and we are not aware of evidence that it has allowed projects that do not meet the minimal effects requirement to be authorized, nor have commenters provided such evidence. Division engineers may regionally condition this NWP to reduce the acreage limit or revoke the NWP if its use would result in more than minimal individual and cumulative adverse effects on the aquatic environment. The 300 linear foot limit for losses of stream bed is also necessary to ensure minimal adverse environmental effects. The waiver provision is discussed in a separate section of the preamble. We are retaining the 300 linear foot limit for stream bed impacts, as well as the ability for district engineers to provide written waivers of the 300 linear foot limit for losses of intermittent and ephemeral stream beds.

One commenter suggested adding a condition to this NWP to limit fill pathways on public lands to six feet wide, with a maximum length of 200 feet, and require open pile or floating boardwalks/docks by prohibiting the discharges below the ordinary high water mark of inland lakes, streams, or the Great Lakes, or areas that otherwise provide fish habitat functions of any kind.

We do not believe the recommended restrictions are necessary to ensure that the NWP authorizes only those activities that result in minimal adverse effects on the aquatic environment. Division engineers may add regional conditions to this NWP to limit certain activities or require specific construction techniques. Division engineers may also restrict or prohibit the use of this NWP in certain waters to protect important resources, such as fish habitat.

One commenter supports requiring pre-construction notification for all activities authorized by this NWP. One commenter said that the activities authorized by this NWP are not similar in nature. One commenter suggested adding a condition requiring recreational facilities to be integrated into the natural landscape and not substantially change pre-construction grades or deviate from natural landscape contours. One commenter requested clarification as to when an easement will not be required.

We have retained the requirement that all project proponents who want to use this NWP must submit a pre-construction notification. This NWP authorizes a specific category of activities (i.e., recreational facilities) and complies with the ''similar in nature'' requirement of Section 404(e) of the Clean Water Act. We do not agree that it is necessary to require

recreational facilities to be integrated into the natural landscape and not substantially change pre-construction grades. The ½-acre and 300 linear foot limits, as well as the requirement to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable on the project site (see general condition 23, mitigation), help ensure that the NWP authorizes activities that result in minimal adverse effects. Conservation easements or other appropriate long-term protection instruments will only be required, if necessary, for areas that are used to provide compensatory mitigation for activities authorized by this NWP.

This permit is reissued as proposed.

NWP 43. *Stormwater Management Facilities.* We proposed to modify this NWP by adding low impact development stormwater management features to the examples of types of stormwater management facilities that may be authorized by this NWP. We also proposed to modify this NWP by changing the waiver provision for activities resulting in the loss of greater than 300 linear feet of intermittent and ephemeral stream bed, to clarify that the district engineer will only issue the waiver after making a project-specific written determination that the activity will result in minimal adverse effects.

One commenter expressed support for the proposed modifications. One commenter suggested that the acreage limit should be increased from ½-acre to one acre to increase the utility and usefulness of this NWP. Several commenters said this NWP should not authorize new stormwater management facilities. One commenter stated that the NWP should only authorize the construction of an outfall structure. A couple of commenters said that this NWP should be changed to clarify that only constructed wetlands may be used to detain, retain, or treat stormwater.

We do not agree that the acreage limit for this NWP should be increased from ½-acre to one acre. The ½-acre limit is necessary to ensure that this NWP authorizes only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment. The construction of new stormwater management facilities may be authorized by this NWP (if all other conditions are met), because those activities often result in minimal adverse environmental effects and help protect the aquatic environment by preventing or reducing the amount of pollutants that enter streams, coastal waters, and other aquatic habitats. Stormwater management facilities are an important tool for fulfilling the objective of the Clean Water Act, by protecting and restoring the physical, chemical, and biological integrity of our Nation's waters. The construction of stormwater management facilities may involve discharges of dredged or fill material into jurisdictional wetlands, so it would not be appropriate to limit this NWP to constructed wetlands for the detention, retention, or treatment of stormwater.

We have substantially modified the first paragraph of this NWP to clarify how construction and maintenance activities may be authorized by this NWP, including the application of the waste treatment system exclusion at 33 CFR 328.3(a)(8). Section 328.3(a)(8) states that ''[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of'' the Clean Water Act are not waters of the United States. The first half of this paragraph provides examples of the types of stormwater management facilities that may be authorized by this NWP, if the construction of those facilities involves discharges of dredged or fill material into waters of the United States. The second half of this paragraph states that to the extent that a section 404 permit is required, this NWP also authorizes discharges of dredged or fill material into waters of the United States for the maintenance of stormwater management facilities. Therefore, this NWP authorizes maintenance activities involving discharges of dredged or fill material if the stormwater management facility is not eligible for the waste treatment system exclusion. A section 404 permit is not required for a discharge of dredged or fill material into a waste treatment system that qualifies for the waste treatment system exclusion at 33 CFR 328.3(a)(8).

Several commenters supported the addition of low impact development stormwater management features to the examples of activities authorized by this NWP. One commenter said that while the construction of low impact development stormwater management features may need a Department of the Army permit in some circumstances, the maintenance of low impact development stormwater management features does not require a section 404 permit. This commenter also stated that requiring Department of the Army permits for maintenance activities in watersheds that have total maximum daily load requirements would result in needless paperwork without any environmental benefits. One commenter requested an explanation of the value of low impact development stormwater management facilities and examples of those facilities that may be authorized by this NWP. One commenter expressed concern that areas not subject to Clean Water Act jurisdiction, such as swales and upland areas holding waters only for short periods of time, may be considered to be waters of the United States if they are used for low impact development stormwater management features. Several commenters requested a definition for ''low impact development stormwater features'' in the definitions section. One commenter asked whether hybrid or combined bank protection and stormwater management techniques are authorized by this NWP or authorized by other NWPs.

We have modified the text of this NWP to clarify that the construction of low impact development integrated management features is authorized by this NWP, if the construction involves discharges of dredged or fill material into waters of the United States. We have also provided examples of the types of low impact development integrated management features that may be authorized by this NWP, such as bioretention facilities (e.g., rain gardens), vegetated filter strips, grassed swales, and infiltration trenches. After these low impact development integrated management features are constructed, they may not be waters of the United States and subsequent maintenance may not require further Department of the Army authorization. The jurisdictional status of these features will be determined by district engineers on a case-by-case basis, after applying the appropriate regulations and guidance. The Corps of Engineers wetland delineation manual and the applicable regional supplement will be used to determine whether a particular feature is a wetland under the definition at 33 CFR 328.3(b). Many low impact development integrated management features may not have wetland hydrology because they are designed to improve water infiltration. By modifying this NWP to make it clear that it can be used to authorize discharges of dredged or fill material to construct low impact development integrated management features, we are providing general permit authorization for activities that will help state and local entities comply with the total daily maximum loads established for a watershed or watershed. We do not believe it is necessary to define the term ''low impact development stormwater management features'' in the Definitions section of the NWPs because the text of the NWP provides examples of those features. This NWP may authorize some minor bank stabilization associated with the construction of a stormwater

management facility. Bank protection may be authorized by this NWP or another appropriate NWP.

One commenter asked whether this NWP authorizes discharges of dredged or fill material for the construction of new stormwater facilities in intermittent or ephemeral streams that are waters of the United States. One commenter recommended prohibiting the construction of new stormwater management facilities in intermittent streams to avoid impacts to numerous rare and threatened and endangered species. Another commenter said this NWP should only authorize activities in ephemeral streams.

We do not believe it is necessary to limit the construction of new stormwater management facilities to ephemeral streams. District engineers will review pre-construction notifications and determine whether the proposed activities will have minimal adverse effects on intermittent and ephemeral streams. Activities authorized by this NWP must also comply with general condition 18, Endangered Species. State-listed rare species may be further protected through the establishment of regional conditions by division engineers, after a public notice and comment process.

Several commenters objected to allowing the district engineer to waive the 300 foot limit for the loss of intermittent or ephemeral stream bed. Another commenter suggested increasing the linear limit for the loss of stream beds to 500 feet before requiring a waiver, to authorize more activities. Several commenters stated the waiver provision should be removed and losses of waters of the United States should be limited to ½-acre or 300 linear feet of stream bed. Another commenter stated that no waivers should be allowed under any circumstances. One commenter suggested that waivers for losses of intermittent and ephemeral stream beds not be issued until the appropriate natural heritage resources database is consulted to inform the minimal adverse impact determination.

We are retaining the provision allowing district engineers to waive the 300 linear foot limit for the loss of intermittent and ephemeral streams, upon making a written determination that the discharge will result in minimal adverse effects. The 300 linear foot limit should not be increased to 500 linear feet, to ensure that any loss of perennial stream bed results in no more than minimal individual and cumulative adverse effects on the aquatic environment. District engineers may use available information, including state or local natural heritage resources databases, to help make the minimal adverse effects determination.

Some commenters suggested combining the maintenance component of this NWP with NWP 3 since both include maintenance activities. Another commenter suggested limiting this NWP to authorizing only the maintenance of stormwater management facilities constructed and used for the primary purpose of providing stormwater detention, retention and treatment.

As discussed above, we have modified this NWP to clarify that Clean Water Act Section 404 permits would not be required for maintenance activities (or other discharges of dredged or fill materials) involving stormwater management facilities that qualify for the waste treatment system exclusion at 33 CFR 328.3(a)(8) because these are excluded from the definition of waters of the United States. We do not believe it is necessary to combine maintenance authorized by NWP 43 with the maintenance activities authorized by NWP 3, since NWP 3 authorizes a variety of maintenance activities. Some stormwater management facilities may have purposes or uses other than stormwater detention, retention or treatment, so maintenance should still be authorized by this NWP, if a section 404 permit is required and the activity results in minimal adverse effects on the aquatic environment.

One commenter suggested that if a development project is required to install stormwater management facilities, the entire development should be treated as the ''area of potential effects'' for the purposes of compliance with Section 106 of the National Historic Preservation Act. One commenter recommended requiring any contaminated materials to be properly handled and disposed of.

The permit area for section 106 compliance will be determined by applying the criteria in Appendix C of 33 CFR part 325, the Corps Regulatory Program's procedures for the protection of historic properties, as well as the interim guidance issued on April 25, 2005, and January 31, 2007. In general, as is made clear in these regulations and guidance, the Corps does not agree that the area of potential effects for an NWP that is needed for a discharge involving one aspect of a development project necessarily encompasses the entire project, though this may be true in individual cases depending on the facts and circumstances. Compliance with general condition 20, Historic Properties, is required for activities authorized by this NWP. In response to a pre-construction notification, the district engineer may add activity-specific conditions to the NWP authorization to protect waters of the United States from adverse effects due to contaminated materials.

This NWP is reissued with the modifications discussed above.

NWP 44. *Mining Activities.* We proposed to add the 300 linear foot limit for the loss of stream bed, which for intermittent and ephemeral stream beds can be waived by the district engineer if he or she makes a written determination concluding that the activity will result in minimal adverse effects.

One commenter requested the NWP be revoked due to the large scale of these activities and their impacts on water quality. One commenter said this NWP should only authorize mining activities that have been permitted by state agencies. This commenter also stated that this NWP should not authorize peat mining or in-stream gravel mining. One commenter recommended expanding the categories of applicable waters to include tidal waters, since the term ''adjacent'' has not been adequately defined.

The terms and conditions of this NWP, including the addition of the 300 linear foot limit for the loss of stream bed, help ensure that the NWP authorizes only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. Division engineers can regionally condition this NWP to restrict or prohibit its use in specific waters or categories of waters, or in particular geographic regions. After reviewing a pre-construction notification, the district engineer may add activity-specific conditions to the NWP authorization to require water quality management measures so that the activity causes only minimal degradation of water quality (see general condition 25, water quality), or he or she may exercise discretionary authority and require an individual permit if it is not possible to reduce the adverse effects so that they are no more than minimal. Division engineers may also regionally condition this NWP to prohibit or restrict peat mining or in-stream gravel mining. We do not agree that the NWP should be expanded to authorize discharges of dredged or fill material into tidal waters, since such activities may result in more than minimal adverse effects on the aquatic environment. The term ''adjacent'' is defined in the Corps regulations at 33 CFR 328.3(c) and is used to identify wetlands that are waters of the United States by virtue of being adjacent to jurisdictional waters.

Many commenters opposed adding the 300 linear foot limit for the loss of stream bed and stated that the 300 linear foot limit should not apply to smaller tributaries. One commenter recommended increasing the linear foot limit to 500 feet. One commenter said the proposed linear foot limit would have the effect of preventing mining of more than one million tons of mineable reserves. One commenter stated that waivers to the 300 linear foot limit should not be issued without evaluating documented natural heritage resources located in the project area.

As stated above, the 300 linear foot limit is being added to help ensure that the NWP authorizes only those activities that result in minimal adverse effects on the aquatic environment and other applicable public interest review factors. Increasing the linear foot limit for the loss of stream bed to 500 feet increases the likelihood that these mining activities would result in more than minimal adverse effects and therefore not comply with the requirements of Section 404(e) of the Clean Water Act. Mining activities that do not qualify for NWP authorization may be authorized by individual permits or other general permits, such as regional general permits issued by district engineers. District engineers will evaluate appropriate information before waiving the 300 linear foot for losses of intermittent or ephemeral stream bed, which may include state natural heritage resource databases. In areas where district engineers have designated state natural heritage sites as critical resources, compliance with general condition 22, designated critical resource waters will protect those natural heritage sites.

This NWP is reissued as proposed.

NWP 45. *Repair of Uplands Damaged by Discrete Events.* We proposed to modify this NWP to clarify that it does not authorize beach restoration. We also proposed to change the Note, to make it clear that the NWP authorizes discharges of dredged or fill material into waters of the United States associated with the restoration of uplands.

One commenter requested that a ½-acre limit be placed on activities authorized under this NWP. One commenter said that authorizing activities under this NWP within channel migration zones can have more than minimal adverse environmental effects and impair stream functions if those activities attempt to force a stream back into previously occupied channels. This commenter said the NWP should be conditioned to prohibit fills that would attempt to move the stream channel to a previous course within the stream channel migration zone. One commenter suggested modifying this NWP to limit it to reconfiguring the affected area, and not authorize increases to the size of structures or fills. Another commenter supported allowing dredging or excavation in all waters of the United States under this NWP in conjunction with the repair of uplands.

We do not believe that it is necessary to impose a ½-acre limit to this NWP, because it limits the repair of uplands to the contours, or ordinary high water mark, that existed before the damage occurred. This NWP also limits dredging to the minimum necessary to restore the damaged uplands, and does not authorize significant alterations to pre-event bottom contours of the waterbody. The minor fills authorized by this NWP are unlikely to substantially alter stream migration. Because this NWP is limited to restoring uplands to pre-event configurations, it does not authorize more than minimal changes in the size of structures or fills that may be constructed on or near uplands.

One commenter said that fills should be limited to the post-event ordinary high water mark. Another commenter made a similar recommendation, but suggested that an exception should be provided in cases where there is a need to respond to immediate threats to a primary structure or to infrastructure.

We do not agree that fills should be limited to the post-event ordinary high water mark. The purpose of this NWP is to authorize discharges of dredged or fill material into waters of the United States for the repair of uplands that have been damaged by discrete events and have minimal adverse effects on the aquatic environment. In some cases, it may not be practicable to limit fills to where the new ordinary high water mark is located, in cases where the discrete event changes the location of the ordinary high water mark.

One commenter said that Tribes should be notified to avoid impacts to Tribal treaty natural resources and cultural resources. Two commenters supported the proposed changes to the Note. One commenter stated that all bank stabilization authorized by this NWP must also satisfy the terms and conditions of NWP 13.

Division engineers can regionally condition this NWP to identify areas where there are Tribal treaty natural and cultural resources, so that consultation can be conducted with those Tribes to ensure that impacts to those resources are appropriately considered during review of pre-construction notifications. General condition 17, Tribal rights, prohibits the impairment of reserved tribal rights such as reserved water rights and treaty fishing and hunting rights. We have retained the proposed changes to the Note at the end of this NWP. This NWP provides separate authorization for discharges of dredged or fill material that are necessary to repair uplands that have been damaged by discrete events, including the placement of fills necessary to stabilize the bank. Unlike NWP 13, this NWP limits bank stabilization so that it does not exceed the land contours that existed before the damage occurred. Nationwide permit 13 may be used in conjunction with this NWP to authorize bank stabilization for restored uplands in cases where it is not practicable to limit bank stabilization to the pre-event ordinary high water mark or contours.

The NWP is reissued as proposed.

NWP 46. *Discharges in Ditches.* We did not propose any changes to this NWP. Most commenters asked why this permit was needed since upland ditches are not subject to Clean Water Act jurisdiction, and any discharges of dredged or fill material into these ditches are exempt by statute under Section 404(f) of the Clean Water Act. Some commenters noted that the Corps does not assert Clean Water Act jurisdiction over many upland ditches and should not attempt to regulate these ditches by reissuing this NWP.

This NWP authorizes discharges of dredged or fill material into a specific category of ditches (i.e., those non-tidal ditches that meet all four criteria in the first paragraph of the NWP), if those ditches have been determined to be waters of the United States. Section 404(f) of the Clean Water Act only exempts discharges of dredged or fill material for the construction or maintenance of irrigation ditches, or the maintenance of drainage ditches, while this NWP authorizes a different set of activities which would require a Section 404 permit. For example, this NWP authorizes discharges of dredged or fill material that may completely fill the specific category of upland ditch described in the NWP, if that ditch is determined to be a water of the United States after either the Corps or EPA makes a jurisdictional determination.

We recognize that many ditches constructed in uplands are not waters of the United States, but there are some ditches constructed in uplands that may be determined to be waters of the United States after evaluating the specific characteristics of those ditches. The preamble to the Corps November 13, 1986, final rule states the non-tidal drainage and irrigation ditches

excavated on dry land are generally not considered to be waters of the United States, but the Corps and EPA reserve the right on a case-by-case basis to determine whether a particular waterbody is a water of the United States (see 51 FR 41217). Joint guidance issued in December 2008 by EPA and the Corps provides additional clarification as to when ditches are and are not considered to be waters of the United States (see *http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf*; p. 12).

Some commenters said there are impacts to upland ditches that could impair water quality downstream and that compensatory mitigation should be required to minimize adverse effects caused by activities authorized by this NWP. One commenter recommended that district engineers evaluate impacts to natural heritage resources during their review of pre-construction notifications.

For those activities authorized by this NWP, the district engineer will review the pre-construction notification and determine whether the activity results in only minimal adverse effects, including whether compensatory mitigation is necessary to ensure that the authorized activity results in minimal adverse effects on the aquatic environment, including water quality. During the review of a pre-construction notification, the district engineer may consult natural heritage resource databases to more effectively evaluate the potential adverse effects on the aquatic environment.

This NWP is reissued as proposed.

NWP 47. *Pipeline Safety Program Designated Time Sensitive Inspections and Repairs.* We proposed to not reauthorize this NWP because it was issued in 2007 in reliance on the development of the Pipeline Repair and Environmental Guidance System (PREGS) by the Pipeline and Hazardous Materials Safety Administration. Since PREGS was not developed and deployed, and paragraph (h) of the NWP required permittees to use PREGS to submit post-construction reports, no activity could be authorized by NWP 47.

Two commenters asked why this NWP was not proposed to be reissued. Three commenters agreed with allowing the NWP to expire and supported the Corps position that designated time sensitive inspections and repairs can be authorized under NWP 3, Maintenance and NWP 12, Utility Line Activities. One commenter said that there should be an NWP to authorize emergency repair activities to fix natural gas pipeline leaks, pressure malfunctions, natural disaster damage, terrorist threats, or other events that pose a danger to public safety. One commenter suggested issuing a new NWP to authorize activities licensed by the Federal Energy Regulatory Commission's blanket certificate program.

Existing NWPs, such as NWPs 3 and 12, may be used to authorize discharges of dredged or fill material or structures or work in navigable waters of the United States associated with pipeline inspections and repairs. Some of these activities do not require pre-construction notification to qualify for NWP authorization. There are other approaches available, such as emergency permitting procedures, to allow emergency repair activities that do not qualify for general permit authorization to proceed if there is ''an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship'' (see 33 CFR 325.2(e)(4)). We do not believe it is necessary to develop a new NWP to authorize activities that are granted blanket certificates by the Federal Energy Regulatory Commission. Many of these activities may be authorized by existing NWPs, such as NWPs 3 and 12.

This NWP is not reissued.

NWP 48. *Commercial Shellfish Aquaculture Activities.* We proposed to modify this NWP by removing the reporting requirement, which applied to all activities that did not require pre-construction notification. We also proposed to add the information previously required in that report to the PCN information requirements. This information includes: A map showing the boundaries of the project area, with latitude and longitude coordinates for each corner of the project area; the name(s) of the cultivated species; and whether canopy predator nets are being used. In addition, we proposed to remove the pre-construction notification requirement for changes in species cultivated, as long as those species had been previously cultivated in the waterbody. We proposed to modify this NWP to authorize activities associated with the expansion of existing commercial shellfish aquaculture operations. We requested comments on modifying this NWP or issuing a new NWP to authorize new commercial shellfish aquaculture activities.

Many commenters said the NWP should be reissued, and recommended many changes. Several commenters stated that this NWP should not be reissued. Most commenters expressed support for removing the reporting requirements for all activities that did not require pre-construction notification, stating that the paperwork was unnecessary given the current regulation of the industry by other entities, such as state and local governments. One commenter said that the reporting requirements should be maintained to ensure protection of resources. Other commenters suggested that pre-construction notification should be required for all activities. Several commenters said that the NWP should only authorize maintenance activities. One commenter stated that shellfish aquaculture methods are sufficiently different for the species cultivated that issuing a single NWP to authorize these activities is inappropriate. Another commenter said that all commercial shellfish aquaculture activities should be authorized under one NWP. Two commenters stated that the NWP should only authorize harvesting that occurs by hand. One commenter stated that these activities may impact tribal fishery access and fishing rights, and coordination with the affected tribes should be required.

We have reissued this NWP and made several changes. Properly sited, operated, and maintained commercial shellfish aquaculture activities support populations of shellfish that provide important ecological functions and services for coastal waters, and should be authorized by a single NWP. We have removed the reporting requirements for this NWP and substantially reduced the number of pre-construction notification thresholds. Division engineers may regionally condition this NWP to establish additional pre-construction notification thresholds if necessary to ensure that this NWP authorizes only those activities that have minimal adverse effects on the aquatic environment. We do not agree that pre-construction notification should be required for all activities authorized by this NWP, because these activities are regulated by a number of other government agencies, especially at the federal and state government levels. In addition, the discharges of dredged or fill material into waters of the United States authorized by this NWP will result in minimal adverse environmental effects to the environmental criteria established under the Clean Water Act. The shellfish populations supported by the activities authorized by this NWP help support the objective of the Clean Water Act because they improve water quality through the conversion of nutrients into biomass (i.e., shellfish growth) and the

removal of suspended materials through filter feeding. Commercially grown shellfish also provide some habitat functions for the aquatic environment. Impacts to submerged aquatic vegetation will, in many cases, be evaluated through the pre-construction notification review process. For commercial shellfish aquaculture activities in new project areas, adverse effects to submerged aquatic vegetation will be minimal because of the ½-acre limit. Impacts to coastal aquatic habitat and species of concern in those habitats are more appropriately addressed through consultation conducted under the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act and/or Section 7 of the Endangered Species Act.

We do not agree that the NWP should be limited to hand harvesting activities. We have retained the pre-construction notification requirement for activities involving dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation. General condition 17, tribal rights, states that NWP activities may not impair reserved tribal rights, including treaty fishing and hunting rights. In addition, division engineers may regionally condition this NWP to identify areas where Tribes must be notified of these activities and government-to-government consultation conducted to avoid or minimize impacts to tribal fishery access and fishing rights.

One commenter said that the restoration of indigenous species would be prevented if cultivation was limited to only those species that were previously commercially cultivated. Another commenter recommended requiring pre-construction notification if there were a proposed change in species cultivated that was not part of a state-approved list. Some commenters suggested that pre-construction notification should not be required for changes in harvesting methods. Another commenter said that pre-construction notification should be required if the culture method changed from bottom culture to floating or suspended culture to allow district engineers to evaluate potential navigation issues. One commenter indicated that the NWP should authorize demonstration projects less than one acre in size and another said that non-commercial shellfish aquaculture activities should be authorized, since states, local governments, and non-governmental organizations engage in recreational and commercial aquaculture. One commenter recommended adding a provision that would require the permittee to implement measures to prevent the spread of aquatic nuisance species, such as prohibiting the transfer of materials used for commercial shellfish aquaculture activities from one project site to another unless appropriate measures have been taken to ensure that those materials are free of aquatic nuisance species. This commenter said a note should be added to the NWP, to prohibit the transfer of equipment used in commercial shellfish aquaculture activities from one waterbody to another waterbody, unless that equipment has been allowed to dry out for a minimum of 90 days or treated in accordance with a regional aquatic nuisance control plan, to prevent the introduction of aquatic nuisance species into the other waterbody.

We have modified this NWP to provide more flexibility in the species cultivated, specifically, to allow the cultivation of nonindigenous species as long as those species have been previously cultivated in the waterbody. We recognize that there has been commercial production of nonindigenous species over many years in certain waterbodies, and activities requiring Department of the Army authorization associated with those commercial operations should be authorized by this NWP. We have retained the prohibitions against cultivating aquatic nuisance species defined by the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990. We have also added Note 2 to the NWP, to reduce the risk of introducing aquatic nuisance species by requiring treatment of materials taken from one waterbody to another in accordance with the applicable regional aquatic nuisance species management plan. Division engineers may add regional conditions to the NWP to make permittees aware of the regional aquatic nuisance species management plan that may be applicable to NWP 48 activities.

We agree that pre-construction notification should not be required for changes in harvesting methods because harvesting methods have temporary impacts and result in minimal adverse effects. A possible exception is dredge harvesting in areas inhabited by submerged aquatic vegetation, which still requires pre-construction notification. We also agree that pre-construction notification should be required if the grower proposes to change from bottom culture to floating or suspended culture in a project area, or if it is an activity in a new project area that requires the installation and use of floating or suspended gear, so that effects to navigation can be evaluated. This NWP authorizes commercial shellfish aquaculture activities undertaken by states, local governments, and non-governmental organizations. Shellfish seeding activities to improve shellfish populations may be authorized by NWP 27. Small recreational shellfish aquaculture activities may be authorized by other applicable NWPs, such as NWP 4. Other recreational shellfish aquaculture activities may be authorized by regional general permits or individual permits. Restoration aquaculture activities may be authorized by NWP 27.

One commenter stated that the structures and fill activities authorized by the NWP were too broad and should be refined. This commenter recommended prohibiting the long-term use of trays if sediment is compacted and diversity is diminished. One commenter said that structures and fill should be limited to shell spat only, while another commenter stated that shell planting should be allowed on any size parcel without pre-construction notification.

The structures and fills authorized by this NWP are limited to those necessary to conduct commercial shellfish aquaculture activities. We have retained the provision that states that the NWP does not authorize attendant features such as docks, piers, boat ramps, stockpiles or staging areas, or the deposition of shell material back into waters of the United States as waste. We have removed the pre-construction notification threshold for commercial shellfish aquaculture activities that are more than 100 acres in size, because we do not believe it is necessary to require pre-construction notification for existing operations with a valid lease, permit, or other appropriate instrument that has been approved by the appropriate state or local government agency, unless the activity triggers any of the pre-construction notification thresholds.

One commenter requested changes to the definition of shell seeding, citing concerns over the use of potentially environmentally damaging materials. Another commenter supported the use of terms such as ''suitable substrate'' and ''appropriate materials'' due to the decreasing availability of shell cultch and new research and development regarding materials. One commenter said that use of the term ''submerged aquatic vegetation'' allowed for the destruction of eelgrass, because eelgrass is often not inundated with tidal waters. One commenter asked whether traditional oyster culture practices were of special concern.

The definition of the term ''shellfish seeding'' in the Definitions section of

the NWP provides examples of appropriate materials that may be used for shellfish seeding activities. Through the issuance of regional conditions, division engineers can restrict or prohibit the use of certain materials for shellfish seeding. In response to a pre-construction notification, district engineers may add activity-specific conditions to an NWP authorization to prohibit the use of certain materials for shellfish seeding. Eelgrass is commonly considered to be a species of submerged aquatic vegetation and we intend it to be covered by the provisions regarding submerged aquatic vegetation, regardless of whether it is fully submerged in all tidal conditions or not.

Many commenters requested clarification as to when pre-construction notification is required and what constitutes a project area for the purposes of this NWP. Several commenters recommended that pre-construction notifications should only be required once and not for each subsequent reissuance of this NWP if the commercial shellfish aquaculture operation has not changed. One commenter asked if the lease holder is required to provide pre-construction notifications annually if the lease covers an area greater than 100 acres. One commenter inquired whether pre-construction notification is required when the operator is only working on 30 acres of a 200-acre project site. One commenter said that multiple pre-construction notifications should not be required from a lease holder that has multiple 100-acre leases; instead, one pre-construction notification should cover all those leases.

We have reduced the number of pre-construction notification thresholds in this NWP. The pre-construction notification thresholds in this NWP focus on those activities that should be reviewed by district engineers to: (1) Ensure that floating or suspended aquaculture facilities do not cause more than minimal adverse effects on navigation or, (2) ensure that both cultivating species that have not been previously cultivated in the waterbody and dredge harvesting, tilling, or harrowing in areas of submerged aquatic vegetation do not cause more than minimal adverse effects on the aquatic environment.

To support our objective to be more consistent with state and local agencies that regulate commercial shellfish aquaculture activities, we have redefined project area so that it is based on leases or permits issued by an appropriate state or local government agency that is responsible for allocating subtidal or intertidal lands for commercial shellfish production. The project area may also be based on rights to conduct shellfish aquaculture that are established by treaty, such as treaties executed between the United States Government and Indian Tribes. Project area may also be identified through an easement, lease, deed, or contract which establishes an enforceable property interest to conduct aquaculture activities on subtidal or intertidal lands.

We have removed the pre-construction notification requirement for relocating existing operations into portions of the project area not previously used for aquaculture activities, since the permit or lease issued by the state or local government agency has already authorized that area for use in commercial shellfish aquaculture. There is no need to address expansions in this NWP if the proposed expansions are within the project area authorized by the state or local government lease or other appropriate instrument. For example, pre-construction notification is not required if an operator who is only working on 30 acres of a 200-acre project area decides to conduct operations beyond those 30 acres within the 200 acre project area.

We have removed the pre-construction notification threshold for project areas greater than 100 acres. Since we have limited the pre-construction notification thresholds to focus on activities that may adversely affect submerged aquatic vegetation and changes in operations that may adversely affect navigation or involve species not previously cultivated in the waterbody, most on-going activities will not require pre-construction notification, thereby substantially decreasing the paperwork burden on current commercial shellfish aquaculture operators. The lease holder is not required to provide a pre-construction notification annually no matter what the size of the project area as long as the lease holder has a valid lease, permit, or other appropriate instrument that has been approved by the appropriate state or local government agency for the project area, and none of the pre-construction notification thresholds are triggered. For example, pre-construction notification is not required if the lease holder is only working within an existing authorized 200-acre project area no matter how much or little of that area is cultivated. However, if the lease holder proposes to cultivate a species of oyster in the 200-acre project area not currently present in the waterbody, pre-construction notification would be required. The activities also do not require pre-construction notification unless the activities involve dredge harvesting, tilling, or harrowing in areas of submerged aquatic vegetation. If the lease holder's operations within the 200-acre project area change from one on-bottom technique to another on-bottom technique, pre-construction notification is not required. However, if the operations are proposed to change from an on-bottom culture method to a floating or suspended culture method, pre-construction notification is required. Lastly, if an operator obtains a lease for a new project area and wishes to conduct any commercial shellfish aquaculture activities in the new project area, pre-construction notification is required.

One commenter said that requiring pre-construction notification for aquaculture relocation and expansion is unnecessary if the area is already leased but transferred to another owner. Another commenter recommended that any NWP authorizations should still be valid when the lease is transferred to another operator and use has not changed. One commenter stated that pre-construction notification should not be required for expansions into newly leased areas since the site conditions are usually the same.

Pre-construction notification is not required for expansions of commercial shellfish activities as long as the expansion occurs within the project area specified by an permit, lease, or other instrument issued by the appropriate state or local agency, and as long as none of the pre-construction notification thresholds are triggered. This would apply to an activity in a new location within the project area, or to an activity that would utilize a larger acreage of the project area, as long as none of those activities require pre-construction notification. If an activity is proposed by an operator in a new project area, however, pre-construction notification is required. An NWP verification can be transferred to a new project proponent, if he or she has obtained an interest in the subtidal or intertidal lands, provided appropriate procedures are followed for the transfer of the NWP verification (see general condition 29, transfer of nationwide permit verifications).

One commenter asked whether or not an NWP verification can be issued prior to a state issuing a lease. Another commenter said that NWP 48 should be delegated to the states who issue leases to reduce duplicative paperwork. One commenter stated that pre-construction notification should not be required when a state already evaluates impacts to submerged aquatic vegetation prior to

granting leases. Another commenter said that certain states do not issue leases in areas with submerged aquatic vegetation, so it is not necessary for the Corps to address that issue.

The district engineer may issue an NWP verification before the state makes its decision on a lease application. It is necessary to respond to a complete pre-construction notification within 45 days to retain the authority to add activity-specific conditions, which would ensure that the NWP activity results in minimal adverse effects on the aquatic environment. Since there is not consistent regulation of commercial shellfish aquaculture activities among all of the states, we do not agree that certain Federal interests, such as navigation and impacts to special aquatic sites, should be delegated to the states. In evaluating a pre-construction notification triggered by potential impacts to submerged aquatic vegetation, the district engineer would consider any evaluation of such impacts that had been previously conducted by the state if this is submitted with the PCN.

Many commenters expressed concerns regarding impacts to species protected under the Endangered Species Act, designated critical habitat, and essential fish habitat. One commenter asked if compliance with the Endangered Species Act was required for both existing and new activities. Another recommended that a detailed eelgrass, macroalgae, and forage fish survey should be required for each pre-construction notification. One commenter stated that NWP authorization should not be granted in areas adjacent to forage fish or critical habitat.

Activities authorized by this NWP must comply with general condition 18, endangered species. Any new or existing activity that involves discharges of dredged or fill material or structures or work in navigable waters of the United States that might affect listed species or designated critical habitat require pre-construction notification to the district engineer, so that Section 7 consultation can be conducted. We do not agree that pre-construction notifications should include surveys for eelgrass, microalgae, or forage fishes. The district engineer may request additional information from the project sponsor if needed to conduct Section 7 consultation. An activity may be authorized in critical habitat if a section 7 biological opinion is issued and impacts to critical habitat are authorized.

One commenter recommended that the Corps work closely with the National Oceanic and Atmospheric Administration to streamline the review and approval of aquaculture projects. Some commenters said that the commercial shellfish aquaculture industry is not sufficiently regulated at the local, state, or federal level. One commenter said that enforceable conditions need to be added to NWP 48 authorizations to protect the aquatic environment. One commenter recommended implementing a regional ecosystem-based management approach.

We have worked closely with the National Oceanic and Atmospheric Administration and other Federal agencies to develop this NWP, and we disagree that there is not already sufficient government oversight of these activities at the various levels of government. In response to a pre-construction notification, the district engineer may add activity-specific conditions to the NWP authorization to ensure that the authorized activity results in minimal adverse effects on the aquatic environment, individually and cumulatively. A regional ecosystem-based management approach is more appropriately undertaken by Corps districts and interested Federal, State, and local government agencies, not at the national level.

Many commenters expressed concern regarding the environmental impacts associated with expansions of commercial shellfish aquaculture activities and for new activities. One commenter said that expansion proposals should not be reviewed as restoration activities since non-native species are a serious threat. Several commenters stated that the environmental benefits do not offset the environmental impacts, introduction of invasive species, impacts to native species such as flatfish and other sandy bottom species, reduction of species diversity, elimination of native animal and plant species, harassment and destruction of migrating birds, and the introduction of plastics. Other commenters expressed concern regarding impacts from geoduck cultivation and harvesting on the environment as well as on wild geoduck populations, and the cultivation and harvesting of other non-native species. Two commenters stated that geoduck cultivation and harvesting has only minimal impacts.

When properly sited, operated, and maintained, commercial shellfish aquaculture activities generally result in minimal adverse effects on the aquatic environment and in many cases provide environmental benefits by improving water quality and wildlife habitat, and providing nutrient cycling functions. These activities are subjected to an extensive amount of regulation at the Federal and state government levels, and often the local government level. The introduction of invasive species can occur through many mechanisms, and the types of species approved for commercial aquaculture activities are regulated. This NWP does not authorize discharges of dredged or fill material or structures or work in navigable waters of the United States associated with the cultivation of nonindigenous species that have not been previously cultivated in the waterbody or the cultivation of aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990. Furthermore, division engineers may add regional conditions to the NWP to require permittees to use specific practices that will prevent the spread of aquatic nuisance species. Such measures may vary, depending on the species of concern and which techniques would be the most effective means to prevent the spread of such species. Adverse effects that may result from geoduck cultivation are more appropriately addressed by Corps districts, since this activity is limited in geographic scope. Division engineers may regionally condition this NWP to restrict or prohibit its use to authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States associated with geoduck production.

Several commenters stated that the expansion of commercial shellfish aquaculture activities will result in more than minimal cumulative adverse effects and should not be authorized by NWP. One commenter said that all activities authorized by this NWP should require reporting to assess cumulative effects. Another commenter suggested that cumulative effects on water quality should be evaluated for water bodies with multiple aquaculture facilities.

As stated above, commercial shellfish aquaculture activities provide habitat, water quality, and nutrient cycling functions and when properly sited, operated, and maintained are unlikely to result in more than minimal cumulative adverse effects on the aquatic environment. Division engineers may restrict or prohibit use of this NWP in geographic regions or specific waterbodies where more than minimal cumulative adverse effects may occur.

One commenter stated that shellfish aquaculture activities have economic impacts that were not sufficiently addressed in the draft decision documents. For example, county and

state health agencies are required to regulate water quality, which costs taxpayer money. This commenter said that changes to aesthetics associated with expansion of these activities, such as noise, odor, and viewshed impacts should also be considered. Impacts to recreational uses of the affected waterbodies could occur if expansions greater than 100 acres in size are authorized. This commenter also said that new and expanded operations should not be proposed in national parks or historic monuments, but existing operations should be allowed to continue. The commenter also stated that any projects in river delta regions should be carefully evaluated due to the sensitive nature of these brackish environments.

The draft decision documents briefly discuss economics as one of the public interest review factors that are considered before the Corps issues a permit, including a general permit. Shellfish aquaculture activities, in general, help improve water quality because many of the commercially cultivated species are filter feeders that remove nutrients and suspended materials from the water column. By removing nutrients, eutrophication and similar water quality problems are lessened. Water quality benefits provided by commercially grown shellfish help reduce costs of remediating local water quality problems. Commercial shellfish aquaculture activities have minimal adverse effects to aesthetics, and are likely to result in little change in local baseline levels of noise, odor, or views when compared to other waterfront uses in coastal residential areas, such as private and commercial boats, as well as the piers, wharves, marinas, and anchorage or mooring areas where those vessels are kept. Coastal areas are used by a wide variety of people. Effects on recreational uses of the waterbody should also be considered during the review of specific commercial shellfish aquaculture activities. Division engineers may regionally condition this NWP to restrict or prohibit its use to authorize new project areas and/or new activities in existing project areas in national parks or in the vicinity of historic monuments. The protection of waters near river deltas or other categories of waters is more appropriately accomplished through regional conditions imposed by division engineers.

One commenter stated that because commercial shellfish aquaculture may be limited by farm runoff, increasing production could require farmland to cease in operation. Another commenter stated that shellfish farming is a good gauge of water quality in an area since poor water quality necessitates closure of shellfish farms. In contrast, another commenter said the potential for aquaculture operations to harvest continuously as farm size increased would result in permanently suspended particulates and increased turbidity which would damage ecosystems.

Changes in farming operations that may be related to commercial shellfish aquaculture activities in nearby waters is outside of the Corps regulatory authority. Such issues are more appropriately addressed by state or local governments, who have the primary responsibility for land use decisions. We recognize that commercial shellfish aquaculture can help improve water quality. Harvesting operations may increase turbidity, but we believe such impacts are temporary and minor.

We received many comments in response to our proposal to consider issuing a new NWP or modifying NWP 48 to authorize new commercial shellfish aquaculture activities. Many commenters supported modifying NWP 48 to authorize new activities, and suggested terms and conditions. One commenter recommended limiting new activities to ten acres or less. One commenter stated that there should be no limits on new activities because shellfish aquaculture has only minimal, short-term adverse environmental impacts, and the shellfish themselves provide valuable ecological services. Two commenters stated that all new shellfish aquaculture activities except floating culture should be authorized under the NWP, because floating facilities have potential to impact navigation. One commenter said limitations on new activities should be imposed on NWP 48 and reconsidered when the proposal to reissue the NWPs is developed in 2016. Other commenters said that new activities should not be authorized by NWP because of their environmental impacts. Another commenter stated that new activities should not be authorized by NWP unless bottom culture methods are used (except for grow-out bags), harvesting is done by hand, and only native species are cultivated. One commenter stated that baseline habitat assessments should be provided and no operations should occur within 180 feet of marine vegetation, eelgrass, or sand dollar beds.

We are modifying NWP 48 to authorize commercial shellfish aquaculture activities in new project areas, provided the project proponent obtains a valid authorization (e.g., a lease or permit from the appropriate state or local government agency responsible for granting such leases or permits) and the activity will not directly affect more than ½-acre of submerged aquatic vegetation beds. Pre-construction notification is required for all commercial shellfish aquaculture activities in new project areas. Pre-construction notification is also required for activities in a project area if they involve dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation or if the activities involve the change from bottom culture to floating or suspended culture in order to assess potential impacts to navigation. In addition, general condition 14, proper maintenance, requires the permittee to properly maintain any authorized structure or fill. Therefore, any authorized commercial shellfish aquaculture activity and its associated equipment shall be properly maintained so as to not pose a hazard to navigation. The pre-construction notification thresholds will provide an opportunity for district engineers to evaluate the potential adverse effects to navigation and vegetated shallows, conservation, and other applicable public interest review factors, and ensure that those adverse effects are minimal. We agree that commercial shellfish aquaculture activities can provide important functions and services to the aquatic environment and should be authorized by NWP, with appropriate notification thresholds and limits. Division engineers may regionally condition this NWP to restrict or prohibit its use in specific waters or geographic areas, if there are concerns that these activities may have more than minimal adverse effects on certain species or specific types of aquatic resources.

This NWP is reissued with the modifications discussed above.

NWP 49. *Coal Remining Activities.* We proposed to clarify how the 40 percent of newly mined area is determined. We also proposed to modify the pre-construction notification provision to require the prospective permittee to submit documentation describing how the overall mine plan will result in a net increase in aquatic resource functions.

Several commenters supported the reissuance of NWP 49 and said no restrictions should be imposed because remining permits are one of the most significant tools to alleviate the environmental effects of past mining activities. Many commenters said this NWP should not be reissued. Some of these commenters stated that these activities result in more than minimal cumulative adverse effects. Many commenters objected to the lack of

limits for filling stream channels and said this NWP should not authorize the construction of valley fills or refuse fills. Other commenters stated that the functional increase associated with re-mining will still be insufficient to offset adverse effects of filling stream beds and that stream mitigation will not effectively replace lost stream functions.

We believe authorizing remining of an unreclaimed site and requiring actions to restore unreclaimed areas is one of the most effective ways to reverse degraded water quality in a watershed. Therefore, we have not imposed any new limits or restrictions on this NWP. All activities authorized by this NWP must result in net increases in aquatic resource functions, which will help manage cumulative effects on a watershed basis. Cumulative effects assessments have revealed the reduction in acid mine drainage and/or sedimentation in downstream segments of stream channels has resulted in functional improvements in many watersheds. The states of Ohio, Pennsylvania, Virginia, and West Virginia frequently use remining activities to reduce acid mine drainage and sedimentation and have data to demonstrate these improvements.

We do not believe this permit should have linear foot or acreage limits, since this NWP authorizes discharges of dredged or fill material into waters of the United States to reclaim previously mined sites that were unreclaimed, abandoned, forfeited, and typically exhibit poor water quality and present safety hazards. These unreclaimed mines may have unreclaimed highwalls, unvegetated mine spoil, disconnected stream segments, and/or pit impoundments. We, as well as other state and federal agencies, recognize that remining and reclaiming these areas is one of the most successful means for improving water quality, because these activities reduce sedimentation and acid mine drainage. Due to advances in mining technology and equipment, it is now economically viable to remove coal from these unreclaimed and abandoned mine sites. These sites can be combined with adjacent unmined areas to develop a project that is economically viable. In many cases the net result of combining remining of a previously mined site with new surface coal mining activities in adjacent areas is to facilitate reclamation of the older mine site and reduce acid mine drainage and sediment from the older mine site to downstream stream segments. Furthermore, this NWP provides an incentive to remine degraded areas, similar to the 1987 Rahall Amendments to the Clean Water Act, which enables mine operators to apply for the U.S. Environmental Protection Agency's modified effluent limits developed specifically for remining projects.

Project proponents who want to use this NWP must submit pre-construction notifications. The pre-construction notification describes how the overall mining plan will result in a net increase in aquatic resource functions. If there is an appropriate functional assessment protocol available for the types of aquatic resources in that geographic area, project proponents are encouraged to use that functional assessment protocol to demonstrate how the activity will result in a net increase in aquatic resource functions. The description of the proposed project required by paragraph (b)(3) of general condition 31 should describe the restoration that will take place on the project site. District engineers may add activity-specific conditions to this NWP to require more detailed restoration plans prior to discharging dredged or fill material into waters of the United States, as well as monitoring plans that will be used to assess whether the remining and associated reclamation activities are resulting in net increases in aquatic resource functions. Supplemental compensatory mitigation may be required in some instances, such as the implementation of mitigation projects near the project site, to remove or reduce causes of aquatic resource impairment and ensure that the overall activity not only results in minimal individual and cumulative adverse effects on the aquatic environment but in a net increase in aquatic resource functions, as required by this NWP.

Several commenters indicated the general public should have the right to comment on the proposal before the district engineer issues the NWP verification. One commenter said all activities associated with remining should require individual permits and another commenter objected to combining unmined lands required for restoration with previously mined lands because that would categorize unmined land as unreclaimed land, and result in additional adverse environmental effects. One commenter stated that slurry impoundments should not be authorized by this NWP.

We believe these activities are appropriate for general permit authorization and should not require a public notice and comment process. District engineers may assert discretionary authority and require an individual permit for proposed activities if they believe those activities will result in more than minimal adverse effects on the aquatic environment. It is appropriate to authorize discharges of dredged or fill material into waters of the United States for some new mining activities, to provide an incentive to restore unreclaimed mine lands, and provide net increases in aquatic resource functions. Impacts to the newly mined area would not be categorized as remining. Adverse effects to waters of the United States associated with the new mining would be subject to the general condition 23, mitigation, and the district engineer may add conditions to the NWP authorization to require mitigation located near the project site or out-of-kind mitigation to compensate for losses of aquatic resource functions. Typical surface coal mining projects, including remining, do not include slurry impoundments, as these impoundments are typically associated with the wastewater resulting from coal processing plants. This NWP does not authorize the construction of coal processing plants.

Many commenters said the Corps is making the review process associated with NWP 49 more onerous, which will decrease the utility of the NWP, and should focus on the environmental benefits that can be realized from this nationwide permit.

The proposed changes to this NWP, which we are adopting, do not make it more difficult to use NWP 49. The requirement to provide information with the pre-construction notification to explain how the overall activity will result in net increases in aquatic resource functions is necessary to ensure compliance with the terms and conditions of the NWP. Clarification of how to apply the 40 percent provision to determine how much new area could be mined will provide consistency in implementation. For example, a site may be proposed to be remined under this NWP. If 30 acres of the site has been previously mined and is proposed to be remined, and 30 acres of the site is unmined and is necessary to make it economically feasible to reclaim the remined area, then 40% of the combined acreage of the remined and reclaimed areas, or 40% of 60 acres which equals 24 acres, can be newly mined. In another example, if you have a 1,000-acre site, and 600 acres are affected by previously unreclaimed mining activities and 200 acres are needed to reclaim the 600 acres, then 40% of 800 acres (the summation of the previously unreclaimed mining activities site and the site needed to reclaim the previously mined site), or 320 acres may be newly mined. As there are only 200 acres remaining at the 1,000-acre site, those 200 acres may be

authorized under NWP 49 for newly mined activities.

One commenter said they did not understand the rationale for establishing the threshold for newly mined areas at 40 percent, if removing the small amount of remaining coal reserves will be far more attractive to coal mine operators if the percentage was increased to allow mining on larger areas of unmined lands. One commenter said the 40 percent limitation becomes an obstacle when the remaining coal seam is deep within the hillside and large amounts of overburden require removal. This commenter suggested increasing the limit for newly mined areas to 50 or 60 percent to encourage more restoration of unreclaimed areas. The commenter recommended adding a provision allowing district engineers to waive the 40 percent threshold in certain situations, such as when the operator receives an approved pollution abatement plan with best management practices, the remining activity is located in a completed Acid Mine Drainage Abatement Treatment watershed area, and watersheds with established total daily maximum loads. Several commenters objected to the provision stating that the Corps would consider the SMCRA agency's decision regarding the amount of currently undisturbed adjacent lands needed to facilitate the remining and reclamation of the previously mined area, stating that it creates duplicative and potentially conflicting layers of regulation to an already highly regulated industry.

The 40 percent limit was established when NWP 49 was first issued in 2007, and was based on the recognition that some new coal mining may have to be conducted to provide incentives to remine and reclaim previously mined lands. The 40 percent limit is intended to facilitate compliance with the minimal adverse effects requirement for the NWPs. We do not agree that it would be appropriate to add a provision allowing district engineers to waive the 40 percent limit. Remining and reclamation activities involving discharges of dredged or fill material into waters of the United States that require larger proportions of newly mined areas may be authorized by individual permits. The expertise provided by the agencies responsible for implementing SMCRA is necessary to help the Corps make its determination of compliance with the terms and conditions of this NWP.

One commenter stated this NWP should look holistically at overall water and site improvements, improvement in the safety of the area by the elimination of pits and highwalls, and reclamation of sites without the use of public funds.

We have focused this NWP on authorizing those activities that provide net increases in aquatic resource functions. The consideration of overall site improvements, increased safety, and the lack of use of public funds is more appropriately addressed by other agencies or programs.

This NWP is reissued as proposed.

NWP 50. *Underground Coal Mining Activities.* We proposed to place a ½-acre limit on this NWP, as well as a 300-linear foot limit for losses of stream bed. We also proposed a provision that allows district engineers to waive the 300 linear foot limit for losses of intermittent or ephemeral stream bed by making a written determination concluding that the discharge of dredged or fill material will result in minimal adverse effects.

Several commenters objected to the reissuance of this NWP, stating that it authorizes activities with more than minimal individual and cumulative adverse effects on the aquatic environment. Several commenters stated that activities authorized by this NWP will result in the loss of stream functions and adversely impact water quality downstream of the mine site. Several commenters said this NWP does not comply with the Section 404(b)(1) Guidelines and that the cumulative impacts analysis is too general and fails to consider past actions.

We have imposed a ½-acre limit on this NWP, as well as a 300 linear foot limit for the loss of stream bed. Pre-construction notification is required for all activities authorized by this NWP, and the permittee may not begin work in waters of the United States until an NWP verification is issued by the district engineer. These requirements, as well as the ability of district engineers to exercise discretionary authority and modify the NWP authorization by imposing activity-specific conditions, will help ensure that the NWP authorizes only those activities with minimal individual and cumulative adverse effects on the aquatic environment. Division engineers may regionally condition this NWP to restrict or prohibit its use in specific geographic regions, waters, or watersheds if the use of this NWP would authorize activities with more than minimal individual and cumulative adverse effects. When reviewing pre-construction notifications, district engineers will also evaluate whether the proposed activity will cause more than minimal direct and indirect adverse effects to water quality downstream of the mine site. The issuance of this NWP complies with the 404(b)(1) Guidelines, and we have complied with the requirements at 40 CFR 230.7. The cumulative effects analysis provided in the decision document in accordance with the National Environmental Policy Act considers the effects of past actions, to the extent that they have continuing effects on the aquatic environment. Under the 404(b)(1) Guidelines, the cumulative effects analysis involves prediction of the number of discharges likely to be regulated by a general permit until its expiration (see 40 CFR 230.7(b)(3)). That regulation, as well as 40 CFR 230.11(g), does not state that the effects of past actions have to be considered for the purposes of the 404(b)(1) Guidelines analysis, although, as stated above, we have considered such effects in connection with our NEPA analysis.

Several commenters stated that NWP 50 should not have any acreage and/or linear foot limitations as these limits would essentially render the permit unusable for underground mining operations.

We do not agree that the ½-acre limit and the 300 linear foot limit for stream bed losses make this NWP unusable. This NWP authorizes discharges of dredged or fill material into waters of the United States for underground coal mining activities, provided those activities result in minimal adverse effects on the aquatic environment. Since these coal mining activities occur underground, losses of waters of the United States are usually small in size because they are limited to discharges of dredged or fill material in waters of the United States to construct infrastructure and impoundments to support those mining activities. Underground coal mining activities that result in the loss of greater than ½-acre of waters of the United States, or more than 300 linear feet of perennial stream bed, may be authorized by individual permits or, if available, regional general permits.

One commenter stated that districts have incorrectly classified perennial streams and that impacts to special aquatic sites (e.g., riffle and pool complexes) have not been properly considered. Another commenter said that Clean Water Act jurisdiction does not extend to ephemeral and intermittent streams. Several commenters indicated stream mitigation measures are not effective and the Corps has failed to provide a rational explanation as to how mitigation will attenuate cumulative effects.

Classifying a stream as perennial, intermittent, or ephemeral is done by district engineers by evaluating available information on stream flow,

including information that may be submitted by a project proponent in support of a pre-construction notification. A site visit may also be conducted to identify perennial, intermittent, or ephemeral stream segments. Impacts to special aquatic sites such as riffle and pool complexes will be considered when reviewing a pre-construction notification, and discretionary authority will be asserted if the district engineer determines that the adverse effects on the aquatic environment are more than minimal. Both intermittent and ephemeral streams are subject to Clean Water Act jurisdiction if they are determined by district engineers to be waters of the United States after applying the appropriate regulations and guidance. Stream rehabilitation and enhancement activities have been shown to improve the ecological functions provided by those aquatic ecosystems. Stream compensatory mitigation projects must comply with the applicable requirements provided in general condition 23, mitigation, and the compensatory mitigation regulations at 33 CFR 320.4(r) and 33 CFR part 332. District engineers will review and approve mitigation plans, and will require alternative or additional compensatory mitigation if they determine the proposed compensatory mitigation will not be sufficient to successfully offset the losses of aquatic resources caused by the permitted activity. Compensatory mitigation projects must be implemented in accordance with their approved mitigation plans. District engineers will also require monitoring of these compensatory mitigation projects, and require remediation and adaptive management if those mitigation projects are not providing the intended aquatic resource functions. If a district engineer determines that a compensatory mitigation project is not ecologically successful and fails to fulfill its objectives, district engineers may require alternative compensatory mitigation to comply with the mitigation requirements established through conditions added to the NWP authorization.

Several commenters indicated the activities regulated by this NWP are also heavily regulated by SMCRA, the Federal Mine Safety and Health Act (MSHA), and the state mining and water resource programs; therefore, no limits should be imposed on the permit. One commenter said the limits and the waiver process is highly subjective and results in uncertainty in the Regulatory Program. One commenter stated that limitations imposed on this NWP could potentially require applicants to seek individual permits for all underground mining actions, which may result in a requirement to prepare an environmental impact statement. This commenter said that there should be a transition period without acreage or linear foot limits so that underground coal mining activities could continue to be authorized by this NWP until an individual permit can be obtained. One commenter said that reissuing NWP 50 with the ½-acre and 300 linear foot limits would result in significant job losses for their company, which consists of Native Americans who comprise 62 percent of their workforce. One commenter said that the new limits on this NWP would also increase the Corps workload.

This NWP provides authorization required under Section 404 of the Clean Water Act, for discharges of dredged or fill material into waters of the United States. The acreage and linear foot limits of this NWP are necessary to ensure that authorized activities result in minimal adverse effects on the aquatic environment. Compliance with other laws may be required for surface coal mining activities, but those decisions are made by the agencies responsible for administering those laws. District engineers will consider the criteria in paragraph (1) of section D, ''District Engineer's Decision'' and other appropriate criteria, when making a minimal effects determination for a proposed NWP activity. Activities that result in the loss of greater than ½-acre of waters of the United States require individual permits, unless those activities qualify for applicable regional general permits. If an individual permit is required, district engineers will determine whether an environmental impact statement is necessary to comply with the requirements of the National Environmental Policy Act. We do not agree that there should be a transition period for these activities, because the acreage and linear foot limits are necessary to comply with Section 404(e) of the Clean Water Act, and past use of this NWP indicates that the average loss of waters of the United States was 0.21 acre per NWP 50 activity. While there might be an increase in the number of individual permits, we do not believe it will be a large workload increase. As with all NWPs, an activity that was authorized under the 2007 NWPs has until March 18, 2013, to be completed under this authorization.

One state agency indicated implementation of the limits would result in increased workload for their staff and requested that funding be provided to their office to mitigate this increase. One commenter stated that sites which contain reclaimed and abandoned mines associated with deep mining operations with portals and/or bat habitat should be assessed for bat use.

Any workload increase due to the addition of the ½-acre and 300 linear foot limits would be borne primarily by the Corps districts. It does not directly impose additional workload on state agencies. The SMCRA permits required for all mining activities must go through advanced coordination with the U.S. Fish and Wildlife Service regarding endangered bat species and with the State natural resources agencies regarding state listed bat species. Effects to wildlife, including bats, that are not federally-listed as endangered or threatened, or state-listed bat species, will also be addressed through the SMCRA permit process. For federally-listed bat species, activities authorized by this NWP must also comply with general condition 18, endangered species.

This NWP is reissued as proposed.

NWP 51. *Land-Based Renewable Energy Generation Facilities.* This NWP was proposed as NWP A to authorize the discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction, expansion, or modification of land-based renewable energy production facilities. Examples include infrastructure to generate solar (concentrating solar power and photovoltaic), biomass, wind or geothermal energy and their collection systems. Attendant features may include, but are not limited to roads, parking lots, utility lines, and stormwater management facilities. We proposed a ½-acre limit for this NWP, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives this 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects.

Several commenters objected to the issuance of this NWP, stating that the Corps had failed to explain why the direct and indirect impacts resulting from the land-based renewable energy projects authorized by this NWP would be minimal, including the impacts caused by construction and operation of these facilities. These commenters said that individual permits should be required for these facilities. One of these commenters said that biomass facilities will significantly add to greenhouse gas

emissions and expressed the belief that biomass facilities will lead to increased land-clearing for harvest, planting and re-planting of trees. Several commenters stated that wind turbines will cause direct mortality on birds and bats and adversely affect critical avian and bat habitat. Two commenters stated that wind-generated energy facilities should incorporate guidelines developed by the U.S. Fish and Wildlife Service to minimize impacts to avian and bat species. One commenter stated that land-based wind and solar renewable energy facilities are not water dependent and should always require individual permits to allow for a thorough alternatives analysis for site selection. Several commenters stated that the activities authorized by this NWP are not similar in nature, since they involve various types of renewable energy facilities that have different adverse environmental effects.

This NWP authorizes discharges of dredged or fill material into waters of the United States for the construction, expansion, or modification of land-based renewable energy facilities. Unless the operation of these facilities involves discharges of dredged or fill material into waters of the United States, the Corps does not authorize, or have any Federal control or responsibility over, their operation. We believe that the construction, expansion, or modification of these facilities has minimal adverse effects on the aquatic environment, individually and cumulatively. Division engineers can regionally condition this NWP to restrict or prohibit its use in waters of the United States, where the discharges of dredged or fill material are likely to result in more than minimal adverse effects on the aquatic environment. While there may be emissions of greenhouse gases during construction activities involving discharges of dredged or fill material into waters of the United States, those direct emissions will generally not exceed de minimus levels of a criteria pollutant or its precursors and are exempted by 40 CFR 93.153. Emissions of greenhouse gases that occur from the operation of a land-based renewable energy generation facility, as well as emissions that occur when harvesting plant material for biomass energy production and operating the energy generation facility, are outside the Corps scope of analysis under the National Environmental Policy Act, because the Corps does not have the legal authority to control such emissions. The 404(b)(1) Guidelines do not include any requirements to assess effects of proposed discharges of dredged or fill material into waters of the United States on greenhouse gas emissions. Land clearing that may be conducted for the harvesting, planting, and replanting of trees that provide fuel for biomass energy facilities is not authorized by this NWP, and if such activities involve discharges of dredged or fill material into waters of the United States, a separate Department of the Army permit is required.

If the construction, expansion, or modification of a land-based renewable energy facility involves discharges of dredged or fill material into waters of the United States, and that activity may affect an endangered or threatened species, or is located in designated critical habitat, Endangered Species Act Section 7 consultation is required, and the activity cannot proceed until section 7 consultation is completed. We have added general condition 19, migratory birds and bald and golden eagles, to clarify that if an activity regulated by the Corps will result in the ''take'' of a migratory bird or a Bald or Golden Eagle, and a ''take'' permit is required from the U.S. Fish and Wildlife Service, it is the responsibility of the permittee to apply for, and obtain, the appropriate ''take'' permits from the U.S. Fish and Wildlife Service. The draft Land-based Wind Turbine Guidelines developed by the U.S. Fish and Wildlife Service are voluntary guidelines that project proponents may incorporate into their land-based wind energy projects. The Corps does not have the authority to condition this NWP to incorporate the recommendations provided in those guidelines. Water dependency is not a requirement for authorization by general permit, including nationwide permits. The water dependency test in the 404(b)(1) Guidelines guides the alternatives analysis for activities that require individual permits under Section 404 of the Clean Water Act.

The activities authorized by this NWP (i.e., discharges of dredged or fill material into waters of the United States for the construction, expansion, or modification of land-based renewable energy facilities) are similar in nature. The Corps interprets the ''similar in nature'' requirement in Section 404(e) of the Clean Water Act broadly, to cover general categories of activities. The discharges of dredged or fill material authorized by this NWP will have similar effects on the aquatic environment, by replacing waters of the United States with dry land, or altering their characteristics, when renewable energy facilities are constructed, modified, or expanded.

Two commenters expressed concern that if NWP A is issued, all land-based renewable energy facilities will require pre-construction notification because they could only be authorized by this NWP. Several commenters stated that NWP A should not be issued because all types of land-based renewable energy facilities can be authorized by existing NWPs, such as NWPs 12, 14, 18, 25, and 39, and it is not necessary to issue a new NWP that requires pre-construction notification for all activities. They also said that the issuance of NWP A would contradict the Corps stated goals of reducing administrative burdens on the regulated public, and utilizing its resources to focus on those projects that could be more environmentally damaging. One commenter stated that the pre-construction notification requirement would cause an unnecessary burden on project proponents, especially the requirement to provide a delineation of waters of the United States in the project area.

We are retaining the requirement that all activities authorized by this NWP require pre-construction notification, so that district engineers can evaluate these activities and add activity-specific conditions, if necessary, to ensure that they result in minimal individual and cumulative adverse effects on the aquatic environment. Other NWPs may be used to authorize discharges of dredged or fill material into waters of the United States for activities that may be associated with land-based renewable energy facilities. We do not intend issuance of this NWP to restrict currently available options for use of other NWPs to authorize any such discharges. For example, NWP 12 may be used to authorize discharges of dredged or fill material associated with the construction, maintenance, repair, or removal of utility lines for land-based renewable energy facilities. Likewise, NWP 14 may be used to authorize road crossings in waters of the United States within a land-based renewable energy facility. Project proponents may specify which NWP they wish to use to provide the requisite Department of the Army authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. If the proposed activity qualifies for authorization under that particular NWP, the district engineer will issue a verification letter. This NWP fulfills the objectives of the NWP program, since many land-based renewable energy projects require discharges of dredge or fill material into waters of the United States that would not qualify for NWPs 12 or 14, or other NWPs that do not require pre-construction notification.

One commenter suggested changing the pre-construction notification

threshold to 1/10-acre, so that compensatory mitigation would not be required for activities resulting in the loss of less than 1/10-acre of waters of the United States. Another commenter said that requiring pre-construction notification for losses of less than 1/10-acre removes incentives to minimize losses of waters of the United States to less than 1/10-acre. Two commenters stated that increasing the pre-construction notification threshold to 1/10-acre would be more consistent with Executive Order 13212, Actions To Expedite Energy-Related Projects.

We do not agree that the pre-construction notification threshold should be increased to 1/10-acre to match the pre-construction notification thresholds for NWP 12 or 14, since utility lines or road crossings may be only partial components of a land-based renewable energy generation facility. It should be noted that NWP 14 requires pre-construction notification for any discharge into a special aquatic site, including wetlands, which means that many NWP 14 activities that result in a loss of less than 1/10-acre require pre-construction notification. Nationwide permit 12 should be used when the only activities that require Department of the Army authorization are discharges of dredged or fill material to construct, maintain, repair, or remove utility lines. Therefore, in Note 1 we state that NWP 12 is to be used to authorize those utility line activities, as long as those activities comply with the terms and conditions of NWP 12, including applicable regional conditions and any case-specific conditions imposed by the district engineer. This NWP authorizes building pads for the renewable energy generation devices and attendant features associated with those devices, such as parking lots and stormwater management facilities. If more than one NWP is used to authorize a land-based renewable energy generation facility, the activity must comply with general condition 28, use of multiple nationwide permits, which states that the loss of waters of the United States cannot exceed the acreage limit of the NWP with the highest specified acreage limit. Compensatory mitigation is at the discretion of the district engineer, and will be required when necessary to ensure that the authorized activity results in minimal individual and cumulative adverse effects on the aquatic environment. Paragraph (a) of general condition 23, mitigation, requires permittees to avoid both temporary and permanent adverse effects to waters of the United States on the project site. The issuance of this NWP supports the objective of Executive Order 13212, by providing NWP authorization for some activities that would otherwise require individual permits because they do not qualify for any of the existing NWPs.

Two commenters agreed that NWP A is needed but said that many land-based renewable energy projects would not qualify because the losses of waters of the United States frequently exceed the acreage or linear foot limits. One commenter suggested increasing the acreage limit to one acre and the linear foot limit to 500 linear feet of stream bed, and allow the district engineer to waive the 500 linear foot limit if he or she determines that the activity will result in minimal adverse environmental effects. One commenter stated that NWP A should not allow waivers for stream bed losses in excess of 300 linear feet.

We believe that there will be a sufficient number of land-based renewable energy generation facilities authorized by this NWP to warrant its issuance. As with all general permits, this NWP will also provide an incentive for project proponents to reduce losses of waters of the United States to qualify for NWP authorization, instead of having to apply for individual permit authorization, if there are no regional general permits available to authorize these activities. The 1/2-acre and 300 linear foot limits are necessary to ensure that this NWP authorizes only those activities that have minimal individual and cumulative adverse effects on the aquatic environment, and are consistent with the limits in many other NWPs. Division engineers can regionally condition this NWP to reduce the acreage limit or linear foot limits, or revoke this NWP in specific waters or geographic areas where the adverse effects on the aquatic environment may be more than minimal. In response to a pre-construction notification, the district engineer may add activity-specific conditions to the NWP authorization to impose requirements to satisfy the minimal adverse environmental effect requirement. The 300 linear foot limit for the loss of intermittent and ephemeral stream bed can only be waived when the district engineer makes a written determination that the loss of that stream bed will result in minimal adverse environmental effects, after evaluating the site-specific characteristics of the project.

Several commenters said that all pre-construction notifications should be coordinated with other Federal and state agencies. One commenter stated that agency coordination should be required whenever a request for a waiver of the 300 linear foot limit is being evaluated by the district engineer. One commenter stated that this NWP should not include the waiver provision because of potential impacts to cultural resources and historic properties.

We do not believe it is necessary to coordinate all activities authorized by this NWP with Federal and state agencies. District engineers will carefully evaluate these pre-construction notifications and determine whether the proposed activities qualify for NWP authorization. Agency coordination is required for pre-construction notifications for proposed activities resulting in the loss of intermittent or ephemeral stream bed in excess of 300 linear feet. Activities authorized by this NWP must also comply with general condition 20, historic properties and district engineers will conduct section 106 consultation if a proposed activity may have the potential to cause effects to any historic properties listed, or eligible for listing, on the National Register of Historic Places.

Several commenters requested clarification on whether land-based renewable energy facilities would be considered as single and complete linear projects or single and complete non-linear projects. Several commenters asked if the linear features of these facilities, such as roads, utilities, and transmission lines, could be categorized as linear projects, while the construction of other components of the project, such as parking lots and buildings, would be considered as non-linear projects. A few commenters said terms and conditions should be added to the NWP to specify that the definition of single and complete linear project would always be used for linear components of the overall facility. One commenter stated that the activities authorized by this NWP should be considered one single and complete project because all renewable energy devices and their attendant features, including both linear and non-linear components, are required for the facility to have independent utility.

We have added Note 1 to this NWP to clarify that the NWP authorizes discharges of dredged or fill material into waters of the United States for the construction, expansion, or modification of a land-based renewable energy generation facility, including attendant features within that facility, and that utility lines that are used to transfer energy from the renewable energy generation facility to a distribution system, regional grid, or other facility are generally considered to

be separate single and complete linear projects. Those utility lines may be authorized by NWP 12 or other Department of the Army authorization. A similar approach should be used for roads or other types of utility lines (e.g., sewage or water lines) constructed to provide access to, or service, the land-based renewable energy generation facility. We are using the term ''generally'' in Note 1 because crossings of waters of the United States have to be at separate and distant locations to be a single and complete project. Crossings that are close together would not be considered separate single and complete projects. Since the configuration of land-based renewable energy generation facilities can vary substantially, district engineers will use their discretion to determine which activities are single and complete linear projects and which activities are single and complete non-linear projects, after evaluating the specific circumstances of a particular project. For example, the devices used to collect wind or solar energy may be arranged in a grid or in a linear configuration.

One commenter asked how the permit area would be determined for land-based renewable energy facilities. Specifically, the commenter asked whether the permit area would be the entire area bound by the perimeter of the facility, or just those areas within the facility where there are discharges of fill material into waters of the United States.

Identifying the permit area for the purposes of compliance with general condition 20, historic properties, is accomplished by applying the criteria in Appendix C to 33 CFR part 325, specifically paragraph 1(g), as well as the interim guidance issued on April 25, 2005 (paragraph 6(d)). The permit area will be determined by district engineers after considering the project-specific circumstances.

Several commenters stated that this NWP should not authorize activities in certain geographic areas, such as the Great Lakes. One commenter said that approval may be required for facilities that would impact state-owned waters or submerged lands.

Division engineers have the authority to suspend or revoke this NWP in specific waters or geographic areas. Division engineers may also add regional conditions to restrict or prohibit its use in certain waters or regions. In response to a pre-construction notification, district engineers may add activity-specific conditions to the NWP authorization to ensure that the activity results in minimal adverse effects on the aquatic environment. Project proponents must obtain all applicable Federal, state, or local authorizations, such as state permits to authorize activities on state-owned waters or submerged lands.

One commenter said that this NWP could be used to authorize activities associated with wind energy generating structures, solar towers, or overhead transmission lines, which have the potential to interfere with Department of Defense's long range surveillance, homeland defense, testing, and training missions. This commenter requested that copies of pre-construction notifications and NWP verification letters for these activities be provided to the Department of Defense Siting Clearinghouse, so that the Department of Defense could have an opportunity to coordinate with the project proponent to ensure that long range surveillance, homeland defense, testing, and training missions are not adversely affected by these activities.

We have added Note 2 to this NWP to require district engineers to send pre-construction notifications and NWP verification letters to the Department of Defense Siting Clearinghouse if this NWP is proposed to be used to authorize the construction of wind energy generating structures, solar towers, or overhead transmission lines. The Department of Defense Siting Clearinghouse is responsible for coordinating with the project proponent and resolving any potential effects on Department of Defense long range surveillance, homeland defense, testing, and training missions.

Proposed NWP A is issued as NWP 51, with the changes discussed above.

NWP 52. *Water-Based Renewable Energy Generation Pilot Projects.* This NWP was proposed as NWP B to authorize structures or work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States, for the construction, expansion, or modification of water-based wind or hydrokinetic renewable energy generation pilot projects and their attendant features. Attendant features may include, but are not limited to land-based distribution facilities, roads, parking lots, utility lines, and stormwater management facilities. We proposed a ½-acre limit for this NWP, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives this 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects.

Several commenters supported the issuance of this NWP. Some of these commenters provided suggestions to improve the NWP. Two commenters said the acreage limit should be increased from ½-acre to one acre and the linear foot limit be increased from 300 linear feet to 500 linear feet. One commenter stated that the NWP limits impacts to ½-acre without taking into consideration the aggregate capacity of the facility, only the number of generation units. One commenter said the pre-construction notification threshold should be increased to 1/10-acre to be consistent with the pre-construction notification threshold of some of the other NWPs that authorize similar activities, such as NWP 12. This commenter asked why activities associated with water-based renewable energy projects should be subject to closer scrutiny than other energy-related activities.

We are issuing this NWP with the ½-acre and 300 linear foot limits, and restricting its use to pilot projects, to ensure that this NWP authorizes only those activities that have minimal adverse effects on the aquatic environment. Division engineers can impose regional conditions on this NWP to decrease these limits, if there is potential for these activities to result in more than minimal adverse effects on the aquatic environment in a particular waterbody or geographic area. Individual permits, with a public notice and comment process, should be required for larger-scale water-based renewable energy generation facilities that are not pilot projects and involve activities that require Department of the Army authorization. Use of technologies other than wind or hydrokinetic devices for water-based renewable energy generation facilities may be authorized by other forms of Department of the Army permits, if such permits are required for the construction, expansion, modification, or removal of those devices. We are requiring pre-construction notification for all activities authorized by this NWP, so that district engineers can evaluate the proposed work and make a project-specific determination that the adverse effects on navigation, the aquatic environment, and other public interest review factors would be minimal, individually and cumulatively. It should be noted that NWP 12 only authorizes discharges of dredged or fill material, or structures or work in navigable waters of the United States, for the construction, maintenance, or repair of utility lines, and that all NWP 12 activities in section 10 waters require

pre-construction notification. Therefore, there are few differences in pre-construction notification thresholds for this NWP and other NWPs that may authorize similar activities. However, as with NWP 51, it is not our intent to limit any currently available options for use of other applicable NWPs to cover discharges of dredge or fill material associated with activities involved in the construction of water-based renewable energy generation pilot projects. Rather, this NWP provides an additional option for authorization of such discharges that are not currently covered by any other NWP.

Several commenters also stated that the limit of 10 generation units should either be eliminated or further defined. Several commenters said the 10 generation unit limit should be removed to allow projects that employ different technologies to be authorized by this NWP. Several commenters said that the total number of generation units should be defined as the total number of units per each single and complete project.

We believe the 10-unit limit is necessary to ensure that these pilot projects are small in scope, to ensure they would not have significant adverse environmental effects. The 10-unit limit, as well as the ½-acre and 300 linear foot limits, apply to single and complete projects. The information collected during these pilot projects will be useful in evaluating the potential productivity, feasibility, and environmental effects of larger scale water-based renewable energy generation facilities, which will require other types of authorization if they require DA permits.

Numerous commenters objected to the issuance of this NWP. Most of these commenters said that these activities will result in more than minimal individual and cumulative adverse effects on the aquatic environment. Several commenters said that there is not sufficient understanding of the environmental effects of these activities to warrant issuance of an NWP. Some commenters stated that these activities should be authorized by individual permits, with a full public notice and comment process and National Environmental Policy Act documentation. A few commenters said this NWP should not be used to authorize activities in the Great Lakes.

The terms and conditions of this NWP, including the ½-acre limit, the 300 linear foot limit, and the 10-unit limit will ensure that this NWP authorizes only those activities with minimal adverse effects on the aquatic environment. All activities authorized by this NWP require pre-construction notification, which provides district engineers with the opportunity to review each proposed activity and determine whether the adverse effects on the aquatic environment will be minimal. District engineers may add activity-specific conditions to the NWP authorization which require actions to mitigate adverse environmental effects. District engineers may also exercise discretionary authority to require an individual permit if permit conditions will not be sufficient to comply with the minimal adverse environmental effects requirement for general permits. Division engineers may impose regional conditions to restrict or prohibit the use of this NWP in certain waters or specific geographic areas, including the Great Lakes.

Several commenters requested a definition of the term ''pilot project.'' Some of these commenters said that this term could be interpreted broadly, in part because much of the technology used for water-based renewable energy generation facilities is in the early stages of development. In contrast, another commenter stated that not defining the term ''pilot project'' would restrict the applicability of this NWP. One commenter suggested that this NWP not be limited to pilot projects. One commenter recommended limiting pilot projects to those that will be used as demonstration projects or test projects to determine the practicability of water-based renewable energy generation at a particular site. One commenter said that this NWP should not be limited to small offshore wind energy pilot projects, and that this NWP should authorize offshore wind energy projects of any duration to encourage the development of renewable energy technologies.

We have added a provision to this NWP that defines the term ''pilot project.'' The definition is similar to how the Federal Energy Regulatory Commission describes hydrokinetic pilot projects in their April 2008 white paper on licensing hydrokinetic pilot projects. The definition in the NWP focuses on the experimental nature of pilot projects, and their use in collecting data on the performance of the device in generating energy for other uses and the effects of the devices on the environment, including the aquatic environment. Due to the recent development of this technology, we believe it is necessary to limit these water-based renewable energy generation facilities to pilot projects, to provide more information on potential adverse effects to the aquatic environment. In a future reissuance of the NWPs, we may consider expanding the scope of this NWP to authorize other small-scale water-based renewable energy generation facilities. A water-based renewable energy generation facility that is not a pilot project and does not qualify for an applicable regional general permit is more appropriately evaluated through the standard permit process, including a full public interest review.

One commenter stated that even pilot projects may result in more than minimal adverse effects on the aquatic environment because of indirect effects caused by blade strikes on birds and potential obstructions to navigation when these pilot projects are sited in navigable rivers. One commenter said the 10 generation unit limit may not be effective in ensuring that single and complete projects do not cause more than minimal adverse environmental effects on a cumulative basis or comply with monitoring requirements.

District engineers will review pre-construction notifications and determine whether the proposed activity complies with all terms and conditions of the NWP and may add activity-specific conditions, such as authorizing less than 10 units, to minimize adverse effects to navigation, the aquatic environment, and other public interest review factors such as impacts to fish and wildlife values. Indirect effects caused by the operation of these pilot projects, such as wind turbine blade strikes on birds, should be addressed through compliance with the appropriate Federal laws, such as the Endangered Species Act, Migratory Bird Treaty Act, or Bald and Golden Eagle Protection Act. Compliance with the Endangered Species Act is addressed through general condition 18. As stated in general condition 19, project proponents are responsible for obtaining any take permits that may be required under the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act. The project proponent should contact the local office of the U.S. Fish and Wildlife Service to determine whether a take permit is required for that project. Impacts to fish or other aquatic organisms caused by hydrokinetic energy units should be considered by district engineers when reviewing pre-construction notifications for activities authorized by this NWP. District engineers may also suspend or revoke NWP authorizations if they determine those activities are causing more than minimal adverse environmental effects to the aquatic environment. Division engineers may impose regional conditions on this NWP to reduce the number of units authorized by this NWP, or restrict or prohibit its use in specific waters or other geographic areas.

Several commenters requested clarification of applicability of the 300 linear foot stream limit to the ocean floor or the Great Lakes because those waters are not characterized as streams. A few commenters suggested that the 300 linear foot limit does not apply to water-based renewable energy generation pilot projects in the ocean or large rivers, since activities in those waters does not result in a loss of stream bed.

We agree that the 300 linear foot limit does not apply to the construction, expansion, modification, or removal of water-based wind or hydrokinetic renewable energy devices in the ocean, Great Lakes, or large navigable rivers, since those activities do not result in loss of stream bed. The 300 linear foot limit also does not apply to the installation or removal of transmission lines on the ocean floor, the bottom of the Great Lakes, or the substrate of large navigable rivers. Transmission lines placed on the bottom of navigable waters are generally considered to be structures, not fill. District engineers will evaluate the techniques used to place transmission lines on the bottom of navigable waters and determine whether there is a discharge of dredged or fill material, and whether that discharge of dredged or fill results in a loss of waters of the United States subject to the 300 linear foot limit. The installation of transmission lines in these navigable waters in trenches that are backfilled constitutes a temporary impact and is not applied to the 300 linear foot limit for the loss of stream bed. The 300 linear foot limit for the loss of stream bed applies primarily to the construction of land-based attendant features, such as distribution facilities, control facilities, roads, parking lots, and stormwater management facilities. We have added a provision to this NWP to clarify that the placement of a transmission line on the bed of a navigable water of the United States from the renewable energy generation unit(s) to a land-based collection facility is considered a structure regulated under Section 10 of the Rivers and Harbors Act of 1899, and not a discharge of fill material under Section 404 of the Clean Water Act. The placement of the transmission line on the bed of the navigable water is not considered a loss of waters of the United States that applies towards the ½-acre limit or 300 linear foot limit of the NWP.

Several commenters requested the addition of more categories of sensitive habitat where this NWP could not be used to authorize structures or work in navigable waters of the United States or discharges of dredged or fill material into waters of the United States for water-based renewable energy generation pilot projects. Two commenters suggested adding coral reefs to the list of prohibited areas. Another commenter suggested adding National wildlife refuges, state parks, state wildlife management areas, designated significant coastal areas, critical habitats for Federally-listed endangered and threatened species, important bird areas, or any sensitive environmental area. One commenter recommended adding eelgrass beds, seagrass beds, kelp beds, macro-algae beds, vegetated shallows, and shellfish beds to the list of excluded areas.

The proposed NWP B stated that it did not authorize activities in coral reefs. This NWP is also subject to general condition 22, designated critical resource waters, which prohibits using this NWP to authorize discharges of dredged or fill material into critical resource waters and their adjacent wetlands. Critical resource waters include marine sanctuaries and marine monuments managed by the National Oceanic and Atmospheric Administration, and National Estuarine Research Reserves. District engineers may designate additional critical resource waters, after notice and an opportunity for public comment. Division engineers may also impose regional conditions to restrict or prohibit the use of this NWP in specific categories of waters or in certain geographic areas. In response to a pre-construction notification, district engineers may exercise discretionary authority and require an individual permit if the proposed activity will result in more than minimal adverse effects on the aquatic environment.

One commenter said that district engineers should not be authorized to waive the 300 linear foot limit for the loss of intermittent and ephemeral stream bed. One commenter suggested that all pre-construction notifications requesting a waiver of the 300 linear foot limit should be coordinated with the Federal and state resource agencies.

For those losses of more than 300 linear feet of intermittent and ephemeral stream bed that result in minimal adverse effects on the aquatic environment, it is appropriate for district engineers to have the authority to waive the 300 linear foot limit. This approach is consistent with the statutory requirement that activities authorized by general permits, including NWPs, result in minimal individual and cumulative adverse environmental effects. Agency coordination is required for proposed losses of greater than 300 linear feet of intermittent and ephemeral stream bed.

Two commenters recommended adding a provision to this NWP that requires the removal of structures associated with any activity authorized under this NWP, once the pilot project has been completed. One commenter suggested adding more examples of attendant features that may be authorized by this NWP, such as control rooms, trailers, vaults and sheds since these are common features of land-based distribution facilities.

We have added a paragraph to this NWP that requires the permittee to remove the generation units, transmission lines, and other structures or fills associated with the pilot project once the pilot project is completed, unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. Pilot units may be integrated into a permanent water-based renewable energy generation facility after the experimental phase has been completed, and the permanent facility has been authorized by any required Department of the Army permits. We have also added ''removal'' to the first sentence of this NWP, to clarify that the NWP also authorizes the removal of structures and fills associated with water-based renewable energy generation pilot projects, if, for example, the removal of structures or fills from navigable waters of the United States would require authorization under Section 10 of the Rivers and Harbors Act of 1899. Furthermore, we added a clarification of ''completion of the pilot project,'' which will be identified as the date of expiration of the FERC (Federal Energy Regulatory Commission) license, or the expiration date of the NWP authorization if no FERC license is issued. If the project proponent wants to continue operating the pilot project after the expiration of the FERC license, he or she should apply for another form of DA permit, such as an individual permit. If the pilot project was only authorized by NWP 52, it may be verified under a reissued NWP 52, if NWP 52 is reissued in 2017. Reauthorization under a reissued NWP 52 may require submission of a new pre-construction notification, to ensure that the pilot project still meets the terms and conditions of the reissued NWP 52. We have added ''control facilities'' to the list of examples of attendant features.

One commenter recommended adding a note to the NWP to require a mutual agreement between the Corps, the United States Coast Guard, and a prospective permittee to ensure

navigational safety. One commenter stated that the NWP should include a provision requiring compliance with state permit requirements to ensure a consistent and thorough environmental review. One commenter said that this NWP should require project proponents to comply with the Department of the Interior's suggested practices for avian protection to protect birds from electrocution.

We do not agree that it is necessary to require the execution of agreements between the Corps, United States Coast Guard, and the prospective permittee to ensure navigation safety. District engineers will review pre-construction notifications and exercise discretionary authority if the proposed activity will have more than minimal adverse effects on navigation. The permittee must comply with applicable United States Coast Guard requirements to mark or light structures in navigable waters. It is the permittee's responsibility to obtain any other Federal, state, or local authorizations that may be required for the water-based renewable energy generation pilot project. The permittee may voluntarily incorporate into his or her project the Department of the Interior's recommended practices for protecting birds from electrocution. If the proposed NWP activity may affect endangered or threatened bird species, Endangered Species Act Section 7 consultation will be conducted, which may also address potential effects to those species caused by electrocution. In accordance with general condition 19, migratory birds and bald and golden eagles, it is the permittee's responsibility to obtain any ''take'' permits that may be required under the U.S. Fish and Wildlife Service's regulations governing compliance with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act.

One commenter said that this NWP could be used to authorize activities associated with wind energy generating structures, solar towers, or overhead transmission lines, which have the potential to interfere with Department of Defense's long range surveillance, homeland defense, testing, and training missions. This commenter requested that copies of pre-construction notifications and NWP verification letters for these activities be provided to the Department of Defense Siting Clearinghouse, so that the Department of Defense could have an opportunity to coordinate with the project proponent to ensure that long range surveillance, homeland defense, testing, and training missions are not adversely affected by these activities.

We have added Note 4 to this NWP to require district engineers to send pre-construction notifications and NWP verification letters to the Department of Defense Siting Clearinghouse if this NWP is proposed to be used to authorize the construction of wind energy generating structures, solar towers, or overhead transmission lines. The Department of Defense Siting Clearinghouse is responsible for coordinating with the project proponent and resolving any potential effects on Department of Defense long range surveillance, homeland defense, testing, and training missions.

Proposed NWP B is issued as NWP 52, with the changes discussed above.

General Conditions

One commenter suggested reordering the general conditions to better aggregate concepts based on importance to permittees and the resources potentially affected. One commenter recommended placing general conditions 14 and 20 together because they both address cultural resources. One commenter said that proposed general condition 30, pre-construction notification, should become general condition 1 because of its importance for potential users of the NWPs, in terms of the pre-construction notification requirements.

With one exception, we have retained the order of the general conditions because we believe they are in a logical order. We have moved proposed general condition 14, discovery of previously unknown remains and artifacts, to become general condition 21 so that it follows general condition 20, historic properties. We have retained the pre-construction notification general condition in its place as the last general condition (as general condition 31), because the text of the NWPs state which activities require pre-construction notification.

Two commenters suggested new general conditions to minimize construction impacts. One suggestion was to require flagging construction limits to protect nearby aquatic areas and the other recommended a general condition to address temporary crossings or structures.

Requirements to flag construction limits are more appropriately addressed through activity-specific conditions added to an NWP authorization, when the district engineer determines such flagging is necessary to ensure the authorized activity results in minimal adverse effects on the aquatic environment. General condition 13, removal of temporary fills, and general condition 9, management of water flows, adequately address the concerns about temporary crossings and structures.

One commenter said the phrase ''as appropriate'' should be deleted from the Note at the beginning of Section C, Nationwide Permit General Conditions.

We have changed this phrase to ''as applicable'' to clarify that a permittee is responsible for complying with general conditions that are pertinent to a particular NWP activity.

Comments on Specific General Conditions

GC 1. *Navigation.* We did not propose any changes to this general condition and no comments were received. The general condition is adopted as proposed.

GC 2. *Aquatic Life Movements.* We proposed to modify this general condition to provide added protection to the aquatic environment by promoting the use of bottomless culverts, when it is practicable to use those types of culverts to maintain movements of aquatic organisms.

Two commenters supported the proposed changes to this general condition. One commenter said that all crossings should be designed by using a stream simulation technique. Another commenter stated that requirements for bottomless culverts should only apply to new activities. Many commenters said that culverts that are installed with their bottoms below the grade of the stream bed can be as effective as bottomless culverts in improving conditions for aquatic life movement while still being cost effective and providing the intended function of allowing movement of aquatic organisms.

Many commenters objected to the proposed changes to this general condition, and most of these commenters requested that the reference to the use of bottomless culverts be removed, stating that in many cases that bottomless culverts are not practicable or cannot be used in many locations. A large number of commenters expressed concern that requiring the use of bottomless culverts would significantly increase costs and would not be feasible. Several commenters disagreed that the use of bottomless or buried culverts reduces overall impacts to streams, and some commenters said that use of bottomless culverts can cause adverse effects to streams by increasing erosion and head cuts. One commenter recommended promoting the use of alternative measures or techniques to maintain aquatic life movements. Some commenters said that the proposed changes to this general condition would

result in all affected activities requiring pre-construction notification.

After evaluating the large number of comments received in response to the proposed changes to this general condition, we have generally reverted back to the text that was in the 2007 general condition, with a few minor changes. We have modified the last sentence of the 2007 general condition to make it clear that the general condition applies to both temporary and permanent crossings, and that those crossings should be designed and constructed to maintain low flows to sustain the movement of indigenous aquatic species. We have not adopted the provision that would have required bottomless culverts to be used where practicable. In addition, we have not incorporated the sentence that explains some of the circumstances where bottomless culverts may not be practicable. In response to a pre-construction notification, the district engineer may evaluate the proposed crossing to determine whether it complies with this general condition. The district engineer may add conditions to the NWP authorization to require measures to sustain aquatic life movements, including bottomless culverts, if appropriate.

Many commenters said that bottomless culverts require complex designs that require pile supported footings and many local and county governments do not have the resources available to design, construct, and maintain bottomless culverts in a manner that ensures roadway safety. Many commenters stated that bottomless culverts need more long-term maintenance and will increase costs and delays. One commenter noted that construction techniques required to install bottomless culverts may result in unsuitable conditions for aquatic life movement. Several commenters expressed concern that footings may deteriorate and undermine the integrity of the structure and increase the possibility of collapse during high flow conditions. Several commenters said bottomless culverts cannot be installed in areas with highly erodible or weak soils. One commenter asserted that bottomless culverts generally cannot support load conditions created by rail traffic.

Because of the various factors that determine appropriate culvert designs for a particular waterbody, we are not adopting the proposed language concerning bottomless culverts. The general condition requires permanent and temporary crossings to be suitably culverted, bridged, or otherwise designed and constructed to fulfill the objective of the general condition, which is to sustain the movements of aquatic species indigenous to the waterbody, both during and after completion of the activity.

Several commenters stated that requiring bottomless culverts or bottoms of culverts to be below the grade of the stream bed restricts design flexibility that reflects site specific conditions. One commenter said it is not practicable to install the bottoms of culverts below grade in all circumstances. One commenter said that the appropriate structure to allow aquatic life movements to continue should be determined by considering the land cover within the watershed, the variability of stream flow, and the presence or absence of aquatic life. One commenter indicated that it is not possible to bury pre-cast culverts because the bed material would be difficult to place. This commenter also said that below grade structures collect more debris and increase erosion on the downstream side of the culvert. This commenter expressed concern that culvert bottoms installed below grade would cause water to pool and provide habitat for pests such as mosquitoes. One commenter said that below grade culverts direct high velocity flows and create scour holes at the outlet and destabilize the banks. Another commenter stated that sinking a culvert below grade drains land used for row crops and accumulates silt that blocks aquatic life movements.

We have also removed the provision requiring the bottoms of culverts to be installed below the grade of the stream bed unless the stream bed consists of bedrock or boulders. The modified general condition merely states that permanent and temporary crossings of waterbodies must be suitably culverted, bridged, or otherwise designed or constructed, to provide flexibility for using a crossing that is appropriate for the site conditions, while sustaining the movements of aquatic species indigenous to the waterbody.

Many commenters said that the use of bottomless culverts should be limited to perennial streams. A number of commenters stated that many ephemeral and intermittent streams are not capable of supporting aquatic life or do not have sufficient aquatic life movement to justify the expense and technical design requirements for bottomless culverts. Several commenters said this general condition should not apply to ephemeral streams. One commenter stated that bottomless culverts should only be used in waters that support special status aquatic life species. One commenter said the bottomless culvert requirement should be limited to streams and not required for ditches or other waters. Another commenter expressed concern that installing the bottom of the culvert below grade will tend to dewater wetlands.

The general condition has been reworded to provide flexibility to determine appropriate culvert design based on site-specific characteristics. Crossings of perennial, intermittent, and ephemeral streams must be appropriately designed and constructed to sustain the movement of indigenous aquatic species.

Many commenters requested a definition of the term ''practicable'' as used in the context of the proposed general condition. One commenter said that regional variability should be considered when determining if it is practicable to use a bottomless culvert. Several commenters asked for more examples of when it would be impractical to use a bottomless culvert. One commenter requested clarification as to who would determine if use of a bottomless culvert is practicable. Many commenters said cost should be a primary factor used to determine if it is practicable to use a bottomless culvert. One commenter stated that there would be additional paperwork requirements necessary to evaluate the practicability of using bottomless culverts.

The proposed provision requiring the use of bottomless culverts where practicable has not been adopted into the final general condition. The term ''practicable'' is defined in the 404(b)(1) Guidelines at 40 CFR 230.3(q) as ''available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.'' However, it is no longer used in this general condition.

One commenter said the general condition should include criteria to be used to determine whether there is a substantial disruption to aquatic life movement. Two commenters asked what threshold would be used to identify a substantial disruption. Another commenter stated that the general condition should list the species that would be covered. One commenter said this general condition would not sustain aquatic life movements during future high flows that are expected as a result of global climate change.

Determining compliance with this general condition is at the discretion of the district engineer. It is not possible to define, on a national basis, what constitutes a substantial disruption of the necessary life cycle movements of aquatic species indigenous to the waterbody. It is not appropriate to

provide a national list of such species, but this condition generally applies to all indigenous species in the waterbody whose life-cycle movement may be affected by the project. How global climate change might affect the flow patterns and volumes of particular streams, rivers, or other waterbodies cannot be predicted with a reasonable degree of certainty. Crossing designs should be based on present conditions, and the crossing may be modified at a later time to accommodate changes in flow patterns and volumes that occur as environmental conditions change.

One commenter stated that additional requirements for proper culvert sizing should be added to this general condition to ensure fish passage and reduce failure. This commenter said that natural bankfull capacity of the stream channel should be maintained. One commenter also recommended that culverts have a width of 1.2 times the bankfull width of the stream, and be embedded a minimum of two feet to maintain connected habitat and a stable stream bed. Another commenter stated that stream crossings should maintain natural flows, substrate, and stream grade from upstream to downstream of the culvert. This commenter suggested adding a provision that states that bridges or bottomless culverts are to be used when practicable.

The proper sizing of culverts is more appropriately addressed through an evaluation of the site for the proposed NWP activity and the surrounding area. The general condition focuses on maintaining the necessary life cycle movements of aquatic species indigenous to the waterbody, not the geomorphic characteristics of the waterbody. Maintenance of water flows, including the proper width and height of culverts, bridges, and other crossings, is more appropriately addressed by general condition 9, management of water flows. We have modified this general condition to require permanent and temporary crossings to be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of indigenous aquatic species.

Two commenters requested that, if the proposed changes to this general condition are adopted, sufficient time should be provided for state, county, and local governments to update their design requirements to include bottomless culverts. One commenter stated it would take approximately two years to develop standards for bottomless and buried culvert installation. Another commenter expressed concern about the expense and time required to revise the plans and specifications for projects nearly ready for construction.

We do not believe it is necessary to provide a grandfathering provision for the implementation of this general condition. The general condition provides substantial flexibility to design permanent and temporary crossings, and uses a results-driven approach to help ensure that NWP activities have only minimal adverse effects on the movement of indigenous species of aquatic organisms. Existing construction and design standards can be used to satisfy the objective of this general condition.

The general condition is adopted with the modifications discussed above.

GC 3. *Spawning Areas.* We did not propose any changes to this general condition. One commenter said this general condition should be removed, and replaced with regional conditions that require buffers for spawning areas. This commenter reasoned that local buffer requirements would be more appropriate for satisfying the requirements of the Endangered Species Act. Two commenters stated that only requiring avoidance of spawning areas to the maximum extent practicable is not sufficient, and one of those commenters said that the destruction of spawning areas should not be allowed under any circumstances. One commenter recommended modifying this general condition to prohibit activities that adversely affected all spawning areas. One commenter suggested explicitly including forage fish habitat and submerged aquatic vegetation as protected resources in this general condition.

We are retaining this general condition because spawning areas are important components of the aquatic environment and should be addressed at the national level to ensure that NWP activities result in minimal adverse effects on the aquatic environment. Division engineers may impose regional conditions on this NWP to establish buffers to protect spawning areas for particular species. Activities authorized by NWPs must also comply with general condition 18, endangered species. The intent of this general condition is to minimize adverse effects to spawning areas caused by NWP activities, and it is not feasible to completely prohibit activities that may affect spawning areas. In areas where there are documented concerns for fish forage habitat or submerged aquatic vegetation, division engineers can add regional conditions to the NWPs to restrict or prohibit activities in those areas.

This general condition is adopted as proposed.

GC 4. *Migratory Bird Breeding Areas.* We did not propose any changes to this general condition. One commenter said this general condition should be removed and regional conditions should be used instead to establish buffers for migratory bird breeding areas. This commenter also stated that the requirement that NWP activities avoid breeding areas for migratory birds to the maximum extent practicable is not sufficient to protect those areas. One commenter said buffers established through regional conditions would satisfy Endangered Species Act requirements more effectively.

This general condition addresses a national concern for breeding areas for migratory birds, and establishes a consistent, national requirement for regulated activities to avoid these areas to the maximum extent practicable. Nationwide permit activities that may affect migratory birds that are listed as endangered or threatened under the Endangered Species Act, or that may affect designated critical habitat, must comply with general condition 18, endangered species.

This general condition is adopted as proposed.

GC 5. *Shellfish Beds.* We did not propose any changes to this general condition. One commenter said the term ''concentrated shellfish populations'' should be defined to specify a method to be used to identify such areas, because in some states shellfish beds are prominent features in waterways. Another commenter suggested changing the text of the general condition to state that shellfish beds created as habitat cannot be used for harvesting, and NWPs 4 and 48 could not authorize activities in those areas. One commenter recommended adding restoration projects authorized by NWP 27 to this general condition.

The identification of concentrated shellfish populations for the purposes of determining compliance with this general condition is more appropriately conducted by district engineers using local criteria and methods. Shellfish beds established through habitat restoration projects may be used for growing shellfish for consumption and other uses, and the decision on whether harvesting in those areas should be allowed is at the discretion of Federal, state, and/or local authorities. We have added shellfish seeding or habitat restoration activities authorized by NWP 27 to the list of NWP activities that may occur in areas of concentrated shellfish populations, since NWP 27 activities may improve habitat quality and further increase shellfish populations.

This general condition is adopted with the modification discussed above.

GC 6. *Suitable Material.* We did not propose any changes to this general condition. One commenter recommended that this general condition should explicitly prohibit the use of tires as fill material, because tires can leach toxic amounts of chemicals that are harmful to aquatic species. One commenter said the general condition should be changed so that only environmentally suitable or stable material may be used as fill, because many plastics are unstable when exposed to ultraviolet light or temperature changes. One commenter stated that contaminated sediments should not be used as fill material. One commenter recommended modifying this general condition to minimize impacts to habitat and species caused by the leaching of heavy metals, pesticides, and polycyclic aromatic hydrocarbons.

We do not believe it is necessary to add tires or plastics to the list of examples of unsuitable materials. Prohibiting the use of unsuitable materials is more effective and enforceable than stating that only environmental suitable or stable materials may be used. It is impractical, for the purposes of the NWP program, to establish what would constitute an environmentally suitable material since we are not aware of any Federal standards that could be applied, other than those covered under Section 307 of the Clean Water Act. A similar problem exists for identifying stable materials, because the timeframe that might be used to determine whether a particular material is ''stable'' would vary by the material. The district engineer will make a case-by-case determination of what constitutes unsuitable material. The current text of the general condition prohibits the use of contaminated sediment as fill material, if it contains toxic pollutants in toxic amounts. The general condition also prohibits the use of materials that contain heavy metals, pesticides, and polycyclic aromatic hydrocarbons in toxic amounts, in accordance with Section 307 of the Clean Water Act.

This general condition is adopted as proposed.

GC 7. *Water Supply Intakes.* We did not propose any changes to this general condition and no comments were received. The general condition is adopted as proposed.

GC 8. *Adverse Effects from Impoundments.* We did not propose any changes to this general condition. One commenter said the general condition should include specific examples of how to reduce impacts associated with accelerating passage of water and how to prevent the restriction of normal water flows. Another commenter asked for a definition for the term ''maximum extent practicable.'' Two commenters stated that impoundments that cause adverse effects to the aquatic environment by changing water flows should not be authorized by NWPs and should instead require individual permits with agency coordination.

Specific measures for reducing impacts caused by accelerated water flows or restricted water flows have to be determined on a case-by-case basis after considering the environmental characteristics of the site of the NWP activity. It would not be appropriate to establish such measures at a national level. An activity-specific evaluation would also have to be done to determine whether the minimization of these adverse effects has been accomplished to the maximum extent practicable. District engineers will use their discretion to determine compliance with this general condition. The term ''practicable'' is defined in the 404(b)(1) Guidelines at 40 CFR 230.3(q) as ''available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.'' We do not agree that all impoundments should require individual permits; impoundments may be authorized by general permits, including NWPs, as long as they have minimal individual and cumulative adverse effects on the aquatic environment and comply with the applicable terms and conditions, including any general conditions, regional conditions, and activity-specific conditions, of an NWP authorization.

This general condition is adopted as proposed.

GC 9. *Management of Water Flows.* We did not propose any changes to this general condition. One commenter asked for a definition of the term ''expected high flows'' and said the possibility of high flow events should be anticipated during project implementation. One commenter stated that this general condition should be modified to prohibit changes to stream channels in intertidal areas. One commenter stated that shoreline structures and fills, such as seawalls, bulkheads, and revetments, reflect wave energy that causes deep scouring of the shore, and over-steepened local shore faces. These induced hydraulic effects substantially alter the flow patterns in intertidal features such as ocean and estuarine beaches, wetlands and mudflats.

It would be inappropriate to attempt to define the term ''expected high flows'' since it would depend on the environmental setting of the NWP activity. To comply with this general condition, the activity should not be substantially damaged by an expected high flow. Activities in stream channels located in intertidal areas are subject to this general condition and if a proposed NWP activity involves the alteration of intertidal stream channels and requires pre-construction notification, the district engineer will evaluate the proposed activity and determine whether it will result in minimal adverse effects on the aquatic environment. Bank stabilization activities should be designed and constructed to withstand expected high flows. Adverse effects to littoral or fluvial processes, or adverse effects caused by deflections of wave energy, should be considered by district engineers when evaluating pre-construction notifications for proposed bank stabilization activities.

This general condition is adopted without change.

GC 10. *Fills Within 100-Year Floodplains.* We did not propose any changes to this general condition. Several commenters explained the benefits of fully functional natural floodplains. Most of the commenters seemed to indicate that the Corps has regulatory jurisdiction over non-wetland floodplains. Several commenters objected to the general condition simply requiring compliance with Federal Emergency Management Agency (FEMA) approved state or local floodplain management requirements. Several commenters said that fills in floodplains identified by state or local FEMA-approved floodplain maps should only be authorized by individual permits, to ensure that state or local floodplain managers are aware of these activities. Two commenters stated that FEMA-approved standards are designed to ensure the public is reasonably safe from flooding, but these standards provide insufficient protection to waterways, floodplains, and other aquatic resources. One commenter said the Corps has an independent obligation to protect waters of the United States and this obligation extends to protection of floodplain resources.

We acknowledge that floodplains provide important ecological functions and services, but it must also be understood that most areas within 100-year floodplains are not subject to Clean Water Act jurisdiction, because a large proportion of the area within 100-year floodplains consists of uplands. The Corps regulatory authority in 100-year

floodplains is usually limited to discharges of dredged or fill material into waters of the United States, including jurisdictional wetlands. The protection of floodplains is more appropriately addressed through land use planning and zoning, which is primarily the responsibility of state and local governments, as well as tribal governments. Land use planning and zoning can provide the holistic approach needed to protect floodplain functions and services, reduce economic losses through flood damage reduction, and protect human health and welfare. If state, local, or tribal governments have zoned areas of 100-year floodplains for residential developments or other uses, and if those activities involve discharges of dredged or fill material into waters of the United States and meet the terms and conditions of an applicable NWP, and the NWP activity results in minimal adverse effects on the aquatic environment or other relevant public interest review factors, then authorization by NWP is appropriate.

This general condition also recognizes that FEMA, in partnership with state and local governments, is the more appropriate authority for floodplain management. It is not the responsibility of the Corps to ensure that project proponents seek any required authorizations from state or local floodplain managers. Such a requirement would not constitute a condition that could be enforced by the Corps. We are not relying on FEMA-approved state or local floodplain management requirements to protect waters of the United States located in 100-year floodplains. The NWP program utilizes other tools, such as regional conditions, the district engineer's ability to exercise discretionary authority to revoke, suspend, or modify an NWP authorization, and add activity-specific conditions to ensure that activities authorized by the NWP results in minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors.

Two commenters stated that fills in 100-year floodplains result in more than minimal adverse environmental effects and should not be authorized by NWP. One commenter suggested that the Corps evaluate NWP activities in floodplains and riparian areas in a more holistic manner than it did in previous NWP rulemaking efforts. One commenter said that authorizing discharges of fill material in waters of the United States in floodplains affects the ability to manage floodplains so that there are no adverse impacts. One commenter stated that coordination with the resource agencies should be required to protect habitat and biodiversity in floodplains.

Discharges of dredged or fill material into waters of the United States located in 100-year floodplains often have minimal adverse effects on the aquatic environment, individually and cumulatively. Division engineers can impose regional conditions on one or more NWPs to restrict or prohibit their use in waters of the United States within 100-year floodplains if those NWP activities would result in more that minimal adverse effects on the aquatic environment. In response to a pre-construction notification, district engineers may exercise discretionary authority and require an individual permit if the adverse effects on the aquatic environment would be more than minimal. District engineers may also add activity-specific conditions to an NWP authorization to require measures to minimize adverse effects on the aquatic environment caused by NWP activities. Since the Corps Regulatory Program only regulates discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States, and most areas of 100-year floodplains are not wetlands as defined at 33 CFR 328.3(b) or otherwise waters of the United States under 33 CFR 328.3(a) and associated guidance, the Corps does not have the authority to take a holistic approach to floodplain management. In areas of the country where 100-year floodplains consist mostly of uplands, construction activities in these uplands may have a substantial adverse impact on these 100-year floodplains. We do not agree that agency coordination should be required for fills in 100-year floodplains, because district engineers have the necessary expertise to evaluate pre-construction notifications for potential adverse effects to habitat and biodiversity in these areas.

Two commenters said the general condition should inform permittees of their responsibility to apply for a Conditional Letter of Map Revision from FEMA if they are discharging dredged or fill material into waters of the United States within 100-year floodplains. One commenter recognized that although proposed development projects must comply with all applicable Federal, state, regional and local regulatory requirements, many project proponents do not apply for all required permits. One commenter said that this general condition should be modified to require documentation of compliance with applicable FEMA-approved state or local floodplain management requirements. One commenter stated that FEMA-approved state or local floodplain management requirements do not adequately protect communities and resources from flood risks.

We do not believe it is the Corps responsibility to notify a prospective permittee of his or her responsibility to apply for a Conditional Letter of Map Revision from FEMA if the overall project would modify the existing regulatory floodway, the effective base flood elevations, or a special flood hazard area. The discharge of dredged or fill material authorized by NWP is likely to be only a small proportion of the overall construction project within the 100-year floodplain. Section E, Further Information, states that obtaining an NWP authorization does not obviate the need to obtain other Federal, state, or local permits, approvals, or authorizations required by law. Building permits to authorize the construction of the overall project are the responsibility of the state or local government, and should be based on compliance with the applicable FEMA-approved state or local floodplain management requirements. It is not the Corps responsibility to ensure that project proponents have complied with the applicable FEMA-approved state or local floodplain management requirements; the state or local governments responsible for floodplain management should enforce the requirements they established to qualify the community for the National Flood Insurance Program. If the floodplain management requirements developed by state or local governments are not adequately protecting communities from flood risks, then the agency that approved those requirements is the appropriate entity to reexamine those requirements.

One commenter requested that the Corps report the extent to which NWPs are being used in floodplains, particularly in areas that have experienced repeated flood damages. Two commenters stated that this general condition ignores the Corps own public interest review processes and does not comply with Executive Order 11988.

The Corps does not track the number of NWP activities that have occurred in floodplains, since our statutory authorities are focused on activities involving discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States. As stated above, many areas of 100-year floodplains are uplands and not waters of the United States. In addition, there is no consistent national coverage in floodplain maps, since such maps are

either not available for some areas of the country or the existing maps are outdated. This general condition is consistent with our regulations on the public interest review, specifically 33 CFR 320.4(g), consideration of property ownership, 33 CFR 320.4(j), other Federal, state, or local requirements, and 33 CFR 320.4(l), floodplain management. Section 320.4(g)(1) states that an ''inherent aspect of property ownership is the right to reasonable private use.'' Section 320.4(j)(2) states that the primary responsibility for land use planning and zoning is with state and local governments. Section 320.4(l) requires consideration of whether practicable alternatives to floodplain development are available, and if there are no practicable alternatives, then impacts to human health, safety, and welfare, risks of flood losses, and impacts to natural and beneficial aspects of floodplains should be minimized to the maximum extent practicable. This NWP general condition, as well as the other terms and conditions of the NWPs, such as the acreage and linear foot limits for losses of waters of the United States, are consistent with the principles in these regulations because they require avoidance and minimization of adverse effects on the aquatic environment. Executive Order 11988 states that Federal agencies are to consider alternatives to ''avoid adverse effects'' to floodplains, and ''minimize potential harm to or within the floodplain''. The Executive Order also says that agencies should also consider flood hazards in the permit programs they administer. The adoption of general condition 10 into the NWP program is consistent with Executive Order 11988. It is also consistent with Executive Order 13132, Federalism, because it recognizes the cooperative approach the Federal government has taken with state and local governments for floodplain management (i.e., federal review, by FEMA, of state or local floodplain management requirements).

Two commenters suggested reinstating the provisions in the 2002 NWPs that prohibited discharges of dredged or fill material into waters of the United States within mapped 100-year floodplains that would result in above-grade fills for residential, commercial and institutional developments, agriculture activities, recreational facilities, stormwater management facilities, and mining activities.

We do not agree that the approach taken in the 2002 NWPs for fills in 100-year floodplains should be reinstated. There are sufficient safeguards in the NWPs, including the terms and conditions, pre-construction notification requirements, and the authority for district engineers to exercise discretionary authority and either require individual permits or add conditions to NWP authorizations, to ensure that NWP activities have minimal adverse effects on the aquatic environment, including public interest review factors such as floodplain values and flood hazards.

Three commenters said that using NWPs to authorize discharges of dredged of fill material into waters of the United States will result in increased flood damages in coastal and riparian areas by reducing the amount of aquatic area available to absorb future floods that will likely be larger and more frequent due to climate change. They suggested increasing the application fee for NWPs to cover the estimated cost of permit processing and to offset future economic impacts of authorizing floodplain development.

The flood storage capacity of a coastal or inland floodplain is dependent primarily on its topographic characteristics, including the amount of land area available for storing flood waters. Uplands also provide important ecological services such as flood storage. Flood damage reduction is more effectively accomplished through land use planning and zoning, which as discussed above, is primarily the responsibility of state, local, and tribal governments. Charging application fees for NWP pre-construction notifications or verification requests is not being considered at this time.

This general condition is adopted as proposed.

GC 11. *Equipment.* We did not propose any changes to this general condition. One commenter stated that the condition should be changed to include streams, and not be limited to wetlands or mudflats.

The intent of this general condition is to ensure that heavy equipment used in special aquatic sites such as wetlands and mudflats does not cause more than minimal disturbances to their soils. The substrate of stream beds is generally not considered to be soil, and other general conditions such as general condition 12, soil and sediment controls, are more appropriate to control the movement and disturbance of stream bed sediments. District engineers may also add activity-specific conditions to NWP authorizations, such as requirements to use best management practices, to minimize disturbances to stream beds.

This general condition is adopted as proposed.

GC 12. *Soil Erosion and Sediment Controls.* We did not propose any changes to this general condition. One commenter said the general condition should provide specific steps that will ensure protection of downstream water quality during the construction of permitted activities. Two commenters suggested adding requirements to prevent the erosion of sediments resulting from harvesting shellfish. One commenter stated that disturbed areas should be stabilized and vegetated areas should be restored to pre-construction conditions or improved conditions.

Specific best management practices and other measures to protect downstream water quality are more appropriately addressed by considering the activity-specific environmental setting and adopting practices and measures that will control soil erosion and sediment loads on the site of the authorized activity. District engineers may add conditions to the NWP authorizations to require permittees to use specific best management practices or other techniques to minimize soil erosion and reduce transport of sediment to waters and wetlands. We do not believe it is necessary to modify this general condition to address sediment movement that may occur during shellfish harvesting activities, because such movements are usually minor and temporary and have minimal adverse effects on the aquatic environment. The restoration of areas where temporary fills have been placed, including revegetating those areas, is more appropriately addressed by general condition 13, removal of temporary fills.

This general condition is adopted without change.

GC 13. *Removal of Temporary Fills.* We did not propose any changes to this general condition. One commenter said the general condition should require the removal of temporary fills during periods of low-flow or no-flow so that there will be little or no downstream transport of the fill material.

It would be inappropriate to require that temporary fills be removed only during periods of low-flow or no-flow because it is not always practicable to wait until water flows are low or absent. In addition, more adverse effects to the aquatic environment may occur if the permittee is required to wait until low flow or no flow conditions exist. It is usually best to remove temporary fills as soon as possible to minimize sediment loads to downstream waters or to nearby wetlands. However, general condition 12, soil erosion and sediment controls, encourages permittees to work in waters of the United States during periods of low or no flow, when possible.

This general condition is adopted as proposed.

GC 14. *Proper Maintenance.* We did not propose any changes to this general condition. One commenter recommended changing the general condition to ensure that maintenance activities minimize impacts to waters and maintain downstream water quality. Another commenter suggested adding a provision that would require proper maintenance to ensure compliance with applicable NWP general conditions as well as conditions added to an NWP verification.

The original intent of this general condition was to ensure that NWP activities are maintained so that they do not endanger public safety. There are other general conditions that more directly address minimization (e.g., general condition 23, mitigation) and water quality (e.g., general condition 12, soil erosion and sediment controls, and general condition 25, water quality). We agree that proper maintenance should also be required to comply with the terms and conditions of an NWP authorization, including any activity-specific conditions added to an NWP authorization by the district engineer. For example, road crossings should be properly maintained to continue complying with general condition 2, aquatic life movements.

This general condition is adopted with the change discussed above.

GC 15. *Single and Complete Project.* We did not propose any changes to this general condition. Two commenters recommend removing the term single and complete project. Two commenters said the definition of ''single and complete project'' is flawed and that the acreage limit of an NWP should apply to the entire project, not just each single and complete project. One commenter suggested changing the general condition to state that an NWP activity cannot be expanded or modified at a later date. Two commenters said the general condition may allow piecemealing under the NWPs.

It has been a long-standing principle in the NWP program that the NWPs authorize single and complete projects. This general condition was added to the NWPs in 2007 to make that clear to users of the NWPs. The general condition is consistent with the NWP regulations at 33 CFR part 330 that were last revised in 1991, especially the definition at 33 CFR 330.2(i). Some of the NWPs issued in the past included terms and conditions stating the NWP authorized single and complete projects. In 2007, we added a general condition to make it clear that all NWPs authorize single and complete projects. As long as any proposed expansions or modifications of a previously authorized NWP activity comply with the terms of the NWPs, they can be authorized by NWP. Expansions or modifications that are not separate single and complete projects from the previously authorized activity have to comply with the terms and conditions of the NWP, including any acreage or linear foot limits that would apply to both the previously authorized activity and the NWP activity included in the expansion or modification. If the expansion or modification is determined by the district engineer to be a separate single and complete project, then that expansion or modification activity may qualify for separate NWP authorization. We do not agree that this general condition results in piecemealing, because the NWP authorization applies to each single and complete project. District engineers will exercise discretionary authority and require other forms of Department of the Army authorization if the use of the NWP to authorize activities in a watershed or other geographic area will result in more than minimal cumulative adverse effects on the aquatic environment.

This general condition is adopted without change.

GC 16. *Wild and Scenic Rivers.* We proposed to modify this general condition to clarify that information on these rivers should be obtained from the specific Federal land management agency responsible for the designated Wild and Scenic River or study river. One commenter supported reissuing the general condition.

The general condition is adopted as proposed.

GC 17. *Tribal Rights.* We did not propose any changes to this general condition. One commenter stated that the use of the NWPs will be in violation of tribal treaty rights, tribal water quality standards, and the Clean Water Act, and threaten salmon recovery efforts in the Pacific Northwest.

Division engineers may impose regional conditions on the NWPs to restrict or prohibit their use in waters where NWP activities may result in more than minimal adverse effects on the aquatic environment or any other public interest review factor, including fish and wildlife values. We have directed our districts to initiate government-to-government consultation with Tribes to develop and propose regional conditions to protect tribal treaty resources and other resources of importance to Tribes. Under this general condition, no activity may be authorized by NWP if it impairs reserved tribal rights, such as reserved water rights or treaty fishing and hunting rights. The regional conditioning process helps identify those rights on a geographic basis, so that prospective users of the NWPs and Corps districts are aware of those tribal rights. Nationwide permit activities must also comply with Tribal water quality standards, if those activities involve discharges into waters covered by Tribal water quality standards. Activities authorized by NWPs must also comply with general condition 18, endangered species, which will help support the recovery of listed salmon species.

The general condition is adopted as proposed.

GC 18. *Endangered Species.* We proposed to modify paragraph (a) of this general condition to clarify that both direct and indirect effects are to be taken into account when assessing whether an activity may jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, or destroy or adversely modify the critical habitat of such species. In addition, we proposed to modify paragraph (e) to include definitions of ''take'' and ''harm.'' Another proposed change was to add a new paragraph (f) to provide prospective permittees with guidance on where they can obtain information on the locations of listed species and their critical habitat. One commenter expressed support for the proposed modifications.

Several commenters requested clarification and definitions for the terms ''directly'' and ''indirectly'' as used in paragraph (a). In addition, several commenters objected to the addition of ''indirectly'' into the general condition, because they believe only direct effects should be considered. Several commenters expressed concern that this will result in the Corps evaluating direct and indirect effects that are far from the NWP activity.

To provide clarification on the use of the terms ''direct'' and ''indirect'' in the context of general condition 18 and the NWPs in general, we are adding definitions of ''direct effects'' and ''indirect effects.'' The definitions were adapted from the definitions provided in the Council of Environmental Quality's National Environmental Policy Act regulations at 40 CFR 1508.8. The definition of ''indirect effect'' is also generally consistent with the Services' definition within the definition of ''effects of the action'' at 50 CFR 402.02. The addition of indirect effects to paragraph (a) of the general condition is consistent with the U.S. Fish and Wildlife Service's and National Marine Fisheries Service's Endangered Species

Act Section 7 regulations for considering whether a proposed activity may jeopardize the continued existence of a listed species or may result in the destruction or adverse modification of critical habitat (see the definitions of ''destruction or adverse modification'' and ''jeopardize the continued existence of'' at 50 CFR 402.02). The Corps is obligated by the section 7 consultation regulations to consider indirect effects caused by proposed NWP activities, and appropriate distances for such indirect effects will have to be determined on a case-by-case basis by district engineers.

One commenter stated that the district engineer should evaluate the Endangered Species Act (ESA) compliance documentation provided by the Federal agency, and determine whether or not it is sufficient to address ESA compliance for the NWP activity, or whether additional ESA consultation is necessary. Two commenters recommended modifying paragraph (b) to clarify that documentation of compliance with the Endangered Species Act provided by a Federal agency will be sufficient and that Corps review and concurrence with that section 7 consultation is not required. One commenter said that paragraph (b) should make it clear that a state agency operating under federal funding can also provide the section 7 compliance documentation obtained by the Federal agency that oversees its activities, and not have to reinitiate consultation. Another commenter stated that when a non-Federal permittee is operating on behalf of a Federal agency, they should follow paragraph (b) of this general condition instead of paragraph (c).

We have added a sentence to paragraph (b) to state that the district engineer will review the other Federal agencies' documentation of compliance with the Endangered Species Act and determine whether that compliance is sufficient for the NWP activity, or whether additional ESA consultation is necessary before the activity can be authorized by NWP. We believe this provision is necessary to address situations where the consultation conducted by the other Federal agency does not adequately cover the direct and indirect effects on listed species or designated critical habitat caused by the NWP activity. For similar reasons, we do not agree that it would be appropriate to modify paragraph (b) to explicitly state that state agencies may rely on ESA compliance documentation obtained by the Federal agency that provides them with funding for an activity. District engineers will generally accept another Federal agency's compliance with section 7, but there may be situations where that agency's section 7 compliance does not adequately address the activities authorized by an NWP and their effects on listed species or designated critical habitat. In those situations, the district engineer may conduct additional section 7 consultation to satisfy the requirements of the Endangered Species Act. If it is not sufficient, then the non-Federal permittee has to follow paragraph (c) of this general condition instead.

One commenter said that this general condition places the responsibility for determining whether a proposed activity may affect listed species in the hands of the permittee. One commenter requested clarification on how the ''might be affected'' threshold in the first sentence is to be determined by an applicant, because it is unclear and leaves room for broad interpretation. One commenter stated that the word ''might'' in the second sentence of paragraph (c) should be changed to ''may.''

It is the Corps' responsibility to make ''may affect'' determinations for the purposes of the ESA, and the ''might be affected'' threshold is intended to be a cautionary threshold to give district engineers the opportunity to evaluate proposed activities and make their effect determinations. Prospective permittees are required to submit pre-construction notifications if the proposed NWP activity has the potential to affect a listed species, is in the vicinity of a listed species, or is located in designated critical habitat. If the Corps determines there will be no effect on listed species or designated critical habitat, then ESA section 7 consultation is not necessary. If the district engineer determines there will be an effect that requires ESA section 7 consultation, then he or she will initiate either formal or informal consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service, as appropriate.

One commenter said paragraph (c) should clearly state that a pre-construction notification is to be submitted if any listed species or designated critical habitat might be affected or is in the vicinity of the project, to ensure that another form of notification is not used. Two commenters stated that 30 days is sufficient for the Corps to notify the applicant of its ''may affect'' determination and asked why the general condition allows 45 days. Two commenters suggested modifying this general condition to state that if the prospective permittee does not receive a response from the Corps within 45 days, then he or she can assume that the Corps has determined that there is ''no effect'' on a listed species. In addition, one of these commenters said that for projects that ''may affect'' a listed species, if the section 7 consultation is not concluded within 135 calendar days of initiation, the activity would be authorized to proceed as if a ''no effect'' determination has been made.

We have modified the first sentence of paragraph (c) to state that non-Federal permittees must submit a pre-construction notification if the notification requirement is triggered. The 45-day period in paragraph (c) of this general condition is intended to be consistent with the 45-day review period for pre-construction notifications provided in paragraph (a) of general condition 31, pre-construction notification. Under paragraph (a) of general condition 31, a prospective permittee may not begin an NWP activity that requires pre-construction notification until he or she has been notified in writing that the activity may proceed under the NWP, or 45 calendar days have passed since the district engineer received a complete pre-construction notification and no written notice has been provided to the applicant by the district or division engineer. However, if pre-construction notification was required by paragraph (c) of general condition 18, the prospective permittee may not proceed with the NWP activity until notified by the Corps, even if the 45 calendar days have passed, because the Corps regulations at 33 CFR 330.4(f)(2) state that NWP activities cannot commence until the requirements of the ESA have been satisfied and the district engineer has notified the applicant that the activity is authorized by NWP. It may take more than 135 days to complete section 7 consultation, and the NWP activity may not proceed until after consultation has been completed.

Two commenters requested clarification on what work the prospective permittee is prohibited from conducting prior to the Corps making a determination of ''no effect'' or until section 7 consultation is completed. Two commenters requested clarification of the term ''vicinity'' in this general condition.

The work covered by the general condition and the Corps regulations at 33 CFR 330.2(f) depends on the scope of analysis for the ESA section 7 consultation. The Corps follows the U.S. Fish and Wildlife Service's and National Marine Fisheries Service's regulations at 50 CFR part 402 and Endangered Species Consultation Handbook to determine the section 7 scope of

analysis. The scope of analysis includes the direct and indirect effects of the NWP activity, as well as the effects of other activities that are interrelated and interdependent with that activity (see 50 CFR 402.02). The section 7 scope of analysis will be determined by district engineers on a case-by-case basis. Generally, the applicant cannot begin any work for which a Department of the Army permit is required until the applicable ESA provisions have been satisfied. The term ''vicinity'' cannot be defined at a national level, since the extent of the vicinity depends on a variety of factors, including the species that might be affected, the proposed activity, and the environmental setting.

One commenter said pre-construction notification should not be required for NWP activities that require section 7 compliance, if they would not otherwise require a pre-construction notification. This commenter stated that the prospective permittee should only be required to submit the appropriate documentation for section 7 consultation. One commenter stated that this general condition should also apply to state-listed threatened and endangered species.

This general condition is consistent with the NWP regulations at 33 CFR 330.4(f)(2), which requires the prospective permittee to notify the district engineer if any Federally-listed endangered or threatened species, or critical habitat, might be affected or is in the vicinity of the project. The prospective permittee must submit the information required for a pre-construction notification, so that the district engineer will have sufficient information to commence evaluation of the proposed activity and its effects on listed species or critical habitat. It would be inappropriate to expand the scope of this general condition to cover state-listed endangered and threatened species, since that is a regional issue that is best addressed through state laws and regulations. If a state is concerned about the potential impacts of one or more NWPs on state-listed species, the state may ask the Corps district to consider adding regional conditions to help protect state-listed endangered or threatened species.

Two commenters recommended removal of the definitions of ''take'' and ''harm'' from this general condition and replacing those definitions with a reference to the Endangered Species Act, to reduce the potential for inconsistencies. One commenter said the Corps should instead use the U.S. Fish and Wildlife Service's regulations to determine what constitutes an effect or jeopardizes any threatened or endangered species or their critical habitat.

The definition of ''take'' is identical to the definition in the Endangered Species Act (see 16 U.S.C. 1532(19)). The definition of ''harm'' is the same as the definition in the U.S. Fish and Wildlife Service's regulations (50 CFR 17.3) and the National Marine Fisheries Service's regulations (50 CFR 222.102). The definitions of ''take'' and ''harm'' were added to this condition to provide clarification for users of the NWPs, and facilitate compliance with the Endangered Species Act.

One commenter stated that paragraph (f) should provide web links to the Services' ESA Section 7 regulations and other documents. Another commenter said the Corps should defer to the U.S. Fish and Wildlife Service on effects determinations.

Paragraph (f) provides links to web sites for the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to assist prospective permittees with obtaining information on listed species and other ESA documents. We do not believe it is necessary to provide a link to the Services' section 7 consultation regulations at 50 CFR part 402 since it is the Corps responsibility to conduct section 7 consultation. It is also the Corps responsibility to make ''may effect'' determinations for the purposes of the ESA and district engineers have the option of soliciting advice from the U.S. Fish and Wildlife and/or the National Marine Fisheries Service prior to making their determinations.

One commenter recommended that surveys be conducted for state- and Federally-listed species prior to the start of construction. Another commenter said the lack of a requirement for surveys makes the pre-construction notification requirement in this general condition ineffective. One commenter said that ''objective science'' is needed to identify habitats and species that may be affected by activities authorized by NWPs. One commenter stated that the Corps must consider the effects of climate change during the consultation process.

The need for surveys for Federally listed species is to be determined by the district engineer on a case-by-case basis. It is not possible to require surveys for the tens of thousands of activities authorized by NWP each year. Project proponents are encouraged, but not required to contact the U.S. Fish and Wildlife Service or the National Marine Fisheries Service for assistance in determining whether listed species or critical habitat might be affected by the proposed activity. The effects of climate change on endangered and threatened species and their critical habitat is more appropriately addressed through the section 7 consultation process, since those effects are likely to be site-specific.

The general condition is adopted with the modifications discussed above.

GC 19. *Migratory Bird and Bald and Golden Eagle Permits.* We are adding this new general condition to clarify that permittees are responsible for complying with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act, and obtaining any ''take'' permits that may be required under the U.S. Fish and Wildlife Service's regulations issued under those two statutes. The Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act differ from the Endangered Species Act in that those two statutes and their implementing regulations establish the project proponent as the responsible party who has to apply to the U.S. Fish and Wildlife Service for take permits, if such permits are required.

The U.S. Fish and Wildlife Service's implementing regulations that establish general permit requirements for migratory birds permits at 50 CFR part 21 state that ''[n]o person may take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase, or barter, any migratory bird, or the parts, nests, or eggs of such bird except as may be permitted under the terms of a valid permit issued pursuant to the provisions of this part and part 13 of this chapter, or as permitted by regulations in this part, or part 20 of this subchapter (the hunting regulations), or part 92 of subchapter G of this chapter (the Alaska subsistence harvest regulations).'' The term ''person'' is defined at 50 CFR 10.12 as ''any individual, firm, corporation, association, partnership, club, or private body, any one or all, as the context requires.'' These regulations do not identify a federal permitting agency as a ''person'' responsible for obtaining a take permit, where that federal agency is not actually carrying out the activity that may result in the ''take'' of a migratory bird. Likewise, the U.S. Fish and Wildlife Service's implementing regulations for the Bald and Golden Eagle Protection Act at 50 CFR part 22 do not include any provisions stating that Federal permitting agencies are responsible for assisting project proponents in obtaining permits to authorize the taking, possession, and transportation within the United States of bald eagles and golden eagles and their parts, nests, and eggs.

Executive Order 13186 discusses the responsibilities of Federal agencies to protect migratory bird for the purposes of the Migratory Bird Treaty Act. The Executive Order applies only to those actions that are directly carried out by Federal agencies (see Section 2, paragraph (h)). Actions carried out by non-Federal entities with Federal assistance are not subject to the Executive Order. Department of the Army permits can be considered a form of Federal assistance since they provide authorization to non-Federal entities to comply with Federal laws such as Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.

This general condition is adopted.

GC 20. *Historic Properties.* We proposed to modify paragraph (c) of this general condition to make a more general reference to the Corps Regulatory Program's current procedures for compliance with Section 106 of the National Historic Preservation Act, since we are using Appendix C to 33 CFR part 325, as well as various guidance documents to address the Advisory Council on Historic Preservation's revised regulations at 36 CFR part 800.

In response to the February 16, 2011, proposal to reissue the NWPs, including the proposed modification of this general condition, we received comments on the Corps use of Appendix C and the current guidance. Concerns regarding the use of Appendix C and the current guidance are outside the scope of the NWP rule, and are not addressed in this rule.

Several commenters asked whether an NWP authorization or verification would be issued before a State Historic Preservation Officer concurs to an effect determination or formalizes an agreement regarding historic properties. One commenter stated that although the NWP regulations provide that the Corps may issue an NWP before a memorandum of agreement is executed, district engineers have, in some cases, not issued NWP verifications without State Historic Preservation Officer concurrence.

This general condition requires non-Federal permittees to submit pre-construction notifications if the NWP activity may have the potential to cause effects to historic properties. In such cases, the district engineer will initiate section 106 consultation with the appropriate State Historic Preservation Officer or Tribal Historic Preservation Officer. Further consultation may be conducted with the Advisory Council on Historic Preservation, if necessary. The prospective permittee may not begin the NWP activity until the district engineer notifies him or her that the section 106 consultation has been completed (which may include execution of a memorandum of agreement to address adverse effects or the concurrence of the State or Tribal Historic Preservation Officer), or the activity has no potential to cause effects to historic properties.

One commenter said the Corps should more closely follow paragraph (b) of the general condition and not require redundant section 106 review on projects that are being undertaken by another Federal agency. Three commenters suggested that the Corps section 106 responsibilities should be satisfied if another Federal agency formally accepts responsibility for conducting section 106 consultation and is the lead for this responsibility through either a programmatic agreement or on a project-by-project basis. One commenter said that duplicate regulatory efforts are unnecessary, particularly when another Federal agency has a lead role.

District engineers will generally accept another Federal agency's compliance with section 106, but there may be situations where that agency's section 106 compliance does not adequately address the activities authorized by an NWP and their effects on historic properties. In those situations, the district engineer may conduct additional section 106 consultation to satisfy the requirements of the National Historic Preservation Act. We have added a sentence to paragraph (b) to address these situations.

One commenter said the general condition does not clearly specify who is responsible for the identification and evaluation of historic properties and determination of effects. Another commenter stated that the general condition does not adequately ensure section 106 compliance because the Corps may not receive enough information from permittees to fully take into account the effect a project may have on a historic property. This commenter also said that while paragraph (c) states that prospective permittees may seek assistance from the State or Tribal Historic Preservation Officer and from the National Register of Historic Places, there is no requirement that an applicant consult with these parties or that an applicant coordinate an effect determination with a qualified professional with relevant historic properties experience.

The Corps is ultimately responsible for determining compliance with the requirements of Section 106 of the National Historic Preservation Act. Non-Federal permittees are required to submit pre-construction notifications if an NWP activity may have the potential to cause effects to historic properties, and the district engineer will evaluate those pre-construction notifications to determine if section 106 consultation is necessary. The general condition also states that district engineers will make reasonable and good faith efforts to identify historic properties and effects on those properties. The district engineer may request additional information from the applicant where necessary to evaluate potential effects of the activity on historic properties or to initiate section 106 consultation. We cannot require prospective permittees to seek assistance from a State Historic Preservation Officer or a Tribal Historic Preservation Officer, search the National Register of Historic Preservation, or consult with qualified historic property professionals. However, this general condition requires prospective permittees to provide a list of " * * * any historic properties listed, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties," if these properties may be affected. The permittee may obtain such information from the State Historic Preservation Officer or Tribal Historic Preservation Officer, the National Register of Historic Places, or other sources of information on historic properties.

One commenter recommended providing language to clearly state when a pre-construction notification is or is not required based on the presence or absence of known historic properties. This commenter suggested that if a prospective permittee independently determines that no historic properties exist within the boundaries of the project area, then pre-construction notification is not necessary. The commenter also said that if the district engineer has to be notified because of potential effects to historic properties, the notification should not be in the form of a pre-construction notification.

We do not agree that the general condition should be modified to explicitly state that prospective permittees do not have to submit pre-construction notifications if they determine there are no known historic properties within the boundaries of the project area. Such a provision would be inappropriate, because there could be visual or noise effects to historic properties outside of the project area that have to be evaluated through the section 106 consultation process. The

current general condition is the proper approach, in which the prospective permittee seeking NWP authorization is required to submit a pre-construction notification if the proposed activity might have the potential to cause effects to any historic property listed in, or eligible for listing in, the National Register of Historic Places, including previously unidentified properties. A pre-construction notification is the appropriate mechanism to notify the district engineer, because it contains information necessary to begin the evaluation process, to determine whether the proposed activity qualifies for NWP authorization.

One commenter requested clarification of what constitutes the permit area for the purposes of consultation under Section 106 of the National Historic Preservation Act. One commenter asked if a permittee is obligated to have the Corps review an archaeologist's determination that an activity will not impact an historic site. One commenter stated that the general condition is unreasonable and violates federalism.

The criteria for identifying the permit area for the purposes of section 106 are provided in paragraph 1(g) of Appendix C to 33 CFR part 325, in addition to paragraph 6(d) of the April 25, 2005, interim guidance. The permit area will be determined on a case-by-case basis by the district engineer. When a professional cultural resource manager or archaeologist performs an investigation or makes an effect determination, the Corps will generally consider the qualifications of the professional and will review any documentation provided for the purposes of section 106 compliance. This general condition is required because the NWP program must comply with the National Historic Preservation Act, a Federal law. Even though most NWP activities occur on private land, compliance with applicable Federal laws is necessary. This general condition would not interfere with any state or local authorities.

This general condition is adopted with the modifications discussed above.

GC 21. *Discovery of Previously Unknown Remains and Artifacts.* We proposed this new general condition to address circumstances where previously unknown or unidentified historical or archaeological remains are discovered while conducting the NWP activity.

Several commenters expressed support for adding this general condition to the NWPs. Two commenters said the condition should refer to the district engineer instead of ''this office'' or ''we.'' We have made these changes to be consistent with the language found in other general conditions.

One commenter stated that the proposed condition relies on the permittee, who is generally not qualified to make determinations concerning remains and artifacts discovered during construction activities. This commenter said that this general condition should require all work to cease immediately and a qualified Corps archaeologist should initiate required consultation.

We believe the revised language in the condition clearly indicates that the Corps will initiate consultation in such instances where a previously unknown historic or archaeological remain is discovered during construction activities. The Corps does not have the authority to prohibit all construction activities on the site in these cases.

Several commenters expressed concern with the use of the term ''artifact'' in this general condition, and some of them stated that it can have too broad of a definition. One commenter requested clarification as to what constitutes an ''artifact.'' Another commenter said that this general condition should have thresholds to protect significant artifact deposits while allowing work to continue when only minor artifacts are discovered. One commenter suggested that we qualify ''artifacts'' by adding ''artifacts that are potentially eligible for the National Register of Historic Places.''

The use of the term artifact is consistent with the definition of ''historic property'' at 36 CFR 800.16, which states that historic properties include '' * * * artifacts, records, and remains that are related to and located within [historic] properties.'' Procedures for the protection of historic properties address all properties that may be eligible for inclusion in the National Register of Historic Places, and do not establish quantitative thresholds for when section 106 consultation must occur. The consultation threshold is an effects-based threshold. We do not believe it is necessary to add text clarifying that artifacts are those ''that are potentially eligible for the National Register of Historic Places.'' Eligibility determinations will be made after the discovery of artifacts and remains.

Three commenters stated that the proposed general condition is more restrictive than general condition 3 provided in Appendix A to 33 CFR part 325, the permit form for individual permits. These commenters said the NWP general condition should not be more restrictive than the standard permit condition. Two commenters suggested deleting this general condition because provisions for the discovery of unknown historic or archaeological remains are already codified in the NWP regulations and in the Corps Regulatory Program's implementing regulations for Section 106 of the National Historic Preservation Act.

The proposed general condition is similar to general condition 3 in Appendix A of 33 CFR part 325. For this new NWP general condition, we have taken the text of general condition 3 in Appendix A and modified it to include Tribes. We have also modified it by adding a provision requiring, to the maximum extent practicable, avoidance of construction activities that could affect the remains and artifacts. We believe the latter provision is necessary to protect those artifacts and remains as much as possible. The addition of Tribes to the condition reflects current section 106 procedures. This general condition can be more restrictive than the standard permit condition in Appendix A because the NWPs may only be used to authorize activities with minimal adverse effects on the aquatic environment and other applicable public interest review factors. While 33 CFR 330.4(g)(3) contains a similar provision, we believe the general condition is needed to comply with applicable cultural resource laws.

Several commenters expressed concern with requiring the permittee to stop work once previously unknown historic or archaeological remains are found. One commenter said this provision is too unpredictable and may result in significant delays. One commenter suggested adding time frames to this general condition to provide predictability and assure permittees that the Corps will proactively seek to resolve any outstanding historic property issues. One commenter recommended clarifying this general condition to state that if a discovery occurs, work should cease only in the area containing remains or artifacts. One commenter objected to the work stoppage provision, stating that once construction begins, substantial investment has been made and the requirement to stop construction indefinitely upon the discovery of a potentially insignificant archaeological resource represents an unacceptable financial risk. This commenter recommended that if we keep this provision as proposed, we impose time frames on identification and consultation in order to provide some predictability to the process.

We believe it is necessary to include a provision in this general condition to require the permittee, once any

previously unknown historic, cultural, or archeological remains or artifacts are found while conducting the NWP activity, to avoid construction activities that could affect those remains and artifacts, to the maximum extent practicable. We recognize that in some circumstances it may not be possible to avoid further construction activities that might affect the remains and artifacts, because those construction activities may have to be completed for safety or minimizing erosion and sedimentation. In addition, the Corps does not have the legal authority to stop construction activities. We have replaced the phrase ''stop activities that would adversely affect those'' with ''avoid construction activities that could affect the'' to protect those remains and artifacts as much as possible while preventing other adverse environmental effects from occurring, such as the installation of sediment and erosion control devices to reduce or eliminate sediment inputs to wetlands, streams, and other waters while the necessary Federal, Tribal, and state coordination is conducted. It would not be appropriate to impose timeframes in this general condition, because the amount of time to complete coordination will vary across the country and from case to case. We cannot remove the provision for avoiding construction activities that could affect the remains and artifacts, because Section 106 of the National Historic Preservation Act and other cultural resource laws impose binding requirements on the Corps and other federal agencies.

A few commenters said this general condition should not apply to other Federal agencies with section 106 responsibilities if they are the permittees, since their implementing regulations already contain provisions for the discovery of previously unknown historic or archaeological remains during construction.

We agree that in cases where another federal agency is the lead Federal agency for purposes of compliance with Section 106 of the National Historic Preservation Act, that Federal agency should follow its procedures for addressing post-review discoveries. However, the Corps also has section 106 responsibilities if the NWP activity has the potential to cause effects to an historic property. As long as the lead Federal agency is in compliance with section 106 requirements and this compliance satisfies section 106 requirements for the NWP authorization, the Corps can rely on the lead Federal agency's compliance efforts. Upon notification, the district engineer will let the other Federal agency know if any further action by the Corps is necessary.

This general condition is adopted with the modifications discussed above.

GC 22. *Designated Critical Resource Waters.* We proposed to modify this general condition to clarify the types of waters subject to the general condition by changing how NOAA's marine sanctuaries are described, which categories of critical resource waters are always subject to this general condition, and how additional critical resource waters can be designated by a district engineer after a public notice and comment process. We also proposed to add proposed new NWPs A and B, now designated NWPs 51 and 52, respectively, to the list of NWPs in paragraph (a).

Several commenters objected to allowing state-designated outstanding national resource waters to be automatically included as designated critical resource waters because of varying designations and criteria across the states. These commenters also said that a state's process to designate such waters may not include the opportunity for public comment and that the designations carry no legal basis. In addition, commenters indicated there are inconsistent approaches by different agencies within the same state for designating outstanding national resource waters. Some commenters said that other state programs, such as those that are responsible for Clean Water Act Section 401 water quality certifications, are capable of adequately addressing the effects of the activity to these state designated waters. One commenter requested a definition of outstanding national resource waters. Two commenters said such waters should have a particular environmental or ecological significance. Two commenters objected to including outstanding national resource waters automatically because that designation may be based only on recreational characteristics. Three commenters suggested that the general condition should be changed to require the district engineer to designate such waters only after issuing a public notice and soliciting comment, and then obtaining concurrence from the state.

This general condition was first adopted in the NWPs issued on March 9, 2000 (see 65 FR 12872). In the preamble to the 2000 NWPs, we stated that '' * * * outstanding national resource waters must be identified and approved by the district engineer after public notice and opportunity for comment'' (65 FR 12873, third column). In that notice, we also said that state or local officials should not be able to designate additional waters as critical resource waters without the district engineer providing an opportunity for public notice and comment. We are modifying this general condition to return to our original approach, since there is much disparity across the country in how outstanding national resource waters are identified and designated. Because of the inconsistency in how outstanding national resource waters are designated, we believe it is necessary to provide the public with the opportunity to review and comment on those waters before they become adopted as designated critical resource waters for the purposes of this general condition. Outstanding national resource waters should have environmental and ecological significance, and their designation should not be based solely on recreational uses or characteristics.

Three commenters expressed concern that providing district engineers the ability to designate, after notice and opportunity to comment, additional waters officially designated by a state as having particular environmental or ecological significance would lead large areas of state-designated waters of all types to be removed from being eligible for the NWPs. One commenter said this general condition should be removed because it violates the principles of federalism in Executive Order 13132. This commenter said a district engineer could use state stream designations to identify critical resource waters and override the rights of states to interpret and enforce their own laws.

We are retaining the provision that allows district engineers to designate additional critical resource waters after notice and opportunity for public comment. That process is not substantially different from using the regional conditioning process to restrict or prohibit the use of NWPs in specific waters or geographic areas, which can be delegated by division engineers to district engineers. This general condition is not contrary to Executive Order 13132. The general condition helps support the objective of the Clean Water Act, which is to restore and maintain the physical, chemical, and biological integrity of the Nation's waters. In addition, this general condition helps ensure that the NWPs authorize only those activities that have minimal individual and cumulative adverse effects on the aquatic environment. This general condition only applies to waters and wetlands that are both waters of the United States and designated critical resource waters.

One commenter objected to removing state natural heritage sites from

automatic inclusion in the general condition due to their interest in maintaining the existing protection the general condition provides to areas of unique ecological significance. Another commenter supported the proposed change. One commenter said state natural heritage sites should not be automatically considered critical resource waters because the term is undefined. Another commenter suggested that state natural heritage sites should be limited to those sites that are identified through state legislation. One commenter opposed including state natural heritage sites as potentially being classified as critical resource waters and suggested that the Corps continue to defer to State Historical Preservation Officers to determine effects on historic sites.

While we understand the perspective that state natural heritage sites should be automatically subject to this general condition, we also understand the need for transparency and clarity for the regulated public. Given the variability in waters and wetlands that may be designated as state natural heritage sites, and the different processes that may be used by states to designate their natural heritage sites, we believe it is necessary to provide a public notice and comment process before including state natural heritage sites as designated critical resource waters under this general condition. This approach will help improve compliance with the NWP conditions, because it will make project proponents aware of certain restrictions for the use of specific NWPs. The protection of historic properties is more appropriately addressed through general condition 20, historic properties.

One commenter said the use of an NWP should not be prohibited in critical resource waters when the agency responsible for managing those critical resource waters is conducting the activity. This commenter also suggested that the general condition should not prohibit the use of NWPs, but instead the NWPs listed in paragraph (a) should be moved to the notification provision of paragraph (b) and also require the approval of the agency that manages the designated critical resource water, similar to the approach taking in general condition 16, wild and scenic rivers. One commenter supported protecting critical resource waters but suggested that protection can be provided instead by requiring prior written approval through a state's water quality agency. Another recommended requiring water quality certifications for the NWPs listed in paragraph (b) instead of pre-construction notifications, to ensure that the activities authorized by those NWPs result in minimal adverse effects on designated critical resource waters and adjacent wetlands.

The purpose of the prohibition in paragraph (a) of this general condition is to exclude the use of those NWPs in critical resource waters that have the potential to result in more than minimal adverse effects on the aquatic environment. The status of the entity who would be conducting the proposed discharge of dredged or fill material is not relevant to the minimal adverse effects determination; instead, it is the environmental effects of the discharge that have to be considered. Discharges of dredged or fill material into waters of the United States that are designated critical resource waters, as well as their adjacent wetlands, may be authorized by other forms of Department of the Army permits, such as individual permits or regional general permits. Wild and Scenic Rivers referenced in general condition 16 are those waters that have been designated as such in accordance with the Wild and Scenic Rivers Act of 1968, a federal law. Similar to state-listed threatened and endangered species, the NWP program cannot be used to ensure compliance with other state or local laws. However, an NWP authorization does not obviate the need for the permittee to obtain other federal, state, or local authorizations, including specific authorizations related to state-protected critical resource waters. The water quality certification process would not be an appropriate alternative to the pre-construction notification requirement in paragraph (b) of this general condition because the evaluation of an NWP pre-construction notification involves consideration of more than water quality issues.

One commenter suggested that pre-construction notifications for NWP activities listed in paragraph (b) proposed in waters identified as critical resources through state processes, should only be coordinated with state authorities. This commenter said the pre-construction notification for simple maintenance and improvement projects creates unnecessary work for the project proponent and the Corps. One commenter recommended adding a list of conservation areas to the general condition, with a requirement that permittees must be in compliance with the site specific management plan of the conservation area.

The district engineer will evaluate the pre-construction notification for an NWP listed in paragraph (b) of this general condition, to determine if the proposed activity will result in minimal adverse effects on the aquatic environment, including the critical resource water and its adjacent wetlands. Agency coordination is only required for NWP activities that result in the loss of greater than ½-acre of waters of the United States. None of the NWPs listed in paragraph (b) have the 300 linear foot limit for the loss of stream beds, so the agency coordination threshold for requests for written waivers for the loss of greater than 300 linear feet of intermittent or ephemeral stream bed would not be triggered. We do not agree that conservation areas should be added to the general condition at the national level, because what constitutes a ''conservation area'' is likely to vary across the country. District engineers may add specific aquatic conservation areas that meet the definition of critical resource waters to this general condition after a public notice and comment process.

The general condition is adopted as proposed.

GC 23. *Mitigation.* We proposed to modify paragraph (g) to be more consistent with the compensatory mitigation regulations at 33 CFR part 332, by replacing the word ''arrangements'' with ''programs'' in describing in-lieu fee programs and replacing the phrase ''activity-specific'' with ''permittee-responsible'' when referring to compensatory mitigation implemented by the permittee. In addition, we proposed to add a provision stating that for activities resulting in the loss of marine or estuarine resources, permittee-responsible compensatory mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. Finally, we proposed to revise the last sentence of paragraph (g) to state that the party responsible for providing the required permittee-responsible mitigation, including any required long-term management, is to be identified in conditions added to the NWP authorization. Several commenters supported these proposed changes. One commenter commended the Corps for the flexibility in determining compensatory mitigation requirements.

One commenter stated that paragraph (a) should indicate that when another Federal agency has determined that the activity has been designed to avoid and minimize impacts the district engineer will defer to that agency's determination. Several commenters said this general condition does not adequately stress avoidance of aquatic resources before compensatory mitigation is considered. One

commenter also said the general condition should refer to the measures provided in the 404(b)(1) Guidelines for details on avoiding and minimizing impacts. This commenter also suggested that the prospective permittee should be required to document the steps taken to avoid and minimize impacts, and describe them in the pre-construction notification. In addition, the commenter said that the NWPs should only authorize discharges of dredged or fill material into special aquatic sites when the activity is water dependent or in cases where the prospective permittee clearly demonstrates there are no practicable alternatives available. One commenter stated that the practicable alternative test in the Section 404(b)(1) Guidelines should be used for NWP activities.

The district engineer determines compliance with the terms and conditions of the NWPs, including whether the permittee has avoided and minimized adverse effects to waters of the United States to the maximum extent practicable on the project site. The general condition imposes substantive requirements to avoid and minimize adverse effects to waters of the United States, and district engineers will review pre-construction notifications and determine whether project proponents have satisfied the avoidance and minimization requirement, as well as other applicable provisions of this general condition. District engineers will also determine if proposed activities result in minimal adverse effects on the aquatic environment and qualify for NWP authorization. General permits only need to comply with section 230.7 of the 404(b)(1) Guidelines, which provides the evaluation process for the issuance of Clean Water Act Section 404 general permits, including NWPs. Individual activities that qualify for NWP authorization do not have to implement the avoidance and minimization measures provided elsewhere in the 404(b)(1) Guidelines, although they must still comply with the avoidance and minimization provisions of this general condition, which are designed to ensure that the NWPs collectively comply with the 404(b)(1) Guidelines. Requiring the permittee to provide documentation of avoidance and minimization measures taken would result in unnecessary paperwork requirements, and the current information requirements for complete pre-construction notifications are sufficient. Section 230.7(b)(1) of the 404(b)(1) Guidelines states that the alternatives analyses required by section 230.10(a) are not directly applicable to general permits.

One commenter stated the general condition should address other aspects of mitigation, such as performance standards, monitoring, and contingency actions. One commenter said the general condition does not comply with 33 CFR part 332 because it does not provide any criteria or performance standards for compensatory mitigation. One commenter indicated that monitoring must be required for all mitigation.

We have made several changes to this general condition to make it consistent with the applicable provisions in 33 CFR part 332. We have also added a sentence to paragraph (c)(1) of this general condition to state that compensatory mitigation projects to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332. The general condition provides basic requirements, since the specific details for compensatory mitigation projects (e.g., objectives, ecological performance standards, monitoring requirements, and site protection) are determined on a case-by-case basis by district engineers. We acknowledge that monitoring is required for all compensatory mitigation projects, in accordance with 33 CFR 332.6.

Two commenters stated that the district engineer should have discretion to determine what, if any, compensatory mitigation is required for projects impacting more than 1/10-acre of wetlands, as in some cases, compensatory mitigation may not be necessary, and mitigation ratios of less than one-for-one may be adequate. One commenter said that the Corps cannot require mitigation for NWP activities that result in minimal adverse environmental effects, even if there are wetland losses greater than 1/10-acre, and requested that the Corps change the first sentence of paragraph (c) to state that the mitigation requirement can be waived if the district engineer determines that the impacts of the proposed activity are minimal or some other form of mitigation would be more environmentally appropriate. Several commenters stated that compensatory mitigation should be required for all NWP activities, and all resource types, regardless of the amount of impact.

The 2008 compensatory mitigation rule (33 CFR part 332, as published in the April 10, 2008, edition of the **Federal Register** (73 FR 19594)) established standards and criteria for all compensatory mitigation projects required to offset losses of aquatic resources. The standards and criteria apply to all sources of compensatory mitigation, including permittee-responsible mitigation, mitigation banks, and in-lieu fee programs. As stated in 33 CFR 332.1(b), the 2008 rule does not change the circumstances under which compensatory mitigation is required. The NWP regulations at 33 CFR 330.1(e)(3) stipulate when compensatory mitigation is to be required for NWP activities—that is, when the district engineer determines the individual and cumulative adverse environmental effects are more than minimal. The requirements at 33 CFR part 332 may affect the practicability of providing compensatory mitigation for all NWP activities that result in the loss of 1/10-acre to 1/2-acre and require pre-construction notification, especially if the NWP activity is not in the service area of an approved mitigation bank or in-lieu fee program with released or advance credits available at the time the NWP pre-construction notification is being evaluated by the district engineer.

In the 2008 mitigation rule, we also discussed our concerns about the failure rates of on-site compensatory mitigation, which are often not ecologically successful because of nearby changes in land use (see 73 FR 19601). We believe it would be inappropriate to require users of the NWP to provide small on-site compensatory mitigation projects to offset losses caused by NWP activities if they are likely to fail. If the district engineer determines that on-site mitigation is likely to be ecologically successful, he or she may require that compensatory mitigation. It may not be practicable to provide off-site compensatory mitigation if the activity is not in the service area of an approved mitigation bank or in-lieu fee program with available credits. It is also important to recognize that not all areas of the country have approved mitigation banks or in-lieu fee programs. If the district engineer determines that compensatory mitigation is necessary to ensure than an NWP activity results in minimal individual and cumulative adverse effects on the aquatic environment, and there are no practicable and ecologically successful compensatory mitigation options available, then he or she will exercise discretionary authority and notify the project proponent that another form of Department of the Army authorization is required, such as an individual permit.

To be consistent with 33 CFR 330.1(e)(3), and to take into account how the requirements of 33 CFR part 332 affect the practicability for providing compensatory mitigation for small wetland losses, we have modified paragraph (c) of this general condition

to state that the district engineer will evaluate the pre-construction notification and may not require compensatory mitigation for losses of greater than 1/10-acre of wetlands if he or she determines that either alternative mitigation (such as additional avoidance and minimization of impacts to waters of the United States on the project site) would ensure that the NWP activity results in minimal individual and cumulative adverse effects on the aquatic environment, or the impacts of the proposed activity are minimal without compensatory mitigation and determines the compensatory mitigation would not be required. We do not agree that compensatory mitigation should be required for all activities authorized by NWPs. For example, compensatory mitigation may not be needed to ensure that the authorized activity results in minimal adverse effects on the aquatic environment. In addition, not all NWP activities require pre-construction notification, and the pre-construction notification thresholds are established so that those NWP activities that generally do not result in more than minimal adverse effects on the aquatic environment can proceed without review by the district engineer. To address exceptions in specific waters or geographic areas, division engineers may add regional conditions to an NWP to lower its pre-construction notification threshold or require pre-construction notification for all activities authorized by that NWP.

One commenter stated that greater than one-for-one mitigation ratios must be required, stream mitigation ratios should address both areal and linear extent, and waivers of the mitigation ratio should not be allowed. One commenter stated that stream or open water mitigation should have a mandatory mitigation ratio of one-for-one for in-kind replacement and two-for-one riparian habitat improvement for any impacts exceeding 50 feet of any stream or waterbody. One commenter stated that mitigation should be required for all stream impacts that exceed 100 feet. One commenter stated that appropriate in-kind mitigation should be provided for any wetland or stream impacts. One commenter also stated that out-of-kind mitigation contradicts the no-net-loss policy.

The amount of compensatory mitigation necessary to ensure that the NWP activity results in minimal adverse effects on the aquatic environment is determined by the district engineer on a case-by-case basis by applying the provisions at 33 CFR 332.3(f). The district engineer will determine whether compensatory mitigation for losses of stream bed should be required for a particular NWP activity. We do not agree that losses of stream bed should have a threshold for determining when compensatory mitigation should be required for those losses. We have modified paragraph (d) of this general condition by replacing the word ''restoration'' with ''rehabilitation, enhancement, or preservation'' to be consistent with 33 CFR 332.3(e)(3), which recognizes streams as ''difficult-to-replace'' resources.

Out-of-kind mitigation does not contradict the ''no overall net loss'' goal for wetlands, since out-of-kind wetlands mitigation may be environmentally preferable if another wetland type provided as compensatory mitigation would benefit the watershed more than simply providing in-kind replacement of the wetland being lost as a result of the NWP activity.

One commenter also requested that consideration be given to the cumulative impacts of wetland and stream disturbance. Several commenters said that mitigation cannot be used to bring the adverse effects of the NWPs to a minimal level. Some of these commenters stated that mitigation is not predictable and in many cases is not successful. Two commenters stated that if an NWP activity requires mitigation, then by definition it has more than minimal adverse environmental effects.

Cumulative effects to wetlands and streams are evaluated in the decision documents that are prepared for each NWP by Corps Headquarters, as well as the supplemental decision documents approved by division engineers. Wetland restoration, enhancement, establishment, and preservation activities, and stream rehabilitation, enhancement, and preservation activities (including and riparian area restoration, enhancement, and preservation) can offset losses of aquatic resource functions provided by waters of the United States that are impacted by activities authorized by NWPs. District engineers evaluate compensatory mitigation proposals provided by prospective permittees, to determine whether the compensatory mitigation project will be ecologically successful and be sufficient to offset losses of waters of the United States to ensure that the net adverse effects on the aquatic environment are minimal. The approved mitigation plan must include the applicable components listed in 33 CFR 332.4(c)(2)–(14), including ecological performance standards used to determine if the compensatory mitigation project is achieving its objectives.

The party responsible for providing the compensatory mitigation must implement the approved mitigation plan, and if it is determined that changes are needed to improve ecological success, request approval of those modifications. After the approved compensatory mitigation project is implemented, monitoring is required on a regular basis and monitoring reports must be submitted to the district engineer. The monitoring reports are reviewed by the district engineer and if there are deficiencies in the compensatory mitigation project, the district engineer will work with the responsible party to determine what actions are necessary to fix the compensatory mitigation project so that it will meet its original objectives or comparable objectives that are acceptable to the district engineer. If it is not possible to take adaptive management measures to remediate the compensatory mitigation project, then the district engineer may require alternative compensatory mitigation.

Several commenters said that applicants should be required to submit detailed mitigation plans with their pre-construction notifications and conceptual mitigation proposals are not sufficient. Several commenters also stated that the public should be provided the opportunity to review mitigation plans and provide comments on whether the impacts will be minimal.

We have added a new paragraph (c)(1) to state that the prospective permittee is responsible for proposing an appropriate compensatory mitigation option, if the district engineer determines that compensatory mitigation is needed to ensure that the activity results in minimal adverse effects on the aquatic environment. Another new provision, paragraph (c)(3) of this general condition, states that the mitigation plan may be conceptual or detailed, which is consistent with the Corps regulations at 33 CFR 332.4(c)(1)(ii). We do not believe that public review of compensatory mitigation proposals is necessary. District engineers have the expertise to review compensatory mitigation plans, evaluate their potential for ecological success, and determine whether they will offset losses of aquatic resource functions so that the NWP activity, after considering the required compensatory mitigation, will result in minimal individual and cumulative adverse effects on the aquatic environment.

One commenter asked whether functional assessments used to assess aquatic resources must be approved by the Corps. One commenter said the

general condition should provide clearer requirements to reduce the amount of discretion to be exercised by district engineers. One commenter stated that compensatory mitigation should be linked to the impacts of the project, and both the compensatory mitigation project and the monitoring requirements should last as long as the authorized impacts.

Functional assessments do not have to be formally approved by the Corps, although district engineers may determine that a functional assessment method proposed to be used for a particular aquatic resource or activity is not appropriate. This general condition provides basic principles for addressing mitigation requirements for NWP activities, because it is not possible to cover all possible mitigation options and requirements at the national level. Most activities authorized by NWPs result in the permanent loss of waters of the United States, and it is not practical or necessary to require permanent monitoring of compensatory mitigation projects. The Corps regulations require long-term protection of compensatory mitigation project sites (see 33 CFR 332.7(a)(1), and compensatory mitigation projects should be self-sustaining. Some compensatory mitigation projects may require long-term management, if the district engineer determines that long-term management is appropriate and practicable.

One commenter said that paragraph (f) should be revised to include the option of restoring riparian areas next to open waters. In addition, the commenter stated that the restoration or establishment of riparian areas should not be required on both banks of a stream, because in some cases the permittee may not have authority or legal interest in the land to restore or establish riparian areas on both sides of the stream. This commenter noted that there may be conflicting easements, roads, levees, or other structures in the proposed riparian area, or the area may not support riparian vegetation. One commenter stated that the Corps is inconsistent with use of the term buffer and riparian areas and that buffer is more inclusive and should be used in the general condition instead of riparian areas.

We have added the term ''restoration'' to the first sentence of paragraph (f) to make it clear that the riparian area may either be restored or established next to open waters. The general condition does not require riparian areas to be established on both sides of a stream. The fifth sentence of this paragraph provides a recommended width for riparian areas, based on a presumption that the project proponent can restore or establish riparian areas on both sides of the stream. If it is not possible to establish a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or establishing a riparian area along a single bank or shoreline may be sufficient, and we have added language to paragraph (f) of general condition 23 to clarify that this can be acceptable compensatory mitigation. The proposal did not use the term ''buffer'' and paragraph (f) focuses on providing mitigation next to open waters through the restoration or establishment, maintenance, and legal protection of riparian areas.

One commenter requested that we include the phrase ''for resource losses'' at the end of the parenthetical in paragraph (b) to be consistent with 33 CFR part 320.4(r)(1). Two commenters stated that it is difficult to provide long-term maintenance of mitigation sites for weed control and invasive species. One commenter asked that definitions for rectifying and reducing be added to the general condition.

We have added ''for resource losses'' after the word ''compensating'' in paragraph (b). Before requiring long-term management for compensatory mitigation sites, district engineers will evaluate whether such a requirement would be practicable, as well as appropriate and necessary. We recognize that it may not be appropriate and practical to require long-term management for small permittee-responsible compensatory mitigation project sites, so we have modified paragraph (g) to make it clear that long-term management is necessary only when the district engineer adds conditions to an NWP authorization to require long-term management for the compensatory mitigation project. We do not believe it is necessary to provide definitions of the terms ''rectifying'' and ''reducing'' since the commonly understood definitions of these terms are sufficient.

One commenter requested the removal of paragraph (h), stating that it creates confusion and sometimes results in mitigation being required for non-jurisdictional activities, such as non-mechanized, above-ground landclearing for overhead electric transmission lines. Another commenter said that paragraph (h) implies that the Corps has authority over activities it does not regulate, such as the removal of woody vegetation from a wetland when there is no discharge of dredged or fill material into waters of the United States. One commenter requested clarification of the circumstances under which the Corps would require compensatory mitigation for the conversion of forested and scrub shrub wetlands, and said the phase ''may be required'' should be changed to ''shall be required.'' This commenter also said that no waivers should be allowed for mitigation for projects within a utility right of way for forested and scrub shrub wetlands that are permanently converted to emergent wetlands.

Paragraph (h) is being retained, to make it clear that district engineers may require compensatory mitigation for permanent losses of specific aquatic resource functions that are caused by discharges of dredged or fill material into waters of the United States or other regulated activities. Paragraph (h) is part of a general condition that applies only to activities authorized by NWPs. We do not agree that the phrase ''may be required'' should be replaced with ''shall be required'' because it is the district engineer's discretion whether to require compensatory mitigation for losses of specific aquatic resource functions.

One commenter recommended adding a new paragraph to this general condition to clarify that any mitigation requirements must be limited to a single and complete linear project. This commenter said that compensatory mitigation should only be required if a specific crossing of a waterbody triggers paragraph (c), (d), or (f) of this general condition, not for other crossings that do not trigger pre-construction notification requirements or mitigation requirements.

We do not believe such an addition to this general condition would be appropriate or necessary. As discussed elsewhere in this notice, district engineers evaluate the entire linear project, even though each separate and distant crossing of waters of the United States may qualify for a separate NWP authorization. District engineers may require compensatory mitigation for all temporary and permanent losses of waters of the United States. District engineers are required to consider cumulative adverse effects in reviewing NWP pre-construction notifications, not just adverse effects from the specific single and complete project to which the notification applies.

One commenter stated that this general condition does not adequately convey the hierarchy of mitigation preference established by 33 CFR part 332. One commenter stated that in-lieu fee arrangements must not be used unless the arrangements comply with the requirements of the in-lieu fee guidance. One commenter stated that

remining of lands results in a net benefit to the aquatic resources, and the Corps should consider this remining as adequate compensatory mitigation and should consider if it is appropriate to create an in-lieu fee program for remining of previously mined areas.

We do not believe it is necessary to include the mitigation options evaluation framework provided in 33 CFR 332.3(b), since that regulation applies to all forms of Department of the Army permits, and the general condition explicitly states that mitigation must comply with part 332. In-lieu fee programs used to provide compensatory mitigation for NWP activities must comply with the applicable provisions in 33 CFR 332.8, unless the district engineer determined that they qualified for the extension of the grandfathering provision provided at 33 CFR 332.8(v)(2). District engineers will determine on a case-by-case basis whether compensatory mitigation should be required for remining activities authorized by NWP.

This general condition is adopted with the modifications discussed above.

GC 24. *Safety of Impoundment Structures.* We proposed to add this new general condition to the NWPs. We received no comments on the proposed general condition. The general condition is adopted as proposed.

GC 25. *Water Quality.* We did not propose any changes to the general condition. Two commenters recommended modifying this general condition to state that activities are not authorized by NWP if the state denies water quality certification, unless the project proponent obtains an individual water quality certification or water quality certification is waived. One commenter suggested adding a provision to state that the district engineer will determine, after a reasonable amount of time (generally 60 days) from the date an application for an individual water quality certification was submitted by the project proponent, that water quality certification is waived unless the Corps and the water quality certification agency agree that additional time is needed. A few commenters said that individual permits should be required for activities in any waters identified as 303(d) listed streams.

We believe that the current wording of this general condition is sufficient to make it clear that an individual water quality certification or waiver must be obtained if the state, Tribe, or EPA had not previously issued water quality certification for an NWP. We also do not believe it is necessary to provide a specific timeframe in the general condition to reflect the language in 33 CFR 330.4(c)(6), since those timeframes may vary by Corps district because of local agreements with water quality certification agencies. There are a variety of causes of stream impairment for 303(d) listings other than discharges of dredged or fill material (e.g., nutrients, metals, sedimentation, temperature, bacteria, pH, toxics). Reversing those causes of impairment is more appropriately addressed through other Clean Water Act programs.

This general condition is adopted as proposed.

GC 26. *Coastal Zone Management.* We received no comments on the proposed general condition. The general condition is adopted as proposed.

GC 27. *Regional and Case-by-Case Conditions.* We received no comments on the proposed general condition. The general condition is adopted as proposed.

GC 28. *Use of Multiple Nationwide Permits.* We received no comments on the proposed general condition. The general condition is adopted as proposed.

GC 29. *Transfer of Nationwide Permit Verifications.* We received no comments on the proposed general condition. The general condition is adopted as proposed.

GC 30. *Compliance Certification.* We proposed a minor change to this general condition to clarify that we will provide the permittee with the necessary documentation to complete and return to the Corps as the signed certification. One commenter expressed support for the proposed change.

Two commenters recommended including regional conditions to the list of conditions under paragraph (a). One commenter suggested that a separate compliance certification be required for mitigation projects, because permittees submit the compliance certification when the work is completed, not when the compensatory mitigation project is completed. Two commenters said the general condition should be modified to clarify that the success of the required compensatory mitigation would be addressed separately, after evaluation of monitoring reports demonstrates achievement of the performance standards for the compensatory mitigation project.

We have modified paragraph (a) to require the statement to read that the authorized work has been done in accordance with any general, regional and activity-specific conditions to cover all of the conditions that may be applicable to an NWP authorization. We have also changed the first paragraph of this general condition by adding a sentence to state that the success of any required permittee-responsible mitigation, including the achievement of ecological performance standards, will be addressed separately by the district engineer. Paragraph (b) has also been revised by adding a sentence to address the use of mitigation bank and in-lieu fee program credits to fulfill compensatory mitigation requirements in NWP authorizations. This new sentence states that if mitigation bank credits or in-lieu fee program credits are used, the permittee must submit the documentation required by 33 CFR 332.3(l)(3) to confirm that he or she has secured the appropriate number and resource type of credits from the mitigation bank or in-lieu fee program.

One commenter suggested adding language similar to that provided in NWP 32, to state that it is necessary to comply with all terms and conditions of the NWP, and that the NWP authorization is automatically revoked if the permittee does not comply with all terms and conditions. One commenter suggested that additional funding be allocated to do more on-site compliance inspections. One commenter said there are insufficient monitoring and compliance procedures in the NWPs. One commenter stated that it should be the permittee's responsibility to provide the required proof that the authorized activity was conducted to comply with the terms and conditions of the NWP.

The Note at the beginning of Section C, Nationwide Permit General Conditions, adequately addresses the requirement to comply with all applicable terms and conditions of the NWPs. Funding for compliance inspections is outside of the scope of this rule. Corps districts are required, through our performance measures, to conduct initial compliance inspections for a minimum percentage of the total number of all general permit (including NWP) verifications issued during the preceding fiscal year where authorized work is underway. The purposes of this general condition is for the permittee to submit documentation to the district engineer demonstrating that the authorized activity has been implemented in accordance with the conditions of the NWP authorization. Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and any required compensatory mitigation.

This general condition is adopted with the modification listed above.

GC 31. *Pre-Construction Notification.* We proposed to modify paragraph (d)(2) to clarify that all NWP activities

resulting in the loss of greater than ½-acre of waters of the United States require agency coordination. We also proposed to require agency coordination for certain NWPs when the proposed activity would result in the loss of greater than 1,000 linear feet of intermittent and ephemeral stream bed, in cases where the district engineer is considering waiving the 300 linear foot limit. Another proposed change was to clarify that the district engineer will consider direct and indirect effects caused by the NWP activity when making a minimal adverse effects determination. We also proposed to provide a list of factors to be considered when making minimal effects determinations for the purposes of the NWPs. One commenter supported the proposed list of factors.

One commenter objected to adding more pre-construction notification requirements, stating that it takes several days to weeks for an applicant to prepare pre-construction notification at the high level of detail required by district offices. Several commenters stated that they did not have the time and resources to prepare a pre-construction notifications for all activities. One commenter said the proposed changes that require pre-construction notifications for additional activities would add to the workload of the Corps for projects that are minor in nature.

We have not substantially increased the number of activities that require pre-construction notification. We have issued two new NWPs, and although both of those NWPs require pre-construction notification for all activities, some of the activities authorized by those NWPs may also be authorized by other NWPs that do not require pre-construction notification. A prospective permittee may request authorization under a specific NWP, if the proposed activity qualifies for authorization under that NWP. District engineers have been instructed, through Regulatory Program Standard Operating Procedures, to use the most efficient permit process wherever possible, to make timely permit decisions while protecting the aquatic environment. The two new NWPs issued today will provide a more efficient means of authorizing renewable energy generation facilities and pilot projects, in cases where those activities did not previously qualify for NWP authorization and required individual permits instead.

One commenter expressed concern with delays associated with the pre-construction notification process. Several commenters said some districts make requests for additional information after the 30-day pre-construction notification completeness determination period ends, and suggested adding a provision to paragraph (a) to state that all requests for additional information must be made within 30 days of receipt of a complete pre-construction notification and that districts are limited to one request for additional information. One commenter said the phrase ''as a general rule'' should be deleted from paragraph (a). Several commenters said that in many cases, the district engineer fails to describe the specific information that is needed for a pre-construction notification to be deemed complete. Two commenters requested clarification as to whether the activity is authorized by an NWP 30 or 45 days after submitting a complete pre-construction notification.

We have added text to the second sentence of paragraph (a) to state that district engineers must notify prospective permittees within the 30-day completeness review period if the pre-construction notification is incomplete and additional information has to be provided to the district engineer to make the pre-construction notification complete. We have also added a sentence that directs the district engineer to specify, in his or her request for additional information, what information is needed to make the pre-construction notification complete. We have retained the phrase ''as a general rule'' in the new fourth sentence, which states that district engineers will request additional information only once, because there may be occasions where it is necessary to make an additional request for information. It should be noted that the 30-day period only applies to information necessary to make the PCN complete, which is listed in paragraph (c) of this general condition. Other types of information may also be needed to make a decision on whether the proposed activity qualifies for NWP authorization, such as a conceptual or detailed compensatory mitigation plan, if the applicant only provided a mitigation statement to satisfy the requirement in paragraph (b)(5). A conceptual or detailed mitigation plan is needed to determine whether the proposed compensatory mitigation will be suitable for ensuring compliance with general condition 23, and may be requested after the 30-day completeness review period, but before the 45-day pre-construction notification review period ends. Another example is request for additional information necessary to complete either Endangered Species Act Section 7 consultation under general condition 18 or National Historic Preservation Act Section 106 consultation under general condition 20. Past rulemaking activities for the NWPs have established a 45-day pre-construction notification review period for the NWPs, and today's final rule retains that time period. Exceptions are for compliance with general condition 18, endangered species, and general condition 20, historic properties. Under those two general conditions, activities that may affect endangered or threatened species or critical habitat, or have the potential to cause effects to historic properties, are not authorized until the required consultations are completed. Another exception is NWP 21, for which activities are not authorized until the applicant receives written verification from the Corps.

One commenter said that ''he or she'' be removed from paragraph (a)(1) as it is the only location in which personal pronouns are used. Another commenter recommended changing paragraph (a)(2) to state that if the permittee does not receive any written notification from the district engineer within 45 days of submitting a complete pre-construction notification, then the permittee can assume that the district engineer has made a ''no effect'' determination for endangered species or historic properties.

The use of ''he or she'' is appropriate in paragraph (a)(1) because it refers to the prospective permittee, who may be an individual, corporation, or other entity. The NWP regulations (see 33 CFR 330.4(f)(2) for Endangered Species Act compliance and 33 CFR 330.4(g)(2) for National Historic Preservation Act compliance), as well as general conditions 18 and 20, state that the activity is not authorized by NWP until the requirements of the Endangered Species Act and/or the National Historic Preservation Act have been satisfied. Those two provisions in the Corps NWP regulations do not allow a prospective permittee to conclude that there is a ''no effect'' finding for the purposes of compliance with the Endangered Species Act or a ''no potential to cause effect'' finding for the purposes of compliance with Section 106 of the National Historic Preservation Act if the district engineer does not respond to the pre-construction notification within 45-days in which the applicant stated there might be effects to listed species or designated critical habitat or there may be potential to cause effects to historic properties.

One commenter requested clarification whether the seven items

identified in paragraph (b) of this general condition are a complete list and should not be supplemented. One commenter said that if additional requirements are added to the NWP authorization by the district engineer after the evaluation of the pre-construction notification, those requirements should be subject to public notice and comment.

The seven items listed in paragraphs (b)(1) through (7) of this general condition are required for a pre-construction notification. Additional information may be needed by the district engineer to make a decision on the NWP pre-construction notification, such as a compensatory mitigation proposal if the district engineer disagrees with the prospective permittee's statement that compensatory mitigation is not necessary to ensure the activity results in minimal adverse environmental effects, or information needed to conduct Endangered Species Act Section 7 or National Historic Preservation Act Section 106 consultation. Permit conditions added to an NWP authorization by a district engineer do not need to go through a public notice and comment process because they are incorporated into the authorization to ensure compliance with regulatory and statutory requirements that general permits only authorize activities that have minimal adverse effects on the aquatic environment and other applicable public interest review factors. The Corps regulations do not require public notice and comment for any conditions added to Department of the Army permits, including standard permits, letters of permission, and all categories of general permits.

Two commenters stated that applicants should be required to submit detailed mitigation plans with their pre-construction notifications and conceptual mitigation proposals are not sufficient. One commenter said paragraph (e)(2) should be revised to require the prospective permittee to submit a compensatory mitigation proposal if the activity will result in the loss of greater than 1/10-acre of wetlands.

Paragraph (b)(5) requires the prospective permittee to submit a statement explaining how the mitigation requirement will be satisfied or why the adverse effects of the proposed activity on the aquatic environment are minimal without mitigation. A detailed or conceptual mitigation plan may be submitted with the pre-construction notification, and a conceptual mitigation plan is usually sufficient for making the minimal adverse effects determination. If the proposed mitigation shown in the conceptual mitigation plan is acceptable, a detailed mitigation plan that complies with the requirements of 33 CFR 332.4(c)(2)–(14) will be required and must be approved by the district engineer before work begins in waters of the United States unless the district engineer determines such prior approval is not practicable or necessary (see paragraph (c)(3) of general condition 23, mitigation).

One commenter said that state agencies operating under Federal funding should be added to paragraphs (b)(6) and (b)(7), for the submittal of documentation demonstrating compliance with Section 7 of the Endangered Species Act or Section 106 of the National Historic Preservation Act. This commenter also stated that pre-construction notifications should be provided electronically as well. One commenter said that a pre-construction notification should include information demonstrating that a project complies with applicable federal and state requirements.

A state agency operating under Federal funding, where the Federal agency has conducted Endangered Species Act Section 7 consultation or National Historic Preservation Act Section 106 consultation for the activity that is being provided Federal funds, may provide that documentation to the district engineer as part of its pre-construction notification, but the district engineer will determine whether that consultation is sufficient for the NWP activity. The NWP regulations at 33 CFR 330.1(e)(1) state that pre-construction notifications must be in writing. We have modified paragraph (d)(4) to state that prospective permittees may also provide electronic files of pre-construction notifications to expedite agency coordination. Compliance with other Federal, state, or local requirements is the responsibility of the permittee, and the Corps does not have the authority to enforce the regulatory requirements of programs administered by other agencies.

Several commenters objected to the requirement for a delineation of special aquatic sites and other waters of the United States under paragraph (b)(4) of this general condition, because requiring a full delineation has become a significant cause of delays and increased costs due to uncertainties regarding the extent of Federal jurisdictional waters under U.S. Supreme Court decisions in 2001 and 2006. One commenter said that in the second sentence of paragraph (b)(4) the term ''wetland delineation'' should be replaced with ''delineation of waters of the United States,'' because the requirement is for not only a delineation of wetlands but also of other waters of the United States. One commenter suggested modifying paragraph (b)(4) to clarify that a jurisdictional determination is not required with the submittal of a complete pre-construction notification, just a delineation of waters of the United States, which would be completed by either the prospective permittee or the Corps.

We have modified paragraph (b)(4) to state that a pre-construction notification must include a delineation of wetlands, other special aquatic sites, and other aquatic habitats (e.g., perennial, intermittent, and ephemeral streams, and lakes and ponds) on the project site, instead of a delineation of special aquatic sites and other waters of the United States. Use of the term ''waters of the United States'' in this paragraph implies that an approved jurisdictional determination would have to be done for a NWP pre-construction notification. An approved jurisdictional determination is an official Corps determination that jurisdictional ''waters of the United States'' or ''navigable waters of the United States,'' or both, are either present or absent on a particular site, and precisely identifies the limits of those waters on the project site that are determined to be jurisdictional under the Clean Water Act or Sections 9 and 10 of the Rivers and Harbors Act of 1899 (see Regulatory Guidance Letter 08–02). We understand that many users of the NWPs do not want to obtain an approved jurisdictional determination, and that preliminary jurisdictional determinations may be appropriate for the purposes of NWP authorizations.

Under a preliminary jurisdictional determination, the wetlands, other special aquatic sites, and other aquatic habitats on the project site are presumed to be waters of the United States for the purposes of the NWP authorization, and any compensatory mitigation that may be required. A project proponent has the option of requesting an approved jurisdictional determination if he or she believes that some or all of the wetlands, special aquatic sites, or other aquatic habitats are not waters of the United States, and wants an official jurisdictional determination from the Corps. A request for an approved jurisdictional determination should be submitted to the Corps in advance of submitting a pre-construction notification, because the Corps may not be able to make an approved jurisdictional determination within the 45-day pre-construction notification review period, and this NWP rule does not contain a provision stating that approved jurisdictional determinations

are necessary to make a decision on an NWP pre-construction notification.

Several commenters suggested modifying the general condition to allow the applicant to satisfy the pre-construction notification requirement by demonstrating that consultation under the National Historic Preservation Act (NHPA) and/or Endangered Species Act (ESA) has been completed and has resulted in a finding that the project would not adversely affect resources protected under those statutes. One of the commenters also stated that paragraph (e)(1) is incorrect, because the condition refers to a limit of 300 feet, but NWP 13 has a limit of 500 feet that can be waived. One commenter stated that submittal of a pre-construction notification should be required for any NWPs within 303(d) impaired waters and that the applicant should prepare a statement identifying how the project avoids contributing to existing water quality impairments and maintains consistency with any existing Total Daily Maximum Loads (TMDLs).

Pre-construction notification is required for NWP activities that might affect endangered or threatened species listed, or proposed for listing, under the Endangered Species Act (see 33 CFR 330.4(f)(2)). Likewise, pre-construction notification is required for NWP activities that may affect historic properties (see 33 CFR 330.4(g)(2)). It is the Corps responsibility to make effect determinations for the purposes of the NWP authorizations. Information provided by the project proponent for Endangered Species Act or National Historic Preservation Act compliance will be fully considered by the district engineer, but it is the district engineer's decision as to whether the requirements of those acts have been complied with for the NWP authorizations. We have determined that modification of paragraph (e)(1) (which has been moved to paragraph 1 of Section D, District Engineer's Decision) is not necessary, as the 500 linear foot limit for the request for a waiver of NWP 13 is ''an otherwise applicable limit'' as specified in this text. The state agency that makes water quality certifications for the NWPs has the authority to determine whether an NWP should authorize discharges into 303(d) impaired waters, so we do not believe pre-construction notification should be categorically required for all such discharges. As noted previously, many waters are impaired for pollutants not related to discharges of dredge or fill material.

Two commenters said that under paragraph (c) of this general condition, there are problems with using ENG 4345 for pre-construction notifications, because the standard permit form requires information that is not listed in paragraphs (b)(2) through (b)(7), and those paragraphs also cite information that is not required by ENG 4345.

The standard permit form, ENG 4345, may be used for pre-construction notifications, and it is not necessary to fill out those fields in ENG 4345 that are not relevant to paragraphs (b)(2) through (b)(7). The prospective permittee must supplement ENG 4345 if the NWP pre-construction notification must include information that is not specifically required by ENG 4345. A permittee is not required to use ENG 4345 for pre-construction notification as long as all required information is included.

Several commenters said that the threshold for agency coordination should be increased, or that interagency coordination is not necessary. In contrast, several commenters stated that the thresholds for agency coordination should be decreased. One commenter said agency coordination should be required for any activity potentially impacting approved mitigation banks, other mitigation areas, or local, state, or Federal public properties. One commenter suggested requiring agency coordination for NWP 12 activities, because they could result in the loss of greater than ½-acre of waters of the United States.

We believe the agency coordination thresholds established in paragraph (d)(2) of this general condition are appropriate, and focus on those activities where it would be helpful to solicit the views of the listed agencies prior to making a decision on an NWP pre-construction notification. Potential impacts to mitigation banks, other compensatory mitigation project sites, or other public properties are more appropriately addressed through the district engineer's review, and do not require additional agency coordination under the NWP program. However, agency coordination may be required under other regulations, such as 33 CFR 332.8, which has an interagency review process for the establishment and operation of mitigation banks and in-lieu fee programs. A proposed activity that may directly affect an approved mitigation bank or in-lieu fee project site may require the district engineer to consult with an interagency review team before making a decision on that activity. The limits for NWP 12 apply to single and complete projects, and for each single and complete project the NWP 12 activity may not result in the loss of greater than ½-acre of waters of the United States. As discussed elsewhere in this final rule, in response to pre-construction notifications for NWP 12 activities that are linear projects, district engineers will evaluate the cumulative effects of those linear projects on the aquatic environment when determining whether authorization by NWP is appropriate. We do not believe it is necessary to require agency coordination for those linear projects.

This general condition is adopted with the modifications discussed above.

District Engineer's Decision

We have established a new Section D, District Engineer's Decision, by moving paragraph (e) of the proposed general condition 30 (now designated as general condition 31) to a separate section of the NWPs. We believe this is appropriate because the proposed paragraph (e) does not require compliance on the part of the permittee. Therefore, the criteria that district engineers use to determine whether a particular activity is authorized by NWP should not be in the general conditions. The comments received in response to the proposed paragraph (e) of the pre-construction notification general condition have been moved to this new section.

Two commenters objected to the language which states that the district engineer must determine that the proposed NWP activity is not contrary to the public interest. One of these commenters said that Section 404(e) of the Clean Water Act does not require such a public interest review for NWP activities, and this provision should be deleted because it conflicts with other Corps regulations.

The NWP regulations clearly state that the district engineer may exercise discretionary authority if he or she identifies concerns for the aquatic environment under the 404(b)(1) Guidelines or for any factor of the public interest (see 33 CFR 330.1(d)). In addition, the NWP regulations also require the district engineer to review pre-construction notifications and add conditions to the NWP authorization if necessary to ensure that the activity results in minimal individual and cumulative adverse effects on the aquatic environment and the public interest (see 33 CFR 330.1(e)(2)). The Corps issued those regulations under its authority under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.

One commenter suggested adding definitions of the terms ''direct'' and ''indirect'' to the NWPs. Two commenters requested clarification on when a district engineer can exercise discretionary authority for the purposes of the NWP authorization, particularly for those circumstances where pre-

construction notification is not required by the NWP. Several commenters said that the district engineer should also evaluate the environmental benefits of a project.

We have added definitions for the terms ''direct effects'' and ''indirect effects'' to the ''Definitions'' section of the NWPs. District engineers have the authority to modify, suspend, or revoke any NWP authorization (see 33 CFR 330.1(d) and 33 CFR 330.4(e)(2)) when he or she has identified sufficient concerns for the environment or other factors of the public interest. District engineers may also consider environmental benefits that may result when making a decision as to whether an NWP activity results in minimal individual and cumulative adverse effects to the aquatic environment.

One commenter stated that the factors required for a district engineer to make a minimal effects determination on a request for a waiver of the limits of any NWP suggests a level of analysis that is more comparable to the individual permit process, which threatens the availability of the NWPs for prospective permittees.

The evaluation of a request for a waiver of the 300 linear foot limit for the loss of intermittent or ephemeral stream bed, or any other limit that can be waived by the district engineer, is an important tool for maintaining flexibility in the NWP, and authorizing activities that result in minimal individual and cumulative adverse effects on the aquatic environment. The waiver review process is not comparable to the individual permit review process, because it does not require a public notice, National Environmental Policy Act documentation, and a project-specific 404(b)(1) Guidelines analysis.

In response to the proposed considerations for making minimal effects determination, one commenter suggested adding the type of resource that will be affected by the NWP. This commenter also recommended defining the term ''minimal effects'' as those effects that constitute relatively small changes in the affected environment and insignificant changes in ecological function or hydrology. This commenter said the minimal effects decision may also depend on whether the proposed activity will occur in a special aquatic site, its proximity to nesting or spawning areas, the presence of state- or federally-listed species of concern other than endangered or threatened species, and the amount of permitted or unpermitted aquatic resource loss in the same watershed, stream reach, and/or bay or estuary.

We agree that adding the resource type is appropriate, because the minimal effects threshold may be different for a difficult-to-replace resource such as a stream, bog, fen, or spring. We do not agree that a finding of minimal effects should be based on small changes to the affected environment, ecological function, or hydrology. While the NWPs have acreage or linear foot limits, or inherent limits based on the type of activity authorized, at a small scale those activities result in complete losses of ecological function or hydrology because most discharges of dredged or fill material into waters of the United States replace aquatic areas with dry land. These complete losses of waters of the United States often have minimal individual and cumulative adverse effects on the aquatic environment. It is the environmental setting and other factors listed in the proposed paragraph (e)(1) (which has been changed to paragraph (1) of Section D) that are more appropriate for making the minimal effects determination. It is also the broader watershed or landscape context that is important for determining whether minimal adverse effects on the aquatic environment will result. Proximity to nesting or spawning areas is more appropriately addressed through compliance with general condition 4, migratory bird breeding areas, and general condition 3, spawning areas. Division engineers may impose regional conditions to restrict or prohibit the use of NWPs to authorize activities that may affect state- or federally-listed species of concern if they determine, after the public notice and comment process, it is in the public interest to add such regional conditions to ensure minimal adverse effects. The Corps is required to consider effects within a wetland, stream reach, or coastal waterbody that are caused either by an individual activity, or cumulatively by many such activities authorized by the same NWP, and to determine that such effects are minimal before use of an NWP can be authorized.

We have made additional modifications to the text of this provision of the NWPs. In the first paragraph, we have added a sentence stating that for linear projects, the district engineer will evaluate the individual crossings to determine if they satisfy the terms and conditions of the applicable NWP(s), as well as the cumulative effects of all the crossings authorized by NWPs. This sentence is consistent with the preamble for the NWP final regulation published in the November 22, 1991, issue of the **Federal Register**, in which the definition of ''single and complete project'' at 33 CFR 330.2(i) was promulgated (see 56 FR 59114).

In paragraphs (2) and (3) of Section D, we have added text to be consistent with the mitigation rule at 33 CFR part 332, with a focus on adding activity-specific conditions to the NWP authorization for compensatory mitigation requirements. We have also added a provision to the end of paragraph (3) stating that the district engineer may determine that prior approval of a mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. This provision is consistent with 33 CFR 332.3(k)(3).

Definitions

Best management practices (BMPs). We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Compensatory mitigation. We proposed to modify this definition to make it consistent with the definition of this term found in 33 CFR 332.2. We did not receive any comments on the proposed definition and the definition is adopted as proposed.

Currently serviceable. We did not proposed any changes for this definition. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Direct effects. In response to several comments, we are adding a definition of ''direct effects'' to provide clarification to be used with paragraph (1) of Section D, District Engineer's Decision. We have adapted this definition from the Council of Environmental Quality's definition in their National Environmental Policy Act regulations at 40 CFR 1508.8(a).

Discharge. The proposed definition included the phrase ''and any activity that causes or results in such a discharge.''

One commenter said that that phrase should be removed because it is inconsistent with court decisions on the definition of ''discharge of dredged material.'' We inadvertently included the language in the proposal, and are removing it from the definition.

This definition is adopted with the modification discussed above.

Enhancement. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Ephemeral stream. We did not propose any changes to the definition. One commenter said the definition should be modified to state that for ephemeral streams, flow is also derived from snow melt as well as rainfall. One

commenter requested clarification that the definition of ephemeral stream did not include roadside ditches.

While snow melt may contribute to the flow of ephemeral streams, snow melt also contributes to the flow of intermittent and perennial streams, especially in areas with deep snow packs. The proposed definition appropriately focuses on the duration of flow, and melting snow should not be considered a precipitation event since the development of snow pack occurs over the course of a winter season. Therefore, we are not making the suggested change. Ephemeral streams may, in some circumstances, be channelized or relocated to become roadside ditches, so we do not agree that recommended change should be made.

The definition is adopted as proposed.

Establishment (creation). We did not receive any comments on the proposed definition. The definition is adopted as proposed.

High Tide Line. We proposed to add this as a new definition, based on the definition at 33 CFR 328.3(d). One commenter suggested expanding the definition of storm surges to include build up of water against a coast or a bay by flood waters which cause water levels to exceed spring high tide levels.

We do not agree that the suggested change should be made to this definition, because it would make the definition inconsistent with 33 CFR 328.3(d), which states that storm surges are not to be used to identify the high tide line.

The definition is adopted as proposed.

Historic property. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Independent utility. We proposed to add ''non-linear'' in the first sentence after ''complete'' and before project to reflect the independent utility test only applies to single and complete non-linear projects.

One commenter requested that the term ''independent utility'' be eliminated from the nationwide permit program because it discourages assessment of a project's total impacts. Another commenter asked whether the term independent utility applied to both single and complete non-linear projects and single and complete linear projects.

The concept of ''independent utility'' is important for the implementation of the NWP program because it provides a useful test to help determine whether proposed activities requiring Department of the Army authorization should be evaluated together for one permit authorization, or may be evaluated separately to determine if each activity qualifies for its own permit authorization. Despite the independent utility test, the cumulative effects of NWP activities must still be evaluated by district engineers when they review pre-construction notifications or other NWP verification requests. The modified definition makes it clear that the independent utility test only applies to single and complete non-linear projects; however, separate linear projects may have independent utility.

This definition is adopted as proposed.

Indirect effects. In response to several comments, we are adding a definition of ''indirect effects'' to provide clarification to be used with paragraph (1) of Section D, District Engineer's Decision. We have adapted this definition from the Council on Environmental Quality's definition in their National Environmental Policy Act regulations at 40 CFR 1508.8(b).

Intermittent stream. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Loss of waters of the United States. We did not propose any changes to the definition. One commenter said the loss of stream bed should be defined. One commenter suggested revising this definition to state that waters of United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States, especially as it relates to utility line construction. Another commenter said that clarification should be provided to state that for the purposes of the NWPs, the loss of waters of the United States generally does not include the cleared area along the utility line right-of-way between two poles or towers supporting overhead power transmission lines. One commenter requested clarification of application of this definition to activities in the ocean, bays, and Great Lakes, especially in the context of NWP 52 activities. This commenter recommended stating, for the purposes of NWP 52, that the loss only applies to the area of the ocean, bay, or Great Lakes occupied by wind towers and associated structures such as meteorological towers and transformers.

The proposed definition stated that the loss of stream bed results from filling or excavating the stream bed, and we do not believe it is necessary to change that definition. The proposed definition also stated that waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. That provision may apply to temporary impacts to waters of the United States caused by utility lines activities, or to any other activity involving temporary filling, flooding, excavation, or drainage. While the presence of an overhead utility line above waters of the United States does not constitute a ''loss of waters of the United States,'' the construction of a utility line right-of-way for overhead transmission lines may result in losses of waters of the United States if it involves discharges of dredged or fill material into waters of the United States that cause permanent conversions of aquatic areas to dry land or permanent increases to the bottom elevation of a waterbody.

The application of this definition to renewable energy generation facilities in coastal waters and the Great Lakes depends on the type of activity. A structure installed in these waters is generally not considered to result in a loss of waters of the United States, unless it is a pile supported structure that is constructed by placing a series of piles so closely together that they have the effect of fill (see 33 CFR 323.3(c)). If the construction of these facilities and associated structures involves the placement of materials that meet either the definition of ''discharge of dredged material'' at 33 CFR 323.2(d) or ''discharge of fill material'' at 33 CFR 323.2(f), such as the placement of riprap at the base of a pile supported structure, then the area of sea bed or lake bed covered by that dredged or fill material would be counted towards the ''loss of waters of the United States'' for that activity.

The definition is adopted as proposed.

Non-tidal wetland. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Open water. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Ordinary high water mark. We did not propose any changes to the definition. One commenter said the definition should state that, for flowing waters, the term ordinary high water mark includes the bankfull stage or elevation, since this indicator can be readily delineated at most locations.

The bankfull elevation is not a useful tool for identifying the ordinary high water marks of streams or rivers in some parts of the country, especially the arid west. In the arid west, the Corps

examines stream geomorphology and vegetation that is responsive to the dominant stream discharge to identify the ordinary high water mark for intermittent and ephemeral streams (see ''A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual'' published by the Corps Engineer Research and Development Center, report number ERDC/CRREL TR–08–12, dated August 2008).

The definition is adopted as proposed.

Perennial stream. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Practicable. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Pre-construction notification. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Preservation. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Re-establishment. We proposed to modify this definition by adding ''and functions'' to the end of the last sentence in order to be consistent with the definition of this term found in 33 CFR 332.2.

Two commenters objected to the proposed change. The addition of the phrase ''and functions'' makes this definition consistent with the definition at 33 CFR 332.2, which was promulgated in 2008. The objective of re-establishing aquatic resources is to provide aquatic resource functions.

The definition is adopted as proposed.

Rehabilitation. We did not propose any changes to this definition. One commenter expressed support of this definition. The definition is adopted as proposed.

Restoration. We did not propose any changes to this definition. One commenter expressed support of this definition. The definition is adopted as proposed.

Riffle and pool complex. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Riparian areas. We did not propose any changes to this definition, and we did not receive any comments on the proposed definition. We have changed this definition to more accurately describe where riparian areas occur, and what types of features may be found in riparian areas. We have replaced the word ''waterbody'' with the phrase ''riverine, lacustrine, estuarine, and marine waters,'' since the definition of ''waterbody'' includes wetlands and wetlands by themselves do not have riparian areas. We have also added ''wetlands, non-wetland waters, or'' between the words ''adjacent'' and ''uplands'' since riparian areas are not limited to uplands. There may be wetlands and non-wetland (open) waters such as oxbow lakes and ponds within a riparian area. The definition is adopted with the modifications discussed above.

Shellfish seeding. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Single and complete linear project and single and complete non-linear project. We proposed to take the definition of ''single and complete project'' and split it into two definitions to clarify the use the term ''single and complete project'' for linear and non-linear projects. Our proposal was based on the definition for ''single and complete project'' at 33 CFR 330.2(i) that was provided in the November 22, 1991, final rule (56 FR 59113).

Many commenters expressed support for the proposal. Most of these commenters also agreed that the independent utility test does not apply to single and complete linear projects. They said the proposed definitions will remove some of the uncertainty and inconsistencies that currently exist with respect to how multiple stream and wetland crossings are evaluated for linear projects as opposed to non-linear projects. One commenter asked for assurance that these new definitions would not materially affect how the Corps evaluates separate crossings of tributaries for the purposes the NWP program.

These two definitions are consistent with the NWP regulations and are not expected to have an effect on the Corps current practices for implementing the NWP program for both linear and non-linear projects.

One commenter opposed differentiating between linear and non-linear projects for the purposes of the definition of single and complete project. One commenter said that references to single and complete linear projects and single and complete non-linear projects should be removed from the NWPs. One commenter stated that these two definitions would complicate the water quality certification process.

The separate definitions established in today's rule will help provide consistent implementation of the NWP program by clarifying how the term ''single and complete project'' should be applied for different types of activities authorized by NWP. These definitions are important for efficient implementation of the Corps Regulatory Program and determining whether a particular regulated activity and any related regulated activities qualify for NWP authorization. Therefore, we do not agree that these terms should be removed from the NWP program. The definition of ''single and complete project'' for the NWPs has been in place since 1991 and the separate definitions provided in today's final rule are consistent with the 1991 definition. Therefore, the use of these definitions should not complicate the water quality certification process.

One commenter requested the addition of examples, such as utility lines, to the definition of single and complete linear project. One commenter asked for clarification on whether the term independent utility only applies to non-linear single and complete projects. Several commenters said the definition of single and complete linear project should preclude district engineers from evaluating separate crossings cumulatively.

The new definitions distinguish between linear and non-linear projects and reflect the fact that while each single and complete non-linear project must have independent utility, each single and complete linear project need not have independent utility within the overall linear project. However, separate linear projects may have independent utility. To clarify what a linear project is, we have added a sentence to the definition of single and complete linear project to state that a linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point. A linear project may involve multiple crossings of streams, wetlands, or other types of waters from the point of origin to the terminal point. Roads and pipelines are examples of linear projects. While each separate and distant crossing of a waterbody associated with a linear project would be considered a separate single and complete project for the purposes of the NWPs, district engineers will also evaluate the cumulative effects of those crossings to determine whether they qualify for NWP authorization.

One commenter said that for an overall linear project the sum total of the losses of waters of the United States associated with that linear project cannot exceed the acreage or linear foot limits for an NWP. Several commenters stated that it was inappropriate to use multiple NWPs to authorize multiple crossings associated with one overall linear project, because it would be

impossible for the district engineer to determine if the overall project had minimal adverse effects on the environment or prevent the Corps from assessing the cumulative effects caused by the overall project. One commenter said these two proposed definitions may conflict with the NWP general conditions.

For single and complete linear projects, each separate and distant crossing of a waterbody, as well as each crossing of other waterbodies along the corridor for the linear project may be permitted by separate NWP authorizations. The acreage and other applicable limits for an NWP would be applied to each crossing, as long as those crossings are far enough apart to be considered separate and distant. District engineers will evaluate the cumulative effects of those linear projects when determining whether authorization by NWP is appropriate. The approach to cumulative effects analysis for linear projects is little different than the cumulative effects analysis for other types of NWP activities, including those circumstances in which more than one NWP is used to authorize a single and complete non-linear project, because cumulative effects are evaluated on a regional basis. Cumulative effects analysis may be done on a watershed basis, or by using a different type of geographic area, such as an ecoregion.

One commenter asked how offshore wind energy projects would be evaluated in accordance with these definitions, especially how the turbines, substations, cables, and associated infrastructure would be considered as either single and complete linear projects or single and complete non-linear projects.

Deciding which definition to apply to a particular project depends on the configuration of the project relative to the locations of waters of the United States within the project boundaries. For offshore wind energy projects, the turbines would be located on structures in a single waterbody as would the transmission cables that transfer the energy from the turbines to a land-based substation, while land-based attendant features might be constructed in separate waterbodies located within a tract of land. The off-shore turbine structures and land-based attendant features may be considered as a single and complete non-linear project, while as discussed above for NWPs 51 and 52, the utility lines that transfer the energy from the renewable energy generation facilities to a distribution system, regional grid, or other facility may be considered to be separate single and complete linear projects and may be authorized under a separate NWP, such as NWP 12. The district engineer will have to consider the activity-specific circumstances when determining which definition to apply and which NWPs are appropriate to use.

One commenter asked whether district engineers have the authority to change the definitions of single and complete project or independent utility. Two commenters said the term ''distant'' should be defined in ''single and complete linear project.''

The definitions provided in today's final rule cannot be changed by district engineers, but those definitions will be subject to interpretation after these NWPs go into effect and they are implemented. It is not practical to provide specific definition of ''distant'' since that must be a judgment call by the district engineer because of the substantial variability in landscapes and environmental conditions across the country.

The definition for ''single and complete linear project'' is adopted with the modification discussed above. The definition for ''single and complete non-linear project'' is adopted as proposed.

Stormwater management. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stormwater management facilities. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stream bed. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stream channelization. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Structure. We did not propose any changes to the definition. One commenter requested that we include bridges and culverts in the definition of structures.

Depending on how a bridge or culvert is constructed, and its effects on the aquatic environment, it may be considered a structure or fill. The bridge supports (i.e., bents) may be considered to be a structure for the purposes of this definition. However, placement of a culvert in a water of the United States can have the effect of raising the bottom elevation and thus should be regulated as fill. Accordingly, we are retaining the definition of structure as is presently proposed.

Tidal wetland. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Vegetated shallows. We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Waterbody. We did not receive any comments on the proposed definition, but we believe some modification of the definition is necessary to make it simpler and clearer. The revised definition simply says that, for the purposes of the NWPs, a waterbody is a jurisdictional water of the United States. We have removed the text referring to the presence of standing or flowing water above ground and the statement that an ordinary high water mark is an indicator of jurisdiction. The ordinary high water mark indicates the lateral extent of jurisdiction for a non-wetland waterbody in the absence of adjacent wetlands (see 33 CFR 328.4(c)(1)); the jurisdictional status of the waterbody is determined by applying the appropriate regulatory or legal criteria. In cases where the waterbody is a wetland, the lateral extent of the waterbody is the wetland boundary. Likewise, we have revised the last sentence of this definition by removing the phrase ''a jurisdictional waterbody displaying an OHWM or other indicators of jurisdiction'' and replacing it with ''a waterbody determined to be a water of the United States under 33 CFR 328.3(a)(1)–(6)''.

The definition is adopted with the modifications discussed above.

In addition to the comments submitted on definitions provided in the proposed rule, we received a number of comments suggesting the addition of more definitions to the ''Definitions'' section of the NWPs.

One commenter requested that we define ''discrete event'' as it pertains to NWP 3 and NWP 45. One commenter asked for a definition of mechanized land clearing as it relates to the first pre-construction notification threshold in NWP 12, to make it clear whether activities that only involve the cutting or removal of vegetation above the ground are, or are not, regulated activities. One commenter said that the definition of fill should be provided in the NWPs to clarify the types of materials allowed or prohibited by the NWPs.

What constitutes a ''discrete event'' for the purposes of NWPs 3 and 45 is at the discretion of the district engineer, and in both NWPs we provide examples that give context to the term ''discrete event.'' In NWP 3, storms, floods, and fire are examples of discrete events. For NWP 45, storms and floods provide examples of discrete events. The definition of ''discharge of dredged material'' at 33 CFR 323.2(d) is used to determine whether mechanized landclearing involves a discharge of

dredged material that is regulated under Section 404 of the Clean Water Act. Project proponents are encouraged to contact the district engineer to determine whether a particular activity involving mechanized clearing of a utility line right-of-way in a forested wetland constitutes a regulated activity, because the equipment and techniques used are important considerations. The definition of the term ''fill material'' is provided in the Corps regulations at 33 CFR 323.2(e). Nationwide permit activities must comply with general condition 6, suitable material, and it is not feasible to provide a comprehensive list of the types of materials that may be used as fill material for NWP activities.

One commenter suggested adding a definition of ''special aquatic sites'' in the NWPs. One commenter said the definition of special aquatic sites should include glides, side channels, floodplains, and other types of habitats that create and maintain habitat for salmon and other fish species.

The NWPs have a definition for one of the special aquatic sites listed in the 404(b)(1) Guidelines, specifically riffle and pool complexes and vegetated shallows. Definitions for the other special aquatic sites, that is, sanctuaries and refuges, wetlands, mud flats, and coral reefs, are found at sections 230.40, 230.41, 230.42, and 230.44 of 40 CFR part 230, respectively. Glides, side channels, floodplains, and salmon and fish habitat are not considered special aquatic sites unless they satisfy the criteria at 40 CFR 230.40 through 230.45.

Regional Conditioning of the Nationwide Permits

Concurrent with this **Federal Register** notice, district engineers are issuing local public notices. In addition to the changes to some NWPs and NWP conditions required by the Chief of Engineers, division and district engineers may propose regional conditions or propose revocation of NWP authorization for all, some, or portions of the NWPs. Regional conditions may also be required by state or Tribal water quality certification or for state Coastal Zone Management Act consistency. District engineers will announce regional conditions or revocations by issuing local public notices. Information on regional conditions and revocation can be obtained from the appropriate district engineer, as indicated below. Furthermore, this and additional information can be obtained on the Internet at *http://www.saj.usace.army.mil/Divisions/Regulatory/HQAvatar.htm* which will help the public find the home page of the appropriate Corps district office.

Contact Information for Corps District Engineers

Alabama

Mobile District Engineer, ATTN: CESAM–RD, 109 St. Joseph Street, Mobile, AL 36602–3630

Alaska

Alaska District Engineer, ATTN: CEPOA–RD, P.O. Box 6898, Elmendorf AFB, AK 99506–6898

Arizona

Los Angeles District Engineer, ATTN: CESPL–RG–R, P.O. Box 532711, Los Angeles, CA 90053–2325

Arkansas

Little Rock District Engineer, ATTN: CESWL–RD, P.O. Box 867, Little Rock, AR 72203–0867

California

Sacramento District Engineer, ATTN: CESPK–RD, 1325 J Street, Sacramento, CA 95814–2922

Colorado

Albuquerque District Engineer, ATTN: CESPA–OD–R, 4101 Jefferson Plaza NE., Albuquerque, NM 87109–3435

Connecticut

New England District Engineer, ATTN: CENAE–R, 696 Virginia Road, Concord, MA 01742–2751

Delaware

Philadelphia District Engineer, ATTN: CENAP–OP–R, Wannamaker Building, 100 Penn Square East Philadelphia, PA 19107–3390

Florida

Jacksonville District Engineer, ATTN: CESAJ–RD, P. O. Box 4970, Jacksonville, FL 32232–0019

Georgia

Savannah District Engineer, ATTN: CESAS–RD, 100 West Oglethorpe Avenue, Savannah, GA 31401–3640

Hawaii

Honolulu District Engineer, ATTN: CEPOH–EC–R, Building 230, Fort Shafter, Honolulu, HI 96858–5440

Idaho

Walla Walla District Engineer, ATTN: CENWW–RD, 201 North Third Avenue, Walla Walla, WA 99362–1876

Illinois

Rock Island District Engineer, ATTN: CEMVR–OD–P, P.O. Box 2004, Rock Island, IL 61204–2004

Indiana

Louisville District Engineer, ATTN: CELRL–OP–F, P.O. Box 59, Louisville, KY 40201–0059

Iowa

Rock Island District Engineer, ATTN: CEMVR–OD–P, P.O. Box 2004, Rock Island, IL 61204–2004

Kansas

Kansas City District Engineer, ATTN: CENWK–OD–R, 635 Federal Building, 601 E. 12th Street, Kansas City, MO 64106–2896

Kentucky

Louisville District Engineer, ATTN: CELRL–OP–F, P.O. Box 59, Louisville, KY 40201–0059

Louisiana

New Orleans District Engineer, ATTN: CEMVN–OD–S, P.O. Box 60267, New Orleans, LA 70160–0267

Maine

New England District Engineer, ATTN: CENAE–R, 696 Virginia Road, Concord, MA 01742–2751

Maryland

Baltimore District Engineer, ATTN: CENAB–OP–R, P.O. Box 1715, Baltimore, MD 21203–1715

Massachusetts

New England District Engineer, ATTN: CENAE–R, 696 Virginia Road, Concord, MA 01742–2751

Michigan

Detroit District Engineer, ATTN: CELRE–RG, 477 Michigan Avenue, Detroit, MI 48226–2550

Minnesota

St. Paul District Engineer, ATTN: CEMVP–OP–R, 180 Fifth Street East, Suite 700, St. Paul, MN 55101–1678

Mississippi

Vicksburg District Engineer, ATTN: CEMVK–OD–F, 4155 Clay Street, Vicksburg, MS 39183–3435

Missouri

Kansas City District Engineer, ATTN: CENWK–OD–R, 635 Federal Building, 601 E. 12th Street, Kansas City, MO 64106–2896

Montana

Omaha District Engineer, ATTN: CENWO–OD–R, 1616 Capitol Avenue, Omaha, NE 68102–4901

Nebraska

Omaha District Engineer, ATTN: CENWO–OD–R, 1616 Capitol Avenue, Omaha, NE 68102–4901

Nevada

Sacramento District Engineer, ATTN: CESPK–CO–R, 1325 J Street, Sacramento, CA 95814–2922

New Hampshire

New England District Engineer, ATTN: CENAE–R, 696 Virginia Road, Concord, MA 01742–2751

New Jersey

Philadelphia District Engineer, ATTN: CENAP–OP–R, Wannamaker Building, 100 Penn Square East, Philadelphia, PA 19107–3390

New Mexico

Albuquerque District Engineer, ATTN: CESPA–OD–R, 4101 Jefferson Plaza NE., Albuquerque, NM 87109–3435

New York

New York District Engineer, ATTN: CENAN–OP–R, 26 Federal Plaza, New York, NY 10278–0090

North Carolina

Wilmington District Engineer, ATTN: CESAW–RG, P.O. Box 1890, Wilmington, NC 28402–1890

North Dakota

Omaha District Engineer, ATTN: CENWO–OD–R, 1616 Capitol Avenue, Omaha, NE 68102–4901

Ohio

Huntington District Engineer, ATTN: CELRH–OR–F, 502 8th Street, Huntington, WV 25701–2070

Oklahoma

Tulsa District Engineer, ATTN: CESWT–RO, 1645 S. 101st East Ave., Tulsa, OK 74128–4609

Oregon

Portland District Engineer, ATTN: CENWP–OD–G, P.O. Box 2946, Portland, OR 97208–2946

Pennsylvania

Baltimore District Engineer, ATTN: CENAB–OP–R, P.O. Box 1715, Baltimore, MD 21203–1715

Rhode Island

New England District Engineer, ATTN: CENAE–R, 696 Virginia Road, Concord, MA 01742–2751

South Carolina

Charleston District Engineer, ATTN: CESAC–CO–P, P.O. Box 919, Charleston, SC 29402–0919

South Dakota

Omaha District Engineer, ATTN: CENWO–OD–R, 1616 Capitol Avenue, Omaha, NE 68102–4901

Tennessee

Nashville District Engineer, ATTN: CELRN–OP–F, 3701 Bell Road, Nashville, TN 37214

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Galveston District Engineer, ATTN: CESWG–PE–R, P.O. Box 1229, Galveston, TX 77553–1229

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Sacramento District Engineer, ATTN: CESPK–RD, 1325 J Street, CA 95814–2922

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New England District Engineer, ATTN: CENAE–R, 696 Virginia Road, Concord, MA 01742–2751

Virginia

Norfolk District Engineer, ATTN: CENAO–WR–R, 803 Front Street, Norfolk, VA 23510–1096

Washington

Seattle District Engineer, ATTN: CENWS–OP–RG, P.O. Box 3755, Seattle, WA 98124–3755

West Virginia

Huntington District Engineer, ATTN: CELRH–OR–F, 502 8th Street, Huntington, WV 25701–2070

Wisconsin

St. Paul District Engineer, ATTN: CEMVP–OP–R, 180 Fifth Street East, Suite 700, St. Paul, MN 55101–1678

Wyoming

Omaha District Engineer, ATTN: CENWO–OD–R, 1616 Capitol Avenue, Omaha, NE 68102–4901

District of Columbia

Baltimore District Engineer, ATTN: CENAB–OP–R, P.O. Box 1715, Baltimore, MD 21203–1715

Pacific Territories (American Samoa, Guam, & Commonwealth of the Northern Mariana Islands)

Honolulu District Engineer, ATTN: CEPOH–EC–R, Building 230, Fort Shafter, Honolulu, HI 96858–5440

Puerto Rico and Virgin Islands

Jacksonville District Engineer, ATTN: CESAJ–RD, P.O. Box 4970, Jacksonville, FL 32232–0019

Administrative Requirements

Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998, (63 FR 31855) regarding plain language, this preamble is written using plain language. The use of ''we'' in this notice refers to the Corps. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

Paperwork Reduction Act

These NWPs will result in a net decrease in the number of permittees who are required to submit a pre-construction notification, especially because of the changes to NWP 48. The content of the pre-construction notification is not changed from the current NWPs, and the paperwork burden will decrease because of the reduced number of pre-construction notifications submitted. The Corps estimates the decreased paperwork burden to be 4,005 hours per year. This is based on an average burden to complete and submit a pre-construction notification of 11 hours, and an estimated 45 NWP 48 activities that will still require pre-construction notifications, rather than 3,150 NWP 48 activities that were previously estimated to require either reporting or pre-construction notification. Prospective permittees who are required to submit a pre-construction notification for a particular NWP, or who are requesting verification that a particular activity qualifies for NWP authorization, may use the current standard Department of the Army permit application form or submit the required information in a letter. The total burden for filing pre-construction notifications is estimated at 330,000 hours per year (11 hours times 30,000 activities per year requiring pre-construction notification).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. For the Corps Regulatory Program under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information collection requirements is maintained by the Corps of Engineers (OMB approval number 0710–0003, which expires on August 31, 2012).

Executive Orders 12866 and 13563

Under Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76

FR 3821), we must determine whether the regulatory action is ''significant'' and therefore subject to review by OMB and the requirements of the Executive Orders. The Executive Orders define ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Orders 12866 and 13563, we determined that this action is a ''significant regulatory action'' and it was submitted to OMB for review. It is a significant regulatory action because it meets the fourth criterion in the Executive Order.

The most substantive changes to these NWPs are the additional limits imposed on NWP 21, which authorizes discharges of dredged or fill material into waters of the United States associated with surface coal mining activities, the issuance of NWPs 51 and 52, which authorize activities associated with renewable energy generation facilities, and the modifications to NWP 48 which authorize existing and new commercial shellfish aquaculture activities.

The changes to the NWPs that are most likely to result in additional economic costs are the changes to NWP 21, especially the ½-acre and 300 linear foot limits and the prohibition against discharges of dredged or fill material to construct valley fills. We have prepared a brief economic analysis to estimate the additional costs that will be imposed on the regulated public as a result of the change to the NWPs. It is available in the docket for this action at *www.regulations.gov*, docket number COE–2010–0035.

The issuance of NWPs 51 and 52 will reduce the number of renewable energy generation facilities involving activities regulated under section 404 and/or section 10 requiring individual permits. While some components of land-based renewable energy generation facilities, such as road crossings, utility lines, and building pads involving discharges of dredged or fill material into waters of the United States, have been authorized by NWPs such as NWPs 14, 12, and 39 in the past, the new NWP 51 will provide DA authorization for all components of land-based renewable energy generation facilities that involve discharges of dredged or fill material into waters of the United States. There was no NWP authorization available for water-based renewable energy generation pilot projects, so the new NWP 52 will reduce the number of those activities that require individual permits.

The NWPs support the goals of Executive Order 13563, ''Improving Regulation and Regulatory Review'' by reducing burdens on the regulated public through a streamlined process for obtaining Department of the Army authorization for activities that will result in minimal individual and cumulative adverse effects on the aquatic environment. The NWPs reissued today, when considered as an overall package of NWPs, will authorize more activities than were previously authorized by NWP, such as water-based renewable energy pilot projects and new commercial shellfish aquaculture activities.

Executive Order 13132

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires the Corps 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.'' The issuance of NWPs does not have federalism implications. We do not believe that the NWPs will have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. The NWPs will not impose any additional substantive obligations on State or local governments. Therefore, Executive Order 13132 does not apply to these final NWPs.

Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of the proposed issuance and modification of NWPs on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The statutes under which the Corps issues, reissues, or modifies NWPs are Section 404(e) of the Clean Water Act (33 U.S.C. 1344(e)) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403). Under section 404, Department of the Army (DA) permits are required for discharges of dredged or fill material into waters of the United States. Under section 10, DA permits are required for any structures or other work that affect the course, location, or condition of navigable waters of the United States. Small entities proposing to discharge dredged or fill material into waters of the United States and/or conduct work in navigable waters of the United States must obtain DA permits to conduct those activities, unless a particular activity is exempt from those permit requirements. Individual permits and general permits can be issued by the Corps to satisfy the permit requirements of these two statutes. Nationwide permits are a form of general permit issued by the Chief of Engineers.

Nationwide permits automatically expire and become null and void if they are not modified or reissued within five years of their effective date (see 33 CFR 330.6(b)). Furthermore, Section 404(e) of the Clean Water Act states that general permits, including NWPs, can be issued for no more than five years. If the current NWPs are not reissued small entities and other project proponents would be required to obtain alternative forms of DA permits (i.e., standard permits, letters of permission, or regional general permits) for activities involving discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Regional general permits that authorize similar activities as the NWPs may be available in some geographic areas, so small entities conducting regulated activities outside those geographic areas would have to obtain individual permits for activities that require DA permits.

Nationwide permits help relieve regulatory burdens on small entities who need to obtain DA permits. They provide an expedited form of authorization, as long as the project proponent meets all terms and conditions of the NWPs. In FY 2010, the Corps issued 32,029 NWP verifications, with an average processing time of 32 days. Those numbers do not include activities that are authorized by NWP, where the project proponent was not required to submit a pre-construction notification or did not voluntarily seek verification that an activity qualified for NWP authorization. The average processing time for the 2,085 standard permits issued during FY 2010 was 221 days. The NWPs issued and reissued today are expected to result in a slight increase in the numbers of activities potentially qualifying for NWP authorization. The estimated numbers of activities qualifying for NWP authorization are provided in the decision documents that were prepared for each NWP. The NWPs issued and reissued today are not expected to significantly increase cost or paperwork burden for authorized activities (relative to the NWPs issued in 2007), including those conducted by small businesses.

The costs for obtaining coverage under an NWP are low. We estimate the average time to prepare and file a pre-construction notification, for those activities where a pre-construction notification is required, is 11 hours. We do not believe this constitutes a ''significant economic impact'' on project proponents, including small businesses.

Another requirement of Section 404(e) of the Clean Water Act is that general permits, including NWPs, authorize only those activities that result in minimal adverse environmental effects, individually and cumulatively. The terms and conditions of the NWPs, such as acreage or linear foot limits, are imposed to ensure that the NWPs authorize only those activities that result in minimal adverse effects on the aquatic environment and other public interest review factors. In addition to the paperwork burden of filing a pre-construction notification, many NWPs require that low-cost, commonsense practices be used to minimize adverse effects. These requirements also do not constitute ''significant economic impacts.''

After considering the economic impacts of these NWPs on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. Small entities may obtain required DA authorizations through the NWPs, in cases where there are applicable NWPs authorizing those activities and the proposed work will result in minimal adverse effects on the aquatic environment and other public interest review factors. The terms and conditions of these NWPs will not generally impose significant economic costs on small entities, and do not generally impose higher costs on small entities than those of the previous NWPs. If an NWP is not available to authorize a particular activity, then another form of DA authorization, such as an individual permit or regional general permit, must be secured. However, as noted above, we expect a slight increase in the number of activities that can be authorized through these NWPs, because we are issuing two new NWPs and making substantial changes to NWP 48. The changes to NWP 48, commercial shellfish aquaculture activities, will result in fewer project proponents having to submit pre-construction notifications or reports to Corps districts. We have also modified NWP 48 to authorize new commercial shellfish aquaculture activities, which were not previously authorized by NWP. While we are making substantial changes to NWP 21, we are also providing NWP 21 authorization without the new limits for surface coal mining activities previously authorized under the 2007 NWP 21, to have an equitable transition for those surface coal mining activities that cannot complete the authorized work by March 18, 2013. For new NWP 21 activities subject to the new limits and prohibition against valley fills, where the project proponent is considered a small entity, the changes to that NWP will not result in a significant economic impact because the costs for obtaining an NWP 21 authorization is generally higher when compared to other NWPs, and approach the costs for obtaining an individual permit.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under Section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating a rule for which a written statement is needed, Section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed, under Section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the NWPs issued today do 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. The NWPs are generally consistent with current agency practice, do not impose new substantive requirements and therefore do 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. Therefore, the NWPs issued today are not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, we have determined that the NWPs contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the issuance of NWPs is not subject to the requirements of Section 203 of UMRA.

Executive Order 13045

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If

the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The NWPs issued today are not subject to this Executive Order because they are not economically significant as defined in Executive Order 12866. In addition, these NWPs do not concern an environmental or safety risk that we have reason to believe may have a disproportionate effect on children.

Executive Order 13175

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' The phrase ''policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

The NWPs issued today do not have tribal implications. They are generally consistent with current agency practice and will not have substantial direct effects 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. Therefore, Executive Order 13175 does not apply to this proposal. Corps districts are conducting government-to-government consultation with Indian tribes to develop regional conditions that help protect tribal rights and trust resources, and to facilitate compliance with general condition 17, Tribal Rights.

Environmental Documentation

A decision document, which includes an environmental assessment and Finding of No Significant Impact (FONSI), has been prepared for each NWP. These decision documents are available at: *http://www.regulations.gov* (docket ID number COE–2010–0035). They are also available by contacting Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street NW., Washington, DC 20314–1000.

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. We will submit a report containing the final NWPs and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The proposed NWPs are not a ''major rule'' as defined by 5 U.S.C. 804(2).

Executive Order 12898

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

The NWPs issued today are not expected to negatively impact any community, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

Executive Order 13211

The NWPs are not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Some of the NWPs authorize activities that support the supply and distribution of energy.

Authority

We are issuing new NWPs and reissuing existing NWPs under the authority of Section 404(e) of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*).

Dated: February 13, 2012.

Michael J. Walsh,

Major General, US Army, Deputy Commanding General for Civil and Emergency Operations.

Nationwide Permits, Conditions, Further Information, and Definitions

A. Index of Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions

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Stream bed
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Structure
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Waterbody

B. Nationwide Permits

1. *Aids to Navigation.* The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard (see 33 CFR, chapter I, subchapter C, part 66). (Section 10)

2. *Structures in Artificial Canals.* Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). (Section 10)

3. *Maintenance.* (a) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided that the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, requirements of other regulatory agencies, or current construction codes or safety standards that are necessary to make the repair, rehabilitation, or replacement are authorized. Any stream channel modification is limited to the minimum necessary for the repair, rehabilitation, or replacement of the structure or fill; such modifications, including the removal of material from the stream channel, must be immediately adjacent to the project or within the boundaries of the structure or fill. This NWP also authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the district engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(b) This NWP also authorizes the removal of accumulated sediments and debris in the vicinity of existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and/or the placement of new or additional riprap to protect the structure. The removal of sediment is limited to the minimum necessary to restore the waterway in the vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend farther than 200 feet in any direction from the structure. This 200 foot limit does not apply to maintenance dredging to remove accumulated sediments blocking or restricting outfall and intake structures or to maintenance dredging to remove accumulated sediments from canals associated with outfall and intake structures. All dredged or excavated materials must be deposited and retained in an area that has no waters of the United States unless otherwise specifically approved by the district engineer under separate authorization. The placement of new or additional riprap must be the minimum necessary to protect the structure or to ensure the safety of the structure. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the district engineer.

(c) This NWP also authorizes temporary structures, fills, and work necessary to conduct the maintenance activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills

must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

(d) This NWP does not authorize maintenance dredging for the primary purpose of navigation. This NWP does not authorize beach restoration. This NWP does not authorize new stream channelization or stream relocation projects.

Notification: For activities authorized by paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 31). The pre-construction notification must include information regarding the original design capacities and configurations of the outfalls, intakes, small impoundments, and canals. (Sections 10 and 404)

Note: This NWP authorizes the repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Clean Water Act Section 404(f) exemption for maintenance.

4. *Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.* Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, and clam and oyster digging, fish aggregating devices, and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks. (Sections 10 and 404)

5. *Scientific Measurement Devices.* Devices, whose purpose is to measure and record scientific data, such as staff gages, tide and current gages, meteorological stations, water recording and biological observation devices, water quality testing and improvement devices, and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards. Upon completion of the use of the device to measure and record scientific data, the measuring device and any other structures or fills associated with that device (e.g., foundations, anchors, buoys, lines, etc.) must be removed to the maximum extent practicable and the site restored to pre-construction elevations. (Sections 10 and 404)

6. *Survey Activities.* Survey activities, such as core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, exploratory trenching, soil surveys, sampling, sample plots or transects for wetland delineations, and historic resources surveys. For the purposes of this NWP, the term ''exploratory trenching'' means mechanical land clearing of the upper soil profile to expose bedrock or substrate, for the purpose of mapping or sampling the exposed material. The area in which the exploratory trench is dug must be restored to its pre-construction elevation upon completion of the work and must not drain a water of the United States. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. This NWP authorizes the construction of temporary pads, provided the discharge does not exceed 1/10-acre in waters of the U.S. Discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration are not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling mud and cuttings may require a permit under Section 402 of the Clean Water Act. (Sections 10 and 404)

7. *Outfall Structures and Associated Intake Structures.* Activities related to the construction or modification of outfall structures and associated intake structures, where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted by, or otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System Program (Section 402 of the Clean Water Act). The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Sections 10 and 404)

8. *Oil and Gas Structures on the Outer Continental Shelf.* Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of Interior, Bureau of Ocean Energy Management. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). The district engineer will review such proposals to ensure compliance with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this NWP will be limited to the effects on navigation and national security in accordance with 33 CFR 322.5(f), as well as 33 CFR 322.5(l) and 33 CFR part 334. Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, nor will such structures be permitted in EPA or Corps designated dredged material disposal areas.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Section 10)

9. *Structures in Fleeting and Anchorage Areas.* Structures, buoys, floats and other devices placed within anchorage or fleeting areas to facilitate moorage of vessels where the U.S. Coast Guard has established such areas for that purpose. (Section 10)

10. *Mooring Buoys.* Non-commercial, single-boat, mooring buoys. (Section 10)

11. *Temporary Recreational Structures.* Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use, provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (Section 10)

12. *Utility Line Activities.* Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than ½-acre of waters of the United States for each single and complete project.

Utility lines: This NWP authorizes the construction, maintenance, or repair of utility lines, including outfall and intake structures, and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in pre-construction contours. A ''utility line'' is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and

television communication. The term ''utility line'' does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

Utility line substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a power line or utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than ½-acre of waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for overhead utility line towers, poles, and anchors: This NWP authorizes the construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (See 33 CFR Part 322). Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP also authorizes temporary structures, fills, and work necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if any of the following criteria are met: (1) The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way; (2) a section 10 permit is required; (3) the utility line in waters of the United States, excluding overhead lines, exceeds 500 feet; (4) the utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along a stream bed that is within that jurisdictional area; (5) discharges that result in the loss of greater than 1/10-acre of waters of the United States; (6) permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 feet; or (7) permanent access roads are constructed in waters of the United States with impervious materials. (See general condition 31.) (Sections 10 and 404)

Note 1: Where the proposed utility line is constructed or installed in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, copies of the pre-construction notification and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.

Note 2: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work, in accordance with the requirements for temporary fills.

Note 3: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

Note 4: For overhead utility lines authorized by this NWP, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

13. *Bank Stabilization.* Bank stabilization activities necessary for erosion prevention, provided the activity meets all of the following criteria:

(a) No material is placed in excess of the minimum needed for erosion protection;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects;

(c) The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects;

(d) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects;

(e) No material is of a type, or is placed in any location, or in any manner, that will impair surface water flow into or out of any waters of the United States;

(f) No material is placed in a manner that will be eroded by normal or

expected high flows (properly anchored trees and treetops may be used in low energy areas); and,

(g) The activity is not a stream channelization activity.

This NWP also authorizes temporary structures, fills, and work necessary to construct the bank stabilization activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Invasive plant species shall not be used for bioengineering or vegetative bank stabilization.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the bank stabilization activity: (1) Involves discharges into special aquatic sites; or (2) is in excess of 500 feet in length; or (3) will involve the discharge of greater than an average of one cubic yard per running foot along the bank below the plane of the ordinary high water mark or the high tide line. (See general condition 31.) (Sections 10 and 404)

14. *Linear Transportation Projects.* Activities required for the construction, expansion, modification, or improvement of linear transportation projects (e.g., roads, highways, railways, trails, airport runways, and taxiways) in waters of the United States. For linear transportation projects in non-tidal waters, the discharge cannot cause the loss of greater than ½-acre of waters of the United States. For linear transportation projects in tidal waters, the discharge cannot cause the loss of greater than 1/3-acre of waters of the United States. Any stream channel modification, including bank stabilization, is limited to the minimum necessary to construct or protect the linear transportation project; such modifications must be in the immediate vicinity of the project.

This NWP also authorizes temporary structures, fills, and work necessary to construct the linear transportation project. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

This NWP cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The loss of waters of the United States exceeds 1/10-acre; or (2) there is a discharge in a special aquatic site, including wetlands. (See general condition 31.) (Sections 10 and 404)

Note: Some discharges for the construction of farm roads or forest roads, or temporary roads for moving mining equipment, may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4).

15. *U.S. Coast Guard Approved Bridges.* Discharges of dredged or fill material incidental to the construction of a bridge across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills, provided the construction of the bridge structure has been authorized by the U.S. Coast Guard under Section 9 of the Rivers and Harbors Act of 1899 and other applicable laws. Causeways and approach fills are not included in this NWP and will require a separate section 404 permit. (Section 404)

16. *Return Water From Upland Contained Disposal Areas.* Return water from an upland contained dredged material disposal area. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d), even though the disposal itself occurs in an area that has no waters of the United States and does not require a section 404 permit. This NWP satisfies the technical requirement for a section 404 permit for the return water where the quality of the return water is controlled by the state through the section 401 certification procedures. The dredging activity may require a section 404 permit (33 CFR 323.2(d)), and will require a section 10 permit if located in navigable waters of the United States. (Section 404)

17. *Hydropower Projects.* Discharges of dredged or fill material associated with hydropower projects having: (a) Less than 5000 kW of total generating capacity at existing reservoirs, where the project, including the fill, is licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; or (b) a licensing exemption granted by the FERC pursuant to Section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and Section 30 of the Federal Power Act, as amended.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Section 404)

18. *Minor Discharges.* Minor discharges of dredged or fill material into all waters of the United States, provided the activity meets all of the following criteria:

(a) The quantity of discharged material and the volume of area excavated do not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;

(b) The discharge will not cause the loss of more than 1/10-acre of waters of the United States; and

(c) The discharge is not placed for the purpose of a stream diversion.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge or the volume of area excavated exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line, or (2) the discharge is in a special aquatic site, including wetlands. (See general condition 31.) (Sections 10 and 404)

19. *Minor Dredging.* Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (i.e., section 10 waters). This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see 33 CFR 322.5(g)). (Sections 10 and 404)

20. *Response Operations for Oil and Hazardous Substances.* Activities conducted in response to a discharge or release of oil and hazardous substances that are subject to the National Oil and Hazardous Substances Pollution

Contingency Plan (40 CFR part 300) including containment, cleanup, and mitigation efforts, provided that the activities are done under either: (1) The Spill Control and Countermeasure Plan required by 40 CFR 112.3; (2) the direction or oversight of the federal on-scene coordinator designated by 40 CFR part 300; or (3) any approved existing state, regional or local contingency plan provided that the Regional Response Team (if one exists in the area) concurs with the proposed response efforts. This NWP also authorizes activities required for the cleanup of oil releases in waters of the United States from electrical equipment that are governed by EPA's polychlorinated biphenyl spill response regulations at 40 CFR part 761. This NWP also authorizes the use of temporary structures and fills in waters of the U.S. for spill response training exercises. (Sections 10 and 404)

21. *Surface Coal Mining Activities.* Discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations.

(a) *Previously Authorized Surface Coal Mining Activities.* Surface coal mining activities that were previously authorized by the NWP 21 issued on March 12, 2007 (see 72 FR 11092), are authorized by this NWP, provided the following criteria are met:

(1) The activities are already authorized, or are currently being processed by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or as part of an integrated permit processing procedure by the Department of Interior, Office of Surface Mining Reclamation and Enforcement;

(2) The permittee must submit a letter to the district engineer requesting re-verification of the NWP 21 authorization. The letter must describe any changes from the previous NWP 21 verification. The letter must be submitted to the district engineer by February 1, 2013;

(3) The loss of waters of the United States is not greater than the loss of waters of the United States previously verified by the district engineer under the NWP 21 issued on March 12, 2007 (i.e., there are no proposed expansions of surface coal mining activities in waters of the United States);

(4) The district engineer provides written verification that those activities will result in minimal individual and cumulative adverse effects and are authorized by NWP 21, including currently applicable regional conditions and any activity-specific conditions added to the NWP authorization by the district engineer, such as compensatory mitigation requirements; and

(5) If the permittee does not receive a written verification from the district engineer prior to March 18, 2013, the permittee must cease all activities until such verification is received. The district engineer may extend the February 1, 2013, deadline by so notifying the permittee in writing, but the permittee must still cease all activities if he or she has not received written verification from the Corps by March 18, 2013, until such verification is received.

(b) *Other Surface Coal Mining Activities.* Surface coal mining activities that were not previously authorized by the NWP 21 issued on March 12, 2007, are authorized by this NWP, provided the following criteria are met:

(1) The activities are already authorized, or are currently being processed by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or as part of an integrated permit processing procedure by the Department of Interior, Office of Surface Mining Reclamation and Enforcement;

(2) The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal individual and cumulative adverse effects. This NWP does not authorize discharges into tidal waters or non-tidal wetlands adjacent to tidal waters; and

(3) The discharge is not associated with the construction of valley fills. A ''valley fill'' is a fill structure that is typically constructed within valleys associated with steep, mountainous terrain, associated with surface coal mining activities.

Notification: For activities under paragraph (b) of this NWP, the permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 31.) (Sections 10 and 404)

22. *Removal of Vessels.* Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This NWP does not authorize maintenance dredging, shoal removal, or riverbank snagging.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The vessel is listed or eligible for listing in the National Register of Historic Places; or (2) the activity is conducted in a special aquatic site, including coral reefs and wetlands. (See general condition 31.) If condition 1 above is triggered, the permittee cannot commence the activity until informed by the district engineer that compliance with the ''Historic Properties'' general condition is completed. (Sections 10 and 404)

Note 1: If a removed vessel is disposed of in waters of the United States, a permit from the U.S. EPA may be required (see 40 CFR 229.3). If a Department of the Army permit is required for vessel disposal in waters of the United States, separate authorization will be required.

Note 2: Compliance with general condition 18, Endangered Species, and general condition 20, Historic Properties, is required for all NWPs. The concern with historic properties is emphasized in the notification requirements for this NWP because of the likelihood that submerged vessels may be historic properties.

23. *Approved Categorical Exclusions.* Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where:

(a) That agency or department has determined, pursuant to the Council on Environmental Quality's implementing regulations for the National Environmental Policy Act (40 CFR part 1500 et seq.), that the activity is categorically excluded from environmental documentation, because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment; and

(b) The Office of the Chief of Engineers (Attn: CECW–CO) has concurred with that agency's or department's determination that the activity is categorically excluded and approved the activity for authorization under NWP 23.

The Office of the Chief of Engineers may require additional conditions, including pre-construction notification, for authorization of an agency's categorical exclusions under this NWP.

Notification: Certain categorical exclusions approved for authorization under this NWP require the permittee to submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 31). The activities that require pre-construction notification are listed in the appropriate Regulatory Guidance Letters. (Sections 10 and 404)

Note: The agency or department may submit an application for an activity believed to be categorically excluded to the Office of the Chief of Engineers (Attn: CECW–CO). Prior to approval for authorization under this NWP of any agency's activity, the Office of the Chief of Engineers will solicit public comment. As of the date of issuance of this NWP, agencies with approved categorical exclusions are the: Bureau of Reclamation, Federal Highway Administration, and U.S. Coast Guard. Activities approved for authorization under this NWP as of the date of this notice are found in Corps Regulatory Guidance Letter 05–07, which is available at: *http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/GuidanceLetters.aspx.* Any future approved categorical exclusions will be announced in Regulatory Guidance Letters and posted on this same Web site.

24. *Indian Tribe or State Administered Section 404 Programs.* Any activity permitted by a state or Indian Tribe administering its own section 404 permit program pursuant to 33 U.S.C. 1344(g)–(l) is permitted pursuant to Section 10 of the Rivers and Harbors Act of 1899. (Section 10)

Note 1: As of the date of the promulgation of this NWP, only New Jersey and Michigan administer their own section 404 permit programs.

Note 2: Those activities that do not involve an Indian Tribe or State section 404 permit are not included in this NWP, but certain structures will be exempted by Section 154 of Public Law 94–587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.4(b)).

25. *Structural Discharges.* Discharges of material such as concrete, sand, rock, etc., into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as bridges, transmission line footings, and walkways, or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc. This NWP does not authorize filled structural members that would support buildings, building pads, homes, house pads, parking areas, storage areas and other such structures. The structure itself may require a separate section 10 permit if located in navigable waters of the United States. (Section 404)

26. [Reserved]

27. *Aquatic Habitat Restoration, Establishment, and Enhancement Activities.* Activities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas, the restoration and enhancement of non-tidal streams and other non-tidal open waters, and the rehabilitation or enhancement of tidal streams, tidal wetlands, and tidal open waters, provided those activities result in net increases in aquatic resource functions and services.

To the extent that a Corps permit is required, activities authorized by this NWP include, but are not limited to: The removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms, as well as discharges of dredged or fill material to restore appropriate stream channel configurations after small water control structures, dikes, and berms, are removed; the installation of current deflectors; the enhancement, restoration, or establishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or establish stream meanders; the backfilling of artificial channels; the removal of existing drainage structures, such as drain tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology; the installation of structures or fills necessary to establish or re-establish wetland or stream hydrology; the construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; re-establishment of submerged aquatic vegetation in areas where those plant communities previously existed; re-establishment of tidal wetlands in tidal waters where those wetlands previously existed; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities. Only native plant species should be planted at the site.

This NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands and streams, on the project site provided there are net increases in aquatic resource functions and services.

Except for the relocation of non-tidal waters on the project site, this NWP does not authorize the conversion of a stream or natural wetlands to another aquatic habitat type (e.g., stream to wetland or vice versa) or uplands. Changes in wetland plant communities that occur when wetland hydrology is more fully restored during wetland rehabilitation activities are not considered a conversion to another aquatic habitat type. This NWP does not authorize stream channelization. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Compensatory mitigation is not required for activities authorized by this NWP since these activities must result in net increases in aquatic resource functions and services.

Reversion. For enhancement, restoration, and establishment activities conducted: (1) In accordance with the terms and conditions of a binding stream or wetland enhancement or restoration agreement, or a wetland establishment agreement, between the landowner and the U.S. Fish and Wildlife Service (FWS), the Natural Resources Conservation Service (NRCS), the Farm Service Agency (FSA), the National Marine Fisheries Service (NMFS), the National Ocean Service (NOS), U.S. Forest Service (USFS), or their designated state cooperating agencies; (2) as voluntary wetland restoration, enhancement, and establishment actions documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or (3) on reclaimed surface coal mine lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) or the applicable state agency, this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or establishment activities). The reversion must occur within five years after expiration of a limited term wetland restoration or establishment agreement or permit, and is authorized in these circumstances even if the discharge occurs after this NWP expires. The five-year reversion limit does not apply to agreements without time limits reached between the landowner and the FWS, NRCS, FSA, NMFS, NOS, USFS, or an appropriate state cooperating agency. This NWP also authorizes discharges of dredged or fill material in waters of the United States for the reversion of wetlands that were restored, enhanced, or established on prior-converted cropland or on uplands, in accordance with a binding agreement between the landowner and NRCS, FSA, FWS, or their designated state cooperating agencies (even though the restoration, enhancement, or establishment activity did not require a section 404 permit). The prior condition will be documented in the original agreement or permit, and the

determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Before conducting any reversion activity the permittee or the appropriate Federal or state agency must notify the district engineer and include the documentation of the prior condition. Once an area has reverted to its prior physical condition, it will be subject to whatever the Corps Regulatory requirements are applicable to that type of land at the time. The requirement that the activity results in a net increase in aquatic resource functions and services does not apply to reversion activities meeting the above conditions. Except for the activities described above, this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion.

Reporting. For those activities that do not require pre-construction notification, the permittee must submit to the district engineer a copy of: (1) The binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement, or a project description, including project plans and location map; (2) the NRCS or USDA Technical Service Provider documentation for the voluntary stream enhancement or restoration action or wetland restoration, enhancement, or establishment action; or (3) the SMCRA permit issued by OSMRE or the applicable state agency. The report must also include information on baseline ecological conditions on the project site, such as a delineation of wetlands, streams, and/or other aquatic habitats. These documents must be submitted to the district engineer at least 30 days prior to commencing activities in waters of the United States authorized by this NWP.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing any activity (see general condition 31), except for the following activities:

(1) Activities conducted on non-Federal public lands and private lands, in accordance with the terms and conditions of a binding stream enhancement or restoration agreement or wetland enhancement, restoration, or establishment agreement between the landowner and the U.S. FWS, NRCS, FSA, NMFS, NOS, USFS or their designated state cooperating agencies;

(2) Voluntary stream or wetland restoration or enhancement action, or wetland establishment action, documented by the NRCS or USDA Technical Service Provider pursuant to NRCS Field Office Technical Guide standards; or

(3) The reclamation of surface coal mine lands, in accordance with an SMCRA permit issued by the OSMRE or the applicable state agency.

However, the permittee must submit a copy of the appropriate documentation to the district engineer to fulfill the reporting requirement. (Sections 10 and 404)

Note: This NWP can be used to authorize compensatory mitigation projects, including mitigation banks and in-lieu fee projects. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition, since compensatory mitigation is generally intended to be permanent.

28. *Modifications of Existing Marinas.* Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips, dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP. (Section 10)

29. *Residential Developments.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Subdivisions: For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed ½-acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Sections 10 and 404)

30. *Moist Soil Management for Wildlife.* Discharges of dredged or fill material into non-tidal waters of the United States and maintenance activities that are associated with moist soil management for wildlife for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to, plowing or discing to impede succession, preparing seed beds, or establishing fire breaks. Sufficient riparian areas must be maintained adjacent to all open water bodies, including streams, to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, or similar features associated with the management areas. The activity must not result in a net loss of aquatic resource functions and services. This NWP does not authorize the conversion of wetlands to uplands, impoundments, or other open water bodies. (Section 404)

Note: The repair, maintenance, or replacement of existing water control structures or the repair or maintenance of dikes may be authorized by NWP 3. Some such activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4).

31. *Maintenance of Existing Flood Control Facilities.* Discharges of dredged or fill material resulting from activities associated with the maintenance of existing flood control facilities, including debris basins, retention/detention basins, levees, and channels that: (i) Were previously authorized by the Corps by individual permit, general permit, or 33 CFR 330.3, or did not require a permit at the time they were constructed, or (ii) were constructed by the Corps and transferred to a non-Federal sponsor for operation and maintenance. Activities authorized by this NWP are limited to those resulting from maintenance activities that are conducted within the ''maintenance baseline,'' as described in the definition below. Discharges of dredged or fill materials associated with maintenance activities in flood control facilities in any watercourse that have previously been determined to be within the maintenance baseline are authorized under this NWP. To the extent that a Corps permit is required, this NWP

authorizes the removal of vegetation from levees associated with the flood control project. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses except when these activities have been included in the maintenance baseline. All dredged material must be placed in an area that has no waters of the United States or a separately authorized disposal site in waters of the United States, and proper siltation controls must be used.

Maintenance Baseline: The maintenance baseline is a description of the physical characteristics (e.g., depth, width, length, location, configuration, or design flood capacity, etc.) of a flood control project within which maintenance activities are normally authorized by NWP 31, subject to any case-specific conditions required by the district engineer. The district engineer will approve the maintenance baseline based on the approved or constructed capacity of the flood control facility, whichever is smaller, including any areas where there are no constructed channels but which are part of the facility. The prospective permittee will provide documentation of the physical characteristics of the flood control facility (which will normally consist of as-built or approved drawings) and documentation of the approved and constructed design capacities of the flood control facility. If no evidence of the constructed capacity exists, the approved capacity will be used. The documentation will also include best management practices to ensure that the impacts to the aquatic environment are minimal, especially in maintenance areas where there are no constructed channels. (The Corps may request maintenance records in areas where there has not been recent maintenance.) Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR 330.5. Except in emergencies as described below, this NWP cannot be used until the district engineer approves the maintenance baseline and determines the need for mitigation and any regional or activity-specific conditions. Once determined, the maintenance baseline will remain valid for any subsequent reissuance of this NWP. This NWP does not authorize maintenance of a flood control facility that has been abandoned. A flood control facility will be considered abandoned if it has operated at a significantly reduced capacity without needed maintenance being accomplished in a timely manner.

Mitigation: The district engineer will determine any required mitigation one-time only for impacts associated with maintenance work at the same time that the maintenance baseline is approved. Such one-time mitigation will be required when necessary to ensure that adverse environmental impacts are no more than minimal, both individually and cumulatively. Such mitigation will only be required once for any specific reach of a flood control project. However, if one-time mitigation is required for impacts associated with maintenance activities, the district engineer will not delay needed maintenance, provided the district engineer and the permittee establish a schedule for identification, approval, development, construction and completion of any such required mitigation. Once the one-time mitigation described above has been completed, or a determination made that mitigation is not required, no further mitigation will be required for maintenance activities within the maintenance baseline. In determining appropriate mitigation, the district engineer will give special consideration to natural water courses that have been included in the maintenance baseline and require compensatory mitigation and/or best management practices as appropriate.

Emergency Situations: In emergency situations, this NWP may be used to authorize maintenance activities in flood control facilities for which no maintenance baseline has been approved. Emergency situations are those which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if action is not taken before a maintenance baseline can be approved. In such situations, the determination of mitigation requirements, if any, may be deferred until the emergency has been resolved. Once the emergency has ended, a maintenance baseline must be established expeditiously, and mitigation, including mitigation for maintenance conducted during the emergency, must be required as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer before any maintenance work is conducted (see general condition 31). The pre-construction notification may be for activity-specific maintenance or for maintenance of the entire flood control facility by submitting a five-year (or less) maintenance plan. The pre-construction notification must include a description of the maintenance baseline and the dredged material disposal site. (Sections 10 and 404)

32. *Completed Enforcement Actions.* Any structure, work, or discharge of dredged or fill material remaining in place or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

(i) The terms of a final written Corps non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of Section 404 of the Clean Water Act, provided that:

(a) The unauthorized activity affected no more than 5 acres of non-tidal waters or 1 acre of tidal waters;

(b) The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity that is authorized by this NWP; and

(c) The district engineer issues a verification letter authorizing the activity subject to the terms and conditions of this NWP and the settlement agreement, including a specified completion date; or

(ii) The terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the United States under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899; or

(iii) The terms of a final court decision, consent decree, settlement agreement, or non-judicial settlement agreement resulting from a natural resource damage claim brought by a trustee or trustees for natural resources (as defined by the National Contingency Plan at 40 CFR subpart G) under Section 311 of the Clean Water Act, Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act, Section 312 of the National Marine Sanctuaries Act, Section 1002 of the Oil Pollution Act of 1990, or the Park System Resource Protection Act at 16 U.S.C. 19jj, to the extent that a Corps permit is required.

Compliance is a condition of the NWP itself. Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Before reaching any settlement agreement, the Corps will ensure compliance with the provisions of 33

CFR part 326 and 33 CFR 330.6(d)(2) and (e). (Sections 10 and 404)

33. *Temporary Construction, Access, and Dewatering.* Temporary structures, work, and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites, provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard. This NWP also authorizes temporary structures, work, and discharges, including cofferdams, necessary for construction activities not otherwise subject to the Corps or U.S. Coast Guard permit requirements. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if the district engineer determines that it will not cause more than minimal adverse effects on aquatic resources. Following completion of construction, temporary fill must be entirely removed to an area that has no waters of the United States, dredged material must be returned to its original location, and the affected areas must be restored to pre-construction elevations. The affected areas must also be revegetated, as appropriate. This permit does not authorize the use of cofferdams to dewater wetlands or other aquatic areas to change their use. Structures left in place after construction is completed require a separate section 10 permit if located in navigable waters of the United States. (See 33 CFR part 322.)

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 31). The pre-construction notification must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions. (Sections 10 and 404)

34. *Cranberry Production Activities.* Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, must not exceed 10 acres of waters of the United States, including wetlands. The activity must not result in a net loss of wetland acreage. This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid.

Notification: The permittee must submit a pre-construction notification to the district engineer once during the period that this NWP is valid, and the NWP will then authorize discharges of dredge or fill material at an existing operation for the permit term, provided the 10-acre limit is not exceeded. (See general condition 31.) (Section 404)

35. *Maintenance Dredging of Existing Basins.* Excavation and removal of accumulated sediment for maintenance of existing marina basins, access channels to marinas or boat slips, and boat slips to previously authorized depths or controlling depths for ingress/egress, whichever is less, provided the dredged material is deposited at an area that has no waters of the United States site and proper siltation controls are used. (Section 10)

36. *Boat Ramps.* Activities required for the construction of boat ramps, provided the activity meets all of the following criteria:

(a) The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or in the form of pre-cast concrete planks or slabs, unless the district engineer waives the 50 cubic yard limit by making a written determination concluding that the discharge will result in minimal adverse effects;

(b) The boat ramp does not exceed 20 feet in width, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in minimal adverse effects;

(c) The base material is crushed stone, gravel or other suitable material;

(d) The excavation is limited to the area necessary for site preparation and all excavated material is removed to an area that has no waters of the United States; and,

(e) No material is placed in special aquatic sites, including wetlands.

The use of unsuitable material that is structurally unstable is not authorized. If dredging in navigable waters of the United States is necessary to provide access to the boat ramp, the dredging must be authorized by another NWP, a regional general permit, or an individual permit.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) The discharge into waters of the United States exceeds 50 cubic yards, or (2) the boat ramp exceeds 20 feet in width. (See general condition 31.) (Sections 10 and 404)

37. *Emergency Watershed Protection and Rehabilitation.* Work done by or funded by:

(a) The Natural Resources Conservation Service for a situation requiring immediate action under its emergency Watershed Protection Program (7 CFR part 624);

(b) The U.S. Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 2509.13);

(c) The Department of the Interior for wildland fire management burned area emergency stabilization and rehabilitation (DOI Manual part 620, Ch. 3);

(d) The Office of Surface Mining, or states with approved programs, for abandoned mine land reclamation activities under Title IV of the Surface Mining Control and Reclamation Act (30 CFR Subchapter R), where the activity does not involve coal extraction; or

(e) The Farm Service Agency under its Emergency Conservation Program (7 CFR part 701).

In general, the prospective permittee should wait until the district engineer issues an NWP verification or 45 calendar days have passed before proceeding with the watershed protection and rehabilitation activity. However, in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the emergency watershed protection and rehabilitation activity may proceed immediately and the district engineer will consider the information in the pre-construction notification and any comments received as a result of agency coordination to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

Notification: Except in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity (see general condition 31). (Sections 10 and 404)

38. *Cleanup of Hazardous and Toxic Waste.* Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not

authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Sections 10 and 404)

Note: Activities undertaken entirely on a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act.

39. *Commercial and Institutional Developments.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The construction of new golf courses and new ski areas is not authorized by this NWP.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Sections 10 and 404)

Note: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

40. *Agricultural Activities.* Discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities, including the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities.

This NWP also authorizes the construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agricultural purposes. This NWP does not authorize the construction of aquaculture ponds.

This NWP also authorizes discharges of dredged or fill material into non-tidal waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Section 404)

Note: Some discharges for agricultural activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4). This NWP authorizes the construction of farm ponds that do not qualify for the Clean Water Act Section 404(f)(1)(C) exemption because of the recapture provision at Section 404(f)(2).

41. *Reshaping Existing Drainage Ditches.* Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in waters of the United States, for the purpose of improving water quality by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation. The reshaping of the ditch cannot increase drainage capacity beyond the original as-built capacity nor can it expand the area drained by the ditch as originally constructed (i.e., the capacity of the ditch must be the same as originally constructed and it cannot drain additional wetlands or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality.

This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity, if more than 500 linear feet of drainage ditch will be reshaped. (See general condition 31.) (Section 404)

42. *Recreational Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of recreational facilities. Examples of recreational facilities that may be authorized by this NWP include playing fields (e.g., football fields, baseball fields), basketball courts, tennis courts, hiking trails, bike paths, golf courses, ski areas, horse paths, nature centers, and campgrounds (excluding recreational vehicle parks). This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity, but it does not authorize the construction of hotels, restaurants, racetracks, stadiums, arenas, or similar facilities.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Section 404)

43. *Stormwater Management Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction of stormwater management facilities, including stormwater detention basins and retention basins and other

stormwater management facilities; the construction of water control structures, outfall structures and emergency spillways; and the construction of low impact development integrated management features such as bioretention facilities (e.g., rain gardens), vegetated filter strips, grassed swales, and infiltration trenches. This NWP also authorizes, to the extent that a section 404 permit is required, discharges of dredged or fill material into non-tidal waters of the United States for the maintenance of stormwater management facilities. Note that stormwater management facilities that are determined to be waste treatment systems under 33 CFR 328.3(a)(8) are not waters of the United States, and maintenance of these waste treatment systems generally does not require a section 404 permit.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams.

Notification: For the construction of new stormwater management facilities, or the expansion of existing stormwater management facilities, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility. (Section 404)

44. *Mining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States for mining activities, except for coal mining activities. The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. (Sections 10 and 404)

45. *Repair of Uplands Damaged by Discrete Events.* This NWP authorizes discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The restoration of the damaged areas, including any bank stabilization, must not exceed the contours, or ordinary high water mark, that existed before the damage occurred. The district engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period.

This NWP does not authorize beach restoration or nourishment.

Minor dredging is limited to the amount necessary to restore the damaged upland area and should not significantly alter the pre-existing bottom contours of the waterbody.

Notification: The permittee must submit a pre-construction notification to the district engineer (see general condition 31) within 12-months of the date of the damage. The pre-construction notification should include documentation, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. (Sections 10 and 404)

Note: The uplands themselves that are lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). (See also 33 CFR 328.5.) This NWP authorizes discharges of dredged or fill material into waters of the United States associated with the restoration of uplands.

46. *Discharges in Ditches.* Discharges of dredged or fill material into non-tidal ditches that are: (1) Constructed in uplands, (2) receive water from an area determined to be a water of the United States prior to the construction of the ditch, (3) divert water to an area determined to be a water of the United States prior to the construction of the ditch, and (4) are determined to be waters of the United States. The discharge must not cause the loss of greater than one acre of waters of the United States. This NWP does not authorize discharges of dredged or fill material into ditches constructed in streams or other waters of the United States, or in streams that have been relocated in uplands. This NWP does not authorize discharges of dredged or fill material that increase the capacity of the ditch and drain those areas determined to be waters of the United States prior to construction of the ditch.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Section 404)

47. [Reserved]

48. *Commercial Shellfish Aquaculture Activities.* Discharges of dredged or fill material in waters of the United States or structures or work in navigable waters of the United States necessary for commercial shellfish aquaculture operations in authorized project areas. For the purposes of this NWP, the project area is the area in which the operator is currently authorized to conduct commercial shellfish aquaculture activities, as identified through a lease or permit issued by an appropriate state or local government agency, a treaty, or any other easement, lease, deed, or contract which establishes an enforceable property interest for the operator. This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures into navigable waters of the United States. This NWP also authorizes discharges of dredged or fill material into waters of the United States necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked. This NWP does not authorize:

(a) The cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody;

(b) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990; or,

(c) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas, or the deposition of shell material back into waters of the United States as waste.

This NWP also authorizes commercial shellfish aquaculture activities in new project areas, provided the project proponent has obtained a valid

authorization, such as a lease or permit issued by an appropriate state or local government agency, and those activities do not directly affect more than ½-acre of submerged aquatic vegetation beds.

Notification: The permittee must submit a pre-construction notification to the district engineer if: (1) Dredge harvesting, tilling, or harrowing is conducted in areas inhabited by submerged aquatic vegetation; (2) the activity will include a species not previously cultivated in the waterbody; (3) the activity involves a change from bottom culture to floating or suspended culture; or (4) the activity occurs in a new project area. (See general condition 31.)

In addition to the information required by paragraph (b) of general condition 31, the pre-construction notification must also include the following information: (1) A map showing the boundaries of the project area, with latitude and longitude coordinates for each corner of the project area; (2) the name(s) of the cultivated species; and (3) whether canopy predator nets are being used. (Sections 10 and 404)

Note 1: The permittee should notify the applicable U.S. Coast Guard office regarding the project.

Note 2: To prevent introduction of aquatic nuisance species, no material that has been taken from a different waterbody may be reused in the current project area, unless it has been treated in accordance with the applicable regional aquatic nuisance species management plan.

Note 3: The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines ''aquatic nuisance species'' as ''a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural, or recreational activities dependent on such waters.''

49. *Coal Remining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal. The activities must already be authorized, or they must currently be in process as part of an integrated permit processing procedure, by the Department of Interior Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act (SMCRA) of 1977. Areas previously mined include reclaimed mine sites, abandoned mine land areas, or lands under bond forfeiture contracts.

As part of the project, the permittee may conduct new coal mining activities in conjunction with the remining activities when he or she clearly demonstrates to the district engineer that the overall mining plan will result in a net increase in aquatic resource functions. The Corps will consider the SMCRA agency's decision regarding the amount of currently undisturbed adjacent lands needed to facilitate the remining and reclamation of the previously mined area. The total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the additional area necessary to carry out the reclamation of the previously mined area.

Notification: The permittee must submit a pre-construction notification and a document describing how the overall mining plan will result in a net increase in aquatic resource functions to the district engineer and receive written authorization prior to commencing the activity. (See general condition 31.) (Sections 10 and 404)

50. *Underground Coal Mining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States associated with underground coal mining and reclamation operations provided the activities are authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of Interior, Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize coal preparation and processing activities outside of the mine site.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 31.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. (Sections 10 and 404)

Note: Coal preparation and processing activities outside of the mine site may be authorized by NWP 21.

51. *Land-Based Renewable Energy Generation Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, or modification of land-based renewable energy production facilities, including attendant features. Such facilities include infrastructure to collect solar (concentrating solar power and photovoltaic), wind, biomass, or geothermal energy. Attendant features may include, but are not limited to roads, parking lots, and stormwater management facilities within the land-based renewable energy generation facility.

The discharge must not cause the loss of greater than½-acre of non-tidal waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. This permit does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Sections 10 and 404)

Note 1: Utility lines constructed to transfer the energy from the land-based renewable generation facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization. If the only activities associated with the construction, expansion, or modification of a land-based renewable energy generation facility that require Department of the Army authorization are discharges of dredged or fill material into waters of the United States to construct, maintain, repair, and/or remove utility lines, then NWP 12 shall be used if those activities meet the terms and conditions of NWP 12, including any applicable regional conditions and any case-specific conditions imposed by the district engineer.

Note 2: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

52. *Water-Based Renewable Energy Generation Pilot Projects.* Structures and

work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction, expansion, modification, or removal of water-based wind or hydrokinetic renewable energy generation pilot projects and their attendant features. Attendant features may include, but are not limited to, land-based collection and distribution facilities, control facilities, roads, parking lots, and stormwater management facilities.

For the purposes of this NWP, the term ''pilot project'' means an experimental project where the renewable energy generation units will be monitored to collect information on their performance and environmental effects at the project site.

The discharge must not cause the loss of greater than ½-acre of waters of the United States, including the loss of no more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in minimal adverse effects. The placement of a transmission line on the bed of a navigable water of the United States from the renewable energy generation unit(s) to a land-based collection and distribution facility is considered a structure under Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(b)), and the placement of the transmission line on the bed of a navigable water of the United States is not a loss of waters of the United States for the purposes of applying the ½-acre or 300 linear foot limits.

For each single and complete project, no more than 10 generation units (e.g., wind turbines or hydrokinetic devices) are authorized.

This NWP does not authorize activities in coral reefs. Structures in an anchorage area established by the U.S. Coast Guard must comply with the requirements in 33 CFR 322.5(l)(2). Structures may not be placed in established danger zones or restricted areas as designated in 33 CFR part 334, Federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas.

Upon completion of the pilot project, the generation units, transmission lines, and other structures or fills associated with the pilot project must be removed to the maximum extent practicable unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. Completion of the pilot project will be identified as the date of expiration of the Federal Energy Regulatory Commission (FERC) license, or the expiration date of the NWP authorization if no FERC license is issued.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 31.) (Sections 10 and 404)

Note 1: Utility lines constructed to transfer the energy from the land-based collection facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization.

Note 2: An activity that is located on an existing locally or federally maintained U.S. Army Corps of Engineers project requires separate approval from the Chief of Engineers under 33 U.S.C. 408.

Note 3: If the pilot project, including any transmission lines, is placed in navigable waters of the United States (i.e., section 10 waters) within the coastal United States, the Great Lakes, and United States territories, copies of the pre-construction notification and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration, National Ocean Service, for charting the generation units and associated transmission line(s) to protect navigation.

Note 4: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

C. Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

1. *Navigation.* (a) No activity may cause more than a minimal adverse effect on navigation.

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. *Aquatic Life Movements.* No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.

3. *Spawning Areas.* Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. *Migratory Bird Breeding Areas.* Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. *Shellfish Beds.* No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

6. *Suitable Material.* No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

7. *Water Supply Intakes.* No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

8. *Adverse Effects From Impoundments.* If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. *Management of Water Flows.* To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization and storm water management activities, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

10. *Fills Within 100–Year Floodplains.* The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

11. *Equipment.* Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

12. *Soil Erosion and Sediment Controls.* Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow.

13. *Removal of Temporary Fills.* Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. *Proper Maintenance.* Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

15. *Single and Complete Project.* The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

16. *Wild and Scenic Rivers.* No activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).

17. *Tribal Rights.* No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

18. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which ''may affect'' a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will review the documentation and determine whether it is sufficient to address ESA compliance for the NWP activity, or whether additional ESA consultation is necessary.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that might be affected by the proposed work or that utilize the designated critical habitat that might be affected by the proposed work. The district engineer will determine whether the proposed activity ''may affect'' or will have ''no effect'' to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have ''no effect'' on listed species or critical habitat, or until Section 7 consultation has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific regional endangered species conditions to the NWPs.

(e) Authorization of an activity by a NWP does not authorize the ''take'' of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with ''incidental take'' provisions, etc.) from the U.S. FWS or the NMFS, The Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word ''harm'' in the definition of ''take'' means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns,

including breeding, feeding or sheltering.

(f) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. FWS and NMFS or their world wide web pages at *http://www.fws.gov/* or *http://www.fws.gov/ipac* and *http://www.noaa.gov/fisheries.html* respectively.

19. *Migratory Birds and Bald and Golden Eagles.* The permittee is responsible for obtaining any ''take'' permits required under the U.S. Fish and Wildlife Service's regulations governing compliance with the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act. The permittee should contact the appropriate local office of the U.S. Fish and Wildlife Service to determine if such ''take'' permits are required for a particular activity.

20. *Historic Properties.* (a) In cases where the district engineer determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of Section 106 of the National Historic Preservation Act. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will review the documentation and determine whether it is sufficient to address section 106 compliance for the NWP activity, or whether additional section 106 consultation is necessary.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the authorized activity may have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of or potential for the presence of historic resources can be sought from the State Historic Preservation Officer or Tribal Historic Preservation Officer, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the district engineer shall determine whether the proposed activity has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties on which the activity may have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.

(d) The district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA Section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). If NHPA section 106 consultation is required and will occur, the district engineer will notify the non-Federal applicant that he or she cannot begin work until Section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (16 U.S.C. 470h–2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

21. *Discovery of Previously Unknown Remains and Artifacts.* If you discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by this permit, you must immediately notify the district engineer of what you have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

22. *Designated Critical Resource Waters.* Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The district engineer may designate, after notice and opportunity for public comment, additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters or state natural heritage sites. The district engineer may also designate additional critical resource waters after notice and opportunity for public comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, and 52 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with general condition 31, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

23. *Mitigation.* The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that adverse effects on the aquatic environment are minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse effects of the proposed activity are minimal, and provides a project-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in minimal adverse effects on the aquatic environment. Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in minimal adverse effects on the aquatic environment.

(2) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, wetland restoration should be the first compensatory mitigation option considered.

(3) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2)–(14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).

(4) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan only needs to address the baseline conditions at the impact site and the number of credits to be provided.

(5) Compensatory mitigation requirements (e.g., resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation, such as stream rehabilitation, enhancement, or preservation, to ensure that the activity results in minimal adverse effects on the aquatic environment.

(e) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any project resulting in the loss of greater than 1/2-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that a project already meeting the established acreage limits also satisfies the minimal impact requirement associated with the NWPs.

(f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the restoration or establishment, maintenance, and legal protection (e.g., conservation easements) of riparian areas next to open waters. In some cases, riparian areas may be the only compensatory mitigation required. Riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to establish a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or establishing a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (e.g., riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(g) Permittees may propose the use of mitigation banks, in-lieu fee programs, or separate permittee-responsible mitigation. For activities resulting in the loss of marine or estuarine resources, permittee-responsible compensatory mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(h) Where certain functions and services of waters of the United States are permanently adversely affected, such as the conversion of a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse effects of the project to the minimal level.

24. *Safety of Impoundment Structures.* To ensure that all impoundment structures are safely designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

25. *Water Quality.* Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA Section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. *Coastal Zone Management.* In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

27. *Regional and Case-By-Case Conditions.* The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

28. *Use of Multiple Nationwide Permits.* The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed ⅓-acre.

29. *Transfer of Nationwide Permit Verifications.* If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

''When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.''

_____

(Transferee)

_____

(Date)

30. *Compliance Certification.* Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and any required compensatory mitigation. The success of any required permittee-responsible mitigation, including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

(a) A statement that the authorized work was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;

(b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and

(c) The signature of the permittee certifying the completion of the work and mitigation.

31. *Pre-Construction Notification*—(a) *Timing.* Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

(1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or in the vicinity of the project, or to notify the Corps pursuant to general condition 20 that the activity may have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is ''no effect'' on listed species or ''no potential to cause effects'' on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or Section 106 of the National Historic Preservation (see 33 CFR 330.4(g)) has been completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) *Contents of Pre-Construction Notification:* The PCN must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed project;

(3) A description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause, including the anticipated amount of loss of water of the United States expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. The description should be sufficiently detailed to allow the district engineer to determine that the adverse effects of the project will be minimal and to determine the need for compensatory mitigation. Sketches should be provided

when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the project and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

(4) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial, intermittent, and ephemeral streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many waters of the United States. Furthermore, the 45 day period will not start until the delineation has been submitted to or completed by the Corps, as appropriate;

(5) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse effects are minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(6) If any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, for non-Federal applicants the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work. Federal applicants must provide documentation demonstrating compliance with the Endangered Species Act; and

(7) For an activity that may affect a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, for non-Federal applicants the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property. Federal applicants must provide documentation demonstrating compliance with Section 106 of the National Historic Preservation Act.

(c) *Form of Pre-Construction Notification:* The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is a PCN and must include all of the information required in paragraphs (b)(1) through (7) of this general condition. A letter containing the required information may also be used.

(d) *Agency Coordination:* (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

(2) For all NWP activities that require pre-construction notification and result in the loss of greater than ½-acre of waters of the United States, for NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of intermittent and ephemeral stream bed, and for all NWP 48 activities that require pre-construction notification, the district engineer will immediately provide (e.g., via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (U.S. FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Office (THPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to telephone or fax the district engineer notice that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure the net adverse environmental effects to the aquatic environment of the proposed activity are minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(3) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by Section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(4) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-construction notifications to expedite agency coordination.

D. District Engineer's Decision

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. For a linear project, this determination will include an evaluation of the individual crossings to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP. If an applicant requests a waiver of the 300 linear foot limit on impacts to intermittent or ephemeral streams or of an otherwise applicable limit, as provided for in NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, 51 or 52, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in minimal adverse effects. When making minimal effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the

adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

2. If the proposed activity requires a PCN and will result in a loss of greater than 1/10-acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for projects with smaller impacts. The district engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed activity are minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the district engineer to be minimal, the district engineer will provide a timely written response to the applicant. The response will state that the project can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

3. If the district engineer determines that the adverse effects of the proposed work are more than minimal, then the district engineer will notify the applicant either: (a) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the project is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (c) that the project is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period, with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation or a requirement that the applicant submit a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level. When mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

E. Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project.

F. Definitions

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

Compensatory mitigation: The restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Currently serviceable: Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Direct effects: Effects that are caused by the activity and occur at the same time and place.

Discharge: The term ''discharge'' means any discharge of dredged or fill material.

Enhancement: The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Establishment (creation): The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

High Tide Line: The line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of

the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Historic Property: Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

Independent utility: A test to determine what constitutes a single and complete non-linear project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

Indirect effects: Effects that are caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the linear feet of stream bed that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities eligible for exemptions under Section 404(f) of the Clean Water Act are not considered when calculating the loss of waters of the United States.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

Open water: For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of standing or flowing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of ''open waters'' include rivers, streams, lakes, and ponds.

Ordinary High Water Mark: An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas (see 33 CFR 328.3(e)).

Perennial stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

Preservation: The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Restoration: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a course substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Riparian areas: Riparian areas are lands adjacent to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 23.)

Shellfish seeding: The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (i.e., spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

Single and complete linear project: A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term ''single and complete project'' is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (i.e., a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

Single and complete non-linear project: For non-linear projects, the term ''single and complete project'' is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of ''independent utility''). Single and complete non-linear projects may not be ''piecemealed'' to avoid the limits in an NWP authorization.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or improve the quality (i.e., by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream's course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized stream remains a water of the United States.

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a wetland (i.e., water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line, which is defined at 33 CFR 328.3(d).

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWPs, a waterbody is a jurisdictional water of the United States. If a jurisdictional wetland is adjacent—meaning bordering, contiguous, or neighboring—to a waterbody determined to be a water of the United States under 33 CFR 328.3(a)(1)–(6), that waterbody and its adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of ''waterbodies'' include streams, rivers, lakes, ponds, and wetlands.

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Part IV

Department of Energy

10 CFR Part 431

Energy Conservation Program: Test Procedure for Commercial Refrigeration Equipment; Final Rule

DEPARTMENT OF ENERGY

10 CFR Part 431

[Docket No. EERE–2010–BT–TP–0034]

RIN 1904–AC40

Energy Conservation Program: Test Procedure for Commercial Refrigeration Equipment

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy.

ACTION: Final rule.

SUMMARY: In this final rule, the U.S. Department of Energy (DOE) is amending its test procedure for commercial refrigeration equipment (CRE), incorporating changes that will take effect 30 days after the final rule is published in the **Federal Register**. These changes will be mandatory for equipment testing to demonstrate compliance with the amended energy standards (Docket No. EERE–2010–BT–STD–0003). The amendments to the test procedure adopted in this final rule include updating references to industry test procedures to their current versions, incorporating methods to evaluate the energy impacts resulting from the use of night curtains and lighting occupancy sensors and controls, and allowing testing of certain commercial refrigeration equipment at the lowest temperature at which it is able to operate, referred to as its lowest application product temperature. In response to comments received in response to the relevant November 2010 Notice of Proposed Rulemaking (NOPR), and to minimize the testing burden on manufacturers, DOE is also incorporating provisions to allow manufacturers to test at the rating temperatures and ambient conditions required by NSF International (founded in 1944 as the National Sanitation Foundation, now referred to simply as NSF) for food safety testing.

DATES: The effective date of this rule is March 22, 2012. The final rule changes will be mandatory for equipment testing starting on the compliance date of any amended energy conservation standards promulgated as a result of the on-going energy conservation standard rulemaking for commercial refrigeration equipment (Docket No. EERE–2010–BT–STD–0003). Representations either in writing or in any broadcast advertisement with respect to energy consumption of commercial refrigeration equipment must also be made using the revised DOE test procedure beginning on that compliance date.

The incorporation by reference of certain publications listed in this final rule is approved by the Director of the Office of the Federal Register as of March 22, 2012.

ADDRESSES: The docket is available for review at regulations.gov, 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.

A link to the docket Web page can be found at: *www1.eere.energy.gov/buildings/appliance_standards/commercial/refrigeration_equipment.html.* This Web page will contain a link to the docket for this notice on the regulations.gov site. The regulations.gov Web page will contain simple instructions on how to access all documents, including public comments, in the docket. For further information on how to review the docket, contact Ms. Brenda Edwards at (202) 586–2945 or by email: *Brenda.Edwards@ee.doe.gov.*

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SUPPLEMENTARY INFORMATION: This final rule incorporates by reference into Part 431 the following industry standards:

(1) Air-Conditioning, Heating, and Refrigeration Institute (AHRI) Standard 1200 (I–P)–2010, ''2010 Standard for Performance Rating of Commercial Refrigerated Display Merchandisers and Storage Cabinets,'' and

(2) Association of Home Appliance Manufacturers (AHAM) Standard HRF–1–2008, ''Energy and Internal Volume of Refrigerating Appliances (2008),'' including Errata to Energy and Internal Volume of Refrigerating Appliances, Correction Sheet issued November 17, 2009.

Copies of AHRI standards may be purchased from the Air-Conditioning, Heating, and Refrigeration Institute, 2111 Wilson Blvd., Suite 500, Arlington, VA 22201, 703–524–8800, or at *www.ahrinet.org.*

Copies of AHAM standards may be purchased from the Association of Home Appliance Manufacturers, 1111 19th Street, NW., Suite 402, Washington, DC 20036, 202–872–5955, or at *www.aham.org.*

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I. Authority and Background

A. Authority

Title III, Part C of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6311–6317, as codified), added by Public Law 95–619, title IV, section 441(a), established the Energy Conservation Program for Certain Industrial Equipment, a program covering certain industrial equipment, which includes commercial refrigerators, freezers, and refrigerator-freezers, the subject of this final rule.[1]

Under EPCA, this program consists essentially of four parts: (1) Testing; (2) labeling; (3) Federal energy conservation standards[2]; and (4) certification and enforcement procedures. The testing requirements consist of test procedures that manufacturers of covered equipment must use (1) as the basis for certifying to DOE that their equipment complies with the applicable energy conservation standards adopted under EPCA; and (2) for making representations about the efficiency of those pieces of equipment. Similarly, DOE must use these test requirements to determine whether the equipment complies with relevant standards promulgated under EPCA. (42 U.S.C. 6315(b), 6295(s), and 6316(a)) The current test procedure for commercial refrigeration equipment appears under Title 10 of the Code of Federal Regulations (CFR) part 431, subpart C.

EPCA requires DOE to conduct an evaluation of each class of covered equipment at least once every 7 years to determine whether to, among other things, amend the test procedure for such equipment. (42 U.S.C. 6314(a)(1)(A)) This rulemaking fulfills DOE's obligation under EPCA to evaluate the test procedure for commercial refrigeration equipment every 7 years.

In addition, EPCA contains specific provisions relating to the test procedure for commercial refrigeration equipment. The test procedure for commercial refrigerators, freezers, and refrigerator-freezers must be: (1) The test procedure determined to be generally accepted industry testing procedures; or (2) rating procedures developed or recognized by the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) or by the American National Standards Institute (ANSI). (42 U.S.C. 6314(a)(6)(A)(i)) EPCA also establishes the initial test procedure for self-contained refrigerators, freezers, and refrigerator-freezers with doors. EPCA established the ASHRAE Standard 117 test procedure, ''Method of Testing Closed Refrigerators,'' (ASHRAE 117–2002) as the initial test procedure for commercial refrigeration equipment, which became effective on January 1, 2005. (42 U.S.C. 6314(a)(6)(A)(ii))

EPCA also establishes that if ASHRAE 117 is amended, the Secretary of Energy (Secretary) must, by rule, amend the DOE test procedure to ensure consistency with the amended ASHRAE 117 standard, unless a case can be made, through certain findings based on clear and convincing evidence, that the amended ASHRAE 117 does not meet the requirements for a test procedure set forth in EPCA. (42 U.S.C. 6314(a)(6)(E) and 6314(2)–(3)) In addition, EPCA states that if a test procedure other than ASHRAE 117 is approved by ANSI, the Secretary must review the relative strengths and weaknesses of such a new test procedure relative to the ASHRAE 117 test procedure and, based on that review, determine whether to adopt the alternate test procedure as the DOE test procedure. (42 U.S.C. 6314(a)(6)(F))

B. Background

ASHRAE amended ASHRAE 117–2002 and adopted ASHRAE Standard 72–2005, ''Method of Testing Commercial Refrigerators and Freezers,'' in its place, which was approved by ANSI on July 29, 2005. During the 2006 en masse test procedure rulemaking, which adopted the test procedures specifically established in EPACT 2005, DOE reviewed ASHRAE Standard 72–2005, as well as ARI Standard 1200–2006. 71 FR 71357 (Dec. 8, 2006). DOE determined that ARI Standard 1200–2006 references the test procedure in ASHRAE Standard 72–2005, as well as the rating temperatures prescribed in EPACT 2005 for certain types of commercial refrigerators and freezers. (42 U.S.C. 6314(a)(6)(B)(i)) As a result, on December 8, 2006, DOE published a final rule (December 2006 en masse test procedure final rule) that, among other things, adopted ANSI/Air-Conditioning and Refrigeration Institute (ARI) Standard 1200–2006, ''2006 Standard for Performance Rating of Commercial Refrigerated Display Merchandisers and Storage Cabinets,'' (hereafter referenced as ARI Standard 1200–2006) as the referenced test procedure for measuring energy consumption for commercial refrigeration equipment. 71 FR 71370 (Dec. 8, 2006); 10 CFR 431.63–64. ARI Standard 1200–2006 prescribes rating temperature specifications of 38 °F (±2 °F) for commercial refrigerators and refrigerator compartments, 0 °F (±2 °F) for commercial freezers and freezer compartments, and −5 °F (±2 °F) for commercial ice-cream freezers. Even though ARI Standard 1200–2006 specified a rating temperature for commercial ice-cream freezers, EPACT 2005 did not specify a rating temperature or standards for commercial ice-cream freezers. During the 2006 test procedure rulemaking, DOE determined that testing at a −15 °F (±2 °F) rating temperature was more representative of the actual energy consumption of commercial freezers specifically designed for ice-cream application. 71 FR 71357 (Dec. 8, 2006). Therefore, in the December 2006 en masse test procedure final rule, DOE adopted a −15 °F (±2 °F) rating temperature for commercial ice-cream freezers, rather than the −5 °F (±2 °F) prescribed in the ARI Standard 1200–2006. *Id.* at 71357 (Dec. 8, 2006). In addition, as part of the 2006 en masse test procedure final rule, DOE adopted ANSI/AHAM Standard HRF–1–2004, ''Energy, Performance and Capacity of Household Refrigerators, Refrigerator-Freezers and Freezers,'' (hereafter referred to as AHAM HRF–1–2004) for measuring refrigerated compartment volumes for equipment covered under this rule. *Id.* at 71358 (Dec. 8, 2006).

[1] For editorial reasons, upon codification in the U.S. Code, Part C was re-designated Part A–1.

[2] EPCA prescribes energy conservation standards for self-contained commercial refrigerators, freezers, and refrigerator-freezers with solid or transparent doors designed for holding temperature applications, as well as self-contained refrigerators with transparent doors designed for pull-down applications. (42 U.S.C. 6313(c)(2)–(3)) EPCA also requires DOE to develop standards for ice-cream freezers; self-contained commercial refrigerators, freezers, and refrigerator-freezers without doors; and remote condensing commercial refrigerators, freezers, and refrigerator-freezers. (42 U.S.C. 6313(c)(4)(A)) DOE conducted a rulemaking to establish standards for these equipment classes (2009 energy conservation standards rulemaking) and published a final rule on January 9, 2009 (the January 2009 final rule). 74 FR 1092.

Approximately one year after the publication of the December 2006 en masse test procedure final rule, ARI merged with the Gas Appliance Manufacturers Association (GAMA) to form the Air-Conditioning, Heating, and Refrigeration Institute (AHRI), and updated its test procedure, the most recent version of which is AHRI Standard 1200–2010, ''2010 Standard for Performance Rating of Commercial Refrigerated Display Merchandisers and Storage Cabinets,'' (hereafter referenced as AHRI Standard 1200–2010), which was approved by ANSI on January 4, 2011. AHRI Standard 1200–2010 includes changes to (1) the equipment class nomenclature used in the test procedure, (2) the method of normalizing equipment energy consumption, (3) the ice-cream freezer test temperature, and (4) other minor clarifications. These changes aligned the AHRI test procedure with the nomenclature, rating temperatures, and normalization method used in DOE's 2009 energy conservation standards rulemaking for commercial refrigeration equipment. 74 FR 1092, 1093–96 (Jan. 9, 2009).

Similarly, AHAM updated Standard HRF–1–2004 to its most recent version, AHAM HRF–1–2008, ''Energy and Internal Volume of Refrigerating Appliances.'' The changes to this standard were mostly editorial and involved reorganizing some of the sections for greater simplicity and usability. As part of the reorganization, the sections of AHAM HRF–1–2004 that currently are referenced within the DOE test procedure, specifically section 3.21, ''Volume''; sections 4.1 through 4.3, ''Method for Computing Total Refrigerated Volume and Total Shelf Area of Household Refrigerators and Household Wine Chillers''; and sections 5.1 through 5.3, ''Method for Computing Total Refrigerated Volume and Total Shelf Area of Household Freezers''; were reorganized and renumbered in the updated HRF–1–2008. However, the content of those sections was not changed substantially. The newly updated AHRI Standard 1200–2010 references the most recent version of the AHAM standard, AHAM HRF–1–2008. As such, DOE is updating its test procedures to adopt AHRI Standard 1200–2010 as the test procedure for commercial refrigeration equipment and AHAM HRF–1–2008 as the prescribed method for determining refrigerated compartment volume.

DOE is also incorporating new test methods in the DOE test procedure to better address certain energy efficiency features applicable to CRE that cannot be accounted for by the current test procedure. During the advanced notice of proposed rulemaking phase of the 2009 energy conservation standards rulemaking for commercial refrigeration equipment, DOE screened out several energy efficient technology options because their effects were not captured by the current test procedure. 72 FR 41162, 41179–80 (July 26, 2007). In the amended test procedure described in this final rule, DOE is adopting modifications to its test procedure to better address some of these technologies. Specific changes include provisions for measuring the impact of night curtains [3] and lighting occupancy sensors and controls [4].

On May 18, 2010, DOE held a public meeting (the May 2010 Framework public meeting) to discuss the rulemaking framework for the concurrent CRE energy conservation standards (Docket No. EERE–2010–BT–STD–0003). *See* 75 FR 24824 (May 6, 2010). During the May 2010 Framework public meeting, DOE received comments from several interested parties that additional rating temperatures should be considered in the test procedure for certain types of specialized commercial refrigeration equipment. The commenters stated that some covered commercial refrigeration equipment designed for operation at higher temperatures is not able to be tested at the prescribed 38 °F, and they suggested that DOE consider this in both the test procedure and the standards rulemakings. (Docket No. EERE–2010–BT–STD–0003, California Codes and Standards, No. 1.3.005 [5] at p. 3) For example, some equipment is designed for storing goods such as wine, candy, and flowers at temperatures that are held constant, but are higher than the temperatures typically used in commercial refrigerators for perishable food storage and merchandising. (Docket No. EERE–2010–BT–STD–0003, Structural Concepts, No. 1.2.006 at p. 59) Consequently, in the NOPR DOE issued on November 24, 2010 to propose amendments to the test procedure for commercial refrigeration equipment (November 2010 NOPR), DOE proposed provisions for testing commercial refrigeration equipment that is designed to operate at temperatures higher than 38 °F at the lowest integrated average product temperature the equipment can achieve, defined as the lowest possible application product temperature. 76 FR 71596, 71605. On January 6, 2011, DOE held a public meeting (January 2011 NOPR public meeting) to discuss the amendments proposed in the November 2010 NOPR and to provide an opportunity for interested parties to comment (*www1.eere.energy.gov/buildings/appliance_standards/commercial/pdfs/fr_cre_nopr_11_24_2010.pdf*). At the January 2011 NOPR public meeting, DOE received further comments from interested parties that the proposed provisions for testing equipment at the lowest application product temperature should be expanded to include freezers and ice-cream freezers. As an example, interested parties pointed out that ice storage units are designed to operate at 20 °F. Equipment that operates at 20 °F would fall into the freezer temperature category, but interested parties claim that this specific type of equipment cannot operate at 0 °F, which is the prescribed rating temperature for freezers in the current test procedure. (True, No. 19 at p. 191 [6]; Hussmann, No. 19 at pp. 192–93; Traulsen, No. 19 at p. 194) In response to these comments, DOE is incorporating a provision in this final rule permitting testing any equipment that cannot be tested at the prescribed rating temperature to be tested at the ''lowest application product temperature.''

C. Test Procedure Rulemaking Requirements and Impact on Energy Conservation Standards

Under 42 U.S.C. 6314, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered equipment.

[3] Night curtains are devices made of an insulating material, typically insulated aluminum fabric, designed to be pulled down over the open front of the case (similar to the way a window shade operates) to decrease infiltration and heat transfer into the case when the merchandizing establishment is closed.

[4] Lighting occupancy sensors are devices that automatically shut off or dim the lights in display cases when no motion is detected in the sensor's coverage area for a certain preset period of time. *Scheduled lighting control* means a device which automatically shuts off or dims the lighting in a display case at preset scheduled times throughout the day.

[5] In the Framework document docket for commercial refrigeration equipment energy conservation standards, comments were identified using the following format based on when the comment was submitted in the rulemaking process. Section 1.1.XXX refers to **Federal Register** documents, section 1.2.XXX refers public meeting support documents, and 1.3.XXX refers to comments submitted by interested parties. This particular notation refers to a comment (1) by California Codes and Standards, (2) in document number 5 of the written comments submitted by interested parties, and (3) appearing on page 3.

[6] A notation in this form provides a reference for information that is in the docket of DOE's rulemaking to develop test procedures for commercial refrigeration equipment (Docket No. EERE–2010–BT–TP–0034), which is maintained at *www.regulations.gov*. This notation indicates that the statement preceding the reference is document number 19 in the docket for the commercial refrigeration equipment test procedure rulemaking, and appears at page 191 of that document.

EPCA requires that the test procedures promulgated by DOE be reasonably designed to produce test results that reflect energy efficiency, energy use, and estimated operating costs of the covered equipment during a representative average use cycle. EPCA also requires that the test procedure not be unduly burdensome to conduct. (42 U.S.C. 6314(a)(2)) In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments on any amendment. (42 U.S.C. 6314(b)(1)–(2))

EPCA also prescribes that if any rulemaking amends a test procedure, DOE must determine to what extent, if any, the proposed test procedure would alter the measured energy efficiency of any covered equipment as determined under the existing test procedure. (42 U.S.C. 6293(e)(1) and 6314(a)(6)) Further, if DOE determines that the amended test procedure would alter the measured efficiency of covered equipment, DOE must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6293(e)(2) and 6314(a)(6)) DOE recognizes that the test procedure amendments adopted in this final rule will affect the measured energy use of some commercial refrigeration equipment. However, DOE is currently considering amendments to the existing Federal energy conservation standards for commercial refrigeration equipment in a concurrent rulemaking, (Docket No. EERE–2010–BT–STD–0003). DOE will use the test procedure amendments adopted in this final rule as the basis for standards development in the concurrent energy conservation standards rulemaking.

Today's rule also fulfills DOE's obligation to periodically review its test procedures under 42 U.S.C. 6314(a)(1)(A). DOE anticipates that its next evaluation of this test procedure will occur in a manner consistent with the timeline set out in this provision.

II. Summary of the Final Rule

DOE is modifying its test procedure for commercial refrigeration equipment to incorporate current industry-accepted test procedures, address certain energy efficiency features that are not accounted for in the current test procedure (*i.e.,* night curtains and light occupancy sensors and controls), and allow testing of commercial refrigeration equipment at temperatures other than one of the three currently specified rating temperatures. Specifically, this test procedure final rule permits testing of commercial refrigeration equipment at the lowest application product temperature. This final rule also allows manufacturers to test equipment at the test conditions prescribed by NSF/ANSI–7, ''Commercial Refrigerators and Freezers'' (hereafter referred to as NSF–7), a food safety standard issued by NSF.[7] The NSF–7 test conditions represent more stringent rating temperatures and ambient conditions than the DOE test procedure conditions and are required by NSF for food safety testing of certain commercial refrigeration equipment. These test procedure amendments alter the measured energy efficiency of some covered equipment. As such, DOE is establishing in this final rule that use of the amended test procedure for compliance with DOE energy conservation standards or representations with respect to energy consumption of commercial refrigeration equipment is required on the compliance date of any revised energy conservation standards, which are being considered in a concurrent rulemaking (Docket No. EERE–2010–BT–STD–0003). DOE has added language to the final test procedure amendments to clarify that manufacturers are required to use the amended test procedure to demonstrate compliance with DOE's energy conservation standards, and for labeling or other representations as to the energy consumption of any covered equipment, beginning on the compliance date of any final rule establishing amended energy conservation standards for commercial refrigeration equipment. Prior to the compliance date of this final rule, manufacturers will continue to use the existing DOE test procedure established by the 2006 en masse test procedure final rule (71 FR 71370 (Dec. 8, 2006)),[8] and set forth at 10 CFR 431.64, to show compliance with existing DOE energy conservation standards and for representations concerning the energy consumption of covered equipment.

In the November 2010 NOPR, DOE proposed amendments to the existing test procedure for commercial refrigeration equipment. 76 FR 71596 (Nov. 24, 2010). DOE held a public meeting on January 6, 2011 to present the amendments proposed in the November 2010 NOPR and received comments from interested parties. DOE analyzed the comments received as a result of the January 2011 NOPR public meeting and incorporated recommendations, where appropriate, into this test procedure final rule. The specific test procedure amendments and responses to all comments DOE received as a result of the November 2010 NOPR are presented in section III, ''Discussion.''

III. Discussion

Section III.A presents all of the revisions to the DOE test procedure found at 10 CFR part 431, subpart C, ''Uniform test method for measuring the energy consumption of commercial refrigerators, freezers, and refrigerator-freezers,'' incorporated in this final rule, and discusses the comments received on these topics during the January 2011 NOPR public meeting and the associated comment period. These revisions include the following:

1. Updated references to industry test procedures to their most current versions;
2. Inclusion of a method for determining energy savings due to the use of night curtains on open cases;
3. Inclusion of a calculation for determining energy savings due to use of lighting occupancy sensors or controls;
4. Inclusion of a provision for testing at lowest application product temperature; and
5. Provisions allowing testing of equipment at NSF test temperatures.

At the January 2011 NOPR public meeting and in subsequent written form, DOE received many comments from stakeholders that did not pertain to a specific test procedure amendment. In section III.B, DOE provides responses to comments pertaining to the following subject areas:

1. Equipment scope;
2. Effective date;
3. Preemption;
4. Burden of testing;
5. Alternative refrigerants; and
6. Secondary coolant systems.

A. Amendments to the Test Procedure

Today's final rule incorporates the following changes to the test procedure for commercial refrigeration equipment in 10 CFR part 431, subpart C.

1. Updated References to Industry Test Procedures to Their Most Current Versions

In this final rule, DOE is updating the industry test procedures referenced in the DOE test procedure for commercial refrigeration equipment to their most current versions, namely AHRI Standard 1200–2010 and AHAM Standard HRF–

[7] NSF International. ''NSF/ASNI 7—2009: Commercial Refrigerators and Freezers.'' Ann Arbor, MI. *http://www.nsf.org/business/food_equipment/standards.asp.*

[8] Hereafter, any reference in this document to the current or existing DOE test procedure will refer to the test procedure for commercial refrigeration equipment established by the 2006 en masse test procedure final rule. 71 FR 71370 (Dec 8, 2006).

1–2008. The current DOE test procedure for commercial refrigeration equipment, published in the **Federal Register** on December 8, 2006, adopted ARI Standard 1200–2006, with additional provisions for testing ice-cream freezers at −15 °F, as the test procedure used to establish compliance with the applicable energy conservation standard. 71 FR 71340, 71356–58. Since the publication of the December 2006 en masse test procedure final rule, AHRI has released an updated version of its test procedure, AHRI Standard 1200–2010. The updated test procedure includes both editorial and technical changes to (1) the equipment class nomenclature used within the test procedure; (2) the integrated average rating temperature for ice-cream freezers; and (3) the method of normalizing and reporting units for equipment energy consumption. These changes align the AHRI test procedure with the nomenclature and method adopted by DOE in the January 2009 final rule. 74 FR 1092 (Jan. 9, 2009); 10 CFR 431.66. AHRI Standard 1200–2010 is also the test procedure currently used in the commercial refrigeration industry. In the November 2010 NOPR, DOE proposed to incorporate by reference AHRI 1200–2010 in the DOE test procedure. 75 FR 71602 (Nov. 24, 2010).

The current DOE test procedure also references AHAM HRF–1–2004 as the protocol for determining refrigerated compartment volume. AHAM has also updated its Standard HRF–1–2004 to newer version AHAM HRF–1–2008, which makes editorial changes including reorganizing some sections for greater simplicity and usability. AHRI 1200–2010 also references AHAM HRF–1–2008. For consistency, in the November 2010 NOPR, DOE proposed to incorporate by reference the more recent AHAM HRF–1–2008 in the test procedure for measuring refrigerated compartment volume. 75 FR 71602 (Nov. 24, 2010).

In commenting on the November 2010 NOPR, AHRI, the American Council for an Energy-Efficient Economy (ACEEE), and the Northwest Energy Efficiency Alliance (NEEA) all supported DOE's proposals. (AHRI, No. 15 at p. 2; ACEEE, No. 12 at p. 2; NEEA, No. 8 at p. 3) DOE did not receive any dissenting comments. DOE believes AHRI 1200–2010 and AHAM Standard HRF–1–2008 are the most up-to-date and commonly used test procedures for commercial refrigeration in the industry. DOE agrees with interested parties that these test procedures are appropriate to characterize the energy consumption of all commercial refrigeration equipment included within the scope of this rulemaking. Thus, in this final rule, DOE is updating the industry test procedures referenced in the DOE test procedure for commercial refrigeration equipment to their most current versions, AHRI Standard 1200–2010 and AHAM Standard HRF–1–2008.

2. Inclusion of a Method for Determining Reduced Energy Consumption Due to the Use of Night Curtains on Open Cases

DOE's current test procedure does not account for potential decreased energy consumption resulting from the use of night curtains on commercial refrigeration equipment. Night curtains are devices made of an insulating material, typically insulated aluminum fabric, designed to be pulled down over the open front of the case (similar to the way a window shade operates) when the merchandizing establishment is either closed or the customer traffic is significantly decreased. The insulating shield, or night curtain, decreases infiltration by preventing the mixing of the cool air inside the case with the relatively warm, humid air in the store interior. It also reduces conductive and radiative heat transfer into the case. Night curtains reduce compressor loads and defrost cycles, which can decrease the total energy use of the commercial refrigeration equipment. A 1997 study by the Southern California Edison Refrigeration Technology and Test Center found that, when used for 6 hours per day, night curtains reduce total energy use of the case by approximately 8 percent.[9]

In the November 2010 NOPR, DOE proposed adopting a standardized physical test method to allow manufacturers to account for the possible energy reduction associated with night curtains installed on open cases. DOE chose a physical test because it accurately captures differences in energy consumption as a function of similar technologies and case dimensions. 75 FR 71602–03 (Nov. 24, 2010). It is important to capture the different impacts on energy consumption among different night curtain designs because of the significant performance disparities that can exist. For example, night curtains made of low-emissivity materials, such as aluminum, decrease the radiative losses from the case and therefore are much more effective at reducing heat loss than night curtains made of plastic, linoleum, or other non-reflective materials. In addition, each night curtain may reduce energy consumption differently, depending on its particular insulating characteristics and design. Case dimensions, air curtain performance, and base infiltration load also impact night curtain performance. A physical test also accurately captures differences in the energy conservation performance of night curtains as a function of case dimension or night curtain design.

In the November 2010 NOPR, DOE proposed using a physical test method similar to section 7.2 in ASHRAE Standard 72–2005, ''Door-Opening Requirements,'' which reads as follows:

> Night Curtain Requirements. For open display cases sold with night curtains installed, the night curtain shall be employed according to manufacturer instructions for a total of 6 hours, 3 hours after the start of a defrost period. Upon the completion of the 6-hour period, the night curtain shall be raised until the completion of the 24-hour test period.

DOE further clarified that the test procedure for night curtains would, if adopted, apply only to cases sold with night curtains installed. 75 FR 71602–03 (Nov. 24, 2010). Following publication of the November 2010 NOPR, DOE received comments regarding the representative use of night curtains, the types of cases on which night curtains can be used, and the cost effectiveness of night curtains. These comments and DOE's responses are presented in the following sections.

a. Representative Use

While interested parties generally agreed with the proposed test procedure for night curtains, some interested parties expressed concerns regarding the way in which night curtains would be treated in the standards analysis, including the concern that the potential treatment might not be representative of actual use. Zero Zone stated that, while it agreed with the proposed test method for night curtains, it did not believe that night curtains should be allowed to be used to reduce measured energy consumption in the DOE test procedure because installing them does not necessarily mean that end users will deploy them. In addition, Zero Zone stated that 24-hour stores cannot use night curtains, and that night curtains may have a short lifetime. (Zero Zone, No. 16 at p. 1) AHRI supported providing a method to account for the reduced energy consumption of night curtains, but questioned the origin of DOE's 6-hour assumption. (AHRI, No. 19 at pp. 72–73) Earthjustice stated that,

[9] Southern California Edison, Refrigeration and Technology and Test Center, Energy Efficiency Division. *Effects of the Low Emissivity Shields on Performance and Power Use of a Refrigerated Display Case.* August 1997. Irwindale, CA. *www.econofrost.com/acrobat/sce_report_long.pdf.*

in accordance with the provisions of EPCA, which guide DOE's development of test procedures and call for the test procedures to reflect ''representative use,'' DOE should account for the inapplicability of night curtains to 24-hour retailers; the likelihood of end users actually deploying night curtains; and the relative lifetime of night curtains and likelihood of users replacing broken ones. Earthjustice added that, while CRE lifetimes span 10 to 15 years according to DOE's own figures, research has estimated a 7-year lifetime for night curtains. (Earthjustice, No. 11 at p. 1) California Codes and Standards agreed that night curtains have significantly shorter lifetimes than most of the other components that comprise an open display case, and suggested that any credit given to night curtains should be discounted because their effective life is short. (California Codes and Standards, No. 13 at p. 3) The Natural Resources Defense Council (NRDC) agreed with DOE's proposal, but reiterated Earthjustice's concern that night curtains are not reliably used in the field and have shorter lifetimes than the refrigerated cases. (NRDC, No. 14 at p. 2) ACEEE recommended that DOE base its treatment of night curtains on underlying data that present a realistic estimate of actual patterns of field use, the fraction of users who actually employ them, and the relative lifetimes of these features. (ACEEE, No. 12 at p. 4) California Codes and Standards expressed concern that DOE's treatment of night curtains might not be representative of actual in-field usage and thus might overstate the savings derived from night curtains. Such use, the comment stated, is dependent both on the specific application and on human (employee) behavior. (California Codes and Standards, No. 13 at pp. 2–3) NEEA commented that it believes the use of night curtains for compliance testing could grant too much credit to a feature that has questionable in-field value, which would undermine the statutory requirement that the test procedure reasonably approximate actual use. In addition, NEEA commented that night curtains would have negligible impacts during periods of peak demand, and that if manufacturers preferred night curtains to features that would reduce energy consumption during peak demand periods, the incorporation of night curtains would not be advantageous. Because of this, NEEA agreed with DOE's proposed 6-hour cycle of use for night curtains in the test procedure when a case is tested with night curtains because it is more conservative than an 8-hour cycle. (NEEA, No. 8 at p. 4)

In response to interested parties' comments that the intended use of a night curtain does not necessarily represent actual use in the field, DOE acknowledges that actual use of night curtains may be variable in the field. However, night curtains are an available technology for reducing energy consumption in commercial refrigeration equipment, and DOE believes that including night curtains in its test procedure provides manufacturers with a mechanism for estimating the energy consumption impacts of this technology and provides a more accurate representation of how those units may operate when installed. The test procedure adopted in this final rule is consistent across all cases sold with night curtains, regardless of their anticipated use. With regard to Earthjustice's concern with respect to the use of night curtains in 24-hour stores, DOE is not mandating the use of night curtains, but rather is simply accounting for the use of night curtains in the 24-hour test procedure. In addition, DOE notes that night curtains may in fact be used in 24-hour stores during periods of low use, although DOE concedes that this is less common.

In response to AHRI's question regarding why DOE proposed 6 hours as the time period for night curtains to be implemented, DOE believes that 6 hours conservatively represents the amount of time a night curtain would be drawn in a typical, non-24-hour store, when accounting for stocking and the fact that not all night curtains can be deployed at once. In addition, 6 hours is consistent with all field data and studies that DOE has identified.[10] [11] [12]

In response to the comments regarding the expected life of a night curtain, DOE understands that a night curtain may have a shorter life than a display case. However, DOE accounts for repair and replacement costs in the energy conservation standards analyses and believes these issues are better addressed in that rulemaking. DOE believes a 6-hour period of use adequately represents the anticipated use of a night curtain, while DOE is also cognizant of potential reductions in energy savings due to application and field use issues. DOE will discuss treatment of night curtains further in the associated energy conservation standards rulemaking and its impact on the energy use of commercial refrigeration equipment (Docket No. EERE–2010–BT–STD–0003).

b. Applicable Equipment

Southern Store Fixtures stated that night curtains can only be practicably used on vertical open display cases, and further clarified that on semi-vertical display cases the night curtain can interfere with the air flow in the case. (Southern Store Fixtures, No. 19 at p. 135) True Manufacturing (True) responded that semi-vertical night curtains do exist. (True, No. 19 at p. 137) Southern Store Fixtures also commented that an air curtain, which blows air across the front of an open case to reduce infiltration, can be temporarily used to reduce infiltration and heat loss to the case, and inquired whether an air curtain would meet DOE's proposed definition of a night curtain. (Southern Store Fixtures, No. 19 at p. 136) NEEA supported DOE's proposed definition of night curtain, provided the definition would be applied only to open cases of all sorts. NEEA also stated that, while it is not opposed to the inclusion of air curtains in the definition of ''night curtain,'' it has seen no data to show that air curtains are used to reduce infiltration and heat loss or that they would save energy. However, NEEA saw no reason to exclude air curtains from the definition of night curtain. (NEEA, No. 8 at pp. 3–4)

Zero Zone requested clarification regarding whether the night curtain provision could be applied to cases with doors that also have night curtains installed (Zero Zone, No. 19 at p. 145), and offered that night curtains could provide benefits for doored cases. (Zero Zone, No. 16 at p. 1) True stated that it had seen night curtains implemented on doored cases and that this does save a minimal amount of energy, but that these minor savings did not justify consideration of night curtains in the DOE test procedure. (True, No. 19 at pp. 146–47) Zero Zone commented that DOE proposed in the test procedure NOPR that automatic controls be required on lighting in order to meet DOE's proposed definition of ''lighting occupancy sensor'' or ''lighting control.'' Given this proposal, Zero Zone questioned why automatic night curtains would not then be required to meet DOE's definition of ''night

[10] Southern California Edison, Refrigeration and Technology and Test Center, Energy Efficiency Division. *Effects of the Low Emissivity Shields on Performance and Power Use of a Refrigerated Display Case.* August 1997. Irwindale, CA. *www.econofrost.com/acrobat/sce_report_long.pdf.*

[11] Faramarzi, R. and Woodworth-Szieper, M. Effects of Low-E Shields on the Performance and Power Use of a Refrigerated Display Case. *ASHRAE Transactions.* 1999. 105(1).

[12] Portland Energy Conservation, Inc. *Query of Database of GrocerySmart Data.* Portland, OR. Received October 18, 2011. Last viewed July 23, 2011.

curtain.'' (Zero Zone, No. 16 at p. 1) Southern Store Fixtures commented that the provision for starting the night curtain test 3 hours after a defrost period creates a problem for cases that are on a timed defrost and scheduled to defrost every 2 hours. (Southern Store Fixtures, No. 19 at p. 142) Southern Store Fixtures added that defrost occurs more frequently for some open cases. In response to Southern Store Fixtures, ACEEE stated that, if the 75/55 rating condition [13] does not cause frost accumulation sufficient to require defrost after 3 hours, it would oppose any special consideration for equipment without adaptive defrost. The test procedure, ACEEE commented, should not shelter legacy technologies when more modern alternatives are available. (ACEEE, No. 12 at pp. 5–6)

In response to interested parties' comments on the use of night curtains on doored cases, it is DOE's understanding that night curtains can be applied to all types of open cases (vertical, semi-vertical, and horizontal) and that night curtains are most effective and commonly used on open cases, rather than on doored cases. DOE was not able to identify any publicly available data regarding the use of night curtains on doored cases. Lacking a sound technical basis for including night curtains on doored cases, DOE is hesitant to expand the definition of night curtain to explicitly include doored cases at this time. DOE also agrees with True in that use of night curtains on doored cases will not significantly impact the daily energy consumption of the display case as measured by the DOE test procedure. Therefore, DOE is not extending the night curtain test procedure to include night curtain testing on cases with doors in this final rule. DOE will continue to monitor the prevalence and energy saving potential of these technologies in the market and may address them in a future rulemaking.

In response to Southern Store Fixtures' comment regarding air curtains, the definition of a night curtain does not necessarily exclude air curtains because the definition does not specify a material or construction. DOE is defining a night curtain as a technology that is used temporarily to reduce infiltration and heat loss on commercial refrigeration equipment, without additional qualifiers. In response to Zero Zone's comment regarding automatic night curtains, both automatic and manual night curtains are included in this definition, as well as air curtains, provided that they are temporarily deployed to decrease air exchange and heat transfer between the refrigerated case and the surrounding environment. To accommodate all defrost cycles, the test procedure requires the night curtain to be drawn 3 hours after the first defrost cycle. This change is consistent with updates that ASHRAE is considering making to the ASHRAE Standard 72 requirements for door openings. This addresses Southern Store fixtures concern regarding cases which may defrost every 2 hours and would never reach a time period ''3 hours after defrost,'' since those cases now may select a defrost cycle as the ''first'' to begin the test and then initiate the night curtain test 3 hours following the first defrost.

c. Cost Effectiveness

In response to DOE's proposal for testing night curtains, Southern Store Fixtures commented that DOE should consider the cost effectiveness of night curtains and noted that the analysis supporting the development of State of California's Title 24, ''California's Energy Efficiency Standards for Residential and Nonresidential Buildings,'' [14] recently showed that using night curtains is not cost effective. (Southern Store Fixtures, No. 19 at p. 70) AHRI did not object to the inclusion of testing provisions for night curtains, but did not believe the installation of night curtains is a cost-effective measure to save a significant amount of energy. AHRI referenced a study conducted by California Codes and Standards [15] which examined the cost effectiveness of night curtains and suggested that DOE review this study as well. (AHRI, No. 15 at p. 2) California Codes and Standards responded that while the State of California determined that night curtains were not cost effective, the analysis did not include the potential for reduction in radiative heat losses, which could be substantial. (California Codes and Standards, No. 19 at pp. 74–75) AHRI also stated that night curtains should not be mandated. (AHRI, No. 19 at pp. 72–73)

DOE acknowledges interested parties' concerns regarding the cost effectiveness of night curtains. DOE will perform a cost-effectiveness analysis as part of the process to consider amended energy conservation standards for commercial refrigeration equipment. Additionally, DOE's energy conservation standards are performance standards, and neither night curtains nor any other specific technology will be mandated. Night curtains will be treated as a design that manufacturers could use to reduce energy consumption in the energy conservation standards analysis. The comments described above pertain mainly to energy conservation standards and will be addressed in more detail in that rulemaking.

3. Inclusion of a Calculation for Determining Reduced Energy Consumption Due to Use of Lighting Occupancy Sensors or Controls

The current DOE test procedure does not account for the potential reduction in energy consumption resulting from the use of lighting occupancy sensors and scheduled controls. The potential for decreased energy use due to the use of occupancy-based sensors or schedule-based controls varies in the field due to differing environmental and operating conditions. However, studies, including a demonstration project conducted through the DOE Solid State Lighting (SSL) Technology Demonstration GATEWAY program,[16] have shown that lighting occupancy sensors or controls could reduce the total energy use of a typical refrigerated merchandising unit operating in a grocery store by up to 40 percent.[17]

In the November 2010 NOPR, DOE proposed a calculation method to account for the reduced energy consumption due to the use of lighting

[13] ''75/55 rating condition'' describes the standard ambient temperature and relative humidity requirements for testing commercial refrigeration equipment in the DOE test procedure. Specifically, the DOE test procedure requires equipment be tested at 75 °F and 55 percent relative humidity.

[14] Title 24, California Code of Regulations, Part 6—''Efficiency Standards for Residential and Nonresidential Buildings.'' April 23, 2008.

[15] California Utilities Statewide Codes and Standards Team. *Working Draft Measure Information Template Supermarket Refrigeration: 2013 California Building Energy Efficiency Standards.* April 2011. *www.energy.ca.gov/title24/2013standards/prerulemaking/documents/2011-04-18_workshop/review/2013_CASE_NR15_Commercial_Refrigeration_working_draft_4.13.2011.pdf.*

[16] DOE's Solid State Lighting (SSL) Technology Demonstration GATEWAY program features high-performance SSL products for general illumination in a variety of exterior and interior applications. Eligible products are installed at demonstration host sites, where their performance can be evaluated. Performance measures include energy consumption, light output/distribution, and installation/interface/control issues. Qualitative performance is investigated via feedback surveys of the relevant user communities. More information on the program is available at *www1.eere.energy.gov/buildings/ssl/gatewaydemos.html.*

[17] U.S. Department of Energy. *Demonstration Assessment of Light-Emitting Diode (LED) Freezer Case Lighting.* October 2009. Prepared by Pacific Northwest National Laboratory for the U.S. DOE Solid State Lighting Technology Demonstration GATEWAY Program. Washington, DC. *http://apps1.eere.energy.gov/buildings/publications/pdfs/ssl/gateway_freezer-case.pdf.*

occupancy sensors or controls. The proposed lighting occupancy sensor test procedure consisted of three primary calculations: (1) Calculation of direct energy use of lighting with occupancy sensors or scheduled controls installed; (2) calculation of reduced refrigeration load when energy use of lights located within the refrigerated compartment is decreased; and (3) calculation of the adjusted daily energy consumption based on the decreased lighting energy use and decreased compressor energy use. These calculations require several default assumptions, which would be used uniformly for all cases employing this test procedure. These assumptions designate values for the length of time lighting is off or dimmed due to lighting occupancy sensors or scheduled controls, the energy efficiency ratio (EER) [18] of the compressor, and the portion of energy produced from the lights that becomes heat in the case and increases the refrigeration load. 75 FR 71602–05 (Nov. 24, 2010).

At the January 2011 NOPR public meeting, DOE presented its proposal for treatment of lighting occupancy sensors and scheduled controls. DOE received comments on the definitions DOE proposed, the scope of technology covered, the calculation of energy savings, and optional physical testing. As part of the associated CRE energy conservation standards rulemaking, DOE also received comments pertaining to the proposed test procedure provision for lighting occupancy sensors and scheduled lighting controls. The comments DOE received on these issues, as well as DOE's responses, are presented in the following sections.

a. Definition of Lighting Control and Lighting Occupancy Sensor

In the November 2010 NOPR, DOE proposed to define ''lighting control'' and ''lighting occupancy sensor'' as follows:

Lighting control means an electronic device which automatically adjusts the lighting in a display case at scheduled times throughout the day.

Lighting occupancy sensor means an electronic device which uses passive infrared, ultrasonic, or other motion-sensing technology to detect the presence of a customer or employee, allowing the lights within the equipment to be turned off or dimmed when no motion is detected in the sensor's coverage area.

75 FR 71611 (Nov. 24, 2010).

In response, NEEA agreed with DOE's proposed definitions for lighting controls, but stated that the term ''electronic'' seemed superfluous. (NEEA, No. 8 at p. 4) Coca-Cola Company (Coca-Cola) suggested that the term ''automatic'' or ''automatically'' be added to the definitions of lighting occupancy sensor and lighting controls. (Coca-Cola, No. 19 at p. 157) ACEEE agreed with NEEA that the term ''electronic'' should be removed from the definition of lighting control and occupancy sensor. Additionally, ACEEE added that the definition of lighting control should not be limited to scheduled times, as such a definition excludes the possibility of accounting for controllers that respond to ambient lighting conditions. (ACEEE, No. 12 at p. 4) ACEEE added that, although such technologies have not been developed yet, DOE has allowed for the possibility of other, more advanced technologies in other rulemakings by marking some technologies ''reserved.'' ACEEE also commented that it was partially DOE's responsibility to investigate these types of potentially attractive technology options that are not yet in the marketplace, and that it was important to ensure that any potential new technologies could be tested using the DOE test procedure. (ACEEE, No. 19 at pp. 181–82) True responded that the test procedure and energy conservation standards do not prevent manufacturers from innovating new technologies, but rather set a minimum standard that manufacturers must meet. True also commented that the desired lighting level in cases can differ based on a number of variables in addition to ambient lighting level (for example, based on marketing purposes). (True, No. 19 at pp. 183 and 186)

Southern Store Fixtures commented that DOE should consider the environmental impact of producing lighting occupancy sensors and controls and questioned their energy savings in the field. (Southern Store Fixtures, No. 19 at p. 153)

DOE agrees with interested parties that the term ''electronic'' may be superfluous and is removing the term from the definitions for ''lighting occupancy sensor'' and ''scheduled lighting control'' adopted in this final rule. In addition, DOE agrees with Coca-Cola that the term ''automatic'' more accurately describes the function of the devices described. DOE will also define ''scheduled lighting control'' instead of ''lighting control,'' as this term is more descriptive of the device being defined.

With respect to lighting controls that respond to external factors other than motion or physical presence, such as ambient light, DOE does not believe any such technologies are widely used and is not aware of any data regarding their efficacy. While these factors do not prevent DOE from including the potential for such technologies in the definition of lighting controls or in a new definition, the calculations in the test method for lighting occupancy sensors and controls were based on the potential reduction in energy consumption associated specifically with lighting occupancy sensors and schedule-based controls. DOE believes that applying these same ''time off'' or ''time dimmed'' assumptions to other technologies may not be representative of their actual performance and would not be appropriate. DOE has not been able to identify any data related to the energy savings of lighting sensors that adjust case lighting based on ambient lighting. Because DOE is currently using a calculation method based on the estimated hours a lighting sensor will dim or turn off lights to calculate lighting energy savings, it would be difficult to incorporate provisions for other types of sensors without data regarding their anticipated or realized efficacy. In the absence of such data, it is difficult for DOE to estimate a representative energy savings from ambient light sensors. Therefore, DOE does not intend to include provisions for ambient light sensors or other sensor technologies in the definition of lighting sensors and/or controls.

With respect to Southern Store Fixtures' comment that DOE should assess the environmental impact of manufacturing lighting occupancy sensors and weigh the impact against the achieved savings, DOE believes lighting occupancy sensors have proven effective over their lifetime and can save energy when installed on commercial refrigeration equipment. DOE will assess the environmental impact of lighting occupancy sensors in the energy conservation standards rulemaking (Docket No. EERE–2010–BT–STD–0003). However, DOE notes that life-cycle environmental impacts of equipment manufacture and disposal are typically outside the scope of the environmental impact analysis performed in any standards rulemaking.

b. Manual Controls

In the November 2010 NOPR, DOE's definitions of ''lighting control'' and ''lighting occupancy sensor'' both dealt exclusively with automatic technologies. 75 FR 71611 (Nov. 24, 2011). At January 2011 NOPR public meeting, AHRI and Zero Zone commented that it was inconsistent for DOE to allow night curtains that must be deployed manually to achieve energy savings in the DOE test procedure, but not to allow manual light switches to

[18] The EER of a particular cooling device is a measure of its relative efficiency, expressed as the ratio of the cooling output to the energy consumed.

receive credit for energy savings. (AHRI, No. 19 at p. 152; Zero Zone, No. 19 at p. 160)

While DOE acknowledges that manual switches can be used to dim or turn off case lighting to save energy when a store is closed, DOE is not aware of any data that substantiate their use. Because DOE does not have any data on which to base the treatment of manual switches, including a provision for manual light switches in the test procedure would be very speculative. In addition, DOE has observed that most cases spanning the full range of efficiencies currently available on the market already include manual light switches installed. In contrast, night curtains and other automatic lighting controls technologies are sold as energy efficiency features incorporated into only higher efficiency commercial refrigeration equipment. Further, manual switches have been installed on cases for some time as a utility feature, to turn off lights when replacing light bulbs for example, rather than as an energy saving feature.

Lacking data that substantiate the use of manual switches to save additional energy, and given the fact that manual light switches are a baseline technology and are not installed to produce energy savings, DOE is not including manual switches in the definition of a lighting control technology.

c. Remote Lighting Controls

In the November 2010 NOPR, DOE proposed that remote lighting control systems would not receive credit for any potential energy savings in the DOE test procedure. 75 FR 71605 (Nov. 24, 2010). California Codes and Standards commented that some scheduled lighting controls are external to the case, and inquired whether cases in which the controls were installed external to the case would receive credit under the proposed test procedure. (California Codes and Standards, No. 13 at p. 5) California Codes and Standards suggested that DOE clearly state that the credit for time switch control would only apply when the switch is on-board the display case. (California Codes and Standards, No. 19 at p. 187) As part of the rulemaking for the CRE energy conservation standards (Docket No. EERE–2010–BT–STD–0003), DOE published the Notice of Public Meeting and availability of the CRE Preliminary Analysis Technical Support Document (76 FR 17573 (March 30, 2011)) and held a public meeting on April 19, 2011 at DOE headquarters in Washington, DC During the commercial refrigeration equipment preliminary analysis public meeting (April 2011 Preliminary Analysis public meeting) and in subsequent written comments, numerous interested parties stated that many cases were installed with remote lighting sensors or controls that were operated at the aisle or store level. (Docket No. EERE–2010–BT–STD–0003, Southern Store Fixtures, No. 31 at pp. 190–91, 194; Zero Zone, No. 31 at p. 196; California Investor Owned Utilities,[19] No. 42 at p. 4) NEEA responded that cases wired uniquely to receive a remote energy management system should receive credit in the DOE test procedure. (Docket No. EERE–2010–BT–STD–0003, NEEA, No. 31 at p. 195)

There are several ways in which a manufacturer, refrigeration contractor, or store owner can implement lighting controls, including individual case controls, single controls serving an entire case lineup, and storewide energy management systems. Including remote lighting controls in the test procedure could inadvertently set a precedent for deeming remote energy management technologies to be part of the covered equipment and allocating energy savings gained by these external devices to associated pieces of equipment. For example, a remote lighting control system may control systems other than commercial refrigeration equipment, and such systems are typically not sold with a piece of commercial refrigeration equipment. Cases set up to interact with these remote control systems have a dedicated circuit for lights so that the lights can be controlled separately from the rest of the case. However, this lighting circuit configuration does not inherently save energy and must be paired with an energy management control system. These energy management systems are sold separately from the piece of commercial refrigeration equipment, may be produced by a different manufacturer from the one that produces the case, and are not integral to the commercial refrigeration equipment.

DOE acknowledges that remote lighting controls do save energy and may be the more commonly used technology to dim or turn off lights in the field. However, energy consumption for a piece of commercial refrigeration equipment must be determined using the DOE test procedure on a representative unit, as shipped from the point of manufacture. 76 FR 12422, 12453 (March 7, 2011) Because a remote energy management system is not part of the piece of equipment as shipped from the manufacturer, but rather it is a separate piece of equipment that may be supplied by a separate manufacturer, remote energy management controls will not be considered in this test procedure final rule.

d. Representative Energy Savings

In addition to conserving energy directly through decreased lighting electrical load, occupancy sensors also decrease the heat load from lights that are located inside the refrigerated space of refrigeration equipment. Therefore, as part of the calculation method for lighting occupancy sensors and controls, DOE proposed a calculation method to account for these energy impacts in the November 2010 NOPR. 75 FR 71602–05 (Nov. 24, 2010). This calculation, as proposed, quantifies the reduced compressor energy use resulting from lighting occupancy sensors and scheduled controls and relies on a table of fixed compressor EERs, as described below.

$$CEC_A = 0.75 \times \frac{3.4121 \times \left(LEC_{sc} - P_{li} \times {}^{t_l}/_{1000}\right)}{EER}$$

Where:

CEC_A = alternate compressor energy consumption (kilowatt-hours);

LEC_{sc} = lighting energy consumption of internal case lights with lighting occupancy sensors and controls deployed (kilowatt-hours);

P_{li} = rated power of lights when they are fully on (watts);

t_l = time lighting would be on without lighting occupancy sensors or controls (24 hours); and

EER = energy efficiency ratio from Table 1 in AHRI Standard 1200–2010 for remote condensing equipment and the values shown in Table III.1 of this document for self-contained equipment (British thermal units per watt (Btu/W)).

[19] ''California Investor Owned Utilities'' refers here to a joint comment submitted by Southern California Edison, Pacific Gas and Electric Company, Southern California Gas Company, and San Diego Gas and Electric in Docket No. EERE–2010–BT–STD–0003.

TABLE III.1—EER FOR SELF-CONTAINED COMMERCIAL REFRIGERATED DISPLAY MERCHANDISERS AND STORAGE CABINETS

Operating temperature class	EER *Btu/W*
Medium	11.26
Low	7.14
Ice Cream	4.80

Notes:

1. EER values for operating temperature classes are calculated based on the average EER value of all equipment in that class, analyzed as part of the previous energy conservation standards rulemaking for commercial refrigeration equipment (2009 rulemaking). 74 FR 1092 (Jan. 9, 2009). This does not include equipment for which standards were set by Congress in EPACT 2005 (VCT, VCS, HCT, HCS, and SOC at medium (M) and low (L) temperatures) or classes for which standards were set using extension multipliers in the 2009 rulemaking (VOP.SC.L, SVO.SC.L, VOP.SC.I, SVO.SC.I, HZO.SC.I, VOP.SC.I, SVO.SC.I, HZO.SC.I, HCS.SC.I, SOC.SC.I). This nomenclature is described in the 2009 rulemaking. 74 FR1093.

2. These values only represent compressor EERs and do not include condenser fan energy use.

Southern Store Fixtures stated that assigning average values for the EER in the calculation of energy reduction due to lighting occupancy sensors would penalize manufacturers that have more efficient compressors. (Southern Store Fixtures, No. 19 at p. 170) NEEA stated that not including the condenser fan energy consumption in the EER value creates an over-credit for any heat load that is not imposed on the case, and agreed with Southern Store Fixtures that this approach gives more credit to less efficient compressors. (NEEA, No. 19 at p. 171) NEEA further stated that, while it has no issue with the direct savings from lighting controls as proposed in the test procedure, it does not support the proposed method for calculating indirect energy savings. First, according to NEEA, DOE should account for condenser fan energy use. Second, NEEA disagreed with the compressor EER values in the November 2010 NOPR because the values are carried out to two decimal places, which NEEA described as unnecessary. Third, NEEA stated that light-emitting diode lighting would lessen the impact on compressor loads. Fourth, NEEA disagreed with the idea that a single factor be used for discounting lighting heat load, instead suggesting that this factor varies by case type. (NEEA, No. 8 at p. 5) California Codes and Standards also suggested that DOE research and incorporate different multiplicative factors for alternate compressor energy consumption for open versus closed cases, because a lower factor may be appropriate for open cases. (California Codes and Standards, No. 13 at pp. 4–5)

With respect to its compressor EER values, DOE believes that the same values can be used for all self-contained equipment because compressor efficiency is primarily a function of compressor design for a given combination of load, product temperature, and ambient conditions, rather than a specific case geometry. In addition, as a precedent, Table 1 in AHRI 1200–2010 provides EER values for remote condensing equipment that are not specifically directed toward either open or closed refrigerated cases. DOE recognizes that the EER values presented in the November 2010 NOPR are not exact quantitative representations of specific compressor designs on the market, and that compressor performance will vary based on compressor manufacturer and model, operating conditions, and the overall design of the specific refrigeration system in which the compressor is used. However, DOE believes that the EER values it proposed are sound representations of default compressor performance available in the marketplace today that, when applied equally to all equipment, will yield a consistent and repeatable result. DOE acknowledges that two decimal points is not appropriate for these default values and has revised them to the nearest whole number for this final rule. (*See* the amendments to 10 CFR 431.64 (b)(2)(iii), following this preamble).

In response to comments that DOE did not account for condenser fan energy consumption, DOE assumed the compressor fan runs continuously in self-contained equipment in the calculations for reduced compressor energy consumption resulting from the use of lighting occupancy sensors and scheduled controls. This assumption may slightly underestimate the savings in some cases, but DOE believes it adequately represents expected energy savings in the field. DOE agrees that it is important that the default compressor EER values not exaggerate energy savings or disincentivize energy efficiency in compressors. However, because these values are applied to all commercial refrigeration equipment, regardless of actual performance, DOE does not believe the default values will affect or motivate compressor selection or design, as they will produce comparable results across all systems to which they are applied.

Because DOE is allowing the option of a physical test to determine savings from lighting occupancy sensors and controls (see section III.A.3.e), DOE must be cognizant of the fact that the calculated reduction in refrigeration load and associated indirect energy savings are comparable to those that would be measured in the physical test. In revising the EER values, DOE has also attempted to ensure that the default values do not result in greater savings than would be achieved if a case with an efficient compressor were tested. Because the calculation does not account for reduced compressor fan power or heat leakage from the compressor into the case, DOE believes that the EER values will not significantly overestimate indirect lighting energy savings. In addition, because the physical test method is optional, a manufacturer may always choose to use the calculation method, which is consistent across all equipment.

e. Optional Physical Test

In the November 2010 NOPR, DOE proposed a calculation method to account for the energy savings due to the use of lighting occupancy sensors or controls. DOE proposed a calculation method because it believed it would be representative, consistent, and relatively less burdensome for manufacturers compared to a physical test. In this assessment, DOE accounted for the fact that manufacturers may need to conduct tests with lights on for the duration of the test for other programs, for example for ENERGY STAR® [20] certification. 75 FR 71600, 71605 (Nov. 24, 2010).

At the January 2011 public meeting and in subsequent written comments, Coca-Cola, NEEA, and California Codes and Standards suggested that DOE allow optional empirical testing for the energy reduction associated with lighting controls. (Coca-Cola, No. 19 at p. 172; NEEA, No. 19 at p. 175; California Codes and Standards, No. 13 at p. 5) Earthjustice stated that the method proposed in the November 2010 NOPR ignores condenser fan energy use, underestimates compressor EER, and uses a fixed discount factor for the lighting heat load that, in actuality, would vary by unit. Earthjustice further stated that testing with lighting off or dimmed would resolve this issue without adding additional burden. (Earthjustice, No. 11 at p. 2) NEEA agreed with Earthjustice and commented that actual testing of lighting controls would be a superior way to account for their impacts, and

[20] ENERGY STAR is a joint program of the U.S. Environmental Protection Agency and DOE that establishes a voluntary rating, certification, and labeling program for highly energy efficient consumer products and commercial equipment. Information on the program is available at *www.energystar.gov/index.cfm?c=home.index*.

that DOE should either require testing or make it optional rather than relying solely on calculations. (NEEA, No. 8 at pp. 5–6)

ACEEE commented that alternative lighting methods, for example fiber bundles, could be developed, and that the DOE test procedure should provide a way for lighting vendors to capture the energy savings of new, innovative lighting technologies so that they can promote the technology to case manufacturers. (ACEEE, No. 19 at p. 173)

Hussmann Corporation (Hussmann) cautioned that the DOE test procedure should be cognizant of the repeatability of test results using a physical test method, specifically when units are tested at third-party laboratories. (Hussmann, No. 19 at p. 175) Traulsen commented that physically testing the energy reduction of lighting occupancy sensors and scheduled controls could be done with a $20 to $60 timing device, which translates to approximately $100 when accounting for markups. Traulsen added that $100 could be problematic for some small manufacturers. (Traulsen, No. 19 at p. 177)

DOE agrees with NEEA and Earthjustice that an optional physical testing method would be more representative of actual condensing unit energy reduction for a given case. However, DOE also agrees with Traulsen that physical testing should be an optional method due to the increased burden associated with additional testing. In response to Hussmann's comment, DOE believes the test procedure amendments for lighting occupancy sensors and scheduled controls adopted in this final rule, which allow for use of the calculation method or performance of a physical test, are sufficiently repeatable for the purpose of showing compliance with DOE energy conservation standards. Thus, in this test procedure final rule, DOE is incorporating provisions that allow manufacturers to choose either the calculation method or a physical test to demonstrate and credit energy savings associated with lighting occupancy sensors and scheduled controls. DOE believes that continuing to provide a calculation method for lighting occupancy sensors and controls is a less burdensome and more consistent method to account for the energy savings associated with these technologies. Nonetheless, if a manufacturer wishes to account for the energy reduction associated with lighting occupancy sensors and controls through physical testing, DOE is specifying that a physical test may be performed. The physical test will be prescribed as ''optional'' to allow the use of a calculation method to reduce burden on manufacturers and provide flexibility in the rating of equipment. In response to ACEEE's comment regarding the treatment of innovative new lighting technologies, DOE believes the optional physical test will allow manufacturers to measure the energy consumption of any new lighting technology that cannot be characterized by the calculation method. In either case, manufacturers will be expected to record which test method, calculation or physical, was used to determine the energy consumption of the equipment and to keep this information as part of the data underlying the certification. For DOE-initiated testing, DOE will run the optional physical test.

4. Inclusion of a Provision for Testing at Lowest Application Product Temperature

DOE has developed equipment classes based on three distinct temperature categories: (1) refrigerators that operate at or above 32 °F and are tested at an integrated average temperature of 38 °F (±2 °F); (2) freezers that operate below 32 °F and above −5 °F and are tested at an integrated average temperature of 0 °F (±2 °F); and (3) ice-cream freezers that operate at or below −5 °F and are tested at an integrated average temperature of −15 °F (±2 °F). 10 CFR 431.66(d)(1)

During the May 2010 Framework public meeting, several parties commented that some equipment covered under this rulemaking is designed to operate at significantly higher temperatures than the designated temperature for the corresponding equipment class. Specifically, California Codes and Standards stated that DOE should review test methods for niche equipment that may require different temperature criteria and schedules. (Docket No. EERE–2010–BT–STD–0003; California Codes and Standards, No. 5 at p. 3) Structural Concepts also stated that some types of equipment, such as candy and wine cases, operate at 55 or 60 °F, yet would have to be tested at 38 °F to meet an energy conservation standard, which is problematic because these units are not designed to operate at that temperature. (Docket No. EERE–2010–BT–STD–0003; Structural Concepts, No. 6 at p. 59)

AHRI Standard 1200–2010 includes provisions for such equipment to be rated at the application product temperature. To accommodate equipment that operates at temperatures much greater than the 38 °F (±2 °F) rating temperature, in the November 2010 NOPR DOE proposed including a provision for testing refrigerators that cannot operate at the prescribed 38 °F (±2 °F) integrated average rating temperature, permitting them to be tested at the lowest application product temperature. In the November 2010 NOPR, ''lowest application product temperature'' was defined as ''the lowest integrated average product temperature achievable and maintainable within ± 2 °F for the duration of the test.'' 75 FR 71605 (Nov. 24, 2010). DOE clarified that, for equipment rated at the lowest application product temperature, the integrated average temperature achieved during the test should be recorded, and that equipment tested at the lowest application product temperature would still be required to comply with the applicable standard for its respective equipment class. 75 FR 71605 (Nov. 24, 2010). DOE received several comments related to (1) the definition of lowest application product temperature; (2) expanding the definition of lowest application product temperature to include freezers and ice-cream freezers that cannot operate at the specified rating temperatures; (3) the energy conservation standard for equipment tested at the lowest application product temperature; and (4) how the provision for lowest application product temperature would accommodate remote condensing equipment. The specific comments and DOE's responses are provided in the subsequent sections.

a. Definition of Lowest Application Product Temperature

In comments received during the November 2010 NOPR comment period, NEEA stated that lowest application product temperature could be defined as the lowest temperature setting on the thermostat, and that DOE needs to better define what the lowest temperature is and how it is determined. (NEEA, No. 19 at p. 213) True responded that the lowest application product temperature is based on a number of factors and that units should be tested at the lowest set point. (True, No. 19 at p. 214) NEEA also stated that, due to the differences in types, applications, and configurations for application-temperature equipment, DOE must establish test procedures for this equipment that address the way that they are designed and controlled, as well as the ambient conditions in which they are operated, regardless of the shipment volume, in accordance with EPCA. (NEEA, No. 8 at p. 6) ACEEE commented that the lowest application temperature should be standardized, and inquired whether manufacturers would be able to test to any temperature

they want, or if the lowest application product temperature will be restricted to one or a few values. ACEEE added that equipment comparison would be difficult if there is no standardization. (ACEEE, No. 19 at pp. 217 and 219)

DOE believes that ''the lowest thermostat setting'' may not be a prescriptive enough definition in all cases. In some cases, the CRE does not contain an adjustable thermostat, which can be manually changed for testing. DOE agrees with True that the lowest application product temperature is based on a number of factors and cannot be limited to one CRE accessory. DOE intends to provide manufacturers with the flexibility to determine the lowest application product temperature for a given case only when the CRE cannot be tested at the specified rating temperatures. The phrase ''lowest application product temperature'' is also consistent with the nomenclature used in the Canadian energy efficiency regulations and test procedures for self-contained commercial refrigerators, freezers, and refrigerator freezers, established by Natural Resources Canada.[21] In most cases with thermostats, DOE agrees that the lowest application product temperature is, in fact, the lowest thermostat set point.

In response to ACEEE's comments, DOE is not restricting the lowest application product temperature to specific values. To qualify to use the lowest application product temperature for a certain piece of equipment, a manufacturer should be confident that any case tested under that equipment rating could achieve the specified lowest application product temperature within ±2 °F and could not be tested at the rating temperature for the given equipment class. Further, manufacturers should clearly document any variation in rating temperature setting in the test data they maintain underlying the certification of each basic model. In this test procedure final rule, DOE has better defined how the proper test temperature is to be determined and has clarified that, for many pieces of equipment, this will be the lowest temperature setting on the unit's thermostat. DOE agrees with commenters that it is important to designate equipment tested using the lowest application product temperature provision to ensure they are not incorrectly compared with units that are tested at the specified rating temperature. While DOE is not modifying the certification requirements in this final rule to require manufacturers to report the temperature at which the unit was tested (if other than the rating temperature), DOE is requiring that documentation be maintained as part of the test data underlying the certification. Further, the certified ratings calculated from the test data and applicable sampling plans should reflect the energy consumption measured at the lowest application product temperature setting.

b. Extension of Lowest Application Product Temperature Rating to All Equipment Classes and Rating Temperatures

At the January 2011 NOPR public meeting, several interested parties commented that there is a second category of equipment, including ice storage cases operating at 20 °F, that are unable to be tested at the prescribed rating temperature for freezers, or 0 °F (±2 °F). The commenters suggested that the provisions for testing at the lowest application product temperature should be expanded to freezers and ice-cream freezers to accommodate equipment that cannot be rated at the prescribed test temperature for its equipment class. (True, No. 19 at p. 191; Hussmann, No. 19 at pp. 192–93; Traulsen, No. 19 at p. 194; Zero Zone, No. 16 at p. 2; AHRI, No. 15 at pp. 2–3) Hussmann added that a case designed for 20 °F that is not required to be designed to be tested at 0 °F (±2 °F) for certification would be more efficient overall. (Hussmann, No. 19 at pp. 192–93)

DOE also has noticed that some equipment may not be able to be tested at the prescribed rating temperature because the operating temperatures are below the specified rating temperature (*e.g.,* a piece of commercial refrigeration equipment that operates at temperatures between 32 and 36 °F and cannot be tested at an integrated average temperature of 38 °F).

DOE understands that some equipment cannot be tested at its prescribed rating temperature and is adopting provisions in this final rule to accommodate testing for those units at the lowest application product temperature. In response to interested parties' comments regarding equipment that operates at, for example, 20 °F, and thus falls into the freezer temperature range, but is not able to be tested at the prescribed rating temperature for freezers, 0 °F (±2 °F), DOE is expanding the ''lowest application product temperature'' provision to freezers and ice-cream freezers. With regard to differentiation of equipment that was tested at the specified rating temperature, DOE is requiring manufacturers to maintain documentation of the temperature at which the unit was tested (if other than the DOE prescribed rating temperature) as part of the test data underlying the certification, as well as base any certified ratings on the energy consumption of the equipment as determined using the lowest application product temperature test procedure.

DOE also notes that while some equipment theoretically may not be able to be tested at the prescribed rating temperature because it operates at temperatures lower than the specified rating temperature and cannot reach the specified rating temperature, DOE is not aware of this occurring in any equipment that is currently marketed and sold in the United States, and DOE believes there is little possibility of this occurring. To provide clarity in differentiating equipment that cannot be rated at the prescribed rating condition, DOE will continue to refer to this provision as the ''lowest application product temperature.'' However, to account for all possible temperature ranges of equipment, DOE is defining the ''lowest application product temperature'' as ''the temperature closest to the equipment's specified rating temperature that the unit can achieve (±2 °F).'' In this case, ±2 °F refers to the repeatability of the lowest application product temperature.

c. Energy Conservation Standard for Equipment Tested at the Lowest Application Product Temperature

In the November 2010 NOPR, DOE proposed that equipment tested at the lowest application product temperature still be required to comply with the standard for its respective equipment class. 75 FR 71605–06 (Nov. 24, 2010). DOE made this proposal due to the small fraction of equipment that DOE expects to be rated using the lowest application product temperature provision. DOE analyzed the shipments data provided by ARI during the Framework comment period of the 2009 energy conservation standards rulemaking. (Docket No. EERE–2006–BT–STD–0126, ARI, No. 7 Exhibit B at p. 1). DOE found that, excluding that equipment for which EPACT 2005 amended EPCA to set standards (*i.e.,* self-contained commercial refrigerators and commercial freezers with doors) (42 U.S.C. 6313(c)(2)), only 1.7 percent of units for which standards were established operate at ''application temperatures,'' namely 45 °F, 20 °F, 10 °F, or −30 °F. Of these, units that operate at 45 °F (typically ''wine chillers'') had the highest shipments, and these units were predominantly remote condensing equipment. Given

[21] Natural Resources Canada, Office of Energy Efficiency. ''Energy Efficiency Regulations.'' *Canada Gazette.* Part I; June 2010.

the relatively low shipment volumes of equipment that operates at application temperatures, DOE did not believe it was justified in developing separate standards for equipment that operates at an application temperature different than one of the three prescribed rating temperatures. 74 FR 1104 (Jan. 9, 2009).

At the January 2011 NOPR public meeting and in written comments submitted during the public comment period, many interested parties commented on DOE's proposal that equipment tested at the lowest application product temperature would still be required to comply with the standard for its respective equipment class. California Codes and Standards, ACEEE, NEEA, and NRDC all agreed that it is reasonable to test equipment not capable of achieving a rating temperature at its lowest operating temperature, provided this equipment represents a small market share and is appropriately differentiated to prevent loopholes. (California Codes and Standards, No. 13 at p. 5; ACEEE, No. 12 at p. 5; NEEA, No. 8 at pp. 6–7; NRDC, No. 14 at pp. 1–2) NRDC suggested that equipment that cannot be tested below 38 °F should be labeled and sold with its projected annual energy consumption data indicating the lowest temperature achievable during testing, and should be clearly differentiated from equipment that meets the required testing temperatures. (NRDC, No. 14 at p. 2) ACEEE suggested that DOE define equipment classes in a manner that prevents the substitution of less efficient equipment for more efficient general-duty equipment. (ACEEE, No. 12 at pp. 1–2) ACEEE also expressed concern regarding the presence of ice cabinets on the market, and questioned how DOE could differentiate ice cabinets from freezers if they are rated at application temperature, so that they are not used inappropriately for frozen food storage. (ACEEE, No. 12 at p. 5) NEEA disagreed with DOE's tendency to refer to equipment with application temperatures above 38 °F as ''medium temperature'' because some of this equipment operates at significantly higher temperatures than the medium temperature rating condition of 38 °F. Therefore, NEEA suggested that this equipment be referred to as ''high or elevated temperature'' equipment. Additionally, NEEA asserted that ice storage cabinets, or any other equipment operating at an operating temperature between 0 °F and 38 °F, should not be called ''medium'' or ''low'' temperature. (NEEA, No. 8 at pp. 6–7)

True asked whether ice chests or freezers that are designed to operate at 20 °F and cannot be tested at 0 °F (±2 °F) would be required to meet the refrigerator or the freezer energy conservation standard. (True, No. 19 at p. 207) California Codes and Standards and NRDC also stated that the standard levels should be correspondingly adjusted to avoid loopholes, as otherwise, less efficient equipment potentially could comply if it were allowed to be tested at a higher operating temperature. (California Codes and Standards, No. 13 at p. 5; NRDC, No. 14 at pp. 1–2) California Codes and Standards suggested that DOE create a method to scale standards based on rating temperature, and stated that this would not require additional equipment classes. (California Codes and Standards, No. 19 at pp. 223 and 227) NRDC stated that, while DOE's past reasoning for not setting specific requirements for application-temperature equipment was based on the small size of the market, a forward-looking standard should include this equipment and set efficiency levels for it. (NRDC, No. 14 at p. 2) Sean Gouw (unaffiliated) commented that DOE had created product classes for niche products with low market share before, for example built-in residential refrigerators. (Gouw, No. 19 at p. 234)

AHRI commented that refrigerated cases that cannot operate at an integrated average temperature of 38 °F are niche products and represent a small part of the market. (AHRI, No. 19 at p. 228) Southern Store Fixtures commented that cases rated for higher temperatures do not necessarily use less energy because they may require additional heaters for humidity control. (Southern Store Fixtures, No. 19 at p. 229)

DOE maintains that units tested at the lowest application product temperature will still be required to meet the applicable energy conservation standard based on their equipment class. While DOE understands that this approach may result in slightly less stringent standards for the small number of units that cannot be tested at the prescribed rating temperatures, as interested parties pointed out, DOE does not believe that establishing separate equipment classes for these niche types of equipment would be justified given their small shipment volume and the wide diversity of niche products.

DOE agrees with interested parties that preventing loopholes that would allow less efficient equipment to be sold is very important. However, DOE believes that allowing testing at the lowest application product temperature for all temperature classes allows for coverage of more equipment and may allow ''intermediate'' equipment that cannot operate at its prescribed test temperatures to be designed to operate more efficiently. It is not expected that this will create an opportunity for less efficient equipment to be sold because DOE is requiring units tested at the lowest application product temperature to be retested if the thermostat is changed.

California Codes and Standards also suggested scaling the energy consumption data for equipment tested at application temperatures to reflect projected energy consumption at the relevant rating temperature. (California Codes and Standards, No. 19 at pp. 223 and 227) However, DOE agrees with Southern Store Fixtures that testing these units at a higher integrated average temperature does not necessarily mean that the unit will use less energy. The variability in energy use and the impact of variation in integrated average temperature will depend on case type, geometry, and configuration. This makes it very difficult to set a consistent scaling factor or incorporate temperature into the standards equations, as any value chosen would be not be representative of all cases. This issue will be discussed further in the energy conservation standards rulemaking (Docket No. EERE–2010–BT–STD–0003).

With respect to NEEA's suggestion that equipment rated at lowest application product temperature be referred to as ''high or elevated temperature'' equipment, DOE cannot control how equipment is referred to or categorized in the market beyond the equipment classes DOE specifies. Since DOE is not creating a unique equipment class for this equipment, DOE will continue to categorize the equipment based on its appropriate equipment class.

d. Remote Condensing Units and the Lowest Application Product Temperature

In the November 2010 NOPR, DOE proposed that the lowest application product temperature provision apply equally to self-contained and remote condensing commercial refrigeration equipment. 75 FR 71605 (Nov. 24, 2010). AHRI inquired how the lowest application product temperature would apply to remote condensing equipment, because the lowest operating temperature for remote condensing equipment is dependent on the condensing unit to which it is attached. (AHRI, No. 19 at p. 203) Zero Zone commented that the approach for testing equipment at the lowest application product temperature was reasonable for

self-contained equipment, but for remote condensing equipment, the size of the condensing unit would affect the operating temperature range. Zero Zone further inquired whether the test procedure would regulate the size of condensing units. (Zero Zone, No. 19 at p. 207) Zero Zone stated that there needs to be more specificity in the testing of application temperature for remote condensing equipment. Zero Zone continued by asserting that ASHRAE 72 requires that a pressure regulator be used to set the evaporating temperature to the correct value. This means that the limit of evaporating temperature is dependent on the size of the test laboratory's compressor rack. Zero Zone suggested that, for standardization purposes, the DOE test procedure should require that the saturated suction temperature be set to 5 °F colder than the temperature needed to maintain the application temperature. (Zero Zone, No. 16 at p. 2)

DOE has reviewed Zero Zone's comment and the pertinent sections of ASHRAE Standard 72. DOE concedes that, for remote condensing equipment that does not have a thermostat or another means to regulate temperature, the size of the compressor rack could impact the lowest achievable application product temperature. In this case, the saturated suction temperature at the compressor rack (also referred to as the Adjusted Dew Point Temperature in AHRI 1200–2010) impacts the amount of refrigerant that can flow through the evaporator. Larger compressor racks are able to achieve lower saturated suction temperatures, which will produce a lower operating temperature in the case than a smaller compressor. DOE acknowledges that the method included in Zero Zone's comment would create a standardized repeatable test for this type of equipment. However, DOE believes that the specification of a saturated suction temperature to 5 °F lower than that required to maintain the application temperature is somewhat arbitrary and not necessarily indicative of the lowest operating temperature of the unit. This specification also could inadvertently restrict or burden manufacturers when testing their equipment. DOE did not receive comments from other manufacturers on this topic. DOE also notes that specification of a fixed saturated suction temperature is only required for remote condensing units without thermostats or other means of regulating temperatures that are rated at the lowest application product temperature. DOE is not currently aware of any equipment on the market that would fit this description.

In the case of remote condensing equipment with a thermostat, DOE believes that the lowest application product temperature is sufficiently defined by the range of the thermostat and that the suction temperature is similarly limited by the thermostat. However, for remote cases that do not have a thermostat or other means for controlling temperature at the case level, DOE acknowledges that this relationship between compressor rack size and lowest application product temperature does create some variability in the lowest application product temperature that can be achieved by a given case. Thus, DOE is requiring that the adjusted dew point temperature, as defined in AHRI 1200–2010, be set to 5 °F colder than that temperature required to maintain the manufacturer's lowest specified application temperature for those pieces of remote condensing commercial refrigeration equipment that do not have a means for controlling temperature at the case, such as a thermostat, and cannot be tested at their specified integrated average rating temperatures.

5. Provisions Allowing Testing of Equipment at NSF Test Temperatures

Commercial refrigeration equipment that is marketed to hold perishable food items is classified and certified by NSF/ANSI–7, ''Commercial Refrigerators and Freezers'' (hereafter referred to as NSF–7), a food safety standard issued by NSF.[22] NSF–7 establishes two classes for commercial display cases: Type I, which is tested at ASHRAE Standard 72 standard ambient conditions (75 °F dry bulb and 64 °F wet bulb temperature), and Type II, which is tested at higher ambient conditions (80 °F dry bulb and 68 °F wet bulb temperature). These two test conditions are also reported in terms of dry bulb temperature and percentage relative humidity. Type I corresponds to 75 °F and 55 percent relative humidity, and Type II corresponds to 80 °F and 60 percent relative humidity. NSF–7 also requires Type I and Type II equipment to be tested such that the average temperature of each test package containing an individual temperature sensor does not exceed 41 °F and no single temperature sensor exceeds a reading of 43 °F at any time during the test. NSF–7 does not specify a required average temperature for all test sensors or the measurement of energy consumption during the test. On the other hand, DOE does require an integrated average test temperature of 38 °F ± 2 °F. However, manufacturers have reported that they test cases at lower integrated average temperatures than that specified by DOE to ensure the NSF–7 requirements are met.

At the January 2011 NOPR public meeting and in subsequent written comments, interested parties commented on the similarities and differences between the DOE test procedure and the NSF–7 test. Commenters also noted the additional burden associated with performing both tests. Southern Store Fixtures commented that if a unit designed to operate at higher ambient conditions is operated at a lower ambient temperature, the case will not perform as well because it will have an oversized compressor and could have operational issues with compressor cycling. Southern Store Fixtures further commented that the energy consumption of a case can increase by as much as 30 percent when changing from a rating condition of 75 °F and 55 percent relative humidity to 80 °F and 60 percent relative humidity. (Southern Store Fixtures, No. 19 at pp. 94–95) True and Coca-Cola stated that a 5 °F difference will not significantly affect energy consumption and that, for those few cases that would be significantly affected, they could apply for a waiver. (True, No. 19 at p. 122; Coca-Cola, No. 19 at p. 123) Southern Store Fixtures countered that only in cases with solid doors will the 5 °F temperature difference be insignificant (Southern Store Fixtures, No. 19 at p. 131), and that the effects of a 5 °F increase in temperature can be significant for open cases or cases with single pane glass. (Southern Store Fixtures, No. 19 at p. 97)

Hussmann stated that, although the difference in energy use among self-contained cases may not be significant, Hussmann was concerned with the additional burden of testing a case twice. (Hussmann, No. 19 at p. 123) Hussmann stated that all units must pass the NSF–7 requirements in order to be certified for food safety. The NSF–7 requirement differs from AHRI 1200 in that the maximum average temperature can never exceed 41 °F at any time. Hussmann also stated that the integrated average temperature for the NSF–7 test (approximately 34 °F) is actually lower than that required by the DOE test procedure, and that the energy consumption of a medium temperature self-contained case is higher during testing for NSF compliance than it is during the DOE energy consumption

[22] NSF International. ''NSF/ASNI 7—2009: Commercial Refrigerators and Freezers.'' Ann Arbor, MI. *http://www.nsf.org/business/food_equipment/standards.asp.*

test. Hussmann commented that, as it stands now, equipment that consumes more energy during the NSF–7 test than is allowed by the DOE test procedure would have to be re-tested at DOE conditions, thereby imposing an additional burden. Hussmann stated that 85 percent of its self-contained models require NSF testing, meaning that hundreds of additional DOE tests could be required. (Hussmann, No. 10 at pp. 1–2) Hussmann recommended that DOE allow for the use of a linear polynomial curve-fit in the development of a normalization equation from NSF to DOE internal temperatures. This would allow manufacturers test at NSF internal conditions and then normalize to the standard DOE conditions, which would reduce the testing burden because manufacturers already test to the NSF standard. (Hussmann, No. 10 at p. 2)

California Codes and Standards and NEEA both suggested that DOE allow testing at both the 75 °F and 55 percent relative humidity rating condition and NSF Type II conditions, provided the case, as tested, were to meet the applicable energy conservation standard. (California Codes and Standards, No. 19 at p. 124; NEEA, No. 19 at p. 127) ACEEE stated its belief that commercial refrigeration equipment can be divided into two types of equipment: that for which food safety is a true concern, and that which cools and displays product for the purposes of presenting value to the consumer. The former subset of equipment is rated in accordance with NSF food safety standards, while the latter is not. Therefore, ACEEE suggested making a distinction between the two in the DOE test procedure, with the NSF–7 test procedure being used for equipment for which food safety is a true concern, and the AHRI/ASHRAE method being used for the remaining equipment. ACEEE stated that it would endorse such a method as long as the two subsets of equipment were separated clearly, such as via labeling. (ACEEE, No. 12 at pp. 2–3)

True stated that the current Federal test procedure relies on ASHRAE Standard 72, which specifies a rating condition of 75 °F and 55 percent relative humidity, and that this reflects the way cases are currently tested. True added that if the test temperatures were to be changed, comparison with historical data could be difficult. (True, No. 19 at pp. 127–28) True also acknowledged that self-contained cases currently required to meet the EPACT 2005 standard must test at the DOE rating condition of 75 °F and 55 percent relative humidity and, optionally, at NSF Type II conditions, so there is no incremental increase in burden. (True, No. 19 at p. 129)

DOE acknowledges the burden on manufacturers that have to certify equipment with both the DOE test procedure and the NSF–7 test procedure. DOE also agrees with interested parties that testing cases at an ambient temperature of 80 °F, rather than the currently specified 75 °F, will not have a significant impact on energy consumption for cases with doors. DOE recognizes that, as Southern Store Fixtures mentioned, the impact on open cases may be greater than on closed cases, but does not believe that equipment will have operation or performance issues if tested at a the temperatures prescribed by the DOE test procedure. DOE believes the energy consumption of a case should scale with ambient temperature and does not believe these issues will prevent units from being tested using the DOE-prescribed test temperatures or demonstrating compliance with DOE energy conservation standards. DOE researched the equipment available on the market and requested specific data regarding the existence of cases that cannot meet the standard or the characteristics of their operation. DOE has found no evidence or firm data supporting the creation of a separate equipment class and standard for equipment designed to operate at higher ambient conditions. Thus, DOE will not create specific new equipment classes for equipment that is designed to operate at internal or ambient temperatures other than the test conditions prescribed by DOE.

DOE does not believe development of a scaling factor that would be sufficiently representative of equipment energy consumption and consistent across an equipment class is justified within the scope of this rulemaking. The geometry and design of each case will cause the magnitude of the impact of variation in temperature to vary, making development of any scaling factor extremely burdensome. This is true for both external and internal temperature variations.

Continuing to require testing at standard rating conditions, as prescribed in the DOE test procedure, without allowances for variation in internal or external temperatures, will not increase the burden for manufacturers. However, it will also not reduce the total burden of testing, which could be accomplished through coordination of test requirements with other programs, such as NSF.

In response to the suggestion that cases could optionally be tested at NSF–7 conditions (ambient or internal) as long as the unit, as tested, complies with the energy conservation standard, DOE believes that this will effectively reduce the burden on manufacturers while ensuring that all cases meet or exceed the DOE energy conservation standard, provided the NSF–7 rating temperatures and ambient conditions represent a more stringent test. In most cases, using the NSF internal temperature requirements or Type II external ambient conditions represents a more conservative test in that equipment will have to be more efficient to operate at NSF internal temperatures or ambient conditions and still comply with DOE energy conservation standards. For example, as Hussmann notes, manufacturers often perform the NSF–7 test at a lower integrated average temperature than that required by the DOE test procedure to ensure their cases will comply with NSF's food safety requirements. However, DOE notes that this method is optional, and manufacturers are technically allowed to test cases at up to 41 °F integrated average temperature under the NSF–7 test, provided the air is perfectly mixed and the spatial temperature variation within the case is very well controlled. In an effort to reduce burden for manufacturers and allow testing for the purposes of NSF certification and DOE compliance to occur in the same test, DOE is adopting in this final rule provisions that allow manufacturers to optionally use NSF internal or ambient conditions to test equipment in a given equipment class, provided the NSF conditions are more stringent than the prescribed DOE rating temperatures and conditions for that equipment class. To clarify, manufacturers may test at the prescribed 75 °F and 55 percent relative humidity ambient rating condition, or they may optionally test at the NSF Type II conditions of 80 °F and 60 percent relative humidity. In either case, the equipment would be required to show compliance with the relevant energy conservation standard for that equipment class. Additionally, manufacturers are allowed to test equipment at integrated average temperatures that satisfy the DOE-specified rating temperatures or are lower than the DOE-specified rating temperatures.

DOE acknowledges that allowing equipment to be tested at NSF–7 conditions in the DOE test procedure would make comparison of equipment within the same equipment class difficult and confusing, given that there could be cases tested at four different conditions in the same class. However, DOE is requiring that equipment rated at

NSF–7 rating temperatures maintain documentation of the internal and ambient temperatures as part of the test data underlying the certification, so that informed comparisons can be made.

As True acknowledged, manufacturers that produce equipment covered by EPACT 2005 standards are currently testing to both the DOE and NSF–7 test procedures. Thus, maintaining the proposed equipment classes and test temperatures for equipment that must also be tested using the NSF–7 test for food safety certification does not introduce any incremental burden on manufacturers. Instead, the provision to demonstrate compliance by testing the equipment at NSF–7 test conditions is only meant to provide an opportunity to the manufacturers to reduce the number of tests for equipment that can comply with DOE standards even when tested at the more stringent NSF–7 test conditions. However, this provision will not be advantageous to equipment that may be unable to comply by DOE standards when tested at the more stringent NSF–7 test conditions due to a large difference in energy consumption at the two different test conditions.

In summary, DOE is incorporating language in the test procedure final rule that will allow manufacturers to optionally test at NSF–7 conditions that are more stringent than the DOE test conditions to reduce the repetitive test burden of testing at both DOE and NSF–7 conditions, provided the case still meets DOE's energy conservation standards.

B. Other Notice of Proposed Rulemaking Comments and DOE Responses

At the January 2011 NOPR public meeting and in the ensuing comment period, DOE received comments from interested parties regarding several issues that pertain to the CRE test procedure and energy conservation standard rulemakings, but not to specific provisions or amendments. DOE received comments on the scope of covered equipment; the testing of part-load technologies not currently referenced explicitly in the test procedure; the effective date of the test procedure rulemaking; preemption of State regulations; the burden of testing; the association of this final rule with DOE's certification, compliance, and enforcement regulations; alternative refrigerants; and secondary coolant systems.

1. Equipment Scope

The test procedure for commercial refrigeration equipment prescribes methods for testing all commercial refrigeration equipment, as defined in 10 CFR 431.62. The definition of commercial refrigerator, freezer, and refrigerator-freezer includes all refrigeration equipment that:

(1) Is not a consumer product (as defined in § 430.2 of part 430);

(2) Is not designed and marketed exclusively for medical, scientific, or research purposes;

(3) Operates at a chilled, frozen, combination chilled and frozen, or variable temperature;

(4) Displays or stores merchandise and other perishable materials horizontally, semi-vertically, or vertically;

(5) Has transparent or solid doors, sliding or hinged doors, a combination of hinged, sliding, transparent, or solid doors, or no doors;

(6) Is designed for pull-down temperature applications or holding temperature applications; and

(7) Is connected to a self-contained condensing unit or to a remote condensing unit.

10 CFR 431.62

a. Remote Condensing Racks

California Codes and Standards commented that DOE should consider regulating remote condensing racks and that significant energy savings were possible in that type of equipment. (California Codes and Standards, No. 19 at p. 12) California Codes and Standards further asked DOE to review the pros and cons of establishing a separate rulemaking on remote condensers and to consider which parts of remote condensing equipment should be covered by energy conservation standards. These standards, the comment stated, would be well suited to establishing a baseline efficiency for the remote condensing unit, independent of the type of equipment it serves. (California Codes and Standards, No. 13 at pp. 1–2) ACEEE stated that DOE should recognize the distinction between dedicated remote condensing units and rack systems that serve multiple pieces of equipment. ACEEE suggested that DOE should develop an appropriate method for rating dedicated remote compressors across various capacities and temperature needs, potentially using standard loads for the testing of remote rack systems. (ACEEE, No. 12 at p. 5)

During the 2009 CRE energy conservation standards rulemaking, DOE made the determination not to cover remote condensers within the scope of the January 2009 final rule, and to limit the standards analyses to refrigerated cases only and not the remote condensers. In the advance notice of proposed rulemaking, DOE stated:

> In its Framework Document, DOE pointed out that EPCA defines a ''self-contained condensing unit,'' in part, as an assembly of refrigerating components ''that is an integral part of the refrigerated equipment * * *'' (42 U.S.C. 6311(9)(F), added by EPACT 2005, section 136(a)(3)) EPCA also defines a ''remote condensing unit,'' in part, as an assembly of refrigerating components ''that is remotely located from the refrigerated equipment * * *.'' (42 U.S.C. 6311(9)(E), added by EPACT 2005, section 136(a)(3)) DOE also stated in the Framework Document that this difference in the definitions may mean that, under EPCA, remote condensing units are not a part of the refrigerated equipment and that energy conservation standards for remote condensing commercial refrigerators, commercial freezers, and commercial refrigerator-freezers would apply only to the refrigerated equipment (i.e., storage cabinets and display cases), but not to the remote condensing units.

72 FR 41170–71 (July 26, 2007).

Several interested parties commented at that time that coverage of remote condensers would be difficult due to the wide variety of this type of equipment. (Docket No. EERE–2006–STD–0126, Zero Zone, Public Meeting Transcript, No. 3.4 at p. 48; [23] ARI, No. 7, at p. 3) Additionally, energy efficiency advocates and utilities expressed the opinion that these units should be covered, but not necessarily within the scope of that rulemaking. (Docket No. EERE–2006–STD–0126, Joint Comment,[24] No. 9 at p. 5) DOE decided to not cover remote condensers in the January 2009 final rule. DOE further stated that it would address later whether it has the authority to regulate this equipment, and if so, would examine then whether standards for remote condensers are warranted and feasible. 74 FR 1105 (Jan. 9, 2009).

DOE believes that nothing has changed to affect this stance. DOE continues to believe that the condenser rack to which a piece of remote condensing commercial refrigeration equipment is attached to, is a separate piece of equipment that may serve other equipment types (*e.g.,* walk-in coolers and freezers). As such, DOE is not

[23] A notation in the form ''Docket No. EE–2006–STD–0126, Zero Zone, Public Meeting Transcript, No. 3.4 at p. 48'' identifies an oral comment that DOE received during the May 16, 2006 Framework public meeting and which was recorded on page 48 of the public meeting transcript (document number 3.4) in the docket for the 2009 CRE energy conservation standards rulemaking (Docket No. EERE–2006–STD–0126).

[24] Joint Comment refers to a written comment submitted by the Alliance to Save Energy, ACEEE, the Appliance Standards Awareness Project, NRDC, Northeast Energy Efficiency Partnerships, and Northwest Power and Conservation Council in Docket No. EERE–2006–STD–0126.

considering remote condensing racks in the current associated energy conservation standards rulemaking (Docket No. EERE–2010–BT–STD–0003). DOE is not introducing test procedures for remote condensers in this rulemaking, and maintains that DOE has no obligation to do so. DOE, if it proposed to regulate or develop a test procedure for remote condensing racks, would do so in a separate rulemaking.

b. Testing of Part-Load Technologies at Variable Refrigeration Load

Technologies that operate as a function of variable ambient conditions can reduce annual energy consumption of commercial refrigeration equipment by adapting to changes in refrigeration load that result from changes in ambient conditions. These variable load, or part-load, technologies include higher efficiency expansion valves, condenser fan motor controllers, and anti-sweat heater controllers. In the November 2010 NOPR, DOE suggested that, although ASHRAE Standard 72–2005 is a steady-state test, some variation in refrigeration load is experienced in that test due to the door opening and night curtain provisions. This variation in refrigeration load inherent in the test procedure means the effects of variable load, or part-load, features are already captured to some degree in the proposed test procedure for commercial refrigeration equipment. DOE further argued that additional independent or explicit part-load testing would result in increased cost and burden for manufacturers of covered equipment. DOE estimated that part-load testing at additional rating conditions could more than double the cost and burden of testing for all commercial refrigeration equipment. In the November 2010 NOPR, DOE stated that explicit testing at multiple sets of conditions was not justified because of this increased burden, and proposed that the test procedure continue to reference only one standard ambient condition, relying on the transient effects inherent in the proposed test procedure to capture part-load performance. 75 FR 71601 (Nov. 24, 2010).

At the January 2011 NOPR public meeting and in subsequent written comments, NEEA and California Codes and Standards agreed with DOE that the ASHRAE Standard 72 test method does include variation in the refrigeration load, which would realize the benefits of part-load technologies, such as floating head pressure controls, liquid suction heat exchangers, and improved thermal expansion loads in equipment with doors. These interested parties asked DOE to evaluate part-load technologies in the energy conservation standards rulemaking. (NEEA, No. 8 at p. 2; California Codes and Standards, No. 19 at p. 13)

AHRI commented that additional, specific requirements for testing of part-load technologies will add an additional burden on manufacturers, and agreed with DOE that ASHRAE 72 already accounts to some degree for the effects of part-load technologies. As a result, AHRI recommended against new testing requirements for these technologies. (AHRI, No. 15 at p. 2) NEEA agreed that short-term part-load impacts are limited, and that longer-term variations, such as those induced by changes in ambient conditions, would be difficult to capture without imposing a significant additional burden. (NEEA, No. 8 at p. 2)

Conversely, NRDC commented that it believed that DOE had not provided sufficient data to show that testing at varying loads would impose an undue burden on manufacturers. NRDC further stated that manufacturers that use advanced control strategies and variable-load technologies need to have such features properly credited. According to NRDC, to not adequately credit such features would conflict with section 342 of EPCA, which requires DOE to adopt test procedures that reflect representative energy use. (NRDC, No. 14 at pp. 3–4)

ACEEE stated its belief that gains due to technologies such as adaptive controls and modulating components must be captured in a test procedure to fairly express to consumers the better value that may be presented by equipment that performs more efficiently in the field. In ACEEE's opinion, to not capture the effects of these features would result in a loss of competitiveness by domestic manufacturers. (ACEEE, No. 12 at p. 2) ACEEE added that it does not believe that the current test methods account for modulating components and their benefits. (ACEEE, No. 12 at p. 6)

DOE recognizes the desire to better characterize the performance of these devices. However, DOE believes that the refrigerant load changes inherent in the amended test procedure are representative of average use and that the test procedure established in this final rule meets the requirements for a test procedure established by EPCA section 342 (42 U.S.C. 6314(a)(2)). Given that, DOE believes the establishment of new, independent test requirements for part-load conditions is not necessary and would impose undue burden on manufacturers. As stated previously, testing of part-load technologies would more than double the burden on manufacturers to test equipment. DOE maintains that part-load technologies that respond to changes in refrigeration load will be partially captured in the DOE test procedure due to door openings, night-curtain deployment, compressor cycling, and minor fluctuations in the thermodynamic state of the case during the test. In any event, manufacturers may implement any part-load technologies as they see fit. DOE believes the efficiency gains achieved by part-load technologies in the current test procedure are sufficient, and that further independent testing is not justified.

2. Effective Date

EPCA requires that, in any rulemaking to amend a test procedure, DOE must determine to what extent, if any, the proposed test procedure would alter the measured energy efficiency of any covered product as determined under the existing test procedure. (42 U.S.C. 6293(e)(1) and 6314(a)(6)(D)) If DOE determines that the amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6293(e)(2) and 6314(a)(6)(D)) Several of the provisions in this test procedure final rule will change the measured energy use of some commercial refrigeration equipment covered under the scope of current standards. As such, DOE is in the process of amending the current energy conservation standards for commercial refrigeration equipment in a concurrent rulemaking (Docket No. EERE–2010–BT–STD–0003).

In the November 2010 NOPR, DOE proposed to require that the use of the amended test procedure be consistent with the compliance date of any revised energy conservation standards. 75 FR 71599 (Nov. 24, 2010). DOE is adding language to the final test procedure amendments clarifying that the amendments shall not be used at the time of publication to determine compliance with the current energy conservation standards. Instead, manufacturers will be required to use the amended test procedure to demonstrate compliance with DOE's energy conservation standards on the compliance date of any final rule establishing amended energy conservation standards for commercial refrigeration equipment. Until this date, manufacturers must continue to use the existing DOE test procedure, as set forth at 10 CFR 431.64, to demonstrate compliance with existing energy conservation standards.

However, EPCA also states that, effective 360 days after any amended

test procedure final rule is prescribed, any representations of the ''maximum daily energy consumption'' of covered equipment, for example in labeling or advertising, must be based on results generated using the amended test procedure. (42 U.S.C. 6314(d)) In the November 2010 NOPR, DOE proposed that, as of 360 days after publication of any test procedure final rule, representations of energy consumption of any covered equipment would need to be based on results generated using the amended test procedure. 75 FR 71599 (Nov. 24, 2010). This would result in possible dual testing requirements for some cases between the period 360 days after publication of the amended test procedure final rule and the effective date of any amended standards. However, because many of the test procedure amendments are optional, this is not expected to affect many units. For example, if a case is sold with and without occupancy sensors, the case would be tested in accordance with the current DOE test procedure, without amendments, to show compliance with DOE energy conservation standards. Because this case is not required to be tested with occupancy sensors in the amended test procedure, the test using the current DOE test procedure is also in accordance with the amended test procedure and the established daily energy consumption values may be reported and publicized. Representations of the ''maximum daily energy consumption'' of cases accounting for the energy savings of lighting occupancy sensors, for example, could be made only after testing the case in accordance with the lighting occupancy sensor provisions in the amended test procedure. However, the amended test procedure could not be used to show compliance with DOE energy conservation standards until the effective date of any amended energy conservation standards. This is also true for covered equipment sold with night curtains. The provision for testing cases at the lowest application product temperature will not affect the reported energy of any covered product because manufacturers of cases that cannot be tested at the prescribed rating temperature are currently advised to request a waiver, since these cases cannot be tested under the existing test procedure.

ACEEE, NEEA, and Earthjustice all expressed the view that the test procedure effective date should be equivalent to that of any amended energy conservation standards published in the concurrent energy conservation standards rulemaking (Docket No. EERE–2010–BT–STD–0003). (ACEEE, No. 12 at p. 3; NEEA, No. 31 at p. 2; Earthjustice, No. 11 at p. 2) Earthjustice also stated that DOE must clarify that manufacturers may not use night curtains and/or occupancy sensors to comply with minimum efficiency standards prior to the compliance date of amended standards that account for those features. (Earthjustice, No. 11 at p. 2) Earthjustice further commented that EPCA requires that, if DOE amends test procedures, it must also determine to what extent the proposed test procedure would alter measured energy use as determined under the existing test procedure. If the test procedure is found to alter measured energy use, DOE must amend the energy conservation standard to account for this, taking into consideration the performance of existing minimally compliant equipment under the amended test procedure. (Earthjustice, No. 11 at pp. 2–3)

DOE understands that, if the amended test procedure will affect the measured energy consumption of a covered piece of equipment, DOE must amend energy conservation standards accordingly. DOE is pursuing amended standards based on the test procedure amendments being adopted in this final rule. As such, DOE is requiring that the use of any amended test procedure not be required until the compliance date of any amended standards. As these amended test procedures will only be used with standards that have been set based on those amendments, DOE believes there is no risk of backsliding, but is conscious of and accounting for this issue in the associated energy conservation standards rulemaking (Docket No. EERE–2010–BT–STD–0003).

With respect to representations of the maximum daily energy consumption of covered equipment, it is DOE's understanding that 360 days following publication of the test procedure final rule, representations of energy consumption must be made using the amended test procedure. However, this could create a situation where manufacturers may have to test equipment using two different test procedures beginning 360 days after publication of the test procedure final rule (anticipated October 2012) and until 3 years after the publication of the CRE energy conservation standards final rule (anticipated January 2016). DOE believes this potentially would be confusing and burdensome for manufacturers. To simplify testing activities, DOE is specifying in this final rule that use of the amended test procedure for compliance and representations of energy use will be required on the compliance date of any amended energy conservation standards resulting from the ongoing rulemaking (Docket No. EERE–2010–BT–STD–0003). This stance is similar to that proposed for walk-in coolers and freezers with respect to the testing of insulation values and is the most practical to implement. 76 FR 48745 (Aug. 9, 2011). DOE is including a clarifying statement in the test procedure rule language regarding when the amended test procedure must be used for purposes of compliance and labeling or other representations of energy consumption.

3. Preemption

At the January 2011 NOPR public meeting, California Codes and Standards asked DOE to consider which features of commercial refrigeration equipment should be addressed by DOE, as opposed to others that could be left uncovered and regulated by State or local building efficiency standards and codes. Features that could be more appropriately covered by State or local building regulations, according to the comment, could include controls not integral to a single unit (centralized, storewide controls); liquid-suction heat exchangers serving an entire lineup of cases; and application-specific devices, such as night curtains, which could be very valuable in some applications but inapplicable in others (such as 24-hour stores). California Codes and Standards requested that DOE clarify which of these types of features would be ''covered'' or ''uncovered'' under the current and forthcoming CRE regulations (California Codes and Standards, No. 13 at pp. 15–16) and requested clarification on the ability of State or local building standards to specify additional prescriptive requirements for equipment based on building occupancy. (California Codes and Standards, No. 19 at p. 75)

Federal minimum efficiency standards for commercial refrigeration equipment supersede State or local efficiency standards (42 U.S.C. 6297, 6316(e)(2)), unless such standards are contained in a State or local building code for new construction that meets the requirements of 42 U.S.C. 6297(f)(3), including the requirement that one pathway for compliance under the State building code is through the use of appliances that meet Federal standards.

4. Burden of Testing

DOE understands that amending test procedures or including additional

provisions in those test procedures could increase the burden on manufacturers to quantify the performance of their equipment. EPCA requires that the test procedures promulgated by DOE be reasonably designed to produce test results that reflect energy efficiency, energy use, and estimated operating costs of the covered equipment during a representative average use cycle. EPCA also requires that the test procedure not be unduly burdensome to conduct. (42 U.S.C. 6314(a)(2))

DOE has analyzed the expected incremental cost of the test procedure amendments adopted in this final rule and its impact on manufacturers. The amendments to the DOE test procedure for commercial refrigeration equipment consist of updating the referenced industry test procedures to the most current versions; testing requirements for units sold with night curtains and lighting occupancy sensors or controls installed; and provisions for testing units at temperatures other than the specified rating temperatures of 38 °F, 0 °F, and −15 °F.

All commercial refrigeration equipment for which standards were set in EPACT 2005 are currently required to be tested using the DOE test procedure to show compliance with the EPACT 2005 standards. (42 U.S.C. 6313(c)(2)–(3); 10 CFR 431.66(b)) Manufacturers of equipment for which standards were set in the January 2009 final rule are similarly required to test units using the DOE test procedure to show compliance with the 2009 standards levels as of January 1, 2012. 74 FR 1093 (Jan. 9, 2009); 10 CFR 431.66(d)). The current DOE test procedure references AHRI Standard 1200–2006 and AHAM HRF–1–2004. This test procedure consists of one 24-hour test at standard rating conditions to determine daily energy consumption.

The updated versions of AHRI Standard 1200–2010 and AHAM HRF–1–2008 do not vary substantially from the previously referenced versions. Aligning the DOE test procedure with the most recent industry test procedures currently in use—AHRI standard 1200–2010 and AHAM HRF–1–2008—simplifies testing requirements and reduces the burden of testing for both small and large manufacturers.

For equipment that is sold with night curtains installed, the current test procedure requires one 24-hour test that does not account for the energy savings associated with night curtain deployment. The amended test procedure adopted in this final rule incorporates provisions to account for the energy savings associated with night curtain deployment. The night curtain test procedure requires the night curtain to be pulled down for 6 hours during the test. DOE believes the incremental burden of pulling down the night curtain at a certain time and retracting it 6 hours later requires less than half a minute each and is not significant relative to the burden of conducting the test. Thus, DOE has determined that the testing costs for CRE models with added night curtains are approximately the same as those for models without night curtains and concludes there are no significant incremental costs associated with testing models with night curtains.

For units sold with lighting occupancy sensors and scheduled controls installed, no additional testing or measurements will be required. Manufacturers will be permitted to use a calculation method to determine the energy savings due to lighting occupancy sensors and scheduled controls. DOE believes that these additional calculations will only require approximately 30 minutes of additional time. These calculations are straightforward and similar to the calculations for alternate component energy consumption, which are part of the existing test procedure. When compared to the burden associated with the physical testing segment of the procedure, the additional calculations required by the lighting occupancy sensor and scheduled control requirements will not significantly increase the total burden of the test. Thus, DOE believes that the additional calculations for lighting occupancy sensors and controls will not significantly increase the burden of test for manufacturers of covered equipment. Also, DOE notes that manufacturers may optionally incorporate the testing of lighting occupancy sensors and controls into the physical test. In this case, manufacturers would be required to turn off and turn on the lights once each during the 24-hour test. DOE believes these additional steps would involve negligible effort in comparison to the burden associated with conducting the complete test and, thus, the incremental increase in burden would be negligible.

For equipment that cannot be tested at the specified integrated average rating temperature for its respective equipment class, manufacturers are currently required to test the unit using AHRI Standard 1200 at the specified test temperature. Under the adopted revisions, these manufacturers will be allowed to test units that cannot meet the specified test temperature for their equipment class at the lowest application product temperature, with the only difference being the integrated average temperature. Because the same test will be performed for cases that cannot be tested at the prescribed rating temperature and must be tested at lowest application product temperature, as compared to cases that are tested at DOE's prescribed rating temperature, DOE believes that this method will not increase the burden of test for those manufacturers and is likely to lead to more representative energy consumption values. DOE notes that the AHRI Standard 1200–2010 test is often already performed by manufacturers for participation in voluntary programs, independent collection of energy consumption information, or other reasons.

In this test procedure final rule, DOE is also allowing manufacturers to test at the internal temperatures and/or ambient conditions required for NSF–7 testing. This could dramatically reduce the burden for manufacturers that produce equipment for food storage, as under the amended test procedure these two 24-hour tests can be combined. The NSF–7 test is similar in length and burden to the DOE test, but is performed at slightly different internal and external temperatures. Certification of equipment tested at NSF–7 test temperatures for the purposes of compliance with DOE energy conservation standards will only be possible for equipment that is able to meet the DOE energy conservation standard at the more stringent NSF–7 test conditions. However, DOE believes this provision can still potentially decrease the burden of test for some manufacturers.

The amendments to the test procedure for commercial refrigeration equipment were chosen to help minimize the impact of additional testing while updating the DOE test procedure to include the most current versions of industry standards, capture new energy efficiency technologies, and provide more accurate test methods for equipment that cannot be tested at the currently prescribed integrated average rating temperature. Because none of these amendments significantly increase the burden of a test, DOE believes that the test procedure finalized here will not be unduly burdensome to conduct.

For further discussion of the economic impact of additional testing on small CRE manufacturers, the entities that will be the most impacted by additional testing requirements, please see section IV.B of this final rule.

a. Determination of Basic Models in the Context of Night Curtain and Lighting Occupancy Sensor and Scheduled Control Test Provisions

In the November 2010 NOPR, DOE proposed that if a unit is tested and demonstrates compliance with the relevant energy conservation standard without night curtains or lighting occupancy sensors installed, that unit can also be sold with night curtains or lighting occupancy sensors installed without additional testing. DOE proposed this same provision for lighting occupancy sensors and controls in order to minimize the testing burden on manufacturers and because DOE believed that the addition of night curtains and lighting occupancy sensors and controls would only decrease energy consumption. If, however, a piece of equipment does not meet DOE's energy conservation standards without night curtains (or lighting controls) installed, DOE proposed to require the unit to be tested with night curtains (or lighting controls) installed. In this instance, assuming the energy conservation standard is met, the equipment would also be required to be sold with night curtains (or lighting controls) installed. 75 FR 71600 (Nov. 24, 2010). However, if a manufacturer wishes to publicize the certified ratings of a unit with night curtains (or lighting controls) installed, that energy consumption value must be determined using the DOE test procedure and applicable sampling plans. (42 U.S.C. 6314(d)) In addition, the energy consumption of this basic model must be certified. 76 FR 12422, 12453 (March 7, 2011).

Coca-Cola commented that a manufacturer could sell a case with a lighting controller installed without testing the case to prove the energy savings as long as it made no claims regarding energy savings. Coca-Cola further commented that performing the additional tests could be burdensome for the manufacturer and should remain optional. (Coca-Cola, No. 19 at p. 243) However, California Codes and Standards commented that the additional burden to calculate, or test, with and without occupancy sensors seemed minimal and that perhaps it should be required. (California Codes and Standards, No. 19 at p. 250) NRDC encouraged DOE to require manufacturers of open cases with night curtains to test them with the curtains deployed for 6 hours as proposed, and to require labeling of equipment accordingly to explain the relevant efficiency features to potential buyers. (NRDC, No. 14 at p. 2) Similarly, NEEA disagreed with DOE's proposal to allow night curtains to be used to establish compliance in units that are noncompliant without night curtains. (NEEA, No. 8 at p. 4)

Coca-Cola agreed with DOE's proposal to allow manufacturers the option of testing with night curtains. (Coca-Cola, No. 19 at p. 243) This provision would require that cases be tested with night curtains if (1) the case without night curtains does not meet the energy conservation standard; or (2) the manufacturer wishes to publicize the energy consumption of the case with night curtains installed. In response to California Codes and Standards and NRDC's comments regarding the requirement of units sold with night curtains to be tested with night curtains, DOE has adopted the provision to allow cases that meet DOE's energy conservation standard without night curtains to be sold with and without night curtains to minimize burden on manufacturers.

Furthermore, implementation of night curtains will only improve energy efficiency of the equipment. This is consistent with the provisions for grouping into basic model families established in the certification, compliance, and enforcement (CCE) final rule. (CCE final rule; 76 FR 12422, 12423 (March 7, 2011)). These provisions allow manufacturers to group individual models with essentially identical, but not exactly the same, energy performance characteristics into a basic model to reduce testing burden. Under DOE's certification requirements, all the individual models within a basic model identified in a certification report as being the same basic model must have the same certified efficiency rating and use the same test data underlying the certified rating. The CCE final rule also establishes that the efficiency rating of a basic model must be based on the least efficient or most energy consuming individual model, or, put another way, all individual models within a basic model must be at least as good as the certified rating. 76 FR 12428–29 (March 7, 2011). Because night curtains would only serve to decrease energy consumption or increase energy efficiency of commercial refrigeration equipment, DOE believes the provisions for optionally testing cases with night curtains if the case without night curtains meets the energy conservation standard for its equipment class ensures that all equipment sold meets DOE's energy conservation standards and minimizes burden on manufacturers. This same argument applies to the testing provisions for cases with lighting occupancy sensor and/or scheduled lighting controls installed. DOE notes that manufacturers are free to test a case both with and without night curtains (or lighting occupancy sensors and/or lighting controls) to establish separate efficiency ratings and must do so if they wish to make representations of both values.

Regarding NEEA's comment criticizing the fact that testing of cases with night curtains could be used to certify otherwise noncompliant equipment, DOE sets performance standards, but cannot control or restrict what design options or technologies a manufacturer chooses to employ to meet a certain standard level. Thus, like any other design option, manufacturers may employ night curtains as a means to increase efficiency of a case to meet DOE's energy conservation standards.

b. Estimates of Burden

In the initial regulatory flexibility analysis (IRFA), presented in the November 2010 NOPR, DOE quantified the incremental burden on small manufacturers and certified that this rulemaking, as proposed, would not have a significant impact on a substantial number of small entities. 75 FR 71596, 71606–08 (Nov. 24, 2010). In the IRFA, DOE presented several estimates of the cost of testing and the number of small U.S. commercial refrigeration equipment manufacturers. DOE estimated testing costs to be approximately $5,000 per unit to conduct the baseline test, as outlined in AHRI 1200–2010. 75 FR 71607 (Nov. 24, 2010). In response to these estimates, Southern Store Fixtures, Traulsen, and Hussmann all commented that the cost of testing is actually much greater than $5,000. (Southern Store Fixtures, No. 19 at p. 237; Traulsen, No. 19 at p. 238; Hussmann, No. 19 at p. 238) Traulsen stated that an estimate for total cost of testing a unit, including shipping, product costs, etc., would be $15,000. (Traulsen, No. 9 at p. 8) NEEA agreed with other interested parties that stated that DOE's estimate of $5,000 for testing a unit was likely too low. However, NEEA also stated that, based on its own experience, the cost of additional testing of a model is not nearly double the cost of the first test, since the unit is only shipped and set up once. Thus, according to NEEA, additional tests would only slightly add to the burden of testing. (NEEA, No. 8 at p. 7) NEEA stated that it did not believe DOE's proposal to be overly burdensome, as in every instance only one 24-hour test should be required for a given piece of equipment. (NEEA, No. 8 at p. 7)

Traulsen stated that it believes DOE's estimate of 22 small businesses in the

CRE manufacturing sector to be too low, and that it believes most or even all CRE manufacturers employ fewer than 750 employees if subsidiaries of larger companies are considered as independent business units. Traulsen submitted a list of 39 brands or manufacturers of commercial refrigeration equipment. (Traulsen, No. 9 at pp. 4–5)

Southern Store Fixtures commented that the proposed test procedure would impact its operation. (Southern Store Fixtures, No. 19 at p. 253) Traulsen stated that equipment sampling provisions and the increasing scope of standards are causing testing costs to increase significantly and, according to Traulsen, the company's marginal costs incurred as a result will be approximately $250,000 per year. (Traulsen, No. 9 at pp. 1–2) Zero Zone commented that applying additional tests is only easy if it is known that these tests must be performed when the unit is originally tested. Re-testing of units is much more burdensome than adding additional tests to a unit being tested, as re-testing requires that the test setup be re-installed and calibrated. Zero Zone also commented that, while the test procedure changes will not have a significant impact on a substantial number of small entities, the addition of DOE regulations to existing regulations will create a barrier to entry into the market for small start-up companies. (Zero Zone, No. 16 at pp. 1–2)

DOE has attempted to minimize the burden on manufacturers by keeping all test procedure amendments confined to the existing single 24-hour test. Thus, the test procedure amendments should not significantly increase the burden of testing a piece of equipment covered under the rule.

DOE appreciates the information related to cost of testing and the number of small businesses covered by this rule. DOE has considered these new numbers in revising the regulatory flexibility analysis. However, DOE notes that the costs cited by manufacturers represent the cost to conduct the AHRI 1200 test, which is required by both the existing test procedure and the new amended test procedure. Thus, the $15,000 test burden is not an incremental cost associated with this test procedure final rule. The incremental cost to test a piece of commercial refrigeration equipment covered under this rulemaking will not increase significantly because the amendments in this final rule do not significantly impact the time, labor, or materials required to conduct a test. Because the testing burden will not increase significantly as a result of this rule, DOE believes the incremental impact on small businesses will be small. DOE's revised final regulatory flexibility analysis can be found in section IV.

c. Coordination with ENERGY STAR

Traulsen expressed concern that increased requirements for third-party testing and compliance with DOE and U.S. Environmental Protection Agency (EPA) programs are escalating the burden on manufacturers. (Traulsen, No. 9 at pp. 1–2) Traulsen also commented that the most significant improvement DOE could make in terms of reducing burden for manufacturers would be to align DOE and ENERGY STAR testing and reporting requirements. (Traulsen, No. 5 at p. 254) Traulsen and True commented that ENERGY STAR is currently requiring equipment to be tested ''out of the box,'' including testing at the product temperature at which the unit is shipped. (Traulsen, No. 19 at p. 195; True, No. 19 at p. 198) Traulsen explained how this requirement has created issues because it ships its cases at an internal temperature set point of 34 °F for marketing reasons, which may create problems when the cases are tested at that temperature. Traulsen asked if DOE was also going to be requiring the testing of cases ''out of the box'' without adjusting the integrated average temperature set point. (Traulsen, No. 19 at p. 195) NEEA commented it had been involved with ENERGY STAR since its inception and that it is not possible to test units out of the box, and that ''out of the box'' simply means that the unit is not specially fabricated or adjusted. (NEEA, No. 19 at p. 198) Traulsen stated that DOE must ensure that the test procedure allows for adjustment of the equipment to the test set points, as ''out of the box'' set points may not be 38 °F. Traulsen further stated that this would differ from EPA testing, where units must be tested as is, out of the box. (Traulsen, No. 9 at p. 7)

DOE attempts, to the extent possible, to minimize duplicative reporting or testing requirements. Further, this final rule does not require ''out of the box'' testing as interpreted by Traulsen. All equipment tested for the purposes of compliance with DOE energy conservation standards must be tested using the DOE test procedure. DOE is working with EPA to ensure that the test procedures for commercial refrigeration equipment for the regulatory program and the ENERGY STAR program are the same.

5. Association With Compliance, Certification, and Enforcement Regulations

Interested parties inquired as to how the provision allowing equipment that complies with the energy conservation standard to be sold with and without night curtains (or lighting controls) without being retested relates to the concurrent CCE rulemaking. 76 FR 12422 (March 7, 2011). AHRI commented that there was a disconnect between what is being proposed in the CCE rulemaking and the provisions for testing night curtains and lighting control devices in the November 2010 NOPR. (AHRI, No. 19 at p. 254) AHRI also commented that because of issues related to compliance and claiming energy savings from night curtains without testing, manufacturers were going to be required to test cases twice. (AHRI, No. 19 at p. 216) NEEA added that utility programs and ENERGY STAR will require certified values for inclusion in their programs. (NEEA, No. 19 at p. 162) Coca-Cola inquired whether a unit that had been tested without night curtains had to be certified with night curtains under the current CCE requirements. (Coca-Cola, No. 19 at p. 161) Heatcraft inquired whether the provision for selling commercial refrigeration equipment with and without night curtains if the unit met DOE's energy conservation standards without night curtains installed could apply to other components, such as a unit that was sold with a permanent split capacitor or evaporative condensed screw condenser fan. (Heatcraft, No. 19 at p. 155)

In response to AHRI's comment that the proposal for testing and certifying units with night curtains may conflict with the CCE rulemaking (76 FR 12422 (March 7, 2011)), DOE notes that testing of equipment with or without night curtains is not required because there are currently no Federal prescriptive standards that include night curtains and no test procedure to quantify their effect on equipment energy consumption. DOE believes that the test procedure established in this final rule for units equipped with night curtains and/or lighting occupancy sensors and scheduled lighting controls does not conflict with the CCE requirements that DOE published in the CCE final rule. 76 FR 12423 (March 7, 2011). Specifically, as mentioned above, implementation of night curtains (or lighting occupancy sensors and/or controls) will only reduce the reported energy consumption of the equipment and is consistent with the basic model provisions, established

in the CCE final rule. 76 FR 12428–29 (March 7, 2011).

Thus, in this final rule DOE is adopting provisions that allow units equipped with night curtains and/or lighting occupancy sensors and controls to be tested. As described in the CCE final rule, DOE allows CRE manufacturers to group individual models into basic models for the purposes of testing and certification. 76 FR 12428–29 (March 7, 2011). A manufacturer may group individual models with and without night curtains into one basic model provided that the certified ratings of all individual models in the group are identical and representative of the least efficient individual model within the basic model (i.e., the most consumptive model without night curtains). Today's final rule also provides that if manufacturers wish to make representations regarding reduced energy consumption associated with any feature, such as night curtains, manufacturers must use multiple basic models to distinguish between those with and without night curtains and the certified ratings of energy consumption must be developed either through testing or calculations as permitted by this final rule.

Regarding Heatcraft's comment, manufacturers have some discretion regarding how to rate units with permanent split capacitor or evaporative condensed screw condenser fans. Manufacturers may group individual models, with different condenser fans or other features, into a single basic model to show compliance with DOE's energy conservation standards, provided all models identified in a certification report as being the same basic model must have the same certified efficiency rating, which is based on the least efficient model. 76 FR 12428–29 (March 7, 2011).

a. Test Tolerances

In comments received during the November 2010 NOPR public comment period, Traulsen stated that the proposal presented by DOE does not address tolerances, but that many components have tolerances of 10 to 15 percent, and that test laboratories recognize variations of 5 to 10 percent. Traulsen suggested a 20 percent tolerance on standards testing. (Traulsen, No. 9 at pp. 7–8) DOE's current test tolerances for commercial refrigeration equipment were established in the CCE final rule and are based on a specified sampling plan and statistical variances approximated with a Student's t-distribution. 76 FR 12430 (March 7, 2011). Amendment of these tolerances, sampling plans, or other items related specifically to CCE activities for commercial refrigeration equipment are not addressed in this test procedure final rule.

6. Alternative Refrigerants

At the January 2011 NOPR public meeting, DOE received several comments regarding alternative refrigerants. AHRI stated that there is proposed legislation (unspecified) that would require the phase down of hydrofluorocarbons, which would require the use of alternative refrigerants in commercial refrigeration equipment, and suggested that DOE assess the performance of different refrigerants. (AHRI, No. 19 at p. 22) California Codes and Standards commented that DOE should address the burden of testing the same piece of equipment when different refrigerants are used. (California Codes and Standards, No. 19 at pp. 16–17)

True commented that if the refrigerant in a case changes, the evaporator coil, the expansion valve, and several other components would also have to change, which would effectively change the entire system. (True, No. 19 at pp. 19–20) Coca-Cola also commented that different refrigerants are not used in the same case. Coca-Cola further stated that different refrigerants work better at different temperatures, which is one reason the cabinets are treated separately. (Coca-Cola, No. 19 at pp. 20–21)

DOE agrees with Traulsen and Coca-Cola that if a different refrigerant were used in a case, it would require a new case design. Thus, cases with different refrigerants should be treated as different basic models and will require separate tests regardless. The DOE test procedure finalized here is capable of testing units using any primary refrigerant that enters and leaves the case as a single phase. However, each unit employing a different refrigerant would be treated as an individual basic model because of the different design considerations and performance characteristics. DOE acknowledges AHRI's comment suggesting that there may be proposed legislation which would influence the availability of hydroflourocarbon refrigerants; however this legislation is not in place and DOE does not wish to speculate on the specific requirements or impacts of any such legislation.

7. Secondary Coolant Systems

In the January 2009 final rule, DOE determined secondary coolant systems to be outside the scope of that rulemaking because secondary coolant systems constitute a small market share and there is no industry test procedure that covers all secondary coolant systems in the market. 74 FR 1105 (Jan. 9, 2009). Neither of these factors has changed significantly since the January 2009 final rule and, thus, DOE will continue to exclude secondary coolant systems from this test procedure and the concurrent energy conservation standards rulemaking (Docket No. EERE–2010–BT–STD–0003).

Nevertheless, several interested parties commented regarding secondary coolant systems at both the January 2011 NOPR public meeting and the April 2011 Preliminary Analysis public meeting. At the January 2011 NOPR public meeting, AHRI stated that secondary coolant systems are excluded from AHRI 1200, but that AHRI is in the process of developing a relevant standard that would be issued soon. (AHRI, No. 19 at p. 58) True commented that secondary coolant systems are very difficult to test and are not covered by ASHRAE Standard 72. True added that the ASHRAE Standard 72 committee is reviewing test methods for secondary coolant systems, but currently there is no definitive, repeatable test method. (True, No. 19 at pp. 17–18) True stated that the ASHRAE Standard 72 committee is also working to incorporate test methods for secondary coolant equipment, but so far has found the variability of results in the currently available test methods quite large. True added that a revised standard would probably not be ready for inclusion in the DOE test procedure. (True, No. 19 at pp. 58–59) Traulsen agreed that it does not believe that secondary coolant systems can be effectively tested and rated. (Traulsen, No. 9 at p. 6) California Codes and Standards agreed with DOE's proposed exclusion of secondary coolant systems from the test procedure because it believed that coverage of them by DOE at this time could result in a hastily developed regulation, which would also pre-empt States from regulating such systems themselves. In addition, California Codes and Standards stated that because there is no test method in place and thus no data, more data must be collected prior to developing any standard levels for this equipment. (California Codes and Standards, No. 13 at p. 4) NEEA agreed with DOE's plan to exclude secondary coolant equipment from this round of rulemaking, citing the fact that there is currently no industry test procedure for this equipment. Instead, NEEA encouraged DOE to plan to address this equipment in the next rulemaking, potentially by including a ''reserved''

section in this notice. (NEEA, No. 8 at p. 2)

ACEEE expressed concern about the lack of coverage of secondary coolant systems, stating that hydrochlorfluorocarbon phase-downs and other factors are increasing the attention paid to these sorts of systems. Not regulating these systems, in the opinion of ACEEE, will prevent customers from being able to fairly compare them with existing systems. However, ACEEE conceded that it is not clear how to make accommodations in the test procedure to cover such equipment. At a minimum, ACEEE agreed with NEEA that placeholders for the systems should be inserted into the rule. (ACEEE, No. 12 at p. 3) True similarly expressed that secondary loop systems, often with carbon dioxide (CO_2), are becoming more common, which offers an environmental emissions improvement but can result in decreased energy efficiency. (True, No. 19 at pp. 17–18)

California Codes and Standards stated that the State of California is considering incorporating secondary loop CO_2 systems as part of its building standards, and will be addressing both energy efficiency and greenhouse gas emissions. (California Codes and Standards, No. 19 at pp. 18–19) ACEEE stated that manufacturers would likely prefer that secondary coolant systems be covered by a DOE rule, as excluding them would allow States to publish their own standards. (ACEEE, No. 12 at p. 3)

At the April 2011 Preliminary Analysis public meeting, interested parties also commented regarding the lack of an industry-accepted test procedure for secondary coolant systems. True stated that existing test methods for secondary coolant systems work only for systems for which there is not a phase change and test methods for transcritical or slurry systems have yet to be developed or verified. (Docket No. EERE–2010–BT–STD–0003, True, No. 31 at p. 162–63) Southern Store Fixtures stated that AHRI has recently developed a test procedure for secondary coolant systems, but that it is only applicable to fully liquid systems and does not accommodate two-phase flow. (Docket No. EERE–2010–BT–STD–0003, Southern Store Fixtures, No. 31 at p. 165) AHRI added that its work with secondary coolant applications is linked to ASHRAE's work, and that it too would have to wait for ASHRAE to produce a method of test (Docket No. EERE–2010–BT–STD–0003, AHRI, No. 31 at pp. 165–66) Traulsen agreed with DOE that secondary coolant technologies have not matured to the point where regulatory oversight would be required or beneficial. (Docket No. EERE–2010–BT–STD–0003, Traulsen, No. 31 at p. 5)

DOE previously excluded secondary coolant systems in the January 2009 final rule, in part, because there were no established test procedures to evaluate their energy consumption. As AHRI mentioned, secondary coolant systems are still excluded from AHRI 1200–2010. In December 2011, AHRI published AHRI Standard 1320 (I–P)–2011, ''Performance Rating of Commercial Refrigerated Display Merchandisers and Storage Cabinets for Use with Secondary Refrigerants.'' However, as interested parties noted, this new standard specifies a reference working fluid and is applicable only to the portion of secondary coolant systems that use secondary coolants with similar characteristics. Specifically, this standard will not be applicable to transcritical CO_2, brine, or ammonia secondary coolant systems. The ASHRAE Standard 72 committee is also considering a method of testing to evaluate secondary coolant systems, including transcritical CO_2 systems; however, this standard was not available in time for this rulemaking.

DOE agrees with many of the interested parties that testing secondary coolant systems accurately will be difficult and an accepted and vetted method to do so does not yet exist. Given this uncertainty and the small market share of this equipment, DOE believes it best to continue to exclude secondary coolant systems from the DOE test procedure; however, DOE will continue to consult with ASHRAE and AHRI regarding the development of a future test procedure for secondary coolant systems. In the next DOE test procedure revision, DOE will reassess the status and accuracy of industry test procedures for secondary coolant systems and, if available, could include the test procedures in the DOE test procedure at that time. Since it is not clear when a reliable and vetted test procedure for transcritical secondary coolant systems will be available, DOE does not wish to reserve a section in this test procedure final rule.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget (OMB) has determined that test procedure rulemakings do not constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the OMB.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an IRFA whenever an agency is required to publish a general notice of proposed rulemaking. When an agency promulgates a final rule after being required to publish a general notice of proposed rulemaking, the agency must prepare a final regulatory flexibility analysis (FRFA). The requirement to prepare these analyses does not apply to any proposed or final rule if the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the agency makes such a certification, the agency must publish the certification in the **Federal Register** along with the factual basis for such certification.

As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, so that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990 (Feb. 12, 2003). DOE has made its procedures and policies available on the Office of the General Counsel's Web site at *www.gc.doe.gov.*

In the November 2010 NOPR, DOE reviewed the proposed rule to amend the test procedure for commercial refrigeration equipment, under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE certified that the proposed rule, if adopted, would not result in a significant impact on a substantial number of small entities. DOE received comments on its certification and the economic impacts of the test procedure, and has responded to these comments in section III.B.4. After consideration of these comments, DOE certifies that the test procedure amendments set forth in this final rule will not have a significant impact on a substantial number of small entities. The factual basis for this certification is set forth below.

For the CRE manufacturing industry, the Small Business Administration (SBA) has set a size threshold, which defines those entities classified as ''small businesses'' for the purpose of the statute. DOE used the SBA's size standards to determine whether any small entities would be required to

comply with the rule. The size standards are codified at 13 CFR part 121. The standards are listed by North American Industry Classification System (NAICS) code and industry description and are available at *www.sba.gov/sites/default/files/Size_Standards_Table.pdf.* CRE manufacturers are classified under NAICS 333415, ''Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.'' The SBA sets a threshold of 750 employees or less for an entity to be considered as a small business for this category.

DOE conducted a focused inquiry into small business manufacturers of equipment covered by this rulemaking. During its market survey, DOE used all available public information to identify potential small manufacturers. DOE's research involved the review of industry trade association membership directories (including AHRI), equipment databases (*e.g.,* Federal Trade Commission (FTC), the Thomas Register, California Energy Commission (CEC), and ENERGY STAR databases), individual company Web sites, and marketing research tools (*e.g.,* Dunn and Bradstreet reports, Manta) to create a list of companies that manufacture or sell commercial refrigeration equipment covered by this rulemaking. DOE also referred to a list of small businesses that manufacture commercial refrigeration equipment, supplied by Traulsen in a written comment. (Traulsen, No. 9 at pp. 4–5) Using these sources, DOE identified 61 manufacturers of commercial refrigeration equipment.

DOE then reviewed this data to determine whether the entities met the SBA's definition of a small business manufacturer of commercial refrigeration equipment and screened out companies that do not offer equipment covered by this rulemaking, do not meet the definition of a ''small business,'' or are foreign owned and operated. Based on this review, DOE has identified 26 companies that would be considered small manufacturers. DOE had originally identified 22 manufacturers of commercial refrigeration equipment. 75 FR 71596, 71606–07 (Nov. 24, 2010). DOE referred to the list supplied by Traulsen to revise its estimate of the number of small entities considered in this rule. (Traulsen, No. 9 at pp. 4–5)

Table IV.1 stratifies the small businesses according to their number of employees. The smallest company has 6 employees and the largest company has 400 employees. The majority of the small businesses affected by this rulemaking (85 percent) have fewer than 200 employees. Annual revenues associated with these small manufacturers were estimated at $569.3 million ($21.9 million average annual sales per small manufacturer). According to DOE's analysis, small entities comprise 43 percent of the entire commercial refrigeration equipment manufacturing industry.

TABLE IV.1—SMALL BUSINESS SIZE BY NUMBER OF EMPLOYEES

Number of employees	Number of small businesses	Percentage of small businesses	Cumulative percentage
1–10	4	15.4	15.4
11–20	3	11.5	26.9
21–30	2	7.7	34.6
31–40	1	3.8	38.5
41–50	2	7.7	46.2
51–60	1	3.8	50.0
61–70	1	3.8	53.8
71–80	2	7.7	61.5
81–90	0	0.0	61.5
91–100	1	3.8	65.4
101–110	1	3.8	69.2
111–120	0	0.0	69.2
121–130	2	7.7	76.9
131–140	0	0.0	76.9
141–150	0	0.0	76.9
151–200	2	7.7	84.6
201–300	3	11.5	96.2
301–400	1	3.8	100.0
401–750	0	0.0	100.0
Total	26		

All commercial refrigeration equipment for which standards were set in EPACT 2005 are currently required to be tested using the DOE test procedure to show compliance with the EPACT 2005 standard levels. Manufacturers of equipment for which standards were set in the January 2009 final rule will similarly be required to test units using the DOE test procedure to show compliance with the 2009 standards levels beginning January 1, 2012. The current DOE test procedure references AHRI Standard 1200–2006 and AHAM HRF–1–2004. This test procedure consists of one 24-hour test at standard rating conditions to determine daily energy consumption.

In the November 2010 NOPR, DOE estimated the cost of conducting the DOE test procedure as $5,000 per 24-hour test. 75 FR 71607 (Nov. 24, 2010). DOE received comments from interested parties presenting cost estimates of $15,000 per test. (Southern Store Fixtures, No. 19 at p. 237; Hussmann, No. 19 at p. 238; Traulsen, No. 9 at p. 8; NEEA, No. 8 at p. 7) DOE revised its analysis using a cost of $15,000 per 24-hour test, as suggested by interested parties. DOE notes that $15,000 represents the cost of conducting the current DOE test procedure, not the incremental cost associated with the amendments in this final rule.

In this final rule, DOE is adopting amendments that align the DOE test procedure with the most recent industry test procedures currently in use (AHRI Standard 1200–2010 and AHAM HRF–1–2008); incorporate provisions for testing certain energy efficiency features, including night curtains and lighting occupancy sensor and

scheduled controls; and provide a test procedure for specialty equipment that cannot be tested at the prescribed rating temperature. The updated standards referenced in this test procedure final rule, namely AHRI Standard 1200–2010 and AHAM HRF–1–2008, are not substantially different from those referenced in the current DOE test procedure. DOE estimates that the amended test procedure will still require 24 hours to conduct and cost approximately $15,000 per test.

For cases with night curtains installed, manufacturers can now take advantage of the reduced energy consumption associated with night curtains in the DOE test procedure. The night curtain provisions in the test procedure require the night curtain to be pulled down for 6 hours during the test. DOE believes the incremental burden of pulling down the night curtain at a certain time and retracting it 6 hours later requires less than half a minute each and is not significant relative to the burden of conducting the test. Although there is a small labor requirement associated with pulling down night curtains, DOE believes this is not an incremental burden because conducting the test already requires personnel to be present to check temperature probes and monitor the status of the test. Thus, DOE has determined that the testing costs for CRE models with added night curtains are approximately the same as those for models without night curtains and therefore concludes there are no significant incremental costs associated with testing models with night curtains.

The amendments in this final rule allowing calculations to quantify the energy savings associated with lighting occupancy sensors and controls will not lead to significant additional testing burden. DOE estimates the minimal costs associated with conducting the necessary calculations as $26.67 per test. DOE bases its estimate on the assumption that it would take an engineer 30 minutes to perform the calculation. The average hourly salary for an engineer completing this task is estimated at $38.74.[25] Fringe benefits are estimated at 30 percent of total compensation, which brings the hourly costs to employers to $55.34.[26] As this incremental cost represents 0.4 percent of the total testing cost for a unit, DOE believes this increase is not significant.

For equipment that cannot be tested at the prescribed integrated average product temperature, manufacturers currently are required to test the unit using AHRI Standard 1200 at the integrated average temperature associated with their respective equipment class. Under the revisions adopted in this final rule, these manufacturers will be allowed to test units that cannot meet the prescribed rating temperature at the lowest application product temperature, with the only difference being the integrated average product temperature. Since the same test is performed in both cases, DOE believes that this amendment to the test procedure will not increase the burden of test for those manufacturers. In addition, the provision for testing units that cannot operate at the specified integrated average product temperature will affect only a small percentage of units. DOE believes there would not be an incremental increase in testing burden, for small or large manufacturers, due to this provision.

DOE also notes that, if a unit is tested and shows compliance with the relevant energy conservation standard without night curtains or lighting occupancy sensors and scheduled controls installed, that unit can also be sold with these efficiency features installed without additional testing. DOE believes this provision will reduce burden on manufacturers.

Because there is not a significant incremental burden associated with any of the individual amendments adopted in this final rule, DOE concludes that there is not a significant incremental burden associated with the test procedure amendments in this final rule. In fact, the burden of conducting the amended test procedure is almost identical to the burden of conducting the existing DOE test procedure. Since there is no incremental burden associated with the amended test procedure, DOE has determined that this test procedure final rule does not impose negative economic impacts on manufacturers, including small entities. Thus, DOE continues to certify that this rule will not have a ''significant economic impact on a substantial number of small entities,'' and the preparation of a regulatory flexibility analysis is not warranted. DOE has transmitted the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of commercial refrigeration equipment must certify to DOE that their equipment complies with any applicable energy conservation standards. In certifying compliance, manufacturers must test their equipment according to the DOE test procedure for commercial refrigeration equipment, including any amendments adopted for the test procedure. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including commercial refrigeration equipment. 76 FR 12422 (March 7, 2011). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB Control Number 1910–1400. Public reporting burden for the certification is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person 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.

D. Review Under the National Environmental Policy Act of 1969

In this final rule, DOE amends its test procedure for commercial refrigeration equipment. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule amends an existing rule without affecting the amount, quality, or distribution of energy usage, and therefore will not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D, which applies to any rulemaking that interprets or amends an existing rule without changing the environmental effect of that rule. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

[25] U.S. Department of Labor, Bureau of Labor Statistics. 2009. *National Occupational Employment and Wage Estimates.* Washington, DC.

[26] U.S. Department of Labor, Bureau of Labor Statistics. 2010. *Employer Costs for Employee Compensation—Management, Professional, and Related Employees.* Washington, DC.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (Aug. 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE examined this final rule and determined that it will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the equipment that is the subject of this final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action resulting in a rule that may cause 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 (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a),(b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *www.gc.doe.gov*. DOE examined this final rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Today's final rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), that this regulation will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use if the regulation is implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's regulatory action is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as

a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the NOPR must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the FTC concerning the impact of the commercial or industry standards on competition.

The proposed rule incorporates testing methods contained in the following commercial standards: (1) AHAM HRF–1–2008, which supersedes ANSI/AHAM HRF–1–2004, ''Energy and Internal Volume of Refrigerating Appliances,'' including errata issued November 17, 2009, section 3.30, ''Volume,'' and sections 4.1 through 4.3, ''Method for Computing Refrigerated Volume of Refrigerators, Refrigerator-Freezers, Wine Chillers and Freezers,'' in 10 CFR 431.64(b)(3) and 431.66(a)(1); and (2) AHRI Standard 1200–2010, which supersedes ARI Standard 1200–2006, ''Performance Rating of Commercial Refrigerated Display Merchandisers and Storage Cabinets,'' section 3, ''Definitions,'' section 4, ''Test Requirements,'' and section 7, ''Symbols and Subscripts,'' in 10 CFR 431.64(b)(1), (b)(2), (b)(4)(i), and (b)(4)(ii), and 431.66(a)(3), (d)(2) and (3). As stated in the November 2010 NOPR, DOE has evaluated these standards and is unable to conclude whether they fully comply with the requirements of section 323(b) of the Federal Energy Administration Act (*i.e.,* determine that they were developed in a manner that fully provides for public participation, comment, and review). 75 FR 71596, 71609 (Nov. 24, 2010). DOE has consulted with both the Attorney General and the Chairman of the FTC about the impact on competition of using the methods contained in these standards and has received no comments objecting to their use.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule before its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation test procedures, Incorporation by reference.

Issued in Washington, DC, on January 31, 2012.

Kathleen B. Hogan,

Deputy Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE amends part 431 of Chapter II of Title 10, Code of Federal Regulations as set forth below:

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

■ 2. Section 431.62 is amended by adding in alphabetical order the definitions of ''lighting occupancy sensor,'' ''lowest application product temperature,'' ''night curtain,'' and ''scheduled lighting control'' to read as follows:

§ 431.62 Definitions concerning commercial refrigerators, freezers, and refrigerator-freezers.

* * * * *

Lighting occupancy sensor means a device which uses passive infrared, ultrasonic, or other motion-sensing technology to automatically turn off or dim lights within the equipment when no motion is detected in the sensor's coverage area for a certain preset period of time.

Lowest application product temperature means the integrated average temperature closest to the specified rating temperature for a given piece of equipment achievable and repeatable, such that the integrated average temperature of a given unit is within ±2 °F of the average of all integrated average temperature values for that basic model.

Night curtain means a device which is temporarily deployed to decrease air exchange and heat transfer between the refrigerated case and the surrounding environment.

* * * * *

Scheduled lighting control means a device which automatically shuts off or dims the lighting in a display case at scheduled times throughout the day.

* * * * *

■ 3. Section 431.63 is amended by adding paragraph (b)(2) and revising paragraph (c) to read as follows:

§ 431.63 Materials incorporated by reference.

* * * * *

(b) * * *

(2) AHAM HRF–1–2008 (''HRF–1–2008''), Association of Home Appliance Manufacturers, *Energy and Internal Volume of Refrigerating Appliances* (2008) including *Errata to Energy and Internal Volume of Refrigerating Appliances,* Correction Sheet issued November 17, 2009, IBR approved for § 431.64.

(c) AHRI. Air-Conditioning, Heating, and Refrigeration Institute, 2111 Wilson Blvd., Suite 500, Arlington, VA 22201, (703) 524–8800, *ahri@ahrinet.org,* or *http://www.ahrinet.org/Content/StandardsProgram_20.aspx*.

(1) ARI Standard 1200–2006, *Performance Rating of Commercial Refrigerated Display Merchandisers and Storage Cabinets,* 2006, IBR approved for §§ 431.64 and 431.66.

(2) AHRI Standard 1200 (I–P)–2010 (''AHRI Standard 1200 (I–P)–2010''), *2010 Standard for Performance Rating of Commercial Refrigerated Display Merchandisers and Storage Cabinets,* 2010, IBR approved for § 431.64.

■ 4. Section 431.64 is amended by revising paragraph (b) to read as follows:

§ 431.64 Uniform test method for the measurement of energy consumption of commercial refrigerators, freezers, and refrigerator-freezers.

* * * * *

(b) *Testing and calculations.* Manufacturers shall use this paragraph (b) for the purposes of certifying compliance with the applicable energy conservation standards and for all representations of energy efficiency/energy use. For equipment manufactured prior to January 1, 2016, determine the daily energy consumption of each covered commercial refrigerator, freezer, or refrigerator-freezer by conducting the test procedure set forth in the Air-Conditioning and Refrigeration Institute (ARI) Standard 1200–2006, ''Performance Rating of Commercial Refrigerated Display Merchandisers and Storage Cabinets,'' section 3, ''Definitions,'' section 4, ''Test

Requirements,'' and section 7, ''Symbols and Subscripts'' (incorporated by reference, see § 431.63). For each commercial refrigerator, freezer, or refrigerator-freezer with a self-contained condensing unit, also use ARI Standard 1200–2006, section 6, ''Rating Requirements for Self-contained Commercial Refrigerated Display Merchandisers and Storage Cabinets.'' For each commercial refrigerator, freezer, or refrigerator-freezer with a remote condensing unit, also use ARI Standard 1200–2006, section 5, ''Rating Requirements for Remote Commercial Refrigerated Display Merchandisers and Storage Cabinets.'' For equipment manufactured on or after January 1, 2016, determine the daily energy consumption of each covered commercial refrigerator, freezer, refrigerator-freezer or ice-cream freezer by conducting the test procedure set forth in the AHRI Standard 1200 (I–P)–2010, section 3, ''Definitions,'' section 4, ''Test Requirements,'' and section 7, ''Symbols and Subscripts'' (incorporated by reference, see § 431.63). For each commercial refrigerator, freezer, or refrigerator-freezer with a self-contained condensing unit, also use AHRI Standard 1200 (I–P)–2010, section 6, ''Rating Requirements for Self-contained Commercial Refrigerated Display Merchandisers and Storage Cabinets.'' For each commercial refrigerator, freezer, or refrigerator-freezer with a remote condensing unit, also use AHRI Standard 1200 (I–P)–2010, section 5, ''Rating Requirements for Remote Commercial Refrigerated Display Merchandisers and Storage Cabinets.''

(1) For display cases manufactured after January 1, 2016 and sold with night curtains installed, the night curtain shall be employed for 6 hours; 3 hours after the start of the first defrost period. Upon the completion of the 6-hour period, the night curtain shall be raised until the completion of the 24-hour test period.

(2) For commercial refrigerators, freezers, and refrigerator-freezers manufactured after January 1, 2016 and sold with lighting occupancy sensors, scheduled lighting controls, or lighting occupancy sensors and scheduled lighting controls installed on the unit, the effect on daily energy consumption will be determined by either a physical test or a calculation method and using the variables that are defined as:

CEC_A is the Alternate Compressor Energy Consumption (kilowatt-hours);

LEC_{sc} is the lighting energy consumption of internal case lights with lighting occupancy sensors and controls deployed (kilowatt-hours);

P_{li} is the rated power of lights when they are fully on (watts);

$P_{li(off)}$ is the power of lights when they are off (watts);

$P_{li(dim)}$ is the power of lights when they are dimmed (watts);

$TDEC_o$ is the total daily energy consumption with lights fully on, as measured by AHRI Standard 1200 (I–P)–2010 (kilowatt-hours);

t_{dim} is the time period which the lights are dimmed due to the use of lighting occupancy sensors or scheduled lighting controls (hours);

$t_{dim,controls}$ is the time case lighting is dimmed due to the use of lighting controls (hours);

$t_{dim,sensors}$ is the time case lighting is dimmed due to the use of lighting occupancy sensors (hours);

t_l is the time period when lights would be on without lighting occupancy sensors and/or scheduled lighting controls (24 hours);

t_{off} is the time period which the lights are off due to the use of lighting occupancy sensors and/or scheduled lighting controls (hours);

$t_{off,controls}$ is the time case lighting is off due to the use of scheduled lighting controls (hours);

$t_{off,sensors}$ is the time case lighting is off due to the use of lighting occupancy sensors (hours); and

t_{sc} is the time period when lighting is fully on with lighting occupancy sensors and scheduled lighting controls enabled (hours).

(i) For both a physical test and a calculation method, determine the estimated time off or dimmed, t_{off} or t_{dim}, as the sum of contributions from lighting occupancy sensors and scheduled lighting controls which dim or turn off lighting, respectively, as shown in the following equation:

$$t_{off} = t_{off,sensors} + t_{off,controls}$$

$$t_{dim} = t_{dim,sensors} + t_{dim,controls}$$

The sum of t_{sc}, t_{off}, and t_{dim} should equal 24 hours and the total time period during which the lights are off or dimmed shall not exceed 10.8 hours. For cases with scheduled lighting controls, the time the case lighting is off and/or dimmed due to scheduled lighting controls ($t_{off,controls}$ and/or $t_{dim,controls}$, as applicable) shall not exceed 8 hours. For cases with lighting occupancy sensors installed, the time the case lighting is off and/or dimmed due to lighting occupancy sensors ($t_{off,sensors}$ and/or $t_{dim,sensors}$, as applicable) shall not exceed 10.8 hours. For cases with lighting occupancy sensors and scheduled lighting controls installed, the time the case lighting is off and/or dimmed due to lighting occupancy sensors ($t_{off,sensors}$ and/or $t_{dim,sensors}$, as applicable) shall not exceed 2.8 hours and the time the case lighting is off and/or dimmed due to scheduled lighting controls ($t_{off,controls}$ and/or $t_{dim,controls}$, as applicable) shall not exceed 8 hours.

(ii) If using a physical test to determine the daily energy consumption of a commercial refrigerator, freezer, or refrigerator-freezer sold with lighting occupancy sensors, scheduled lighting controls, or lighting occupancy sensors and scheduled lighting controls installed on the unit, turn off the lights for a time period equivalent to t_{off} and dim the lights for a time period equal to t_{dim}. If night curtains are also being tested on the case, the period of lights off and/or dimmed shall begin at the same time that the night curtain is being deployed and shall continue consecutively, in that order, for the appropriate number of hours.

(iii) If using a calculation method to determine the daily energy consumption of a commercial refrigerator, freezer, or refrigerator-freezer sold with lighting occupancy sensors, scheduled lighting controls, or lighting occupancy sensors and scheduled lighting controls installed on the unit—

(A) Calculate the LEC_{sc} using the following equation:

$$LEC_{sc} = \frac{\left((P_{li} \times t_{sc}) + (P_{li(off)} \times t_{off}) + (P_{li(dim)} \times t_{dim})\right)}{(1000)}$$

(B) Calculate the CEC_A using the following equation:

$$CEC_A = 0.75 \times \frac{3.4121 \times \left(LEC_{sc} - P_{li} \times {}^{t_l}/_{1000}\right)}{EER}$$

Where EER represents the energy efficiency ratio from Table 1 in AHRI Standard 1200 (I–P)-2010 (incorporated by reference, see § 431.63) for remote condensing equipment or the values shown in the following table for self-contained equipment:

EER FOR SELF-CONTAINED COMMERCIAL REFRIGERATED DISPLAY MERCHANDISERS AND STORAGE CABINETS

Operating temperature class	EER *Btu/W*
Medium	11
Low	7
Ice Cream	5

(C) For remote condensing commercial refrigerators, freezers, and refrigerator-freezers with lighting occupancy sensors, scheduled lighting controls, or lighting occupancy sensors and scheduled lighting controls installed, the revised compressor energy consumption (CEC_R) shall be the CEC_A added to the compressor energy consumption (CEC) measured in AHRI Standard 1200 (I–P)-2010 (incorporated by reference, see § 431.63). The CDEC for the entire case shall be the sum of the CEC_R and LEC_{sc} (as calculated above) and the fan energy consumption (FEC), anti-condensate energy consumption (AEC), defrost energy consumption (DEC), and condensate evaporator pan energy consumption (PEC) (as measured in AHRI Standard 1200 (I–P)-2010).

(D) For self-contained commercial refrigerators, freezers, and refrigerator-freezers with lighting occupancy sensors, scheduled lighting controls, or lighting occupancy sensors and scheduled lighting controls installed, the TDEC for the entire case shall be the sum of total daily energy consumption as measured by the AHRI Standard 1200 (I–P)-2010 (incorporated by reference, see § 431.63) test with the lights fully on ($TDEC_o$) and CEC_A, less the decrease in lighting energy use due to lighting occupancy sensors and scheduled lighting controls, as shown in following equation.

$$TDEC = TDEC_o + CEC_A - \left({}^{[(P]_{li} \times t_l)}/_{1000} - LEC_{sc}\right)$$

(3) Conduct the testing required in paragraphs (b) introductory text, (b)(1), and (2) of this section, and determine the daily energy consumption, at the applicable integrated average temperature in the following table. The integrated average temperature is determined using the required test method.

Category	Test procedure prior to January 1, 2016	Test procedure on or after January 1, 2016	Integrated average temperatures
(i) Refrigerator with Solid Door(s)	ARI Standard 1200–2006.	AHRI Standard 1200 (I–P)–2010	38 °F (±2 °F).
(ii) Refrigerator with Transparent Door(s)	ARI Standard 1200–2006.	AHRI Standard 1200 (I–P)–2010	38 °F (±2 °F).
(iii) Freezer with Solid Door(s)	ARI Standard 1200–2006.	AHRI Standard 1200 (I–P)–2010	0 °F (±2 °F).
(iv) Freezer with Transparent Door(s)	ARI Standard 1200–2006.	AHRI Standard 1200 (I–P)–2010	0 °F (±2 °F).
(v) Refrigerator-Freezer with Solid Door(s)	ARI Standard 1200–2006.	AHRI Standard 1200 (I–P)–2010	38 °F (±2 °F) for refrigerator compartment. 0 °F (±2 °F) for freezer compartment.
(vi) Commercial Refrigerator with a Self-Contained Condensing Unit Designed for Pull-Down Temperature Applications and Transparent Doors.	ARI Standard 1200–2006.	AHRI Standard 1200 (I–P)–2010	38 °F (±2 °F).
(vii) Ice-Cream Freezer	ARI Standard 1200–2006.	AHRI Standard 1200 (I–P)–2010	−15.0 °F (±2 °F).
(viii) Commercial Refrigerator, Freezer, and Refrigerator-Freezer with a Self-Contained Condensing Unit and without Doors.	ARI Standard 1200–2006.	AHRI Standard 1200 (I–P)–2010	(A) 0 °F (±2 °F) for low temperature applications. (B) 38.0 °F (±2 °F) for medium temperature applications.
(ix) Commercial Refrigerator, Freezer, and Refrigerator-Freezer with a Remote Condensing Unit.	ARI Standard 1200–2006.	AHRI Standard 1200 (I–P)–2010	(A) 0 °F (±2 °F) for low temperature applications. (B) 38.0 °F (±2 °F) for medium temperature applications.

(A) If a piece of commercial refrigeration equipment is not able to be tested at the specified integrated average temperatures of 38 °F (±2 °F), 0 °F (±2 °F), or −15 °F (±2 °F) for refrigerators, freezers, and ice-cream freezers, respectively, the unit may be tested at the lowest application product temperature, as defined in § 431.62. For many pieces of equipment, this will be the lowest thermostat setting. For remote condensing equipment without a thermostat or other means of controlling temperature at the case, the lowest application product temperature shall be that achieved with the adjusted dew point temperature (as defined in AHRI 1200 (I–P)–2010) set to 5 degrees colder than that required to maintain the manufacturer's lowest specified application temperature.

(B) For commercial refrigeration equipment that is also tested in accordance with NSF test procedures

(Type I and Type II), integrated average temperatures and ambient conditions used for NSF testing may be used in place of DOE prescribed integrated average temperatures and ambient conditions provided they result in a more stringent test. That is, the measured daily energy consumption of the same unit, when tested at the rating temperatures and/or ambient conditions specified in the DOE test procedure, will be lower than or equal to the measured daily energy consumption of the unit when tested with the rating temperatures or ambient conditions used for NSF testing. The integrated average temperature measured during the test may be lower than the range specified by the DOE rating temperature specifications, provided in paragraph (b)(3) of this section, but may not exceed the upper value of the specified range. Ambient temperatures and/or humidity values may be higher than those specified in the DOE test procedure.

(4) For equipment manufactured prior to January 1, 2016, determine the volume of each covered commercial refrigerator, freezer, or refrigerator-freezer using the methodology set forth in the ANSI/AHAM HRF–1–2004, ''Energy, Performance and Capacity of Household Refrigerators, Refrigerator-Freezers and Freezers'' (incorporated by reference, see § 431.63), section 3.21, ''Volume,'' sections 4.1 through 4.3, ''Method for Computing Total Refrigerated Volume and Total Shelf Area of Household Refrigerators and Household Wine Chillers,'' and sections 5.1 through 5.3, ''Method for Computing Total Refrigerated Volume and Total Shelf Area of Household Freezers.'' For equipment manufactured on or after January 1, 2016, determine the volume of any covered commercial refrigerator, freezer, refrigerator-freezer, or ice-cream freezer using the method set forth in the HRF–1–2008 (incorporated by reference, see § 431.63), section 3.30, ''Volume,'' and sections 4.1 through 4.3, ''Method for Computing Refrigerated Volume of Refrigerators, Refrigerator-Freezers, Wine Chillers and Freezers.''

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Part V

Environmental Protection Agency

40 CFR Parts 52 and 97

Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 97

[EPA–HQ–OAR–2009–0491; FRL–9631–8]

RIN 2060–AR22

Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing revisions to the Transport Rule that was published on August 8, 2011 (76 FR 48208). These revisions address discrepancies in unit-specific modeling assumptions that affect the proper calculation of Transport Rule state budgets and assurance levels in Florida, Louisiana, Michigan, Mississippi, Nebraska, New Jersey, New York, Texas, and Wisconsin, as well as new unit set-asides in Arkansas and Texas. EPA is also finalizing allowance allocation revisions to specific units covered by certain consent decrees that restrict the use of those allowances. The resulting budgets maintain substantial emission reductions from historic levels and are consistent with the final Transport Rule's methodology for defining significant contribution and interference with maintenance.[1]

EPA is also finalizing the proposal to amend the assurance penalty provisions of the rule to make them effective beginning January 1, 2014. EPA believes that deferring the effective date of the assurance provisions will provide additional program confidence and will not compromise the air quality goals of the program.

In addition, we are finalizing corrections of typographical errors in the rule.

DATES: This final rule is effective on April 23, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. OAR–EPA–HQ–OAR–2009–0491. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed on the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742. This Docket Facility is open from 8:00 a.m. to 5:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (929) 566–1742, fax (202) 566–1741.

FOR FURTHER INFORMATION CONTACT: For general questions concerning this action, contact Gabrielle Stevens, U.S. Environmental Protection Agency, Clean Air Markets Division, MC 6204J, Ariel Rios Building, 1200 Pennsylvania Ave. NW., Washington, DC 20460, telephone (202) 343–9252, email at *stevens.gabrielle@epa.gov*. Electronic copies of this document can be accessed through the EPA Web site at: *http://epa.gov/crossstaterule*.

SUPPLEMENTARY INFORMATION:

I. Glossary of Terms and Abbreviations

The following are abbreviations of terms used in this final rule:

CFR Code of Federal Regulations
EGU Electric Generating Unit
FIP Federal Implementation Plan
FR **Federal Register**
EPA U.S. Environmental Protection Agency
ICR Information Collection Request
NAAQS National Ambient Air Quality Standards
NODA Notice of Data Availability
NO_X Nitrogen Oxides
SIP State Implementation Plan
OMB Office of Management and Budget
$PM_{2.5}$ Fine Particulate Matter, Less Than 2.5 Micrometers
PM Particulate Matter
RIA Regulatory Impact Analysis
SNPR Supplemental Notice of Proposed Rulemaking
SO_2 Sulfur Dioxide
TSD Technical Support Document

II. General Information

A. Does this action apply to me?

Regulated Entities. Entities regulated by this action primarily are fossil fuel-fired boilers, turbines, and combined cycle units that serve generators that produce electricity for sale or cogenerate electricity for sale and steam. Regulated categories and entities include:

Category	NAICS Code	Examples of potentially regulated industries
Industry	2211, 2212, 2213	Electric service providers.

This table is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities which EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should carefully examine the applicability criteria in §§ 97.404, 97.504, and 97.604 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this final rule will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this action will be posted on the transport rule Web site *http://www.epa.gov/airtransport*.

C. How is this preamble organized?

I. Glossary of Terms and Abbreviations
II. General Information
A. Does this action apply to me?
B. Where can I get a copy of this document and other related information?
C. How is the preamble organized?
III. Executive Summary
IV. Specific Revisions
A. Budgets/New Unit Set-Aside Revisions and Recordation of Allowances
B. Allowance Allocation Revisions to Units Covered by Existing Utility Consent Decrees
C. Assurance Penalty Provisions
D. Typographical Errors

[1] In this preamble, EPA uses the terms ''significant contribution'' and ''interference with maintenance'' to refer to the emissions that must be prohibited pursuant to Clean Air Act section 110(a)(2)(D)(i)(I) because they significantly contribute to nonattainment or interfere with maintenance of the NAAQS in another state.

V. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act (RFA)
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act
L. Judicial Review

III. Executive Summary

In a previous proposal published on October 14, 2011 (76 FR 63860), EPA identified potential errors in unit-specific modeling assumptions that affect the proper calculation of Transport Rule state budgets and assurance levels in Florida, Louisiana, Michigan, Mississippi, Nebraska, New Jersey, New York, Texas, and Wisconsin, as well as potential errors affecting the proper calculation of new unit set-asides in Arkansas and Texas. EPA is now taking final action to: (1) Revise Michigan's annual NO_X budget to account for an erroneously assumed selective catalytic reduction (SCR) emission control device at one unit; (2) revise Nebraska's annual NO_X budget to account for an erroneously assumed SCR emission control device at one unit; (3) revise the Texas SO_2 budget to account for erroneously assumed flue gas desulphurization (FGD, or scrubber) emission control devices at three units and revised assumptions regarding flue gas treatment in existing scrubbers at seven units; (4) revise the Arkansas ozone-season new unit set-aside to account for erroneously omitted projected emissions from one new unit; (5) revise the Texas new unit set-aside to account for erroneously omitted projected emissions for SO_2, ozone-season NO_X, and annual NO_X from one new unit; (6) revise New Jersey's ozone season NO_X, annual NO_X, and SO_2 budgets to account for erroneously assumed FGD and SCR emission control devices at one unit, and taking into account operational constraints likely to necessitate non-economic generation at six facilities; (7) revise Wisconsin's SO_2 and annual NO_X budgets to account for erroneously assumed FGD and SCR devices at two units; (8) revise New York's SO_2, annual NO_X, and ozone season NO_X budgets taking into account operational constraints likely to necessitate non-economic generation at ten units; (9) revise Louisiana's ozone season NO_X budget taking into account operational constraints likely to necessitate non-economic generation at twelve units; (10) revise Mississippi's ozone season NO_X budget taking into account operational constraints likely to necessitate non-economic generation at four units; (11) revise the Texas annual NO_X and ozone season NO_X budgets taking into account operational constraints likely to necessitate non-economic generation at seven units; and (12) revise Florida's ozone-season NO_X budget taking into account the immediate-term unavailability of a previously operating nuclear unit. See section IV.A of this preamble for a discussion of these revisions and any additional changes.

The proposed revisions to state budgets also entailed proposed revisions to the affected states' assurance levels, as the variability limit component of the assurance level for each state is calculated as a percentage of the applicable budget. Therefore, for each revision EPA is finalizing to a state budget, EPA is also finalizing corresponding revisions to the calculation of that state's variability limit and assurance level pertinent to that state budget. Assurance levels are only applicable to 2014 and beyond, given the 2014 effective date of the assurance provisions as described below and in section IV.C of this preamble.

The revised budgets maintain substantial emission reductions from historic levels and are consistent with the final Transport Rule's methodology for defining significant contribution and interference with maintenance.[2] No changes to that methodology were proposed, and EPA did not reopen the methodology established in the final Transport Rule for public comment. EPA also did not propose any change to the levels of stringency (i.e., cost per ton) selected in the final Transport Rule's determination of significant contribution and interference with maintenance and did not reopen that issue for public comment. For more information, see the ''Final Revisions Rule Significant Contribution Assessment Technical Support Document'' in the docket for this rulemaking.

In the proposed revisions rule, EPA solicited further information from the public that may support similar revisions to Transport Rule state budgets or new unit set-asides (76 FR 63868). EPA believed that the scope of such information supporting potential revisions was limited, considering that EPA had already conducted several notice-and-comment processes through initial proposal of the Transport Rule and multiple notices of data availability (NODAs) to prompt the public to provide the relevant input information that informs the calculation of the Transport Rule state budgets. By providing, in this rulemaking, an additional opportunity for comment on aspects of Transport Rule state budgets, EPA also addressed some of the issues and concerns raised in many of the petitions for administrative reconsideration of the final Transport Rule.

Based on relevant comments received that merited revisions, EPA is making additional revisions in a separate direct final rule with parallel proposal rulemaking.

EPA also proposed revisions to allowance allocations at certain units in six states that are affected by existing utility consent decrees. When establishing the state budgets under the final Transport Rule, EPA accounted for the emission reduction requirements of these consent decrees; therefore, the Transport Rule state budgets sustain the environmental protection secured by those existing utility consent decrees. However, when dividing those state budgets into individual unit-level allowance allocations, EPA included allowance allocations to certain units that exceed those units' allowable emissions under the terms of the applicable consent decree. Because EPA already secured the environmental improvements required by the consent decrees by incorporating their emission reductions into the Transport Rule state budgets, there is no environmental need to prevent the allowances from being used for compliance by sources subject to the Transport Rule, aside from those sources whose emissions are restricted by the terms of the consent decrees to which they are subject. Therefore, EPA proposed to revise Transport Rule unit-level allowance allocations to the specific units affected by these consent decrees to reflect their maximum allowable emissions, such that none of the allowances affected by the consent decrees are unnecessarily removed from

[2] Throughout this preamble, EPA refers to a state budget for 2012 and 2013 as a ''2012'' state budget and refers to a state budget for 2014 and thereafter as a ''2014'' state budget. Therefore, any revision of a 2012 state budget would apply to the state budget for 2012 and 2013, and any revision of a 2014 state budget would apply to the state budget for 2014 and thereafter.

use for compliance by other units. EPA proposed this revision to benefit program implementation. EPA is finalizing this revision as proposed, with small adjustments to reflect provisions under existing consent decrees that account for extraordinary events. See section IV.B of this preamble for further explanation of Transport Rule units also covered by existing utility consent decrees.

EPA is finalizing its proposal to revise the assurance penalty provisions of the Transport Rule to make them effective January 1, 2014. The revision of the effective date of the assurance provisions will promote the development of allowance market liquidity, thereby smoothing the transition from the Clean Air Interstate Rule (CAIR) programs, which were temporarily re-instated as of the Court's action on December 30, 2011 to stay the Transport Rule, at such time as the Court lifts the stay of the Transport Rule and provides clarity on implementation dates for the Transport Rule programs. See section IV.C of this preamble for a further discussion of the assurance provisions effective date.

EPA is also finalizing corrections to typographical errors in certain sections of rule text in parts 52 and 97 of the final Transport Rule. See section IV.D of this preamble for further explanation of these corrections.

On December 30, 2011, the Court of Appeals for the DC Circuit in *EME Homer City Generation, L.P.,* v. *Environmental Protection Agency,* No. 11–1302 (EME Homer City) issued an Order staying the final Transport Rule. While this action revises that rule, it is consistent with and is unaffected by the Court's Order staying the underlying final Transport Rule. Finalizing this action in and of itself does not impose any requirements on regulated units or states.

IV. Specific Revisions

A. Budget/New Unit Set-Aside Revisions and Recordation of Allowances

EPA is finalizing the following revisions:

(1) Increase Michigan's 2012 and 2014 annual NO_X budgets in accordance with a revision to the final Transport Rule analysis that erroneously assumed that an SCR exists at Monroe Unit 2.

EPA is finalizing revisions to Michigan's 2012 and 2014 annual NO_X budgets as proposed. This action revises the assumption of an SCR at Monroe Unit 2. This SCR is planned, but is not expected to be online in 2012 or 2014. Commenters did not identify any errors that would invalidate EPA's approach to making the proposed revisions addressing Monroe Unit 2. This results in a 5,228 ton increase in the state's annual NO_X budget. See ''Final Revisions Rule State Budgets and New Unit Set-Asides TSD'' in the docket for this rulemaking for a quantitative demonstration of these revisions.

EPA adjusted Michigan's 2012 and 2014 ozone-season NO_X budgets to reflect the corrections to the Monroe Unit 2 emissions when it included Michigan in the Transport Rule ozone-season NO_X program (76 FR 80760, December 27, 2011), as previously proposed (76 FR 40662, July 11, 2011).

(2) Increase Nebraska's 2012 and 2014 annual NO_X budgets in accordance with a revision to the final Transport Rule analysis that erroneously assumed that an SCR exists at Nebraska City Unit 1.

EPA is finalizing Nebraska's 2012 and 2014 annual NO_X budgets, as proposed, to correct an assumption that an SCR exists at Nebraska City Unit 1. There is no SCR that is present, planned, or under construction at the unit. Commenters did not identify any errors that would invalidate EPA's approach to addressing Nebraska City Unit 1. This adjustment results in an increase of 3,599 tons to the state's annual NO_X budget. See ''Final Revisions Rule State Budgets and New Unit Set-Asides TSD'' in the docket for this rulemaking for a quantitative demonstration of these revisions, as well as for the impacts this revision has on the state's assurance level, new unit set-aside, and Indian country new unit set-aside, and ''Final Revisions to Unit-Level Allocations under the FIPs'' in the docket to this rulemaking for a quantitative demonstration of the effect of this revision on unit-level allocations under the FIP.

(3) Increase the Texas 2012 and 2014 SO_2 budgets in accordance with a revision to the final Transport Rule analysis that erroneously assumed that scrubbers exist at W.A. Parish Unit 6, J.T. Deely Unit 1, and J.T. Deely Unit 2, and that assumed full flue gas treatment in existing scrubbers at Martin Lake, Monticello, Sandow, W.A. Parish, and Oklaunion facilities.

EPA is finalizing revisions to the modeling assumptions affecting the calculation of the Texas SO_2 budget, with an adjustment described below based on comments received. EPA is finalizing increases to the Texas SO_2 budget in accordance with a revision to the final Transport Rule analysis that erroneously assumed flue-gas desulfurization (FGD) technology is installed on J.T. Deely Units 1 and 2 and W.A. Parish Unit 6 by 2012. As explained in the proposal, these FGDs are no longer scheduled to be installed in 2012 (76 FR 63864). Commenters did not identify any errors that would invalidate EPA's approach to addressing J.T. Deely Units 1 and 2 or W.A. Parish Unit 6.

EPA is also finalizing an increase to the Texas SO_2 budget in accordance with revised assumptions regarding the SO_2 removal efficiency of existing scrubbers on units at the Martin Lake, Monticello, Sandow, W.A. Parish, and Oklaunion facilities. These facilities in Texas currently face immediate-term limitations regarding the amount of flue gas that can be treated in their existing FGDs. In the final Transport Rule analysis, EPA relied on the SO_2 removal efficiency that these facilities reported at their scrubbers to the Energy Information Administration (EIA). However, EPA has since determined that these particular facilities' reports only intended to address the removal efficiency for the portion of the flue gas treated in the scrubber. For this reason, that removal efficiency should not be applied to the total amount of sulfur combusted in the coal consumed (as some of the flue gas at these units must be vented without being treated in the scrubber as originally constructed). When the SO_2 removal rates are decreased to reflect the reported operational constraint of each affected scrubber's flue gas treatment, the projected emission level for Texas, after all significant contribution and interference with maintenance identified in the final Transport Rule is addressed, correspondingly rises.

In the proposed revisions rule, EPA quantified this revision using these scrubbers' SO_2 removal efficiencies as reported for 2008 on EIA form 923. Public comments on the rule pointed out that data reported by these units on EIA form 860 offered more technically detailed explanation of these scrubbers' SO_2 removal efficiencies. In addition, EPA based all of its assumptions of existing scrubber performance in the final Transport Rule analysis on values reported by sources on EIA form 860, as EPA believes this data captures scrubber performance capability as opposed to performance in any particular year, which can vary depending on the frequency that a facility chooses to operate its FGD.[3] EPA believes that basing the effective removal rate for these units on EIA 860 constitutes a more accurate and reliable data source for this rulemaking, and EPA is

[3] For example, the same facilities for which EPA proposed these revisions reported higher scrubber SO_2 removal efficiencies in 2009 on the EIA 923 form than they reported on the same form in 2008.

finalizing this revision using this data as the basis for the recalculated projected emissions at these units, which inform the state budget.

In accordance with the revised unit-level input assumptions regarding existing scrubbers and adjustments to the flue gas treatment calculations at the Texas units described above, EPA is increasing the state's 2012 and 2014 SO_2 budgets each by 50,517 tons.

See ''Final Revisions Rule State Budgets and New Unit Set-Asides TSD'' in the docket for this rulemaking for a quantitative demonstration of these revisions.

(4) Increase Arkansas' ozone-season NO_X new unit set-aside in accordance with revisions to the final Transport Rule's calculation of the new unit set-aside that erroneously omitted Plum Point Unit 1's projected emissions.

EPA is finalizing an increase of 3 percent to the portion of Arkansas' ozone-season budget dedicated to the new unit set-aside account. This change yields a total new unit set-aside of 5 percent as the portion of Arkansas' ozone-season budget dedicated to the new unit set-aside account (as opposed to the 2 percent previously established under the final Transport Rule). The revision is consistent with the new unit set-aside methodology described in the final rule. As explained in the proposal, the updated value simply reflects the revised classification of Plum Point Unit 1, which commenced commercial operation on or after January 1, 2010, as a new unit for purposes of unit-level allowance allocations under the final Transport Rule's unit-level allocation methodology (76 FR 48290). Commenters did not identify any errors that would invalidate EPA's approach to addressing Plum Point Unit 1. See the ''Final Revisions Rule State Budgets and New Unit Set-Asides TSD'' in the docket for this rulemaking for a quantitative demonstration of these revisions.

These revisions to the Arkansas new unit set-aside result in changes to allowance allocations to existing units, but they do not change the state's overall budget. See ''Final Revisions Rule Unit-Level Allocations under the FIPs'' in the docket to this rulemaking.

(5) Increase Texas' ozone-season NO_X, annual NO_X, and SO_2 new unit set-asides in accordance with a revision to the final Transport Rule's calculations of the new unit set-asides that erroneously omitted Oak Grove Unit 2's projected emissions.

EPA is finalizing a revision to the calculation of the new unit set-asides for ozone-season NO_X, annual NO_X, and SO_2 in Texas to reflect the revised classification of one unit as a new unit for purposes of unit-level allowance allocation. As explained in the proposal, this unit, Oak Grove Unit 2, commenced commercial operation on or after January 1, 2010, and should be considered a new unit under the final Transport Rule's unit-level allocation methodology. Including this unit's projected emissions in the calculation yields revised new unit set-asides of 4 percent of the state's ozone-season NO_X budget, 4 percent of the state's annual NO_X budget, and 5 percent of the state's SO_2 budget. Commenters did not identify any errors that would invalidate EPA's approach to addressing Oak Grove Unit 2. See ''Final Revisions Rule State Budgets and New Unit Set-Asides TSD'' in the docket for this rulemaking for a quantitative demonstration of these revisions.

These revisions to the Texas new unit set-asides result in changes to allowance allocations to existing units, but they do not change the state's overall budget. See ''Final Revisions Rule Unit-Level Allocations under the FIPs'' in the docket to this rulemaking.

(6) Increase New Jersey's 2012 SO_2 budget and 2012 and 2014 ozone-season and annual NO_X budgets in accordance with revisions to the final Transport Rule analysis that erroneously assumed that an SCR and scrubber exist at BL England Unit 1 and to reflect operational constraints likely to necessitate non-economic dispatch at six other facilities.

EPA is finalizing New Jersey's ozone-season NO_X, annual NO_X, and SO_2 budgets to reflect revisions to assumed control technologies at BL England Unit 1 (2012 only) and operational constraints affecting units at six other facilities. Commenters did not identify any errors that would invalidate EPA's approach to making the proposed revisions addressing BL England Unit 1, which were described in the proposal (76 FR 63865). EPA is also finalizing revisions to New Jersey's state budgets based on information demonstrating that northern New Jersey is an out-of-merit-order dispatch area. Units at six New Jersey plants (Bergen, Edison, Essex, Kearny, Linden, and Sewaren Generating Stations) are frequently dispatched out of regional economic order as a result of short-run limitations on the ability to meet local electricity demand with generation from outside the area. EPA is making only a minor adjustment in the way these budget revisions are calculated based on public comments regarding the eligible sources of generation that would be offset by the assumption of increased generation at the identified units. Commenters argued that cogeneration units would be less likely than other generators to adjust their dispatch in order to maintain the system's equilibrium between electricity supply and demand, as operation of these units would remain supported by steam demand. EPA agrees with these commenters and has recalculated the associated budget revisions while excluding cogeneration units from the calculation.

EPA re-calculated projected emissions from BL England Unit 1 and the six plants with near-term out-of-merit-order generation to account for the input assumption changes finalized in this action. These calculations yield increases to the New Jersey 2012 state budgets for SO_2 of 2,096 tons, annual NO_X of 952 tons, and ozone-season NO_X of 746 tons; and 2014 state budget increases for annual NO_X of 679 tons, and ozone-season NO_X of 349 tons. See ''Final Revisions Rule State Budgets and New Unit Set-Asides TSD'' in the docket for this rulemaking for a quantitative demonstration of these revisions.

(7) Increase Wisconsin's 2014 SO_2 budget and 2012 and 2014 annual NO_X budget in accordance with a revision to the final Transport Rule analysis that erroneously assumed that an FGD exists at Weston Unit 3, wet FGDs (instead of dry FGDs) exist at Columbia Units 1 and 2, and a SCR exists at John P. Madgett Unit 1.

EPA is finalizing the proposed increase to Wisconsin's SO_2 budget. As explained in the proposal, EPA proposed to adjust Wisconsin's 2014 SO_2 budget to reflect Weston Unit 3's operation without an FGD in 2014; and dry scrubbers instead of wet scrubbers at Columbia Units 1 and 2. Commenters did not identify any errors that would invalidate EPA's approach to making the proposed revisions addressing Weston Unit 3 or Columbia Units 1 and 2. To account for these adjustments, EPA is increasing the Wisconsin SO_2 budget by a total of 7,757 tons in 2014.

EPA is also finalizing the proposed increase to Wisconsin's annual NO_X budgets in 2012 and 2014. As explained in the proposal to this action, there is no SCR expected to be online in 2012 or 2014 at John P. Madgett Unit 1. Commenters did not identify any errors that would invalidate EPA's approach to addressing John P. Madgett Unit 1. Therefore, EPA is increasing Wisconsin's annual NO_X budgets by 2,473 tons.

See ''Final Revisions Rule State Budgets and New Unit Set-Asides TSD'' in the docket for this rulemaking for a quantitative demonstration of these revisions, as well as for the impacts this

revision has on the state's assurance level, new unit set-aside, and Indian country new unit set-aside, and ''Final Revisions to Unit-Level Allocations under the FIPs'' in the docket to this rulemaking for a quantitative demonstration of the effect of this revision on unit-level allocations under the FIP.

EPA adjusted Wisconsin's 2012 and 2014 ozone-season NO_X budgets to reflect the corrections to the John P. Madgett emissions when it included Wisconsin in the Transport Rule ozone-season NO_X program (76 FR 80760, December 27, 2011), as previously proposed (76 FR 40662, July 11, 2011).

(8) Increase New York's 2012 and 2014 ozone-season NO_X, annual NO_X, and SO_2 budgets in accordance with a revision to the final Transport Rule analysis that did not reflect operational constraints likely to necessitate non-economic dispatch at four plants.

EPA is finalizing increases to the New York state ozone-season NO_X, annual NO_X, and SO_2 budgets in 2012 and 2014, to satisfy three specific immediate-term operational constraints documented by the New York Independent System Operator (NYISO). These three constraints are referred to here as the N–1–1 Contingency, the Minimum Oil Burn Rules, and out-of-merit-order dispatch conditions, which collectively affect the likely 2012 and 2014 operations of specific units in the New York City and Long Island areas. See the proposal to this rule for details (76 FR 63865, October 14, 2011). Commenters did not identify any errors that would invalidate EPA's approach to addressing the units identified by the proposal with near-term out-of-merit-order generation in New York State.

EPA re-calculated projected emissions from the units identified in the proposal at Arthur Kill Generating Station, Ravenswood, Astoria Generating Station, and Northport facilities with near-term out-of-merit-order generation to account for the input assumption changes finalized in this action. These calculations yield increases to the New York 2012 and 2014 state budgets for SO_2 of 3,527 tons, for annual NO_X of 3,485 tons, and for ozone-season NO_X of 1,911 tons. See ''Final Revisions Rule State Budgets and New Unit Set-Asides TSD'' in the docket for this rulemaking for a quantitative demonstration of these revisions, as well as for the impacts this revision has on the state's assurance level, new unit set-aside, and Indian country new unit set-aside, and ''Final Revisions to Unit-Level Allocations under the FIPs'' in the docket to this rulemaking for a quantitative demonstration of the effect of this revision on unit-level allocations under the FIP.

(9) Increase Louisiana's 2012 and 2014 ozone-season NO_X budgets in accordance with a revision to the final Transport Rule analysis to reflect operational constraints likely to necessitate non-economic dispatch at twelve units.

EPA is finalizing revisions to Louisiana's 2012 and 2014 state ozone season NO_X budgets based on assumptions regarding near-term non-economic dispatch of certain units. As explained in the proposed revisions rule, conditions in these out-of-merit-order dispatch areas are likely to necessitate what would otherwise be non-economic generation at five Louisiana plants (R.S. Nelson, Nine Mile Point, Michoud, Little Gypsy, and Waterford) in the immediate future, as explained in detail in the proposed revisions rule (76 FR 63866). EPA is making only a minor adjustment in the way these budget revisions are calculated based on public comments regarding the eligible sources of generation that would be offset by the assumption of increased generation at the identified units. Commenters argued that cogeneration units would be less likely than other generators to adjust their dispatch in order to maintain the system's equilibrium between electricity supply and demand, as operation of these units would remain supported by steam demand. EPA agrees with these commenters and has recalculated the associated budget revisions while excluding cogeneration units from the calculation.

EPA is increasing Louisiana's 2012 and 2014 state budgets for ozone-season NO_X by 4,594 tons. See ''Final Revisions Rule State Budgets and New Unit Set-Asides TSD'' in the docket for this rulemaking for a quantitative demonstration of these revisions.

(10) Increase Mississippi's 2012 and 2014 ozone-season NO_X budgets in accordance with a revision to the final Transport Rule analysis to reflect operational constraints likely to necessitate non-economic dispatch at certain units.

EPA is finalizing revisions to Mississippi's 2012 and 2014 state ozone season NO_X budget based on conditions in this out-of-merit-order dispatch area that are likely to necessitate what would otherwise be non-economic generation at three Mississippi plants (Rex Brown, Gerald Andrus, Baxter Wilson) in the immediate future, as explained in detail in the proposed revisions rule (76 FR 63866). EPA is making only a minor adjustment in the way these budget revisions are calculated in order to replace the proposal's use of an annual NO_X rate with a more appropriate ozone-season NO_X rate to calculate the revision to the state's ozone-season NO_X budgets.

EPA re-calculated the emissions from the three plants with non-economic generation to account for the input assumption changes. These calculations yield increases to Mississippi's 2012 and 2014 state budgets for ozone-season NO_X of 2,154 tons. See ''Final Revisions Rule State Budgets and New Unit Set-Asides TSD'' in the docket for this rulemaking for a quantitative demonstration of these revisions.

(11) Increase the Texas 2012 and 2014 annual and ozone-season NO_X budgets in accordance with a revision to the final Transport Rule analysis to reflect operational constraints likely to necessitate non-economic dispatch at two plants.

EPA is finalizing revisions to Texas's 2012 and 2014 state annual and ozone season NO_X budgets as proposed. EPA is adjusting Texas's emission budgets based on analysis projecting the minimum frequency units at two plants, Lewis Creek and Sabine, will have to run in the immediate-term for non-economic purposes, according to data provided by the utility operating those units. Commenters did not identify any errors that would invalidate EPA's approach to making the proposed revisions addressing the units identified by the proposal with near-term out-of-merit-order generation in Texas.

These revisions yield increases to Texas's 2012 and 2014 state budgets for annual NO_X of 1,375 tons and ozone-season NO_X of 1,375 tons. See ''Final Revisions Rule State Budgets and New Unit Set-Asides TSD'' in the docket for this rulemaking for a quantitative demonstration of these revisions.

(12) Increase Florida's 2012 ozone-season NO_X budget in accordance with a revision to the final Transport Rule analysis to reflect the immediate-term unavailability of Crystal River Unit 3, a nuclear unit.

EPA is finalizing the increase of 819 tons to Florida's 2012 ozone-season NO_X budget as proposed. As explained in the proposal, Crystal River Unit 3 is currently experiencing an extended outage that renders its nuclear generation unavailable in the immediate future (76 FR 63867). EPA received public comments requesting that this revision to Florida's ozone-season NO_X budget be extended into 2014 and beyond, on the basis that future generation from Crystal River Unit 3 is

uncertain. EPA does not believe this revision has merit on that timeframe.[4]

Commenters did not provide any evidence that Crystal River Unit 3 would fail to return to service upon the conclusion of the current extended outage, and the unit is in fact expected to return to service in 2014.[5] Furthermore, EPA notes that the potential outage of a nuclear unit in any given year is a scenario that the Transport Rule's assurance provisions were explicitly designed to accommodate. The final Transport Rule's methodology for calculating variability limits (the degree to which a state's emissions are permitted to exceed its budget in any given year under the program) is based on a decade-long observation of historic year-to-year variability in states' heat input at covered units, which would capture the impact of disruptions at other sources of generation (such as a nuclear outage) on emissions at covered units. As EPA explained in the final Transport Rule, a state budget represents remaining emissions at covered units in an average year after the elimination of significant contribution and interference with maintenance, whereas the variability limit accommodates year-to-year fluctuation of state-level emissions around that average outcome consistent with historically observed year-to-year variability in state-level heat input at covered units. EPA believes it is appropriate to quantify an ''average year'' of projected emissions in Florida for 2014 and beyond to include projected generation from Crystal River Unit 3, while allowing the variability limit to accommodate the potential that such generation may be temporarily unavailable in any given year in that timeframe. As such, EPA is not extending this revision to Florida's ozone-season NO_X budget for 2014 and beyond.

See ''Final Revisions Rule State Budgets and New Unit Set-Asides TSD'' in the docket for this rulemaking for a quantitative demonstration of these revisions.

B. Allowance Allocation Revisions to Units Covered by Existing Utility Consent Decrees

The state budgets in the August 8, 2011 final Transport Rule (76 FR 48290) accurately incorporated the emission reduction requirements of existing utility consent decrees. However, after the final rule was published, EPA determined that provisions under certain existing utility consent decrees could restrict the use of Transport Rule allowances allocated to units subject to those consent decrees, such that a certain portion of those allocated allowances could be rendered unavailable for compliance use by any source under the Transport Rule programs. EPA determined that the sum of the SO_2 and/or NO_X allowances allocated to the units at certain facilities (or to the units included in certain systems) affected by these consent decrees exceeded the facility-wide (or system-wide) annual tonnage limit (ATL) specified in the applicable consent decree. The consent decrees for these facilities and systems include provisions that either require that allowances in excess of those necessary for compliance with the consent decrees be surrendered or place restrictions on the trading of such allowances. Therefore, excess allowances at these facilities (or within these systems) cannot be used by any Transport Rule program source(s) for compliance purposes.

To address this issue, on October 14, 2011, EPA proposed to add a constraint on Transport Rule unit-level allowance allocations for the facilities and systems in question (76 FR 63860). This action finalizes the proposed constraint, which affects a total of 82 units in six states: Alabama, Indiana, Kansas, Kentucky, Ohio, and Tennessee. The constraint reduces the number of SO_2 and/or NO_X allowances allocated to each of the 82 affected units, in order to align the facility-wide and system-wide allowance totals with the ATLs specified in the consent decrees.

The unit-level allowance adjustments for each affected facility (or system) were made using the methodology described in the October 14, 2011 proposed rule. First, EPA calculated the ratio of the facility-wide (or system-wide) ATL to the total number of allowances allocated to the units at the facility (or in the system). Then, for each unit, an annual tonnage limit equivalent (''unit-level cap'') was determined by multiplying this ratio by the number of allowances originally allocated to the unit.

As previously noted, EPA took the requirements of existing utility consent decrees into account when the state budgets were established. Therefore, this final action, as it regards the consent decrees, does not alter the budget of any of the six affected states. Further, this action with respect to the consent decrees has no impact on the existing unit-level allocations in states where there are no units covered by consent decrees with ATLs. The excess allowances removed from the 82 affected units have been reallocated to other covered sources in each relevant state using the allowance allocation methodology described in the October 14, 2011 proposed rule.

EPA received several comments on the proposed constraint and the unit-level cap apportionment methodology. Some commenters supported the proposal. Other commenters expressed concern that EPA was inappropriately using its rulemaking authority to modify, undo, or compromise provisions in the negotiated consent decree agreements. The Agency does not agree that the allowance allocation revisions being finalized in this rule modify the terms of any consent decree. The unit-level allowance allocation caps applied in this rulemaking do not alter any obligation, timeline, or other requirement of the utility consent decrees. None of the restrictions in the utility consent decrees are premised on trading programs that employ any particular allocation methodology or distribution of unit-level allocations. Moreover, the utility consent decrees do not, and cannot, preclude any particular allocation methodology or distribution from being implemented in future trading programs. Finally, unit-level allowance allocations under existing trading programs, including the Transport Rule programs, do not establish unit-level emission constraints, because sources may obtain additional allowances from the marketplace to cover emissions that are above the unit-level allocations.

Several commenters asked EPA to either clarify the specific consent decrees or exempt Transport Rule allowances from those restrictions and requirements. However, legal interpretations of utility consent decree provisions are outside the scope of this rulemaking. Moreover, it would be inappropriate for EPA to attempt to alter the terms of the consent decrees to exempt the Transport Rule allowances from the trading restrictions and allowance surrender provisions via a rulemaking.

Tennessee Valley Authority (TVA) commented that the TVA consent

[4] In 2002, during NRC-required inspections, plant workers discovered a football-sized cavity atop the reactor vessel head. The Nuclear Regulatory Commission (NRC) ordered the plant closed and it stayed closed for a total of two years while undergoing increased NRC scrutiny. It reopened in 2004. See *http://pbadupws.nrc.gov/docs/ML0925/ML092540084.pdf.*

[5] The plant operator has announced intentions to return the unit to service by 2014 (*https://www.progress-energy.com/company/media-room/news-archive/press-release.page?title=Progress+Energy+provides+update+on+Crystal+River+Nuclear+Plant+outage&pubdate=06-27-2011*).

decree includes a higher SO_2 ATL in the event that a nuclear electric generating unit is shut down for more than 120 days during calendar years 2012, 2013, or 2014. Because EPA and TVA are unable to predict whether such an event will occur, EPA is adopting, for purposes of allowance allocations in this rulemaking, the higher ATL for the TVA system which is based on the occurrence of a nuclear unit shut down. This change only affects TVA unit-level allocations in the year 2013. EPA reviewed the other existing utility consent decrees and did not find similar provisions in those decrees that require such an adjustment.

In the proposed revisions rule, EPA adjusted unit-level allocations to units affected by the TVA consent decree in years for which the final Transport Rule's allowance allocations to those units collectively exceeded that consent decree's ATL that is effective in that year. For the affected TVA units, the final Transport Rule's allowance allocations exceeded the consent decree ATL in 2013, 2018, and thereafter. TVA submitted comments arguing that the effective ATL under that consent decree is subject to change based on the potential retirement of affected units, which would also reduce aggregate unit-level allowance allocations to TVA under the Transport Rule. TVA's comments noted that the future balance of these two factors, which change over time, is uncertain.

EPA recognizes that the relationship between unit-level allowance allocations under the FIPs and the applicable ATL becomes relatively less certain when considered over longer time horizons. In order to reduce the potential impact utility consent decree ATLs may have on the availability of Transport Rule allowances for compliance, EPA must account for the variability in utility consent decree ATLs in future years. Where information was available, EPA included generating unit retirements in its analysis of utility consent decree ATLs (see ''Assessment of Impact of Consent Decree Annual Tonnage Limits on Transport Rule Allocations'' in the Docket (EPA–HQ–OAR–2009–0491) for the proposed revisions (76 FR 63860)). However, EPA agrees that the uncertainty becomes more pronounced in more distant years. Therefore, in this rulemaking EPA is not quantifying any additional adjustments to unit-level caps attributable to consent decree ATLs that become effective after 2017. In 2018 and thereafter, EPA will continue to apply the ATLs effective in 2017 for the purpose of unit-level allocations. EPA notes that this timeline will provide states with ample opportunity, if they wish, to submit SIPs and establish alternate allocation methodologies where updated information on consent decree requirements may affect Transport Rule allowance use.

C. Assurance Penalty Provisions

EPA is finalizing its proposal to make the assurance provisions effective starting in 2014. EPA maintains that, for 2012–2013, the Transport Rule (as revised by this final rule) ensures the elimination of each state's significant contribution to nonattainment and interference with maintenance.[6] The only commenters that opposed this proposed approach were North Carolina and Maryland. EPA is adopting the proposed approach—and rejecting North Carolina's and Maryland's comments in opposition—for the following reasons.

EPA's decision in this final revised rule to delay the effectiveness of the assurance provisions is based on new information, i.e., information that recently became available on states' total EGU emissions in the last four quarters (one in 2010 and three in 2011) and concerns raised recently by commenters about the immediate-term viability of Transport Rule allowance markets during the transition from CAIR. The most current available emissions data—i.e., total emissions for the last quarter of 2010 and the first three quarters of 2011—for EGUs in the states subject to the Transport Rule trading programs show that, in the vast majority of states, EGUs are already emitting at an annual level below the level of the applicable 2012 state assurance level. Specifically, in 16 out of the 23 states subject to the Transport Rule SO_2 program, 19 out of the 23 states subject to the Transport Rule NO_X annual program, and 22 out of the 25 states subject to the Transport Rule NO_X ozone season program, EGU emissions for the state for the last 12 months total less than the state assurance level (state budget plus variability limit), the level that reflects elimination of significant contribution and interference with maintenance.[7] Moreover, in the remaining states, emission controls that EPA's projections demonstrate will bring annual emissions down to the level of the applicable state assurance level are in the process of being installed and will be in operation in 2012 and 2013.

In addition, EGU owners and operators will know in 2012 and 2013 that the assurance provisions will be taking effect in 2014 when many state budgets under the Transport Rule trading programs will be reduced. Owners and operators will therefore need to implement compliance strategies to meet both the requirement to hold allowances covering emissions and to avoid assurance provision penalties in the context of, in many cases, reduced state budgets. Consequently, EGU emissions are likely to decline even further during 2012–2013 as owners and operators make immediate investments in further emission reductions to prepare for 2014 and beyond. As one commenter observed, ''Moreover, the desire of electric generating units (EGUs) to avoid the increased penalties once they are implemented in 2014 should encourage compliance with the Transport Rule even prior to assurance penalties being imposed. It is likely not in a polluter's interest to fail to implement emission reduction measures now, as it would be forced to decrease emissions with potentially unfeasible rapidity once the assurance penalty provisions are enacted, or else face extra exorbitant penalties'' (Docket ID EPA–HQ–OAR–2009–0491–4775).

EPA also conducted additional modeling of projected EGU emissions in 2012 and 2013 under the Transport Rule without applying the assurance provisions to those years.[8] This modeling shows that the Transport Rule trading programs will still result in emission reductions that cause total emissions in *each state* to be below the level of the applicable state assurance level, even when sources are not subject to the assurance provisions in those years. These very short-term projections are based on inputs that reflect validated, currently installed emission controls resulting in a higher degree of certainty than longer-term emission projections. In particular, the locations are known of existing EGUs with existing emission controls or with ongoing emission control retrofits to be

[6] As discussed in the Transport Rule, with respect to the 1997 ozone NAAQS, for certain states EPA quantified the ozone-season NO_X emission reductions that are necessary but may not be sufficient to eliminate all significant contribution and interference with maintenance (76 FR 48210). For such states EPA maintains that, for 2012–2013, the Transport Rule (as revised by this final rule) ensures the elimination of the quantified prohibited emissions.

[7] *http://camddataandmaps.epa.gov/gdm/index.cfm?fuseaction=iss.isshome.*

[8] IPM uses model run years to represent the full planning horizon. Mapping each year in the planning horizon into a representative model run year enables IPM to perform multiple year analyses while keeping the model size manageable. In this case, results for 2012 also apply to 2013. Modeling results are available in the docket for this rulemaking, in IPM output files named after this modeling scenario entitled ''Final Transport Rule with 2014 Assurance.''

completed by 2012, and of new EGUs (with emission controls) to be completed by 2012, and the emission reduction capabilities of all these controls also are known.

Based on the current level of EGU emissions and EPA's short-term modeling results, EPA maintains that EGU emissions in 2012 and 2013 in each of the states subject to the Transport Rule—without the assurance provisions being applicable in those years—have virtually no chance of exceeding the applicable state assurance level. Consequently, imposition of the assurance provisions during 2012–2013 is unnecessary and could actually be detrimental to smooth program implementation, as explained below.

EPA believes that a limited postponement of the effectiveness of the assurance provisions is justified in order to achieve a seamless transition from the existing CAIR programs to the new Transport Rule programs. Under both CAIR and the Transport Rule, individual units have the flexibility to supplement their own emission reduction efforts with acquisitions from the market of any additional allowances needed to cover emissions under the applicable programs. Active, transparent markets providing broad access to CAIR NO_X annual, CAIR NO_X ozone season, and Acid Rain SO_2 allowances have been in existence for many years. Sources covered by CAIR have relied on the availability of these robust markets when developing compliance plans. The Transport Rule (TR) creates new TR SO_2 Group 1, TR SO_2 Group 2, TR NO_X annual, and TR NO_X ozone season allowances. Markets for these allowances have started up and were developing before the Court issued a stay of the rule on December 30, 2011.

Some EGU owners and operators, states, and other organizations have expressed concern about the future availability of Transport Rule allowances in the market. For example, EPA received the following comment and several others like it: ''The [Group] strongly supports EPA's proposal to delay implementation of the assurance penalty provisions until January 1, 2014. The Group has significant concerns regarding the viability of the allowance markets anticipated by CSAPR. Delay of the assurance penalty provisions may increase the likelihood that allowance markets will develop in the first CSAPR compliance period. Accordingly, the Group urges EPA to finalize its proposed amendments to the assurance penalty provisions * * * Delaying implementation of the assurance penalty provisions until 2014 would reduce the risks associated with entering the market and encourage sources to engage in allowance trading'' (Docket ID EPA–HQ–OAR–2009–0491–4821).[9] Indeed, such concerns are to be expected as new markets start up and develop, with the result that prices tend to spike during market start-up and eventually settle to anticipated levels. After a period of time, the market matures and increasing numbers of participants gain experience with, and confidence in, the market.

Not only do the allowance markets under the Transport Rule involve the purchase and sale of new types of allowances for use in new trading programs, but also only the Transport Rule trading programs include assurance provisions, which were not included in any previous allowance trading programs. Many of the comments EPA received indicated that the introduction of this new and unfamiliar element in the Transport Rule trading programs has heightened concerns about the ability of owners and operators to use the new allowance markets to comply with the requirement to hold allowances covering emissions. Early trading activity is important for demonstrating market liquidity and assisting in price discovery to facilitate compliance planning by owners and operators of covered sources. If, out of immediate-term unfamiliarity with how the assurance provisions would be applied, owners and operators were to limit their own early trading activity, the assurance provisions would have negative impacts not only on those owners and operators, but also on all participants in the Transport Rule trading programs.

EPA is delaying the effective date of the assurance provisions until 2014 in order to neutralize a key uncertainty facing successful and potentially rapid program implementation following the current stay, such that sources can rely on immediate activation of a Transport Rule allowance market that offers the cost-effective emission reduction flexibilities on which the rule relies to eliminate significant contribution and interference with maintenance.

In summary, EPA concludes that, not only are the assurance provisions not necessary in 2012–2013 to ensure elimination of significant contribution and interference with maintenance, but also that the imposition of the assurance provisions in 2012–2013 would risk inhibiting the development and availability of the allowance market and thus raise the costs of compliance with Transport Rule emission reduction requirements. Delaying imposition of the assurance provisions until 2014 will ease the transition for covered sources from compliance with CAIR requirements to compliance with Transport Rule requirements by addressing concerns about the readiness of new Transport Rule allowance markets, facilitating progress of these markets, and instilling confidence that owners and operators can comply through a variety of cost-effective strategies that are not limited by initial Transport Rule unit-level allowance allocations. EPA maintains that this will result, in the aggregate in each state, in cost-effective emission reductions and total state emissions that are consistent with EPA's quantification of each state's obligation to eliminate significant contribution and interference with maintenance in downwind areas.

EPA's adoption, in the final revision rule, of a brief delay until 2014 in the imposition of the assurance provisions constitutes a change in the Agency's approach from the approach adopted in the final Transport Rule. In the final Transport Rule, EPA decided to make the assurance provisions effective starting in 2012 ''because this approach provides even further assurance, consistent with *North Carolina,* that each state's prohibited emissions will be eliminated from the start of the Transport Rule trading programs'' (76 FR at 48296). Although EPA took the conservative approach of providing more assurance by adopting 2012 as the start of the assurance provisions, EPA did not conclude, in the final Transport Rule, that starting the assurance provisions in 2014 would be inconsistent with *North Carolina* or would result in states not eliminating their significant contribution or interference with maintenance.

The trading programs created by the final Transport Rule, as modified by the final revision rule, are distinguishable from the CAIR trading programs that the Court reversed in *North Carolina* and meet the requirements set forth in the Court's decision. In the Transport Rule, EPA established state-specific budgets and state-specific variability limits, and, if each state's total EGU emissions for a control period do not exceed the applicable state budget plus variability, then that state's significant contribution and interference with maintenance are eliminated for that control period. In contrast with the Transport Rule, in CAIR, EPA determined at a regional level the amount of required emission reductions. *See North Carolina,* 531 F.3d at 907. Thus, the requirement—which was not met by CAIR—to determine the amount of each state's

[9] The Cross-State Air Pollution Rule (CSAPR) is another name for the Transport Rule.

significant contribution and interference with maintenance is met by the Transport Rule.

Moreover, unlike the circumstances in CAIR, EPA determined in this rulemaking that information on the current level of EGU emissions and ongoing emission control installations, supported by the results of EPA's short-term modeling, demonstrates that without the assurance provisions being applicable in 2012–2013, EGU emissions in 2012 and 2013 in each state will not exceed the applicable state assurance level. For 2014 and thereafter when controls and emissions are likely to be different from current controls and emissions and modeling projections are correspondingly less certain, the Transport Rule imposes assurance provision requirements that penalize sources whose emissions result in the state having total EGU emissions in excess of the state assurance level, and thereby ensures that sources operate in a manner that results in the elimination of each state's significant contribution and interference with maintenance.

In contrast with the Transport Rule, state-level EGU emissions were not, when CAIR was issued, already at (or well on the way to meeting) the required reduction levels. EPA did not impose penalties on sources whose emissions resulted in a state's failing to eliminate its significant contribution and interference with maintenance, and EPA relied entirely on its modeling, as opposed to data demonstrating states' emission reductions occurring in the period immediately prior to the relevant compliance years, to show that significant contribution and interference with maintenance would be eliminated. *See North Carolina,* 531 F.3d at 907 (stating that ''CAIR only assures that the entire region's significant contribution will be eliminated. It is possible that CAIR would achieve [CAA] section 110(a)(2)(D)(i)(I)'s goals. EPA's modeling shows that sources contributing to North Carolina's nonattainment areas will at least reduce their emissions even after opting into CAIR's trading programs * * * But EPA is not exercising its section 110(a)(2)(D)(i)(I) duty unless it is promulgating a rule that achieves something measurable toward the goal of prohibiting sources 'within the State' from contributing to nonattainment or interfering with maintenance 'in any other State.' '')

In addition, in CAIR, the EPA modeling was for the intermediate term (i.e., projected in 2005 emissions for 2009 and 2010), not for the short term when critical elements (such as the locations of existing EGUs with existing emission controls or with control retrofits to be completed by 2012 and of soon-to-be-completed, new EGUs with controls and the reduction capabilities of all these controls) are known. Thus, the Transport Rule accomplishes on a state-by-state basis what CAIR accomplished on a regional basis, i.e., assurance that significant contribution and interference with maintenance will be eliminated, and the requirement—which was not met by CAIR—that EPA provide such assurance is met by the Transport Rule.

North Carolina's argument that EPA is somehow barred from delaying the effectiveness of the assurance provisions in the Transport Rule FIPs because this delay ''will, at least in some locations, lead to'' increased emissions in some nonattainment or maintenance areas is inconsistent with the facts regarding emission controls installed on EGUs over the near term. As discussed above, without the assurance provisions in 2012–2013, total EGU emissions in each state will still be below the state assurance level and therefore each state will meet the requirements of CAA section 110(a)(2)(D)(i)(I) by eliminating the significant contribution and interference with maintenance identified in the final Transport Rule. North Carolina failed to show otherwise.

On the contrary, North Carolina asserted that, during 2012–2013, the lack of assurance provisions will result in more emissions in ''some locations'' than if the assurance provisions were in effect and that these emissions will increase ambient pollutant levels in areas with nonattainment or maintenance problems. However, North Carolina failed to identify any such ''locations'' and any such nonattainment/maintenance problem areas, or to provide any modeling or other evidence showing that these emission increases and ambient effects would occur.

For the reasons explained above, EPA is revising the Transport Rule such that its assurance provisions are effective beginning in 2014.

D. Correct Typographical Errors

EPA is finalizing as proposed to correct typographical errors in certain sections of rule text in parts 52 and 97 in the final Transport Rule. EPA received no comments on correcting typographical errors.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action.'' Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This action makes relatively minor revisions to the emission budgets and allowance allocations or allowance allocations only in certain states in the final Transport Rule and corrects minor technical errors which are ministerial. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the final Transport Rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0667. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

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

After considering the economic impacts of this action on small entities,

I certify that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by this action are electric power generators whose ultimate parent entity has a total electric output of 4 million megawatt-hours (MWh) or less in the previous fiscal year. We have determined that the changes considered in this proposed rulemaking pose no additional burden for small entities. The proposed revision to the new unit set-asides in Arkansas and Texas would yield an extremely small change in unit-level allowance allocations to existing units, including small entities, such that it would not affect the analysis conducted on small entity impacts under the finalized Transport Rule. In all other states, the revisions proposed in this rulemaking would yield additional allowance allocations to all units, including small entities, without increasing program stringency, such that it is not possible for the impact to small entities to be any larger than that already considered and reviewed in the finalized Transport Rule.

D. Unfunded Mandates Reform Act

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. This action is increasing the budgets and increasing the total number of allowances or maintaining the same budget but revising unit-level allocations in several other states in the Transport Rule. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

In developing the final Transport Rule, EPA consulted with small governments pursuant to a plan established under section 203 of UMRA to address impacts of regulatory requirements in the rule that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action makes relatively minor revisions to the emissions budgets and allowance allocations or allowance allocations only in certain states in the final Transport Rule. Thus, Executive Order 13132 does not apply to this rule. EPA did provide information to state and local officials during development of both the proposed and final Transport Rule.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This action makes relatively minor revisions to the emissions budgets and allowance allocations in several states in the final Transport Rule and helps ease the transition from CAIR. Indian country new unit set-asides will increase slightly or remain unchanged in the states affected by this action. Thus, Executive Order 13175 does not apply to this action. EPA consulted with tribal officials during the process of promulgating the final Transport Rule to permit them to have meaningful and timely input into its development.

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

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. Analyses by EPA that show how the emission reductions from the strategies in the final Transport Rule will further improve air quality and children's health can be found in the final Transport Rule RIA.

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. EPA believes that there is no meaningful impact to the energy supply beyond that which is reported for the Transport Rule program in the final Transport Rule.

I. National Technology Transfer and Advancement Act

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

As described in section XII.I of the preamble to the final Transport Rule, the Transport Rule program requires all sources to meet the applicable monitoring requirements of 40 CFR part 75. Part 75 already incorporates a number of voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

Executive Order (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.

In the Final Revisions Rule Significant Contribution Assessment Technical Support Document in the docket to this rulemaking, EPA assessed impacts of the emission changes in this rule on air quality throughout the Transport Rule region. For SO_2, the estimated air quality impacts were minimal and no additional nonattainment or maintenance areas were identified. EPA also assessed the relationship between the NO_X emission inventories in each affected state and the finalized revisions to annual and ozone-season NO_X budgets and found the revisions represent small percentages of each state's total emissions in 2014. As a result, EPA does not believe these technical revisions would affect any of the conclusions supported by the air quality and environmental justice analyses conducted for the final Transport Rule.

Based on the significant contribution assessment in the technical support document for this action, EPA has determined that this action will not have disproportionately high and

adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. EPA believes that the vast majority of communities and individuals in areas covered by the Transport Rule program inclusive of this action, including numerous low-income, minority, and tribal individuals and communities in both rural areas and inner cities in the eastern and central U.S., will see significant improvements in air quality and resulting improvements in health. EPA's assessment of the effects of the final Transport Rule program on these communities is available in section XII.J of the preamble to the final Transport Rule.

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 a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective April 23, 2012.

L. Judicial Review

Petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by April 23, 2012. Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit if (i) the agency action consists of ''nationally applicable regulations promulgated, or final action taken, by the Administrator,'' or (ii) such action is locally or regionally applicable, if ''such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.''

In the final Transport Rule, EPA determined that ''[a]ny final action related to the Transport Rule is 'nationally applicable' within the meaning of section 307(b)(1).'' 76 FR 48,352. Through this rule, EPA is revising specific aspects of the final Transport Rule. This rule therefore is a final action related to the Transport Rule and as such is covered by the determination of national applicability made in the final Transport Rule. Thus, pursuant to section 307(b) any petitions for review of this action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date final action is published in the **Federal Register**. Filing a petition for reconsideration of this action 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. In addition, pursuant to CAA section 307(b)(2) this action may not be challenged later in proceedings to enforce its requirements.

List of Subjects

40 CFR Part 52

Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Regional haze, Reporting and recordkeeping requirements, Sulfur dioxide.

40 CFR Part 97

Administrative practice and procedure, Air pollution control, Electric utilities, Nitrogen oxides, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: February 7, 2012.

Lisa P. Jackson,

Administrator.

For the reasons set forth in the preamble, parts 52 and 97 of chapter I of title 40 of the Code of Federal Regulations are amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for Part 52 continues to read as follows:

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

Subpart A—General Provisions

§ 52.39 [Amended]

■ 2. Section 52.39, paragraph (i)(1)(ii),is amended by removing the phrase ''Group 1'' and adding, in its place, the phrase ''Group 2''.

Subpart O—Illinois

■ 3. Section 52.745 is redesignated as § 52.731.

■ 4. Section 52.746 is redesignated as § 52.732.

Subpart VV—Virginia

■ 5. Section 52.2241, added at 76 FR 48376, August 8, 2011, is redesignated as § 52.2441.

PART 97—[AMENDED]

■ 6. The authority citation for Part 97 continues to read as follows:

Authority: 42 U.S.C. 7401, 7403, 7410, 7426, 7601, and 7651, *et seq.*

■ 7. Section 97.406 is amended by:

■ a. Designating the first sentence in paragraph (c)(3) as paragraph (c)(3)(i); and by removing the phrase ''paragraphs (c)(1) and (c)(2)'', adding in its place the phrase ''paragraph (c)(1)'';

■ b. Adding a new paragraph (c)(3)(ii); and

■ c. Removing the words ''or or'' and adding, in its place, the word ''or'' in paragraph (e)(2) to read as follows:

§ 97.406 Standard requirements.

* * * * *

(c) * * *

(3) * * *

(ii) A TR NO_X Annual unit shall be subject to the requirements under paragraph (c)(2) of this section for the control period starting on the later of January 1, 2014 or the deadline for meeting the unit's monitor certification requirements under § 97.430(b) and for each control period thereafter.

* * * * *

■ 8. Section 97.410 is revised to read as follows:

§ 97.410 State NO_X Annual trading budgets, new unit set-asides, Indian country new unit set-aside, and variability limits.

(a) The State NO_X Annual trading budgets, new unit set-asides, and Indian country new unit-set asides for allocations of TR NO_X Annual allowances for the control periods in 2012 and thereafter are as follows:

(1) *Alabama.* (i) The NO_X annual trading budget for 2012 and 2013 is 72,691 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 1,454 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 71,962 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 1,439 tons.

(vi) [Reserved]

(2) *Georgia.* (i) The NO_X annual trading budget for 2012 and 2013 is 62,010 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 1,240 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 40,540 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 811 tons.

(vi) [Reserved]

(3) *Illinois.* (i) The NO_X annual trading budget for 2012 and 2013 is 47,872 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 3,830 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 47,872 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 3,830 tons.

(vi) [Reserved]

(4) *Indiana.* (i) The NO_X annual trading budget for 2012 and 2013 is 109,726 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 3,292 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 108,424 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 3,253 tons.

(vi) [Reserved]

(5) *Iowa.* (i) The NO_X annual trading budget for 2012 and 2013 is 38,335 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 729 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 38 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 37,498 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 712 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 38 tons.

(6) *Kansas.* (i) The NO_X annual trading budget for 2012 and 2013 is 30,714 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 583 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 31 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 25,560 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 485 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 26 tons.

(7) *Kentucky.* (i) The NO_X annual trading budget for 2012 and 2013 is 85,086 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 3,403 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 77,238 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 3,090 tons.

(vi) [Reserved]

(8) *Maryland.* (i) The NO_X annual trading budget for 2012 and 2013 is 16,633 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 333 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 16,574 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 331 tons.

(vi) [Reserved]

(9) *Michigan.* (i) The NO_X annual trading budget for 2012 and 2013 is 65,421 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 1,243 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 65 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 63,040 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 1,198 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 63 tons.

(10) *Minnesota.* (i) The NO_X annual trading budget for 2012 and 2013 is 29,572 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 561 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 30 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 29,572 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 561 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 30 tons.

(11) *Missouri.* (i) The NO_X annual trading budget for 2012 and 2013 is 52,374 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 1,571 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 48,717 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 1,462 tons.

(vi) [Reserved]

(12) *Nebraska.* (i) The NO_X annual trading budget for 2012 and 2013 is 30,039 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 1,772 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 30 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 30,039 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 1,772 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 30 tons.

(13) *New Jersey.* (i) The NO_X annual trading budget for 2012 and 2013 is 8,218 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 164 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 7,945 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 159 tons.

(vi) [Reserved]

(14) *New York.* (i) The NO_X annual trading budget for 2012 and 2013 is 21,028 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 400 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 21 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 21,028 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 400 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 21 tons.

(15) *North Carolina.* (i) The NO_X annual trading budget for 2012 and 2013 is 50,587 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 2,984 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 51 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 41,553 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 2,451 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 42 tons.

(16) *Ohio.* (i) The NO_X annual trading budget for 2012 and 2013 is 92,703 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 1,854 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 87,493 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 1,750 tons.

(vi) [Reserved]

(17) *Pennsylvania.* (i) The NO_X annual trading budget for 2012 and 2013 is 119,986 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 2,400 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 119,194 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 2,384 tons.

(vi) [Reserved]

(18) *South Carolina.* (i) The NO_X annual trading budget for 2012 and 2013 is 32,498 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 617 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 33 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 32,498 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 617 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 33 tons.

(19) *Tennessee.* (i) The NO_X annual trading budget for 2012 and 2013 is 35,703 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 714 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 19,337 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 387 tons.

(vi) [Reserved]

(20) *Texas.* (i) The NO_X annual trading budget for 2012 and 2013 is 134,970 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 5,264 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 135 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 134,970 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 5,264 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 135 tons.

(21) *Virginia.* (i) The NO_X annual trading budget for 2012 and 2013 is 33,242 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 1,662 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 33,242 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 1,662 tons.

(vi) [Reserved]

(22) *West Virginia.* (i) The NO_X annual trading budget for 2012 and 2013 is 59,472 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 2,974 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 54,582 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 2,729 tons.

(vi) [Reserved]

(23) *Wisconsin.* (i) The NO_X annual trading budget for 2012 and 2013 is 34,101 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 2,012 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 34 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 32,871 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 1,939 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 33 tons.

(b) The States' variability limits for the State NO_X Annual trading budgets for the control periods in 2014 and thereafter are as follows:

(1) The NO_X annual variability limit for Alabama is 12,953 tons.

(2) The NO_X annual variability limit for Georgia is 7,297 tons.

(3) The NO_X annual variability limit for Illinois is 8,617 tons.

(4) The NO_X annual variability limit for Indiana is 19,516 tons.

(5) The NO_X annual variability limit for Iowa is 6,750 tons.

(6) The NO_X annual variability limit for Kansas is 4,601 tons.

(7) The NO_X annual variability limit for Kentucky is 13,903 tons.

(8) The NO_X annual variability limit for Maryland is 2,983 tons.

(9) The NO_X annual variability limit for Michigan is 11,347 tons.

(10) The NO_X annual variability limit for Minnesota is 5,323 tons.

(11) The NO_X annual variability limit for Missouri is 8,769 tons.

(12) The NO_X annual variability limit for Nebraska is 5,407 tons.

(13) The NO_X annual variability limit for New Jersey is 1,430 tons.

(14) The NO_X annual variability limit for New York is 3,785 tons.

(15) The NO_X annual variability limit for North Carolina is 7,480 tons.

(16) The NO_X annual variability limit for Ohio is 15,749 tons.

(17) The NO_X annual variability limit for Pennsylvania is 21,455 tons.

(18) The NO_X annual variability limit for South Carolina is 5,850 tons.

(19) The NO_X annual variability limit for Tennessee is 3,481 tons.

(20) The NO_X annual variability limit for Texas is 24,295 tons.

(21) The NO_X annual variability limit for Virginia is 5,984 tons.

(22) The NO_X annual variability limit for West Virginia is 9,825 tons.

(23) The NO_X annual variability limit for Wisconsin is 5,917 tons.

(c) Each NO_X annual trading budget identified in this section includes any tons in a new unit set aside or Indian country new unit set aside, but does not include any tons in a variability limit.

§ 97.425 [Amended]

■ 9. Section 97.425, paragraph (b)(1) introductory text, is amended by removing ''2013'' and adding, in its place, ''2015''.

■ 10. Section 97.506 is amended by:

■ a. Designating the first sentence in paragraph (c)(3) as paragraph (c)(3)(i); and by removing the phrase ''paragraphs (c)(1) and (c)(2)'', adding in its place the phrase ''paragraph (c)(1)'';and

■ b. Adding a new paragraph (c)(3)(ii) to read as follows:

§ 97.506 Standard requirements.

* * * * *

(c) * * *

(3) * * *

(ii) A TR NO_X Ozone Season unit shall be subject to the requirements under paragraph (c)(2) of this section for the control period starting on the later of May 1, 2014 or the deadline for meeting the unit's monitor certification requirements under § 97.530(b) and for each control period thereafter.

* * * * *

■ 11. Section 97.510 is revised to read as follows:

§ 97.510 State NO_X Ozone Season trading budgets, new unit set-asides, Indian country new unit set-aside, and variability limits.

(a) The State NO_X ozone season trading budgets, new unit set-asides, and Indian country new unit-set asides for allocations of TR NO_X Ozone Season allowances for the control periods in 2012 and thereafter are as follows:

(1) *Alabama.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 31,746 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 635 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 31,499 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 630 tons.

(vi) [Reserved]

(2) *Arkansas.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 15,037 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 752 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 15,037 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 752 tons.

(vi) [Reserved]

(3) *Florida.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 28,644 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 544 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 29 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 27,825 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 529 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 28 tons.

(4) *Georgia.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 27,944 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 559 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 18,279 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 366 tons.

(vi) [Reserved]

(5) *Illinois.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 21,208 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 1,697 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 21,208 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 1,697 tons.

(vi) [Reserved]

(6) *Indiana.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 46,876 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 1,406 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 46,175 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 1,385 tons.

(vi) [Reserved]

(7) *Iowa.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 16,532 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 314 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 17 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 16,207 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 308 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 16 tons.

(8) *Kentucky.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 36,167 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 1,447 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 32,674 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 1,307 tons.

(vi) [Reserved]

(9) *Louisiana.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 18,026 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 523 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 18 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 18,026 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 523 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 18 tons.

(10) *Maryland.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 7,179 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 144 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 7,179 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 144 tons.

(vi) [Reserved]

(11) *Michigan.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 28,041 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 533 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 28 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 27,016 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 513 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 27 tons.

(12) *Mississippi.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 12,314 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 234 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 12 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 12,314 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 234 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 12 tons.

(13) *Missouri.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 22,762 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 683 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 21,073 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 632 tons.

(vi) [Reserved]

(14) *New Jersey.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 4,128 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 83 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 3,731 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 75 tons.

(vi) [Reserved]

(15) *New York.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 10,242 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 195 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 10 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 10,242 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 195 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 10 tons.

(16) *North Carolina.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 22,168 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 1,308 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 22 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 18,455 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 1,089 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 18 tons.

(17) *Ohio.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 40,063 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 801 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 37,792 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 756 tons.

(vi) [Reserved]

(18) *Oklahoma.* (i) The NO_X ozone season trading budget for 2012 is 36,567 and for 2013 is 21,835 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 is 731 and for 2013 is 437 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 21,835 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 437 tons.

(vi) [Reserved]

(19) *Pennsylvania.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 52,201 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 1,044 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 51,912 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 1,038 tons.

(vi) [Reserved]

(20) *South Carolina.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 13,909 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 264 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 14 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 13,909 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 264 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 14 tons.

(21) *Tennessee.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 14,908 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 298 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 8,016 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 160 tons.

(vi) [Reserved]

(22) *Texas.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 64,418 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 2,513 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 64 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 64,418 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 2,513 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 64 tons.

(23) *Virginia.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 14,452 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 723 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 14,452 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 723 tons.

(vi) [Reserved]

(24) *West Virginia.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 25,283 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 1,264 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 23,291 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 1,165 tons.

(vi) [Reserved]

(25) *Wisconsin.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 14,784 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 872 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 15 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 14,296 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 844 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 14 tons.

(b) The States' variability limits for the State NO_X ozone season trading budgets for the control periods in 2014 and thereafter are as follows:

(1) The NO_X ozone season variability limit for Alabama is 6,615 tons.

(2) The NO_X ozone season variability limit for Arkansas is 3,158 tons.

(3) The NO_X ozone season variability limit for Florida is 5,843 tons.

(4) The NO_X ozone season variability limit for Georgia is 3,839 tons.

(5) The NO_X ozone season variability limit for Illinois is 4,454 tons.

(6) The NO_X ozone season variability limit for Indiana is 9,697 tons.

(7) The NO_X ozone season variability limit for Iowa is 3,403 tons.

(8) The NO_X ozone season variability limit for Kentucky is 6,862 tons.

(9) The NO_X ozone season variability limit for Louisiana is 3,785 tons.

(10) The NO_X ozone season variability limit for Maryland is 1,508 tons.

(11) The NO_X ozone season variability limit for Michigan is 5,673 tons.

(12) The NO_X ozone season variability limit for Mississippi is 2,586 tons.

(13) The NO_X ozone season variability limit for Missouri is 4,425 tons.

(14) The NO_X ozone season variability limit for New Jersey is 784 tons.

(15) The NO_X ozone season variability limit for New York is 2,151 tons.

(16) The NO_X ozone season variability limit for North Carolina is 3,876 tons.

(17) The NO_X ozone season variability limit for Ohio is 7,936 tons.

(18) The NO_X ozone season variability limit for Oklahoma is 4,585 tons.

(19) The NO_X ozone season variability limit for Pennsylvania is 10,902 tons.

(20) The NO_X ozone season variability limit for South Carolina is 2,921 tons.

(21) The NO_X ozone season variability limit for Tennessee is 1,683 tons.

(22) The NO_X ozone season variability limit for Texas is 13,528 tons.

(23) The NO_X ozone season variability limit for Virginia is 3,035 tons.

(24) The NO_X ozone season variability limit for West Virginia is 4,891 tons.

(25) The NO_X ozone season variability limit for Wisconsin is 3,002 tons.

(c) Each NO_X ozone season trading budget in this section includes any tons in a new unit set aside or Indian country new unit set aside, but does not include any tons in a variability limit.

§ 97.525 [Amended]

■ 12. Section 97.525, paragraph (b)(1) introductory text, is amended by removing ''2013'' and adding, in its place, ''2015.''

■ 13. Section 97.606 is amended by:

■ a. Designating the first sentence in paragraph (c)(3) as paragraph (c)(3)(i); and by removing the phrase ''paragraphs (c)(1) and (c)(2)'', adding in its place the phrase ''paragraph (c)(1);''

■ b. Adding a new paragraph (c)(3)(ii); and

■ c. Amending paragraph (e)(2) by removing the words ''or or'' and adding, in their place, the word ''or'' to read as follows:

§ 97.606 Standard requirements.

* * * * *

(c) * * *

(3) * * *

(ii) A TR SO_2 Group 1 unit shall be subject to the requirements under paragraph (c)(2) of this section for the control period starting on the later of January 1, 2014 or the deadline for meeting the unit's monitor certification requirements under § 97.630(b) and for each control period thereafter.

* * * * *

■ 14. Section 97.610 is revised to read as follows:

§ 97.610 State SO_2 Group 1 trading budgets, new unit set-asides, Indian country new unit set-aside, and variability limits.

(a) The State SO_2 trading budgets, new unit set-asides, and Indian country new unit-set asides for allocations of TR SO_2 Group 1 allowances for the control periods in 2012 and thereafter are as follows:

(1) *Illinois.* (i) The SO_2 trading budget for 2012 and 2013 is 234,889 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 11,744 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 124,123 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 6,206 tons.

(vi) [Reserved]

(2) *Indiana.* (i) The SO_2 trading budget for 2012 and 2013 is 285,424 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 8,563 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 161,111 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 4,833 tons.

(vi) [Reserved]

(3) *Iowa.* (i) The SO_2 trading budget for 2012 and 2013 is 107,085 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 2,035 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 107 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 75,184 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 1,429 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 75 tons.

(4) *Kentucky.* (i) The SO_2 trading budget for 2012 and 2013 is 232,662 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 13,960 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 106,284 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 6,377 tons.

(vi) [Reserved]

(5) *Maryland.* (i) The SO_2 trading budget for 2012 and 2013 is 30,120 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 602 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 28,203 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 564 tons.

(vi) [Reserved]

(6) *Michigan.* (i) The SO_2 trading budget for 2012 and 2013 is 229,303 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 4,357 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 229 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 143,995 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 2,736 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 144 tons.

(7) *Missouri.* (i) The SO_2 trading budget for 2012 and 2013 is 207,466 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 4,149 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 165,941 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 3,319 tons.

(vi) [Reserved]

(8) *New Jersey.* (i) The SO_2 trading budget for 2012 and 2013 is 7,670 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 153 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 5,574 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 111 tons.

(vi) [Reserved]

(9) *New York.* (i) The SO_2 trading budget for 2012 and 2013 is 30,852 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 586 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 31 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 22,112 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 420 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 22 tons.

(10) *North Carolina.* (i) The SO_2 trading budget for 2012 and 2013 is 136,881 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 10,813 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 137 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 57,620 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 4,552 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 58 tons.

(11) *Ohio.* (i) The SO_2 trading budget for 2012 and 2013 is 310,230 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 6,205 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 137,077 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 2,742 tons.

(vi) [Reserved]

(12) *Pennsylvania.* (i) The SO_2 trading budget for 2012 and 2013 is 278,651 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 5,573 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 112,021 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 2,240 tons.

(vi) [Reserved]

(13) *Tennessee.* (i) The SO_2 trading budget for 2012 and 2013 is 148,150 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 2,963 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 58,833 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 1,177 tons.

(vi) [Reserved]

(14) *Virginia.* (i) The SO_2 trading budget for 2012 and 2013 is 70,820 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 2,833 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 35,057 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 1,402 tons.

(vi) [Reserved]

(15) *West Virginia.* (i) The SO_2 trading budget for 2012 and 2013 is 146,174 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 10,232 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 75,668 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 5,297 tons.

(vi) [Reserved]

(16) *Wisconsin.* (i) The SO_2 trading budget for 2012 and 2013 is 79,480 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 3,099 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 80 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 47,883 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 1,867 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 48 tons.

(b) The States' variability limits for the State SO_2 Group 1 trading budgets for the control periods in 2014 and thereafter are as follows:

(1) The SO_2 variability limit for Illinois is 22,342 tons.

(2) The SO_2 variability limit for Indiana is 29,000 tons.

(3) The SO_2 variability limit for Iowa is 13,533 tons.

(4) The SO_2 variability limit for Kentucky is 19,131 tons.

(5) The SO_2 variability limit for Maryland is 5,077 tons.

(6) The SO_2 variability limit for Michigan is 25,919 tons.

(7) The SO_2 variability limit for Missouri is 29,869 tons.

(8) The SO_2 variability limit for New Jersey is 1,003 tons.

(9) The SO_2 variability limit for New York is 3,980 tons.

(10) The SO_2 variability limit for North Carolina is 10,372 tons.

(11) The SO_2 variability limit for Ohio is 24,674 tons.

(12) The SO_2 variability limit for Pennsylvania is 20,164 tons.

(13) The SO_2 variability limit for Tennessee is 10,590 tons.

(14) The SO_2 variability limit for Virginia is 6,310 tons.

(15) The SO_2 variability limit for West Virginia is 13,620 tons.

(16) The SO_2 variability limit for Wisconsin is 8,619 tons.

(c) Each SO_2 trading budget in this section includes any tons in a new unit set aside or Indian country new unit set aside, but does not include any tons in a variability limit.

§ 97.625 [Amended]

■ 15. Section 97.625, paragraph (b)(1) introductory text, is amended by removing ''2013'' and adding, in its place, ''2015''.

■ 16. Section 97.706 is amended by:

■ a. Designating the first sentence in paragraph (c)(3) as paragraph (c)(3)(i); and by removing the phrase ''paragraphs (c)(1) and (c)(2)'', adding in its place the phrase ''paragraph (c)(1)'';

■ b. Adding a new paragraph (c)(3)(ii); and

■ c. Amending paragraph (e)(2) by removing the words ''or or'' and adding, in their place, the word ''or'' to read as follows:

§ 97.706 Standard requirements.

* * * * *

(c) * * *

(3) * * *

(ii) A TR SO_2 Group 2 unit shall be subject to the requirements under paragraph (c)(2) of this section for the control period starting on the later of January 1, 2014 or the deadline for meeting the unit's monitor certification requirements under § 97.730(b) and for each control period thereafter.

* * * * *

■ 17. Section 97.710 is revised to read as follows:

§ 97.710 State SO_2 Group 2 trading budgets, new unit set-asides, Indian country new unit set-aside, and variability limits.

(a) The State SO_2 trading budgets, new unit set-asides, and Indian country new unit-set asides for allocations of TR SO_2 Group 2 allowances for the control periods in 2012 and thereafter are as follows:

(1) *Alabama.* (i) The SO_2 trading budget for 2012 and 2013 is 216,033 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 4,321 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 213,258 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 4,265 tons.

(vi) [Reserved]

(2) *Georgia.* (i) The SO_2 trading budget for 2012 and 2013 is 158,527 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 3,171 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 95,231 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 1,905 tons.

(vi) [Reserved]

(3) *Kansas.* (i) The SO_2 trading budget for 2012 and 2013 is 41,528 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 789 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 42 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 41,528 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 789 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 42 tons.

(4) *Minnesota.* (i) The SO_2 trading budget for 2012 and 2013 is 41,981 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 798 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 42 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 41,981 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 798 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 42 tons.

(5) *Nebraska.* (i) The SO_2 trading budget for 2012 and 2013 is 65,052 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 2,537 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 65 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 65,052 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 2,537 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 65 tons.

(6) *South Carolina.* (i) The SO_2 trading budget for 2012 and 2013 is 88,620 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 1,683 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 89 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 88,620 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 1,683 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 89 tons.

(7) *Texas.* (i) The SO_2 trading budget for 2012 and 2013 is 294,471 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 14,430 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 294 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 294,471 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 14,430 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 294 tons.

(b) The States' variability limits for the State SO_2 Group 2 trading budgets for the control periods in 2014 and thereafter are as follows:

(1) The SO_2 variability limit for Alabama is 38,386 tons.

(2) The SO_2 variability limit for Georgia is 17,142 tons.

(3) The SO_2 variability limit for Kansas is 7,475 tons.

(4) The SO_2 variability limit for Minnesota is 7,557 tons.

(5) The SO_2 variability limit for Nebraska is 11,709 tons.

(6) The SO_2 variability limit for South Carolina is 15,952 tons.

(7) The SO_2 variability limit for Texas is 53,005 tons.

(c) Each SO_2 Group 2 trading budget in this section includes any tons identified under a new unit set aside or Indian country new unit set aside, but excludes any tons in a variability limit.

§ 97.725 [Amended]

■ 18. Section 97.725, paragraph (b)(1) introductory text, is amended by removing ''2013'' and adding, in its place, ''2015''.

[FR Doc. 2012–3706 Filed 2–17–12; 8:45 am]

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Part VI

Environmental Protection Agency

40 CFR Part 97

Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone; Final Rule and Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 97

[EPA–HQ–OAR–2009–0491; FRL–9632–8]

RIN 2060–AR35

Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action on additional revisions to the final Transport Rule (Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals published August 8, 2011). In the proposed Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone, published October 14, 2011, EPA sought additional comment on unit-level operational information similar to the information supporting the proposed revisions, which specifically addressed post-combustion pollution control equipment and immediate-term operational requirements necessitating non-economic generation based on verifiable data. Based on comments received, EPA is finalizing adjustments that result in revisions to 2012 and 2014 state budgets in Arkansas, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, New York, Nebraska, Ohio, Oklahoma, South Carolina, and Texas, and revisions to new unit set-asides in Arkansas, Louisiana, and Missouri.[1]

DATES: This rule is effective on May 21, 2012 without further notice, unless EPA receives significant adverse comments by March 22, 2012. If we receive such comments, we will publish a timely withdrawal in the **Federal Register**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2009–0491, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Mail:* Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Avenue NW., Washington, DC 20460.
- *Hand Delivery:* Air and Radiation Docket, EPA West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2009–0491. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket, EPA West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20460. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Gabrielle Stevens, U.S. Environmental Protection Agency, Clean Air Markets Division, MC 6204J, Ariel Rios Building, 1200 Pennsylvania Ave. NW., Washington, DC 20460, telephone (202) 343–9252, email at *stevens.gabrielle@epa.gov.* Electronic copies of this document can be accessed through the EPA Web site at: *http://epa.gov/airmarkets.*

SUPPLEMENTARY INFORMATION: EPA is publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment. However, elsewhere in this issue of the **Federal Register**, we are publishing a separate document that will serve as the proposed rule if significant adverse comments are received on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. We would address all public comments in any subsequent final rule based on the proposed rule.

Regulated Entities. Entities regulated by this action primarily are fossil fuel-fired boilers, turbines, and combined cycle units that serve generators that produce electricity for sale or cogenerate electricity for sale and steam. Regulated categories and entities include:

[1] Throughout this preamble, EPA refers to a state budget for 2012 and 2013 as a ''2012'' state budget and refers to a state budget for 2014 and thereafter as a ''2014'' state budget. Therefore, any revision of a 2012 state budget would apply to the state budget for 2012 and 2013, and any revision of a 2014 state budget would apply to the state budget for 2014 and thereafter.

Category	NAICS Code	Examples of potentially regulated industries
Industry	2211, 2212, 2213	Electric service providers.

This table is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities which EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. To determine whether your facility, company, business, organization, etc., is regulated by this action, you should carefully examine the applicability criteria in §§ 97.404, 97.504, and 97.604 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

I. Detailed Discussion of Corresponding Rule Revisions

EPA has determined that the following additional corrections are needed to the August 8, 2011 final Transport Rule, as a result of comments received on the proposed rule, Revisions to Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone (76 FR 63860, October 14, 2011) (Revisions Rule). In that proposed rule, EPA took comment on several similar corrections and demonstrated a consistent methodology for calculating those corrections. EPA received no comments opposing the proposal to make these corrections to state budgets and new unit set-asides, and EPA received very few comments addressing the manner in which the corrections were quantified, to which EPA responded in the final revisions rule. EPA has calculated the corrections in this rulemaking in a fully consistent manner with the approach developed through public comment on the proposed and finalized revisions rule. See the ''Final Revisions Rule State Budgets and New Unit Set-Asides'' Technical Support Document (TSD) in the docket for this rulemaking for a quantitative demonstration of these revisions. For quantitative assessments of the relationship between final revisions to the Transport Rule and the original analysis, also see ''Final Revisions Rule Significant Contribution Assessment'' TSD in the docket for this rulemaking. The ''Final Revisions Rule Unit-Level Allocations under the FIPs,'' also in the docket for this rulemaking, present unit-level allocations under the FIPs.

(1) Revise the Arkansas ozone season NO_X budgets for 2012 and 2014 and correct the ozone season new unit set-aside budget for an omitted planned facility.

EPA is increasing the Arkansas 2012 and 2014 ozone-season NO_X budget based upon comments received that demonstrate that the McClellan plant is in an out-of-merit-order dispatch area with conditions likely to necessitate what would otherwise be non-economic generation.[2]

EPA re-calculated the emissions from the McClellan plant with non-economic generation to account for the input assumption changes. These calculations yield increases to the Arkansas 2012 and 2014 state budgets for ozone-season NO_X of 73 tons. Comments on the revisions rule identified Turk Unit 1 as commencing commercial operation on or after January 1, 2010, qualifying it as a new unit under the final Transport Rule's unit-level allocation methodology (76 FR 48290); however, the final Transport Rule erroneously omitted this unit's projected emissions from the calculation of Arkansas' ozone-season NO_X new unit set-aside. EPA is therefore revising the portion of the Arkansas ozone-season budget dedicated to the state's new unit set-aside account so that it takes into account this unit's projected emissions, consistent with the new unit set-aside methodology in the final Transport Rule. EPA is only applying this revision for 2014 and beyond, because the Agency has already recorded (i.e., distributed) allowances under the Arkansas state budget for the 2012 and 2013 control periods. Turk Unit 1 remains eligible to request allowance allocation from the new unit set-asides for any control period under the program. This revision yields an ozone-season NO_X new unit set-aside of 8 percent for 2014 and beyond for Arkansas. This revision to the Arkansas new unit set-aside necessitates changes to allowance allocations to existing units in 2014 and beyond.

(2) Revise the Georgia SO_2, annual NO_X, and ozone season NO_X budgets for 2014.

In the final Transport Rule, EPA explained its intent to capture ''reductions that occur due to state rules, consent decrees, and other planned changes in generation patterns that occur after 2012, but during or prior to 2014'' in the 2014 state budgets (76 FR 48261). Commenters on the revisions rule noted that EPA inadvertently included pollution control installation requirements from a Georgia state rule whose deadlines at certain units actually extend beyond 2014. To correct the alignment of the Georgia 2014 state budgets with the requirements for affected units in Georgia to install controls by the state rule's deadlines, EPA is increasing Georgia's 2014 state budgets by 40,334 tons of SO_2, 13,198 tons of annual NO_X, and 5,762 tons of ozone-season NO_X.

(3) Revise the Indiana SO_2 budgets for 2012 and 2014.

EPA is revising the Indiana 2012 and 2014 annual SO_2 budgets based on comments received on the proposed revisions rule (76 FR 63860, October 14, 2011) regarding post-combustion control status at Gallagher Units 2 and 4. Commenters identified an erroneous assumption of flue gas desulphurization (FGD, or scrubber) with 86 percent removal at units that have actually installed dry sorbent injection (DSI) technology with a 60 percent removal rate and an emission rate limit of 0.8 lbs/mmBtu established in a NSR settlement agreement. EPA has recalculated the projected emissions at these units, and that recalculation supports a 3,465 ton increase in the state's annual SO_2 budget.

Commenters on the revisions rule also identified a facility in Indiana, Gibson Unit 5, which currently faces immediate-term limitations regarding the amount of flue gas that can be treated in its existing FGD. In the final Transport Rule analysis, EPA relied on the SO_2 removal efficiency that this facility reported at its scrubber to the Energy Information Administration (EIA). However, EPA has since determined that this reported value only intended to address the removal efficiency for the portion of the flue gas treated in the scrubber. EPA has recalculated the projected emissions for this unit using the most recent data reported by this facility to EIA on form

[2] In the proposed revisions rule, EPA characterized an out-of-merit-order dispatch area as one in which ''units * * * are frequently dispatched out of regional economic order as a result of short-run limitations on the ability to meet local electricity demand with generation from outside the area.'' (76 FR 63865)

860 for 2009, which includes the scrubber's removal efficiency and the portion of flue gas treated. This recalculation supports an increase to Indiana's 2012 and 2014 SO_2 budget of an additional 1,873 tons (5,338 tons total).

(4) Revise the Kansas SO_2 and annual NO_X budgets for 2012 and 2014.

Commenters on the revisions rule provided information showing that one unit at the Quindaro plant in Kansas is in an out-of-merit-order dispatch area with conditions likely to necessitate what would otherwise be non-economic generation. EPA re-calculated the emissions from this plant with non-economic generation to account for the input assumption changes. These calculations yield increases to the Kansas 2012 and 2014 state budgets for annual SO_2 of 452 tons and annual NO_X of 640 tons.

In the final Transport Rule, EPA explained its intent to capture ''reductions that occur due to state rules, consent decrees, and other planned changes in generation patterns that occur after 2012, but during or prior to 2014'' in the 2014 state budgets (76 FR 48261). Commenters on the revisions rule noted that EPA inadvertently included an emission rate requirement from a consent decree affecting a Kansas facility whose deadline actually extends beyond 2014. To correct the alignment of the Kansas 2014 state budget with the requirements for affected units in Kansas to meet the emission rate limitation by the consent decree's deadlines, EPA is increasing the Kansas 2014 annual NO_X budget by an additional 5,154 tons (5,794 tons total).

(5) Revise the Louisiana ozone season NO_X budgets for 2012 and 2014 and adjust the ozone season new unit set-aside.

EPA is increasing the Louisiana 2012 and 2014 ozone-season NO_X budgets based on comments received on the revisions rule demonstrating that the Stall and Lieberman plants are in an out-of-merit-order dispatch area with conditions likely to necessitate what would otherwise be non-economic generation. EPA re-calculated the emissions from the Stall and Lieberman plants with non-economic generation to account for the input assumption changes. These calculations yield increases to Louisiana's 2012 and 2014 state budgets for ozone-season NO_X of 89 tons.

Comments on the revisions rule also noted that in calculating the Louisiana ozone-season NO_X new unit set-aside, EPA included projected emissions from a planned new facility, Washington Parish, which will not in fact come into service in Louisiana. EPA is therefore reducing the size of Louisiana's ozone-season NO_X new unit set-aside in 2012 and 2014 to 2 percent (from the previous 3 percent) to account for the exclusion of these projected emissions from the relevant calculation. This revision means that fewer allowances will need to be held in reserve for the new unit set-aside; after this revision's effective date, EPA will reallocate any allowances in excess of the revised new unit set-aside to existing units in the state by the same existing unit allowance allocation methodology as previously finalized.

(6) Revise the Mississippi ozone season NO_X budgets for 2012 and 2014.

EPA is increasing the Mississippi 2012 and 2014 ozone-season NO_X budgets based on comments received on the revisions rule demonstrating that the Moselle plant is in an out-of-merit-order dispatch area with conditions likely to necessitate what would otherwise be non-economic generation.

EPA re-calculated the emissions from the Moselle plant with non-economic generation to account for the input assumption changes. These calculations yield increases to Mississippi's 2012 and 2014 state budgets for ozone-season NO_X of 115 tons.

(7) Revise the Missouri annual and ozone season NO_X budgets for 2012 and 2014 and correct the SO_2, annual NO_X, and ozone season NO_X new unit set-aside budgets for an omitted operating new facility.

EPA is increasing the Missouri 2012 and 2014 annual and ozone-season NO_X budgets to account for operational constraints at six plants based upon comments received on the revisions rule. The commenters provided information showing that these units were in out-of-merit-order dispatch areas with conditions likely to necessitate what would otherwise be non-economic generation.

EPA re-calculated the emissions from these six plants with non-economic generation to account for the input assumption changes. These calculations yield increases to Missouri's 2012 and 2014 state budgets for annual NO_X of 26 tons and ozone-season NO_X of 26 tons.

Comments on the revisions rule identified Iatan Unit 2 as commencing commercial operation on or after January 1, 2010, qualifying it as a new unit under the final Transport Rule's unit-level allocation methodology (76 FR 48290); however, the final Transport Rule erroneously omitted this unit's projected emissions from the calculation of Missouri's new unit set-asides. EPA is therefore revising the portion of Missouri's SO_2, annual NO_X, and ozone-season NO_X budgets dedicated to the state's new unit set-asides so that they take into account this unit's projected emissions, consistent with the new unit set-aside methodology in the final Transport Rule. EPA is only applying this revision for 2013 and beyond, because the Agency has already recorded (i.e., distributed) allowances under the Missouri state budget for the 2012 control period. Iatan Unit 2 remains eligible to request allowance allocation from the new unit set-asides for any control period under the program. This revision yields an ozone-season NO_X new unit set-aside of 6 percent, an annual NO_X new unit set-aside of 6 percent, and an SO_2 new unit set-aside of 3 percent for 2013 and beyond for Missouri. This revision to Missouri's new unit set-aside necessitates changes to allowance allocations to existing units in 2013 and beyond.

(8) Revise the Ohio SO_2, annual NO_X, and ozone season NO_X budgets for 2012 and 2014.

EPA is increasing Ohio's 2012 and 2014 annual SO_2, annual NO_X, and ozone-season NO_X budgets to account for operational constraints at two plants, Conesville and Muskingum River, based on comments received on the revisions rule. The commenter provided information showing that these plants were in out-of-merit-order dispatch areas with conditions likely to necessitate what would otherwise be non-economic generation.

EPA re-calculated the emissions from these two plants with non-economic generation to reflect the input assumption changes. These calculations yield increases to Ohio's 2012 and 2014 state budgets for annual SO_2 of 5,163 tons, annual NO_X of 547 tons, and ozone-season NO_X of 257 tons.

EPA is finalizing additional adjustments to Ohio's 2012 and 2014 annual and ozone-season NO_X budgets to correct an erroneous assumption of an SCR at Bayshore 4. There is no SCR planned or under construction at this facility. This results in an additional 2,218 ton increase (2,765 ton total) in the state's annual NO_X budget and a 964 ton increase (1,221 ton total) for the ozone-season NO_X budget.

(9) Revise the Nebraska SO_2 budgets for 2012 and 2014.

EPA is finalizing revisions to the Nebraska 2012 and 2014 SO_2 budgets, based on comments on the revisions rule, to correct assumptions regarding FGD pollution control technology at Whelan Energy Center Units 1 and 2 and Nebraska City Unit 2. The commenter noted that the technology at Nebraska Unit 2 and Whelan Unit 2 is

dry FGD technology, whereas EPA had assumed wet FGD technology with a higher SO_2 removal efficiency than the actual dry FGD technology that those units achieve. Additionally, EPA is also revising its assumption of FGD technology at Whelan Energy Center Unit 1. There is no FGD present, planned, or under construction at the unit. These adjustments result in an increase of 3,110 tons to the 2012 and 2014 annual SO_2 budgets for the state.

(10) Revise the New York SO_2, annual NO_X, and ozone season NO_X budgets for 2012 and 2014.

EPA is increasing New York's 2012 and 2014 annual SO_2, annual NO_X, and ozone-season NO_X budgets based on comments received on the revisions rule demonstrating that the East River plant is in an out-of-merit-order dispatch area with conditions likely to necessitate what would otherwise be non-economic generation. EPA re-calculated the emissions from this facility with out-of-merit-order dispatch to reflect the input assumption changes. These calculations yield increases to New York's 2012 and 2014 state budgets for annual SO_2 of 84 tons, annual NO_X of 694 tons, and ozone-season NO_X of 127 tons.

EPA is also finalizing an adjustment of 5,360 tons to New York's 2012 and 2014 SO_2 budgets based on comments received on the revisions rule. Commenters identified two facilities, Dunkirk and Huntley, with existing dry sorbent injection (DSI) technology for which EPA had assumed an SO_2 removal rate of 70 percent but which actually achieves a removal rate of only 53 percent. EPA recalculated the projected emissions for these units based on this revised assumption and is increasing the New York 2012 and 2014 SO_2 budgets accordingly.

(11) Revise the Oklahoma ozone-season NO_X budgets for 2013 and 2014.

EPA is increasing the Oklahoma 2013 [3] and 2014 ozone-season NO_X budget based upon comments received on the revisions rule demonstrating that the Comanche plant is in an out-of-merit-order dispatch area with conditions likely to necessitate what would otherwise be non-economic generation.

EPA re-calculated the emissions from the Comanche plant with non-economic generation to account for the input assumption changes. These calculations yield increases to the Oklahoma 2013 and 2014 state budgets for ozone-season NO_X of 859 tons.

(12) Revise the South Carolina SO_2 budgets for 2012 and 2014.

EPA is finalizing an 8,013 ton increase to South Carolina's 2012 and 2014 annual SO_2 budgets based on comments received on the revision rule regarding post-combustion control technology at three units. This action revises the assumption of an FGD at the W S Lee Facility. There are no FGDs planned, under construction, or expected to be online in 2012 or 2014 at this facility.

(13) Revise the Texas annual NO_X and ozone season NO_X budgets for 2012 and 2014.

EPA is increasing the Texas 2012 and 2014 annual and ozone-season NO_X budgets to account for operational constraints at six plants based on comments received on the revisions rule: Jones, Moore County, Nichols, Plant X, Knox Lee, and Wilkes. The commenters provided information showing that these plants were in out-of-merit-order dispatch areas with conditions likely to necessitate what would otherwise be non-economic generation.

EPA re-calculated the emissions from these plants with non-economic generation to account for the input assumption changes. These calculations yield increases to the Texas 2012 and 2014 state budgets for annual NO_X of 2,731 tons, and ozone-season NO_X of 1,142 tons.

II. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action.'' Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This action makes relatively minor revisions to the emission budgets and allowance allocations or allowance allocations only in certain states in the final Transport Rule and corrects minor technical errors which are ministerial. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the final Transport Rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0667. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

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

After considering the economic impacts of this action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by this action are electric power generators whose ultimate parent entity has a total electric output of 4 million megawatt-hours (MWh) or less in the previous fiscal year. We have determined that the changes considered in this proposed rulemaking pose no additional burden for small entities. The proposed revision to the new unit set-asides in Arkansas, Missouri, and Texas would yield an extremely small change in unit-level allowance allocations to existing units, including small entities, such that it would not affect the analysis conducted on small entity impacts under the finalized Transport Rule. In all other states, the revisions proposed in this rulemaking would yield additional allowance allocations to all units, including small entities, without increasing program stringency, such that it is not possible for the impact to small entities to be any larger than that already considered and reviewed in the finalized Transport Rule.

[3] These changes do not apply to the Oklahoma 2012 budget because similar changes were already made to the affected units' operation in 2012, as described in the Technical Support Document ''Determination of State Budgets for the Final Ozone Supplemental of the Transport Rule'' (EPA–HQ–OAR–2009–0491–485, pg. 5–7).

D. Unfunded Mandates Reform Act

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. This action is increasing the budgets and increasing the total number of allowances or maintaining the same budget but revising unit-level allocations in several other states in the Transport Rule. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

In developing the final Transport Rule, EPA consulted with small governments pursuant to a plan established under section 203 of UMRA to address impacts of regulatory requirements in the rule that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action makes relatively minor revisions to the emissions budgets and allowance allocations or allowance allocations only in certain states in the final Transport Rule. Thus, Executive Order 13132 does not apply to this rule. EPA did provide information to state and local officials during development of both the proposed and final Transport Rule.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This action makes relatively minor revisions to the emissions budgets and allowance allocations in several states in the final Transport Rule and helps ease the transition from CAIR. Indian country new unit set-asides will increase slightly or remain unchanged in the states affected by this action. Thus, Executive Order 13175 does not apply to this action. EPA consulted with tribal officials during the process of promulgating the final Transport Rule to permit them to have meaningful and timely input into its development.

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

This action is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in EO 12866, and because the Agency does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. Analyses by EPA that show how the emission reductions from the strategies in the final Transport Rule will further improve air quality and children's health can be found in the final Transport Rule RIA.

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. EPA believes that there is no meaningful impact to the energy supply beyond that which is reported for the Transport Rule program in the final Transport Rule.

I. National Technology Transfer and Advancement Act

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

As described in section XII.I of the preamble to the final Transport Rule, the Transport Rule program requires all sources to meet the applicable monitoring requirements of 40 CFR part 75. Part 75 already incorporates a number of voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

Executive Order (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.

In the Final Revisions Rule Significant Contribution Assessment Technical Support Document in the docket to this rulemaking, EPA assessed impacts of the emission changes in this rule on air quality throughout the Transport Rule region. For SO_2, the estimated air quality impacts were minimal and no additional nonattainment or maintenance areas were identified. EPA also assessed the relationship between the NO_X emission inventories in each affected state and the finalized revisions to annual and ozone-season NO_X budgets and found the revisions represent small percentages of each state's total emissions in 2014. As a result, EPA does not believe these technical revisions would affect any of the conclusions supported by the air quality and environmental justice analyses conducted for the final Transport Rule.

Based on the significant contribution assessment in the technical support document for this action, EPA has determined that this action will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. EPA believes that the vast majority of communities and individuals in areas covered by the Transport Rule program inclusive of this action, including numerous low-income, minority, and tribal individuals and communities in both rural areas and inner cities in the eastern and central U.S., will see significant improvements in air quality and resulting improvements in health. EPA's assessment of the effects of the final Transport Rule program on these communities is available in section XII.J of the preamble to the final Transport Rule.

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 a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective April 23, 2012.

L. Judicial Review

Petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit by April 23, 2012. Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final actions by EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit if (i) the agency action consists of ''nationally applicable regulations promulgated, or final action taken, by the Administrator,'' or (ii) such action is locally or regionally applicable, if ''such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.''

In the final Transport Rule, EPA determined that ''[a]ny final action related to the Transport Rule is 'nationally applicable' within the meaning of section 307(b)(1).'' 76 FR 48,352. Through this rule, EPA is revising specific aspects of the final Transport Rule. This rule therefore is a final action related to the Transport Rule and as such is covered by the determination of national applicability made in the final Transport Rule. Thus, pursuant to section 307(b) any petitions for review of this action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date final action is published in the **Federal Register**. Filing a petition for reconsideration of this action 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. In addition, pursuant to CAA section 307(b)(2) this action may not be challenged later in proceedings to enforce its requirements.

List of Subjects in 40 CFR Part 97

Administrative practice and procedure, Air pollution control, Electric utilities, Nitrogen oxides, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: February 7, 2012.

Lisa P. Jackson,

Administrator.

For the reasons set forth in the preamble, part 97 of chapter I of title 40 of the Code of Federal Regulations, as amended elsewhere in this issue, is further amended as follows:

PART 97—FEDERAL NO_X BUDGET TRADING PROGRAM AND CAIR NO_X AND SO_2 TRADING PROGRAMS

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

Authority: 42 U.S.C. 7401, 7403, 7410, 7426, 7601, and 7651, *et seq.*

■ 2. Section 97.410 is amended by:

■ a. Revising paragraphs (a)(2)(iv) and (v);

■ b. Revising paragraph (a)(6), (11), (14), (16), and (20); and

■ c. Revising paragraphs (b)(2), (6), (11), (14), (16) and (20) to read as follows:

§ 97.410 State NO_X Annual trading budgets, new unit set-asides, Indian country new unit set-aside, and variability limits.

(a) * * *

(2) * * *

(iv) The NO_X annual trading budget for 2014 and thereafter is 53,738 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 1,075 tons.

(vi) * * *

* * * * *

(6) *Kansas.* (i) The NO_X annual trading budget for 2012 and 2013 is 31,354 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 596 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 31 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 31,354 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 596 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 31 tons.

* * * * *

(11) *Missouri.* (i) The NO_X annual trading budget for 2012 and 2013 is 52,400 tons.

(ii) The NO_X annual new unit set-aside for 2012 is 1,572 tons and for 2013 is 3,144 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 48,743 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 2,925 tons.

(vi) [Reserved]

* * * * *

(14) *New York.* (i) The NO_X annual trading budget for 2012 and 2013 is 21,722 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 412 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 22 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 21,722 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 412 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 22 tons.

* * * * *

(16) *Ohio.* (i) The NO_X annual trading budget for 2012 and 2013 is 95,468 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 1,909 tons.

(iii) [Reserved]

(iv) The NO_X annual trading budget for 2014 and thereafter is 90,258 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 1,805 tons.

(vi) [Reserved]

* * * * *

(20) *Texas.* (i) The NO_X annual trading budget for 2012 and 2013 is 137,701 tons.

(ii) The NO_X annual new unit set-aside for 2012 and 2013 is 5,370 tons.

(iii) The NO_X annual Indian country new unit set-aside for 2012 and 2013 is 138 tons.

(iv) The NO_X annual trading budget for 2014 and thereafter is 137,701 tons.

(v) The NO_X annual new unit set-aside for 2014 and thereafter is 5,370 tons.

(vi) The NO_X annual Indian country new unit set-aside for 2014 and thereafter is 138 tons.

* * * * *

(b) * * *

(2) The NO_X annual variability limit for Georgia is 9,673 tons.

* * * * *

(6) The NO_X annual variability limit for Kansas is 5,644 tons.

* * * * *

(11) The NO_X annual variability limit for Missouri is 8,774 tons.

* * * * *

(14) The NO_X annual variability limit for New York is 3,910 tons.

* * * * *

(16) The NO_X annual variability limit for Ohio is 16,246 tons.

* * * * *

(20) The NO_X annual variability limit for Texas is 24,786 tons.

* * * * *

■ 2. Section 97.510 is amended by:
■ a. Revising paragraph (a)(2);
■ b. Revising paragraphs (a)(4)(iv) and (v);
■ c. Revising paragraphs (a)(9), (12), (13), (15), (17), (18), and (22); and
■ d. Revising paragraphs (b)(2), (4), (9), (12), (13), (15), (17), (18), and (22) to read as follows:

§ 97.510 State NO_X Ozone Season trading budgets, new unit set-asides, Indian country new unit set-aside, and variability limits.

(a) * * *

(2) *Arkansas.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 15,110 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 756 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 15,110 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 1,209 tons.

(vi) [Reserved]

* * * * *

(4) * * *

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 24,041 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 481 tons.

(vi) * * *

* * * * *

(9) *Louisiana.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 18,115 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 344 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 18 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 18,115 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 344 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 18 tons.

* * * * *

(12) *Mississippi.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 12,429 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 237 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 12 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 12,429 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 237 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 12 tons.

(13) *Missouri.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 22,788 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 is 684 tons and for 2013 is 1,367 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 21,099 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 1,266 tons.

(vi) [Reserved]

* * * * *

(15) *New York.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 10,369 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 197 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 10 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 10,369 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 197 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 10 tons.

* * * * *

(17) *Ohio.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 41,284 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 826 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 39,013 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 780 tons.

(vi) [Reserved]

(18) *Oklahoma.* (i) The NO_X ozone season trading budget for 2012 is 36,567 tons and for 2013 is 22,694 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 is 731 tons and for 2013 is 454 tons.

(iii) [Reserved]

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 22,694 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 454 tons.

(vi) [Reserved]

* * * * *

(22) *Texas.* (i) The NO_X ozone season trading budget for 2012 and 2013 is 65,560 tons.

(ii) The NO_X ozone season new unit set-aside for 2012 and 2013 is 2,556 tons.

(iii) The NO_X ozone season Indian country new unit set-aside for 2012 and 2013 is 66 tons.

(iv) The NO_X ozone season trading budget for 2014 and thereafter is 65,560 tons.

(v) The NO_X ozone season new unit set-aside for 2014 and thereafter is 2,556 tons.

(vi) The NO_X ozone season Indian country new unit set-aside for 2014 and thereafter is 66 tons.

* * * * *

(b) * * *

(2) The NO_X ozone season variability limit for Arkansas is 3,173 tons.

* * * * *

(4) The NO_X ozone season variability limit for Georgia is 5,049 tons.

* * * * *

(9) The NO_X ozone season variability limit for Louisiana is 3,804 tons.

* * * * *

(12) The NO_X ozone season variability limit for Mississippi is 2,610 tons.

(13) The NO_X ozone season variability limit for Missouri is 4,431 tons.

* * * * *

(15) The NO_X ozone season variability limit for New York is 2,177 tons.

* * * * *

(17) The NO_X ozone season variability limit for Ohio is 8,193 tons.

(18) The NO_X ozone season variability limit for Oklahoma is 4,766 tons.

* * * * *

(22) The NO_X ozone season variability limit for Texas is 13,768 tons.

* * * * *

■ 3. Section 97.610 is amended by revising:
■ a. Paragraph (a)(2);
■ b. Paragraphs (a)(7)(ii) and (v);
■ c. Paragraphs (a)(9) and (11); and
■ d. Paragraphs (b)(2), (9), and (11) to read as follows:

§ 97.610 State SO_2 Group 1 trading budgets, new unit set-asides, Indian country new unit set-aside, and variability limits.

(a) * * *

(2) *Indiana.* (i) The SO_2 trading budget for 2012 and 2013 is 290,762 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 8,723 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 166,449 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 4,993 tons.

(vi) [Reserved]

* * * * *

(7) * * *

(ii) The SO_2 new unit set-aside for 2012 is 4,149 tons and for 2013 is 6,224 tons.

* * * * *

(v) The SO_2 new unit set-aside for 2014 and thereafter is 4,978 tons.

(vi) * * *

* * * * *

(9) *New York.* (i) The SO_2 trading budget for 2012 and 2013 is 36,296 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 690 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 36 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 27,556 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 523 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 28 tons.

* * * * *

(11) *Ohio.* (i) The SO_2 trading budget for 2012 and 2013 is 315,393 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 6,308 tons.

(iii) [Reserved]

(iv) The SO_2 trading budget for 2014 and thereafter is 142,240 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 2,845 tons.

(vi) [Reserved]

* * * * *

(b) * * *

(2) The SO_2 variability limit for Indiana is 29,961 tons.

* * * * *

(9) The SO_2 variability limit for New York is 4,960 tons.

* * * * *

(11) The SO_2 variability limit for Ohio is 25,603 tons.

* * * * *

■ 4. Section 97.710 is amended by:

■ a. Revising paragraphs (a)(2)(iv) and (v);

■ b. Revising paragraphs (a)(3), (5), and (6); and

■ c. Revising paragraphs (b)(2), (3), (5), and (6) to read as follows:

§ 97.710 State SO_2 Group 2 trading budgets, new unit set-asides, Indian country new unit set-aside, and variability limits.

(a) * * *

(2) * * *

(iv) The SO_2 trading budget for 2014 and thereafter is 135,565 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 2,711 tons.

(vi) * * *

(3) *Kansas.* (i) The SO_2 trading budget for 2012 and 2013 is 41,980 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 798 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 42 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 41,980 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 798 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 42 tons.

* * * * *

(5) *Nebraska.* (i) The SO_2 trading budget for 2012 and 2013 is 68,162 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 2,658 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 68 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 68,162 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 2,658 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 68 tons.

(6) *South Carolina.* (i) The SO_2 trading budget for 2012 and 2013 is 96,633 tons.

(ii) The SO_2 new unit set-aside for 2012 and 2013 is 1,836 tons.

(iii) The SO_2 Indian country new unit set-aside for 2012 and 2013 is 97 tons.

(iv) The SO_2 trading budget for 2014 and thereafter is 96,633 tons.

(v) The SO_2 new unit set-aside for 2014 and thereafter is 1,836 tons.

(vi) The SO_2 Indian country new unit set-aside for 2014 and thereafter is 97 tons.

* * * * *

(b) * * *

(2) The SO_2 variability limit for Georgia is 24,402 tons.

(3) The SO_2 variability limit for Kansas is 7,556 tons.

* * * * *

(5) The SO_2 variability limit for Nebraska is 12,269 tons.

(6) The SO_2 variability limit for South Carolina is 17,394 tons.

* * * * *

[FR Doc. 2012–3704 Filed 2–17–12; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 97

[EPA–HQ–OAR–2009–0491; FRL–9632–9]

RIN 2060–AR35

Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing additional revisions to certain portions of the Transport Rule (Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, published August 8, 2011). The final Transport Rule limits the interstate transport of emissions of nitrogen oxides (NO_X) and sulfur dioxide (SO_2) that contribute harmful levels of fine particle matter and ozone in downwind states. After the final rule was published, it was brought to our attention that there are some incorrect data assumptions that affect a few states' budgets or new unit set-asides in the rule text. On October 14, 2011, EPA proposed revisions to the final Transport Rule based on this new information and sought comment on additional unit-level information addressing post-combustion pollution control equipment and operational requirements necessitating non-economic generation of a unit. EPA is finalizing the earlier specifically proposed revisions in a separate action. EPA has reviewed the information provided in comments addressing the topics described above and proposes to determine that the unit-level adjustments described in the preamble to the direct final are merited.

DATES: Written comments must be received by March 22, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2009–0491, by mail to: Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Avenue NW., Washington, DC 20460. Comments may also be submitted electronically or through hand delivery/courier by following the detailed instructions in the **ADDRESSES** section of the direct final rule published elsewhere in this issue of the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Gabrielle Stevens, U.S. Environmental Protection Agency, Clean Air Markets Division, MC 6204J, Ariel Rios Building, 1200 Pennsylvania Ave. NW., Washington, DC 20460, telephone (202) 343–9252, email at *stevens.gabrielle@epa.gov.* Electronic copies of this document can be accessed through the EPA Web site at: *http://epa.gov/airmarkets.*

SUPPLEMENTARY INFORMATION: This document proposes to take action on certain portions of the Transport Rule. We finalized a rule to address discrepancies in unit-specific modeling assumptions that affect the proposed calculation of Transport Rule state budgets in Florida, Louisiana, Michigan, Mississippi, Nebraska, New Jersey, New York, Texas and Wisconsin, as well as new unit set-asides in Arkansas and Texas (see 76 FR 63860, October 14, 2011). We are issuing a direct final rule, in parallel with this proposal published elsewhere in this issue, based on comments received on the Revisions Rule proposal, to amend the August 8, 2011, final regulation (76 FR 48208) by correcting annual NO_X budgets in Georgia, Kansas, Missouri, New York, Ohio, and Texas; ozone-season NO_X budgets in Arkansas, Georgia, Louisiana, Mississippi, Missouri, New York, Ohio, Oklahoma, and Texas; SO_2 budgets in Georgia, Indiana, Kansas, Nebraska, New York, Ohio, and South Carolina; and new unit set-aside budgets in Arkansas, Louisiana, and Missouri.

We have explained our reasons for this action in the preamble to the direct final rule. If we receive no significant adverse comment, on the direct final rule, EPA will withdraw the relevant portions of the rule and timely notice of the withdrawal will be published in the **Federal Register**. We would address all relevant public comments in any subsequent final rule based on this proposed rule.

We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the information provided in the **ADDRESSES** section of this document.

Dated: February 7, 2012.

Lisa P. Jackson,

Administrator.

[FR Doc. 2012–3702 Filed 2–17–12; 8:45 am]

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws*.

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H.R. 588/P.L. 112–94
To redesignate the Noxubee National Wildlife Refuge as the Sam D. Hamilton Noxubee National Wildlife Refuge. (Feb. 14, 2012; 126 Stat. 10)

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